# 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.
April 5, 6, & 7 • 9 a.m.-4 p.m.

## EVENTS

**Creating Opportunities for Success Rainmaking – How Do I Bring in the Clients?**
Tues., March 15, 2011 at Domus
*See page 6*

**Hon. Elaine Jackson Stack Moot Court Competition**
March 22 & 23, 2011 at Domus

**NY Islanders vs. NY Rangers**
Thurs., March 31, 2011
*See page 8*

**WE CARE "Dressed to a Tea"**
April 7, 2011 at Domus

**Lunch with the Judges:**
District Court • Fri., April 8, 2011
Family & County Court • Wed., May 11, 2011 at Domus
*See insert*

**Law Day**
Thursday Evening, April 28, 2011 at Domus

**112th Annual Dinner Dance**
Sat., May 7, 2011
Long Island Marriott, Uniondale
Dinner Dance Journal Ads
*See insert*

## WHAT'S INSIDE



# LAW DAY APRIL 28

## *Workplace Project, Coppola to Receive NCBA Accolades*

**By Valerie Zurblis**

A long-time Family Court employee and an organization that provides unique help to Long Island's immigrant Latino population will be honored by the Nassau County Bar Association for exceptional service and support to the legal community and the public at this year's annual Law Day celebration on Thursday, April 28, 5:30 p.m. at NCBA's headquarters in Mineola.

Receiving the Liberty Bell Award will be The Workplace Project, the only nonprofit organization on Long Island whose efforts focus exclusively on educating, organizing, and advocating for day laborers and other low wage Latino immigrants, assisting them in their efforts to improve their working and living conditions.

John M. Coppola, Deputy Chief Clerk at Family Court, will receive the Peter T. Affatato Court Employee of the Year Award, recognized for his success in ensuring that operations run smoothly to allow the process of legal justice to be properly carried out in the court.

### Liberty Bell Award

The Liberty Bell Award recognizes non-lawyers for activities that heighten public awareness and understanding of the law. This mission of this year's honoree, The Workplace Project (Centro de Derechos Laborales),

**The Workplace Project Centro de Derechos Laborales**

is to end the exploitation of Latino immigrant workers on Long Island and to achieve socioeconomic justice by promoting the full political, economic and cultural participation of these workers in the communities in which

**See LAW DAY, Page 16**

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**NCBA President Marc Gann is interviewed by WCBS-TV reporter John Slatterly about the newly-created NCBA Crime Lab Task Force. News of the closing of the Nassau Crime Lab and NCBA's reaction was covered by local and national media.**

## NCBA Task Force Gives Defense Attorneys a Voice on Future of Nassau Crime Lab

**By Valerie Zurblis**

Last month, the Nassau County Crime Law was closed after allegations of unsecure drug samples, uncalibrated instruments and sloppy testing procedures. Called into question was the credibility of lab test results used as evidence in hundreds of past criminal trials and convictions. To galvanize a unified voice of attorneys to participate in discussions with judges, the Nassau County Police Department and the Nassau County District Attorney's Office, Nassau County Bar Association President Marc Gann announced the formation of an NCBA Crime Lab Task Force of leading criminal defense attorneys and representatives of legal organizations to help shape the future operation of the lab.

"We are genuinely concerned about the lack of credibility of test results from the crime lab and the effect upon past cases in Nassau County courts," said Gann. "We want to use this opportunity to be a positive influence on the future of the

**See TASK FORCE, Page 6**

**First Lady Abigail Adams**



**President John Adams**

## Abigail Adams to Meet the Press

This year's NCBA's Law Day program theme is "The Legacy of John Adams, From Boston to Guantanomo – With a Stop at Domus." As a featured part of the program First Lady Abigail Adams (Susan Vendikos-Gill), John Adams' wife, will be interviewed by one of America's top political pamphleteers and journalists, James T. Callender (portrayed by NCBA member Chris Garvey). A forerunner for today's political pundits, Callendar was known as a leading scandalmonger of the day due to the tactics of some of his reporting, which overshadowed the political content. A central figure in the press wars between the Federalists and Democratic-Republican parties, Callender made his name reporting on President Thomas Jefferson's alleged children by his slave concubine Sally Hemings, which was eventually confirmed in 1998 by DNA analysis. You won't want to miss his riveting and sure to be controversial interview of the First Lady and her defense of her husband's legacy.



## UPCOMING PUBLICATIONS COMMITTEE MEETINGS

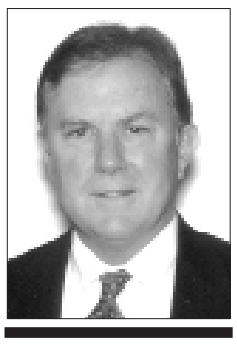
Thurs., March 10, 2010 • Thurs., April 14, 2011 – 12:45 at Domus

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


# Internet Law Focus

## Courts in Conflict over Computer Hacking Statute

The Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. §1030, was enacted by Congress in 1986 to criminalize and to deter computer "hacking." The CFAA has been amended six times – most recently by the U.S.A. Patriot Act and the Identity Theft Enforcement and Restitution Act. The statute authorizes the imposition of fines and imprisonment against any person who "intentionally accesses a computer without authorization or exceeds authorized access" and thereby obtains "information from any protected computer." 18 U.S.C. § 1030 [a][2][c]. The statute prohibits unauthorized access obtained by persons who were physically present at the site of the protected computer as well as from remote locations via the Internet.

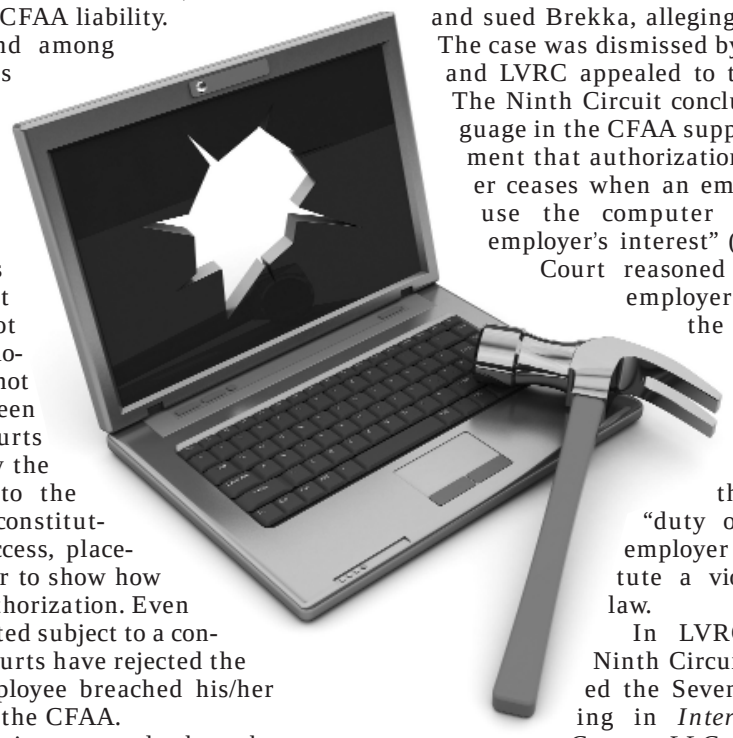


Daniel J. Lefkowitz

The CFAA also provides a limited civil right of action against violators by "any person who suffers damage or loss" (*id.*, §1030(g)) to "1 or more persons during any one-year period … aggregating at least $5,000 in value." (*id.*, § 1030(c)(4) (A)(i)(I)). "Damage" is defined as any "impairment to the integrity or availability of data, a program, a system or information." (*id.*, §1030 (e)(8)). "Loss" is defined as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system or information to its condition prior to the offense, and any revenue lost, cost incurred, or any other consequential damages incurred because of interruption of service." (*id.*, §1030 (e)(11)). Generally, this civil right of action has been used against rogue employees who access employer computers, often to compete with their former employers.

The CFAA was seen as a potentially powerful federal tool through which an employer could obtain injunctive relief and damages against an employee who steals data or trades secrets. However, its suitability for that purpose has been called into question by recent cases. Decisions handed down in the past year have created a split among the federal circuits. A recent high profile Southern District of New York decision siding with the Ninth Circuit and directly rejecting decisions of the First, Fifth, and Seventh Circuits has further widened the approach taken in interpreting the CFAA. The issue confronting the courts is whether the "authorization" granted to an employee to use an employer's computer system is extinguished when that employee misuses and misappropriates data and trade secrets. Even in cases where an employee "exceeds authorized access," courts are split in applying CFAA liability.

The growing trend among federal courts has limited the use of the CFAA by both prosecutors and civil litigants by reasoning that former employees do not access employer's computers "without authorization" and do not "exceed authorized access" in violation of the CFAA whene it is not clear that authorization has been withdrawn. (*See*, §1030 (2)). Courts require an employer to identify the policies it has promulgated to the employee that define the acts constituting unauthorized computer access, placeing the burden on the employer to show how the employee exceeded that authorization. Even in cases where access was granted subject to a confidentiality agreement, some courts have rejected the employer's claim that the employee breached his/her "duty of loyalty" in violation of the CFAA.



The split between the Circuits occurred when the Ninth Circuit held that "an employee with authority to access his employer's computer system does not violate the CFAA by using his access privileges to misappropriate information." *LVRC Holdings LLC v. Brekka*, 581 F. 3d 1127, 1130-31 (9th Cir. 2009). The case arose after Christopher Brekka was hired to conduct internet marketing and regularly e-mailed documents he had generated at work to his personal email address. Brekka had no written employment agreement or confidentiality agreement; nor had the employer promulgated guidelines regarding e-mailing to personal computers. LVRC discovered that the company computer system had been accessed using Brekka's log-in information, and that financial statements and marketing budgets had been removed. LVRC contacted the FBI and sued Brekka, alleging CFAA violations. The case was dismissed by the district court and LVRC appealed to the Ninth Circuit. The Ninth Circuit concluded that "no language in the CFAA supports LVRC's argument that authorization to use a computer ceases when an employee resolves to use the computer contrary to the employer's interest" (*id.*, at 1133). The Court reasoned that, unless the employer had terminated the employee's right to use the company computer, the employee would have no reason to know that his breach of a "duty of loyalty" to his employer would also constitute a violation of federal law.

In LVRC Holdings, the Ninth Circuit explicitly rejected the Seventh Circuit's holding in *International Airport Centers, LLC v. Citrin*, 440 F. 3d 418 (7th Cir. 2006), a case which concluded that a defendant employee's authority to access his employer's computer files terminated when he violated his duty of loyalty to his employer. In *Citrin*, Judge Posner held that the defendant employee, who quit his job to open a com-

See COMPUTER HACKING, Page 19

## The Perils of Social Media in the Workplace

The Internet opened the door to the explosion of what has become known as social networking. Generally consisting of a website or discussion forum in which users can connect and share information, social networking provides employers with unprecedented opportunities to communicate with clients and potential customers. As those networks expand, with each "friend" "friending" others and each tweet inspiring another tweet, employers must consider the actions they take with respect to employees as a result of social media information. For all of the benefits that social networking provides to businesses, it can also result in serious financial and legal consequences.

Jennifer McLaughlin

Employers must be aware of their employees' use of social networking both at work and after the workday has ended. All of this is complicated, however, by privacy rights and libel and discrimination claims, as well as the evolving rules covering the discovery of information on social networking websites in litigation. Lawyers must be in tune with their clients' use of social networking media and provide constantly updated advice and guidance. Lawyers must do so even in the face of many clients' belief that social networking provides a transparency in communicating with their employees and clients that outweigh any potential costs. Even worse, some clients view social networking as a passing fad and have no interest in investing any time or money in understanding its potential impact on the workplace.

A little background is in order. The genesis of the social networking frenzy began with Friendster in 2002, then MySpace and LinkedIn in 2003. Facebook and Twitter followed in 2004 and 2006, respectively. In just a short period of time the number of people and businesses using social networking has increased tremendously. Today, for example, there are 500 million active users of Facebook, 250 million of which log on at least once a day.[1]

Similarly, approximately 79% of Fortune 100 companies are using at least one of the main social media tools.[2] Simply because a business does not use social networking, however, it should not presume that it is immune from its effects. Even if an employer does not already have a presence on a social media website, it should expect that many of its employees do.

Unfortunately, employers and employees often have differing views as to the use of social media in the workplace, which can create workplace issues. The Deloitte LLP 2010 Ethics & Workplace Survey, focusing on trust in the workplace, notes that "there is a persistent gap between employee and employer views on the appropriate use of and access to social media sites…."[3] The Deloitte study claims that 49% of executives believe that social networking helps build trust in the workplace whereas 62% of employees prefer not to be "friends" with their managers on social networking sites. Similarly, 66% of employees believe that they should be permitted to access social networking while working, whereas 54% of employers believe that employees should be barred from social networking while working.[4]

Justin Capuano

This divide clearly shows the need for a clear workplace policy regarding the use of social networking. Unfortunately for employers, the failure to have a clear policy with respect to social networking that is monitored and enforced could lead to serious consequences, including public relations disasters; the release of confidential information; or litigation in the form of harassment claims, privacy violations, or violations of intellectual property rights. Indeed, friending, linking, tweeting, or checking in with foursquare, with or by employees, can be an employer's worst nightmare.

An employer should not be fooled into believing that the dangers of social networking are limited to entry-level employees. Just ask John Mackey, former co-founder and CEO of Whole Foods. In 2007, it was discovered that he had been posting to online message boards to inflate his company's stock and undercut its competitor. Not only was this a public embarrassment to Whole Foods, but the Federal Trade Commission used this information in its efforts to block Whole Foods from buying

See SOCIAL MEDIA, Page 20

# How Did This Happen? Can It Be Fixed?

From the President

Marc C. Gann

For those of you who have followed my prolific writing (LOL), you will recall that my term as President began with the question, "How did this happen?" At that time, I was referring to me personally; questioning how it could be that I was able to obtain your collective respect and become President of this amazing association. Now, I ask the question in the context of our local criminal justice system, which has been shaken to its core by the recent revelations regarding the Nassau County Crime Lab. As a former Nassau County Assistant District Attorney and now a criminal defense attorney for the past twenty years, even my belief in the system has been undermined. How did this happen?

As you are all no doubt now aware, the Nassau County Crime Lab has been shut down by the County Executive and the District Attorney due to the discovery of significant improprieties in the testing of controlled substances, and perhaps, issues that are much broader. We don't know yet whether, and to what extent, results in ballistics, fingerprinting, blood and breath tests may be affected. In the controlled substance area, we already know that quantitative results in cases involving ecstasy and ketamine have been compromised. We also know now that the testing of heroin and cocaine is potentially suspect due to invalid and improper procedures and equipment used in the labs. We don't know how long, to what extent, or how many people have been affected. As you can sense, this is an issue of monumental importance in that many people may have faced sanctions to which they should never have been subjected.

Lab results in criminal cases, particularly drug cases, have for years been routinely accepted as accurate because of a belief that standard scientific procedures and protocols were being specifically adhered to. It was only through the disclosure of the Nassau Lab's probation, imposed by its accreditation agency, that it was discovered that such procedures were not being followed. What followed has been a series of discoveries of improprieties in results, not just procedure and protocol. I believe that the criminal law community as a whole bears some responsibility for the current mess.

It seems clear that some members of the Nassau County Police Department bear the lion's share of that responsibility. Police personnel reportedly knew of the issues as far back as 2006. Not addressing these issues may have allowed for the possibility that individuals could be wrongly convicted. Even if it turns out that this occurred in only one case, it is one too many, and it is my suspicion that the number is significantly higher.

It is unclear whether and when the District Attorney's Office became aware of the lab issues, but given the revelations it seems that there may have been "red flags" that could have and should have been explored. I believe that they, like the defense bar, came to rely on the perceived credibility of the lab and its procedures. D.A.'s do not have training in scientific procedure and protocol, but it certainly seems that for the future they should. Such training would have allowed them to more appropriately examine the lab paperwork in any given case and identify potential impropriety.

Finally, I have to wonder whether as a member of the defense bar, I should accept some blame as well. Most criminal cases are disposed of long before trial. In many such cases, without a specific reason to question a particular lab result I did not do so. I generally accepted the assumption that the technicians were properly trained, educated and following proper procedure. Admittedly, I did not have any practical way to attack or refute those assumptions in such cases, nor do we as defense counsel often have the resources to do so. But that is little solace now. It now seems that the role of zealous defense counsel should be to question everything, even if discovery is difficult if not impossible.

How can it be fixed? NCBA is now in a unique position to restore credibility in the future crime lab and by extension the criminal justice system here in Nassau County. And we have already begun that process. We are working in conjunction with the Criminal Courts Bar Association, our Assigned Counsel Defender Plan, the Legal Aid Society, the District Attorney's Office and the Nassau County Courts. We have scheduled weekly meetings between these stake-holders to keep apprised of the status of the lab results and brainstorm ways of reviewing past cases and moving pending cases.

But that is not all. As President, I have created a Task Force of local legal experts proficient in not only criminal law but forensics as well. The Task Force includes our Criminal Law and Procedure Committee Chair Paul Delle, Bill Kephart, Fred Klein, Bruce Barket, Harry Kutner, Anthony Grandinette, Elizabeth Kase, Robert Schalk, Daniel Russo and myself. I have also extended an invitation to the District Attorney's Office to participate and am hopeful they will do so. The Task Force will be charged with, among other things, evaluating standards for a lab moving forward and proposing legislation aimed at preventing the kinds of disclosure issues and the like that we currently face and which allowed this problem to explode. We will keep the County Executive advised of our recommendations and push the legislature for enactment of legislation after approval by our Board of Directors.

It is our obligation to restore public faith in the Courts and we are prepared to do so!

# New Surrogate McCarty Plans More Involvement with Surrogate's Committee

**By Katharine J. Richards**

As Co-Chair of the Nassau County Bar Association Surrogate's Court Trust and Estates Committee, I had the pleasure of sitting down with newly-elected Nassau Surrogate Edward McCarty recently to discuss his plans for the Court. I must admit that although I was a bit wary of what the Surrogate might have in mind, I was pleasantly surprised throughout the entire meeting. He is wonderfully energetic and apparently wants to take a very "hands on" approach in guiding the Court through his term.

The thought of a new Surrogate, combined with the simultaneous loss of almost one-quarter of some of the most senior and knowledgeable staff at the Court, was most unsettling to say the least. Fear not – Surrogate McCarty was positively bursting with new ideas and pet projects; and was equally as excited to hear the Committee's ideas and suggestions on how to improve practice in the Surrogate's Court, not just for practitioners, but for our clients and those appearing pro se as well.

Here is a brief overview of what we can expect: The Surrogate plans on stopping by every monthly Committee meeting to say hello. In addition, he wants to hold "Town Hall" meetings at least twice a year for the Committee members to ask questions or address any issues they may have with the Court (anonymously or otherwise). The Surrogate is also very interested in participating in our continuing education programs and was delighted with some of the topics I suggested along with my Co-Chair, John Farinacci.

One of his favorite suggested topics was a CLE on "a day in the life of Surrogate's Court practice", which would be held at the courthouse, taught in conjunction with Court attorneys and clerks and cover substantive, procedural and administrative issues. The offer to participate in this CLE would be extended to all Committees, but specifically aimed at newly admitted attorneys as well as those who do not regularly practice in the Surrogate's Court. Judge McCarty is deeply committed to preserving the stellar reputation of the Nassau County Surrogate's Court, maintaining the quality of the Trusts and Estates Bar in Nassau County, and promoting continued civility amongst practitioners. For those interested, however, be warned: the Surrogate advised that no one would be allowed to attend without first being on the OCA part 36 approved Guardian Ad Litem list. This is a wonderful opportunity for those looking to increase their GAL appointments, or just get their first one.

Additionally, the Surrogate was very interested in incorporating more "hands on" presentations to the Committee, along with the semi-annual Court Updates, such as staging mock 1404 examinations, trials, 17A Guardianship hearings, Infant Compromise Orders/Proceedings, etc. Admittance to these presentations will also be offered to members of all other Committees in an effort to promote "cross training," given the overlap that routinely occurs between certain practice areas.

Court attorneys Sally Donahue and Lori Sullivan will now be serving as Court liaisons to the Committee and will be actively involved in designing more innovative Court Updates and CLEs. Moreover, given the major change in Court personnel this past fall, Sullivan advised that she would shortly provide the Committee with an updated directory of Court staff with new departmental assignments and contact information.

I left the meeting secure in the knowledge that we will continue to enjoy the outstanding relationship that has so long existed between the Surrogate's Court and the Bar.

**Katharine J. Richards, Esq., heads the Trusts and Estates department at the law offices of Nicholas A. Pellegrini, LLP, Garden City.**



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Internet Law Focus

# Personal Jurisdiction Questions for Trademark Claims Caused by Out of State Websites

This article will analyze the factors that New York courts have utilized in determining whether it is proper to exercise jurisdiction over out of state defendants that offer or sell products on the internet that prospectively infringe upon the trademarks of others, particularly focusing on CPLR §302, or the Long Arm statute, and how each of the sections contained therein relate to this inquiry.

Under CPLR §302(a)(1), it is possible for a court to exercise personal jurisdiction "where the cause of action arises from any of the acts enumerated in this section, … (and the defendant) transacts any business within the state or contracts anywhere to supply goods or services in the state." Query: does the defendant's operation of a website that is available for viewing in New York constitute the transaction of business in New York? The simple answer is that it may depend upon the level of business activity performed on the internet by the defendant. More to the point, the Second Circuit has generally followed a standard whereby it evaluates websites on a general spectrum of activity that typically fall into one of three categories, namely, passive, interactive and active.[1]

Keith Weltsch

"Passive" websites are mere advertisements for the goods that may be available for sale by the website owner and are similar in character to an advertisement in a national newspaper or magazine, which absent other mitigating factors would not be sufficient to permit a court to exercise personal jurisdiction over a prospective defendant.[2] An example of a "passive" site would be one where the prospective defendant's site contained an image of the infringing product along with an accompanying phone number that prospective purchasers could call in order to obtain information about the product. This type of site acts as a mere advertisement and, as a result, is not likely to create a basis for personal jurisdiction.

By comparison, if a court determines a defendant's site to be "active," that determination may be sufficient to exercise jurisdiction over an out-of-state defendant in New York. An "active" site would "allow consumers to exchange information and actually do business through the internet such as where it repeatedly transmits computer files to customers in other states."[3] While New York courts appear to discuss the types of websites that would theoretically fit into this "active" category, the courts have not actually analyzed many instances where websites were determined to be "active;" thus the analysis in this area of the internet interactivity spectrum is somewhat lacking.

Occupying the middle ground are websites that are classified as "interactive," "which permit the exchange of information between the defendant and website viewers."[4] As example of this type of site is an out-of-state website that allowed New York users to purchase products by providing payment and shipping information online. The Southern District considered this type of exchange to be sufficiently "interactive" for jurisdictional purposes, and dismissed a motion by the defendant for lack of personal jurisdiction.[5] However, a medium level of "interactivity," which permits the exchange of information via the defendant's website is, typically speaking, not sufficient in a vacuum for a New York court to exercise jurisdiction over an out of state defendant. Rather, courts that have permitted the exercise of jurisdiction over a trademark defendant operating an out-of-state website have required a plaintiff to prove further contacts by the defendant with New York.[6] Examples of the types of contacts that supported a finding of jurisdiction over an out-of-state defendant, when combined with a site determined to be "interactive," include where a defendant had affiliates and attended trade shows in New York, or in the alternative actively attempted to recruit customers in New York. Under both of these circumstances, the courts have held that the defendant purposely availed itself of the benefits of "transacting business" in New York, thus permitting the exercise of jurisdiction.[7] Thus, while no court has definitively stated that a plaintiff must show instances of non-internet contact with the forum in order to exercise jurisdiction over an out of state defendant, recent jurisprudence has made such a finding a *de facto* requirement.

Turning to CPLR §302(a)(2), it is possible for a New York court to exert jurisdiction over an out of state defendant if

See TRADEMARK, Page 20

# Making Room to Honor NCBA, WE CARE at the INN

The Nassau County Bar Association was pleased to be recognized for the good works of its members. The INN honored NCBA and its WE CARE Fund at its 2011 Inn Luncheon, held in February at the Garden City Hotel.

The Nassau County Bar Association has a long history of involvement in helping in the fight against hunger and homelessness by supporting The INN. The INN (Interfaith Nutrition Network) addresses the issues of hunger and homelessness on Long Island by providing food, shelter, long-term housing and supportive services in a dignified and respectful manner for those who seek help. The not-for-profit, volunteer-based organization is also committed to educate the public about these issues. In 2010, more than 2,500 volunteers served more than 320,000 nutritious meals in communities across Long Island for hungry guests. The INN has 19 soup kitchens located throughout Nassau and Suffolk, three emergency shelters in Nassau, and long term affordable housing for 19 families, accompanied by a full range of supportive services.

**Receiving the 2011 INN Community Service Award at a luncheon last month at the Garden City Hotel are NCBA Treasurer John McEntee; 2nd Vice President Peter Mancuso, Past President Emily Franchina, President Marc Gann, presented by INN Executive Director Jean Kelly. (Photo by Hector Herrera)**

# Members Appointed to Key NYSBA Positions

At its February meeting, the Board of Directors has selected 8 members to represent the Nassau County Bar Association in the New York State Bar Association House of Delegates for the 2011-2012 term.

Named to serve one-year terms are Hon. Joel K. Asarch, Justice of the Supreme Court of Nassau County; Elena Karabatos, Chair of the Matrimonial Law Committee; Martha Krisel, newly-appointed Council to the Nassau County Executive; John McEntee, NCBA Treasurer; Rick Collins, George DeHaven, Marilyn Genoa and Steve Leventhal. Alternate delegates named were Hon. John Kase, Judge, Nassau County Court, and Cheryl Helfer.

NYSBA's House of Delegates is the decision and policy-making body for the state association. Actions taken by the House on specific issues become official NYSBA policy.

In addition, Board Member Kimberly Lerner was voted to serve as the liaison between NCBA and the Nassau/Suffolk Law Services Committee, which provides pro bono legal assistance to the neediest residents on Long Island.



## TASK FORCE ...

Continued From Page 1

lab as well as to ensure quick resolution of cases that may have been adversely affected. We are in a unique position to help Nassau County create an even better crime lab to guarantee that the rights of all people are protected."

The NCBA Crime Lab Task Force is composed of defense attorneys from the Nassau County Bar Association Criminal Law and Procedure Committee, which is chaired by Paul Delle; Nassau County Criminal Courts Bar Association, whose president William Kephart is also vice chair of the NCBA Criminal Law and Procedures Committee; and the Nassau Legal Aid Society, headed by Kent Mosten. Gann will chair the Task Force. The group will be looking at such issues as procedures and policies, timeliness of lab results, content of lab reports, and possible legislation needed to avoid a recurrence of the current situation. "The Task Force will recommend what is needed to reestablish the credibility of the Crime Lab going forward," Gann noted.

Gann said that any attorney who thinks a closed case or current client may be affected by past crime lab tests should give the information to the District Attorney's office. The DA will be notifying any incarcerated people of the situation and remind them of their rights.

Internet Law Focus

# Hidden Use of Competitors' Trademarks on the Internet

## *The Second Circuit's Minority Approach*


A website consists of a home page and, usually, additional pages. One factor that determines whether the results of a search-engine inquiry include a particular webpage (whether a website's homepage or one of its additional pages), and where the webpage appears in those results, is the webpage's use of metatags. A metatag is a piece of text, such as a word, that is embedded in a webpage's HTML (hypertext markup language) code and is read by search engines but is not visible to internet users.

Todd Bank

When a website belonging to "Company A" includes, in its metatags, a trademark of its competitor, "Company B," a search-engine inquiry for Company B will produce results that include one or more webpages of Company A, perhaps leading the internet user to Company A's website, where he then makes a purchase that he might otherwise have made from Company B. In such an instance, does Company B have a trademark-infringement claim against Company A under the Lanham Act, 15 U.S.C. §§ 1051-1128?

To have a cause of action under the Act,

> "a plaintiff must establish that (1) it has a valid mark that is entitled to protection under the Lanham Act; and that (2) the defendant used the mark, (3) in commerce, (4) "in connection with the sale ... or advertising of goods or services," 15 U.S.C. § 1114(1)(a), (5), without the plaintiff's consent. In addition, the plaintiff must show that defendant's use of that mark "is likely to cause confusion ... as to the affiliation, connection, or association of [defendant] with [plaintiff], or as to the origin, sponsorship, or approval of [the defendant's] goods, services, or commercial activities by [plaintiff]."

*1-800 Contacts, Inc. v. WhenU.Com, Inc.*, 414 F.3d 400, 406-407 (2d Cir. 2005).

Several federal appellate cases have addressed the issue of whether one's use of a competitor's trademark in its metatags violates the Lanham Act and held that it does: *Venture Tape Corp. v. Mcgills Glass Warehouse*, 540 F. 3d 56 (1st Cir. 2008); *Promatek Industries, Ltd. v. Equitrac Corp.*, 300 F.3d 808 (7th Cir. 2002); *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036 (9th Cir.1999); *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228 (10th Cir. 2006); and *North American Medical Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211 (11th Cir. 2008).

Among this group, the most detailed analysis is provided by the Ninth Circuit in the *Brookfield* case, in which the parties were competitors in gathering and selling information about the entertainment industry. Brookfield owned the trademark "MovieBuff," but the website of West Coast was www.moviebuff.com, which West Coast claimed was based on its service mark, "The Movie Buff's Movie Store."

After West Coast rejected a cease-and-desist demand from Brookfield, the latter brought suit in federal court in California under the Lanham Act, 15 U.S.C. §§ 1114, 1125(a), and sought to enjoin West Coast from, *inter alia*, using the term "moviebuff" in its website address as well as in its website's metatags. The District Court for the Central District of California denied Brookfield's request, and Brookfield appealed to the Ninth Circuit.

With respect to West Coast's website address, the Ninth Circuit was "left with the definite and firm conviction that ... the district court[] [erred in] conclu[ding] that the evidence of likelihood of confusion ... was slim," *Brookfield*, 174 F.3d at 1061, and therefore reversed the District Court's refusal to grant Brookfield's request for a preliminary injunction. With respect to West Coast's use of the term "moviebuff" in its metatags, on the other hand, the Ninth Circuit found that the confusion caused by West Coast's use of the term "moviebuff" in its metatags "is not as great as where West Coast uses the 'moviebuff.com' domain name." *Brookfield*, 174 F.3d at 1062. First, when one searches the term "moviebuff," the result "is likely to include both West Coast's and Brookfield's websites[,] [so that] the web user will often be able to find the particular website he is seeking," *i.e.*, Brookfield's site. *Id*.

Second, the court found an Internet user who, in his search results, clicks on a link to a West Coast webpage,

> "will see that the domain name of the website he selected is 'westcoastvideo.com.' Since there is no confusion resulting from the domain address, and since West Coast's initial webpage prominently displays its own name, it is difficult to say that a consumer is likely to be confused about whose site he has reached or to think that Brookfield somehow sponsors West Coast's website." *Id*.

Notwithstanding the court's finding that West Coast's use of Brookfield's trademark in West Coast's metatags would not likely cause confusion among internet users, the court found, under a different rationale, that West Coast had likely violated the Lanham Act:

> "West Coast's use of "moviebuff.com" in metatags will still result in what is known as initial interest confusion. Web surfers looking for Brookfield's 'MovieBuff' products who are taken by

See METATAGS, Page 17

# IN BRIEF

## Member Activities

The Attorneys' and Judges' Chapter of Hadassah will be honoring the **Honorable Leonard Austin**, Justice of the Appellate Division, Second Department, at its annual installation dinner on Tuesday, May 17, 2011 at the Nassau County Bar Association beginning at 6 p.m. Contact Joi Aberle at jaberle@genoaandassociates. com for more information.

**Ilene S. Cooper**, a partner at Farrell Fritz, P.C., has joined Friends of Karen's Steering Committee and Long Island Advisory Board. Friends of Karen services families with children diagnosed with cancer and other life-threatening illnesses. Ms. Cooper, who concentrates her practice in trusts and estates litigation, is the immediate past president of the Suffolk County Bar Association and the Chair-elect of the NYSBA's Trusts and Estates Law Section. She is also a Fellow of the New York Bar Foundation and the American College of Trust and Estates Law Section in addition to an adjunct professor at Touro Law School. Ms. Cooper was appointed to the Suffolk County Youth Board Coordination Council and also serves on the board of The Hills Foundation, The Suffolk County Child Care Council, Child Abuse Prevention Services, Half Hollow Hills Business Advisory Council, Children's Medical Fund Corporate Alliance and the Honorary Board of the Suffolk County Coalition Against Domestic Violence.

Hon. Stephen L. Ukeiley

**Jack L. Libert**, counsel at the Uniondale-based law firm of Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP, has been appointed to the Advisory Board of the Oyster Bay Railroad Museum, an organization dedicated to preserving the legacy of Long Island's railroad history. Mr. Libert concentrates his practice in real estate focusing on transactions, zoning, land use planning and wills, trusts and estates and has an "AV" legal ability and ethics rating by Martindale-Hubbell Law Directory – the highest rating established. Mr. Libert was featured in Long Island Business News "Who's Who in Law on Long Island" (2002) and has appeared as a legal commentator on Cablevision News Channel 12.

Farrell Fritz, P.C. partner **Christopher J. Kutner** was recently appointed to the New York Hospital Queens Community Advisory Council. Mr. Kutner concentrates his practice in corporate and healthcare and has earned a national certification from the Healthcare Compliance Certification Board. He also serves on Farmingdale State College Foundation's board of directors; the advisory board of Stony Brook University's Center for Excellence in Wireless and Information Technology Medical Division; the Brooklyn/Queens Council of the New York Chapter of the Juvenile Diabetes Research Foundation and the board of directors of the American Red Cross in Nassau County.

**Michael Scotto** was named Chief of the newly configured Rackets Bureau of the New York County District Attorney's Office. He also serves as a Deputy Chief of the Investigation Division. Mr. Scotto, who earned his Juris Doctor from Brooklyn Law School, has been a prosecutor since 1989. In 1994, he transferred to the Labor Racketeering Unit/Construction Industry Strike Force, where he was appointed Chief in 2001. In the Labor Racketeering Unit, Mr. Scotto prosecuted or supervised numerous complex cases involving corruption and organized criminal activity in the New York City construction industry. He has also provided legal training for the District Attorney's Office and has lectured on behalf of the Office in the area of construction fraud and labor racketeering.

**Fred Klein** has been appointed as a Visiting Assistant Professor of Law at Hofstra Law School where he will be teaching classes in Criminal Procedure and Trial Advocacy. Mr. Klein will also be supervising students who are externing in agencies and offices that handle criminal cases and supervising a small group of students handling their own misdemeanor cases in the Nassau County District Attorney's Office under a joint program with that Office and Hofstra. Mr. Klein was a state and local prosecutor for 30 years, 27 of which he spent in the Nassau County District Attorney's Office. He was in the Major Offense Bureau for 22 years, 12 of which he served as Chief of that Bureau.

**Erica Garay**, a commercial litigator and partner in the Litigation practice group at Meyer, Suozzi, English & Klein,

See IN BRIEF, Page 22



# COMMITTEE REPORTS

## Intellectual Property Law

Meeting Date 1/25/11
Aimee L. Kaplan, Chair

Michael J. Langer

Prof. Jeremy Sheff of St. John's Univ. spoke about Post-Sale confusion in Trademark law. Mr. Sheff joined the faculty of St. John's Univ. in the fall of 2008 as Assistant Prof. of Law. His research focuses on how law mediates the creation, dissemination and the use of information in social, cultural, political and economic exchange. He received his B.A. summa cum laude from Columbia and his J.D. cum laude from Harvard Law School.

**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.**

Internet Law Focus

# Potential Legal Issues Associated with Internet Promotions

Online promotions can be effective mechanisms for promoting a company's business, product or services. With the growing popularity and viral nature of social networking, social media sites, such as Facebook, YouTube and Twitter, have become hot marketing platforms for the administration of sweepstakes and contests, in addition to promotions conducted on a company's own website.

Terese L. Arenth

Internet promotions, however, are not without legal risk. They are subject to the same laws and regulations that apply to traditional media and promotions, as well as the terms and conditions of the social media site, if applicable. Companies conducting Internet promotions must be cognizant of the relevant legal issues in order to protect themselves from potential exposure to liability. This article highlights some of the more common issues.

## Intellectual Property Issues

Internet promotions frequently incorporate user-generated content ("UGC"), whereby entrants submit and post a photo, video or some other form of user-generated content. These types of submissions may expose a promotion sponsor to potential liability for infringement of a third party's intellectual property rights if, for example, an entrant's submission displays third-party trademarks in the background, on signage or on clothing. This could subject the sponsor to a Lanham Act[1] claim since utilizing a third-party's trademark in this manner could arguably give rise to a false association between the trademark owner and promotion sponsor, by suggesting that the trademark owner: (i) is a co-sponsor of the promotion, (ii) has given permission for use of its trademark, (iii) endorses the promotion and/or (iv) is otherwise affiliated with the promotion sponsor. There could also be potential liability for trademark dilution if a third-party's famous trademark is being used in a way that tarnishes the reputation of the trademark owner (for example, by associating the trademark with pornography or drugs).[2]

If the UGC contains copyrighted material, such as music, the sponsor could be exposed to copyright infringement claims[3] unless the copyrighted material has been used with permission, is in the public domain or falls within the parameters of parody or fair use.[4]

To reduce a sponsor's legal risks, the promotion rules should clearly disclose the precise submission requirements, as well as any type of content that is not acceptable. To afford further protection, any such requirements and limitations should be disclosed prominently at the submission point of entry. The sponsor is advised to regularly monitor the submissions and the promotion rules should reserve the sponsor's right to take down and remove any submission that it deems, in its sole discretion, to be infringing upon another's rights.

The sponsor should also decide how it intends to use the submission and the promotion rules should specify the rights that it seeks to acquire. For example, if the submissions will be incorporated into an advertising campaign, the sponsor may want to obtain all copyright ownership interest in the submissions (or, at minimum, to the winning submissions) or a perpetual license. If the sponsor intends use of the submission for limited purposes, such as posting on its website, it may require only a limited license for that usage. Regardless of whether a sponsor intends to own or license any submission, prior to use the sponsor should clear the intellectual property rights that have been incorporated within the UGC to mitigate against potential exposure to infringement claims.

## Publicity Rights

The right of publicity is a state-based right and prohibits the use of another person's name or likeness for a commercial purpose without their permission.Virtually every state currently recognizes the right of publicity, either by statute or common law.[5] If a video or photo contest submission depicts individuals other than the entrant, the sponsor could be subject to claims for violation of those individuals' right of publicity by posting the photo or video on the sponsor's commercial website without their permission. If the photo or video is posted only on the sponsor's "fan page" of a social media site, an argument may be available that it is not being used for a commercial purpose, depending upon the nature and use of the sponsor's social media page. Conversely, the sponsor may have liability if the video or photo is used by the sponsor in an advertising campaign, on television or in a print ad, unless it has obtained the consent and a release from all parties whose likeness appears in the submission. Either way, a defense may be available to the sponsor if the use (in whichever form and manner) is fleeting and insignificant, as some courts have held that an incidental use of one's picture does not amount to a right of publicity violation.[6] If the posted photo or video includes the likeness of a person that is merely one of many photos or videos posted on the site, and it is not used as an endorsement of the sponsor's product or services, then it could be argued that the use is simply incidental to shield the sponsor from liability.[7]

## Public Voting

If public voting will be used to determine an online contest winner, the extent

See PROMOTIONS, Page 22

# PRO BONO ATTORNEY OF THE MONTH

## Heath S. Berger

By RHODA SELVIN

It did not take long for Heath S. Berger, Pro Bono Attorney of the Month for March 2011, to absorb pro bono representation into his style of practice. He joined the Volunteer Lawyers Project Bankruptcy Panel after graduating from law school. Since October 2006, when VLP previously honored him as Pro Bono Attorney of the Month, he has spent more than 179 hours on 54 VLP bankruptcy cases. He is part of that important group of attorneys who accept whatever cases have been recommended for a Chapter 7 bankruptcy by the volunteer attorneys at VLP's bimonthly Bankruptcy Clinics.

Mr. Berger anticipates that legislation signed into law on December 24, 2010, by then Governor David Patterson, will increase the number of people eligible for a Chapter 7 bankruptcy. Under this new law, assets up to $150,000 can be exempt from liquidation whereas only $50,000 could previously be exempt. In the past people who had to file under Chapter 13 can now do so under Chapter 7.

"This change will likely aid senior citizens and others who have owned their homes for a long period of time and accrued equity over the years," he explained.

Mr. Berger, a 1989 graduate of the State University of New York at Binghamton, received his law degree from Albany Law School in 1992 and is a partner in the firm of Steinberg, Fineo, Berger & Fischoff, P.C. In addition to being a member of the New York State Bar Association, he was admitted to practice before the United States District Courts of the Southern, Eastern, Western, and Northern Districts of New York as well as numerous Federal courts throughout the country. He is a member and serves on the Bankruptcy and Matrimonial Law Committees of both the Nassau and Suffolk County Bar Associations; the National Association of Consumer Bankruptcy Attorneys, and the American Bankruptcy Institute. In addition to these professional organizations, he also serves on his temple's Board of Trustees and Finance Committee for the last three years.

Mr. Berger describes his life as, "my family, my job." And then come his sports: tennis and golf. His wife Hilary is a violin teacher. Fourteen-year-old Mitchell plays competitive tennis in age-level U.S. Tennis Association tournaments and is a member of his middle-school tennis team. Ten-year-old Ellie is a seasoned competitor too and she is on her school's dance team, which participates in jazz, hip-hop and other dance genre competitions.

For Heath S. Berger's exemplary service to the indigent citizens of Nassau County, the Volunteer Lawyers Project is delighted to name him Pro Bono Attorney of the Month once again.



## MAY IS MEMBERSHIP MONTH!

**Get Involved...**
**...Stay Involved**

**MEMBERSHIP MONDAYS AT THE BARRISTER'S TABLE**

**March 7, April 4 & May 2**
**You Have Questions? We Have the Answers!!**

**A representative from the Executive Committee, Association Membership Committee and NCBA Staff will be available for questions and networking. All members are welcome to sit at the Barrister's Table at Domus for lunch weekdays 12 noon - 2.**

## NCBA Committee Meetings

The following committees will be meeting in the month of May.
Please check website calendar for dates, times and topics.
**Current NCBA Members (only) may attend any meeting!**

Alternative Dispute Resolution
Animal Law
Association Membership
Commercial Litigation
Community Relations & Public Education
Education Law
Elder Law, Social Services & Health Advocacy
Ethics
Hospital & Health Law
Labor & Employment Law
Lawyer Assistance Program
Matrimonial Law
Military Law
Publications
Senior Attorneys
Surrogate's Court Estates & Trusts
Tax Law
Technology & Practice Management
Young Lawyers

Internet Law Focus

# Protecting Anonymous Speech on the Internet with Reporters' Shield Laws

The right of a news reporter or media organization to protect the confidentiality of its sources is well recognized in nearly every state. But what about the right to protect the identity of someone who comments anonymously on a news organization's website or blog? In an emerging trend, some courts have recently held that traditional state shield laws meant to protect a reporter's source also protect anonymous commenters.

State shield laws provide varying degrees of protection. Whether they can be used to shield the identities of anonymous commenters depends on how broadly state statutes reach. Only a handful of shield laws have been interpreted to protect anonymous website commenters, but these cases illustrate a very important trend. As the relationship between reporters and sources evolves with the Internet, these courts are recognizing that the law must also change in a way that continues to protect the identities of reporters' sources and the public's right to know together with the right of website commenters to remain anonymous.

Samantha Fredrickson

## Shield Laws and Reporter's Privilege – a Brief Overview

Every state except Wyoming provides some type of protection against compelling a reporter to reveal a confidential source in state court. In 39 states plus the District of Columbia, that protection is provided through state shield laws.[1] In the other states, it is recognized either in state constitutions or through the common law. Protecting reporters' sources and information is vital for the public interest. Without being assured that the information and identities provided to a reporter will remain confidential, many people would be too afraid to speak to the press about matters of public importance. And the public would be kept in the dark.

There are different types of shield laws that offer varying levels of protection for a reporter's sources. The level of protection depends on whether a source and the information the source provides is confidential and whether the information is being sought in criminal or civil court. For example, New York provides an absolute privilege for the protection of confidential sources and information in both criminal and civil court.[2] But, if the information being sought is not confidential, then courts will apply a qualified privilege balancing test. A reporter can be compelled to testify about non-confidential information if there is a "clear and specific" showing by the party seeking disclosure that the material sought (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source.[3]

Other states, such as New Jersey, distinguish between civil and criminal cases. While the privilege is absolute in civil cases, in criminal cases the privilege can be overcome by a criminal defendant upon a showing of relevance, materiality, necessity, and unavailability from any other source.[4]

In federal court, however, there are limited protections for reporters and their sources. There is no federal shield law, though different versions of proposed statutes have passed in both the House and the Senate. Consequently, reporters subpoenaed in federal court or before federal grand juries cannot rely on statutory protection. There also is no uniformly recognized First Amendment-based reporter's privilege[5] and there have been no instances where a First Amendment reporter's privilege was used to protect an anonymous commenter.

## The Protection of Anonymous Commenters as Sources of Information

State shield laws provide much stronger protection for a reporter's sources, and this protection is holding up in the Internet age. The Internet allows people to not only read news reports, but to become an interactive participant as well. With the click of a button and a few key strokes, anyone can leave an anonymous comment or tip regarding an article or at a website. The ability to comment anonymously on news articles is of vital importance. Without being assured that their identities will remain unknown, many readers would not comment for fear of retaliation or retribution. While admittedly some comments that grace news web sites are of little social and political value, many others share information that is vital to the public. Thus, there is value to the law's protection of all anonymous speech on the Internet. Just as a source must be assured confidentiality in order to share valuable information with a reporter, someone commenting on a news website must also be assured that their identity and information can be protected from eager plaintiffs and overzealous prosecutors. Many news organizations agree, and have gone to court to protect the identities of these John Doe commenters.

The attempted unmasking of anonymous commenters arises mainly in two different contexts. In civil cases, it happens most often when a defamation lawsuit is brought against the anonymous writer. The Communications Decency Act of 1996 ("CDA"), 47 U.S.C. § 230 et seq., immunizes website owners and publishers from defamation lawsuits.[6] So, in most states plaintiffs file a lawsuit against a John Doe defendant, and then subpoena the Internet Service Provider ("ISP") or news organization for the identity of the anonymous Internet speaker in order to proceed with their lawsuit. By contrast, in New York, plaintiffs may seek pre-action disclosure of an anonymous blogger by bringing a special proceeding under CPLR 3102 (c).[8]

In criminal cases, it arises usually when criminal defendants or prosecutors

See SHIELD LAWS, Page 21

# NASSAU ACADEMY OF LAW

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## GETTING THE DEAL CLOSED
### BUSINESS ACQUISITION AND SALE CONSIDERATIONS

**Monday, March 14, 2011**

**5:30-8:30 PM** *Light Supper*

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

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

GET TO THE FINISH LINE AND BE A DEAL MAKER

- Overview: Participants and Roles
- Flow of the Transaction-The Process
- Price and Structure
- LOI/Offer to Purchase
- Financing
- Representations + Warranties
- Employee Retention
- Real Estate
- Negotiating & Drafting Documents & Select Partnership Issues

**Panelists**

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

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

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

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

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

**Moderator**
***Robert S. Barnett, Esq.***

**3.0 NYMCLE credit hours: .5 ethics & professionalism; 2.5 areas of professional practice. *Approved for 3.0 CPE credit. NYS Education Sponsor #000643**

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Never a charge! All seminars 1 CLE Credit

Mar. 16 Intermediate Westlaw, 10-11 a.m.
Intro to Westlaw Next 11:30-12:30

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Still $45 per session /1.5 CLE Credit Each

| Intro to Time Slips | Into to Time Matters |
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| 8:30 -10 a.m. | 8:30 - 10 a.m. |
| March 15 | March 17 |
| April 5 | April 7 |
| April 26 | April 28 |
| May 17 | May 19 |

*At NCBA Headquarters, 15th & West Streets Mineola, NY*

*Please register in advance or classes may be canceled.*

To register call **516-747-4464 x228**

Special CLE For NCBA Members Only!!

## 3-DAY BASIC MEDIATION TRAINING FOR THE COMMERCIAL DIVISION

**Friday, April 1 • Monday, April 4**
**Tuesday, April 5**

**8:30 AM - 5 PM** *Continental Breakfast & Lunch*

Topics & Skills:

- Cultivating ideal Mediator orientation, attitude & awareness
- Effective Preparation
- Effective Communication

**24 CLE CREDITS**

- Deep Listening Skills
- Effective Openings
- Maximizing Opportunities in Joint Session
- Wise Caucusing
- Power Risk Analysis-art, timing & tact in engaging in evaluative processes
- Impasse Breaking
- Coming to Closure
- Theoretical tools to Grasp the underlying negotiation
- Mediation Ethics

PLEASE NOTE: Completion of this training and the 2 additional days referred to below will NOT automatically qualify you for listing on the COMMERCIAL DIVISION PANEL. Final placement on any court roster is at the discretion of the local Administrative Judge. Section 146.4 of Court Rules requires "mediators must also have recent experience mediating actual cases in the subject area of the types of cases referred to them."

There will be a separate 2-day commercial division training program on Tuesday, May 10, & Friday, May 13, 2011 to complete the 40 hour training requirement. (Additional information and fees TBA)

This three-day course will present a thorough examination of mediation principles and techniques. The program faculty will analyze the structure of a typical mediation, highlight ethical issues that may arise in mediation, and explore solutions for generating movement and overcoming impasse.

The program faculty will explore the differences between facilitative and evaluative or directive approaches in mediation, both from a practical and from an ethical perspective, and will discuss the advantages and disadvantages of these styles. The instructors will focus on experiential learning through role plays and dialogue to help prepare you for the real work of commercial mediation.

Presented by:
***Simeon H. Baum, Esq.,*** litigator, mediator & President, Resolve Mediation Services, Inc. (www.mediators.com)

***Stephen A. Hochman, Esq.,*** mediator & arbitrator

## Lunch & Discussion!

3 SPECIAL DEAN'S HOURS!

### BUSINESS VALUATION, BASIC CONCEPTS, and DISCOUNT & CAPITALIZATION RATES

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### NUTS AND BOLTS OF PROCEEDINGS TO TERMINATE PARENTAL RIGHTS

**Monday, March 28, 12-2 PM**

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### PADILLA V. KENTUCKY: ONE YEAR LATER

**Wednesday, March 30, 12:30-2 PM**

1.0 NYMCLE in areas of professional practice

The Nassau Academy of Law Invites

## *Annual Hon. Elaine Ja Moot Court Competit*

**Wednesday, March 23, 2**

**THE TEAMS**
CUNY School of Law
Hofstra Law School
Touro Law School

**AT ISSUE**
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•US Citizenship fo citizen, the other a

**MOOT COURT BENCH**
**Hon. Joseph F. Bianco,** Judge, USDC, EDNY
**Hon. Ruth C. Balkin,** Justice, Appellate Divisio
**Hon. Elaine Jackson Stack,** NYS Supreme Cou
**Hon. Marc C. Gann,** President, NCBA; Collins, MacDonald & Gann, Mineola
**Hon. Andrew Engel,** Dean, NAL
Judge, District Court, Nassau

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# March - April 2011

Join the Circle and Save!
Watch for Details

## OOPS!

**OVERCOMING OBSTACLES TO PROFESSIONAL SUCCESS**

**Tuesday, March 29, 2011**

**5:30 - 7:30 PM** *Light Supper*

OW STRESS INTERFERES WITH PERFORMANCE
- Overview of stress
- Stress reduction strategies
- Demonstration of Thought field Therapy-a uick acting stress reduction technique that all ttendees can participate in.

***ll Solz, LCSW, CASAC,*** Director
*ress Solutions of Long Island, Bellmore*

OU CAN'T MANAGE TIME: MANAGE YOUR CTIVITIES
*Vhere does the time go?*
- The difference between being effective and aing efficient
- There's no such thing as multi-tasking
- Managing distractions and interruptions rioritizing
- Learning to focus on the right clients and the ght activities
- Strategies for prioritizing activities

ffective Delegation
- Whether you are giving out the work or ceiving it, effective delegation is a skill that must e learned
- Steps to effective delegation

***lison C. Shields, Esq.***
*galEase Consulting Inc., Mt. Sinai*

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***Please RSVP***
**516-747-4464**

## SUMMARY JURY TRIALS

**Monday, March 21, 2011**
**5-7 PM**
2.0 NYMCLE In professional practice

**FREE** for MEMBERS
Must Preregister

- Introduction —DVD Presentation
- Becoming Part of the Civil Practice Fabric
- Open Discussion, Questions, Comments

**Guest Speaker**
***Hon. Lucinda Suarez***
Statewide Coordinator for Summary Jury Trials
**Moderator**
***Marc C. Gann, Esq.*** *President, NCBA*
McDonald Collins & Gann, Mineola

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TO REGISTER OR ORDER: Circle your selections in the correct columns and total amount due.
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- **By Credit Card:** FAX completed form with credit card information to 516-747-4147
- **Order Online:** www.nassaubar.org >MCLE>Calendar, Reservations

### *Seminar Reservation Form*

| Date | Seminar Name | P | E | TOTAL Credits | Member | Non-Member | 5 Session Ticket |
|---|---|---|---|---|---|---|---|
| Mar. 14 | Getting The Deal Closed | 2.5 | 0.5 | 3.0 | $110 | $145 | YES |
| Mar. 21 | Summary Jury Trials | 2.0 | | 2.0 | FREE | - | - |
| Mar. 23 | Moot Court Competition FINALS | 1.0 | | 1.0 | FREE | - | - |
| Mar. 25 | Business Valuation, Basic Concepts, Discount & Capitalization Rates | 1.0 | | 1.0 | $38 | $55 | - |
| Mar. 28 | Nuts and Bolts of Proceedings to Terminate Parental Rights | 1.0 | | 1.0 | $38 | $55 | - |
| Mar. 29 | OOPS! Overcoming Obstacles to Professional Success | 2.0 | | 2.0 | $25 | $75 | YES |
| Mar. 30 | Padilla v. Kentucky: One Year Later | 1.0 | | 1.0 | $38 | $55 | - |
| April 1, 4 & 5 | 3-Day Mediation Training for the Commercial Division | 24.0 | | 24.0 | $795 | - | - |
| | SEMINAR RESERVATION TOTAL: | | | | | | |

### *SPRING 2011 CD and DVD Order Form*

| Area of Law | Seminar Name | P | E | TOTAL Credits | CD/DVD Member | CD/DVD Non-Member | Seminar Code |
|---|---|---|---|---|---|---|---|
| Business/Corp | The 123's and ABC's of Financial Statements: Entities & Taxes | 1.0 | | 1.0 | 35/50 | 50/70 | 1BIZ0123 |
| | Business Valuation, Basic Concepts, Discount & Capitalization Rates | 1.0 | | 1.0 | 35/50 | 50/70 | OH32511 |
| | Commercial Division Practice | 1.0 | | 1.0 | 35/50 | 50/70 | 1COMM0122 |
| | Getting The Deal Closed | 2.5 | 0.5 | 3.0 | 105/140 | 120/160 | 1DEAL0314 |
| Civil Litigation | The Ins and Outs of Medicare and Medicaid | 2.0 | | 2.0 | 70/100 | 85/120 | OH012411 |
| | Looking for the Advantage At Trial | 6.0 | | 6.0 | 210/240 | 300/320 | 1TRIAL0304 |
| Criminal Law | Administrative Hearings | 1.0 | | 1.0 | 35/50 | 50/70 | 1HEARD0122 |
| | Criminal Law: From Assignment to Disposition | 2.0 | | 2.0 | 70/100 | 85/120 | 1CRIM0123 |
| Estate/Elder Law | Elder Law: The Role of a Court Evaluator | 1.0 | | 1.0 | 35/50 | 50/70 | 1EVAL0122 |
| | Legal Issues Involving Elderly Or Disabled Persons and their Animals | 2.5 | 0.5 | 3.0 | 105/140 | 120/160 | 1PETS0303 |
| Ethics | Etiquette and Ethics - Be Civil! | | 1.0 | 1.0 | 35/50 | 50/70 | 1CIVL0122 |
| | To Report or Not To Report: These Are The Questions! | | 2.0 | 2.0 | 70/100 | 85/120 | 1ETHO215 |
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# Income Tax Consequences of Cancellation of Debt

The topic of Cancellation of debt (called Forgiveness of Debt when I first encountered the topic in my individual tax accounting course as an undergraduate), is a particularly timely one right now as personal and business bankruptcy filings are at all time highs. The first thing to understand is that, under the general rule laid out in Internal Revenue Code Section 61 defining what constitutes gross income, the cancellation of debt causes gross income to increase by the amount of debt that is cancelled (IRC 61(a) (12). Many people ask why the cancellation of debt causes an increase in their taxable income. Actually, the concept is simple and makes perfect sense. For example, if you owe your bank $100,000 on a mortgage, and the bank lets you know in writing that it will accept $50,000 in full satisfaction of your mortgage, that is the same as if you had earned the cancelled $50,000 of mortgage, combined it with the $50,000 that you had earned and saved, and paid off your mortgage.

David Kass

The Internal Revenue Code sets out a number of exceptions to the general rule. The exceptions are set out in Internal Revenue Code Section 108 Subsections A through E. The first exception provides that there is no inclusion of income for debts forgiven or cancelled as part of a bankruptcy under Title 11 of the U.S. Code. To qualify for this exception, the taxpayer must be under the court's jurisdiction and discharge must be granted under a plan approved by the court. A second exception to the general rule is granted when the taxpayer is insolvent. For this purpose, insolvency occurs when a taxpayer's liabilities exceed the fair market value of his assets. An exception to the general rule is also granted for cancellation of qualified farm indebtedness. Another exception is granted for cancellation of qualified principal residence indebtedness discharged before January 1, 2013 (IRC 108(1)(E). The final exception is granted for the cancellation of qualified real property business indebtedness for all taxpayers except C Corporations. A C Corporation is one defined under Subchapter C of the Internal Revenue Code. A C Corporation's profits are typically taxed separately from those of its owners.

To claim an exclusion from gross income under one of these exceptions, a

See DEBT FORGIVENESS, Page 23

VIEW from the BENCH

# The Law of E-Discovery Grows Up

By Hon. Arthur M. Diamond

## *Part 1: Victor Stanley v. Creative Pipe*

My next two columns address the rapidly growing and complex area of electronic discovery and the issues that surround it. When talking to attorneys who litigate in this field and judges who have presided over cases involving these matters their common theme is that our courts and departments are "all over the place" on these issues. Given the rapidly developing technology of legal practice today that should not be all that surprising. What I hope to accomplish here is to identify and discuss problems and trends that practitioners should be aware of in this really interesting area of practice.

We begin with the case of *Victor Stanley v. Creative Pipe*, 250 FRD 251 (D. MD 2008) decided May 29, 2008 and written by the erudite Magistrate Paul W. Grimm. Although it is a federal decision I implore state practitioners to be aware of it and also aware that when a case involves state and federal claims, federal privilege doctrine will control those issues. (*See also* article written by Messers. Boehning and Toal, NYLJ October 5, 2010.)

The plaintiff, Victor Stanley, Inc., filed a motion seeking to retain 165 electronically stored documents that were produced during discovery by the defendant. The defendant claims that the information is protected by the attorney-client privilege and the work-product doctrine. Plaintiffs state that there is no privilege because they were produced in a manner in which any possible privilege claim was waived. It is the party which is asserting the privilege that has the burden of proving it.

After initial discovery responses, each side produced a computer forensic expert to come up with a joint protocol to search and retrieve Plaintiff's ESI requests. Five pages of keyword/phrases were produced and used to identify responsive material. The defendants then reviewed it to locate material that they deemed to be either privileged, work product protected or otherwise not responsive. Defense counsel also then requested a "claw back" provision in the protocol to protect against items that may have been inadvertently turned over. After a court conference the "claw back" request was withdrawn and substituted with an individual document review prior to turn over. There was some danger here, the court noted, because pursuant to the prior ruling in *Hopson v. Mayor of Baltimore*, 232 FRD 228 (D MD 2005), when done without court order, inadvertent production of protected information will be deemed as having waived protection.

After defendant's production and their review, plaintiff's counsel identified potentially privileged/protected material and segregated same. Thereafter, defendant changed attorneys and a dispute arose as to how the defendants created their protected document list. The defendants claimed that prior counsel's forensic expert created an over broad keyword search protocol leading to the turnover of privileged material. Plaintiff vehemently denied this assertion. The issue becomes extremely significant in the light of *Hopson* and was framed for the court as whether or not under these circumstances the defendant waived any privilege or protection for the 165 documents in question.

Until Magistrate Grimm's decision, there were three separate approaches adopted in various federal districts in determining whether the accidental turnover of privileged material constituted a waiver of same. On one end of the spectrum courts have held there is no waiver because there was no knowing and voluntary waiver; on the other end, there are jurisdictions which hold that there is a waiver because once disclosed, there can no longer be a claim of confidentiality; and what I will call the middle ground: courts make a determination whether the party providing the documents exercised 'reasonable care' to prevent disclosure. If the answer is yes, there is no waiver.

As seen from the facts so far described in *Victor*, the complexity of electronic discovery has caused attorneys to become directly involved in the review and preparation of the discovery of ESI. The issue has become, then, not only has a party has inadvertently turned over documents that were not covered by the discovery demand and therefore waived the privilege but also potentially one of the invocation of attorney-client privilege by the offending party. That issue has been addressed in the case of *Continental Casualty Co. v. Under Armour, Inc.* 537 F.Supp2d 761 (C.Md. 2008).

*Editor's Note: See Part II of this article in the April issue of the Nassau Lawyer.*

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

# LAW DAY ...

Continued From Page 1

they live. According to Executive Director Omar Angel Perez, for the past 18 years the Hempstead-based organization has been a strong advocate to secure workers rights and overall human rights and social justice for all individuals and families across Long Island.

A core program is the Workshop Project's Know Your Rights program, which has evolved into an overall process for day laborers and immigrant workers of various industries – car wash, construction, domestic work, factory work, gardening and landscaping, racetrack, restaurant – to learn basic labor rights and become organized in a push for better working conditions and more effective government policies to protect workers' rights. The program focuses on each individual and their work experience, and uses them as a collective base for teaching workers about their rights and introducing them to organizing.

Working with organizations, government agencies, lawyers and volunteers, The Workplace Project has recovered millions of dollars in unpaid salaries since its founding in 1992. In 2010 alone, more than $400,000 was recovered.

Legislatively, The Workplace Project efforts have resulted in New York's 1997 Unpaid Wage Prohibition Act, Nassau County's 2006 Domestic Workers Bill of Rights and the Domestic Workers Bill of Rights, signed this year. The group is currently working on the proposed Non-Payment of Wages Insurance Act in Nassau County, which would create a fund to pay workers who have been cheated out of their wages by employers.

## Peter T. Affatato Court Employee of the Year

The Court Employee of the Year Award is named in honor of NCBA Past President Peter T. Affatato, and is given to a non-judicial employee of any court located in Nassau County who exhibits professional dedication to the court system and to its efficient operation, and who is exceptionally helpful and courteous to other court personnel, members of the Bar, and the many diverse people whom the court serves.

John Coppola, who has served as Family Court's Deputy Chief Clerk since 1996, has become the "go to" person to resolve any problems or concerns from members of the Bar and the public in one of the most challenging courts in Nassau County. Whether it is a problem with a proceeding or with the facilities, Coppola is always available to help the public and the Bar to resolve any issue with regard to the Family Court. He manages all the daily operations of the Family Court while administering a non-judicial staff in excess of 150 employees. He oversees the administration, building services, case scheduling, central services, chambers support, the Child Support Department, communications, court reporting, Court Services Department, docketing, interpreting services, the Judicial Department, Law Department support, Office of the Self Represented, payroll, personnel, public information, Records Department (including document imaging), special programs, transcripts and ad hoc assignments. He is currently working on a major facility upgrade and the formation of a support service department for self-represented litigants. Previously, he was a management analyst in New York Civil Court.

John M. Coppola

Coppola currently serves on Family Court's Advisory Council for the Children's Center, Family Treatment Court and the Universal Case Management System. He is a member of the Family Court Clerk's Association, and in 1997 received NYS Fraternal Order of Court Officers' (FOCO) Merit Award.

He always keeps his focus on his Number One priority – taking care of the children who have to come to Family Court. "That overrides everything," he says. "We are obligated to serve and to do so in a very professional manner. I take this very seriously. Those who come to our court may not remember the outcome of their issue, but they will remember how they were treated and whether or not we served them to the fullest extent possible."

"As a manager, I never take my staff for granted," he continues. "Society's toughest issues come before our court everyday. Any success we have in Family Court is due largely to the day in and day out efforts of our staff, both judicial and non-judicial. I strongly believe in public praising and thanking of staff."

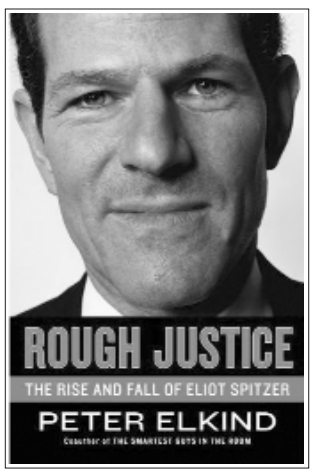
This year's NCBA Law Day is co-sponsored by The Paragon Group, Capital Payments, Realtime Reporting and Karako Suits. Reservations for the April 28 cocktails and dinner are $55 and may be mailed to NCBA at 15th and West Streets, Mineola or ordered online at www.nassaubar.org. For more information contact Caryle Katz, 516-747-4070 x211.





# BOOK REVIEW

**By KENNETH J. LANDAU**




**Rough Justice: The Rise and Fall of Eliott Spitzer**

**Author: Peter Elkind**

**Penguin Group Inc.**
**April 2010**
**Hardcover, 320 Pages**
**List Price: $26.95**
**ISBN: 1591843073**

We recently watched a vigorous primary campaign for Attorney General, followed by an election of a new Governor. These offices were vacant, in part, because of the legacy of Eliot Spitzer. He initially built his reputation as a tough on Wall Street Attorney General and arrived in Albany declaring his readiness to clean up "New York's notoriously corrupt and dysfunctional State government." Eliot Spitzer

Unfortunately for Eliot Spitzer, little went as planned. The author notes that "Spitzer's fatal misdeeds were private acts of marital infidelity – the very sort that some of our greatest presidents had gotten away with. ... Character matters and so do laws. But it's worth giving a moment of thought: should we care so much about personal flaws when our government ... and our financial system ... is so hobbled by the sort of incompetence, greed and corruption that hurt everyone?"

In the end, his "predatory countenance was gone. He is the hunted, not the hunter." Later, after Eliot Spitzer fell, the financial system which he sought to monitor and regulate collapsed. Eliot Spitzer was now on the sidelines and was no longer in a position to prosecute AIG or other companies for cooking their books. But for his fall from power, Eliot Spitzer would have been a major player in fixing this financial mess. The author also believes Spitzer's rise was almost as improbable as his crash and that "no politician who has soared so high has fallen so fast."

Despite his own weakness and stupidity, Spitzer "privately believed that the investigation and exposure of his misdeeds had murkier origins ... that he was the victim of a political 'hit'" perhaps by those he had challenged on Wall Street. Although Eliot Spitzer's father, Bernie, was sometimes described as a "Jewish Joseph Kennedy," Spitzer never dreamed of higher elective office. Despite this, many of those around him thought that Spitzer's life was in preparation for elected office.

His wife Silda's roots were much more humble. She initially thought about only becoming a paralegal until an attorney, who was a colleague of her father, urged her to apply to law school. As a summa cum laude graduate of a local college, she was admitted to Harvard. While at law school, she met a classmate who became her first husband, although their marriage was short lived. After separating from her husband, she met Eliot Spitzer and they were married in October, 1987. After law school, Spitzer went to work for the Manhattan District Attorney's office, first prosecuting career criminals and later helping to prosecute the Gambino family. As a summer intern while in law school, he worked in the New York Attorney General's Anti-Trust Bureau where he met Lloyd Constantine, who was then chief of the division (Lloyd Constantine recently authored his own book about his time in the Spitzer Administration).

After only 18 months in private practice, Spitzer decided to run for Attorney General. Dick Morris, who is now a frequent guest and commentator on Fox News and, at one time, was an advisor to Bill Clinton, became a secret campaign strategist to Spitzer. Spitzer lost his first try for Attorney General in 1994, but shortly thereafter, began a campaign for a second run four years later in 1998.

Fast forward to 2002, and Spitzer as Attorney General used the Martin Act, among other weapons, to monitor, oversee and regulate Wall Street. He also embarrassed the SEC into joining his crusade against Wall Street and then took on Dick Grasso, the Chair of the New York Stock Exchange. The Wall Street Journal noted that Spitzer, almost overnight, became a national regulator of the financial markets, filling the void left by the SEC.

He went on to investigate common Wall Street practices, such as, "market timing," mutual funds and "late trading." Spitzer began to investigate long-accepted gray areas of industry practice; expose examples that rendered the accepted practice indefensible and used the resulting uproar to reform the entire industry and eliminate the gray areas. There were also investigations over research conflicts and the high fees charged to small investors.

As a result of his work, fee reductions and other savings to investors totaled billions of dollars and eliminated many of these tainted practices. He then went on to challenge the insurance industry and found that they directed business to preferred providers along with potential bid rigging.

Spitzer was also becoming a star in the Democratic Party and became extremely popular after becoming a target of Wall Street. After success as Attorney General, he set his sights on the Governorship, especially after Chuck Schumer decided not to run. Spitzer also believed that the Governorship was a spring board for national ambitions, especially for those with presidential aspirations.

The author notes that "Albany had consumed the ambitions of many gifted politicians" and running the government required skills that Spitzer did not need as Attorney General, such as "horse trading, patience, and deference to the egos and agendas of other powerful men." Once he became Governor, Spitzer attempted to embarrass and investigate NYS Senate Majority Leader Joseph Bruno much as he had Wall Street.

Although Spitzer's legal acumen and zealous prosecution helped him to be a well-known and effective Attorney General, as Governor there were many issues which needed to be managed. He was unable to deal with the self interest of politicians and lobbyists, ego and personal relationships which, to the Legislature or their leaders, might outweigh the empirical merits of an issue. One must make them look good and not hold them out to ridicule as one might a public enemy or a target of an Attorney General investigation.

Spitzer apparently, for these reasons, did not have much respect for the Legislators and thought that he could bludgeon those who were recalcitrant and force them "to do the right thing." Eventually, Spitzer agreed to have his reforms include a list of pork-barrel projects to help pass legislation at the same time Legislators did not want to give in to a "dictatorship" and did not want to be pushed around. Ironically, one piece of legislation agreed on by the Legislature and the Governor was a tough new law aimed at combating human trafficking and prostitution. This law helped lead to his downfall.

As a post-script, Joseph Bruno is no longer one of the power brokers in Albany and Eliot Spitzer is relegated to the sidelines as a talk show host and political commentator on CNN. He still has interesting ideas about politics and the economy but is no longer in the driver's seat. If only he had remained Attorney General

**See ROUGH JUSTICE, Page 19**

## METATAGS ...

Continued From Page 7

a search engine to "westcoastvideo.com" will find a database similar enough to 'MovieBuff' such that a sizeable number of consumers who were originally looking for Brookfield's product will simply decide to utilize West Coast's offerings instead. ... [B]y using 'moviebuff.com' or 'MovieBuff' to divert people looking for 'MovieBuff' to its website, West Coast improperly benefits from the goodwill that Brookfield developed in its mark ... [T]he use of another's trademark in a manner calculated to capture initial consumer attention, even though no actual sale is finally completed as a result of the confusion, may be still an infringement."

*Id*. at 1062. For the proposition that one's use of another's trademark might violate the Lanham Act when that use causes initial-interest confusion, the court cited, *inter alia*, the Second Circuit case of *Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254 (2d Cir. 1987.)

### The Second Circuit Takes a Different Approach

In *1-800 Contacts, Inc. v. WhenU. com, Inc.*, 414 F.3d 400 (2d Cir. 2005), whose facts were similar to those in *Brookfield*, the Second Circuit departed from the Brookfield line of cases. In 1-800, "WhenU" was an Internet-marketing company that provided, to Internet users, free software that, based on the websites that an Internet user visits, causes an advertisement to appear in one of three types of windows, each of which is "separate from the particular website or search-results page the [computer] user has accessed," *id*. at 405: a pop-up window in the bottom right-hand corner of the screen, a pop-under window (*i.e.*, below the webpage), or a panoramic window across the bottom of the screen. The advertisement that appears is based on its categorical relevance to the website being visited but is otherwise selected randomly.

The plaintiff in *1-800*, a distributor that sold contact lenses and related products, "allege[d] that [the defendant]'s conduct infringes [the plaintiff]'s trademarks ... by delivering advertisements of [the plaintiff]'s competitors ... to [computer] users who have intentionally accessed [the plaintiff]'s website." *Id*. The Second Circuit heard an appeal of the Southern District of New York's (Batts, J.) issuance of a preliminary injunction prohibiting "WhenU" from utilizing 1-800's trademarks, which the District Court issued upon finding that 1-800 had demonstrated a likelihood of success on its Lanham Act claims.

The Second Circuit reversed the District Court ruling, finding that "WhenU" had not "used" 1-800's trademarks. The Lanham Act itself provides that:

"a mark shall be deemed to be in use in commerce – (1) on goods when – (A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and (B) the goods are sold or transported in commerce, and (2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce. ..." 15 U.S.C. § 1127 (emphases added).

The Second Circuit found that the name of the plaintiff's website, *i.e.*, www.1800contacts.com, was not a trademark, and that, therefore, any "use" of that web address was not covered by the Lanham Act. However, the court also made, quite clear, its view that dismissal would have been required even if "WhenU"'s metatags had contained the plaintiff's trademark:

"'WhenU' does not 'use' 1-800's trademark in the manner ordinarily at issue in an infringement claim: it does not 'place' 1-800 trademarks on any goods or services in order to pass them off as emanating from or authorized by 1-800. The fact is that 'WhenU' does not reproduce or display 1-800's trademarks at all, nor does it cause the trademarks to be displayed to a [computer] user. Rather, 'WhenU' reproduces 1-800's website address, <<www.1800contacts.com.>>, which is similar, but not identical, to 1-800's 1-800CONTACTS trademark."

"The district court found that the differences


between 1-800's trademarks and the website address utilized by 'WhenU' were insignificant because they were limited to the addition of the 'www.' and '.com' and the omission of the hyphen and a space. We conclude that, to the contrary, the differences between the marks are quite significant because they transform 1-800's trademark – which is entitled to protection under the Lanham Act – into a word combination that functions more or less like a public key to 1-800's website."

*Id*. at 408-409.

Further suggesting that "WhenU" could have chosen to include 1-800's trademark in "WhenU's" metatags, the court observed that, "[a]lthough the directory resides in the [computer] user's computer, it is inaccessible to both the [computer] user and the general public. ... Thus, the appearance of 1-800's website address in the directory does not create a possibility of visual confusion with 1-800's mark." *Id*. at 409. Insofar as the Second Circuit found that the invisibility of metatags precluded the possibility of confusion on the part of internet users, such possibility would, of course, also have been precluded if "WhenU's" metatags had contained 1-800's trademark. In any event, the court reverted to its focus on its finding that www.1800contacts.com was not a trademark in the first place:

"More important, a 'WhenU' pop-up ad cannot be triggered by a [computer] user's input of the 1-800 trademark or the appearance of that trademark on a webpage accessed by the [computer] user. Rather, in order for 'WhenU' to capitalize on the fame and recognition of 1-800's trademark – the improper motivation both 1-800 and the district court ascribe to 'WhenU' – it would have needed to put the actual trademark on the list."

*Id*. However, a footnote that immediately followed noted that "[t]his observation, however, is not intended to suggest that inclusion of a trademark in the directory would necessarily be an infringing 'use.' We express no view on this distinct issue." *Id*. at 409, n.11. Nevertheless, the court proceeded to even more strongly address that issue: "[a] company's internal utilization of a trademark in a way that does not communicate it to the public is analogous to a individual's private thoughts about a trademark. Such conduct simply does not violate the Lanham Act, which is concerned with the use of trademarks in connection with the sale of goods or services in a manner likely to lead to consumer confusion as to the source of such goods or services." *Id*. at 409 (emphasis added). The court offered another analogy involving the use of trademarks in metatags:

[I]t is routine for vendors to seek specific 'product placement' in retail stores precisely to capitalize on their competitors' name recognition. For example, a drug store typically places its own store-brand generic products next to the trademarked products they emulate in order to induce a customer who has specifically sought out the trademarked product to consider the store's less-expensive alternative. 'WhenU' employs this same marketing strategy by informing [computer] users who have sought out a specific trademarked product about available coupons, discounts, or alternative products that may be of interest to them.

*Id*. at 411.

In sum, the Second Circuit, which noted that, "we do not necessarily endorse the holdings ... [in] cases such as *Brookfield*," *id*. at 411, n.15, would most likely find that a website's use of a competitor's trademark in the website's metatags does not violate the Lanham Act.

**Todd Bank is a solo practitioner in Kew Gardens representing plaintiffs primarily in class actions.**

## NCBA New Members

*We welcome the following new members*

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# We Care Helps All The Children Play

In October 2005, Let All The Children Play Foundation, located in Cedarhurst, New York, was incorporated. This organization is dedicated to the development of community accessible playgrounds and integrated sports programs that allow adults and children with and without disabilities to play side-by-side. WE CARE is a proud sponsor of this Foundation and through its support, Let All The Children Play has been able to implement amazing programs that enable many disabled residents of our community to integrate with other individuals, encouraging acceptance by others and the formation of very special friendships.

Deanne M. Caputo

The support provided by WE CARE has been applied to the growth of the S.P.O.R.T. program that is run by Let All The Children Play. This program permits young adults with and without disabilities to participate side-by-side in an 8 week sports program. The very name of the program represents the goals of this program which is to provide sports and special friendships, play and perserverance, overcoming obstacles, recreation and respite and teamwork. In addition, LATCP is also working on developing a two-acre sensory adapted accessible playground at Eisenhower Park with the Nassau County Department of Parks and Recreation which will open this Summer. The playground is designed to stimulate children both with and without disabilities and to promote interactions together. LATCP hopes for this playground to be a place where children can discover and learn while naturally developing kindness and sensitivity toward one another without regard to one's disabilities.

On behalf of WE CARE, we commend the staff of LATCP. A sincere thanks is extended to LATCP for promoting this unique and much needed interaction between the residents of our community. It is because of this Foundation that the lives and dignity of so many of our residents are improved.

**Deanne M. Caputo is an associate at the law firm of Sullivan Papain Block McGrath & Cannavo P.C., concentrating her practice in personal injury law.**

The Children's Holiday Festival received rave reviews from attendees.
*"Our children attended the festival and had a wonderful time. Their faces painted with happiness."*

Pres. Gann honors Judge Jonas for her 23 years of dedication and support of the Children's Holiday Festival.

20th Children's Holiday Festival

Hon. Zelda Jonas face painting.

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## COMPUTER HACKING ...

Continued From Page 3

peting business, terminated his authorization to access his company laptop when he installed a secure-erasure program and erased all company data from the laptop. Judge Posner's decision was adopted by a number of district courts soon thereafter.

In contrast, the Ninth Circuit in *LVRC Holdings* reasoned that the CFAA could not be used against employees who are provided access to the company's computers and then use access to further a competing business because "Brekka would have acted 'without authorization' for purposes of §§ 1030(a)(2) and (4) once his mental state changed from loyal employee to disloyal competitor" (*id.* at 1134). The Ninth Circuit held that a defendant would have no reason to know that a breach of a duty of loyalty would expose him to criminal liability. Based upon this reasoning, the Court held that a civil action under the CFAA also would not lie (*id.* at 1134).

Several months after *LVRC Holdings* was published, it was distinguished by the Fifth Circuit in *United States v. John*, 597 F.3d 263 (5th Cir. 2010). In *John*, an account manager at Citibank used her authorized access to take customer account data, intending to make fraudulent charges on the account. The Fifth Circuit reasoned that it was neither improper nor unexpected to interpret "exceed authorized access" to use of an employer's computer when an employee knows the purpose for the access is in violation of the employer policy and part of an illegal plan. In its ruling, the Fifth Circuit acknowledged the distinctions it made from the Ninth Circuit in how "exceed authorized access" should be construed. Regardless, the Fifth Circuit ruled that an authorized computer user "has reason to know that he or she is not authorized to access data or information in furtherance of a criminally fraudulent scheme" (*id.*, at 273). Thus, within the First, Fifth, Seventh and Eleventh Circuits, civil liability against employees can exist under the CFAA when the employee, who, under agency law has a duty of loyalty, breaches that duty by deleting or removing data without authorization of the company or exceeding whatever level of authorization was granted.

The conflict in reasoning was heightened by *United States v. Aleynikov*, 2010 WL 3489383 (S.D.N.Y., September 3, 2010), in which Judge Cote dismissed a CFAA count relying on the Ninth Circuit's decision in *LVRC* for its holding that an "employee with authority to access his employer's computer system does not violate the CFAA by using his access privileges to misappropriate information" (*id.*, *16). Aleynikov, a computer programmer employed as a Vice-President in the Equities Division of Goldman Sachs & Co., was charged criminally with misappropriating the computer source code used in Goldman's high-frequency trading system. On his last day of employment, before moving to a competitor company where he would be responsible for its high-frequency trading, Aleynikov made copies of Goldman's source code onto his personal computer, encrypted and transported it to Chicago, where he was meeting with his future employer. In dismissing the CFAA charge, the Court relied on *LVRC Holdings v. Brekka*, (as well as district court decisions within the Second Circuit) in holding that "an employee with authority to access his employer's computer system does not violate the CFAA by using his access privileges to misappropriate information." The Court expanded upon *LSRV Holdings* when Judge Cote ruled, "What use an individual makes of the accessed information is utterly distinct from whether the access was authorized in the first place" (*id.*, *15).

In *Aleynikov*, the Government argued that the district court in New York should follow the holdings of the Seventh Circuit in Citrin, that an employee's authorization to access his employer's computer is predicated on the agency relationship, and the Fifth Circuit in John, in which the court allowed an employer to place limits on the scope of an employee's access to company computers. It also argued that the court should follow the decision in *EF Cultural Travel B.V. v. Zefer Corp.*, 318 F.3d 58 (1st Cir. 2001), in which the First Circuit held that the CFAA "permits computer owners to spell out explicitly what is forbidden" to its employees, should be followed (*Aleynikov*, *16).

Judge Cote rejected each of those Circuit Court holdings as "unpersuasive" (*id.*, *17). Anchoring her decision in the "ordinary" meaning of "authorization," she held that authorization is not automatically terminated where the individual exceeds the purpose for which access is authorized. Judge Cote further held that an interpretation of the CFAA based upon agency principles would "greatly expand the reach of the CFAA to any employee who accesses a company's computer system in a manner that is adverse to her employer's interests" which "would convert an ordinary violation of the duty of loyalty or of a confidentiality agreement into a federal offense" (*id.* *17). In its analysis, the Court did not consider *Carpenter v. U.S.*, 484 U.S. 19 (1987), in which the Supreme Court held that an employee has a fiduciary obligation to protect confidential information obtained during the course of his employment and that intentionally exploiting that information for an employee's personal benefit was a fraud against his employer in violation of the mail and wire fraud statutes.

Several district court decisions within the Second Circuit have adopted the Ninth Circuit view that misappropriation of information that an employee lawfully accessed does not give rise to CFAA liability (*Jet One Group v. Halcyon Jet Holdings, Inc.* No. 08 Civ. 3980(JS) 2009 WL 2524864 E.D.N.Y. (Aug 14, 2009); *Univ. Sports Pub Co. v. Playmakers* No. 09 Civ. 8206(RJH) 2010 WL 2802322 (S.D.N.Y. July 14, 2010); *Orbit One Communication, Inc. v. Numerex Corp.* 692 F. Supp. 2d 373 (S.D.N.Y. March 10, 2010)). However, two decisions out of the Southern District of New York apply the Seventh Circuit's agency theory that misappropriating data residing on any employer's computer system violates the statute by "exceeding authorization." (*Mktg. Tech Solutions v. Medezine LLC*, No. 09 Civ. 8122(LLM), 2010 WL 2034404 (S.D.N.Y. May 18, 2010); *Calyon v. Mizuho* Sec. USA, Inc. 07 Civ. 2441(RO), 2007 WL 2618658 (S.D.N.Y. 2007)). Thus, a decision by the Second Circuit Court of Appeals is needed to clarify the law in this Circuit regarding the scope of a prospective litigant's access to the CFAA and the injunctive remedies it contains.

Ultimately, a Supreme Court decision will be required in order to resolve the Circuit level conflict. Until then, employee confidentiality agreements will have to be drawn more carefully in order to protect the integrity of confidential data or company trade secrets. Companies are likely to rely, in part, upon state law causes of action such as unfair competition and trespass to chattels in the cases of unauthorized employees who lift confidential material from company databases. Even when a company has clear policies prohibiting access to certain data, if it violates its own policy by providing access of that data to an employee, that company may not prevail on a CFAA claim. An audit of trade secrets and sensitive data is the first step in ensuring that a company's most confidential information is protected. Clear computer usage policies that are enforced will further strengthen a claim against a rogue employee. Ultimately, the Second Circuit and the Supreme Court will need to provide guidance and resolve the conflict of "authorized access."

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## ROUGH JUSTICE ...

Continued From Page 16

during the Wall Street crisis and Bruno's downfall, Spitzer might have become Governor in 2011 under a more favorable climate when almost everyone agrees the reforms he championed are necessary.

This book will be of interest to the many lawyers who dabble in politics as well as to those who treat it as a spectator sport. One lesson from the book is that "tactics and consequences" must also be carefully considered before exercising raw power or demonstrating political acumen. There may also be unanticipated consequences for those who attempt to exercise power blindly or in a vacuum and who fail to anticipate or analyze the probable consequences of or responses to their tactics. In order to accomplish many political goals or legal reform an office holder, even at the top, may be well advised to consult with others who may play a role in the outcome just as a litigator carefully considers tactics and strategy in prosecuting or defending a lawsuit.

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## SOCIAL MEDIA ...

Continued From Page 3

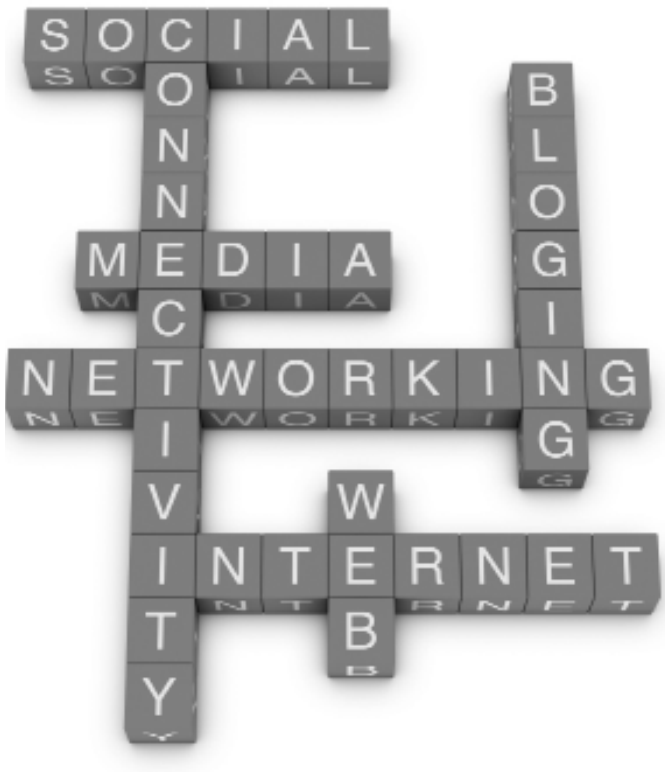
its competitor on antitrust grounds.[5]

Similarly, an employer should not be lulled into a false sense of security simply because it limits its employees to accessing only the company's maintained or approved social networking sites. This is precisely what happened to Continental Airlines. Continental was found to be potentially liable for harassment for statements made by its employees on Continental's online computer bulletin board even if the harassment occurred outside of the workplace.[6] At issue was whether Continental had a duty to take effective measures to stop co-employee harassment that was taking place on a company sponsored electronic forum that was hosted by an independent internet service provider. A key question was whether the forum was sufficiently related to the workplace to impute a duty upon Continental.

Employers must be aware, however, that monitoring or accessing their employees' use of social networking without the employees' consent can subject the employer to civil liability. The Hillstone Restaurant Group made this mistake. Hillstone's former manager allegedly coerced an employee to give him access to a social networking group created and maintained by employees as a forum to vent about their work experiences.[7] After reviewing allegedly offensive material on the forum, the manager terminated an employee. As a result of its actions, Hillstone Restaurant Group was sued for, among other things, violations of the Wiretap Act, 18 U.S.C. § 2510 *et seq.*, the Stored Communications Act, 18 U.S.C. § 2701 *et seq.*, wrongful termination, and invasion of privacy. A jury found that Hillstone violated the employee's rights under the Stored Communications Act by viewing stored electronic information without permission, and awarded punitive damages. Therefore, employers must be aware that while monitoring employees' use of social networking may be necessary to protect an employer's legal interests, such monitoring – if conducted improperly and without consent – could violate an employee's legal rights and subject the employer to litigation and damages.

Although social media is a new and evolving area of law, employers should remember to treat social networking as they would any other media or form of communication. In a recent decision in the Eastern District of New York, the plaintiff made a hostile work environment claim based on, among other things, a MySpace page maintained by a supervisor that displayed pictures of some of the company's employees in seductive poses.[8] The Court ruled that, while the supervisor may have inappropriately used the company logo on the MySpace page, the site itself did not contain any gender-related hostility and the plaintiff had to go out of her way to view the site. As such, the MySpace page was not pervasive in the workplace environment and did not create a hostile workplace. Nonetheless, this is a cautionary tale.

Lawyers navigating these waters on behalf of their clients must assess the legal risks of social media and provide advice on how to keep social networking in order. A quick fix may be to ban social networking access from the workplace. The Deloitte study found that 40% of executives say their company does not allow access to social network sites from company computers. However, this does not completely absolve employers of the risks, as it does not prevent "friending" from personal mobile devices or home computers. Some employers go so far as restricting the content of employee posts, which might, for example, include prohibiting employees from taking stands on contentious issues or broadcasting political affiliations.[9]




A more sensible approach is to create a written, formal policy regarding employees' use of social networking. Such a policy should conform to both the law and the employer's general workplace policies and culture. Due to the ever-changing nature of social networking, the policy should be periodically reviewed and revised to reflect changes in social networking itself. In addition, a senior executive who has the authority to administer any policy, even against senior employees, should implement its rules. Finally, any policy should inform employees that their workplace social networking might be monitored, and should clearly set forth the consequences of failing to comply with the written policy, up to and including termination.

In conclusion, when it comes to social networking, employers will want to know from their lawyers how to balance First Amendment and privacy rights of their employees with vigilant management of inappropriate content and behavior. We may not know the answers to these questions until policies and programs are challenged. As the nature of social media continues to change, the law governing its use will have to evolve. Steps taken to manage social media grounded in common sense will provide most employers a firm legal foundation for its actions.

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1. *See* Press Release, Facebook, Press Room, Statistics, http://www.facebook.com/press/info.php?statistics (last visited Dec. 28, 2010).
2. Jason Zhan Jia, 79% of The Fortune Global 100 Are Using Social Media, Social Media Today, at http://www.socialmediatoday.com/SMC/188506 (Apr. 12, 2010)
3. Deloitte LLP 2010 Ethics and Workplace Survey
4. *Id.*
5. *See* Andrew Martin, Whole Foods Executive Used Alias, N.Y. TIMES, July, 12, 2007, available at http://www.nytimes.com/2007/07/12/business/12foods.html?_r=1&scp=1&sq=whole%20foods%20ceo%20ftc&st=cse.
6. *Blakey v. Continental Airlines, Inc.*, 164 N.J. 38, 751 A.2d 538 (2000).
7. *Pietrylo v. Hillstone Rest. Group*, 2009 WL 3128420 (D.N.J. Sept. 25 2009)
8. *Urban v. Capital Fitness*, CV-08-3858, 2010 U.S. Dist. LEXIS 124307 (E.D.N.Y. Nov. 23, 2010)
9. http://www.wired.com/images_blogs/threatlevel/ 2009/06/apsocialnetworkingpolicy.pdf.

## TRADEMARK ...

Continued From Page 5

it "commits a tortious act within the state." However, the mere display of a prospective defendant's wares on a website that is viewable by New York purchasers is not considered a tortious act within the state. Rather, in instances where an out of state website is displaying products bearing an infringing mark viewed in New York, the tort is deemed to be committed where the website is created and/or maintained.[8] Therefore, this section of the Long Arm statute will not create a basis for a New York Court to exercise jurisdiction over an out of state defendant that merely displays its products on the internet, or for that matter, provides an electronic form that users could complete to order products in New York.

Finally, a prospective defendant's website must be evaluated within the context of CPLR §302(a)(3). Under CPLR §302(a)(3)(i), it is possible for the Court to exercise jurisdiction in instances where the prospective defendant "commits a tortious act without the state causing injury to person or property within the state … if he … regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state." This sub-section of the Long Arm statute shares a great deal of similarity with

CPLR §302(a)(1), except that it is exclusively for use in conjunction with torts, as compared to CPLR §302(a)(1), which is also applicable to breach of contract disputes. However, for the purposes of this article, the analysis under CPLR §302(a)(3)(i) is essentially the same as under CPLR §302(a)(1).

By comparison, under CPLR §302(a)(3)(ii), it is possible for a court to exercise jurisdiction if the defendant "commits a tortious act without the state causing injury to person or property within the state… if he…expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." In order for a court to maintain jurisdiction over an out-of-state trademark defendant selling products that are the subject of a potential tort claim, the court will engage in a four part test in order to assess the propriety of the same, namely whether "(1) defendant committed a tortious act outside of New York, (2) plaintiff suffered harm in New York, (3) defendant should have reasonably expected its actions to have consequences in New York, and (4) defendant derives substantial revenue from interstate commerce."[9]

The first two factors of the test are typically met in a trademark infringement scenario. First, when a website is displaying a product bearing an infringing trademark, the tort is deemed to be committed where the out-of-state website is created and maintained, thus meeting the first factor. Second, a plaintiff's allegations of deception or confusion, or potential confusion, amongst actual or potential customers in conjunction with the allegedly infringing products made available to New York consumers via a defendant's site is sufficient to meet the second prong.[10] The third prong is more difficult to meet in that it "requires that a defendant foresee that its tortious act will have some (emphasis added) consequences in New York, although not necessarily the exact consequences that occurred."[11] Clearly, in an instance where the prospective defendant's website is promoting products that would be of interest to New Yorkers such as Yankees or Mets gear, even if there has not yet been a sale made of such products, the prospective defendant clearly expects, or should expect, that the offer for sale of such products would have consequences in New York. However, if the products in question are more generic, the defendant will have less reason to expect its actions will have consequences in New York. Fourth, with respect to the "substantial revenue" derived from interstate commerce prong, the case law does not provide any minimum threshold. However, if the prospective defendant can prove that nearly all of its sales have been local, it is likely that a court would not be able to exercise jurisdiction under this portion of the statute.[12]

After a court has made its evaluation under the Long Arm statute, it must make an assessment regarding whether the exercise of personal jurisdiction comports with "traditional notions of fair play and substantial justice."[13] Generally, a court will require a defendant to defend itself in a New York court "if the claim arises out of, or relates to the defendant's contacts with the forum, minimum contacts exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there."[14] If it is determined that the Long Arm statute permits the exercise of personal jurisdiction under any of the bases detailed herein, it would certainly seem that due process of the prospective defendant would not be violated. Under 302(a)(1) and 302(a)(3)(i) the defendant would have purposely availed itself of the benefits of the forum by doing business in the state, provided the claim related to the defendant's contacts. By comparison, under 302(a)(2) or 302(a)(3)(ii), the defendant would have either sold an infringing product into the forum, or engaged in behavior that would be clearly anticipated to have an impact in New York, which would demonstrate that the prospective defendant had purposefully availed itself of the benefits of the forum. Thus under either circumstance, fair play and substantial justice would not appear to be violated.

In conclusion, the exercise of personal jurisdiction over a trademark defendant whose chief presence in the forum is web-based will depend heavily upon the nature and extent of the interactivity of the website's features, in addition to more traditional "brick and mortar" business contacts with the state.

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1. *Citigroup Inc. v. City Holding Co.*, 97 F. Supp. 2d 549, 565 (S.D.N.Y. 2000).
2. *Id.*
3. *Id.*
4. *Id.*; *Student Advantage, Inc. v. International Student Exchange Cards Inc.*, 00 Civ. 1971 (AGS), 2000 U.S. Dist. LEXIS 13138, 4* (S.D.N.Y. 2000).
5. Student Advantage, *11.
6. *Rosenberg v. PK Graphics*, 71 USPQ2d 1223, 1224 (S.D.N.Y. 2004).
7. Hsin Ten Enter. *United States v. Clark Enters.*, 138 F. Supp. 2d 449, 456 (S.D.N.Y. 2006); Student Advantage, *12.
8. Citigroup Inc., 97 F. Supp. 2d at 567.
9. *Starmedia Network Inc. v. Star Media Inc.*, 64 USPQ2d 1791, 1792 - 1793 (S.D.N.Y. 2001).
10. Citigroup Inc., 97 F. Supp. 2d at 568.
11. *In re* DES Cases, 789 F. Supp. 552, 570 (E.D.N.Y. 1992).
12. *Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 29 (2d Cir. 1997).
13. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).
14. *Bank Brussels Lambert v. Fiddler Gonzalez*, 305 F.3d 120, 127 (2d Cir. 2002) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-76 (1985)).

## SHIELD LAWS ...

Continued From Page 11

subpoena a news organization for the identity of an anonymous writer who commented on a news article about the underlying crime. The party issuing the subpoena is usually seeking the commenter's testimony.

More parties to litigation are attempting to unmask anonymous speakers on the Internet. In many instances, courts apply a balancing test that weighs the merits of a plaintiff's claim against the defendant's right to remain anonymous, among other factors.[9] This is the most common way of determining whether to "out" an anonymous speaker. But in another string of cases, a more novel approach has developed. Some news organizations facing subpoenas demanding information about the identities of anonymous commenters have raised state shield laws as a defense.

One of the first cases in which a news organization successfully used a shield law to protect an anonymous commenter was *Doty v. Molnar*. A former candidate for the Montana Public Service Commission, Russ Doty, sued his opponent for defamation in 2008. To help him prove his case, he subpoenaed the Billings Gazette for the IP and email addresses of two people who commented anonymously on the paper's website. The Billings Gazette successfully argued that the state shield law protected the newspaper from revealing the identities of the commenters.

In a ruling from the bench in the fall of 2008, Judge Todd Baugh quashed the subpoena and ruled that Montana's shield law, the Media Confidentiality Act, protected the newspaper from having to reveal the identities of the anonymous commenters.[10] The act is broad, he noted, and protects news entities from having to disclose "any information obtained or prepared or the source of that information in any legal proceeding if the information was gathered, received, or processed in the course of his employment or its business."[11]


Shortly after *Doty v. Molnar*, a court in Oregon applied the Oregon shield law to anonymous commenters. A Portland-area business man, Terry Beard, filed a defamation lawsuit against a John Doe defendant who had made some anonymous remarks about Mr. Beard on a blog published by the Portland Mercury. Beard subpoenaed the Portland Mercury for the anonymous commenter's IP and e-mail addresses. Judge James E. Redman of the Clackamas County Circuit Court ruled that the identity of the anonymous commenter was protected under the Oregon Media Shield Law.[12]

Oregon's law protects both the source that provides information, and the information itself. Specifically, it protects "any unpublished information obtained or prepared by the person in the course of gathering, receiving or processing information for any medium of communication to the public,"[13] and it defines information as "any written, oral, pictorial or electronically recorded news or other data."[14] The court ruled that the comment on Portland Mercury's blog was "data" provided to the news organization, and was protected under the statute. The Oregon case differs from the Montana case. In Oregon, the basis for the decision was that that the data was protected, whereas in Montana the basis was that the source itself was protected.

In Illinois however, a court ruled that the state shield law did not protect the identities of anonymous commenters sought by a prosecutor in a high profile murder case. In the fall of 2008, an Illinois man, Frank Price, was indicted for the murder of a 5-year-old child. The Alton Telegraph reported about the indictment, and the online news article drew several comments. The prosecutor subpoenaed the Alton Telegraph for the names, addresses, and IP addresses of five anonymous commenters who had revealed personal knowledge of the defendant and his past actions.[15]

The news organization argued that the identities were protected under the Illinois Reporters' Privilege Act.[16] The Act defines a source as "the person or means from or through which the news or information was obtained." The Court held that the commenters were not sources because the writers commented on the news article after it was published, and the comments were made with no input or discussion from the reporter. The court applied the balancing test required under the Illinois shield law in criminal investigations and held that the news organization could be compelled to reveal the identities of two of the five commenters because the information was relevant and the state had exhausted all other possibilities for obtaining the information. In balancing the news organization's right to protect the identities of the commenters with the state's right to prosecute someone who allegedly murdered a child, the court found that the state's interest outweighed that of the newspaper.

The court did recognize, however, the importance of preserving the anonymity of online speech and urged the state legislature to take up the issue. In the court's words, "A lack of these protections and/or anonymity might well have a chilling effect on future bloggers. … These bloggers may have become potential sources of leads for a reporter."

Though there have been only a handful of cases so far, it is likely that more state shield laws will be put to the test. It is important that courts apply these laws broadly so that those who comment on news organizations' websites can remain anonymous. Compelling news organizations to reveal the identities of these anonymous commenters would surely chill the speech of future commenters, who would become afraid to contribute valuable speech that furthers public debate on important issues. As the Alton Telegraph court noted, these commenters could be providing information that could lead to the unearthing of important news stories.

As these cases continue to arise, other courts should follow the lead of Montana and Oregon by recognizing the importance of preserving a reporter's privilege in the digital age.

**Samantha Fredrickson is the Nassau Chapter Director of the New York Civil Liberties Union in Hempstead. This article represents the opinion of the author, and does not necessarily reflect the views of the NYCLU or the Nassau County Bar Association.**

1. The Reporters Committee for Freedom of the Press, Reporter's Privilege Compendium, http://www.rcfp.org/privilege/ (a listing and comprehensive analysis of all state shield law protections).
2. NY Civil Rights Law § 79-h
3. NY Civil Rights Law § 79-h(c)
4. N.J. Stat. Ann. § 2A:84A-21
5. *Branzburg v. Hayes* 408 U.S. 665 (1972)
6. *Gibson v. Craiglist, Inc.*, 2009 WL 1704355, *3 (S.D.N.Y.)
7. *See, e.g. Doe v. TS No.*, CV08030693 (Or. Cir. Ct. Sept. 30, 2008)
8. *See, e.g., Matter of Cohen*, Petitioner, to Compel Disclosure from Google, Inc. And/or its Subsidiary Blogger.com., 25 Misc.3d 945 (Sup. Ct., NY County 2009)
9. *See, e.g. Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001)
10. *Doty v. Molnar*, No. DV 07-022 (Mont. Cir. Ct. Sept. 3, 2008)
11. Mont. Code Ann. § 26-1-902
12. *Doe v. TS No.*, CV08030693 (Or. Cir. Ct. Sept. 30, 2008)
13. Or. Rev. Stat. 44.520 1(a)
14. Or. Rev. Stat. 44.510 (1)
15. *Alton Telegraph v. Illinois* 08-MR-548 (Ill. Cir. Ct. May 15, 2009)
16. 735 ILCS 5, 8-901 to 8-909.

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*As of February 2011*

## PROMOTIONS ...

Continued From Page 9

to which public voting will be used must be carefully considered in structuring the contest. To qualify as a "contest" the winner must be determined on the basis of bona fide skill. The contest rules must clearly disclose the specific judging criteria and the weight given to each criterion. The judging criteria must be objective and the judges must be qualified. If public voting is the sole or predominant factor in determining the contest winner, the qualifications of the public as "judges" and their objectivity could raise an issue. If deemed no more than a popularity contest or favoritism, it could be argued that the winner is selected by chance, not skill. This raises two potential legal issues for a promotion that was intended to be a contest, but may now be deemed a sweepstakes (whereby the winner is randomly determined on a chance basis).

First, it could impact the promotion's legality if consideration or a purchase was required to enter the contest. In most states, it is permissible to require consideration or a purchase for entry into a bona fide skill contest. However, it is unlawful to require consideration or a purchase to enter a sweepstakes. In all fifty states and by federal law, a promotion that requires consideration or a purchase to enter for a chance to win a prize is an illegal lottery.[8]

Second, if the promotion is open to Florida and/or New York residents and the prize value exceeds $5,000, then the promotion must be registered and bonded in those states if it is deemed a game of chance, not skill.[9] In both New York and Florida, the failure to register and bond a game of chance with a prize value exceeding $5,000 is a misdemeanor and the sponsor faces civil penalties, as well as a possible injunction against the continuation of the promotion.[10]

To mitigate against the legal risks associated with public voting, the promotion rules can limit votes to one per person, clearly explain the judging criteria for public judging and have the selection by public vote count as only a percentage of the criteria by which a winner will be ultimately selected, with the controlling decisions made by qualified, professional judges.

### Other Potential Legal Claims

Internet promotions can lead to potential libel or defamation claims against the sponsor if UGC submissions are posted online and contain comments or information that may harm the reputation of a competitor or individual. In addition, a sponsor should beware of the potential for false advertising or unfair competition claims against it in contests that encourage entrants to compare a sponsor's product to a competitor's product. For example, in 2006, Subway Restaurants filed a false advertising action against Quiznos Restaurants relating to an online contest that invited consumers to submit videos comparing Quiznos and Subway sandwiches.[11] Arguably, the federal Communications Decency Act ("CDA")[12] may provide the promotion sponsor with protection under its broad immunity for "users" of an interactive computer service that publish the statements of a third party. CDA immunity applies when someone is attempting to make a re-publisher liable as if it were the speaker of the defamatory statement. To qualify for immunity, the sponsor cannot be the speaker of the defamatory statement and should make clear who made the statement if it is not already otherwise clear. In addition, the availability of CDA immunity may depend upon the degree to which the sponsor participated or encouraged the defamatory content and whether or not the sponsor edited or created its own content from the promotion entrant's submission.[13]

At a minimum, to reduce legal risk, the promotion rules should reserve the sponsor's right to take down and remove any submissions that it deems, in its sole discretion, to be defamatory or libelous, lewd, obscene, sexually explicit, pornographic, disparaging, or otherwise containing inappropriate content or objectionable material.

### Social Media Sites Terms of Use

In addition to compliance with applicable laws, promotion sponsors must also comply with the applicable social media site's terms and conditions. Both YouTube's Contest Platform Terms and Conditions of Use ("YouTube's Terms")[14] and Facebook's Promotions Guidelines ("Facebook's Guidelines")[15] prohibit the requirement of a payment, purchase or consideration to participate in the promotion. Other key terms and conditions shared by YouTube's Terms and Facebook's Guidelines include that: (i) the promotion may not be open to minors; (ii) the promotion must have official rules posted on the entry page or otherwise disclosed to entrants; (iii) the promotion sponsor has sole liability to entrants and third parties with respect to content and other materials in connection with the promotion; (iv) notice must be posted on the website disclaiming the social media site's responsibility or liability regarding the conduct or administration of the promotion; and (v) there is an indemnification provision in favor of the social media site for any claims relating to the promotion.

Noncompliance with YouTube's Terms or Facebook's Guidelines puts the promotion sponsor at risk for the social media site's removal of any materials relating to the promotion or the entire promotion itself, in addition to triggering the indemnification provisions if a claim is brought against YouTube or Facebook relating to the promotion.

While Twitter does not have any specific rules governing online promotions, it does provide guidelines for contests on Twitter[16] and rules governing content boundaries and the use of Twitter.[17] Twitter promotions, however, are not without their own legal risks. If substantial effort is required by an entrant as a condition to entry, such as multiple "retweets," there is potential risk of turning an otherwise lawful sweepstakes into an illegal lottery. Given the viral nature of Twitter and its international reach, the eligibility requirements for a Twitter promotion should be carefully considered, as well as any conditions to entry. If open to international residents, the promotion and its rules should be reviewed by appropriate legal counsel to avoid possible noncompliance with any applicable foreign laws.

### Conclusion

This article highlights only some of the potential legal issues that may be associated with Internet promotions. While offering a company many benefits and opportunities for viral marketing and real-time interaction with users, a company is well-advised to consult counsel to ensure that its Internet promotion is compliant with applicable laws. Failure to do so could result in legal liability, removal of the sponsor's promotion from a social media site and otherwise defeat a promotion's purpose with adverse publicity.

**Terese L. Arenth is a partner with Moritt Hock & Hamroff LLP, co-chairing its promotions and marketing law practice group.**

1. 15 U.S.C. § 1125.
2. 15 U.S.C. § 1125(c).
3. 15 U.S.C. § 501 et seq.
4. 15 U.S.C. § 107.
5. Currently, 19 states, including New York (*see* N.Y. Civ. Rights Law § 50), recognize a right of publicity by statute. Another 28 states recognize it via common law. .
6. *See e.g. Almeida v. Amazon.com, Inc.*, 456 F.3d 1316 (11th Cir. 2006).
7. *See e.g.* N.Y. Civ. Rights Law § 50.
8. *See e.g.* N.Y. Penal Law § 225.00(10).
9. *See* N.Y. Gen. Bus. Law § 369-e; Fl. Stat. § 849.094.
10. *Id.*
11. *See Doctor's Associates, Inc. v. QIP Holder LLC*, No. 3:06-cv-1710 (D. Conn. Feb. 19, 2010)(denying Quiznos' summary judgment motion). The parties subsequently settled.
12. 47 U.S.C § 230.
13. *See Fair Housing Council v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).
14. http://www.youtube.com/t/contest_platform_rules.
15. http://www.facebook.com/promotions_guidelines.php.
16. http://support.twitter.com/articles/68877-guidelines-for-contests-on-twitter.
17. http://support.twitter.com/articles/18311-the-twitter-rules.



## IN BRIEF ...

Continued From Page 8

P.C., recently addressed the changing face of Law in the Workplace in 2011, as part of a Suffolk County Bar Association's Academy of Law's Continuing Legal Education Program. Ms. Garay concentrates her practice in corporate and partnership dissolutions, shareholder disputes and business valuations and employment law.

**Joseph J. Ortego**, a partner at Nixon Peabody LLP, was recently named President of the Board of Trustees of the Adults and Children with Learning and Developmental Disabilities organization. The group is one of the region's leading organizations serving the needs of individuals with developmental disabilities. Mr. Ortego is the leader of the firm's Products: Class Action, Trade & Industry Representation practice and NP Trial team and a member of its Diversity Action Committee. He has earned the Martindale-Hubbell Law Directory's AV rating, the Directory's highest accolade, and has also been recognized for the past four years by New York Super Lawyers for his exceptional standing in the legal community.

**Morris Sabbagh**, a partner in the Tax, Trusts and Estates and Elder Law Practice Groups at Vishnick McGovern Milizio, will be speaking at the Opal Financial Group's Trust, Tax & Estate Planning Forum at the Grand Hyatt in New York City on March 7, 2011. Mr. Sabbagh, who specializes in Trust & Estate Planning and Elder Law, will serve as a panelist at the session entitled The Future of the Estate Tax: Constructing an Estate Plan for the 21st Century.

**Robert M. Harper**, an associate at Farrell Fritz, P.C., has been appointed Vice Chair of the NYSBA's Trust & Estates Law Section's Governmental Relations and Legislation Committee. Mr. Harper, who concentrates his practice in trusts and estates-related litigation, is also a Special Professor of Law at Hofstra University School of Law where he teaches the Moot Court Competition Seminar.

### New Partners, Of Counsel and Associates

**Douglas M. Nadjari** and **John G. Farinacci** have joined Ruskin Moscou Faltischek, P.C. as partners. Mr. Nadjari is a member of the firm's Health Law Regulatory Department and White Collar Crime & Investigations practice. He is a former member of the Homicide Bureau as Deputy Chief of the Investigations, Felony Trial and Major Frauds Bureaus in the Brooklyn District Attorney's Office. Mr. Farinacci has joined the Trusts & Estates Department at the firm and concentrates his practice in trust and estate litigation.

**Mary Anne Walling** has been named a partner of Sullivan Papain Block McGrath & Cannavo, P.C. Ms. Walling, who earned her Juris Doctor from St. John's University School of Law, is also a registered nurse with a Bachelor's of Science and a Master's of Science in Nursing. She concentrates her practice in the representation of plaintiffs in medical malpractice actions.

**Randy Zelin** has joined Moritt Hock & Hamroff LLP as a partner, adding a new area of practice in the white collar defense sector. Mr. Zelin concentrates his practice in both criminal and civil matters in both State and Federal Courts, as well as before financial regulators and SROs. A former prosecutor, Mr. Zelin regularly appears as a legal analyst on FOX News, FOX Business, and FOX Radio. He has also appeared on the O'Reilly Factor, Geraldo at Large, Nancy Grace, Tru TV, CNN and CNN Headline News. He also frequently provides lectures at continuing legal education programs on criminal law and procedure, and has taught as a guest instructor in various local law schools' trial advocacy programs, as well as for the National Institute for Trial Advocacy. Mr. Zelin earned his Juris Doctor from Touro College, Jacob D. Fuchsberg School of Law.

**Neil Kaufman**, **Reaz Jaffri** and **Ron Lebow** have joined Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP as partners. Mr. Kaufman will head the firm's Corporate and Securities Law Department and Mr. Jaffri will head the Immigration and Nationality Law Department. Mr. Lebow concentrates his practice in health law and earned his Juris Doctor from Brooklyn Law School.

**Jacquelyn DiCicco** has joined The Law Firm of John M. Zenir, Esq., PC as an associate. Ms. DiCicco earned her Juris Doctor from Touro College Jacob D. Fuchsberg Law Center.

### New Firms and Locations

**Philip A. Kusnetz** announced the opening of the law firm of Philip A. Kusnetz, P.C., located at 825 East Gate Blvd., Suite 308, Garden City. Mr. Kusnetz concentrates his practice in the areas of matrimonial, family law and personal injury.

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

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## DEBT FORGIVENESS ...

Continued From Page 14

taxpayer files Form 982 "Reduction of Tax Attributes Due to Discharge of Indebtedness and IRC Section 1082 Basis Adjustment, attaching Form 982 to the debtor/taxpayer's income tax return. A key question that often arises in this area is: what happens if a taxpayer receives a Form 1099C from a bank or other third party reporting an amount of cancellation of indebtedness income that the taxpayer/debtor thinks is wrong. In short, is issuance of a Form 1099C conclusive evidence of the amount of cancellation of debt income? Internal Revenue Code Section 6201(d) provides that, in a court proceeding, the taxpayer/debtor asserting that a Form 1099C he received is incorrect, has the burden of proving the document is incorrect, unless the taxpayer has cooperated with the IRS by providing access to and inspection of witnesses, information, and documents within his control, in which case the burden of proof is shifted to the IRS to prove that the Form 1099C is correct. The U.S. Court of Appeals in the case of *Zarin v. Commissioner of Internal Revenue Service*, 916 F. 2d., 110, 115 3rd Circuit 1990, set out the general rule in this area. The Court held in Zarin that there must be evidence of a dispute as that term is used in IRC 6201(d). A mere settlement, standing alone, does not prove a dispute existed. The mere fact that the creditor turned the taxpayers' account over to a collection agency or a collection attorney by itself is not enough to establish that a dispute exists as set forth in IRC Section 6201(d). John and Mary Lou McCormack TC memo 2009-239.

The case of *Briar Park v. Commissioner of Internal Revenue Service*, 163F. 3d 313 1999, involved a situation in which a partnership (Briar Park) sold real property which had indebtedness that was greater than the selling price of the property. Briar Park argued that, since it was insolvent at the time of the transfer, none of the gain on the sale of the property should be recognized under IRC Section 61(a)(3) providing for the inclusion in gross income of gain from the sales of real property (capital gains). The Court of Appeals held that the sale of the property and the cancellation constituted one transaction rather than two. Specifically the court held that the Internal Revenue Code (Section 1001-2(a)(1)) provides that the amount realized includes the amount of liabilities from which the transferor is discharged via cancellation of indebtedness as a result of the sale or disposition.

**David N. Kass is of counsel on a part time basis to The Law Offices of Victor W. Luke, A Professional Law Corporation.**

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