



WESTCHESTER COUNTY BAR ASSOCIATION NEWSLETTER

www.wcbany.org

July 2011

President's Message

BY CAROL L. VAN SCOYOC, ESQ.



GOLF: THE GAME WITH A LEGAL ANGLE

COME JOIN US ON JULY
19TH FOR THE WCBA'S
ANNUAL GOLF OUTING
AND DINNER AT SLEEPY
HOLLOW COUNTRY CLUB

One of my favorite romantic comedy movies is the 1996 classic *Tin Cup*. The film demonstrates how success can change an individual's attitude toward the game of golf. After a particularly awful shot, Dr. Molly Griswold, a psychologist, explains to Roy "Tin Cup" McAvoy, a golf pro and her instructor, that golf "is, without doubt, the stupidest, silliest, most idiotic grotesquery masquerading as a game that has ever been invented." "Tin Cup" encourages his student to try another shot. After then making a great shot, Dr. Griswold takes pride in her accomplishment and realizes golf can actually be fun!

Indeed, whether you are a golf aficionado or just enjoy the outdoors, please join us for a fun-filled day and evening at the Westchester County Bar Association's Annual Golf Outing and Dinner on Tuesday, July 19th. This year it will again be held at the prestigious and picturesque Sleepy Hollow Country Club situated on 338 acres of the "Washington Irving" hills and woodlands in Scarborough, New York.

Sleepy Hollow's golf course is listed in the top 100 of the 2011 *Golfweek's* Best Classic Courses in the nation. For those planning to play golf (or not), as a preparation for this event, I would like to suggest some interesting

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Revisiting ADR Within Domestic Relations



BY JOHN A. PAPPALARDO, ESQ.
WITH JUDITH E. MURPHY AND
KRISTEN L. WOODFORD

**MEDIATION: PART ONE OF
A TWO-PART SERIES**

Mediation in matrimonial matters has evolved with a stigma of producing agreements that are non-compliant with New York State Domestic Relations Law and in setting parties up for economic failure. Much like matrimonial arbitration, mediation is driven by the matrimonial knowledge and domestic relations experience of the Mediator. To the extent that your Mediator is an ongoing matrimonial trial lawyer who possesses the necessary neutral skills to facilitate dialogue towards the production of a settlement agreement in keeping with New York State Domestic Relations Law, mediation can be an invaluable tool for lawyers, the court system, and clients alike.

This article discusses mediation in two parts. The first part discusses mediation from a broad perspective, providing a general overview of the way in which the process is initiated and who is involved. The second part, which will appear in the August Newsletter, discusses mediation from a narrow perspective, providing a substantive review of the drafting process relative to mediation agreements.

Under New York law, mediation is governed by local rules, not by statute. This article draws on Rules 3, 4, 5, 7, 13, and 14 as set out in the Matrimonial Mediation Program for Westchester County via The Local Rules of Court for the Ninth Judicial District, Supreme and County Courts, Matrimonial Part. However, parties can retain the services of a private matrimonial mediator outside of

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President's Message

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reading material exploring the mystical connection between golf and the law which you may wish to peruse for sparking stimulating conversation with your fellow golfmates during the game or on the 19th hole.

In the introduction to *Why Lawyers Love Golf*, published in 2007 in Australia by Scribblers Publishing, Craig Brown, a law professor at the University of Western Ontario, observes that it is not surprising that a lot of lawyers play golf because “golf’s mix of physical and intellectual challenges provides great pleasure to those who participate and even lawyers are entitled to pleasure in their lives.” He notes that there are aspects of golf especially attractive to lawyers, as a game of golf is a good way to entertain clients or even negotiate deals in pleasant surrounds—a great vehicle for “networking.”

But the most significant attraction of golf for lawyers, according to Professor Brown, “might just be that almost everything to do with the game has a legal angle. Golf and the law seem to have been made for each other.” Golf is a sport that can often reveal the best in a person or on occasion, the worst. In no other sport are the players left to determine for themselves whether they are following the rules.

Given that reality, the sport has certainly given rise to a considerable amount of litigation beyond the magnitude of the game itself. Professor Brown declares that “[o]n every fairway, in every stretch of rough, in every clubhouse, in every golf bag, at every swing at the ball, in every set of plans for a new course, in every application for club membership, there lurks a potential lawsuit.”

Professor Brown’s book, resulting from a decade of research, provides a detailed yet entertaining account of nearly 500 cases involving golf and the law. *Why Lawyers Love Golf* covers legal matters arising out of the game of golf ranging from land use and zoning, ownership, easements, leases, mortgages, personal property, trademarks, taxes, patents, bankruptcy, criminal cases, municipal law, and of course, tort cases and personal injury.

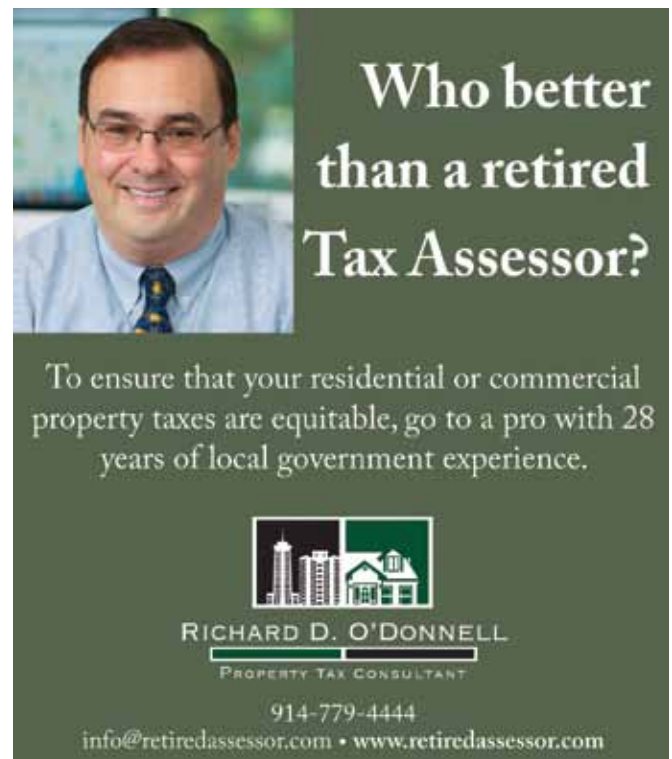
Another fascinating and amusing book about golf and the law is *The Little Green Book of Golf Law—The Real Rules of the Game of Golf*, written by John H. Minan, a professor at the University of San Diego School of Law and published in 2007 by the American Bar Association. An avid golfer, Professor Minan’s book is comprised of nineteen chapters, metaphorically called “holes,” signifying the 18 holes typ-

ically played during a round of golf plus one for the visit to the clubhouse bar, the so-called 19th hole. Each chapter examines one of 19 published legal opinions involving golf, identifying the official citation to the case and the subject matter, with titles such as “Bad Day of Golf Results in Criminal Prosecution (Out-of-control golfer gets birdie),” “Golf Course Liability to Neighbor for Personal Injury (Out-of-bounds on the left),” and “Required Use of Reclaimed Water on Golf Courses (‘Water, water everywhere and not a drop to drink’).” At the end of each chapter, there is a section called “Inside the Rules,” which highlights certain aspects of the *Rules of Golf*, the official code governing how the game is played.

The United States Golf Association and the Royal and Ancient Golf Club of Saint Andrews interpret, write and revise the *Rules of Golf* every four years. The *Decisions on the Rules of Golf* is provided every two years as another source governing the game. Many of the chapters refer to the *Rules of Golf* or *Decisions on the Rules of Golf* discussed within the “Inside the Rules” section.


The Little Green Book of Golf Law contains a broad array of interesting cases in several state and federal courts, involving such matters as a professional’s right of publicity, personal injuries occurring on and off the course, contract disputes involving hole-in-one contests and golf cart rentals, patent and trademark disputes, a product liability case for a defective golf

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**Registration forms MUST be received
NO LATER THAN Friday, JULY 8th!**

**No reservations or cancellations
permitted after July 8th.**

For information
events@wcbany.org
(914) 761-3707 Ext. 19

Tuesday, July 19, 2011

**Sleepy Hollow Country Club,
Scarborough, NY**

- ☐ **Individual Golfer Fee (\$395)**: Includes Golf, Putting Contest, BBQ Lunch, Soft Drinks on Course, Open Bar @ 5:30 p.m., Hors D'Oeuvres, Awards Dinner, Greens Fees, Golf Carts, Ranger, Locker Facilities & Prizes
- ☐ **Dinner (\$125)**: Includes 3 Hour Open Bar, Dinner & Door Prize Ticket
- ☐ **Hole/Tee Sponsorship (\$250)**: To ensure that your name is printed on your sign, commitment must be made by June 29th.
Name of Firm/Organization as it should appear on the sign:

- ☐ **Promotional Gift Bag Item** (Golf Polos, Golf Tees/Balls, Towels, etc.) All donated items must be delivered to the Bar Office **on or before July 8th**. Please call in advance (914) 761-3707 Ext. 19, or email cle@wcbany.org, to let us know what you wish to donate. Items are first-come, first-served.

Reservation and Payment Information

Name _____
Email _____
Firm _____
Bus. Phone _____

___ Golf & Dinner @ \$395 Ea.	\$ _____
___ Dinner Reception @ \$125 Ea.	\$ _____
___ Hole Sponsorship @ \$250 Ea.	\$ _____
___ Sponsorship Contribution	\$ _____
Total Enclosed	\$ _____

Golfer Name(s) MUST BE SUBMITTED BY JULY 12TH

Name _____ Phone _____ Email _____ (We will be playing ___ Stroke Play ___ Scramble)

Method of Payment: Check/money order enclosed \$ _____ or Charge to: ☐ MC ☐ VISA ☐ AMEX
Card Number _____ Exp. Date: _____ Sec. Code: _____
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HOW TO SUBMIT THIS APPLICATION AND PAYMENT: There are 3 options for submitting the application and payment:

WEBSITE: Go to the home page at www.wcbany.org, choose the "Golf Outing" under the Calendar menu and follow the directions.

EMAIL: Fill out this form and email to: events@wcbany.org. (Omit credit card information for security purposes and we will contact you.)

MAIL: Mail this form with check made out to "WCBA" to: WCBA, One North Broadway, Ste. 512, White Plains, NY 10601.

TRIAL LAWYERS AND TORT LAW COMMITTEE'S CLE ON SUMMARY JURY TRIALS



Ana Morais of sponsor Hudson Valley Bank, Co-chair Richard Vecchio, Hon. Gerald Loehr, Hon. Lucindo Suarez and Joseph Ruhl of Hudson Valley Bank

On May 24, 2011, WCBA's Trial Lawyers and Tort Law Committee presented a CLE Seminar entitled "Summary Jury Trials: Becoming Part of the Civil Practice", that was sponsored by Hudson Valley Bank. Justice Lucindo Suarez, JSC Supreme Bronx and the Statewide Summary Jury Trial Coordinator and Judge Gerald Loehr, AJSC Supreme Westchester, gave excellent presentations on the procedures for, and success of, the SJT system. The presentation was well received by all in attendance.

HEALTH LAW COMMITTEE CLE ON EMERGENCY MANAGEMENT

On June 1, 2011, the newly revived Health Law Committee sprinted into action by presenting its inaugural event, a successful CLE titled "When Disaster Strikes: Legal and Regulatory Issues in Health Care/Emergency Management." The CLE was hosted and sponsored by Priority Home Care in White Plains.

There were three distinguished speakers who explained several issues related to Emergency Management: Doris Varlese, Project Director for a program funded with a federal grant from the New York City Department of Health and Mental Hygiene at The Mt. Sinai Medical Center; Daniel Blum, senior vice president at Phelps Memorial Hospital Center; and

Legislator Michael B. Kaplowitz who has represented the 4th District since 1998.

The speakers presented several topics including Legal Authority, Disaster Declaration, PREP Act, Isolation/Quarantine, influenza vaccination and EMTALA. They outlined perspectives from the hospital, EMS and government.

The event was moderated by the two co-chairs for the Health Law Committee, Mathew C. Varughese and Gary Sastow. Along with members, Jay Shapiro and John Barbera, the co-chairs have successfully resumed the Health Law Committee's membership and have met monthly and discussed topics ranging from the Accountable Care Organization to the Family Health Care Decisions Act.

FAMILY & DOMESTIC RELATIONS LAW SECTION CLE ON RETIREMENT ACCOUNTS AND SOCIAL SECURITY BENEFITS

On Tuesday, June 7th, the Family & Domestic Relations Law Section held a CLE Dinner on the Terrace of Harvest on Hudson Restaurant.

Robert Guarnera, President of Pension Actuaries, Inc. and Lewis Insler, Esq. of Insler & Herman LLP spoke on Retirement Accounts & Social Security

Benefits: What You Need to Know for Agreements, QDROS and Financial Planning."

On the first true summer evening, members of the section enjoyed dinner and cocktails overlooking the Hudson River with members of the judiciary—Judges Christopher, Connolly and Jamieson—and their colleagues.

Special thanks to our sponsors: David Bernacchia of UBS Financial Services and Dennis Kremer, partner, Gettry Marcus Stern & Lehrer.



Co-Chair, Stephen G. Gordon and Speaker, Robert Guarnera, President, Pension Actuaries, Inc.



John McCarron and Judge Francesca Connolly



Sponsor, Dennis Kremer, Speaker, Lewis Insler, Esq. Insler & Hermann LLP, Sponsors Darren De Quatro, Jeff Muller and David Bernacchia, UBS, Lawrence J. Braunstein and Stephen Gordon, Chairs, Speaker Robert Guarnera, President, Pension Actuaries, Inc.

WINNERS OF JOSEPH F. GAGLIARDI AWARD FOR EXCELLENCE ANNOUNCED

BY P. DANIEL HOLLIS, III, ESQ.



Carol L. Van Scoyoc, Marisa Garcia, Chief Clerk, City Court, City of Yonkers; Kathleen A. Ryan, Senior Court Clerk, Rockland County Family Court; and P. Daniel Hollis, III, Esq.

Marisa Garcia and Kathleen A. Ryan were awarded the prestigious Joseph F. Gagliardi Award for Excellence in a ceremony presided over by the Hon. Alan D. Scheinkman on May 25, 2011 in the Gagliardi Courtroom.

The Gagliardi Award celebrates the contributions to the Ninth Judicial District's mission by all non-judicial employees of the District.

So much of the public's perception of the fairness of the system is a reflection of the services of non-judicial employees. This award, in Judge Gagliardi's name, because of his example, recognizes those non-judicial employees who strive for excellence.

ANIMAL LAW COMMITTEE

On June 6, 2011, the second meeting of the Animal Law Committee was held. Members present were: Roxanne Beecher, Lydia Antoncic, Esq., Christine Argentina, Esq., Carol Simon, and Bill Egan.

Among the topics discussed were the ties between domestic violence and animal abuse. Lydia Antoncic, a family law attorney, spoke about how women refuse to leave their abusive environment because organizations such as My Sisters' Place, an organization that shelters abused women and children, lack the facilities to take care of their pets. The committee proposes to establish a connection with facilities such as the SPCA, foster homes, and boarding kennels that would be willing to house and shelter these pets while the women remain sheltered.

Christine Argentina, a criminal law attorney, spoke about how animal rights and Estates and Trusts can be related. There is a need to raise awareness for pet owners to create trusts that provide for their beloved

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Marisa Garcia is the Chief Clerk of the Yonkers City Court and is responsible for the hiring and supervision of a staff of 75 people.

Kathleen A. Ryan works with Judge William Warren in the Rockland County Family Court.

It was through the efforts and generosity of the Ruth and Seymour Klein Foundation, that the Joseph F. Gagliardi Award for Excellence was established.

The Gagliardi Award committee members are: Hon. Fred L. Shapiro, Hon. Susan Cacace, Lucille A. Fontana, Esq., James Garfein, Esq., P. Daniel Hollis, III, Esq., John S. Marwell, Esq., Professor Jay C. Carlisle, II, and Mary Ellen Manley, Esq.

Thanks to our sponsor Captain Lawrence Brewing Co.

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who each donated 15 hours to the WCBA
during their busy school year:
Ashley T. DeVito, Aharon Diaz, David Haimi,
Caesar Lopez, Christopher Psihoules and
Penni Stathakos

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wcbany.org



Court's Broad Discretion Can Be Used To Punish A Wayward Fiduciary

BY LIAM J. MCLAUGHLIN, ESQ.

It is axiomatic that a fiduciary has a duty to act in the best interest of an estate. The seminal case of *Meinhard v. Salmon* states that a "trustee is held to something stricter than the morals of the marketplace. Not honesty alone but the punctilio of an honor most sensitive, is the standard of behavior."¹

Failing to live up to the high standards set forth in *Meinhard*, can manifest in numerous ways, and when they do, the Surrogate's Courts have broad discretion to punish errant fiduciaries. When a fiduciary fails to act prudently with regard to handling the administration of an estate, Surrogate's Court Procedure Act 2211 grants the court broad discretion to make "such order or decree as justice shall require."² A court can fashion any and all remedies it deems necessary, including, but not limited to, removal of the fiduciary, surcharge, imposing interest on a surcharge and denial of all or some commissions.³

There is no better example of the Court's levying such penalties against a wayward fiduciary than in the recent Westchester County Surrogate's Court decision *Matter of Carmelo Carbone*, File No. 2004-2272/B.⁴

This case is a contested Accounting where the decedent died in May, 2004. In his Will, the decedent nominated his brother as the estate's fiduciary and gave each of his two daughters an equal share of the proceeds of the sale of the decedent's real property. Three years after the decedent's death, the fiduciary had not yet sold the real property or accounted for his actions to either the Surrogate's Court or the beneficiaries.

THE ACCOUNTING

The beneficiary-daughters compelled the fiduciary to account pursuant to SCPA 2205. In April, 2007, the Surrogate's Court directed the fiduciary to account. In January, 2009, the fiduciary had still failed to file his Accounting. Finally, in May of 2009, five years after the decedent's death, the fiduciary filed his Accounting.⁵ One beneficiary-daughter objected to the Accounting and ultimately moved for partial Summary Judgment.⁶ She sought and alleged, *inter alia*, removal of the executor, denial of executor's commissions, self-dealing, failing to maintain records

and the wasting of estate assets. In sum, the Objectant maintained that the executor administered the estate for his personal benefit or the benefit of members of his family to the detriment of the beneficiaries. Summary Judgment was granted, on many issues, to the Objectant.

In its Decision, the Court found that expenses and claims, totaling over \$900,000, were paid from estate assets by the fiduciary. Of that amount, the fiduciary paid himself and other members of his family over \$450,000, including the following unsubstantiated payments: (1) payments to himself; (2) the repayment of an alleged loan to the fiduciary's mother; (3) payment to the fiduciary's son; (4) payments to other family members and (5) payments to an unknown entity. For each expense, the fiduciary was surcharged the amount of the payment plus a 9% interest rate, pursuant to CPLR 5004, which was imposed from the date that each payment was made.

COURT ORDERED DEPOSITIONS

In addition, the fiduciary paid his daughter \$56,027 in accounting fees despite the fact that the Executor paid two other accountants for services which appeared to duplicate the services of his daughter. She filed an Affidavit of Services seeking payment for that amount plus an additional \$36,100 in unpaid fees. After reviewing her Affidavit, the Court deemed it to be "wholly inadequate" to determine her fee.

The Court found that these excessive expenses paid from the estate were a waste of estate assets, as the Will did not grant the fiduciary the authority to carry on the business of the decedent and specifically instructed the fiduciary to sell the real property and distribute the sale proceeds to his two daughters. The Court cited *Matter of Muller*,⁷ which stated the general rule that, absent specific authority, assets of an estate may not be used for the purpose of continuing a business.⁸ Despite the Will's clear instruction to the fiduciary, he continued to administer the estate for the benefit of himself and his family members to the detriment of the estate beneficiaries.

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NOTICES OF INTEREST TO OUR MEMBERS

In the interest of keeping our members informed of recent developments in the law we are including the following notices.

MATRIMONIAL ATTORNEYS AND PRO SE LITIGANTS



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
Matrimonial Part
111 Dr. Martin Luther King, Jr., Blvd., White Plains, New York 10601
WestchesterMatrimonial@nycourts.gov
Chambers of Francesca E. Connolly, Supreme Court Justice
Supervising Judge of the Matrimonial Part

May 10, 2011

NOTICE TO MATRIMONIAL ATTORNEYS AND PRO SE LITIGANTS

Effective immediately, please forward all correspondence directed to the Court Attorney-Referees, which is permitted by the Westchester Supreme Court Matrimonial Part Operational Rules, through the designated Matrimonial Part general e-mail address:

MatrimonialWestchester@nycourts.gov.

The fax number should only be used if you do not have access to e-mail.

In addition, please include the following information in the Subject Line on the e-mail:

Last name of Court Attorney Referee; Name of case, Index number.

Thank you for your cooperation.

REAL PROPERTY ATTORNEYS

RE: INSURANCE LAW §6409 CD

REAL ESTATE BROKER REFERRAL TO AFFILIATE TITLE AGENT

This Summary Report is provided by

Benchmark Title Agency, LLC

Per: Jean Partridge, Chief Counsel

On May 31, 2011, the New York State Insurance Department opined that a violation of Insurance Law §6409 (d) occurs when a residential real estate broker refers its clients to attorneys on an “approved” or “recommended” list and the attorneys, in turn, refer those clients to the broker’s affiliate title agent under common control. Pursuant to the opinion, such a quid pro quo is violation of Insurance Law Sec. 6409 (d). The Department further states that even “an informal quid pro quo, whereby attorneys that do not make the referral quota are removed from the list” would be a violation of the law. The opinion further states that any person or entity that accepts or receives such a quid pro quo is subject to a penalty equal to the greater of \$1,000 or five times the amount thereof.

For the complete report visit: <http://www.wcbany.org/associations/9830/files/inslaw6409dviolations.pdf>

Friday, July 15, 2011**LIMITED
SEATING****The Real Property Section presents****1031 CLE and Mets vs. Phillies Game****Topic: Section 1031 Exchanges in the 21st Century:
Regulatory Changes and Case Law Impact**

- Speakers** David M. Gorenberg, Esq.
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Senior VP-1031 Exchange
Services, Citibank, N.A.
- Location** Citi Field Stadium, Roosevelt Ave.,
Enter at Hodges VIP Gate
Flushing, NY 13368
The presentation will be held in the
auditorium followed by dinner
in the Empire Suite.
- Time** 3:00 pm–3:30 pm Registration
3:30 pm–6:30 pm Presentation
7:00 pm: Dinner
7:05 pm: Game Start
- Price** FREE Members & Non-members
- CLE** 3 CLE Credits
- To Register** See “Registration Box” on this page

Thanks to our sponsor Citibank**Tuesday, September 13, 2011****The Municipal Law Section presents****Development Rights in Uncertain Economic Times**

- Speakers** Michael Zarin Esq., and
Daniel Richmond Esq.,
of Zarin & Steinmetz
- Location** Vintage Bar & Restaurant
171 Main St., White Plains, NY
- Time** 12:30 pm–1:00 pm Registration and
Lunch
1 pm–2 pm Presentation
- Price** \$35 Members/\$45 Non-members
- CLE** 1 credit Professional Practice
- To Register** See “Registration Box” on this page

REGISTRATION BOX**HOW TO REGISTER FOR CLEs and EVENTS**

There are four options to register for
a **CLE** or **EVENT**:

WEBSITE: Go to www.wcbany.org
Select Calendar and Select CLE title of interest

EMAIL: Fill out the form below and email to:
cle@wcbany.org *(Omit credit card information for
security purposes and we will contact you.)

FAX: Fill out the form below and Fax to:
(914) 761-9402

MAIL: Registration form with check made out to
“WCBA” One North Broadway, Suite 512, White
Plains, NY 10601

CLE and EVENT ORDER FORM

Please register in advance whenever possible. Registration later than 12 pm 24 hours PRIOR to the CLE will incur a \$10 late fee and applicants will be seated and provided written materials ONLY if space permits.

CLE TITLE	Date	Fee
	//	\$
EVENT TITLE	//	\$
<input type="radio"/> CD <input type="radio"/> DVD Title:		\$
<input type="radio"/> CD <input type="radio"/> DVD Title:		\$
		TOTAL: \$
Name(s):	Firm:	
Bus. Tel.:	Email:	
METHOD OF PAYMENT:		
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Card Number: *	Exp.:	Sec. Code
Credit Card Billing Address:		
Authorized Signature:		

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Copies of the WCBA CLE Rules and Procedures and the Hardship Policy may be obtained by emailing cle@wcbany.org or calling 914/761-3707 ext. 19. Your knowledge of the CLE rules and procedures is presumed when you register for a CLE. If you have paid for a program in advance and circumstances require cancellation, full credit will be applied to a future program, provided written notification (by mail/fax/email) is received by the WCBA at least 1 business day in advance of the program.

Thursday, October 20, 2011

The Tax Law Section presents

Collaborative Divorce: The Use of Financial Planning and Valuation Experts, and Tax Consequences

Speakers	Edward Heben CPA/ABV/CFF, CVA, AEP, Partner: Valuation & Forensic Services, Citrin Cooperman & Company, LLP David Bruckman, JD, MS Tax Managing Director Citrin Cooperman Wealth Management, LP <i>and</i> Stephen G. Gordon Esq. Location Westchester Hills Golf Club 401 Ridgeway, White Plains, NY Time 7:30 am–8:00 am Registration and Breakfast 8:00 am–10:00 am CLE Presentation Price \$30 Members/\$40 Non-members CLE 2 credits Professional Practice Audience Collaboratively-trained attorneys and those who wish to learn about collaborative divorce and dispute resolution To Register See “Registration Box” on page 8
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Thanks to our sponsor Statewide Abstract

Thursday, October 27, 2011

The Construction Law Committee presents

Unique Requirements of Contracts with Federal Money

Speakers	William D. Guernier VP, The Kenrich Group LLC
Location	TBD
Time	5:30 pm–6:00 pm Registration and Light Refreshments 6:00 pm–8:00 pm CLE Presentation
Price	TBD
CLE	2 credits Professional Practice
Audience	Attorneys, architects, contractors, sub-contractors, suppliers and engineers
To Register	See “Registration Box” on page 8

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**JAMES VENERUSO MANAGING PARTNER,
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James Veneruso, Esq. is honored and deeply appreciative of receiving this award. In recognizing Veneruso's achievements, Lou Kirven, commissioner of planning and development for the city of Yonkers, said that for many years Veneruso "has been a very strong advocate for many of the businesses here in Yonkers."

Mr. Veneruso serves as counsel and a board director for a number of charity and community service organizations, including Habitat for Humanity, Westchester County.



**PHILLIP C. LANDRIGAN, ESQ.
APPOINTED TO BOARD OF LEGAL
SERVICES OF THE HUDSON VALLEY**

Phillip C. Landrigan, Esq. partner at McCarthy Fingar LLP has been appointed to the Board of Directors of Legal Services of the Hudson Valley.

Mr. Landrigan looks forward to working with the Board to increase the public's awareness of the Legal Services of the Hudson Valley's mission and to assure its dedicated staff has the resources to make the ideal of "justice for all" a reality.

**ANTHONY J. ENEA, RECEIVES
AV® PREEMINENT™ RATING FOR TENTH
CONSECUTIVE YEAR**



Anthony J. Enea, Esq. of Enea, Scanlan & Sirignano, LLP has received an AV® Preeminent™ rating for ten consecutive years from Martindale-Hubbell. This is the highest possible peer review rating in legal ability and ethical standards.

Mr. Enea is the Chair-Elect of the Elder Law Section of the New York State Bar Association. Mr. Enea is the Immediate Past President and a founding member of the New York Chapter of the National Academy of Elder Law Attorneys (NAELA). He is also a member of the Council of Advanced Practitioners of the National Academy of Elder Law Attorneys.

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Wayward Fiduciary

(continued from page 6)

SURCHARGING FOR FAILURE TO INCLUDE AN ASSET

The Court also found that the fiduciary failed to include an asset (a 1962 Corvette Stingray) in the Accounting, which the fiduciary claimed the decedent gifted to him mere days before his death. The fiduciary failed to supply any admissible evidence to establish the elements of a lifetime gift.⁹ The Court surcharged the fiduciary the missing asset's value as of the decedent's date of death and the statutory interest at the rate of 9% per year.

The Court ordered that the fiduciary pay all surcharges totaling more than \$560,000 plus the statutory 9% interest, within 20 days of the issuance of its order and to turn over all estate assets and books and records to the Objectant.

SUSPENSION OF LETTERS TESTAMENTARY

Due to the Executor's alleged self-dealing, the Court suspended his Letters Testamentary¹⁰ and issued Limited Letters to the Objectant.¹¹

LEGAL FEES TO ESTABLISH FIDUCIARY MISCONDUCT

The Court also noted that the record demonstrated that legal services were necessary to establish the fiduciary's misconduct; therefore, it granted Objectant's attorney's request for legal fees.¹² The amount of the legal fees however, the Court stated, was an issue of fact to be determined at trial.

Matter of Carbone is a cautionary tale to all fiduciaries. Be warned that the Court has great latitude in order to fashion a remedy against an unscrupulous fiduciary and will not hesitate to use its power in order to do so.

ENDNOTES

1. 249 N.Y. 458 (1928).
2. *Matter of Acker*, 128 A.D.2d 86 (2d Dep't 1987).
3. *Matter of Kaskawits*, 25 Misc.3d 1228 [A] (N.Y. Sur. Ct. Westchester Co. 2009); *Matter of Lippner*, 135 Misc. 2d 34 (N.Y. Sur. Ct. Kings Co. 1987).
4. Please note that due to space limitations, the factual and procedural history are dramatically abbreviated.
5. The Court noted in its April 13, 2011 Decision that that Accounting filed with the Surrogate's Court did not balance.
6. CPLR 3212.
7. 24 N.Y.2d 336 (1969).
8. *Id.*
9. *Gruen v. Gruen*, 68 N.Y. 2d 48 (1986): the three elements of a gift are (1) intent; (2) delivery; and (3) acceptance; see also *Matter of Kaminsky*, 17 A.D.2d 690 (3d Dep't 1962).
10. SCPA 711(2) and 719(10).
11. SCPA 702(10).
12. The Court may fix legal fees incurred by a party as a surcharge against a fiduciary where it is established that such legal fees reflect services solely to establish the fiduciary's misconduct and recover funds from him or her. *Matter of Kaskawits*, 25 Misc. 3d 1228 [A] (N.Y. Sur. Ct. Westchester Co. 2009); *Matter of Buxton*, NYLJ Oct. 13, 2006, at 32, col. 3; *Matter of Miller*, NYLJ Aug. 30, 1995, at 26, col. 1.

Liam J. McLaughlin, Esq., CPA, is a partner in the law firm of McLaughlin & Zerafa, LLP. Mr. McLaughlin was previously involved in this matter while working at another firm.

Divorce Mediation

(continued from page 1)

the county-wide program. In either context, mediation is non-binding and confidential.

INITIAL MEDIATION PROCEDURES:

RULE 3 AND RULE 13

In Westchester County, parties are referred to the Matrimonial Mediation Program through either their Matrimonial Part Justice, their assigned Court attorney-referee, or upon their own request. Under Rule 3, referral can take place at any time during the litigation process and is only inappropriate in cases involving child abuse, neglect, domestic violence, or a severe imbalance of power between the parties.

Mediation proceedings begin after the Court issues an Order of Reference specifying “the topics (*e.g.*, child custody, visitation and/or financial issues) to be submitted to the Program for resolution . . . [and] direct[ing the] parties to attend an initial, free 90-minute session with a Mediator from the Program’s Roster of Neutrals.” If the parties do not wish to be appointed a Mediator from the Roster of Neutrals, they can appoint their own Mediator. Regardless, at least three days “prior to the initial session, the parties’ counsel [must] send the Mediator a copy of the pleadings, the Statements of Net Worth, and any other information necessary for the effective negotiation and resolution of the issues involved.”

Importantly, under Rule 13, the commencement of mediation proceedings does not stay court proceedings. The “no stay” policy [in this respect] recognizes the special need for prompt action in matrimonial and family proceedings [since] full discovery, emergency and *pendente lite* relief, family dynamics, and the needs of children require ongoing access to the Court.”

THE MEDIATORS: RULE 7 AND RULE 14

As noted above, Mediators are appointed to the Matrimonial Mediation Program through the Roster of Neutrals. Overall, under Rule 7, the District Administrative Judge determines and oversees “whether a person qualifies for inclusion on the Roster of Neutrals and whether . . . [he/she] has the requisite temperament, character, and discretion” for a position as a Mediator.

In order to qualify for inclusion on the Roster of Neutrals, Mediators must meet the following prerequisites: “[c]ompletion of at least 60 hours of family mediation training in a program recognized by the New York State Office of Court Administration . . . [and] at least four years of family mediation experi-

ence, including 250 hours of face-to-face mediation with clients and a minimum of 25 custody and visitation cases.” In addition, “all [M]ediators must attend at least six hours of additional approved training relevant to their respective practice areas every two years.”

When assigning Mediators to cases, if a case involves financial issues, only “Mediators with knowledge of, training in and experience with financial aspects of divorce” may be assigned. Likewise, if a case involves “decision-making for a child or parenting time with a child . . . [such cases may be] referred only [to] Mediators with knowledge of, training in and experience with such issues.”

THE ROLE OF THE MEDIATOR: RULE 4

Once a Mediator has been appointed, his/her primary task is to act—under Rule 4—as a “neutral facilitator of communication [who] helps the parties reach future-oriented solutions that meet their families’ individualized needs.” Overall, Mediators are supposed to “probe the parties’ feelings, values, and preferences underlying their stated positions [and withhold from] giv[ing] legal advice, predict[ing] likely court outcomes, or forc[ing] solutions on the parties.”

Notwithstanding Rule 4, as a general matter, mediation is very personal to the Mediator. In essence, the Mediator should facilitate the mediation in a way that he/she is comfortable. It is critical that the law

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be explained and, if otherwise knowingly waived, applied. Mediation is not therapy nor is it counseling. The intent of mediation is to dissolve a marriage and to resolve ancillary issues to the dissolution. The Mediator at all times must remain neutral and never engage in any unilateral correspondence and/or conversations with either of the parties. All documents forwarded by the Mediator and/or received by the Mediator from the respective parties need to be made fully available to the other.

In addition, the effective Mediator will recognize the imbalance of power in the marital relationship and attempt to neutralize it. The effective Mediator cannot be timid about confronting the more emboldened party in a cerebral and direct way. An agenda needs to be set for each mediation hearing, with homework given at the conclusion. The Mediator needs to prioritize in his/her own mind the issues with a recognition that if the respective parties are precluded from discussing at the inception of each mediation session their immediate concerns, it will impede the ability to resolve other, sometimes larger issues. For example, if one of the parties is offended because he/she is buying the dog food or the milk for the coffee, that issue needs to be reconciled before equitable distribution can be addressed. Also, safety as to children is obviously paramount and an interim, financial arrangement with strict compliance needs to be crafted.

THE ROLE OF THE PARTIES, COUNSEL AND ATTORNEYS FOR THE CHILD: RULE 5

While the role of the Mediator is important to mediation sessions, under Rule 5, parties to mediation are also considered vital to the process. Parties are more or less required to attend mediation sessions once they enter the Matrimonial Mediation Program. The Rules stipulate that “party participation . . . not only increases the likelihood of settlement, but also improves compliance with any agreed-upon terms and enhances the parties’ satisfaction.”

In terms of the parties’ attorneys, while they are “not required to attend” sessions, they are encouraged to do so. The Rules note that “attorneys play a crucial role in informing parties of their legal rights and responsibilities [as well as] the consequences of proposed solutions.” As such, if “counsel for either party is discharged or withdraws for any reason, the case will not proceed in [m]ediation.” Similarly, under the Rules, in “those cases in which an Attorney for the Child or guardian ad litem has been assigned, [m]ediation may not commence without the appropriate Attorney or guardian’s presence, unless the parties agree otherwise.”

Overall, the use of attorneys in mediation can be helpful to parties as well as to the Mediator. Many Mediators are offended by the presence of counsel. I am of the firm belief that this is misplaced. To the extent that counsel has the presumed respect of the Mediator,

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Divorce Mediation

(continued from page 13)

his/her neutrality can aid the attorneys in facilitating settlement in part or in whole of the case where clients are otherwise refusing to listen to their counsel. The Mediator can be assisted enormously by the attorneys in being provided disclosure and other compelling information, including their interpretation of case and statutory law. To the extent that a mediation produces in part or in whole an agreement, the Mediator should take the time during the course of the mediation session to use the services of his/her office to draft a stipulation, have counsel review it, and—only if counsel and the parties are comfortable—conduct a *Voir Dire* of the parties to have it executed.

In the second part of this article, issues related to the drafting of mediation agreements will be addressed from a substantive perspective. In my strong opinion, it is critical that the parties be made fully aware of statutory and case law so their decision on issues is educated and with full knowledge of what they are obligated to do and what they have elected to waive. An agreement must be entered into knowingly and voluntarily and cannot violate public policy.

John A. Pappalardo is a partner in the law firm of Farber, Pappalardo & Carbonari. He has been an active matrimonial litigator for 25 years and supervises a seven-member matrimonial department. John also has a private matrimonial mediation practice, is certified in matrimonial collaborative law, sits as a matrimonial arbitrator and is New York State Certified as an attorney representing children.

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BY RICHARD M. GARDELLA



The Harvard-educated lawyer's letter bristled at the perceived employment of propaganda. Responding to a businessman's complaints against union organizing tactics, the lawyer's letter called propaganda a "communist technique" and stated:

"...assert your argument over and over again, no matter how illogical. Ignore all arguments against it. Hope that in time it will have an effect, purely through repetition."

Written sixty five years ago this month, U.S. Senator Robert A. Taft's short letter to a business constituent, focused only on one aspect of propaganda—repetition. A political leader from the same era who relied on propaganda to help him gain control of a country and plunge the world into war, killing millions, gave a broader definition. Writing in *Mein Kampf* in 1933, Adolph Hitler asserted:

"All propaganda has to be popular and has to adapt its spiritual level to the perception of the least intelligent of those towards whom it intends to direct itself."

According to Hitler:

"...The great masses of the people...will more easily fall victims to a big lie than to a small one..."

Dictionary definitions of propaganda target the systematic nature of propaganda in promoting doctrines or attacking opposing ideas. No leader provided more system to a nation's propaganda effort than Stalin. Opposing views and the exchange of different ideas were wiped out for the Soviet people. Opposition figures were demonized, history rewritten and language limited to identify enemies of the state. The average Russian probably did not know what "revisionists", "reactionaries", "Trotskyites" or "imperialist lackeys" stood for or represented, but they knew such individuals were bad. They were enemies of the state.

George Orwell used Stalin and his methods as a model for his novel *Nineteen Eighty-Four*. Published in 1949, the novel pictured a future of endless war, mind control, constant government surveillance and the complete subordination of the individual to the state. Language control was accomplished through a new, limited glossary of terms called *Newspeak*. History was rewritten to perpetuate the state's propaganda effort. The novel gave us new mind control terms such as *Big Brother*, *doublethink* and *thought crime*. In 1998, Orwell's novel was ranked as 13th on

(continued on next page)

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ANIMAL LAW COMMITTEE

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pets when the owners predecease the pets.

Roxanne Beecher, a former Manhattan prosecutor, has witnessed first hand the abuse and neglect of hack horses. She purchased her horse to remove him from an abusive environment. At the committee level we discussed the possibility of proposing legislation for an Animal Abuse Registry and a Rental Horse Licensing Law. An upcoming CLE was also discussed.

The next meeting will be held on Monday, July 11th, and the guest speaker will be Odette Wilkens, civil rights attorney specializing in animal activism and the founder and executive director of the Equal Justice Alliance.

Please feel free to join us at our next meeting. We look forward to meeting you.

Contact: Carol Simon at ctsimon622@gmail.com

the Modern Library's list of 100 best English-language novels of the 20th century.

Back in the 40's and 50's, Taft often attacked the use of propaganda. He even opposed formation of the United States Information Agency because in his mind government should not be involved in propaganda.

Today's politicians, who demonize opponents and miscast opposing views, rarely rail against the use of propaganda as Senator Taft did. Maybe such word play has become more acceptable for the American people.

A vigorous, unbiased press can provide defense against the evil effects of propaganda, but in the end, the American people, themselves, should be the greatest bulwark against thought control.

Abraham Lincoln had a different view of the people than Hitler. The American president once said "I am a firm believer in the people. If given the truth they can be depended upon to meet any national crisis. The great point is to bring them the real facts." *

Lincoln's belief in the people also was echoed in the following more familiar quote from the great man:

"You may fool all the people some of the time. You can even fool some of the people all of the time. But you can't fool all of the people all of the time."

Let's hope his belief is still relevant.

*The Wit and Wisdom of Abraham Lincoln, edited by Alex Ayres, published by Penguin Group in 1992.

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President's Message

(continued from page 2)

club, a criminal prosecution under the Endangered Species Act, a disagreement over the mandated use of reclaimed water on a golf course, the Internal Revenue Service's litigation with a taxpayer over tax deductions for golf-related expenses, and the application of the Americans with Disabilities Act (ADA) to tournaments sponsored by the Professional Golfers' Association (PGA) Tour, where the United States Supreme Court examined the fundamental nature of the game of golf. *See PGA Tour v. Martin*, 532 U.S. 661 (2001).

In addition to the Annual Golf Outing and Dinner, during the month of July, the WCBA will be sponsoring CLE programs, including a free CLE at Citi Field with dinner and a Mets game! (see the "CLE Center" on page 8, and our website's calendar for the latest information) and the Bar After the Bar event on July 27th at Pace University School of Law.



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