President’s Letter
By Robert N. Consueiro

Renewal

Sometimes procrastination pays off. If I had written this letter on time, I would have been in a bad mood. It would have started with a wholly negative review of the Summer that Wasn’t. It would have ranted and raved about the cold, dreary and rainy July and the wasted August. I would have felt lousy and it would have gone downhill from there. But by delaying, I made it to the end of August and the first week of September, and now I get to write this after 10 glorious days of sunshine. All’s well that ends well. Of course, I still feel lousy since I’m writing this on Labor Day, which I think is a crime.

The end of summer brings on a renewal of sorts. Just as the kids go back to school, all fresh-faced and in brand new clothes, we go back to the serious business of lawyering. The courts are back in full swing. Managing partners everywhere gear up to drive their firm’s lawyers to more billable hours. We meet with clients day and night. We are hustling to make a living, and work long, hard hours. We try to help our families, and to fulfill our destinies.

Judicial Candidates Luncheon Scheduled for October 27

Rumor has it that Hon. Frank “Dean Martin” Carano has once again been revered – oops, we meant to say graciously invited – into the bully pulpit as roastmaster at this year’s Judicial Candidates Luncheon, scheduled for Tuesday, October 27 at the Hyatt Regency beginning at 12:00 noon. As in past years, the Powers That Be selected Carano for this “honor” (how we love euphemisms!) because “his written opinions make him the only logical choice” or at least according to a highly reliable anonymous statement that appeared at Bar headquarters scrawled illegibly on a cocktail napkin.

On the “menu” for this year’s roast are: Hon. Christopher J. Burns, Russell T. Ippolito, Jr., Hon. Henry J. Nowak, Hon. John F. O’Donnell, Hon. Shirley Troutman and Jeffrey F. Voorkl. There’s more than enough stuff on your calendar to stress you out and make you crazy. And there’s a ton of research on the heart-healthy, endorphin-boosting benefits of laughing until your face hurts. So give yourself a break already. As one of Carano’s staff members (who refused to be identified on account of his handwriting bears a striking resemblance to the one on the cocktail napkin) put it so eloquently, “Hey, ya gotta eat yourself a break already. As one of Carano’s staff members (who refused to be identified on account of his handwriting bears a striking resemblance to the one on the cocktail napkin). So give yourself a break already. As one of Carano’s staff members (who refused to be identified on account of his handwriting bears a striking resemblance to the one on the cocktail napkin). So give yourself a break already. As one of Carano’s staff members (who refused to be identified on account of his handwriting bears a striking resemblance to the one on the cocktail napkin).

Hon. Paula L. Feroleso Named Administrative Judge

Hon. Paula L. Feroleso, who served the BAEC as its deputy treasurer and treasurer, has been named Administrative Judge of the Eighth Judicial District. The appointment was announced by Chief Administrative Judge Ann Pfau with the approval of Chief Judge Jonathan Lippman and in consultation with Hon. Henry J. Scudder, the Presiding Justice of the Appellate Division, Fourth Department. Eight other judges were under consideration for the position. Judge Feroleto is only the second woman to be named to this post, replacing Hon. Sharon S. Townsend, who has been appointed Vice Dean for Family and Matrimonial Law of the New York State Judicial Institute.

“Judge Feroleto is an outstanding candidate who is eminently qualified to handle the critical challenges of her new position,” according to Chief Administrative Judge Pfau. “She has proven herself to be a dedicated and intelligent jurist, as well as an outstanding and experienced lawyer. I am confident that Justice Feroleto will take over from Judge Townsend in her new capacity, and focus on the judges and courts of the Eight Judicial District, as well as the citizens they serve.”

After serving as an associate attorney, then the first female partner at Brown & Kelly LLP from 1983 to 2004, Judge Feroleto was elected to New York State Supreme Court in 2004. She is currently the president of the Supreme Court Judges Association in the Eighth Judicial District. She was the recipient of the Women Lawyers of Western New York Lawyer of the Year Award in 2006 and is also a past president of Western New York Trial Lawyers Association.

Born in Kingston, Ontario, and raised in Rochester, Judge Feroleto graduated from Georgetown University in 1978 and received her JD from the University at Buffalo School of Law in 1982. She and her husband, Buffalo attorney John P. Feroleto, are the parents of three children, an Erie County assistant district attorney and two UB Law students.

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Some of us are successful and some are not. Some of us can afford to retire. Our Bar Association is here for all of us. Through our CLEs and our committees, we strive to provide the latest information on the law and the procedures which affect us. We provide help through some of our committees, through Lawyers Helping Lawyers and through the Bar Foundation, to those who struggle with health issues, financial distress and other adversities. We provide health and disability insurance coverage for all our members but especially for solo practitioners and small firms. We offer a helping hand to those who need our support. We serve as a conduit for our members to contribute to the Erie County Bar Foundation, which has a special insert in this edition and which seeks your support for its 2009 campaign.

We plan for the future.

I am having our Senior Lawyers Committee, under the able leadership of former president Dick Blewett, look ahead to develop protocols and programs for assisting lawyers who are having mental health and dementia problems. We are focusing on developing programs for our solo and small firm practitioners to assist lawyers who seek employment in our firms. You can read about their efforts on page 5 of this issue of the Bulletin.

DEADLINES

DEADLINE: October 2009

All materials submitted for publication in the Bulletin are subject to editing for reasons of style, space and content.

Send all submissions as Word documents to obrian@eriebar.org (preferred) or by mail to: Bulletin Editor, 438 Main Street, Sixth Floor, Buffalo, NY 14202.

DEADLINE: October 2009

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www.eriebar.org | October 2009
The Company of Friends

The Erie County Bar Foundation exists to provide a helping hand to lawyers in need.

The need may be based on medical problems, job loss, emotional difficulties, family crises or many other situations. No person or problem is categorically excluded. If you need assistance – or know a friend or colleague who does – please call Kelly Bainbridge at 626-4892. All services are individualized and completely confidential.

Bar Association Ratings for Judicial Candidates

The Bar Association of Erie County has completed and issued its ratings for New York State Supreme Court judicial candidates for the November 3, 2009 general election. Ratings include Outstanding, Well Qualified, Qualified, and Not Recommended. The Association announced its rating as follows:

- New York State Supreme Court
  - Hon. Christopher J. Burns – Outstanding
  - Russell T. Ippolito, Jr. – Qualified
  - Hon. Henry J. Nowak – Qualified
  - Hon. John F. O’Donnell – Well Qualified
  - Hon. Shirley Troutman – Well Qualified
  - Jeffrey F. Violett – Qualified

Judicial candidates complete a written questionnaire and are rated on criteria including integrity, experience, professional ability, education, reputation, industry, temperament, fairness, statutory standards, attitude, punctuality, and knowledge of the law, all of which are determined through a process which includes a personal interview with each candidate and interviews with lawyers and judges who have had interaction with the candidates.

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Camaraderie, collegiality and comedy...

High-spirited events like the Judicial Candidates Luncheon and Roast set our legal community apart from others across the country. Don’t miss the comic relief coming your way on October 27 with roastmaster extraordinary Hon. Frank Caruso.
LANDLORD “CLEANS UP” AS SHOWER SUIT GETS BOOT
She entered the shower to get herself clean
Never expecting the shower
To turn mean!
Turning that shower on at first
Caused her to be sprayed
With a scalding burst!
The court had a sad look
When it announced that the landlord
Was off the hook!
No constructive notice
Was what the court did say
The landlord will not have to pay!
Flores v. Langsam Property Services Corp., et al.,
63 AD3rd 502, 881 NYS2nd 405, 6/11/09

IDENTIFICATION ELABORATION
A suggestive identification of the defendant not conducted by the police or the authorities may not be automatically suppressed as unconstitutional. (Peo. v. Marte, __NY3rd__, 6/11/09)

NEGATIVE EQUITY NOT NIXED
After complex analysis, the Court of Appeals (in an opinion by Judge Eugene Pigott) found that “negative equity” of a prior obligation can be part of a “purchase money obligation.” (In the Mtr of Peaslee et al., v. GMAC, LLC et al., __NY3rd__, 6/24/09)

NIGHT CURFEW CANNED
A night curfew of juveniles was found to violate the federal and state constitutions in Anonymous v. City of Rochester, __NY3rd__, 6/11/09.

SEARCH SENSITIVITIES
In Pro. v. Casey, __NY3rd__, 6/30/09, an insufficient basis was found for a full inventory search of a car after a police stop.

IN QUANTUM MERUIT QUERY
A “quantum meruit” claim for construction work at a school was held to be not precluded by a settlement agreement for prior work. (Pulver Co., Inc., v. SBLM Architects, PC, __AD3rd__, 4th Dept., 8/21/09, #890)

LONG-ARM GRABS DEFENDANT
Long-arm jurisdiction was upheld over a non-domiciliary where the complaint alleged that an agreement was breached in New York by the sale of nonconforming products, and where the agreement was negotiated in New York.

THERAPEUTIC VISITATION ELABORATION
Temporary supervised visitation with an appointed therapist was upheld in Bibas v. Bibas (62 AD3rd 924, 881 NYS2nd 139, 5/26/09)

“Birds sing after a storm; why shouldn’t people feel as free to delight in whatever remains to them?”
— ROSE KENNEDY

By Jeff Spencer

By Jeff Spencer

Become a Contributing Member!
The BAEC bylaws confer “contributing member” status on any member who resides or maintains an office in Erie County and elects to pay an additional $40 in annual dues to help support Association programs. Contributing members have the same rights and privileges as regular members and “such additional rights and privileges as the board of directors shall determine,” including special recognition in the Bulletin, annual dinner program and other publications.
A newly revamped trial law curriculum at the University at Buffalo School of Law will build on the best of previous programs to offer students enhanced opportunities for hands-on clinical education.

BAEC members Hon. Thomas P. Franczyk and Christopher J. O’Brien are co-directors of the University’s new Trial Advocacy program, which will combine elements of the Law School’s former Trial Techniques classes with its nationally renowned Trial Competition program in a more comprehensive format.

The new curriculum “is an expansion of the program that has been in existence for a long time,” according to Erie County Court Judge Franczyk. “It will be a more intensive, concentrated program that will allow students to prepare civil or criminal cases for trial” in a more coordinated way that combines theoretical classroom instruction with hands-on trial experience.

“Working with instructors who are practicing trial lawyers or judges, students will learn to prepare both sides of a case, make motions, deliver opening statements, examine witnesses, respond to objections and prepare closing arguments,” Franczyk says.

The Trial Techniques classes culminate in a final trial at the end of the semester, in which students argue cases before local members of the bench and bar who serve as judges and evaluators. Trial team members participate in national trial competitions hosted by other schools, as well as by UB Law, which is gearing up for the sixth annual Buffalo Niagara Trial Competition scheduled for November 13-16, 2009.

There are now 32 schools registered to participate in the competition, which is “largely due to the tireless efforts of Judge Franczyk and those who have worked with him since 1994,” according to program co-director Christopher J. O’Brien, a partner in the Amherst law firm of O’Brien Boyd, PC.

“Law school teams from across the country want to compete because the program is so well run and has such broad based support from both the Bar Association and Dean Makau Mutua at the Law School,” O’Brien says.

Noting that “more than 100 trials take place locally” during the annual event, O’Brien also credits Administrative Judge Sharon S. Townsend for making so many courtrooms available for the tournament.

The ultimate goal of the program is to “provide better advocates from UB Law,” O’Brien continues, noting that participation benefits not only the law students but also the lawyers and judges who volunteer to participate.

“Anyone who takes this program seriously will become a better lawyer, even if they’ve been in practice for 30 years and tried hundreds of cases,” he says.

“Hearing from those at the pinnacle of the profession planted a seed for what I wanted to be in the future,” he recalls.

Trial Advocacy Faculty

Among those who are currently serving as instructors in the program are:

**Fall Semester**
- Hon. Hugh B. Scott
- Hon. E. Jeannette Ogden
- Hon. Richard G. Klatch, Sr.
- Hon. Sheila A. Di Tullio
- Hon. Patrick M. Carney
- BAEC President Robert N. Convissar
- BAEC President Robert N. Convissar
- Michael P. J. McGorry
- Thomas J. Speyer

**Spring Semester**
- Hon. Shirley Troutman
- Hon. James A. W. McLeod
- John F. Ballou
- Anthony M. Bruce
- Howard R. Cohen
- Nelson S. Torre
- Ronald J. Winter
APPEAL
In Frumott v. Conkright (08-CV-631HL, 3/5/09), defendants, a retirement plan and its administrators, moved for a stay pending appeal under Rule 62(d). Fed. R. Civ. P., following the court’s decision directing defendants to recalculate plaintiffs’ retirement benefits and to pay lump sums commensurate with that calculation. Notwithstanding the recalculation portion of that remedy, the court held that the combined relief constituted a money judgment for purposes of the stay under Rule 62(d), which applies only to money judgments. The court also waived the required bond after concluding that defendants had ample assets and posed no risk of insolvency during the appeal process.

ATTORNEY-CLIENT PRIVILEGE
In Mackenzie-Childs LLC v. Mackenzie-Childs (06-CV-610TE, 3/14/09), two shareholders of a now defunct closely-held corporation moved to compel deposition testimony and production of documents by a non-party attorney who had formerly represented the corporation. Plaintiffs were affiliated corporations that had acquired substantially all of the assets from, and creditors of, the defunct corporation. Plaintiffs and the attorney opposed the motion on the ground that the requested testimony and documents were protected by the attorney-client privilege. The magistrate judge agreed, holding that the privilege that arose from the attorney’s representation of the defunct corporation had passed to the plaintiffs. The magistrate judge agreed, holding that the defendants, although former shareholders of the defunct corporation, could not establish that they held the privilege in their individual capacities, because defendants presented no evidence that they had consulted with the attorney about personal legal matters or had informed the attorney they were seeking advice in their individual capacities.

ATTORNEYS’ FEES
In Berry v. National Financial Systems, Inc. (08-CX-10X, 8/27/09), the court awarded attorneys’ fees on plaintiffs’ claims under the Fair Debt Collection Practices Act following entry of a default judgment and an evidentiary hearing as to damages. In calculating fees, the court found reasonable an hourly rate of $215 for partner time and $175 for an associate, representing a “slight upward adjustment” from the amounts awarded in a 2007 FDCPA case. The total award was $2,000 in statutory damages, $3,000 in statutory damages, and $9,999 in costs and attorneys’ fees.

CLASS ACTIONS
In Mendez v. The Ruder Corp. (03-CX-6042L, 8/20/09), a class action under the Fair Labor Standards Act, the court addressed, among other issues, whether its prior summary judgment ruling in favor of the named plaintiff could be applied to other class members (plaintiff had simultaneously moved for class certification and for summary judgment). Distinguishing cases involving dispositive motions filed by defendants, in which putative class members cannot be bound until they are given notice and an opportunity to opt out, the court found that the ruling could be applied to all class members. The court also addressed various issues raised by defendants’ motion to decertify the class, including class counsel’s failure to seek court approval of a notice to be sent to class members and whether individual members with respect to damages predominated over class-wide issues. [R]

Nominations Sought for Bar Association Leaders
The Bar Association of Erie County is seeking active, involved leaders to run for officer and director positions for the 2010-11 year.

The Nominating Committee, chaired by President Robert N. Convissar, is now accepting applications from interested members of the Bar Association of Erie County for the positions of vice president, deputy treasurer, and director. You may nominate yourself or other members; you feel would be qualified and willing. Candidates should be able to demonstrate a history of activity within the organized bar.

Vice President
The vice president performs the duties of the president if he or she is absent or unable to perform the duties of the office. The vice president serves a one-year term followed by a one-year term as president. The president is the chief executive officer of the Association and presides at all meetings of the association and all meetings of the board of directors. The president is the association’s spokesperson.

Deputy Treasurer
The deputy treasurer is a member of the Finance Committee and performs as treasurer in his or her absence or inability to perform the duties of the office. The deputy treasurer serves a one-year term followed by a one-year term as treasurer. The treasurer is the Association’s chief financial officer.

Director
The affairs of the Association are managed by a 16-member board of directors. Four directors rotate off the board annually and four new directors are elected. Directors are elected to a three-year term and are not eligible for re-election as a director until the expiration of one year after he or she has left that position.

Interested persons should send a resume along with the position title to: Nominating Committee, Bar Association of Erie County, 432 Main Street, Sixth Floor, Buffalo, New York 14202. The Nominating Committee is actively soliciting nominations from the membership.

Nominating Committee
Robert N. Convissar, Chair
Diane M. LaJelle
Katherine B. Bouch
Richard F. DiGiacomo
James M. Shaw
Gerald P. Gorman
John J. Molloy

By Paul K. Sieker and Kevin M. Hogan

In calculating fees, the court found reasonable an hourly rate of $215 for partner time and $175 for an associate, representing a “slight upward adjustment” from the amounts awarded in a 2007 FDCPA case."
Special Project Will Help Individuals Enroll in Medicaid Program for Working Individuals with Disabilities

Neighborhood Legal Services (NLS), a Buffalo-based agency which provides free legal services to individuals with low income and/or disabilities, has a new program to help individuals with disabilities obtain or retain Medicaid while working. NLS and its partners (see below) will help individuals enroll in the Medicaid Buy-In for Working People with Disabilities in a 15-county region of western New York.

Background

Many individuals with severe disabilities have come to depend on one of two cash benefit programs, Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI). The typical SSDI benefit for New York residents who live on their own is $761 per month. The average SSDI benefit is about $3,000 per month, but many get a Social Security check that is much smaller. Those who get a small SSDI check may also get a small SSI supplement to bring their combined benefit income up to $20 above the SSI level ($781 per month).

Individuals with disabilities have also come to depend on one of two government-run health insurance programs, Medicaid or Medicare. In New York, an individual who receives any amount of SSI benefits qualifies for Medicaid automatically. Similarly, an individual who receives any amount of SSDI qualifies for Medicare after 24 months of SSDI eligibility. Medicare covers many important services, including limited home health care services and some medical equipment under the optional Part B program and, since 2006, prescription drugs for those who enroll in Medicare Part D. However, Medicaid typically covers a broader range of services than Medicare.

Many individuals who had a significant work history before developing a disability will qualify for SSDI at monthly rates between $800 and $2,000 or more. Other individuals with lifetime disabilities may qualify for similar benefit amounts, as adult dependent children, if a parent paid into the Social Security trust fund and the parent is now disabled, retired or deceased. Because benefit rates of $800 or more per month are too high to also qualify for SSI, these individuals must apply for Medicaid through what is officially known as the “medically needy program,” but more commonly referred to as the “spend-down program.”

Example: Maria, age 38 and single, receives SSDI benefits of $1,120 per month. She will qualify, for Medicaid by incurring medical expenses of at least $333 per month or agreeing to pay that amount to her local Medicaid agency (i.e., the Department of Social Services in Erie County). The Medicaid agency determines this spend-down amount by first reducing Maria’s income by $20 per month ($1,120 - 20 = $1,100) and then subtracting $65, the one-person medically needy eligibility threshold for 2009 ($1,100 - 65 = $1,035).

Maria is considering part-time work (about 80 percent) that will pay her $1,200 gross per month ($21,000 per year). She could be making up to $39,000 within two years if she is able to move to full-time employment. She understands that she will probably lose her SSDI benefits after a nine-month trial work period, but wants to know if she can go back on SSDI if she sustains wages at this level of at least nine months (i.e., at more than $390 per month that Social Security considers to be “substantial gainful activity”), the medically needy spend-down will go up and by how much.

The Historical Treatment of Wages by Medicaid

When an individual with a disability works, the medically needy program will disregard the first $65 of gross monthly wages (or $85 if the person has no unearned income) and then reduce countable income by $1 for every additional $2 earned. Here is what Maria’s budget will look like if she takes the job earning $3,000 per month gross.

<table>
<thead>
<tr>
<th>Gross monthly wages</th>
<th>Countable earned income</th>
<th>Addition 50 percent exclusion</th>
<th>Countable unearned income</th>
<th>Countable income</th>
<th>New monthly Medicaid spend-down</th>
<th>Total countable income</th>
</tr>
</thead>
<tbody>
<tr>
<td>$1,200.00</td>
<td>- 20.00</td>
<td>- $1,000.00</td>
<td>$1,000.50</td>
<td>$1,100.00</td>
<td>$1,267.50</td>
<td>$1,867.50</td>
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<td>$1,270.00</td>
<td>- 40.00</td>
<td>- $1,000.00</td>
<td>$1,000.50</td>
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<td>$1,267.50</td>
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<td>$1,330.00</td>
<td>- 60.00</td>
<td>- $1,000.00</td>
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<td>$1,390.00</td>
<td>- 80.00</td>
<td>- $1,000.00</td>
<td>$1,000.50</td>
<td>$1,100.00</td>
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<td>$1,450.00</td>
<td>- 100.00</td>
<td>- $1,000.00</td>
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<td>$1,510.00</td>
<td>- 120.00</td>
<td>- $1,000.00</td>
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<td>$1,100.00</td>
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<td>$1,867.50</td>
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<td>$1,570.00</td>
<td>- 140.00</td>
<td>- $1,000.00</td>
<td>$1,000.50</td>
<td>$1,100.00</td>
<td>$1,267.50</td>
<td>$1,867.50</td>
</tr>
</tbody>
</table>

As you can see, under traditional spend-down rules, Maria’s spend-down goes up by more than $750 per month when she earns $1,200 per month. This is not the end of the bad news. If Maria sustains wages at this level of at least nine months (i.e., at more than $390 per month that Social Security considers to be “substantial gainful activity”), the medically needy spend-down will go up and by how much.

Maria is considering part-time work (about 80 percent) that will pay her $1,200 gross per month ($21,000 per year). She could be making up to $39,000 within two years if she is able to move to full-time employment. She understands that she will probably lose her SSDI benefits after a nine-month trial work period, but wants to know if she can go back on SSDI if she sustains wages at this level of at least nine months (i.e., at more than $390 per month that Social Security considers to be “substantial gainful activity”), the medically needy spend-down will go up and by how much.
program will consider her no longer disabled and will not cover her in the spend-down program.

The Medicaid Buy-In for Working People with Disabilities Program (MBI-WPD)

In Maria’s case, the MBI-WPD program will be just what she needs. Based on the facts she will be eligible for Medicaid under this program with no spend-down. Just as important, since there is no substantial gainful activity rule used in determining eligibility, Maria can work and remain eligible for Medicaid even if she makes $30,000 per year or more.

This federally optional program was first implement-
ed in New York in July 2003. It is also offered by 42 other states. The program is often just called the Medicaid Buy-In or abbreviated as MBI-WPD. It allows working individuals with disabilities to obtain or retain Medicaid at very high levels of income, with out-of-pocket premiums currently set at no more than $25 per month. In the case of an individual whose only income is from wages, those wages could be as high as $55,000 per year and the individual would still be eli-
gible for the MBI-WPD program with a premium not exceeding $25 per month.

There are several key criteria to establish eligibility for the MBI-WPD:

- Have certification or proof of disability as defined by the Social Security Administration;
- Be at least 16 but not yet 65 years of age;
- Be engaged in paid work (includes part-time and full-time work);
- Have a countable income of $2,257 or less per month (with countable income of $1,354 or less for eligible couples; and
- Have non-exempt resources that do not exceed $13,800 for an individual or $20,100 for a dis-
abled couple.

Since the local Medicaid office must follow the same rules as the spend-down program for counting income (i.e., the first $65 or $85 of wages and 50 percent of remaining wages is excluded), an individual could have gross monthly wages of up to $4,589 per month and still be eligible for the MBI-WPD.

Let’s take another look at Maria. With $1,867.50 of countable monthly income using the formula explained above, she is well under the $2,257 monthly income limit and should qualify for the MBI-WPD (we will assume that her resources are well within the $13,800 limit). At this level of monthly wages, she would ordi-
narily owe a $25 monthly premium but the program is not currently collecting premiums and is not expected to have a system in place to do so during 2009. Maria can confidently pursue future full-time work (if her condition allows) and salary increases, knowing that her annual income could go as high as $55,000 with eligibility retained.

NLS’s MBI-WPD Facilitated Enrollment Program

The Western New York Work Incentives and Benefits Advancement (WIBA) Project of Neighborhood Legal Services offers no-cost benefits counseling to SSDI or SSI beneficiaries who are working or planning to go to work. With three partners (Independent Living of Niagara County in Niagara Falls, the Southwestern Independent Living Center in Jamestown, and the Advocacy Center in Rochester) and a special grant from the Social Security Administration, we provide this service in a 16-county region. Our experienced staff will provide one-on-one counseling to help individuals, like the hypothetical Maria, understand the SSDI, SSI, Medicaid and Medicare rules and make decisions about how to move forward with their work goals. In many cases, we help individuals like Maria identify special work incentives that they can access to help them reach their goals.

Recently, NLS has started a Medicaid Buy-In Outreach and Facilitated Enrollment Project. Our goal is to reach people, like Maria, who might be good can-
didates for this MBI-WPD and provide them with the information and tools needed to apply for the program and establish eligibility. Readers who want more infor-
mation about this project, the MBI-WPD, or our bene-
fits counseling services can call our toll-free Work Incentives Hotline at 1-888-224-3272 (available to callers statewide). Our outreach/facilitated enrollment project and statewide hotline are both provided as part of our collaboration with Cornell University’s Employment and Disability Institute and guests of the New York Makes Work Pay Project (www.nymakesworkpay.org).

For helpful resources about the Medicaid Buy-In for Working People with Disabilities Program, visit www.mymakesworkpay.org. An electronic newsletter addressing the Buy-In can be found at www.ilr.cornell.edu/nyieldsworkpay/docs/MRG_Newsletter_S P09.pdf and a more extensive Policy-to-Practice Brief on the topic will soon appear on the site.
“If we are facing in the right direction, all we have to do is keep on walking”

~ BUDDHIST PROVERB
Robocallers Get Roped In

Depending on your perspective, automatically dialed pre-recorded calls (a/k/a “robocalls”) have been either an incredible annoyance or a great way to access customers both cheaply and efficiently. Regardless of your perspective about this 21st Century way of reaching out and touching customers, the rules governing robocalls were tightened substantially on September 1st of this year, and the changes should have a significant effect on both the number of those calls made and received, as well as the content of those calls. While a major overhaul of these rules became effective as December of last year, the most current tweaks will have consequences for telemarketing providers and recipients.

The newly effective rules fall under the jurisdiction NOT of the FCC, but rather the Federal Trade Commission (FTC), which initially published new rules in December, 2008 as an amendment to its Telemarketing Sales Rule (TSR). (This material can be found at 16 CFR 310). Since December, ALL pre-recorded telemarketing calls made to consumers must provide a clear provision allowing consumers to officially and permanently “opt-out” of future calls.

Specifically, the rules require that any telemarketer making robocalls MUST have the written permission they word in is “written” of those who have elected to receive such calls. That is, unless the consumer specifically has agreed to receive robocalls, telemarketers are precluded from making them. Given that the penalty for making robocalls without such permission is up to a whopping $16,000 PER CALL, both consumers and those whose clients make telemarketing-type calls, are well-advised to be aware of the new rules.

As in the case with any good rulemaking, there are exceptions, and in this case, they are quite significant. First, these rules do not apply to calls made by live individuals. That’s right…none of this applies if the person who’s trying to sell aluminum siding during the dinner hour is live. The new rules govern pre-recorded messages only. Secondly, certain robocalls to consumers who have not provided written consent are legal, so long as they are made to existing customers AND the purpose of the calls is strictly informational.

A call that provides some information but also tries to “up-sell” or solicit for anything that looks like a new sale is off-limits. Calls fitting into the “acceptable” category include those from airlines notifying consumers of flight delays, or from schools to notify parents of, among other things, snow days. The new rules also do not apply to banks attempting to collect a debt, telephone companies, most charities, and politicians (“Oh joy,” I hear you exclaim!).

In addition, calls which are subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) are exempt from all requirements of these rules. So are calls made by professional (for profit) telemarketers to members of or previous donors to charitable organizations. In these cases, the telemarketers will not need to receive prior written consent, but the calling group must provide an easy key press or other opt-out mechanism so that the recipient can elect to be removed from the list.

Finally, until September 1, robocalls (except as has otherwise been described) could be made to consumers with whom the telemarketer had previously done business for any reason. Now, absent specific, clear, written permission, such calls are not only explicitly prohibited, but can be very costly to the telemarketer.

Perhaps in an effort to reinforce its tough talk, the FTC has also just gone after a company making robocalls whose content it deemed deceptive regarding the extensions of vehicle warranties. I know that I’ve received a number of these calls and they always come at an inopportune moment (in fairness, I’m not sure that there are many people who actually look forward to receiving an automated call unless perhaps it’s about a flight delay that’s made before heading to the airport…) In any case, Transcontinental Warranty, Inc., as well as its owner, will be permanently banned from robocalling, under the terms of a proposed settlement announced on the same day that the new tougher rules went into effect. The proposed settlement also includes a $24 million judgment, although the fine has been suspended—possibly temporarily—based upon the defendants’ inability to pay.

The settlement remains “proposed,” but not yet final, so this may not be the last word. What is clear, however, is that the FTC is taking the way that consumers feel about robocalls seriously. In an attempt at dilatory alliteration, FTC chairman Jon Leibowitz said recently that “Starting September 1, this bombardment of pre-recorded pitches, senseless solicitations, and malicious marketing will be illegal.” As Astro of “The Jetsons” would say, “ruh roh…”

To report a violation of the new rules, consumers have three different avenues to the FCC. The first is the newly subscribed “Do Not Call” list, which can be found at www.donotcall.gov. The second is the Federal Trade Commission at www.ftc.gov, and the final is a toll free line at 1-877-382-4357.

Bar Association Ratings for Judicial Candidates

The ratings are defined in the Bar Association of Erie County’s Judicial Rating Application:

“The great public responsibility and power of the bench necessitates that the measure of qualifications for judicial office must be greater than that required for the private practice of law. To be rated “Qualified” the applicant must meet each of the listed criteria to a reasonable degree. A rating of “Well Qualified” requires qualifications to a high degree, and a rating of “Outstanding” requires qualifications even beyond that high standard. In assessing an applicant’s qualifications it must be remembered that meeting the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession, is at least as important as the requirement of knowledge and proficiency in technical aspects of the practice of law.”

November 2009 Bulletin DEADLINE

The next deadline for ALL bulletin contributors and advertisers is Friday, October 2, 2009.

PLEASE NOTE: the deadline for the December Bulletin is contributors and advertisers is Friday, October 30, 2009.

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Offers in Compromise with the IRS

The government, like other creditors, encounters situations where an account receivable cannot be collected in full (especially in the current economic climate) or there is a legitimate dispute as to what is owed. The IRS, with the permission of Congress, has accepted the business practice of compromise of liability in certain circumstances with the creation and implementation of its Offer in Compromise program.

The Offer in Compromise program includes four types of offers:

1. Doubt as to Collectibility
2. Doubt as to Liability
3. Effective Tax Administration
4. Doubt as to Collectibility with Special Circumstances

This article is intended to give a brief overview of the type and purpose of each Offer and to discuss recent developments and issues with the Offer program.

Doubt as to Collectibility Offer

The quick sale value of the taxpayer’s equity in assets plus the present value of a future installment payment agreement between the taxpayer and the Service equals the minimum amount necessary to offer the IRS to compromise a tax liability for less than the full amount owed (referred to by the Service as its reasonable collection potential).

Assets

The Service looks at all of the assets belonging to the taxpayer. Some assets, such as cash, bank accounts and investment accounts are valued at 100 percent. Non-cash items, such as a house, car, etc., are discounted by 20 percent since the IRS realizes that they will not obtain full value if they force the sale of the asset. Therefore, 20 percent of the fair market value, minus any senior encumbrance is used to determine the taxpayer’s equity in the asset for purposes of the Offer analysis. This 20 percent discount is referred to as the quick sale value.

Many practitioners are not aware that retirement accounts, such as IRAs or 401(k)s, are not exempt from collection by the IRS and as such must be included in the Offer computation. However, the Service will allow credit for the tax consequences of the disqualification of pre-taxed funds including the early withdrawal penalty if the retirement account is going to be liquidated to pre-taxed funds including the early withdrawal penalty. If the account is going to be liquidated to pre-taxed funds including the early withdrawal penalty, then the taxpayer must substantiate all “other” expenses, but there are no pre-set caps on the amounts.

Allowable necessary expenses subtracted from the taxpayer’s gross income equals “disposable income.” The disposable income is then multiplied by a factor. The amount of the factor depends on the payment terms of the Offer. The PVFIPA is then added to the quick sale value of all assets and this is the minimum amount that must be offered to compromise the liability. Other than the level of review (acceptance of Offers for liabilities in excess of $50,000 require approval by the Office of Chief Counsel), the amount of the liability is irrelevant. Further, if an analysis of the taxpayer’s financial circumstances indicates that the taxpayer could fully pay the tax liability over the remaining life of the statute, the IRS will reject the Offer.

The quick sale value of the taxpayer’s equity in assets plus the present value of a future installment payment agreement between the taxpayer and the Service equals the minimum amount necessary to offer the IRS to compromise a tax liability for less than the full amount owed (referred to by the Service as its reasonable collection potential).
Effective Tax Administration Offers are appropriate where the tax is legally owed and the taxpayer has the ability to full pay, however, the taxpayer cannot establish that, nevertheless, there is a very good reason why the taxpayer should not be forced to full pay. Unlike Doubt as to Liability Offers, Effective Tax Administration Offers involve a review and evaluation of the taxpayer’s financial circumstances.

Factors taken into consideration by the Internal Revenue Service that impact the taxpayer’s financial condition include:
1. The taxpayer’s ability to provide for basic living expenses;
2. A taxpayer’s age and employment status;
3. The number, age and health of the taxpayer’s dependents;
4. The cost of living in the area in which the taxpayer resides and any extraordinary circumstances such as special education expenses;
5. Medical catastrophe, natural disaster, etc. that apply to the taxpayer.

Factors that support an economic hardship determination may include:
1. Taxpayer is not capable of earning a living because of a long term illness, medical condition or disability and it is reasonably foreseeable that the financial resources will be exhausted providing for care and support during the course of the condition.
2. Taxpayer has a set monthly income and no other means of support and the income is exhausted each month in providing for the care of dependents.
3. Taxpayer has assets, but is unable to borrow against the equity in those assets and liquidation to pay the outstanding tax liabilities would render the taxpayer unable to meet basic living expenses.

Doubt as to Collectibility Offer with Special Circumstances

A little known type of Offer in Compromise that pre-dates RRA ’98 is Doubt as to Collectibility with “Special Circumstances”. This type of Offer is appropriate where the taxpayer’s assets are in excess of the amount offered, but less than the outstanding tax liability. Keep in mind, an Effective Tax Administration Offer is an Offer where the taxpayer has sufficient assets to full pay, but there is a very good reason why he or she should not. The Doubt as to Collectibility Offer with Special Circumstances is a situation where the taxpayer does not have sufficient assets to full pay, but does have assets in excess of the amount being offered.

When evaluating a Doubt as to Collectibility Offer with Special Circumstances, the Internal Revenue Service will determine its reasonable collection potential and the taxpayer must then establish the circumstances forming the basis of the “special circumstances.” Factors similar to those listed above under Effective Tax Administration are those that can be used by a taxpayer to establish “special circumstances.”

Centralization

The local Offer Review Unit in Buffalo was one of the last in the country to be disbanded and that occurred in the summer of 2006. Thus, most Offers in Compromise are submitted and worked through a Central Processing Unit with the Unit location depending on where the taxpayer resides. If an Offer in Compromise is submitted based solely on Doubt as to Liability, after processing, the Offer is forwarded to the Exam Function. The majority of offers submitted are Doubt as to Collectibility and are worked at a Centralized Processing Unit.

Twenty Percent Deposit

On May 17, 2006, then President Bush signed into law the Tax Increase Prevention and Reconciliation Act of 2005. This legislation added the requirement that a taxpayer make a 20 percent non-refundable deposit with the submission of any Offer in Compromise based on Doubt as to Collectibility that will be paid in installments of five or less. This deposit is due in addition to the $150 processing fee.

If a taxpayer submits an Offer in Compromise which will be paid in periodic installments of six or more, instead of a 20 percent deposit, the taxpayer must begin making the periodic installment payments with the submission of the Offer and continue making the installment payments throughout the processing and evaluation of the Offer in Compromise.

Since the 20 percent deposit is considered a mandatory payment, the taxpayer can designate the application of the 20 percent lump sum deposit or installment payments. The designation is not relevant if the Offer is ultimately accepted, but if the Offer is not ultimately accepted, the designation could be useful to the taxpayer. For example, if the type of tax in issue is an income tax liability which includes years that could be dischargeable in a bankruptcy and years that could not be dischargeable in a bankruptcy, the taxpayer should consider designating the payment to the priority taxes that would not be discharged.

Alternatives

In some circumstances, an Offer in Compromise can be a fabulous resolution for a client. However, the Offer in Compromise program has become more difficult as the rules are applied to certain taxpayers. The 20 percent non-refundable-down payment is a problem for some taxpayers, especially those submitting behalf Offers as some taxpayers are unwilling or unable to make a large non-refundable deposit. Additionally, although it does not apply in every circumstance, the retirement of debt rule does affect the acceptability of some Offers. For those taxpayers who are unable to submit and negotiate a successful Offer in Compromise, alternatives for resolving their outstanding tax liabilities include partial payment installment payment agreements, full pay installment payment agreements, non-collectibility status and, in some circumstances, bankruptcy. The appropriate “Plan B” to be applied to a case obviously depends on the particular circumstances of each and every particular taxpayer. Although a detailed discussion of the various alternatives is outside of the scope of this outline, recommendation of the most appropriate alternative is the job of the competent tax professional.
Recent Surrogate’s Court Decisions and Other Estate Planning Matters

This month we want to discuss some recent legislative changes that significantly impact all practitioners.

Major Power of Attorney Changes

The New York Legislature recently enacted a statute that dramatically changes New York General Obligations Law § 5-1501, the law detailing requirements for a Power of Attorney. After a “false start” in March, the law took effect September 1, 2009. Because the law enacts very major changes to all powers of attorney, whether you use the statutory short form or not, practitioners should take time to review and understand the new requirements.

Under the new law, a Power of Attorney is only valid if both the principal and the agent sign and date the document and have their acknowledgments taken by notaries. Comparatively, the old law required only the principal to sign the form – the agent’s signature was not required.

While the agent does not need to be present when the principal signs the Powers of Attorney, the Power does not become effective until the agent’s signature and acknowledgment are on the document. If two or more agents are designated to act together, the Power of Attorney will be effective only when all designated agents sign the Power of Attorney and have notaries public take their acknowledgments. If the principal names a successor attorney-in-fact, then the successor agent’s appointment does not become effective until the primary agent becomes unable to serve and the successor agent has signed the Power of Attorney and had his signature notarized.

This could raise some serious problems if the principal is incompetent and the primary agent is unable to serve; there will be a gap in coverage if the successor agent did not sign the Power of Attorney prior to the primary agent being unable to serve. Finally, the way the new law is written, the successor agent takes over when “every initial or predecessor agent resigns, dies, becomes incapacitated, is not qualified to serve or declines to serve.” Unfortunately the new law does not state who will determine if the initial or predecessor agent is incapacitated.

The new statute also affects the agent’s power to make gifts on behalf of the principal. The former law permitted the principal to insert a gift provision in the Power of Attorney, or merely initial a box on the Power of Attorney, and have the gift executed by the agent. The new law requires that the principal and the agent sign and date the Power of Attorney used by the IRS in tax matters, form 2848, is required, it should be noted that the New York State Department of Taxation has modified its form to meet the new Power of Attorney requirements.

Some other noteworthy changes under the new Power of Attorney statute include a higher standard for capacity for both the principal and the agent. The new law requires the principal to authorize the agent to receive “reasonable” compensation, otherwise no compensation will be allowable, however, the law does not provide any guidance as to what constitutes “reasonable” compensation. The principal may also designate a “monitor” to oversee the agent’s actions, albeit, the monitor has no fiduciary duty to the principal.

Revisions to Revocatory Effect of Divorce Statute

In another significant legislative change, EPTL, § 5-14 was replaced with a new § 5-14. The legislature expanded the law dealing with the revocatory effect of divorce upon testamentary dispositions to a former spouse to include dispositions to, or for the benefit of, a former spouse by will, revocable trust, or beneficiary designation in a life insurance policy. In the new statute, which was signed into law in 2008, provides that divorce revokes the nomination of a former spouse as a beneficiary in a retirement plan. In addition, the new statute, which was signed into law in 2008, provides that divorce revokes the former spouse’s interest in property held by the couple as joint tenants with rights of survivorship. Upon divorce, the property becomes a tenancy in common.

The provisions of the old law, treating the former spouse as if he or she had predeceased the testator for purposes of the will, is now expanded to the other documents mentioned above. Other New York statutes still provide that divorce revokes the nomination of a former spouse as a health care agent and the power of a former spouse to dispose of a decedent’s remains.

The new statute also permits a couple to opt-out of the new default rule. If a newly divorced couple still wishes to maintain a joint tenancy, or dispositions of property to one another in a will or life insurance policy, they may execute a form that states the divorce does not revoke such dispositions to a former spouse.

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death and taxes

by Peter J. & Jillian E. Brevorks
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If death takes place before a divorce is final, the new EPTL § 5-1.4 will not apply. Therefore, it makes sense when a client walks in the door for a divorce, to revise the will and have any beneficiary designations which can be changed without the spouse’s consent, such as life insurance, an IRA or other non-qualified retirement plans.

An important thing to note is that the new statute does not create a presumption of revocation for dispositions to family members of a former spouse. For instance, if the will left the estate to the spouse, or if she did not survive, to her children, divorce would cause the gift to the spouse to lapse, but it would not prevent the gift from passing to the ex-spouse’s children.

The new EPTL § 5-1.4, like the old law, also provides that if the former spouses marry one another again the dispositions, appointments, or nominations, which were revoked solely by reason of the statutory revocation will be revived.

The revised statute applies to cases where divorce occurs on or after July 7, 2008. In addition, the law applies to all cases where divorce or annulment occurred prior to the effective date, but the disposition of the decedent’s property took effect at death, and the death occurred after July 7, 2008.

A Complete Re-Write of the N.Y. Version of the Simultaneous Death Act

Effective July 21, 2009, New York has substantially adopted the revised version of the Uniform Simultaneous Death Act as EPTL 2-1.6

As you may recall, EPTL 2-1.6 provided that if there was not sufficient evidence to prove that two persons died otherwise than simultaneously, each was deemed to have survived for purposes of his own estate and for his beneficiary designations, such as life insurance. Joint property is a case where the imposition of the 120-hour requirement would cause a non-vested property interest or a power of appointment to be invalid under EPTL 9-1.1 (New York’s Rule Against Perpetuities); (4) a case where the application of the 120-hour requirement would lead to an unintended failure or duplication of a disposition; (5) the rule’s application leading to the vesting of an intestate estate to the State; or (6) a situation where a surviving spouse exercised the right of survivorship for 120 hours.

The new EPTL § 5-1.4 applies not only to the devolution of property under intestacy or by will, but also surviving under a governing instrument such as a trust. If survivorship for 120 hours cannot be proven, then the alternate beneficiary takes.

In the case of joint property, if survivorship for 120 hours cannot be proven, the property is still split between the two respective estates.

The Act provides that it will not apply to: (1) a governing instrument dealing with simultaneous death – like an existing will that directs who is deemed to survive in a common accident; (2) a governing instrument that does not require survival of an event, including death of another; (3) a situation where the imposition of the 120-hour requirement would cause a non-vested property interest or a power of appointment to be invalid under EPTL 9-1.1 (New York’s Rule Against Perpetuities); (4) a case where the application of the 120-hour requirement would lead to an unintended failure or duplication of a disposition; (5) the rule’s application leading to the vesting of an intestate estate to the State; or (6) a situation where a surviving spouse exercised the right of survivorship for 120 hours.

The coverage of the statute includes not only wills, trusts and deeds, but also insurance or annuity policies, bank accounts in trust form, stock Transfer On Death designations, pension, profit-sharing, retirement or similar benefit plans, and instruments creating a power of appointment.

Surprisingly, while the Uniform Act contains provisions insulating payors, bona fide purchasers and other third parties who may make payment in good faith, EPTL 2-1.6 does not contain any such protection for third parties. Therefore, it would appear that in order to protect themselves, banks, insurance companies, stock brokers, retirement plans and the like should not make payment to designated beneficiaries if five days have passed since the decedent died.

Small Estates Are Now $30,000

Effective January 1, 2009, the legislature expanded the definition of Small Estates. Section 1301 of the SCPA was amended to permit Voluntary Administration with respect to individuals who die with personal property worth $30,000 or less. Under this amendment, a small estate of $30,000, net of exempt property provided in EPTL 5-3.1, may be settled without the formality of court administration.

A bill that proposed increasing the threshold amount for a small estate from $30,000 to $100,000 was introduced during the spring. The bill was referred to the judiciary committee this summer. We will keep you updated if that change occurs.
How the Court System Protects Children Affected by Divorce, Separation or Other Child-Centered Litigation

By Susan L. Pollet, Counsel and Director
NYS Parent Education & Awareness Program

You do not have to know someone who is undergoing a separation, divorce or other child-centered litigation or experience it yourself to recognize that putting children in the middle of the adult conflict can be detrimental to their health and well-being.

In 2001, the former Chief Judge Judith Kaye, in her State of the Judiciary Address, announced an initiative to institutionalize parent education and awareness programs in New York, and created an advisory board to oversee this process. The Hon. Evelyn Fraze, a Supreme Court Justice in Rochester, serves as chair. Called the New York State Parent Education and Awareness Program, the program continues to enjoy the support of Chief Judge Jonathan Lippman and Chief Administrative Judge Ann Pfau.

What is the New York State Parent Education and Awareness Program ("PEAP")? It is a program designed to educate divorcing or separating parents about the impact of their breakup on their children. The primary goal is to teach parents ways they can reduce the stress of family changes and protect their children from the negative effects of ongoing parental conflict in order to foster and promote their children’s healthy adjustment and development.

What does the court system do? Following the guidelines developed by the Advisory Board, the Office of Court Administration certifies and monitors local providers of such services who wish to accept court-referred participants.

The program maintains a Web site at www.nycourts.gov/parented, which contains all of the guidelines and procedures for certification, along with the forms that the providers of the program must use.

There are currently 51 certified parent education providers in 62 counties offering classes in 100 locations. By Court Rule (July 24, 2006), Family Court Judges and Supreme Court Matrimonial Justices were empowered to order, in their discretion, parents of children under the age of 18 who are involved in custody, visitation, divorce, separation, annulment or child-support court actions or proceedings to attend PEAP-certified parent education programs. The Court Rule was subsequently revised (May 15, 2007) to clarify that judges cannot order parents to attend parent education where there is any history, or specific allegations or pleadings, of domestic violence or other abuse involving the parents or their children.

“Experience and research have shown that parent education does make a positive difference for children and their parents who are experiencing divorce or separation and it can help bring about a reduced need for court intervention.”

Parent Education Makes a Difference

This is just a brief overview of the current status of the New York State Parent Education and Awareness Program. Experience and research have shown that parent education does make a positive difference for children and their parents who are experiencing divorce or separation and it can help bring about a reduced need for court intervention. Currently, parent education is available in all 62 counties of New York. We are focusing on “getting the word out” about the certified programs so that more and more parents will utilize them.

If you have any suggestions about how we can accomplish this, please contact us by e-mail at nyparent-ed@courts.state.ny.us, toll-free at 888-809-2798, or by mail at the New York State Parent Education and Awareness Programs, 140 Grand Street, Suite 701, White Plains, New York 10601. Further information about parent education is available at www.nycourts.gov/parented. Lastly, please tell parents about this important program - it can make all the difference in the lives of children and parents in this state.
We lawyers are used to precise language and thoughts expressed with clarity and to be interpreted as such. Unfortunately, some of our clients hear only the parts they like and want to ignore the bad news.

I illustrate as any Englishman would with a news story about our weather.

In the springtime, the government meteorological office had been predicting a “BBQ” summer. However, as the jet stream moved southwards, what we ended up with was more than a little dampness in the air. In fact, it was less like the Shakespearian quote “that droppest as the gentle rain from heaven upon the place beneath” and more like precipitation which would leave Noah looking for his umbrella!

The meteorological office then issued an updated bulletin clarifying the statement. A BBQ summer was not guaranteed but had been a 65 percent probability, i.e. a 35 percent improbability. Thus newspapers and television heard only what they wanted to hear because during the recession and global financial meltdown, we all hoped the sun might shine. Well to prove that my cup is half full (rather than half empty), my new hosepipe remains in pristine condition, my grass is beautifully green and unparched, and the flowers in my garden are not wilting.

That leads me neatly onto a few words about another garden that I was pleased to wander round earlier in the summer.

You will see from the photograph that I am dressed even more smartly than usual. My wife has the extra special headgear. The picture was taken as we set off for Buckingham Palace, having been selected to attend one of the Queen’s famous Buckingham Palace garden parties. A small (and select – I would say that!) number of solicitors who sit on the Kent Law Society’s national body are allowed tickets to represent the Society at that occasion.

The very eagle-eyed amongst you may spot two badges on my left lapel. Firstly is the silver prancing horse, the symbol of Kent, presented to me as the immediate past president of Kent Law Society. Next to it is a small gold buffalo presented to me by Mayor Brown, in your great City Hall on the occasion of the Kent Law Society visit to the Bar Association of Erie County in November 2006.

Such regalia was of course understated – especially compared to some of the regalia worn by the mayors of some of our great cities. Much of that bling was so vast it would have embarrassed a gangsta rapper!

I had considered a conversation with one of the royals – perhaps the Queen’s spouse, the Duke of Edinburgh, not known for his political correctness. I thought the conversation might go something like this:

Smithers: “Your Royal Highness, what a pleasure to meet you!”
D of E: “What’s that on your lapel? Is it a bull?
Smithers: “No, sir, I am a lawyer. Bull is what I speak. That’s a buffalo!”
D of E: “What is it doing next to that horse?”
Smithers: Well, sir, the juxtaposition is perhaps unfortunate but it is to demonstrate the alliance between two great legal organizations.
D of E: “Blah blah blah…”

In the end, the Queen and Duke of Edinburgh smiled and nodded in our direction. I was only able to engage in meaningful conversation with the Queen’s youngest son, Prince Edward, Earl of Wessex. He did not express too much interest in my badges but I was able to tell him how important lawyers were for the economy. In fact, I recently learned that there are more lawyers in England and Wales than men in the British Army. He took that to mean that there were far too many lawyers – which was not my point at all – but all was not lost as he immediately turned his attention to my wife’s hat!

In my last column, I mentioned that one of my aims during my year of presidency of Kent Law Society had to be to raise its profile and to keep it there. Well, having been to Buckingham Palace to see the Queen, I wonder where I can go next with that? I have a feeling that there is a chap on Pennsylvania Avenue who might be interested. Perhaps I can get him to invite me for a beer? Like him, I am partial to a Bud Light…
Millard Fillmore and Grover Cleveland: Buffalo’s Lawyer-Presidents

By Norman Gross

With his historic election to the White House, Barack Obama became the 44th president, the first African American to hold America’s highest office. Two of these chief executives — each of whom could be described as a “lawyer’s lawyer” — had strong Buffalo connections. This article provides some legal insights about them and America’s other lawyer-presidents.

Millard Fillmore

Born in Cayuga County to a tenant farmer, the largely self-taught Fillmore studied law with county judge Walter Wood and the Buffalo firm of Rice and Clay. Following his admission to the bar in 1823, Fillmore began his 25 years of law practice in East Aurora before moving to the boomtown that was Buffalo of 1830. There, he founded a prestigious law firm with Nathan Hall and Solomon Haven that handled, according to biographer Gilbert Smith, “most of the area’s important cases.” Like many lawyers of the day, the law partners were politicians as well, all elected to high public office. During those early years, Fillmore also helped write the charter incorporating Buffalo and later helped found the University of Buffalo.

The quest for land, prefered tax breaks, harbor rights and other business licenses and advantages brought much business to Fillmore’s firm. And though the wreckage left by the panic of 1837 provided the firm with even more clientele — as out-of-state creditors sought their counsel and assistance — Fillmore rued this development. “Lawyers may perhaps make money in [hard economic] times,” he said, “but to them they are unpleasant when they see the ruin of business men from whom they derive their patronage.”

Though Fillmore’s practice focused primarily on business dealings, he also handled other cases of note, including representing accused fugitive slaves and defending a mudslipman accused of shooting at the publisher of the Buffalo Commercial Advertiser. Fillmore also helped write the 1847 charter incorporating Buffalo and assisted with its incorporation.

Grover Cleveland

Born in Caldwell, New Jersey, young Grover was on his way to Cleveland to pursue the study of law when he stopped near Buffalo to visit his uncle, who encouraged him to remain there. He did so, studying law at the firm of Rogers, Bowen and Rogers, whose predecessor firm had included Millard Fillmore. After passing the bar in 1859, he remained with the firm until he became assistant district attorney of Erie County in 1863. There, he earned a reputation for “legal talent and probity,” drawing up “most of the indictments and trying over half the cases personally.”

Cleveland then formed a series of law partnerships, during the first of which he handled several notable cases. In 1866, he successfully defended Irish nationalists tried for organizing an ill-fated invasion of Canada and he later defended a local newspaper against libel charges brought by a prominent businessman. As a partner in subsequent firms, he helped secure the largest jury award ($240,000) in western New York and counted Standard Oil and other major companies among his firm’s clientele. “It was his invariable rule to master every detail of any legal matter,” said fellow Buffalo attorney Philip Wickler.

Interestingly, in between his presidencies, Cleveland was counsel in the 1891 Supreme Court case of Burke v. New Orleans, an appearance most notable because the Court included several of his former law partners — Chief Justice Melville Fuller and Associate Justice Louis Lamar. Though both declined to resign themselves and ultimately supported the former president’s position, Cleveland lost the case for his clients, who were seeking payment for drainage warrants from the city of New Orleans.

Supreme Court Advocates

Cleveland was one of eight lawyer-presidents who argued cases before the U.S. Supreme Court. John Quincy Adams was the first to do so, appearing in five cases, two of which were notable decisions. Adams represented the respondent in the 1810 decision of Fletcher v. Peck, the first time the Court declared a state statute unconstitutional. Thirty years later, he helped defend the Amistad captives in their case before the Court. The saga, made famous by Steven Spielberg’s recent rendition, concluded with the Supreme Court ordering their release, ruling the captive free men who had been abducted and sold into slavery.

Interestlingly, President James Monroe nominated Adams for a high court seat in 1810 and the Senate confirmed the selection, all while Adams was serving as minister to Russia. Upon learning of the appointment, Adams declared, “I am … too much of a partisan to be a judge.”

James Polk and Abraham Lincoln each argued a single case before the Court, and James Garfield appeared in a dozen such cases, with his very first legal case the landmark 1866 decision in Ex parte Milligan. The person who defeated Grover Cleveland in the presidential election of 1888 — Benjamin Harrison — argued 15 cases before the high court, and Harrison’s Solicitor General, William Howard Taft, argued several dozen cases. The most recent lawyer-president to appear there was Richard Nixon, who argued the high-profile case of Time v. Hill in 1969.

Lawyer Lincoln

On this 200th anniversary of Abraham Lincoln’s birth, it seems appropriate to include a brief reference to his substantial 25-year legal career. It involved over 5,100 cases, including hundreds of appearances before the Illinois Supreme Court and one before the U.S. Supreme Court. Following his early days as a struggling lawyer in 1837, Lincoln’s legal reputation steadily grew to the point that he was representing railroads

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Photos: Courtesy of the San Antonio Art League and Museum and the Buffalo and Erie County Historical Society
Buffalo’s Lawyer-Presidents continued from page 21

Lincoln’s legal practice in many ways reflected his personality and character. William Herndon offered this description of his law partner’s approach to legal practice: “He had a keen sense of justice, and struggled for it, throwing aside forms, methods, and rules, until it appeared pure as a ray of light flashing through a fog-bank.” Others, including Judge David Davis, Lincoln’s riding companion on Illinois’ eighth judicial circuit and later his appointee to the U.S. Supreme Court, indicated that “The framework of his mental and moral being was honesty, and a wrong case was poorly defended by him.”

Perhaps more than any other lawyer-president, Lincoln carried his legal background into his presidential administration. For example, his cabinet appointments were mainly lawyers and when he sought their opinions, it often reminded one of a law firm partner seeking legal briefs from his associates. Moreover, the most notable public document of his presidency, the Emancipation Proclamation, was so legalistically crafted that one historian derided it as having “all the moral grandeur of a bill of lading.” Indeed, Lincoln’s concerns about Constitutional challenges to the proclamation led him to draft a precise, legalistic document that, though lacking “moral grandeur,” delivered a historic blow to the institution of slavery in the United States and led to passage of the Thirteenth Amendment banning slavery and involuntary servitude.

Norman Gross was founding director of the American Bar Association’s Museum of Law in Chicago, where he developed an exhibit on America’s Lawyer-Presidents and edited the original companion book. He previously served as the ABA’s Director of Entrepreneurial Projects and headed its Division for Public Education. He is currently a consultant living in Arizona.

Domestic Violence is NEVER Okay.

Domestic abuse doesn’t discriminate. It happens within all age ranges, ethnic backgrounds, and financial levels. If it happens once, it will happen again. The abuse may occur during a relationship, while a couple is breaking up, or after a relationship has ended.

Despite what many people believe, domestic violence is not due to an abuser’s temporary loss of control over his or her behavior. In fact, violence is a deliberate choice made by the abuser in order to take control of a spouse or partner.

Look What You Made Me Do! In spite of the abuser’s efforts to “blame the victim,” domestic violence is NEVER your fault. If you or a loved one are suffering, help is just a phone call away. Please call 852-1777 in complete confidence today to be referred to a colleague who can help.

Don’t Suffer in Silence.
Let Us Help You Find Your Voice.
Law Line Educates Public on Legal Issues

Since 1997, The Law Line has engaged the minds of thoughtful western New Yorkers who tune in as WNEZ-AM (970) at 10:00 on Saturday mornings. Host Mike Desmond talks to lawyers and judges from our legal community on wide-ranging topics related to the law. The program provides a valuable public service to lawyers and judges from our legal community.

We appreciate the time that the following members of our Association have taken to educate the public about legal matters by volunteering their time to appear on The Law Line.

Hon. Robert T. Russell
Veterans Treatment Court

Paul D. Pearson
Alternative Dispute Resolution: Mediation and Collaborative Law

Jennifer L. Fay and Amanda A. Greens
Auto & Homeowner’s Insurance

Mary Moorman Penn and Mark F. Steiner
What to Do When Injured at Work

The Law Line is underwritten by the Erie County Bar Foundation and the Lawyer Referral and Information Service of the EBA/C. If you would like to appear as a guest on the program, please contact Maureen Gorski at 852-3687 or by e-mail at mgorski@eriebar.org.

In this context, it is helpful to turn to the example of Saint Thomas More, who distin-
guished himself by his constant fidelity to legitimate authority and institutions precisely in his intention to serve not power but the supreme ideal of justice. His life teaches us that government is above all an exercise of virtue. Unwaveringly in this rigorous moral stance, this English statesman placed his own public activity at the service of the person, especially if that person was weak or poor; he dealt with social controversies with a superb sense of fairness, he was vigorously committed to favouring and defending the family, he supported the all-around education of the young.

What enlightened his conscience was the sense that man cannot be sinned from God, nor politics from morality. The life of St. Thomas More clearly illustrates a fundamental truth of political ethics. “Whenever men or women heard the call of truth, their conscience then guides their actions reliably towards good.” This is truly a simple concept to be grasped, but I fear that our culture of today with all the technological advances, has created far too many barriers that interfere with our ability to hear that call. We have been so obsessed with speed in the world of communication by our cell phones, e-mail, texting, twittering and tweeting that I believe we have substantially abandoned what I call contemplative time in our daily lives – contemplation in the sense of standing back from our experiences of daily life, thinking them over and considering their implications in a fairly orderly way.

I would now like to present to you my own initiative on an issue of serious social concern that we as judges, lawyers and representatives of government must address and work toward solving.

In 1980, there were approximately 40,000 inmates in American jails and prisons for drug crimes. In 2008, there were almost 500,000 such inmates. The issue of illegal drugs and long prison sentences has been the subject of ongoing debate for a number of years, and I have no intention of delving into that issue at this time. Rather, I am referencing an issue, that in essence, was long ago addressed by St. Thomas More in his book Utopia through his literary creation of what has been described by some as the ideal Christian humanist, to which Raphael Hythlodaeus.

Hythlodaeus engages in a debate with a “layman” learned in the law” about the concept of “strict justice” which was then dealt out to thieves, namely, execution. Hythlodaeus provides that this manner of punishing thieves goes beyond justice and is not for the public good, stating that “it is too harsh a penalty for theft and yet is not a sufficient deterrent because no penalty that can be devised is sufficient to refrain from acts of robbery those who have no other means of getting a livelihood. In this respect, such society resembles bad schoolmasters, who would rather beat than teach their scholars. It ordains grievous and terrible punishments for a third when it would have been much better to provide some means of getting a living.”

In what he describes as his “Harangue.” Hythlodaeus further responds to the pontifications of the lawyer by stating that “assuredly, unless you remedy these evils, it is useless for you to boast of the justice you execute in the punishment of theft. Such justice is more showy than really just or beneficial. When you allow your youths to be badly brought up and their characters, even from early years, to become more and more corrupt, to be punished; of course, when as grown-up men, they commit the crimes which from boyhood, they have shown every prospect of committing, what else, I ask, do you do but first create thieves and then become the very agents of their punishment.”

By analogy, we have a similar problem in addressing illegal drug trafficking and its impact on the youth of our society. Right here in our very own city we see young people shooting each other on an almost daily basis over issues of turf and drug trafficking. Young people who have not obtained or been provided the benefits that a good education can provide, young people who cannot work in gainful employment because there are no jobs to be had or because they lack the necessary skills to fill those few jobs that are available. As the philosopher Plutarch stated: “The very spring and root of honesty and virtue lie in good education.”

I submit to you that we have a moral obligation to make our voices heard so as to find a remedy by clear political decisions that will enable these young people to obtain quality educations and remain in school and provide them with the necessary tools to obtain and retain gainful employment. Such a remedy will ultimately reduce our prison populations. Thus, to me, is a call of truth that our consciences can no longer ignore.

In conclusion, I leave you with this contemplative prayer which paraphrases the substantive content of Psalm 15, the Psalm of David:

The one who does justice will live in the presence of the Lord.

Thank you.
Contributions to the Erie County Bar Foundation provide an excellent vehicle for recognizing and honoring members of our profession. Memorial gifts to the Foundation become a lasting tribute to the entire legal profession, as funds are used exclusively to assist attorneys and promote understanding of our legal system.

The Foundation gratefully acknowledges the following contributions:

In Gratitude to the Erie Institute of Law for its Southern Tier CLE Initiative:
Warren M. Emerson

In Honor of David Stiller’s quick recovery:
Melvyn L. Hurwitz

In Memory of Robert C. Schaus (Father of Richard and Barbara Schaus):
Diane F. Bosse
Leo M. Lynett, Jr.

In Memory of Noreen Peradotto (Mother of Hon. Erin M. Peradotto):
Diane F. Bosse
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Jeffrey Freedman & Barbara Hamilton

In Memory of Concetta Lamantia (Mother of Stephen Lamantia):
Maryann Saccomando Freedman

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In Memory of Mary Good:
Diane F. Bosse

In Memory of Deborah Sorbini:
Patricia Pance

In Memory of Hon. David J. Mahoney:
Hon. Donna M. Siwek & Timothy G. McEvoy

Are You An Attorney Struggling With Depression?

If so, you’re definitely not alone. A recent Johns Hopkins study of 108 occupations found that lawyers topped the list of those who suffered from depression. Attorneys were found to suffer from depression at a rate of four times that of the general population.

Depression is a treatable illness and the right combination of medications and therapies can significantly improve the quality of life for those who suffer from it.

Help and support are just a phone call away. The Lawyers with Depression Support Group meets monthly to share stories and fellowship. The group meets every other Friday (except holidays). See the calendar on the back page for meeting dates. Meetings are held at Bar Headquarters, 438 Main Street, Sixth Floor, at 12:30 pm and lunch is provided. There is no need to pre-register.

If you or a colleague are struggling with depression, there is no need to suffer in silence. For further information, visit www.lawyerswithdepression.com or contact Kelly Bainbridge at 628-4892. All calls are strictly confidential. We invite you to join us and share your story.

Hoyt Lake by Glenn Edward Murray
The Bar Association of Erie County

and

Monroe County Bar Association

cordially invite you to attend the

Annual Western District of New York
Federal Court Dinner

Wednesday, October 21, 2009
Terry Hills – Batavia, New York
5122 Clinton Street Road (go to www.terryhills.com for directions)

Cash Bar 5:30 p.m. – Dinner 7:00 p.m.
$40.00 per person

Reservation deadline is Wednesday, October 14, 2009.
Refunds will not be made after the deadline date.

The Bar Association of Erie County and Monroe County Bar Association
gratefully acknowledge Counsel Press and The Daily Record
for their generous support of this event.

Reservation Form

Annual Western District of New York
Federal Court Dinner
October 21, 2009 – Terry Hills, Batavia

Please reserve ______ place(s) at $40.00 each.
Provide additional names of attendees on separate sheet
and return with payment.

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Please make check payable to the Bar Association of Erie
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Bar Association of Erie County
438 Main Street, Sixth Floor
Buffalo, New York 14202
Attn: Sharlene A. Hall

Tel: No. 716-852-8687
Fax No. 716-852-7641
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<tr>
<th>Date/Time/Location</th>
<th>Topic</th>
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<tr>
<td>Wednesday, October 7, 2009 1:00 p.m. - 2:00 p.m. 438 Main St. Buffalo, NY</td>
<td>Avoiding the Dreaded Letter from the Grievance Committee - A Primer for the Matrimonial Attorney (Noonday)</td>
<td>1.0 credit</td>
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<tr>
<td>Wednesday, October 14, 2009 1:00 p.m. - 2:00 p.m. 438 Main St. Buffalo, NY</td>
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<td>Wednesday, October 21, 2009 1:00 p.m. - 2:00 p.m. 438 Main St. Buffalo, NY</td>
<td>Overview of Medicare and Its Impact on Personal Injury Litigation (Noonday)</td>
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<td>Friday, October 23, 2009 TBA Hyatt Regency Buffalo Two Fountain Plaza Buffalo, NY</td>
<td>Planning Ahead (Save the Date) (Seminar)</td>
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Technology. At its best, it helps us to process information more efficiently and effectively. But the rapid-fire changes in the way we communicate can easily become overwhelming. If the Information Age sometimes makes you feel like you’re drowning in a sea of confusion, this Computer and Technology Training program was developed especially for you.

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COMPUTER & TECHNOLOGY TRAINING
REGISTRATION FORM

12:15 p.m. – 1:30 p.m. (noon registration)
D4 Tech Center
350 Main Street, Suite 1650
Buffalo, NY

[No food or beverages allowed in Tech Center]

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Mail or fax to: Eric Institute of Law • 438 Main Street, Sixth Floor; Buffalo, New York 14202
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Computer Classes are continually offered – if these don’t fit your schedule. Check with www.eriebar.org for upcoming programs.
With winter right around the corner – can’t you already feel that frigid wind whipping you down Court Street?

Isn’t it nice to know that your balcony stateroom aboard the Royal Caribbean is waiting? Rooms have now been reserved for BAEC members who want to escape Buffalo’s elements in February 2010 and head for warmer climates.

This year, there are two cruise options available. Members can choose to spend seven days in the southern Caribbean, leaving from San Juan, or 11 days in the Caribbean and Panama Canal, leaving from Miami.

Plan now to leave Buffalo’s blustery blizzard winter behind and come cruise the Southern Caribbean with us! If you have been considering a much-needed escape with your friends from the bar, don’t delay! The final deadline for reservations is rapidly approaching! For full details or to book your passage, call Ann Blask at Visions Travel – 657-1455 – today.

**Plan now to leave Buffalo’s blustery blizzard winter behind and come cruise the Southern Caribbean with us!**