



## Review of Family Law

by Michael Dikman and David S. Dikman



By far, the most significant change in our Family Law this year is legislative, rather than decisional. And as most, if not all of the readers of this review know, it is the "new" maintenance Law.

The last review we wrote, concerning this topic, was in 2010. That was when the maintenance statute was first changed to include a formula-based set up, similar to the Child Support Standards Act (CSSA). But in all candor, the law was so flawed and controversial that although it virtually "had" to pass, in order to get the "powers that be" to pass the much desired "No Fault" law, it was made applicable to only temporary maintenance applications. At that time the New York State Law Revision Commission was directed to:



1. Review and assess the economic consequences of divorce on parties;
2. Review the maintenance laws and their administration to determine their impact on post marital economic disparities and the laws' effectiveness in achieving the state's goals; and
3. Recommend legislation deemed necessary to achieve those goals.

A preliminary report to the Legislature & Governor was required no later than 9 months from the effective date and a final report was to be made by December 31, 2011. These dates were regularly

*Continued on page 8*

### Queens District Attorney Richard A. Brown Honors Queens County Women's Bar Association President Lourdes M. Ventura With the 10th Annual Hispanic Heritage Award

Queens District Attorney Richard A. Brown today announced that Lourdes M. Ventura has been named the recipient of the District Attorney's 2015 Hispanic Heritage Award for her dedication to the Queens community, her outstanding accomplishments and her tireless leadership as the first Latina president of the Queens County Women's Bar Association.

District Attorney Brown said, "It is truly a pleasure and an honor to pay tribute to Lourdes M. Ventura. A talented and skilled lawyer, she started her professional career in my office as an assistant district attorney. Today she is a remarkable leader who has dedicated her professional life to helping others using the power and ethics of the law. Ms. Ventura is a trailblazer, who received a master's in social work and a law degree at the same time. Throughout her career she has used her knowledge in both fields to assist others while also paving new paths for Latinos and women alike."

In presenting the Hispanic Heritage Award at a reception late yesterday afternoon in his Kew Gardens office, District Attorney Brown said, "This year we pay tribute to our former colleague, Lourdes Ventura, who now serves as President of the Queens County Women's Bar Association."

"Queens County - the most diverse county in the nation - has a large and ever-growing Latino population. It is a population that enriches every aspect of life in our county and adds to its vibrancy and vitality," said District Attorney Brown. "We have this special gathering to honor those of Hispanic descent who exemplify the values of leadership, public service and commitment to excellence."



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# The Docket

Being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th Street, Jamaica, NY. Due to unforeseen events, please note that dates listed in this schedule are subject to change. More information and changes will be made available to members via written notice and brochures. Questions? Please call 718-291-4500.

## CLE Seminar & Event Listing

### December 2015

Friday, December 25 Christmas Day – Office Closed

### January 2016

Friday, January 1 New Year's Day - Office Closed  
Monday, January 18 Martin Luther King, Jr. Day - Office Closed

### February 2016

Monday, February 12 Lincoln's Birthday - Office Closed  
Monday, February 15 President's Day - Office Closed

### March 2016

Friday, March 25 Good Friday – Office Closed  
Wednesday, March 30 Judicial Relations Committee Seminar

### April 2016

Thursday, April 7 Sports & Entertainment Law Committee Meet & Greet  
Monday, April 11 Judiciary, Past Presidents and Golden Jubilarian Night  
Wednesday, April 20 Equitable Distribution Update

### May 2016

Thursday, May 5 Annual Dinner & Installation of Officers  
Monday, May 30 Memorial Day - Office Closed

## New Members

Eric L. Brown	Jennifer Lundgren
Jonelle Casey	Michael Mascetti
Brandon S. Clark	Marina Virginia Moreno
Leor Oved Edo	Enrique A. Ochoa
Jason Eisenfeld	Anthony J. Perrotto
Eviana Englert	Jessica Seminario
Sarah Filcher	Rachel R. Shamalov
Sha-Quia Francis	Carolyn Shields
Dale Frederick	Ruben Stepanian
Michael J. Golia	Marta Trojanowska
Joseph F. Keenan	Vitaliy Usten
David Ko	Feng Xia
Barbara Lucas	Wa Lucia Yang

## Notice of Nominating Committee Meetings

Please take notice that those members who wish to be considered for nomination as Officers or Members of the Board of Managers of the Queens County Bar Association should submit written requests and resumes highlighting your activities in the Association prior to January 15, 2016.

Tentative meetings pursuant to the by-laws have been scheduled by the Nominating Committee on January 20, 2016 and finally on January 27, 2016. Said meetings are scheduled for 5:00 P.M. in the Board of Managers Room - in the Headquarters Building, 90-35 148th Street, Jamaica, N.Y.

At those meetings you may present the names of the persons whom you desire to have considered by the Nominating Committee for nomination to offices to be filled at the Annual Meeting. Hearings will be held at those times for that purpose pursuant to the by-laws.

**Hilary Gingold**  
Secretary

Please submit your requests in writing to the attention of the:

**Nominating Committee**  
**Queens County Bar Association**  
**90-35 148 Street**  
**Jamaica, N.Y. 11435**

The Annual Election of Officers and Managers will be held on March 4, 2016. The newly elected Officers and Managers will assume their duties on June 1, 2016.

Dated: December 4, 2015

## 2015-2016 Officers and Board of Managers of the Queens County Bar Association

President - Paul E. Kerson  
President-Elect - Gregory J. Brown  
Vice President - Gregory J. Newman  
Secretary - Hilary Gingold  
Treasurer - Richard H. Lazarus

### Class of 2016

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Frank Bruno, Jr.  
Marie-Eleana First  
Charles A. Giudice  
Joseph Risi

### Class of 2017

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Adam M. Orlow  
Paula Pavlides  
Lourdes M. Ventura  
Clifford M. Welden

### Class of 2018

Karina E. Alomar  
Joseph Carola III  
Deborah M. Garibaldi  
Jeffrey D. Lebowitz  
Michael Serres

**Arthur N. Terranova . . . Executive Director**  
**Queens Bar Bulletin**  
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### Charles A. Guidice

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# Law School “Debt Crisis” Finally Noticed By Media

by Charles A. Giudice

Last month, it came to the attention of The New York Times that there was a “debt crisis” in American law schools. (i)

Specifically, the nation's paper of record noticed that students of a for-profit law school were graduating with an average debt load of \$163,000, but unable to practice law because they could not pass the bar exam. The graduates were then unable to repay their loans. When they defaulted, the federal government, and by extension the taxpayers, were left with the bill while the school faced no consequences for failing to prepare its students for the rigors of the bar exam and the practice of law. In its editorial, The Times rightly pronounced this a scam. (ii)

To its credit, the Times did not stop there. “A majority of American law schools, which have nonprofit status, are increasingly engaging in such behavior, and in the process threatening the future of legal education.” (iii)

Indeed, the drop in law school applications, as well as the dismal bar exam pass rates of the last few years has been extensively covered. The working hypothesis is that, faced with declining application rates, law schools have lowered their standards and accepted lesser qualified students so as to maintain their revenues and enrollments. (v)

The Times places blame for this on the availability of federal student loan funding caused by the extension of direct federal loans. They point out that since 2006, a graduate student has been able to borrow the full amount of tuition directly from the federal government. They link this development to the escalating tuition charged by law schools, and their continuing to flood the market with graduates unable to find work even after passing the bar exam. (vi) This is a flawed analysis.

Before 2006, graduate students were limited to \$18,500 in federal loans. In 2003, when I began attending law school, the annual tuition was more than that, and living expenses were not

taken into account.

Graduate students in that era took private student loans to bridge the gap between tuition, living expenses, and what was covered by financial aid, scholarships and federal loans. In my time at law school, the tuition inexplicably rose every year before 2006. I believe this to have been true at other law schools as well. Clearly, these tuition rises were not attributable to a change in law that had yet to take place.

Moreover, one proposal from the Times – namely capping the amount of loans available to students in an effort to drive tuition down (vii) – will clearly not work. I respectfully suggest that the governments charged with regulating these allegedly not-for-profit institutions actually scrutinize the finances of these schools or, dare I say, regulate their conduct.

If only there were some entity, independent of government control, impervious to company talking points, whose job it was to inform the public at large of events and trends affecting them as they took place. Forewarned is forearmed, after all. A neutral arbiter, a tribune with national reach, a means by which citizens could be informed and demand solutions to emerging problems before they grow to crisis proportions ...

Instead, the crisis has been metastasizing like an end-stage malignant tumor for more than a decade. Student loans are pernicious. They cannot be discharged in bankruptcy. They cannot be refinanced like a mortgage can be when rates go down. They remain with you even if you are unable to find work. Retirees and the disabled have seen their federal benefit payments, which are normally exempt from collection, garnished to satisfy the outstanding student loans because, like a tax obligation or any other payment due the federal government, a court order is not necessary to seize income.

Private student loans combine all the worst features of federal student loans with even fewer rights and protections for the borrowers. After ten years of working in either government or the not-for-profit sector, direct federal student loans may be discharged. While in repayment, direct federal student loans may qualify for income-based repayment plans, and borrowers are entitled to economic hardship deferments. None of these are available for private student loans.

While there are many different paths to hell, the bottom line is that to become a lawyer today likely means saddling oneself with more than \$100,000 in student loans for the graduate degree. This figure holds true for the elite schools as well as the middling and lowest-ranked. This on top of any debt carried over from college, and any debt incurred while preparing for the bar exam and attempting to find work.

When the recession hit, large firms cut their hiring. Federal budget sequestration closed off another traditional source of jobs. The lack of funding trickled down to state and local governments. People who might have been ready to move upward and onward stayed put. Senior employees delayed retirements.

Lawyers have the option to hang a shingle, of course. Market saturation and economic downturns, however, have made this an even riskier proposition with much less of a reward. According to Bloomberg, since 1988, the average income of solo practitioners, adjusted for inflation, has fallen from \$71,000 to \$49,000 – a drop of 38%. (viii)

So, even if a law graduate can pass the bar, he or she still has an uphill climb to find work in the legal profession. Tougher still is finding a job that allows repayment of the student loans without constantly worrying about money, a condition a graduate degree and entry into a profession was supposed to forestall. Toughest yet after all this is actually moving up the economic ladder – home ownership and all the trappings

of middle class stability that used to be taken for granted.

This clearly does not benefit the law graduates or the attorneys. As the practice of law comes with its own stressors, it seems clear that this is also detrimental to the profession itself.

But much like the law schools and student lenders, I've saved the worst for last. Even as the ranks of law school graduates swelled in inverse proportion to the jobs available to them, the numbers of people needing but not receiving legal services has grown even larger.

As the *Times* puts it:

*Perhaps the most galling part of this crisis is the misallocation of resources. Even as law schools are churning out unqualified graduates stuck under hopeless mountains of debt, millions of poor and lower-income Americans remain desperate for quality legal representation. [...]*

*If fewer federal dollars were streaming into law schools' coffers and more were directed to fund legal services organizations, the legal profession – and the American legal system as a whole – would be better for it. (ix)*

Amen. I commend the editorial board of Times for this piece. I agree wholeheartedly with their conclusions regarding the behavior of the allegedly not-for-profit law schools and the need for funding for civil legal services.

I can't help but think, however, that if the Times and their brethren in the fourth estate had been doing their jobs all along, this problem might not have grown into a crisis. I further think that if the fourth estate had done their jobs, many of the reasons why poor and low-income Americans need civil legal services – abuses in foreclosures and consumer collections, as well as the subprime lending and Wall Street speculation that crashed the economy – might also have been averted.

Maybe next time.

i Editorial, The Law School Debt Crisis, N.Y. TIMES, Oct. 25, 2015 at SR8.

ii Editorial, The Law School Debt Crisis, N.Y. TIMES, Oct. 25, 2015 at SR8

iii Editorial, The Law School Debt Crisis, N.Y. TIMES, Oct. 25, 2015 at SR8

iv See e.g. Andrew Denney, Most New York Law Schools See Decline in Bar Passage Rates, N.Y. L.J. November 9, 2015 at 1; Natalie Kitroeff, Are Lawyers Getting

v Dumber, BLOOMBERG BUSINESS, August 20, 2015 available at: <http://www.bloomberg.com/news/features/2015-08-20/are-lawyers-getting-dumber-ld>.

vi Editorial, The Law School Debt Crisis, N.Y. TIMES, Oct. 25, 2015 at SR8.

vii Editorial, The Law School Debt Crisis, N.Y. TIMES, Oct. 25, 2015 at SR8.

viii Natalie Kitroeff, Are Lawyers Getting Dumber, BLOOMBERG BUSINESS, August 20, 2015 available at: <http://www.bloomberg.com/news/features/2015-08-20/are-lawyers-getting-dumber-ld>.

ix Editorial, The Law School Debt Crisis, N.Y. TIMES, Oct. 25, 2015 at SR8.

## QUEENS COUNTY BAR ASSOCIATION SCHOLARSHIP FUND

Dear Member:

The Queens County Bar Association's Scholarship Fund was created in 2005 to offer financial assistance to law students who are residents of Queens County or who attend law school in Queens County.

The recipients of the QCBA Scholarship are carefully chosen based on academic achievement, community service and/or service to the Bar and financial need and is awarded at the Annual Dinner in May.

I know that times are hard, but I would hope that you could donate to this worthwhile purpose and your tax deductible donation (of any amount) will help to support and recognize a deserving law student(s). The assistance we provide to the future lawyers, many of whom are struggling with enormous debt, also enhances the good name of our Association.

As President of the Queens County Bar Association, I thank you for your support of this valuable community-based program.

Sincerely,  
Paul E. Kerson  
President

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## President's Message

# Defending Our Practices



This past August 2015 it came to the attention of your Queens County Bar Association Officers and Board of Managers that the New York State Department of Financial Services proposed draconian new regulations for New York State Title Insurance companies.

The new proposed Insurance Regulation 208 published at 11 NYCRR 227 would prohibit title insurance companies from print advertising, business

lunches and dinners, sports events, continued legal education programs and other forms of commercial speech. Further, these new regulations would prohibit lawyers and/or our clients from paying title closers.

Your Officers Executive Director, and Board of Managers took vigorous action. We called in Larry Litwack, President of Big Apple Abstract Corporation of Bayside, Queens County, New York to give testimony at our September meeting concerning the impact of proposed Insurance Regulation 208 on New York State title insurance companies. Larry was an especially wise choice for this task as he is a past President of the New York Land Title Association.

At our September meeting, Larry testified that new Insurance Regulation 208 would be devastating to title insurance companies and would greatly inhibit the efficient administration of real estate transactions throughout the State.

Your Officers and Board of Managers voted to direct your President to come up with the best legal arguments possible to try to defeat proposed Insurance Regulation 208 before it could become effective.

I spent considerable time researching the matter and preparing a draft. At our November meeting, the draft was circulated and your Officers and Board of Managers made certain corrections.

This past November 10, 2015 the final draft was read by your President, your Executive Director and Janice Ruiz, our Administrative Assistant for any further typographical errors. Finally, the letter was sent to the Superintendent of Financial Services, the Assistant Secretary for Financial Services and the entire Queens County delegation to State Senate and State Assembly.

I am very proud of our Officers, Executive Director, Board of Managers and staff. We all worked together to try to make certain that our tried and true method of conducting real estate transactions is preserved. Our method have given us a real estate market that is the envy of the world. To try to tamper with our system would be beyond foolish.

The letter on this subject sent by your Queens County Bar Association Officers, Executive Director and Board of Managers is reproduced on page 16. I hope you are as proud of our Association's work on this subject as I am.  
(Letter on page 16)

**Paul E. Kerson, President**

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## Ventura Honored Continued from p.1

Ms. Ventura is the daughter of Dominican immigrants and the oldest of three children. She grew up in Corona, Queens, but as a first-grader struggled in school. Even though she was born in New York City, she did not speak English. It wasn't long, however, before this young achiever was translating English to Spanish for her mother and others. At first she saw it as an obligation, but after a while there was a spark that generated a desire to be that person that others could depend on for help.

After four years investigating and prosecuting drug cases, economic fraud and various street crimes, Ms. Ventura moved on to join the Civil Rights Bureau of the New York State Attorney General's Office.

As an assistant attorney general, Ventura prosecuted cases involving discrimination in housing, education

and other areas where people of color were impacted in a negative and possibly illegal way.

Ms. Ventura is now a senior associate at Ahmuty, Demers & McManus. There she continues being involved in numerous civic and professional organizations. She is a past president of the Latino Lawyers Association and earlier this year became the first Latina president of the Queens County Women's Bar Association in its 84-year history.

National Hispanic Heritage Month began as a week-long celebration in 1968. The observance was expanded to a month-long celebration in 1988 (Sept. 15 - Oct. 15). During this month, America celebrates the traditions and culture of U.S. residents who trace their roots to Spain, Mexico and the Spanish-speaking nations of Central America, South America and the Caribbean. September 15 was chosen as the starting point for the celebration because it is the anniversary of independence of five

Latin American countries:

Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua. In addition, Mexico and Chile celebrate their independence days on September 16 and September 18, respectively.

Last year's Hispanic Heritage Award was given to the Metropolitan Latin American Law Student

Association (MetroLALSA) for its outstanding work bringing together the Latino student law communities from 13 different New York and New Jersey law schools. The previous year, the Hon. Carmen Beauchamp Ciparick, retired Senior Associate Judge of the New York State Court of Appeals, was honored for her distinguished judicial and legal career that has spanned more than four decades. Prior award recipients include: Joseph A. Zayas, Judge of the New York State Court of Claims, in 2012; Richard M. Gutierrez, the President of the Queens County Bar Association, in 2011;

Assistant District Attorney Mariela Palomino Herring, Chief of District Attorney Brown's Gang Violence and Hate Crimes Bureau, in 2010; Dr. Eduardo J. Martí, President of Queensborough Community College, in 2009; the Honorable Fernando Camacho,

Administrative Judge of the State Supreme Court, Queens County, Criminal Term, in 2008; New York State Assemblyman Jose R. Peralta, of the 39 Assembly District, in 2007; and the Latino Lawyers Association of Queens County received the inaugural Hispanic Heritage award in 2006.

# Noncompete Agreements: Part 1

By Richard H. Apat

**Editor's note: Because the first part in this series ran in 2012, we are reprinting part I to provide context for part II.**

The phone rings and your client tells you he has been served with a summons and complaint alleging he has violated a non-compete agreement he had with his former employer. Most employees unless they are at the higher levels of compensation will not seek private counsel to review these agreements before signing them. Unfortunately your client did not understand the implications of the agreement when signing it and did not consult counsel when starting a new job with a competing company or opening their own company.

Even agreements which seem clear and unambiguous can often be subject to varying interpretation based upon the industry involved, whether or not trade secrets are involved, whether confidential customer lists are really confidential and whether or not activity your client has engaged in was actually prohibited by the agreement.

More often than not, we see these agreements at the litigation stage when the facts have already transpired. In today's electronic age, transactions are often documented by e-mails and other forms of electronic media and communication.

Many of these cases are litigated in Federal District Court, however in both District Court as well as in State Court. Most of these agreements provide for injunctive relief if violated. *The requirements for a preliminary injunction are: 1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of equities in favor of the movant's position (see Family-*



*Friendly Media, Inc. v. Recorder Tel. Network*, 74 A.D.3d 738, 739, 903 N.Y.S.2d 80; *Glorious Temple Church of God in Christ v. Dean Holding Corp.*, 35 A.D.3d 806, 807, 828 N.Y.S.2d 442). "A party seeking the drastic remedy of a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts" (*Omakaze Sushi Rest., Inc. v. Ngan Kam Lee*, 57 A.D.3d 497, 497, 868 N.Y.S.2d 726). *Radiology Associates of Poughkeepsie, PLLC v. Drocea*, 87 A.D.3d 1121, 930 N.Y.S.2d 594, 2011

Another complicating factor in this litigation is that the employer often times makes the case personal and pursues the case beyond what they are entitled to just for the purpose of hurting the former employee who they feel has betrayed their trust. Given the fact that the employer usually has far superior resources and that this type of litigation has many forms of disclosure available, (notices to admit, notices for document production, interrogatory demands, bills of particular etc.) it is very easy for the employer to try and crush their opponent. Representing a client in this position, who is facing the stress of this litigation can be challenging. The client must know they are in good hands and reminded on a regular basis what to expect in these cases.

In future articles on this topic we will explore the law related to this area, practical suggestions and techniques for discovery, depositions, trial preparation and the actual trial.

Editor's Note: Richard H. Apat is a partner in the firm of Pearlman, Apat, Futterman, Sirotkin & Seinfeld, LLP, with offices in Kew Gardens, New York and Hicksville.

## Noncompete Agreements: Part 2

Non-compete cases are very fact specific. Whether the agreements have similar language or not, the underlying facts will determine how the case is decided. The Court will look at the industry, the work actually done and whether trade secrets or confidential information is involved. Other considerations include confidential customer lists and if areas of special proprietary or unique services were rendered.

Therefore, a close reading of the complaint is a must. Time spent with your client at the outset to understand what the company does, what they did and what they are accused of doing will go a long way towards evaluating the case. It must be determined if anything your client has done will ultimately be considered interfering with a valid business interest of the employer. This is time well spent and will give your client confidence that there is a logical approach to these cases and determining the merits of the case and what defenses are available in their specific case.

On a case I handled years ago the client, an economist, had a non-compete agreement with his employer and was accused of providing information to a client of the employer who was looking to hire him away. The information involved among other things an econometric model. The employer argued that these communications by the employee undermined the employer's ability to resell that particular analysis to this client in the future. The employer argued that the program was based on a unique economic algorithm that had been developed by my client, and the model was the property of the employer. The model predicted the rate at which commercial backed mortgages would fail in various locations across the country.

The client was very capable and did create sophisticated econometric models while employed with the company. For this reason, we were concerned that we were dealing with a trade secret, a unique formula and it would therefore be considered confidential/proprietary information. This is what the employer asserted during the litigation. The client insisted that this particular model was nothing more than a "Monte Carlo" simulation and was not proprietary. Needless to say, we were confused; what in the world is a Monte Carlo simulation!

Up to this point we thought Monte Carlo was a place in Monaco or an American made muscle car. We discovered that Monte Carlo is a computerized mathematical technique for predicting risk in a quantitative way. It has existed for many years and is taught in college level economic classes. It is a risk analysis simulation that provides a range of possible outcomes for a given question posed or course of action chosen.

Of course, before running into court to argue: "Judge, this is a simple Monte Carlo

simulation, it's been used by scientists since the creation of the atom bomb," (which apparently it was); we spoke to an economist and confirmed what our client was saying. After speaking to the independent economist he confirmed what our client had told us about Monte Carlo.

We were confident that this portion of the employer's complaint to the extent that they based it upon a trade secret or confidential information would be tough for the employer to prove. Thankfully with the testimony of our expert economist, we were proven correct at trial. If we had made a snap decision on this we would have been thinking complex econometric algorithm, this must be a proprietary trade secret.

Returning to the law, the Court of Appeals in *BDO Seidman v. Hirshberg* 93 N.Y.2d 382, 712 N.E.2d 1220, 690 N.Y.S.2d 854 (Ct. of Appls. 1999) continues to hold:

*New York has adopted this prevailing standard of reasonableness in determining the validity of employee agreements not to compete. "In this context a restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee" (Reed, Roberts Assocs. v. Strauman, 40 N.Y.2d 303, 307, 386 N.Y.S.2d 677, 353 N.E.2d 590)(Ct. of Appls. 1976).*

*In general, we have strictly applied the rule to limit enforcement of broad restraints on competition. Thus, in Reed, Roberts Assocs., supra, we limited the cognizable employer interests under the first prong of the common-law rule to the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary. (40 N.Y.2d, at 308, 386 N.Y.S.2d 677, 353 N.E.2d 590)(Ct. of Appls. 1976).*

The take home message is that working with generalities in the area of non-compete agreements can be dangerous. There are many factors that can be relevant in a particular non-compete case. Spending time with the client to understand what they do for a living and what they did for their employer which is the subject of the lawsuit is an absolute necessity. Attention to the details is crucial for the best analysis at the early stages of the case when your client needs it the most.

Editor's Note: Richard H. Apat is a partner in the firm of Rosado, Chechanover, Apat & Dudley, LLP, with offices in Jackson Heights, Hicksville and the Bronx.

## Review Family Law Continued...

extended, and the preliminary report surveyed the laws of many other states, but made no recommendations at all. The final report, dated May 15, 2013, did, however those recommendations were not all readily accepted. There was legislative disagreement, combined with pressures from various law and other interest groups and delay based upon legislators' concerns with what were deemed to be more significant topics.

If any one factor can be identified as having brought a "final maintenance" law into effect, it would be the work of Brooklyn Supreme Court Justice Jeffrey S. Sunshine, who organized a committee consisting of numerous interest groups and legal organizations, frequently in substantial disagreement on many of the provisions this law was to contain. With a great deal of work, and reported exceptional cooperation, agreements were reached and legislative leaders were ultimately convinced to act.

This new law, effecting maintenance decisions in Supreme Court and spousal support in the Family Court, passed the Assembly on June 15, 2015 (146 to 1) (A. 7645) and the Senate unanimously passed it on June 24, 2015 (S. 5678). The Governor signed it on September 25, 2015, which makes the changes relative to TEMPORARY MAINTENANCE effective in all actions commenced on and after October 26, 2015. All of the other provisions become law 120 days after the effective date, meaning they will only apply to those actions commenced on and after January 23, 2016. The provisions make it clear that this new law does not create any "change of circumstances" nor change the prior standard for modification of maintenance in surviving agreements (extreme financial hardship). Thus, none of its provisions will apply to any actions commenced or agreements signed before the effective dates.

The prior (2010) law, set forth a \$500,000 "cap" below which the court was required to use the guideline formula, unless the result was found to be "unjust or inappropriate" (with annual cost of living adjustments to that cap, most recently raising it to \$543,000). While the Law Revision Commission recommended that the caps for maintenance and child support be the same, the new law (and the result of much compromise) reduces the cap to \$175,000. Another major change (details below) was to recognize the difference between cases in which the maintenance payor was also paying

child support and those where that was not the case, and to set forth different guideline formulae for each type of case.

One other major change to be highlighted, before we begin a summary of all significant provisions, is the elimination of so called "enhanced earning capacity" (EEC) as a distributable asset, as has been the case since the 1985 Court of Appeals decision in *O'Brien v. O'Brien* (66 N.Y. 2d 576). The amendment to DRL § 236B (5) (d) (7) legislatively repeals the *O'Brien* decision and puts a long overdue end to the necessity, created not only by *O'Brien*, but also subsequent case law expanding and interpreting it, to evaluate and distribute, as intangible assets, enhanced earning capacity developed during the marriage, by reason of the receipt of licenses, degrees and in some cases celebrity goodwill and other career enhancement. Despite reams of criticisms in judicial decisions and legal publications, it took 30 years to get rid of this concept, which the vast majority of matrimonial lawyers and judges viewed as an abomination. Of note, however, is that direct and indirect contributions to the other's EEC is still a factor to be considered in connection with the equitable distribution of marital property.

In this article we mean only to acquaint the reader with the primary provisions of the 2015 maintenance law. As indicated, there is now a separate formula for cases where child support is paid by the payor and those where this is not a factor. In the former, maintenance has to be determined FIRST, since it will be an income deduction to the child support payor and added to the income of the maintenance payee in the computation of child support. In all cases, the starting point for computations will be the payor's income as defined and regularly computed under the CSSA (with the exception, of course, of the maintenance deduction). The exception is that for permanent maintenance purposes, the court can also add income from income producing property distributed or to be distributed. Also, in all cases the income cap is \$175,000 of the payor's income (not "combined income" as in the CSSA) - subject to adjustment every 2 years, commencing with January 1, 2016.

### FORMULA CALCULATIONS

In those cases, where both maintenance and child support obligations are imposed upon the payor, the guideline amount is calculated to be the LOWER

of two computations:

1. 20% of the payor's income up to the \$175,000 cap, less 25% of the payee's income.
2. 40% of the payor's income, up to said cap, plus the payee's income, less the payee's income.

There are 18 statutory factors set forth, regarding temporary maintenance, and 20 regarding permanent or post-divorce maintenance. Those same factors are used to determine additional support in connection with income above the cap and for determinations as to whether or not the guideline calculation is "unjust or inappropriate", requiring deviation.

To compute the temporary or permanent maintenance guideline amount, where the payor is not paying child support to the payee, the LOWER of the following two computations is used:

1. 30% of the payor's income up to the \$175,000 cap, less 20% of the payee's income.
2. 40% of the payor's income, up to said cap, plus the payee's income, less the payee's income.

In each case, the court must apply the guideline amount up to the "cap" unless it specifies, using the statutory factors, how much more is to be ordered, by reason of income above the cap, or how much more or less is to be ordered because the guideline is found to be unjust or inappropriate.

Where we speak about "permanent" or "post-divorce" maintenance, the law also applies to Family Court spousal support orders (with the one exception that Family Court awards are still non-durational, until a contrary agreement, death or a contrary matrimonial action order) Family Court can modify its

support orders upon a showing of a substantial change in circumstances (FCA § 412 (10)).

### DURATION PROVISIONS

This is brand new to our law: an advisory (only) range for support duration, depending upon the length of the marriage from the date of marriage to the commencement of the action.

1. From 0 - 15 years the range is: 15 - 30% of the duration.
2. More than 15 to 20 years it is: 30-40% of the duration.
3. For more than 20 years it is: 35-50% of the duration.

Doing the math, some hypotheticals based on the schedule are:

Length of marriage | Range of duration

3 years	.45 - .9 years
5 years	.75 - 1.5 years
10 years	1.5 - 3.0 years
13 years	1.9 - 3.9 years
16 years	4.8 - 6.4 years
20 years	6.0 - 8.0 years
23 years	8.05 - 11.5 years
25 years	8.75 - 12.5 years
28 years	9.8 - 14 years
30 years	10.5 - 15 years
35 years	12.25 - 17.5 years

The law makes clear that maintenance can still be awarded on a non-durational basis. The order is to terminate upon the death of either party, the valid or invalid remarriage of the payee or a modification order pursuant to DRL § 236 (B) (9) (b) or 248. A provision in this law (finally) makes § 248 read in a gender neutral fashion.

**Continued on page 9**



  
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This law continues the 2010 provisions, then new to our law, that temporary maintenance orders could be for a fixed duration: no later than the final judgment or death, as usual, but also the court now has discretion to limit the period further (e.g. a short term marriage with seemingly never-ending litigation)

#### ADDITIONAL NOTEWORTHY PROVISIONS

1. The Court is now to consider anticipated retirement assets, benefits and retirement eligibility ages, if ascertainable. If not ascertainable, the actual full or partial retirement of the payor, with a substantial diminution of income, shall be a basis for a maintenance modification.
2. Where there is a default or insufficient evidence, as was provided in the 2010 law, the award is to be made upon the greater of the needs of the payee or the prior standard of living, and may be modified upward upon a showing of newly discovered evidence.
3. In fixing temporary maintenance, the Court is now to consider and allocate, where appropriate, the parties' respective responsibilities for various family expenses during the pendency of the action. This will include discretion to make directions for who is to pay carrying charges on the marital residence, a factor which caused many problems under the old law.
4. As with the CSSA, nothing prevents parties from negotiating and executing their own agreements, deviating from the statutory scheme.
5. Where the Court is either going to deviate from the guideline amount for income at or below the cap (when found to be unjust or inappropriate), or elect to impact income above the cap, it must write a decision indicating what statutory factors were considered and the reasons for the decision, which cannot be waived by either party or counsel.
6. Case law is codified, to the extent that any temporary maintenance award shall not prejudice either party in the fixation of the permanent award after trial.
7. Some of the factors set forth for consideration by the court, most carried over from the 2010 law, but rarely considered before then, include:
  - a) The existence and duration of a pre-marital joint household or pre-divorce separate household.
  - b) Medical insurance costs or the loss of such insurance.
  - c) The care of children, step children, disabled adult children, elderly parents or in-laws, provided during the marriage, that inhibited or continues to inhibit a party's earning capacity.
  - d) The acts of one party that inhibit the other's earning capacity (e.g. domestic violence)
  - e) The need to pay for exceptional expenses for a child (e.g. schooling, day care and medical treatment).

Most of the other factors are the same or similar to prior law, including "such other" factors as may seem just and proper to the court

A separate law, also passed by the legislature in June and signed into law by the

Governor on October 26, 2015 (A. 7637 & S 5691) was to clarify the legislative intent to the effect that in computing child support in both Family and Supreme Court, any maintenance paid to the child support payee by written agreement or court order, is to be included in his or her income for child support computations and purposes.

The Family Law Committee presented a seminar on this new law, on September 16, 2015, after the law was passed in the legislature and pending expected signing by the Governor. Materials from that seminar are available from the Bar Association, which include a full copy of the statute.

It has been the firm opinion of those supposedly "in the know", that maintenance guidelines were going to be engrafted upon the law for at least 10 years. But based upon a combination of law groups' objections and legislative indifference or priorities, this was prevented until 2010. We say "prevented" because many



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matrimonial attorney organizations were (and still are) opposed to maintenance guidelines, essentially because the fact situations in our cases are just too disparate to require specific formulae or the drudgery of writing decisions based upon many specified statutory factors. But as time went on, primarily in order to "trade off" for a "No Fault" law, more groups gave approval, with varying recommendations for changes, virtually none of which found their way into the 2010 law.

The poor drafting and very often outlandish results from applying the original formula kept legislators and supporters and opponents of maintenance guideline laws at odds and unable to revise the 2010 laws for 5 years. But given the efforts of Judge Sunshine and his committee, and a host of other "prime movers," compromise was reached and we now have to deal with this law, which represents a vast improvement over the 2010 statute. It restores wider discretion to the Court in setting spousal support.

However, the concept of maintenance guidelines and formulae clearly make the judge's tasks far more time consuming and formidable and require good lawyering to avoid unfair results. Given the huge differences in the factual scenarios in our cases, great care has to be taken to make clear to the Court the specific circumstances of our cases and the bottom line realities of the results we are seeking.

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# Revocatory Effect of Divorce on Testamentary Bequests Between Former Spouses Does Not Extend To Relatives of the Former Spouse

By Jeffrey Gorak



Under Estates, Powers and Trusts Law (EPTL), Section 5-1.4, a divorce revokes any revocable disposition of property to or for the benefit of a former spouse and any nomination of the former spouse to serve in any fiduciary capacity, unless the instrument containing the revocable disposition or nomination states a contrary intent. To this end, the EPTL treats the former spouse as having predeceased the decedent. However, the EPTL is silent as to whether the revocatory effect of such dispositions and nominations extend to other people related to the decedent solely as a result of the former marriage. This issue was recently addressed in *Matter of Lewis*.<sup>1</sup>

In *Lewis*, the decedent and her husband were married in Texas in 1991. The decedent thereafter executed a Last Will and Testament, dated July 1996, in which she left all her property to him, and, in the event he predeceased her, then all to his father. The decedent named her husband as executor and his father as successor executor. Prior to her death, the couple purchased property in Clayton, New York. Subsequently, in April of 2007, the decedent and her husband were divorced in Texas, and, as part of the divorce settlement, the decedent was awarded the property in New York. The decedent never revised her Will following the divorce and, at the time of her death in April of 2010, the principal asset of her estate was the property in New York. The petitioner, the father of the decedent's ex-husband, claimed that he was entitled to the decedent's entire estate, including the New York property, because the disposition of the property to his son, the decedent's ex-husband, was revoked by their divorce, and, under EPTL 5-1.4, his son was treated as having predeceased the decedent, resulting in his becoming

the new sole beneficiary under her estate.

The Surrogate's Court, Jefferson County, held that the petitioner's bequest was not revoked under EPTL 5-1.4 by his son's divorce to the decedent. The Appellate Division, Fourth Department, affirmed the Surrogate's Court's decision on two independent grounds. First, the Court applied the plain meaning rule of statutory interpretation, and since the statute excluded other relatives of the former spouse, such relatives were excepted from the revocatory effect of the divorce. Second, the court was constrained to follow prior case law, which held that EPTL 5-1.4 only applies to "former spouses, not to members of the former spouse's family,"<sup>2</sup> when considering the revocatory effect of a divorce on bequests made to stepchildren.

Judge Peradotto, in his dissenting opinion, observed that allowing the father of the decedent's ex-husband to inherit her estate would "defeat the purpose and spirit"<sup>3</sup> of the statute as the ex-husband would, in all likelihood, eventually inherit the property from his father, thereby allowing the ex-husband to receive indirectly that which he was disqualified from receiving directly under EPTL 5-1.4. It was suggested by the dissent that the Court employ its equitable powers to prevent this unjust result as had been done in similar instances on prior occasions. Notably, in *Riggs v. Palmer*,<sup>4</sup> the Court of Appeals invoked its equitable powers to bar a grandson, a named beneficiary under the Will and the killer of the decedent, from receiving his testamentary bequest. Judge Peradotto concluded that, here, the actions of the ex-husband's family in failing to return the Will to the decedent following the divorce (petitioner was in possession of the Will but his son, the decedent's ex-husband, was required to return all papers to the decedent as part of the divorce), their knowledge of her relocation to New York in failing health, and their resurrection of the Will shortly after learning of her demise, were sufficient grounds to equitably preclude the petitioner from receiving his bequest under the decedent's estate.

This issue was not addressed by the majority or the Court of Appeals.

The Appellate Division's holding was later affirmed by the Court of Appeals.<sup>5</sup> As a result, in the absence of legislative intervention, an automatic statutory revocation of a decedent's bequest to a former spouse does not affect the decedent's testamentary disposition to relatives of the former spouse.<sup>6</sup> However, as a result of the *Lewis* decision itself, and perhaps the inequities observed by Judge Peradotto, the Surrogate's Court Advisory Committee has recommended the adoption of legislation extending the revocatory effect of divorce to "relatives"<sup>7</sup> of the decedent's former spouse, unless there is substantial evidence of contrary intention, which could include inadmissible evidence under Civil Practice Law and Rules (CPLR) Section 4519, so long as such evidence is corroborated by other evidence. Under this proposed approach, the revocatory effect on the former spouse is retained, but as to the "relatives" of the former spouse, there arises a presumption of revocation, which can be rebutted by the evidence permitted under CPLR 4519. The purpose in allowing this presumption—as opposed

to the absolute revocation applicable to former spouses—is to account for those instances in which a decedent may have continued a relationship with a relative of the former spouse following the divorce, but failed to revise his or her Will to conclusively identify such relative as an intended beneficiary. The New York Legislature has introduced legislation adopting the Advisory Committee's recommendation, but the legislature has not yet voted on it, as of the date of this writing.<sup>8</sup>

The expansion of the revocatory effect of divorce to relatives of a former spouse with the inclusion of a rebuttable presumption is a practical supplement to EPTL 5-1.4. Nevertheless, this section of the EPTL, like many other sections therein (e.g., intestate distribution, anti-lapse statute), is a default statute, only taking effect in the absence of planning by a testator; accordingly, the application of the statute may or may not reflect a particular testator's true desires. It is thus vital for testators to update Wills following important life events, including marriage, birth, death, and, in light of *Lewis*, divorce.

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1. 25 N.Y.3d 456, 13 N.Y.S.3d 323 (2015).

2. *Matter of Coffed*, 59 A.D.2d 297, 399 N.Y.S.2d 548 (4th Dep't 1977).

3. *Matter of Lewis*, 114 A.D.3d 203 at 230.

4. 115 N.Y. 506 (1889).

5. *Matter of Lewis*, 25 N.Y.3d 456, 459-460 ("Although the son was disqualified by reason of his divorce from decedent from serving as her executor or taking under the proffered pre-divorce will...decedent's former father-in-law, who was named in the will as decedent's alternate executor and beneficiary, was not so disqualified under New York law, which governs the disposition of decedent's New York real property, the sole asset of significant value in her estate.).

6. Since EPTL 5-1.4 provides that all revocable instruments (including non-probate assets) naming a former spouse are revoked by the divorce, it can be concluded by *Lewis* that non-probate assets naming other people related to the decedent through the marriage are not revoked by the divorce.

7. These relatives include, but are not limited to, step children, step grandchildren and parents in law.

8. NY Senate-Assembly Bill S5684, A07638.



Hon. Jodi Orlow; Donna Furey; Spiros A. Tsimbinos; Karl E. Pflanz; Hon. Aprilanne Agostino; Paul E. Kerson; Michael J. Hartofilis; Lourdes M. Ventura; Gary F. Miret; Michelle A. McSweeney



Karl E. Pflanz, Deputy Chief Court Atty, Appellate Division, 2nd Dept, discussing the civil cases at the NYS Court of Appeals.



Hon. James Golia, Spiros Tsimbinos and Hon. Joseph Golia



Hon. Bernice Siegal and Hon. Seymour Boyers



Spiros A. Tsimbinos, Moderator and giving a summary of the 2014 Annual Report and Recent Personnel Changes.

# Recent Significant Decisions & Developments from our Highest Appellate Courts | 10.27.15 | Photos by Walter Karling



Paul Shechtman speaking on criminal cases that came before the NYS Court of Appeals.



Donna Furey and Hon. Jodi Orlow



Clerk of the Court Hon. Aprilanne Agostino speaking about practice and procedure at the Appellate Division, 2nd Dept.



Basil Apostle, Spiros Tsimbinos and John Saketos



Attendees to the Recent Significant Decisions and Developments from our Highest Appellate Courts seminar.



Hon. Rudy Greco, Hon. Stephen Knopf, Hon. Morton Povman and Hon. Seymour Boyers - Copy



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Thank You Cake for Pro Bono Recognition Night

# Social Media and Its Effect on Your Bottom Line

by Kamilla Mishiyeva



Facebook, Twitter, Tumblr, and Pinterest: these are probably four of the most important tools that can greatly benefit your law firm and your law firm's website from a marketing standpoint. Managing and maintaining social media accounts can certainly be exhausting and time consuming, but the sky

is the limit as far as prospective client exposure and SEO (search engine optimization) is concerned.

The more followers and friends you are able to acquire, the better. Every time you post something, all of your friends are able to see the post. Suppose your law firm provides a new service or you recently added a new practice area. By blogging about it on your law firm's website and then posting a link to that blog on your social media accounts, your post is seen on thousands of laptops and smart phone screens. This is essentially free advertising.

For those who do not know what SEO is, it is the process in which your website ranks higher in the organic search

results of major search engines (i.e. Google, Yahoo, Bing). What makes certain websites rank on the first page of Google? There are many factors including the quality of your website, the quality of links on other websites pointing back to your site (this is called back links), and of course your social media activity. This wasn't a major factor the last few years but with the massive usage rate of social media, I can foresee it having a substantial effect on a lawyer's SEO campaign. There is something called social signals. A social signal is when someone shares one of your posts on Facebook or someone retweets something you said on Twitter. These social signals will be a major factor affecting your visibility on Google.

The two crucial ingredients required to develop these social signals are many followers and solid content. I won't get into how to create good content, but I will mention how to get followers. First off, ensure all of your social media accounts are posted on your website. That makes it easy for people to follow you whenever you get organic traffic. You do not want to get followers from Australia if you're an attorney located in New Jersey. Why? Chances are the Australian based user will not retain your services anytime soon whereas a New Jersey user may. How do you pin point the location of

users? You really can't BUT you can find something that a New Jersey user may "like" or "follow". For example, if a person is "liking" pictures of Trenton New Jersey or is following a local politician in New Jersey, chances are they are a New Jersey resident. Search various items by using the hashtag ( # ) command. As a New York Probate Lawyer, I search for users with the following commands: #NYC #Park Slope #Brooklyn. The queries I get in return are various photos and videos about those subjects. I then examine who is liking those particular hashtags and I begin following those individuals. I follow as many as I could in a particular day. All of these social media accounts do have limitations as far as how many people you can follow per day. I have found that for every 1000 people I follow, 200 follow me back. That means I now have an audience of 200 New York residents ready to see any one of my posts. By doing this for several months, you can realistically find yourself with thousands of followers in your geographical area.

Advertising has truly evolved over the years and we as attorneys must evolve with it. Aside from newspaper and local television ads, take a chance and invest time into building up your social media profiles. The opportunity it may provide could result in something very lucrative.

## Medicaid Planning Considerations for IRAs

By Michael Davidov, Esq., CFP



The best retirement plans can be jeopardized by a long nursing home stay. The 2015 Genworth Cost of Care Survey<sup>1</sup> puts the average cost of a private room in a New York State nursing home at \$136,437 a year, or \$11,370 per month. Locally, costs can be even higher, with the average nursing home in Queens and Nassau exceeding \$12,000 per month for a private room.

With the stakes so high, it's no surprise that many clients seek the help of an elder law attorney to make sure that they guard against any prolonged health condition derailing their overall financial and estate plan. Thankfully, savvy practitioners can help clients and their families deal with nursing home fees and other long-term care expenses.<sup>2</sup>

### Insurance Options

Long-term care insurance can help clients address this risk. However, it is my experience that many clients do not have this insurance coverage at all, or have limited coverage. Some clients have not yet considered long-term care insurance, while others have decided that the cost of obtaining a policy is financially prohibitive, or they simply cannot obtain coverage because of a pre-existing condition.

As Medicare provides extremely limited help in the area of long-term care expenses, many opt for Medicaid. In fact, roughly two-thirds of all nursing home patients have their bills paid by Medicaid, the Congressional blog The Hill recently reported .

### Qualifying for Nursing Home Medicaid

The eligibility rules for Medicaid are complex, and in some instances, interpreted differently from social service department to department. Generally, an applicant's home (up to a certain value), car, burial arrangements, and \$14,850 in assets are exempt . Spouses may keep more resources. All non-exempt assets will be counted and will disqualify a nursing home Medicaid applicant, or subject the applicant to a penalty period for any gifts made during the five year look-back period.

### How IRAs Impact Medicaid Planning

For many Medicaid applicants, Individual Retirement Accounts (IRAs) and other retirement accounts (401K, 403b, 457K, etc.) are some of their biggest assets. These retirement accounts are treated similarly in the context of Medicaid planning. An IRA may impact Medicaid eligibility in that the pre-tax value of the account may be considered a non-exempt asset, and disqualify the applicant, unless it is in "payout status." Typically, the term applies to clients older than 70 ½ and taking required minimum distributions (RMDs). Younger clients may be able to put an IRA into payout status by electing to take regular, periodic distributions. The distributions must be based on the Internal Revenue Service Uniform Lifetime table or the Health Care Finance Administration Life Expectancy table (HCFA 64). Periodic payments disbursed from a retirement account to the owner, including RMDs, are deemed as additional income, rather than as a non-exempt asset in the qualifying process.

### Planning Options

Medicaid planning for IRAs and other retirement assets involves a thorough understanding of the interplay between Medicaid benefits laws, estate planning, financial planning, and income taxation of retirement accounts and the effects on the client's taxable income and permitted deductions.

Asset preservation strategies exist both in: i) crisis planning — when long-term care needs and expenses are imminent; and ii) pre-planning — planning to protect against possible future long-term care expenses. The strategies will differ depending on the client's health, age, desires, and timeline, as well as asset and income levels.

Potential options for IRAs include: i) purchasing a long-term care insurance plan in advance of needing care; ii) converting the IRA to payout status when requiring care; and iii) cashing in the IRA, immediately, or over a period of time, paying the income tax liability, and sheltering the asset in a trust that can provide income to the owner and / or beneficiaries.

1. 2015 Genworth Cost of Care Survey, [https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/130568\\_040115\\_gnw.pdf](https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/130568_040115_gnw.pdf), (retrieved 11/12/2015)

2. Costly New Medicaid Regs Will Cripple Nursing Homes, The Hill Blog, <http://thehill.com/blogs/congress-blog/healthcare/253100-costly-new-medicaid-regs-will-cripple-nursing-homes>, (retrieved 11/12/2015)

# Judicial Expungement of Criminal Records Raises Constitutional Questions

By Richard E. Lerner, Esq.

*Author's Note: This article concerns recent coverage of expungement of criminal sentences, such as:*

*"How to Get Around a Criminal Record,"* <http://www.nytimes.com/2015/10/19/opinion/how-to-get-around-a-criminal-record.html>

*"Federal Judge Expunges 14-Year-Old Fraud Conviction in Rare Ruling,"* <http://www.wsj.com/articles/federal-judge-expunges-14-year-old-fraud-conviction-in-rare-ruling-1432909226>.

*"A Second Chance: One Judge Just Exercised His Power to Expunge a Conviction and Help Someone Start a New Life,"* [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/06/judge\\_gleeson\\_expunges\\_jane\\_doe\\_s\\_conviction\\_judges\\_can\\_give\\_criminals\\_a.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/06/judge_gleeson_expunges_jane_doe_s_conviction_judges_can_give_criminals_a.html)

*"From the Bench, a New Look at Punishment,"* [http://www.nytimes.com/2015/08/27/nyregion/from-the-bench-a-new-look-at-punishment.html?\\_r=1](http://www.nytimes.com/2015/08/27/nyregion/from-the-bench-a-new-look-at-punishment.html?_r=1)

Federal judges are crafting special remedies – such as expungement – for criminal defendants they deem to have been rehabilitated, and they're doing so behind an almost impenetrable wall of sealing orders, closed courtrooms, and "Doe" pseudonyms, leaving victims, the public and Congress completely in the dark.

Where such action has been made public, reaction has been puzzling. Recent coverage of Judge John Gleeson's expungement of the criminal record of one "Jane Doe" is illustrative. In an article for Slate ("A Second Chance: One Judge Just Exercised His Power to Expunge a Conviction and Help Someone Start a New Life"<sup>1</sup>), Joel Cohen of Stroock & Stroock & Lavan, LLP compared the offender to Jean Valjean, the reformed convict protagonist of *Les Misérables*, and lauded the rehabilitative justice of expungement, exhorting that "[a] willingness to expunge a criminal record in the right circumstances is something a judge should consider as part of the array of powers enabling him or her to implement the individualization of justice." Mr. Cohen said, unquestioningly, "a judge has the power to expunge the conviction – to put the prior conviction in a dark hole undiscoverable by the press or any would-be snooper.... The judge can actually remove from the public court record the very existence of a conviction, and can do so without identifying—and therefore publicizing—the identity of the defendant."<sup>2</sup> In a New York Times editorial on October 19, 2015, the editors stated, "In fact it appears

to be the first time that a federal judge has expunged a conviction for this reason. It should not be the last."<sup>3</sup>

However, while judges have the right to advocate a change in the law, they do not have the right or the power to subvert it. Before casting these judges as heroes, we should first ask whether they are abrogating their constitutional responsibilities and arrogating powers unto themselves that they simply do not have.

Consider the First Amendment: The U.S. Supreme Court held a generation ago in the *Richmond*<sup>4</sup> line of cases that a First Amendment right of access exists for criminal court proceedings. A generation before that, the Court held in *Craig v. Harney*<sup>5</sup> that what occurs in the courtroom is "public property." And the Second Circuit conceded in *Gambale*<sup>6</sup> that once information in a court docket becomes public, it can never be made un-public. To order expungement of a conviction and seal up a defendant's court record is to take from the public information that is their property and to which they have a vested right of access.

Consider separation of powers: The Supreme Court unanimously held in *Ex Parte United States* (1916)<sup>7</sup> that crafting a special remedy not authorized by Congress and signed into law by the president creates an unconstitutional appropriation of legislative and executive authority. Known as the "Killits" case for the federal district judge who refused to impose the mandatory sentence, *Ex Parte United States* was only resolved after the Court threatened Judge Killits with contempt unless he capitulated.

No matter how Judge Killits and his ideological acolytes might wish otherwise, the Supremacy Clause provides that the valid laws of Congress are the supreme law of the land. Thus, any statute, unless unconstitutional, must be obeyed and enforced by the federal courts. In the Killits case, the Supreme Court held it to be flatly illegal for federal judges to fail to impose statutorily required minimum prison sentences. The Court reasoned that to allow otherwise would be to let judges decide for themselves what laws to enforce and what laws to ignore – judicial tyranny.

Now the pragmatic problems: It is shockingly naïve to believe that, in an age where travelers in a desert can stream *Sex in the City* on their cellphones, anything public can ever be truly hidden. Information on federal



court dockets is instantly vacuumed up by websites like *RecapTheLaw.Org* and other mirror sites. Even when federal courts illegally re-seal information already made public on "PACER" – Public Access to Court Electronic Records – the information is still available for those inquisitive enough to know where to look.

It follows that expungement and the disappearance of convictions off the public docket can only work where the case and the defendant have always been hidden behind sealing orders, or "John Doe" and "Jane Doe" pseudonyms. And that means judges necessarily must claim the power to hide entire criminal cases forever.

I believe that this is not only unconstitutional; it is patently unlawful, notwithstanding that it is common practice within the Second Circuit. Judicial concealment violates the public's First Amendment right of access to criminal proceedings and repudiates the statutory rights of crime victims – under the Mandatory Victims Restitution Act and the Crime Victims Rights Act – to be kept informed of the prosecution of those who are charged with victimizing them, not to mention their rights to "mandatory" restitution from the convicted defendant.

Yet "Doe" sealings within the Second Circuit are so commonplace that they are openly discussed in court proceedings without question of their legality. At the recent sentencing of computer hacker Hector Monsegur, his defense counsel Peggy Cross-Goldenberg of Federal Defenders of New York stated on the record: "Because most cases are resolved with a guilty plea, the cooperation is never publicly revealed and some sentencing proceedings and even some complete dockets remain under seal. This could have been such a case, because all of Mr. Monsegur's co-conspirators, all of the co-conspirators, pled guilty without a trial."<sup>8</sup>

What wasn't mentioned is that myriad "Doe" defendants and others within the Second Circuit have used such secrecy to continue their criminality. Myron Gushlak, Felix Sater, Joseph Shereshevsky and Salvatore Lauria are just a few who pled guilty in secret and then continued to defraud others of hundreds of millions of dollars.

Unfortunately, the recent coverage plays these judges up as heroes, rather than as possibly exceeding the limits of

their authority. Their attempts to usurp congressional and executive authority are depicted in strangely reverential tones, as if this naked violation of the separation of powers is admirable, rather than seditious.

Why aren't judges who repudiate federal sentencing laws impeached? Why aren't judges who order expungements charged under 18 U.S.C. § 1506, a statute enacted in 1790 that makes it a felony to falsify or hide court records and thereby render void the judgment of conviction?

The coverage of District Judge John Gleeson's recent expungement of "Jane Doe's" criminal record, despite the utter lack of legal authority for him to do so, fails to address these fundamental questions. As troubling, however, is that he too admitted the open secret, even acknowledging that last year, at the request of then-U.S. Attorney Loretta Lynch, he ordered the guilty plea of a tax preparer to be sealed so that he could continue preparing tax returns, despite that it is illegal for someone who has pled guilty to such a crime to do so. That is, Ms. Lynch – now the Attorney General of the United States – requested that someone who had pled guilty to tax fraud be permitted, by court order, to continue to prepare tax returns, and this judge went along with that request, rather than ask, By what authority can I issue such an order, Ms. Lynch? When judicial nullification is unquestioningly viewed as a public good, we have a rule-of-law crisis.

The crafting of special remedies, such as expungement, is simply the latest adventure in the long history of the self-aggrandizement of judicial power. Indeed, two hundred years ago Jefferson warned that judges, "are in the habit of going out of the question before them, to throw an anchor ahead and grapple further hold for future advances of power, ...steadily working to undermine the independent rights of the States and to consolidate all power in the hands of that government in which they have so important a freehold estate."

Federal judges wear robes, have lifetime appointments, and are presumed by many to be smarter and wiser than the rest of us. Those expunging criminal records in seeming violation of caselaw, statutes and the United States Constitution may be exceeding the limitations of their authority. Most dangerously, they have convinced themselves and the public that they are doing it for the greater good.

1. [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/06/judge\\_gleeson\\_expunges\\_jane\\_doe\\_s\\_conviction\\_judges\\_can\\_give\\_criminals\\_a.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/06/judge_gleeson_expunges_jane_doe_s_conviction_judges_can_give_criminals_a.html)

2. See also "Federal Judge Expunges 14-Year-Old Fraud Conviction in Rare Ruling," <http://www.wsj.com/articles/federal-judge-expunges-14-year-old-fraud-conviction-in-rare-ruling-1432909226>; "From the Bench, a New Look at Punishment," [http://www.nytimes.com/2015/08/27/nyregion/from-the-bench-a-new-look-at-punishment.html?\\_r=1](http://www.nytimes.com/2015/08/27/nyregion/from-the-bench-a-new-look-at-punishment.html?_r=1).

3. See "How to Get Around a Criminal Record," <http://www.nytimes.com/2015/10/19/opinion/how-to-get-around-a-criminal-record.html>.

4. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

5. *Craig v. Harney*, 331 U.S. 367 (1947).

6. *Gambale v. Deutsche Bank*, 377 F.3d 133 (2d Cir. 2004).

7. *Ex Parte United States*, 242 U.S. 27 (1916).

8. <http://cryptome.org/2014/05/monsegur-sentencing.htm>. See pages 7-8.



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# Proposed Insurance Regulation Concerning Title Insurance Companies

Dear Superintendent Albanese, Assistant Secretary Fitzgerald and Queens County Members of the State Senate and State Assembly:

We have carefully reviewed proposed Insurance Regulation 208 of 11 NYCRR 227. This regulation proposes to abolish the ability of Title Insurance Companies to advertise, including print advertising, business lunches and dinners, sports events, continuing legal education programs and other forms of commercial speech. See proposed Section 227.2 entitled "Inducements." Further, and even more surprising, the new regulations prohibit us from paying the title closer to do his or her job in filing all the necessary documents. See section 227.5 (c).

We are writing to call to your attention the fact that the proposed Regulation 208 is inconsistent with U.S. Supreme Court decisions on this subject.

In *Bates v. State Bar of Arizona* 433 U.S. 350, 97 S. Ct. 2691 (1977), the United States Supreme Court held that "Commercial speech of that kind was entitled to the protection of the First Amendment...Our cases long have protected speech even though it is in the form of a paid advertisement." See 433 U.S. at 363.

In *Bates*, the U.S. Supreme Court further held that states may regulate advertisements that are "false, deceptive or misleading." See 433 U.S. at 383.

There is nothing in proposed Insurance Regulation 208 that regulates "false, deceptive or misleading" Title Insurance Company advertisements. Indeed, since Title Companies mostly advertise their services to attorneys, there has not been any allegation that any Title Company issued a "false, deceptive or misleading" advertisement in their efforts to obtain our business.

In reaching its holding *Bates v. State Bar of Arizona*, the United States Supreme Court relied on its earlier decision in *Virginia Pharmacy Board v. Virginia Consumer Council* 425 U.S. 748, 96 S. Ct. 1817 (1976). The *Virginia Pharmacy Board* case concerned the right of pharmacists to advertise prescription drug prices.

In *Bates*, the United States Supreme

Court relied on its *Virginia Pharmacy Board* decision:

"Although acknowledging that the State had a strong interest in maintaining professionalism among pharmacists, this Court concluded that the proffered justifications were inadequate to support the advertising ban." See 433 U.S. at 365.

There is no question but that New York State Title Companies are analogous to Arizona lawyers and Virginia pharmacists.

Forbidding Title Companies from print advertisement in journals, internet advertisements, business lunches and dinners, sports events and continuing legal education programs is inconsistent with the law of the United States.

Forbidding us to pay Title Closers at closings is clearly an arbitrary and capricious action proposed by the Department of Financial Services. This is forbidden to Government officials by New York Civil Practice Law and Rules (CPLR) Article 78.

We have all been paying Title Closers as long as anyone can remember to perform an important public service in recording all of the necessary documents and delivering all the necessary checks to the proper parties so that the closing can be completed.

As this has been the custom and practice throughout the Real Estate industry for decades, without complaint, any change of this type by regulation will certainly be "arbitrary and capricious" within the meaning of CPLR Article 78.

The New York State Court of Appeals has been very wary of overreaching by New York State Government Departments. In *New York State Superfund Coalition Inc., et. al. v. Department of Environmental Conservation* 75 N.Y. 2d 88, 550 N.Y.S. 2d 879 (1989) the New York State Court of Appeals struck down the Superfund regulations of the New York State Department of Environmental Conservation (DEC).

In *Superfund* the DEC Commissioner tried to enact regulations that gave him the sole responsibility of defining "significant threat." This was held to be arbitrary and capricious.

Similarly, in *Matter of Campagna v. Shaffer* 73 N.Y. 2d 237, 538 N.Y.S. 2d 933 (1989) the New York State Court of Appeals struck down a regulation promulgated by the New York State Secretary of State forbidding "all broker-initiated solicitation, not just the illegal solicitation as targeted by the Legislature." See 73 N.Y. 2d at 243.

Similarly, the instant proposed Insurance Regulation 208 constitutes the same type of arbitrary and capricious conduct by the Department of Financial Services that has been forbidden to State agencies by the New York State Court of Appeals in *Superfund Coalition Inc.* and *Campagna*, both cited above.

Our New York State Title Insurance Companies provide a valuable service at reasonable costs. They specifically greatly assist attorneys in the complicated world of Real Estate transactions. They provide valuable services in researching titles and

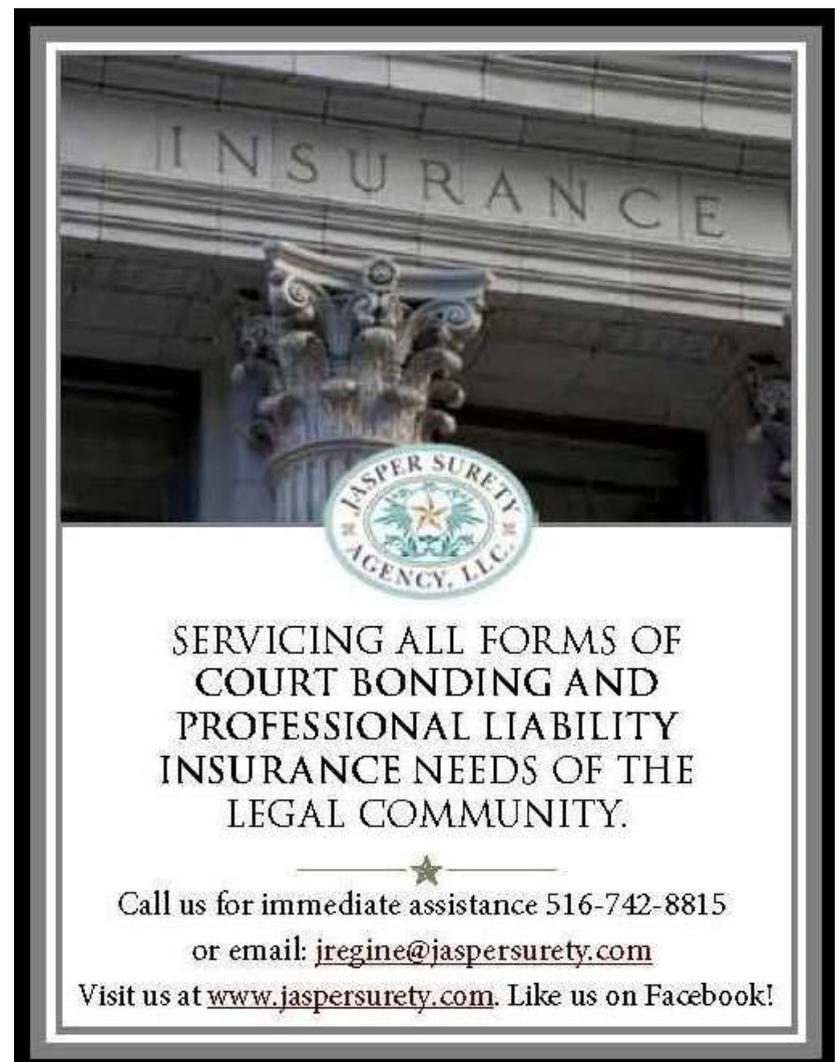
delivering and filing documents and sizable checks. Without them, Real Estate property transfers would be that much more difficult.

The proposed Insurance Regulation 208 is also thoroughly unwise. The Title Closers and the Title Insurance Company employees of this State have given us a thriving Real Estate market that is the envy of the world. The economic consequences to New York State of hampering the activity of Title Companies would amount to billions of dollars in lost business and lost revenue to the State and City Governments.

We understand that you are reconsidering Insurance Regulation 208. We hope you will withdraw this plan entirely.

Sincerely,

Paul E. Kerson,  
President



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