THE SUFFOLK LAWYER

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NOVEMBER 2019
FOCUS ON
Ethics & Civility

Pro Bono Foundation Celebrate Attorney Volunteers with a Luncheon

A luncheon was held at the Suffolk County Bar Association to honor the Pro Bono attorney volunteers.

By Sarah Jane LaCova

A special luncheon was held at the Suffolk County Bar Association's Bar Center on Oct. 23 to salute our Pro Bono attorney volunteers. The Pro Bono Project, in partnership with Nassau Suffolk Law Services, paid tribute to these attorneys who provide their time and effort to Long Islanders who cannot afford legal services.

Managing Director Vincent J. Messina, Jr. said it was his distinct privilege to welcome everyone to the SCBA's annual Pro Bono Recognition luncheon and to celebrate National Pro Bono Week, which salutes our many attorney volunteers without whom the program could not exist. Our Administrative Judge the Honorable C. Randall Hinrichs then introduced our honored guest, the Honorable Edwina Mendelson, Deputy Chief Administrative Judge for Justice Initiatives. She said that

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PRESIDENT'S MESSAGE

Access to Justice and Court Consolidation

By Lynn Poster-Zimmerman

Lynn Poster-Zimmerman

Along with the change in the seasons and the beautiful fall foliage on Long Island, there are many changes that we, as the Judiciary and as practitioners, need to be aware of in the coming months and years. Certainly, for our Criminal Justice System, there are sweeping changes to be effectuated in the new year, with bail reform and new, stringent requirements for the production of discovery. While it is universally recognized that these are significant changes, the issues and the logistics of implementation are being addressed within Suffolk County to establish procedures for these transitions.

The concept of Access To Justice seems to be the guiding force behind many of the New York's State Court system's current initiatives. Several weeks ago, I, along with several other representatives from Suffolk

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BAR EVENTS

November

SCBA's Annual Judiciary Night
Thursday, Nov. 21 at 6 p.m.
Watermill Caterers, Smithtown

Honored Guest — Hon. Alan D. Scheinkman, Presiding Justice, Appellate Division, Second Judicial Department.
Watermill Caterers, Smithtown Bypass, Smithtown, NY.
$70/person – Register marion@scba.org or call (631) 234-5511 x230.

December

The 2019 Annual School Law Conference
Friday, Nov. 6, sign-in and breakfast 8:30 a.m.; event from 9 a.m. until 3:30 p.m.
Nassau County Bar Association, 15 West Street, Mineola

20/20 Vision: Sharpening Your Focus on School Law Issues as we Move into 2020. For further information call the Suffolk Academy of Law.

SCBA Annual Holiday Party
Friday, Dec. 6, from 4 until 7 p.m.
Great Hall

Join your colleagues at this popular end of the year party.

January 2020

Save the Date!
SCBA Judicial Swearing-In & Robing Ceremony
Monday, Jan. 13, at 9 a.m.
Touro Law Center, 225 Eastview Drive, Central Islip

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COURT NOTES

By Ilene Sherwyn Cooper

Appellate Division-Second Department

Attorney reinstatements granted

The following attorneys have been reinstated to the roll of attorneys and counselors- at-law:

Bohyoung Kim

Attorney resignations granted/disciplinary proceeding pending

Polly Eustis: The respondent submitted an affidavit in support of her application to resign as an attorney. Respondent acknowledged that she was the subject of an investigation by the Grievance Committee, involving allegations that she misappropriated down payment funds from a real estate transaction, which were entrusted to her charge as fiduciary. Respondent stated that she could not successfully defend herself on the merits against charges predicated upon the foregoing. Further, she stated her resignation was freely and voluntary rendered, that she was fully aware of the implications of submitting her resignation. In addition, respondent indicated that pending the issuance of an order accepting her resignation, she would not undertake to represent any new clients or accept any new retainers for future legal services to be rendered. In view of the foregoing, the respondent's resignation was accepted and she was disbarred from the practice of law in the State of New York.

Attorneys suspended

Jeffrey S. Lisabeth: The Grievance Committee commenced a disciplinary proceeding against the respondent, to which an answer was filed and the matter was referred to a Special Referee. The referee sustained all three charges against the respondent, and the Grievance Committee moved to confirm.

Ilene Sherwyn Cooper

The charges against the respondent alleged, *inter alia*, that he neglected legal matters committed to his charge, and failed to cooperate with the Grievance Committee. The respondent was examined under oath after being served with a subpoena and subpoena duces tecum. Upon review of the evidence adduced at the hearing and respondent's admissions, the court granted the motion by the Grievance Committee. The court further found that the respondent had an extensive disciplinary history, including five Letters of Caution, and four Admonitions. Based thereon, the court concluded that the respondent's disciplinary history, together with the present matter, revealed a longstanding and uncorrected pattern of neglecting client matters, failing to communicate with clients, and failing to timely respond to requests of the Grievance Committee. Accordingly, the respondent was suspended from the practice of law for a period of two years.

Frederick M. Oberlander, admitted as Frederick Martin Oberlander: By order

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SUPREME COURT

SCOTUS Gears Up for a Trio of Cases Involving LGBT Rights in the Workplace

By Richard DeMaio

In early October, the Supreme Court will hear argument in a trio of cases asking whether federal employment law protects LGBT employees. The cases will provide a definitive answer as to whether federal employment law prohibits discrimination based on sexual orientation and gender identity. The Supreme Court takes this trio of cases at a pivotal time. These are the first cases affecting LGBT employment rights since Justice Kennedy retired, who provided the key swing vote in several cases involving gay rights. And no matter the outcome of these cases, the decisions will come in the spring or summer of 2020, thrusting the Supreme Court to centerstage in the next presidential election.

Richard DeMaio

In the first two cases heard together, *Altitude Express v. Zarda* and *Bostock v. Clayton County, Georgia*, the Supreme Court will decide whether federal employment law prohibiting discrimination protects gay and lesbian employees. Both cases involve male employees who claim their employers discriminated against them by terminating their employment after finding out they were gay. The employees then went to federal court in New York and Georgia where they argued that their firing violated federal employment law, which prohibits discrimination "because of sex." The cases resulted in a circuit split. The U.S. Court of Appeals for the 2nd Circuit permitted Zarda's case to move forward, reasoning that discrimination based on sexual orientation is a "subset of sex discrimination," but the U.S. Court of Appeals for the 11th Circuit reached the opposite conclusion, holding Bostock's case could not go forward because federal employment law does not apply to discrimination based on sexual orientation.

As expected in such landmark cases,

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CIVIL RIGHTS/AMERICAN WITH DISABILITIES ACT

Visually Impaired Website (ADA) Litigation, Here to Stay…

By Cory Morris

Previous Suffolk Lawyer articles discussed the surge of Americans with Disabilities Act ("ADA") commercial website litigation in New York State. Most recently, the infamous pizza restaurant chain Dominos Pizza LLC ("Dominos") was the subject of one of these lawsuits by serial litigant, Guillermo Robles, a blind man who could not order a customized pizza using Dominos' online platform.

Reversing the District Court's granting of Dominos' motion to dismiss, the 9th Circuit held that ADA Title III "expressly provides that a place of public accommodation, like Domino's, engages in unlawful discrimination if it fails to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services,"[1] a decision the Supreme Court of the United States will not review. The Ninth Circuit held that the lack of specific regulations does not eliminate Dominos' duty under the ADA and that the matter should be remanded to the lower court for discovery and whether Dominos "provide[s] the blind with effective communication and full and equal enjoyment of its products and services as the ADA mandates."

Cory Morris

Commentators feel that "[t]he Supreme Court cleared the way…for blind people to sue Domino's Pizza and other retailers if their websites are not accessible."[2] Indeed, this is fair notice to those who serve consumers via text message, online ordering and other electronic means as "New York's federal courts saw 1,471 lawsuits filed in 2018 aimed at websites that plaintiffs claim are not American with Disabilities Act accessible, accounting for 64 percent of the 2,285 ADA website accessibility lawsuits launched in seven major states tracked by the company UsableNet Inc."[3] As noted by the parties in *Robles v. Domino's Pizza, LLC*, the courts are split as

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FAMILY

Imputed Income: More Than Meets the Eye

By Jeffrey L. Catterson

One of the first questions we hear from a prospective client is "How much am I going to have to pay in support" or "How much is he/she going to pay me?" While we have statutory formulas for the court to utilize to calculate maintenance and child support obligations/entitlements, before the court can employ these calculations it must first determine the appropriate incomes for the parties. Significantly, a court need not rely upon a party's own account of his or her finances, but may impute income based upon the party's past income or demonstrated future potential earnings. *See Steinberg v. Steinberg*, 59 A.D.3d 702, 874 N.Y.S.2d 230 (2nd Dept. 2009). Where a party's account of their income is not believable, the court may impute a true or potential income higher than alleged by that party. *See Lilikakis v. Lilikakis*, 308 A.D.2d 435, 436, 764 N.Y.S.2d 206 (2d Dept. 2003). Notably, the court may impute income to a party based on his or her employment history, future earning capacity, educational background, or money received from friends and relatives. *See Matter of Collins v. Collins*, 241 A.D.2d 725, 727, 659 N.Y.S.2d 955 (3d Dept. 1997). Additionally, when addressing child support, the court's award can be based on the needs of the child where the court finds that the payor's representations regarding his/her income are not credible. See, DRL §240[1-b][k]; *see also Lew v. Lew*, 82 A.D.3d 1171, 920 N.Y.S.2d 230 (2nd Dept. 2011).

Jeffrey L. Catterson

The court's ability to impute additional income to a party is applicable to both maintenance and child support determinations. Indeed, it is well-settled that in determining income for purposes of calculating temporary maintenance, it is within the court's authority to impute income to a party based upon that party's past earnings and earning capacity when the record does not reflect a party's actual income or earning potential. See Bittner v. Bittner, 296 A.D.2d 516, 745 N.Y.S.2d 559 (2d Dept. 2002), *Zabezhanskaya v. Dinhofer*, 274 A.D.2d 476, 710 N.Y.S.2d 639 (2d Dept. 2000), *Gaetano D. v. Antoinette D.*, 37 Misc.3d 990, 955 N.Y.S.2d 752 (Sup. Ct., Westchester Cnty. 2012); *Nerayoff v. Rokhsar*, 168 A.D.3d 1071, 93 N.Y.S.3d 96 (2nd Dept. 2019) (where the Second Department held that the trial court properly exercised its discretion in imputing $210,000 in annual income to plaintiff and $70,000 in annual income to defendant

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President's Message (Continued from page 1)

County, including District Administrative Judge C. Randall Hinrichs and Past-President Donna England, attended the annual stakeholders meeting of the Permanent Commission on Access to Justice in Albany. Suffolk County had been the pilot program for this initiative of the Chief Judge. Presentations were made by each of the District Administrative Judges of eight Judicial Districts in our state. The goal of the commission is to provide effective assistance of counsel to low-income New Yorkers facing challenges in civil matters involving the essentials of life. The focus of the various districts ranged from providing easier access to filing petitions, especially in Family Court, including on-line forms and remote filings, establishment of help centers, volunteer call-in lines and resource guides. In Suffolk County, we have established the Community Legal Help Project, which staffs attorneys in each of the Selden and Brentwood libraries one day per week. This has been a very successful endeavor and approximately 60-70 people come to these libraries each month seeking legal advice. Our volunteer attorneys are to be commended for their time and commitment.

Many districts seem to be utilizing mediation as a form of resolving disputes and promoting Access to Justice. My last message was devoted to the establishment of these procedures within the Suffolk County court system. The Suffolk County Bar Association Academy of Law is in the process of formulating a mediation training program to be held in January 2020, so that we, as attorneys, can learn these important skills and better represent our clients as it would appear that mediation, indeed, is becoming the wave of the future. Please be on the lookout for more information on this training if you are interested.

An important component of the Access to Justice initiative is to ensure quality assistance of counsel which, of course, includes representation by the 18b panel in criminal and family court proceedings. To that end, the bar association is charging forward in our efforts to raise the rate of pay for 18b attorneys. I, along with Dan Russo, have met with several of our local state legislators to impress upon them the need for this reform. We have met with Assemblyman Joseph Lentol, who co-sponsored the current bill to raise the rate, the Chief of Staff to Senator Brad Hoylman, who is the Chair of the Senate Judiciary Committee, and Senator Monica Martinez. While we have found receptive audiences, we are continuing with our endeavors, our goal being to convince the governor of this necessary reform to be included in next year's budget.

As I have also continued to propound, it is equally important to establish fair and reasonable eligibility criteria for assigned counsel. While there is no question that there is a great need to be fulfilled in providing quality assistance of counsel to indigent and low-income litigants, as a bar association, there is a balance to be sustained between meeting the needs of the less fortunate, which no one would argue otherwise, and providing paid legal services to those who can afford it. We are attorneys, many, if not most, of us solo and small firm practitioners, and we need to be able to provide quality assistance of counsel to all litigants.

In another proposed sweeping change to the New York State court system, Chief Judge Janet DiFiore has announced a proposed amendment to the State Constitution, the purpose of which is to streamline the court system and ease massive caseloads within the various courts. The proposal would reduce the 11 trial courts to a three-level system with Supreme, Municipal and Justice courts. Presumably, this system would more readily provide access to justice to all litigants in our state. To enact the proposal, it first needs to pass through both the Assembly and the Senate, and then would be put to the voters as a ballot referendum, probably in 2021.

The proposal, if enacted, would merge the Court of Claims into the Supreme Court, effective Oct. 1, 2022. The County, Family and Surrogate's courts would thereafter be merged with the Supreme Court by Jan. 1, 2025. All judges in these courts would automatically become Supreme Court justices. The Supreme Court system would still retain several divisions, for family, probate, criminal, state claims, commercial and general. However, cases with the same litigants would be merged into one part.

The New York City Civil and Criminal courts, along with the district courts on Long Island and the 61 upstate city courts, would no longer exist and would be replaced with a new Municipal Court. The Justice Courts would remain unchanged.

The merging of the courts into one Supreme Court system would entail integrating certain separate proceedings, such as a custody, support and matrimonial proceeding. Yet, there are many unanswered questions. If there were then a death in the family, would the probate be integrated with the matrimonial? Or a crime between family members? In order to more fully understand the implementation and effect of this proposal, our bar association, in conjunction with the Nassau County Bar Association, has established a task force to investigate and report as to their findings and recommendations at a joint meeting of our bar associations in January, 2020. Chief Administrative Judge Lawrence K. Marks will be in attendance at that meeting to discuss the proposal. I have heard several presentations by Chief Judge DiFiore regarding this initiative. This is, no doubt, an important issue, and one that justifies serious inquiry.

As you can see, Access To Justice takes many forms. I welcome your input with regard to any of these matters. Lastly, enjoy the beautiful weather and the season!

Meet Your SCBA Colleague (Continued from page 5)

banking company. When I was in law school I needed a job. I worked in their product development department and then moved to the legal department. I worked under the company's outside counsel which included Sullivan & Cromwell, AT&T and Chemical Bank. I learned a tremendous amount. In my second year of law school the company fired its general counsel and I was handed everything with the approval of the outside counsel. I was working as an attorney before I was an attorney. Then Prodigy came out and Covidea disbanded. They gave me 2 years severance pay and I opened my own firm.

And you also went into a partnership with Jaeger and Block. I was there for 4 years. But I was always big on networking and was asked by Ecotyre Technologies to be its general counsel. I accepted the offer. During that time, I was still going to court as a law guardian with my own firm. I left Ecotyre after we sold it and became a partner at Hagney and did a lot of corporate work. I now focus all of my efforts on my own firm and have one associate, a legal assistant and a file clerk.

What do you like about being an attorney? I like being in the courtroom, making arguments. I especially like representing children and being in the courtroom to settle their cases.

When did you join the SCBA and why? In 1990 I started with the Academy. I wanted to get involved with other lawyers in the community. And I wanted to be involved with the Academy programs. There are a lot of things they do which they don't teach you in law school, like the practical aspects of being a lawyer. And what to do when you go into a courtroom. I got involved in the SCBA and I have always found the people to be great.

You are arranging for a trip to Cuba for the SCBA, right? Yes. Attorneys will get 7 CLE credits. I've got a bunch of people going so far.

You've been involved in the Association's Charitable Foundation. Yes, I am the managing director. We raise money for adults' protective services, for veterans and children to help those in need. It's a great group of people. We give of our time and spend our own money too. I see it as another way to give back to the community.

Family (Continued from page 8)

for purposes of calculating maintenance and child support, based upon their skills, educational backgrounds, and employment histories as court need not rely upon party's own account of finances, but may impute income based on his/her employment history, future earning capacity, educational background, or money received from friends and relatives).

However, a party is not bound by their prior earnings if they provide a competent basis for the court to deviate from such historical data. *See Balaj v. Balaj*, 136 A.D.3d 672, 25 N.Y.S.3d 244 (2nd Dept. 2016) (where the Second Department held that the trial court properly imputed of only $150,000 annual income to plaintiff for purposes of child support where, although his previous earnings were much higher in past, he provided credible evidence of downturn in his field of employment). The evidence that is to be submitted to convince the court to deviate from historical earnings should be more than just that party's testimony. This additional evidence can consist of a vocational expert, statistical data from the industry/profession and medical testimony.

Absent such credible evidence, which is the burden of the proponent to establish and customarily requires corroborating evidence other than solely a party's own testimony, the court will be within its discretion to impute income greater than a party's representation. *See Rudish v. Rudish*, 150 A.D.3d 1291, 56 N.Y.S.3d 191(2nd Dept. 2017) (where the Second Department affirmed the trial court's exercise of discretion in imputing income of $65,000 per year to the husband for child support purposes where, although husband testified that stress, depression, and anxiety impeded his ability to work, he presented no medical evidence to substantiate these claims and failed to meet burden of establishing that he diligently sought to obtain employment commensurate with his qualifications and abilities, and the evidence presented at trial demonstrated that he received financial and other assistance from family members and friends); *Zappin v. Comfort*, 155 A.D.3d 497, 65 N.Y.S.3d 30 (1st Dept. 2017) (where the First Department held that the trial court properly imputed income to the father based on his income in 2014 where, even if he was terminated from his position at his law firm because of negative publicity he received after he had been sanctioned during underlying proceedings, his unemployment resulted from his own misconduct at trial, not from court's conduct in sanctioning him/publicly releasing sanctions order).

Clearly, the Appellate Departments provide the trial courts with broad discretion in determining a party's income. It is the asserting party's burden to make certain the record contains sufficient evidence to support the deviation from either the reported income for imputation or from historical earnings / skill set to avoid an imputation.

Note: Jeffrey L. Catterson is a partner at Barnes, Catterson, LoFrumento & Barnes, LLP, with offices in Garden City, Melville and Manhattan and practices primarily in matrimonial and family law. He can be reached at JLC@BCLBLawGroup.com and (516)222-6500.