In preparing to write this month’s column, I reviewed the mission statement of the Albany County Bar Association (“ACBA”) which is as follows:

“To promote professional collegiality among the bench and the bar; facilitate public service and access to justice for all; and offer programs, benefits and services to enhance the skills of its members.”

With the mission statement in mind, I begin my term as president and look back at the rich history of the organization. ACBA was incorporated almost 120 years ago with just 53 founding members. Today we have over 1200 members and have been the voice of the Albany legal community for more than a century.

When I first became a member of ACBA, I was immediately welcomed by then Executive Director, Barbara Davis. Likewise, I was encouraged to develop into a leadership role by President David Miranda who appointed me as Co-Chair to the newly implemented Attorneys in Public Service Committee (“APS”). My co-chair at that time was Dan Hurteau, a private practitioner who was focused on cultivating more public service attorney involvement in the Bar. The purpose of the committee was to recognize that attorneys in government have different needs than attorneys in the private sector. Today the committee remains dedicated to ensuring that those needs are recognized and addressed by ACBA.

As a Supreme Court Justice, I have the daily opportunity to serve the people of the State of New York by making tough decisions and bringing what I hope is a sense of justice and fairness to each case. Before serving as a Judge, I committed most of my legal career to public service because at the end of the day it was important for me to feel that I was making a difference. Nonetheless, whether you’re an attorney in public service, in private practice, or a solo practitioner, ACBA is an organization that remains beneficial to each one of you. Indeed, there are several committees to join, social gatherings, networking opportunities, mentorship, the lawyer referral service and the list goes on.

My goal this year is to stay focused on the mission statement and work with the Executive Committee, our wonderful Executive Director Marquita Rhodes, the Board and the fabulous members of this fine organization to insure that ACBA continues to grow and offer benefits to each one of you. If you have suggestions you wish to share, please email me at: cryba@albanycountybar.com.

Lastly, during my presidency I will use this column to highlight members working in public service with a short interview to spotlight their contributions to the success of our community. You see, public service attorneys work really hard but at times, their work goes unnoticed. I am hoping that will change -- through highlighting such work in this column.

Continued on page 2
EXECUTIVE DIRECTOR’S MESSAGE

Have you renewed your 2018 Albany County Bar Association membership yet? It is easy to do. Go online albanycountybar.com or give us a call (518) 445-7691 and cross that off your list today. The deadline to renew membership is March 1, 2018.

This just in! LexisNexis is excited to partner with the ACBA Small and Solo Committee and the NYS Trial Academy to host an Early Spring Happy Hour slated for March 7, 2018. More details on this fun evening are online and on the flier on the back inside cover. Space is limited so register early.

Be sure to check out all the CLEs and programs schedule on our website. We update our offerings often and are always open to suggestions. Write us!

Happy Winter,
Marquita Jo

MARQUITA JO RHODES
Executive Director
mrhodes@albanycountybar.com

PRESIDENT’S MESSAGE (continued)

Continued from page 1

This month I interviewed Albany County Attorney Daniel Lynch.

What is your current job title and summarize what you do?

I am the Albany County Attorney and have held this position since February 2016. The County Attorney is the chief legal advisor for the County of Albany, its agencies and officers, on all civil matters and is responsible for representing the County in all civil actions and proceedings brought by or against the County. In short, the County Attorney is legal counsel for the County.

The County Attorney’s Office is comprised of three bureaus: the Civil Litigation Bureau which defends civil and administrative actions brought against the County; the Family Law Bureau which prosecutes abuse/neglect petitions and juvenile delinquents, litigates adult protective issues and initiates action for resource recovery; and the Municipal Bureau which advises county officers, renders legal opinions, reviews FOIL requests, drafts and reviews contracts, and enforces all consumer affairs and health related laws.

What drew you to work in public service?

I knew I wanted to use my legal education to help others and my first opportunity to work for the public was with the Albany County District Attorney’s Office. It was in that role that I enjoyed representing the County to make our community safer and protect victims and their families. I ended up spending over 13 years in that office before becoming Albany County Attorney. I continue to serve the public interest as the County’s legal counsel on matters that affect the citizens of Albany County from providing greater resources to protecting health and safety. For example, our office recently collaborated with Motley Rice, a well-respected mass tort litigation firm, to file a federal lawsuit in the United States District Court for the Northern District of New York against the manufacturers of opiates to combat the prescription drug crisis.

Has your job in public service shaped your view on what it means to be a lawyer? If so, how?

MISSION STATEMENT

The purpose of the Albany County Bar Association is to promote professional collegiality among the bench and bar; facilitate public service and access to justice for all; and offer programs, benefits and services to enhance the skills of its members.
Committee Updates

Young Lawyers Committee

Hello from the new co-chairs of the Young Lawyers Committee! We are both very excited to take on this new position and look forward to getting to know you all in the process. We would like to thank previous co-chairs Amanda Kuryluk and Alicia Dodge for their hard work and dedication to the YLC over the past few years. The two of us have big shoes to fill!

Thank you to everyone who came out to our happy hour at the Fort Orange Brewery in January. It was great to meet you all, network and hear your ideas on what events and CLEs you would like the YLC to organize this year.

One of our goals is to get more involvement from the other young attorneys that have expressed interest in being a member of the YLC. We plan to have quarterly meetings to serve as an opportunity to brainstorm and plan events as a group. If you would like to join the committee, contact us. Please feel free to contact us anytime with any ideas you have for events or CLEs at Mackenzie@maguirecardona.com and Marinello@oobf.com.

We look forward to serving as YLC co-chairs and to seeing you all at future events!

Sincerely,
Hildy Marinello and Mackenzie Kesterke

PRESIDENT’S MESSAGE (continued)

Continued from page 2

It is inspiring to work in public service. I am reminded daily that the legal work our office does goes beyond motion practice and affects the well-being of families and community members and I am humbled by the opportunity to be a public servant.

What do you find most valuable with being a member of the Albany County Bar?

The Albany County Bar Association offers a wide range of resources for attorneys engaged in both private practice and the public sector. I have found networking events to be a great way to stay connected to the legal community. The networking opportunities offered by the Association are invaluable for both public and private attorneys alike and I have seen first-hand the positive results of fostering these relationships.

Additionally, the Association has offered more trainings tailored for public sector attorneys, which have been useful in practice. For the last several years, the Albany County Bar Association, the Albany County Attorney’s Office, and the County Attorneys Association of the State of New York have partnered and offered statewide training on juvenile delinquency issues. Last year, this collaboration resulted in a 3-day comprehensive training conference which addressed and encouraged discussions on the foreseeable concerns and issues that the recent Raise the Age legislation will have on county government.

What can the Bar Association do to encourage more public sector attorneys?

I think the Bar Association can continue to be a resource and work with public sector attorneys and understand their interests, for example pro bono work, and find ways to assist them on how to make that a reality within the confines of being a public servant.

ACBA President Judge Christina L. Ryba and Immediate Past President James E. Hacker.
The H-2B Nonimmigrant Visa

Last month I wrote about receiving a call from a friend of mine who heads up the local affiliate of a national not-for-profit charitable endeavors, this not-for-profit runs a summer camp for kids. Some of their employees come from overseas. My friend, his superiors, and the association that represents the interests of him and other similarly situated not-for-profits are concerned that the Trump Administration, as a result of the Presidential Executive Order “Buy American and Hire American”, is going to revamp the J-1 Exchange Visitor Program, and specifically two of its component visa categories, the Summer Work Travel program (and possibly even the J-1 Camp Counselor program).

In our telephone conversation, he asked whether there were any alternative visa options that they might be able to consider. I told him there was, the H-2B nonimmigrant visa, but that the requirements for qualifying for an H-2B visa are much more onerous than the J-1 Summer Work Travel or Camp Counselor programs.

The H-2B nonimmigrant visa allows foreign nationals who are citizens of certain named countries (with limited exceptions), to accept “temporary” non-agricultural employment in the United States. Before doing so, the sponsoring employer must first obtain a temporary labor certification from the U.S. Department of Labor (“USDOL”) by establishing that there were no willing, able, and qualified U.S. workers available during the recruitment period. As this employment is temporary, the foreign national must also show “nonimmigrant intent” (i.e., that he or she has a compelling reason to return to his or her country of origin).

Like the H-1B program, there is an annual numerical limitation of 66,000 H-2B visas that are available in each government fiscal year. Under the regulations, an H-2B petition may be valid for up to one year for seasonal, intermittent, or peakload needs, and for up to three years for a one-time need. Also under the regulations, H-2B petitions may be extended for periods of up to one year, to a maximum of three years in H-2B status in some instances. To be eligible for a period of H-2B status beyond these limitations, a foreign national must remain outside the United States for at least three months. Spouses and children under 21 may hold a derivative H-4 status.

There are some key aspects of the H-2B visa program, among them, the employer identifying what its temporary need is. The job may be professional, skilled, or unskilled, and there must be a seasonal, peakload, intermittent, or one-time need for the temporary services or labor. The following definitions apply:

A. Seasonal. The seasonal definition of temporary need requires an employer to establish that their need for labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature and the period(s) of time during each year in which the employer does not need the services or labor. (Note that employment is not seasonal if the period of need is unpredictable, subject to change, or considered a vacation period for the employer’s permanent employees).

B. Peakload. The peakload definition of temporary need requires an employer to establish that it regularly employs permanent workers to perform the services or labor at the place of employment and it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand and the temporary additions to staff will not become part of the employer’s regular operation.

C. One-Time Occurrence. The one-time occurrence definition of temporary need requires an employer to establish that it has not employed workers to perform the services or labor in the past and it will not need the workers to perform the services or labor in the future or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker(s).

D. Intermittent. Under this standard, an employer must establish that it has not employed permanent or full-time workers to perform the services or labor but occasionally or intermittently needs temporary workers to perform the services or labor for short periods.

As also noted above, before an employer can file a petition with U.S. Citizenship and Immigration Services (“USCIS”), it must first obtain a temporary labor certification from the USDOL. After a period of recruitment, the employer will file an application for temporary labor certification with the USDOL. The temporary labor certification represents an employer’s attestation of testing the labor market appropriately and in good faith to demonstrate that capable U.S. workers did not respond to its recruitment efforts or ultimately were not available (either due to lawful rejection by the employer, failure on the worker’s part to follow through or remain on the job, etc.) to perform the labor or services. Before filing the temporary labor certification, the law requires the employer to recruit for the offered position(s). This recruitment must take place within 120 days of the start date for the offered positions. Prior to the recruitment, the employer must also apply for and receive a Prevailing Wage Determination from the USDOL, which can take around 60 days to receive.
Product Liability – Distributor Not Entitled to Summary Judgment

Palmatier v Mr. Heater Corp. et al and Star of India Fashions, Inc. (Rose, J., 524731 [12/21/17])

Plaintiff was injured when a skirt she was wearing caught fire while standing next to a propane heater. She initiated this lawsuit against the alleged distributor of the skirt, defendant Star of India Fashions, as well as the propane heater manufacturer/distributor/designer, referred to as the Enerco defendants. Star of India moved for summary judgment dismissing all claims and cross claims asserted against it, which was opposed by plaintiff and the Enerco defendants. After Supreme Court granted Star of India’s motion, the Enerco defendants appealed. In reversing, the Third Department found Star of India failed to prove as a matter of law it did not distribute the plaintiff’s skirt. What grabbed my attention about this case pertained to a document that Star of India offered through its general manager, Ms. Smith, in an attempt to establish it did not distribute this skirt. Ms. Smith testified that a 2 ½ page printout of search results from Star of India’s “In Transit” record database, of some three million items it distributes per year, conclusively established it did not distribute any skirts to Macy’s in 2007, the year and possible retailer where plaintiff’s skirt was purchased. However, Ms. Smith was unable to identify who performed the search on the “In Transit” database or what search terms where used to produce the 2 ½ page results. Given the absence of this evidence providing a basis for the search results, coupled with other proof that the plaintiff’s skirt has the Star of India registration number and logo on the label, the Third Department held Star of India failed to meet its burden.

Of note, in a related appeal, Palmatier v Mr. Heater, et al. (Rose, J., 524050 [12/21/17]), the Third Department also held that the Enerco defendants were entitled to production of the entire Star of India “In Transit” database because it may be “fairly characterized as useful and reasonable” in defense of this case.

Can Multiple Actions Stand?

Rothschild v Braselmann, et al. (Pitzker, J., 524521 [1/4/18])

Plaintiff initiated this Supreme Court negligence and medical malpractice action against five doctors after suffering urological problems that lead to sepsis while incarcerated at Elmira Correctional Facility and Clinton Correctional Facility. Plaintiff had previously filed 1) an action in the Court of Claims alleging similar negligence and medical malpractice; and 2) a 42 USC § 1983 claim

TORTS AND CIVIL PROCEDURE

IMMIGRATION LAW UPDATE (continued)

Continued from page 4

Once all of this is done, and assuming there are no available U.S. workers and the temporary labor certification is certified by the USDOL, the employer will file its H-2B petition with USCIS. It is permissible for an H-2B petition to be filed for multiple beneficiaries provided the temporary labor certification application on behalf of multiple workers entails “the same service or labor on the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment.” Once that’s approved, it will be forwarded to the U.S. embassy / consulate closest to where the foreign nationals reside and that issues H-2B visas.

I have completely over-simplified this process. It’s highly technical and keeping on top of the timing is critical. However, for an employer that has the type of needs that are outlined above, the H-2B visa may be a very viable option.●

1 On April 18, 2017, President Trump signed an Executive Order entitled “Buy American and Hire American.” The purported purpose of the “Hire American” portion of the order is to create higher wages and employment rates for U.S. workers, and to protect their economic interests by rigorously enforcing and administering the laws governing entry into the United States of foreign workers. Most of the focus of the implications of this Executive Order has been on the H-1B nonimmigrant visa program. Other visa programs are clearly in the cross-hairs as well.
The Appellate Division recently issued a decision of interest concerning the difference between independent contractors and employees. For those that actually follow this area of law, the case is more of an example of how to lose “contractor” designation by ignoring Labor Law § 511 – a straightforward statute.

In Matter of Kaufman Leasing Company LLC (524647), claimant worked as an office leasing broker for Kaufman Leasing Company LLC (“Kaufman”), which is engaged in the business of commercial real estate brokerage. After claimant was terminated from his position, he was deemed eligible for unemployment insurance benefits on the basis that an employer-employee relationship existed, and Kaufman was assessed for additional unemployment insurance contributions on remuneration paid to claimant and those similarly situated. Kaufman objected to the finding of an employment relationship, and, following a hearing, an Administrative Law Judge affirmed the initial determination. The Unemployment Insurance Appeal Board (“Board”) affirmed that decision, and Kaufman appealed.

In affirming the Board’s decision, the Court noted that a determination that an employer-employee relationship exists must rest upon evidence that the purported employer exercises control over the results produced by its salespersons or the means used to achieve the results. “Whether an employment relationship exists within the meaning of the unemployment insurance law is a question of fact, no one factor is determinative and the determination of the [Board], if supported by substantial evidence on the record as a whole, is beyond further judicial review even though there is evidence in the record that would have supported a contrary conclusion.”

Here, claimant, a licensed real estate salesperson, submitted his resume and was interviewed twice before being hired as an office leasing broker and signing an independent contractor agreement. Kaufman provided claimant and those similarly situated an extensive training program that included assignment of a mentor and instruction by a third-party vendor hired by the Kaufman that took place either at Kaufman’s offices or the vendor’s location. The training included instruction on best practices, basic leasing terminology, how to identify prospects, how to make cold calls and how to negotiate a transaction. Even after claimant successfully completed the training program within the probationary period, the services of the vendor were still available to him. Claimant was paid a draw during the probationary and training period, for which Kaufman did not seek reimbursement. Kaufman also provided claimant and those similarly situated an office with equipment and supplies — including desks, computers, Internet and multiple listing service — where claimant and those similarly situated were expected to report when the office opened at 8:30 a.m. or otherwise inform a supervisor of his or her whereabouts during the day. In addition, Kaufman issued claimant and those similarly situated a work email address, as well as business cards with the salesperson’s name and Kaufman’s name on them. Pursuant to the signed agreement, Kaufman reimbursed claimant and those similarly situated a work email address, as well as business cards with the salesperson’s name and Kaufman’s name on them. Pursuant to the signed agreement, Kaufman reimbursed claimant and those similarly situated for certain professional expenses, set the commission rates, reserved the right to request monthly reports, required confidential final transaction reports, provided health insurance at Kaufman’s expense, prohibited the performance of similar services outside the company and required that the services be performed to the best of the salesperson’s abilities in a timely and productive manner.

In view of the foregoing, the Court found that substantial evidence supported the Board’s finding that the level of supervision and control exerted by Kaufman amounted to an employer-employee relationship, notwithstanding that there was other evidence in the record to support a contrary conclusion. To the extent that the testimony from a Kaufman representative contradict ed claimant’s testimony, this created a credibility issue for the Hearing Officer to resolve.

Notwithstanding the foregoing, the record indicates that Kaufman at least raised Labor Law § 511(19) as a defense. Labor Law § 511(19) expressly provides that real estate agents are independent contractors, provided certain criteria are met and a written agreement (containing specific provisions) is executed. The Court, however, rejected Kaufman’s argument, finding that the written agreement did not set forth all of the eight (8) specific provisions required under the statute.

Individuals or entities retaining real estate agents on a contractor basis must be cognizant of Labor Law § 511(19). Structuring the relationship to satisfy the criteria of the statute should not affect most retentions, and drafting and executing an agreement every twelve months (as required under the statute) should be a rather simple and routine exercise.

1. Labor Law 511 removes a number of positions from employer-employee status, provided specific criteria are satisfied.
The Best Job in the State

“Anyone who lives within their means suffers from a lack of imagination.” Oscar Wilde

OK, it is just my opinion, but I think the best job in New York State is Administrative Judge in the Office of Court Administration, at least since Alain Keloyeras left public service. He was paid $877,098 in 2016 as a Principal Investigator for the College of Nanoscale Science & Engineering and $987,075 in 2014 as Executive Officer of SUNY Polytechnic Institute. That’s hard to beat. But Chief Administrative Judge isn’t bad either, and I’m not just talking about the $17,000 pay raise in 2016. There’s also the car and driver in case you want to make some calls or review some Family Court statistics on the way to work. And then there’s the spiffy office at 25 Beaver Street in the Financial District neighborhood in Manhattan. But the real perks begin when the job ends.

Jonathan Lippman was the Chief Administrative Judge from 1989 until 2009 when he ascended to Chief Judge of the Court of Appeals. During that time he championed a program to dole out millions of dollars to organizations for civil legal services, i.e. lawyers for other people. That has now risen to $85 million per year. This year’s winners are Legal Services NYC ($9,786,789), the Legal Aid Society ($3,786,789) and Legal Services of Central New York ($5,391,921). This is not money for mandated attorneys like Public Defenders or Attorneys for Children. This is for people who seek to have representation in Family Court, City Court and other places where legal representation is not required by statute or law. Here’s the thing. Do you know who doles out all that money? The Chief Administrative Judge and two other guys. Together they are known as the Oversight Board for Judiciary Civil Legal Services Funds in New York or to me, OBJUCLESEFUNY. Try saying that three time fast.

Here’s the thing. When you decide to stop being an Administrative Judge, you can go to work for one of the organizations that receives the money you dole out, and your successor Chief Judge can give out lots more of the taxpayers’ money for your new employer. What a sweet deal, eh?

In 2011, Judge A. Gail Prudenti was appointed Chief Administrative Judge of the State of New York. She left her $188,000 per year job and was succeeded by her First Deputy Chief Administrative Judge Lawrence Marks in July of 2015 when she went to work for Hofstra Law School’s Center for Children, Families and Law. Hofstra Law School didn’t receive a dime from OBJUCLESEFUNY for 2012-2013 with Judge Prudenti at the helm but by 2015 they doubled their previous year’s award to about $98,000 thanks to Chief Executive Judge Prudenti. The year after she left, her successor Judge Marks and the two other guys awarded Hofstra $131,888 for Civil Legal Services. A similar sum was awarded for 2017-2018. On Law Day this year she was named Dean of Hofstra Law School. Congratulations your Honor. The Hofstra Law School Dean received $429,854 in compensation plus $76,781 from affiliated organizations in 2014, their most recent tax filing. I wonder if Dean Prudenti will receive a raise from that. She also receives $92,545 yearly from the New York Retirement System.

But the pioneer of all this was Judge Judy Harris Kluger. She was one of the five Executive Judges of the Office of Court Administration, technically the Deputy Chief Administrative Judge for Court Operations and Planning. She left that job on January 1, 2014 to become the Executive Director of Sanctuary for Families, a not for profit organization in New York City. In 2013 they were awarded $401,600 by Judge Prudenti and the two other guys. In 2014 the award was increased by $190,000. The award for this year? $1,698,922. Plus, they receive an additional $375,000 from the state’s Interest on Lawyer Account (IOLA) largesse. The IOLA Board of Trustees Chair also happens to be a member of OBJUCLESEFUNY along with the Chief Administrative Judge. In 2016 Sanctuary Executive Director Kluger was paid $204,017 which is of course in addition to her $101,321 yearly NYS tax free retirement pay. I’m guessing she just might get a raise from the Sanctuary this year.

Your tax money at work, not mine.

Post Scriptum: It has been suggested that this is a stretch. I agree. It might just be a coincidence. After all, former Administrative Judge Barry Kamins did not land a nice job with a Judicial Legal Services recipient when he came to an agreement with the Commission on Judicial Conduct to stop being a judge because of some political irregularities involving the Brooklyn District Attorney. Last Thursday he gave a lovely CLE at the Brooklyn Bar Association on Attorney Discipline. So, sure, maybe just a coincidence.
An Insiders’ View

Hon. Stacy L. Pettit, Surrogate
Alima M. Atoui, Esq., Law Clerk
Deborah S. Kearns, Esq., Chief Clerk
Albany County Surrogate’s Court

Howdy – Aloha – Hola – Bonjour: WELCOME TO FOREIGN ESTATES – SCPA article 16

While local practitioners may be well-versed in commencing estate proceedings for domiciliary decedents, occasionally, you may find yourself with New York estate matters for a non-New York domiciliary. For example, maybe a Florida domiciliary owned a summer camp in the Adirondacks, or a New Jersey domiciliary had some unclaimed funds being held by New York State. Guidance for such matters may be found in SCPA article 16.

As you know, Surrogate’s Court has jurisdiction over the estates of decedents who were domiciliaries of New York at the time of death (see SCPA 206 [1]). In addition, the court has jurisdiction over nondomiciliary decedents who leave property or a wrongful death cause of action in the state (see SCPA 206 [1]) – although, it is noted that fiduciaries appointed in other states or territories may participate in New York legal actions without the need for an ancillary proceeding, subject to certain conditions (see EPTL 13-3.5).

SCPA article 16 addresses ancillary estates for persons who were domiciled elsewhere and left assets in New York, and for whom an estate proceeding has already occurred in the domiciliary jurisdiction – whether formally or informally (see SCPA 1601). As stated by the Court of Appeals, “the essential, underlying function of ancillary proceedings [is] to obtain control and possession of New York assets of a nondomiciliary, to satisfy New York creditors, and to transfer remaining assets to the domiciliary administrator” (Matter of Obregon, 91 NY2d 591, 603 [1998]). An understanding of the estate laws of the decedent’s domicile will be necessary to establish entitlement to ancillary letters in Surrogate’s Court.

Procedure

SCPA 1609 sets forth the procedure for commencing an ancillary estate in Surrogate’s Court. A verified petition for an ancillary estate may be filed by any creditor, public administrator, county treasurer, person interested, or person to whom ancillary letters may issue. The petition must list all of the decedent’s New York assets, the value of each asset, the amount of any bond given on the domiciliary appointment, the names and addresses of each domiciliary creditor or purported creditor, and the amount of each claim (see SCPA 1609 [1]). The verified petition should be accompanied by an oath and designation executed by the proposed fiduciary (see SCPA 1608 [2]; see also SCPA 708).

The application for an ancillary estate should also include authenticated copies of the documents issued by the foreign jurisdiction, including the letters testamentary or of administration, the decree or order, and, with respect to probate matters, the will (see SCPA 1614; see also CPLR 4540, 4542). If the documents are in a foreign language, they must be accompanied by an English translation and an affidavit by the translator attesting to the accuracy of the translation and the qualifications of the translator (see CPLR 2101 [b]).

As with any Surrogate’s Court proceeding, either a citation or waivers from all interested parties will be necessary. The Department of Taxation and Finance is always an interested party to ancillary estate proceedings, regardless of whether letters are requested (letters may not be requested where ancillary probate is needed only to establish clear title to real property); thus, process must issue to the Department (see SCPA 1609 [2, 3]; Tax Law § 971-a). In appropriate cases, the Department will cooperate with the taxing authorities of the decedent’s domicile so that the domicile state receives any taxes due from the estate (see Tax Law § 971-a). Instructions for obtaining a waiver of citation and consent from the Department can be found here: https://www.tax.ny.gov/pdf/current_forms/et/au67.pdf.

Additional interested parties to an ancillary proceeding include any domiciliary creditors or purported creditors, and any persons entitled to ancillary letters or entitled to designate an ancillary fiduciary (see SCPA 1609 [2]). Pursuant to SCPA 307 (6), creditors may be served by mail, even if they are New York domiciliaries.

With respect to estate beneficiaries, only those will beneficiaries or distributees who are New York domiciliaries need to be listed on the petition. Surrogate’s Court may direct that notice of the petition be served on the domiciliary beneficiaries (see SCPA 1608 [5]). In such cases, the notice shall comply with either SCPA 1005 for administrations or SCPA 1409 for probates (see SCPA 1608 [5]).

The filing fee for an ancillary estate proceeding is based on the value of the New York assets only (see SCPA 2402 [7]). A certified death certificate should also be included with the filing. Foreign estates are properly venued in the county where the decedent left property (see SCPA 206).

Ancillary Probate

With respect to an ancillary probate proceeding, the petitioner must establish that decedent’s written will has been admitted to probate, or established in accordance with the law, in the original jurisdiction, and that it is not being contested in that jurisdiction, although it may remain subject to contest under the laws of that jurisdiction (see SCPA 1602 [1]). A will which has been denied pro-
Ancillary Administration

Surrogate’s Court entertains both ancillary probates and ancillary administrations. With respect to an ancillary administration proceeding, the petitioner should establish to the court that letters of administration have been issued by the original jurisdiction, or, in a jurisdiction that does not grant letters of administration, that a person is acting to administer the decedent’s estate in accordance with the laws of the original jurisdiction (see SCPA 1607). Surrogate’s Court will need to establish that the petitioner is entitled to such relief under the laws of the decedent’s domicile; accordingly, the petitioner should supply Surrogate’s Court with sufficient information to make such a determination.

In an ancillary administration proceeding, the court shall issue letters of administration to eligible persons in the following order: (1) the person appointed or acting as administrator in the domiciliary jurisdiction; or (2) a person entitled to letters of administration under the SCPA (see SCPA 1607 [2]).

Letters, Bonds and Other Issues

Where the foreign fiduciary isineligible to receive letters in New York, perhaps due to being a nondomiciliary alien (see SCPA 707), that fiduciary has the right to designate an ancillary fiduciary (see SCPA 1608).

A bond may be required of an ancillary fiduciary (see SCPA 801 [1] [c] [ii]; 1608 [2], [3]). The court may dispense with a bond for an executor where the will has dispensed with a bond requirement. Otherwise, the bond “may be in such sum as to the court seems just” (SCPA 1608 [2]). If there are no domiciliary creditors and no New York estate tax, the court may likewise dispense with the bond requirement (see SCPA 1608 [3]).

In Matter of Whitney (57 AD3d 1142 [3d Dept 2008]), the Court held that neither the doctrine of res judicata nor the Full Faith and Credit Clause of the US Constitution precluded Surrogate’s Court from requiring an ancillary fiduciary to post a bond, despite having already posted a bond in the domiciliary jurisdiction. This was so because the subject matter of the ancillary proceeding differed from that of the domiciliary proceeding. Each court is limited to protecting the assets within its state (see generally Matter of Obregon, 91 NY2d 591 [1998]), thus the amount of the bond issued by Surrogate’s Court in an ancillary proceeding should correspond to the value of the New York assets at issue.

The other articles of the SCPA apply to ancillary fiduciaries just as they would to domiciliary fiduciaries (see SCPA 1610, 1613). For example, in Matter of Coccellato (202 AD2d 942 [3d Dept 1994], the ancillary administrator commenced a proceeding for advice and direction (see SCPA 2107) concerning the decedent’s New York real property.

We look forward to seeing you here in Albany Surrogate’s Court!
MATRIMONIAL LAW UPDATE

Court of Appeals: Family Offense – Violation of Temporary Order

In Matter of Lisa T. v. King E.T., 2017 Westlaw 6454309 (Dec. 19, 2017), the Court of Appeals held, with two Judges dissenting, that where Family Court finds, following a hearing, that a respondent has violated a temporary order of protection, it may issue a new and final order of protection pursuant to Family Court Act §§846 and 846-a as a disposition of such violation, even though the underlying family offense petition is dismissed.

Agreement – Upheld

In Suchow v. Suchow, 2018 Westlaw 280866 (3d Dept. Jan. 4, 2018), the husband appealed from an October 2016 Supreme Court order, which denied his motion made in his February 2015 divorce action, seeking summary judgment and incorporation of the parties’ 2012 separation agreement. The Third Department reversed, on the law, granted the husband’s motion and remitted to Supreme Court for entry of a judgment of divorce. The parties were married in 1982 and negotiated the agreement through counsel and a social worker, who acted as a facilitator, over a period of 11 months. The wife, who, according to the Appellate Division, received “meaningful benefits in the form of four vehicles, property in Las Vegas, and a total distributive award of $570,000, $405,000 of which was to be remitted upon signing of the agreement,” challenged the agreement upon the grounds of fraud and duress, after all $570,000 were paid to her. The Court held that the wife “ratified the agreement and is estopped from challenging it.”

Counsel Fees – After Trial; Divorce – Grounds; Equitable Distribution – Debt; Maintenance – Durational

In Johnston v. Johnston, 2017 Westlaw 6519486 (3d Dept. Dec. 21, 2017), the Third Department upheld a January 2017 Supreme Court judgment, which, after a trial of the wife’s April 2014 separation action and the husband’s counterclaims for divorce, decided the issues of counsel fees, equitable distribution and maintenance. The parties were married in September 1989 and have two children, born in 1991 and 1995. Supreme Court: granted the husband a divorce on his no-fault counterclaim; awarded the wife $5,000 in counsel fees and $3,000 per month in maintenance until she begins to receive the husband’s retirement benefits; the death of either party, the wife’s remarriage or a subsequent modification by the court; directed an equal sharing of a home equity loan; and gave the husband a credit for payments made over and above rent received. The Appellate Division held that “having determined that the husband established irretrievable breakdown pursuant to Domestic Relations Law §170(7), Supreme Court was under no obligation to grant the wife a judgment of divorce on the ground of adultery or constructive abandonment.” The Court noted that “the parties had been renting out the marital residence for $1,300 per month” and that Supreme Court “awarded the husband a credit for one half of the payments that he made during the pendency of the action toward the portion of the mortgage that was not covered by the rental income.” The Third Department rejected the wife’s assertion that Supreme Court erred by concluding that the home equity loan taken on the marital residence was a marital debt and that the parties should equally share its repayment upon the sale of the residence, given “the absence of any evidence that the husband used the home equity loan to pay off his separate liabilities.” The Appellate Division noted that Supreme Court’s maintenance award considered “the parties’ long-term marriage, the ‘comfortable lifestyle’ that they enjoyed throughout the marriage, their respective property, income and potential earning capacities and its distributive award of marital property and debt.” The husband had been the primary wage earner and the wife managed the home; she was the primary caretaker and educator of the children, who were home schooled for a majority of their childhoods. The Third Department held that Supreme Court properly imputed an annual income of $30,000 to the wife. The Court affirmed the $5,000 counsel fee award, given “the $8,000 that the husband paid to the wife in interim counsel fees, the amount of temporary maintenance and child support received by the wife, and ‘the tremendous expenditures made by the husband to keep the family and the marital residence afloat during the pendency of the action.’” The Court concluded: “To the extent that the wife asserts that the proceedings were unfair because the husband allegedly spent more in legal fees, we note that the wife was free to use her temporary maintenance to supplement the interim and postjudgment counsel fee awards.”

Custody – Modification – Mother Arrested; Communication Breakdown

In Matter of Damiano v. Guzzi, 2018 Westlaw 280869 (3d Dept. Jan. 4, 2018), the Third Department affirmed an October 2016 Family Court order, which granted the father’s petitions for modification of a 2014 consent order, under which she had sole legal and physical custody of their daughter born in 2013, by awarding joint legal custody with primary placement to the father. The Appellate Division held that changed circumstances, which included “communication difficulties that the father asserted were impairing his visitation and the mother’s arrest and ongoing interactions with the criminal justice system [.]” warranted a best interests analysis. The Court noted that the father was living in an apartment attached his mother’s residence (she assisted in child care) and that he “maintained the house and grounds while he searched for stable employment.” The Court found that the mother, “in contrast, was unemployed, dependent upon distant...
DON’T DE-FEET YOURSELF

For most people, feet are just there – something to transport us from one place to another – until feet start to have problems and then they become all important. If you are a hiker, runner or other athlete who uses your feet beyond gentle walking you probably appreciate the value of feet that work well. As we age, our feet do too! I remember a friend seeing my infant son and saying – “his feet are so perfect”. Old feet do not have to be ugly. It takes some work on your part to either prevent problems, treat them or minimize their impact. As a yoga dance instructor, my feet are really important to me, so I do things to make them happy. Here are a few suggestions:

• First, and really important, use lotion on your feet every day, at least in the morning and at night. In addition, if you are working your feet hard like hiking, running, ice skating etc., use lotion before you go out. This really really helps reduce calluses and any irritations.

Any lotion will do – no need for something special. If you have a few minutes, massage the lotion into your feet. It’s a great relaxation exercise at the end of a crazy day.

• Buy good socks! This may sound a little silly, but good socks can keep sweat off your skin and cushion your feet well. My favorite socks are made with merino wool. I use them 12 months a year (with different thicknesses) for all kinds of activities. The socks keep your feet warm in winter and cool in summer.

• Pamper your feet. Soak your feet in warm soapy water for approximately 10 minutes. This helps soften and clean skin and nails. After the foot soaking, gently remove calluses with a pumice stone, Hindu stone or emery board. This gets rid of dead skin cells as well as calluses. I regularly use a pumice stone after showers to keep calluses in check. In addition, some body scrub products can help exfoliate dead skin.

It takes some work on your part to either prevent problems, treat them or minimize their impact. As a yoga dance instructor, my feet are really important to me, so I do things to make them happy. Here are a few suggestions:

• Pamper your feet. Soak your feet in warm soapy water for approximately 10 minutes. This helps soften and clean skin and nails. After the foot soaking, gently remove calluses with a pumice stone, Hindu stone or emery board. This gets rid of dead skin cells as well as calluses. I regularly use a pumice stone after showers to keep calluses in check. In addition, some body scrub products can help exfoliate dead skin.

• Do your own massage by rolling your feet over a bottle or rolling pin. It feels great!

TORTS AND CIVIL PROCEDURE (continued)

Continued from page 5

obtain full relief therein.” Therefore, the Supreme Court action against the two non-DOCCS doctors should not have been dismissed.

Breach of Contract Claims Against No-Fault Insurer

Brown v Government Employees Insurance Company. (Rumsey, J., 524696, [12/14/17])

Plaintiff alleges she was seriously injured as a result of a car accident in 2012. Plaintiff’s no-fault benefits were terminated by her insurer, GEICO, following an independent medical examination performed at the request of GEICO that found plaintiff’s injuries were pre-existing and not causally related to the accident. Following this denial of benefits, plaintiff brought this breach of contract action alleging violations of General Business Law §§ 349 and 350 and intentional infliction of emotional distress based on alleged pressure GEICO put on its IME physicians to attribute injuries to pre-existing conditions to facilitate denial of no-fault benefit claims. Defendant GEICO moved to dismiss plaintiff’s General Business Law §§ 349 and 350 claims and intentional infliction of emotional distress, as well as plaintiff’s claims for consequential damages, emotional distress and punitive damages. Supreme Court partially granted GEICO’s motion and dismissed all claims other than those for consequential damages for economic loss and pain and suffering. On appeal by plaintiff, the Third Department reversed in part finding the plaintiff’s General Business Law § 349 claim was sufficiently stated at this early stage of the litigation and should not have been dismissed. Notably, in the complaint, plaintiff alleged GEICO engaged in a consumer related pattern in an effort to wrongfully deny no-fault benefit claims by pressuring physicians it hired to conduct IME’s to support denial of claims and that plaintiff suffered injury due to this practice by GEICO. The Court also noted that plaintiff’s claim for emotion distress was properly dismissed because “absent a duty upon which liability can be based, there is not right of recovery for mental distress resulting from the breach of a contract-related duty.” ●
relatives for financial support and facing an uncertain legal future with the potential to impact any child in her care,” and also cited Family Court’s determination that the mother was “entirely incredible” when she “feigned a lack of recall as to basic details surrounding her legal difficulties.”

Family Offense – Intimate Relationship; Harassment 2d and Menacing 3d

In Matter of Kristina L. v. Elizabeth M., 2017 Westlaw 6519537 (3d Dept. Dec. 21, 2017), the Third Department affirmed an October 2016 Family Court order, which found that respondent had committed Harassment in the Second Degree and Menacing in the Third Degree and granted petitioner a one year order of protection. The Appellate Division rejected respondent’s contention that petitioner failed to establish an “intimate relationship” as defined by Family Court Act 812(1)(e), finding: “[i]n February 2016, petitioner moved into respondent’s apartment for a period of two to three months. *** [T]hey had agreed that petitioner would live with respondent rent-free in exchange for acting as a nanny to respondent’s seven-year-old daughter and helping with household chores. *** Additionally, the evidence ***, including text messages between the parties, demonstrated that the parties were each familiar with personal details relating to the other. *** Although the parties’ relationship certainly encompassed a business component, the parties’ preexisting friendship, together with the frequency of their interactions while living together, on both a personal level and with respect to the child, take their relationship out of the categories of ‘casual acquaintance’ or ‘ordinary fraternization between two individuals in business’ that are excluded from the statutory definition of ‘intimate relationship’ (citations omitted).” As to menacing, the Third Department noted that Family Court found respondent was not a credible witness and “became upset with [petitioner] about the condition of the home and, during a confrontation in the kitchen, threw a coffee mug in her direction. Petitioner testified that she avoided contact with the mug, which hit a door and broke, by moving to the side and that, had she not done so, it would have hit her in the face.” According to petitioner, her encounter with respondent was an ‘intimidating situation.’” With respect to harassment in the second degree, the Appellate Division cited as sufficient the evidence, that among other things, respondent sent petitioner text messages which alarmed her and which included: “You are a filthy human being and the police will punish you just like they punished your mother.”

Pendente Lite – Temporary Maintenance Guidelines (Former); Carrying Charges; Reduced on Appeal; Remittal on CSSA

In Rouis v. Rouis, 2017 Westlaw 6519456 (3d Dept. Dec. 21, 2017), the husband appealed from an April 2016 Supreme Court order, which granted the wife's September 2015 motion for pendente lite relief. The parties were married in 1993 and have two children born in 1997 and 1999. The husband moved out of the home and the wife commenced the divorce action in August 2014. Supreme Court granted the wife temporary maintenance ($1,958 per month) and child support ($2,720 per month) and required the husband to pay the carrying costs and upkeep of the marital residence ($4,859 per month), private school for the younger child ($848 per month), health insurance for the family ($1,921 per month), interim counsel fees ($10,000) and the wife’s vehicle and fuel costs ($644 per month). The appeal was argued on November 15, 2017 and the parties informed the Appellate Division that the trial commenced in October 2017, but a final decision is not expected for several months. Departing from the general rule that the best remedy for any claimed inequity in a temporary order is a speedy trial, the Third Department stated: “However, given that Supreme Court’s combined monthly awards amount to an annual award of $155,400 plus $10,000 in interim counsel fees, to be paid from the husband’s annual gross income of $183,300.50 (for purposes of maintenance) as calculated by the court based upon his 2013 tax return, we agree that the temporary awards are excessive and should be modified.” The Appellate Division noted that Supreme Court “essentially credited the husband for one half of the carrying costs on the home ($2,429.50 per month) by reducing the presumptive maintenance award by that amount, resulting in a temporary maintenance award of $1,958 per month. *** When the wife’s vehicle expenses are added ($644 per month), this results in a total combined monthly award of $7,461, plus tuition ($848 per month) and child support, discussed below.” The Court recognized that the husband correctly argued “that the statutory formula used to calculate the presumptive temporary maintenance award was intended to cover all of the nonmonied spouse’s needs and basic living expenses, including the carrying charges on the home and her vehicle expenses (citations omitted).” The Third Department found that “the combined award for maintenance, carrying costs and the expenses of the wife’s vehicle ($7,461 per month) — which is $3,073.50 per month in excess of the presumptive maintenance award ($4,387.50 per month) (without considering health insurance costs, child support or tuition) — is excessive. Accordingly, we deem it appropriate to reduce the husband’s obligation to pay the carrying costs on the marital home by approximately one half of that excess amount, or $1,540 per month, to $3,319 per month. The temporary maintenance award of $1,958 is not changed.” As to temporary child support, the Court held that “Supreme Court miscalculated the parties’ pro rata shares of child support. *** Accordingly, the matter must be remitted for immediate recalculation of the husband’s temporary child support obligation. *** Finally, we note that the excess payments made by the husband under the court’s temporary order may be considered at trial ‘in appropriately adjusting the equitable distribution award’ (citation omitted).”
FRUITCAKES, DUMMIES, WHINERS, AND WEASELS

Is There a Special Olympics for Crime?

George knew that Lennie would never get a fair trial. Before the other ranch hands could savagely beat the big guy to death, George took Lennie’s life himself in John Steinbeck’s classic “Of Mice and Men.” The epic novel captures the sense of powerlessness of men drifting through life. If there had been a trial, how would Lennie have done in court? What about George? You can write the sequel.

Why wasn’t anyone upset when “Rainman” totaled around in his father’s 1949 Buick Roadmaster and wasn’t ticketed for driving without a license? What accommodation should we, do we, make for persons who never had, or lost, the intellectual capacity of conforming to legal standards promulgated for “normal” people?

The use of the term “fruitcakes” to describe persons flawed with mental illness is unkind. To refer to developmentally disabled people as “dummies” is even more degrading. The ascriptions were not intended for accuracy, but to capture the reader’s attention. Nothing in the articles we have written is designed to denigrate the defendants who might be so characterized, but to challenge attorneys to explore the totality of the client. One size doesn’t fit all.

If you are the owner of a major league baseball team, before you acquire a player, you’re going to want to know everything there is to know about the prospect. Defense attorneys usually don’t accept or reject a case because the defendant has a criminal history, certain unappealing physical characteristics, comes from a “high crime area,” or any other factor. Public Defenders are assigned files by someone else, and “paid lawyers” don’t turn down too many cases if they want to remain in business.

Have you ever asked a prospective client his or her IQ? Do you insist on receiving transcripts of all grades from kindergarten through high school before you take on a case? Anyone who says yes to these questions (and can prove it) gets a dozen golf balls.

Defense attorneys not gifted in languages other than English find communicating with a client who “no habla inglés” difficult at best. You need help. You find an interpreter, but—face facts—a lot is lost in the translation. Clients who speak some English might seem ok, but, almost always, the subtlety of language is lost. So, you convince yourself to do the best you can. Try harder. Learn to interpret for someone who does not have the same intellectual capacity as you. Clients with flaws may need their thoughts, feelings, and experiences translated to DAs, judges, and juries. If you can’t appreciate underlying conditions you will fall short of achieving the best result. Can you teach your “Dummy” to help him/her self?

Developmentally disabled men and/or women might seem to understand. They might nod their heads or smile, often at inappropriate times. Through no fault of their own, they usually can’t distinguish what’s important from what’s not and don’t know how to protect themselves during interrogations, before a Grand Jury, at a hearing, or in trial.

A rare sub-issue arises when you have a client who behaved normally while a crime was committed, but subsequently developed a stroke or other medical condition that destroyed their ability to process information or think rationally. How will this factor into your representation? Will a DA or judge care?

If locking up crazy people seems like a bad idea, then how do we feel about locking up people who lack a certain Intellectual Quotient or suffer from a developmental disability?

Crimes sometimes occur in places we rarely think about: psychiatric hospitals, foster homes, parochial schools, doctor’s offices, to name a few. Sometimes the “Dummy” is the accused and sometimes the accuser. What happens when the “Dummy” is arrested? Can he/she cope? A growing body of research indicates that young adults do not have the capacity to comprehend the Miranda warnings, inter alia. What about a person whose mental age is 10, or 5? People who were once hidden away in asylums now live with the rest of us. Sometimes, they’re arrested. Do the police care if their suspect grew up attending special needs classes? What can you do to show the judge and prosecutor that your client isn’t acting or pretending, but really has a disability? This proof is easier when the client has been diagnosed in the past and you can produce a pile of medical records and school reports, but many people may not have ever seen a doctor or psychologist who identified their problems.

If you represent a client who has intellectual impairment and “confessed” to the police, you must familiarize yourself with the work of Thomas Grisso, Ph.D. He has generated hundreds of scholarly articles on this issue. In virtually every arrest the police try to extract a confession or admissions from the defendant, and even Rhodes Scholars should keep

Continued on page 18
The Ethical Duties of Technology Competence and Reasonable (Cyber) Security

The rapidly evolving area of cybersecurity means that many attorneys can no longer take an ostrich-like approach to data breaches. Simply hoping an incident never happens in your practice is no longer realistic when two-thirds of law firms have suffered data breaches.1 Even major law firms like Cravath and Weil Gotshal have suffered significant compromises of client data.2 The massive data breach of Panamanian law firm Mossack Fonesca resulted in the exposure of hundreds of wealthy clients’ tax avoidance schemes to international scrutiny.3 The American Bar Association (ABA) and state bar associations have also created ethical guidelines requiring each attorney have technological competence and maintain reasonable (cyber) security. Attorneys should be extremely concerned that they have not taken adequate steps to establish their technology competence and reasonable security because they could face reputation damage, legal malpractice and negligence claims, and fines and sanctions for client data breaches.

I. Ethical Duty of Technology Competence

A majority of states, including New York, have adopted an attorney ethical duty of technology competence.4 The foundation of an attorney’s duty of competence lies in Rule 1.1, which has stated since 1983 that “[a] lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”5 In 2015, New York adopted Comment [8] to Rule 1.1, which clarifies that the scope of the duty of competence includes technology: “To maintain the requisite knowledge and skill, a lawyer should . . . keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information . . . .” (emphasis added).6

Practicing attorneys have faced difficulties demonstrating basic competency in respect to technology and these difficulties have led to unfavorable outcomes for their clients. For example, one law firm inadvertently posted a link to a client’s Claims File to the internet, leading the magistrate judge in the case to waive any attorney-client privilege or work-product protection over information contained in the file.7 In another matter, an attorney did not understand that e-discovery software could not show more than a limited number of records on a single computer screen and as a result inadvertently produced documents containing the financial records of tens of thousands of Wells Fargo’s customers.8 These cases illustrate the basic principle that attorneys have a duty to understand how the technology they use works.

Nevertheless, it can be difficult to determine what constitutes a minimum standard of care for technology competence. One suggestion is that technology competence includes facility with processing basic Microsoft Word processing tasks. Attorneys may wish to assess whether the legal practitioners in their office are able to accept/turn off track changes, cut & paste, replace text, format fonts and paragraphs, fix footers, insert hyperlinks, apply/modify styles, insert/update cross-references, insert page breaks, insert non-breaking spaces, clean document properties; and create comparison documents (i.e., a redline).9 Beyond this, maintaining technology competence requires attorneys to have a colleague, staff member of consultant to help the attorney “keep abreast of the benefits and risks associated with technology.”10

II. Ethical Duty of Reasonable (Cyber) Security

Applying technology competence to client confidentiality results in an attorney ethical duty of reasonable (cyber) security. While New York courts have not yet adopted ABA Model Rule 1.6 Comment [18], there is an emerging standard for what constitutes reasonable cyber security. This emerging standard requires attorneys demonstrate “reasonable efforts” by applying several non-exclusive factors as well as to take certain minimal steps for cybersecurity. Attorneys can also look to industry standards, such as those put forth by the Center for Internet Security (CIS) Critical Security Controls for a standard for reasonable cyber security.

A. Rule 1.6 Commentary

Under both New York and the Model Rule 1.6(c), a lawyer must act competently to protect client confidential information and both the New York and ABA versions of Rule 1.6 apply a “reasonableness” standard.11 The ABA has indicated that a data breach in and of itself does not constitute a violation of Rule 1.6(c)’s requirement to preserve client confidences as long as “the lawyer has made reasonable efforts to prevent access or disclosure.”12 Attorneys should consider, in making a reasonableness determination, several factors:

- the sensitivity of the information,
- the likelihood of disclosure if additional safeguards are not employed,
- the cost of employing additional safeguards,
- the difficulty of implementing the safeguards, and
- the extent to which the safeguards

Antony K. Haynes
Albany Law School
Associate Dean For Strategic Initiatives And Information Systems
Executive Director Shaffer Law Library
Director Cybersecurity & Privacy Law
Assistant Professor Of Law
ahaynes@albanylaw.edu
adversely affect the lawyer’s ability to represent clients.\textsuperscript{13}

In Comments to its version of Rule 1.6, Virginia has emphasized that “[p]erfect online security and data protection is not attainable. … What is ‘reasonable’ is determined in part by the size of the firm.”\textsuperscript{14} Furthermore, attorneys should review and address several practices:

- Periodic staff security training and evaluation programs, including precautions and procedures regarding data security;
- Policies to address departing employee’s future access to confidential firm data and return of electronically stored confidential data;
- Procedures addressing security measures for access of third parties to stored information;
- Procedures for both the backup and storage of firm data and steps to securely erase or wipe electronic data from computing devices before they are transferred, sold, or reused;
- The use of strong passwords or other authentication measures to log on to their network, and the security of password and authentication measures; and
- The use of hardware and/or software measures to prevent, detect and respond to malicious software and activity.\textsuperscript{15}

B. Industry Standards

Along with the Rule 1.6 commentary, a good place to start with establishing reasonable cybersecurity is the CIS controls. In 2016, California listed these controls as a minimum standard of care for reasonable cyber security for companies doing business in California.\textsuperscript{16} CIS has indicated that the first five controls will “eliminate the vast majority of your organization’s vulnerabilities”:\textsuperscript{17}

- Inventory of Authorized and Unauthorized Devices
- Inventory of Authorized and Unauthorized Software
- Security Configurations for Hardware and Software on Mobile Devices, Laptops, Workstations, and Servers
- Continuous Vulnerability Assessment and Remediation
- Controlled Use of Administrative Privileges.

While the legal profession is still coming to grips with the impact of technology on legal practice, Albany Law School (ALS) stands at the forefront of helping educate and train attorneys to gain technology competence and establish reasonable cybersecurity. ALS offers seminars, courses, certificates and degree programs around technology and innovation, including the nation’s first fully online LLM specializing in cybersecurity and data privacy. Courses offered online include cybersecurity law and policy, cyberspace law, privacy law, cybersecurity frameworks, cybercrime, cyber war, global data protection, supply chain cybersecurity, and healthcare compliance. Upcoming Albany County Bar Association (ACBA) CLEs offered by ALS will address the intersection of technology and the law, including the ethical duties of technology competence and reasonable security.\textsuperscript{18}

Antony K. Haynes is an Associate Dean and Assistant Professor at Albany Law School, where he directs the Cybersecurity and Privacy Law Program. Email him at ahaynes@albanylaw.edu.

5. N.Y. Rules of Prof’l Conduct r. 1.1(a) (amended 2017).
6. Id. at cmt. 8.
10. See, e.g., Va Rules of Prof’l Conduct r. 1.6(d) cmt. 20 (amended 2016) (“To comply with this Rule, a lawyer does not need to have all the required technology competencies. The lawyer can and more likely must turn to the expertise of staff or an outside technology professional.”).
11. Compare N.Y. Rules of Prof’l Conduct r. 1.6(c) (amended 2017) (“A lawyer shall exercise reasonable care to prevent the lawyer’s employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client” (emphasis added)) with Model Rules of Prof’l Conduct R. 1.6 (Am. Bar Ass’n 2013) (requiring a lawyer “shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client” (emphasis added)).
12. Model Rules of Prof’l Conduct r. 1.6 cmt. 18 (Am. Bar Ass’n 2013).
13. Id.
14. Va Rules of Prof’l Conduct r. 1.6(d) cmt. 20.
15. Id. cmt. 21.
No, You Cannot Have a Copy of the Minutes – Workers’ Compensation Board Policy Contrary to Workers’ Compensation Law

All hearings before the NYS Workers’ Compensation Board (WCB) in the Albany District are now “virtual hearings,” which means that parties may attend a hearing online via video conferencing software from anywhere with a sufficient internet connection. Instead of having a court reporter at hearings, the Administrative Law Judge (ALJ) is required to record the hearing on the WCB recording software and to operate all of the computer systems necessary to conduct the virtual hearing, in addition to hearing the evidence, weighing credibility and making decisions based upon the evidence and the law.

Though the WCB has transitioned from live stenographers to digital recording, there has been no change in the applicable law regarding availability of the minutes of a hearing. WCL § 122 provides:

A copy of the testimony, evidence and procedure of any investigation, or a particular part thereof, transcribed by a stenographer in the employ of the board and certified by such stenographer to be true and correct may be received in evidence with the same effect as if such stenographer were present and testifying to the facts so certified. A copy of such transcript shall be furnished to any party upon payment of the fee for transcripts of similar minutes in the supreme court (emphasis added).

Given the rather clear statutory language, the WCB must be providing the parties with a transcript of the minutes from a hearing if requested, right? Wrong. Pursuant to WCB policy, parties are not allowed to request that the recording of the hearing be transcribed. In fact, even the presiding ALJ is not allowed to direct that minutes be transcribed.

How does a party obtain minutes? It depends. If the WCB has already commissioned a transcription of the minutes (e.g., the case is under appeal with the Administrative Review Division), then a WCB-employed court reporter can provide a copy of the transcribed record for a fee. However, in cases where the WCB has not commissioned transcription of the recording from a hearing, and despite the seemingly plain language of WCL § 122, a party may not obtain a copy of a transcript.

Pursuant to a WCB release on the issue, a party of interest can request Digital Audio Recordings by sending an email to: DARMinutes@wcb.ny.gov with the identifying case information, and in response, the recording will be transmitted via email software for the party to listen to the recording. However, the WCB specifically set forth that, “The Board’s audio minutes are the official record. Any transcripts that parties may choose to produce from audio minutes are not the official record.” In other words, there is no way for a party of interest (or the ALJ) to obtain an official record.

A party can listen to the proceeding, but can neither obtain the transcript of the official record, nor produce its own transcript of the official record based upon the recording. This creates a logistical impossibility for filings with the Appellate Division or other venues if minutes have not otherwise been commissioned by the WCB. It is also hugely inconvenient if not unfair to parties who wish to actually review or cite to the record for arguments or appeals. Similarly, it would seemingly be beneficial for a presiding ALJ to have access to a transcript of the prior hearing and testimony before issuing a decision. Nonetheless, the WCB will not provide the transcript.

Perhaps seeing some of the potential conflict, the WCB amended Regulation 300.9. Previously, the Regulation provided “…and a stenographic record of the proceedings in a shorthand or stenotype shall be made and kept by the board.” The current Regulation provides, instead:

(c) The Board shall keep a verbatim record of all hearings and proceedings. No other record shall be allowed. The Board will maintain in its case file a copy of the verbatim record it prepared in a readable, viewable or audible format. No other record of a hearing or proceeding in a readable, viewable or audible format shall be allowed.

Thus, the WCB seems to have remediated the lack of a viewable transcript by Regulation, but unless/until the Legislature modifies WCL § 122, the WCB is operating afoul to its own governing statute.
Albany County Bar Association Officer and Board Installation | January 18, 2018

James E. Hacker turns over his name on the Past President’s plaque at the Albany County Courthouse the evening of the 2018 Installation.

The 2017 ACBA Board sits one final time together, before saying farewell to Daniel Coffey, Immediate Past President.

Judge Christina L. Ryba is sworn in as the 2018 ACBA Board President by the Honorable John C. Egan, Jr.

The 2018 ACBA Officers and Board of Directors take the historical oath of office.

James E. Hacker says his final remarks as the 2017 Board President.

Judge Christina L. Ryba makes her first remarks as ACBA President.
their mouth shut. Signs should be posted in all police stations with the copy “Nothing You Say Will Help You”.

In some cases, the person accusing your client, whether “Dummy” or not, may have intellectual limitations. On cross examination, how do you handle a witness who isn’t sure of the year and can’t remember how old he or she is? Would a jury be more sympathetic to a witness with those issues? Then, why not toward the defendant with the same challenges? Grisso’s findings indicate we should use different standards to determine person’s ability to comprehend, yet New York courts require abuses by the police and not ineptness.

In “Dancing with the Stars” and at gymnastics, diving, and other athletic competitions, the judges flip cards or push buttons to register their score. Even hurricanes and earthquakes get numerical ratings. For your clients, what about “The Eptness Quotient”? Bo Derek and Simone Biles scored tens. Can you say the same about any of your clients? The “Dummy” is not always intellectually challenged. Very often they just don’t know any better. Has anyone taught them to say “thank you” or “please”, to show up in court on time, to keep appointments, to call or text if they can’t make it? How about when handed a check by a stranger and blithely walking into Price Chopper to cash it, or to not act out violently when insulted or upset? In many cases, not so much.

If your client won a spelling bee, was an Eagle Scout, or loves to play chess, you might not be too concerned about how they’ll do as a witness. If the DA, on cross-examination, asks questions about distance and your client says 10 yards instead of 10 feet, will that help his case? If asked for how long it took from the time his car was pulled over by the police until he/she was handcuffed, and she says “a couple of seconds” instead of 30 minutes, will that make a difference?

In every case, the defendant is flawed in some ways. If proof of guilty is overwhelming, then your focus must be on mitigation—not just a concept for death penalty cases. If not, use what you can learn about your client to prepare for trial.

Next month, we’ll go deeper into the sea of confusion over how much slack to cut for persons whose Eptness Quotient isn’t up to par. ●
Albany County Bar Association’s Committee on Attorneys in Public Service
Commitment to Excellence and Trailblazer Awards
2018 Application

Criteria

- Must be an attorney admitted to practice in the State of New York in good standing with the Bar and a current member of the Albany County Bar Association.
- Excellence - Must be an attorney dedicated to public service with more than 10 years of experience working in state, local or federal government or in the not-for-profit sector;
- Trailblazer - Must be an attorney dedicated to public service with 10 years or less of experience working in state, local or federal government or in the not-for-profit sector;
- Notable accomplishments or contributions to public service, such as, but not limited to; those relating to the implementation of a program, passage of legislation, administration of a program or service or achievement in the area of regulation, enforcement or service delivery, significant case outcome, etcetera;
- Notable accomplishments or contributions within the community;
- Notable contributions to promoting choosing careers in public service.

Please fill out this form and email it, along with the nominee’s resume and 2 letters of support to aclapinski@gmail.com by April 6, 2018. Incomplete applications will not be considered.

Name of Nominee:
Nominee’s Address:
Nominee’s Email Address:
Nominee’s Daytime telephone number:
Cellular telephone number:
Nominee’s Law School and Year of Graduation:
Nominee’s Employer:
Nominee’s Years in Service/Award Sought:

**************************************************
The following material must be submitted along with this application:

- Name, address, email and telephone number of the person nominating the candidate
- Resume of the nominee
- Two thoughtful and separate short statements of support. These statements should be no more than 500 words explaining the nominee’s commitment to public service and specific accomplishments that have had a significant impact on public service, program or service delivery or industry regulation.
NEW MEMBERS

The ACBA welcomes the following new members:
Barbara J. Samel
Abigail A. Dean
Kyle T. Ishman
Joseph D. Moravec
Sarah Annmarie Shearer
Kathryn Conklin Mabey
Mara B. Ginsberg
Joseph M. Dougherty
Vanessa Marie Rodriguez
Joseph Paul Drescher
Patrick K. Jordan

We want to Hear from You!

What topics would you like to see discussed in the ACBA Newsletter?

Your thoughts are important to us!

Contact us at acba@albanycountybar.com

CLASSIFIED

LAW OFFICE AVAILABLE – Ideal situation for attorney ready to start their own practice

Two Offices Available in Multi-Lawyer Suite with experienced attorneys


OFFICE SUITES AVAILABLE – Furnished, Prime office space located at 311 State Street, 2 offices approximately 700 square feet, including 4 parking spots and heat; common reception area; and conference room – $750.00 per month/per office. Call (518) 756-7333.

OFFICE SPACE AVAILABLE – Solo Practitioner at 1520 Crescent Road, Clifton Park (Exit 8) has an extra office with conference room and kitchen privileges that would be ideal for a downtown firm looking for a Saratoga venue for conferences, closings, EBTs, etc. Phone, fax/scanner/copier, ample parking. Contact Jim at (518) 783-1001.

ADVERTISING POLICY FOR THE ACBA NEWSLETTER

Advertising & articles appearing in the ACBA Newsletter does not presume endorsement of products, services & views of the Albany County Bar Association.

2018 Rates and Deadlines: Albany County Bar Association Rates: Member: $50 in our classified section (approximately 30-40 words) additional fees will be incurred as the number of words increase. Non-member: $100 in our classified section (approximately 30-40 words) additional fees will be incurred as the number of words increase. There is an additional $10 charge for Blind Ads.

The rates for all photo ready ads are: full page (8.5” x 11”) = $550; half page (7.5” x 5") = $375; Quarter page (3.5” x 5") = $300; Business card size (3.5” x 2.5") = $200.

Classified Advertising Policy: All ads must be prepaid and in writing. We also hold the right to edit all ads. For display advertising rates and information, please call (518) 445-7691. All ads must contain wording “Paid Advertising” at the top. It shall be the policy of the Albany County Bar Association that no advertisement should indicate any preference, limitation, specification, or discrimination based on color, handicap, religion, sex, national origin, or age.

Change of Scene and Bench & Bar in the News: Provided at no cost to our members and inclusion is limited to ACBA Members. All notices must be submitted in writing. E-mail is preferable.

Deadline: *Please note change: The third Friday of the prior month. E-mail ad copy and remit payment to Albany County Bar Association, 112 State Street, Suite 1120, Albany, NY 12207. We also take credit cards, call (518) 445-7691.
BENCH & BAR IN THE NEWS

Attorney JAMES T. TOWNE, JR. of Towne, Ryan & Partners, P.C. recently completed a two-week teaching assignment at the Univerzita Pardubice in the Czech Republic at the request of the Center for International Legal Studies ("CILS") (www.cils.org) headquartered in Salzburg, Austria. CILS is a non-profit law research, training, and teaching institute, established and operating as a public interest society. Its essential purpose is to promote and disseminate knowledge among members of the international legal community. As a Senior Visiting Professor at Univerzita Pardubice, Jim’s instruction was based on United States corporate, commercial and contract laws and issues. If anyone has an interest in discussing the experience or would like to pursue an appointment as a visiting CILS professor, please feel free to contact Jim at (518) 608-8522.

JASON A. LITTLE, ESQ., partner at Albany-based law firm of Deily & Glastetter, LLP, was appointed to Leadership Tech Valley's Steering Committee, an initiative of the Capital Region Chamber. Little will serve on a two-year term basis. Little is a graduate Leadership Tech Valley's Class of 2012 where he was involved in a class initiative that made local headlines throughout the Capital Region by generated over $36,000 to renovate the kitchen facilities and sign at the Rotterdam Junction Fire Department which was severely damaged by Hurricane Irene in August 2011. The renovations allowed the Fire Department to continue providing meals to displaced residents as well as relief workers, provide information to local residents and serve as a base for relief efforts in the area. As a member of the Steering Committee, Little and his team will be involved in program planning for incoming classes.

Lemery Greisler LLC, a leading Capital Region business law firm, has announced the addition of KADAN M. SAMPLE as an associate attorney. Kadan M. Sample focuses her practice in the areas of commercial lending and real estate. Prior to joining Lemery Greisler LLC, Ms. Sample was an associate at the law firm of Cannon Heyman & Weiss LLP in Albany, New York where she represented developers and syndicators in federal and state low-income housing tax credit transactions, including tax-exempt bond financing, from the application process to construction loan closing through permanent loan closing. In her practice she represented limited partnerships and limited liability companies in the acquisition of property or existing apartment buildings and the financing and regulatory matters associated with constructing or rehabilitating affordable housing for low income families, seniors and persons with disabilities. Ms. Sample also prepared applications for not-for-profit corporations seeking 501(c)(3) tax exempt status. Ms. Sample is admitted to practice in the State of New York and the State of Connecticut. She is a member of the New York State Bar Association and the American Bar Association.

Hinckley Allen announced that the following attorneys have been promoted to Partner in their Albany office: CHRISTOPHER V. FENLON and NATHAN R. SABOURIN. These attorneys assumed their new positions effective January 1, 2018. Christopher V. Fenlon practices in the Litigation group and is focused on the area of business litigation, government enforcement and white collar defense, and construction litigation. Chris provides thoughtful representation to a variety of clients, including banks and financial services companies, medical providers, public agencies, construction firms, and individuals. He was named a Rising Star in Albany, NY by Super Lawyers in 2016 and 2017. Nathan R. Sabourin practices in the Construction & Public Contracts group. Nathan works with corporations, contractors, subcontractors, owners, developers, and design professionals on a wide array of commercial and construction matters. He was named a Rising Star in Upstate NY by Super Lawyers in 2016 and 2017.

Towne, Ryan & Partners, P.C. is pleased to announce that Attorney JOSEPH A. COTICCHIO has joined the Firm as an associate in the Firm’s Albany office. Mr. Coticchio joins Towne, Ryan & Partners, P.C.’s labor and employment law, litigation, municipal law and real estate law teams. Prior to joining Towne, Ryan & Partners, P.C., Mr. Coticchio was an associate at another Capital District law firm where he practiced in the areas of civil litigation and municipal law. Mr. Coticchio received his J.D. from Albany Law School of Union University and his B.A. in History from State University of New York at Albany. Mr. Coticchio is admitted to practice in New York and is a member of the New York State and Albany County Bar Associations. Mr. Coticchio is also fluent in Spanish.
# Albany County Bar Association

## CALENDAR OF EVENTS

### February

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>13</td>
<td>Retirement Planning for Solo and Small Firm Practitioners</td>
<td>New York State Bar Association</td>
</tr>
<tr>
<td>26</td>
<td>Legal Ethics CLE</td>
<td>112 State Street, Cahill Room, Albany</td>
</tr>
<tr>
<td>28</td>
<td>Investigating and Preventing Employee Misconduct: From Cybersecurity to Fraud CLE</td>
<td>112 State Street, Cahill Room, Albany</td>
</tr>
</tbody>
</table>

### March

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Morning Meet and Greet</td>
<td>Great Oaks Office Park, Albany</td>
</tr>
<tr>
<td>7</td>
<td>Albany County Family Court Help Center Training CLE</td>
<td>112 State Street, Albany</td>
</tr>
<tr>
<td>21</td>
<td>Gender Equality in Alternative Dispute Resolution: If Not Now, When? CLE</td>
<td>Albany Law School, Albany</td>
</tr>
<tr>
<td>22</td>
<td>Intro to Business Law CLE</td>
<td>McNamee Lochner, 677 Broadway, Albany</td>
</tr>
<tr>
<td>22</td>
<td>The Experts on Experts CLE</td>
<td>112 State Street, Albany</td>
</tr>
</tbody>
</table>

### September

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>13</td>
<td>ACBA Clam Bake</td>
<td>Western Turnpike Golf Course, Albany</td>
</tr>
</tbody>
</table>

Please visit albanycountybar.com to register and learn more about our upcoming events!

The Albany County Bar Association has been certified by the NYS Continuing Legal Education Board as an Accredited Provider of CLE in the NYS and has also been given approval to provide non-traditional CLE format courses. Hardship Scholarships are available. For a list of our CDs, or additions to our programs, please visit our website: www.albanycountybar.com.
JOIN THE ACBA SMALL AND SOLO COMMITTEE AND THE NYS ACADEMY OF TRIAL LAWYERS FOR AN

Early Spring Happy Hour

THURSDAY, MARCH 7, 2018 | 5:30 - 7:30 PM

1st Hour Open Bar | 2nd Hour Cash Bar | Hors D'Oeuvres
Vintage House, 897 Broadway, Albany

Event is free, but please RSVP:
albanycountybar.com | acba@albanycountybar.com

Sponsored by:

LexisNexis®
UPCOMING CLE EVENT

The Experts on Experts

When: March 22, 2018
Time: 8:30 AM to 10:30 AM
Where: 112 State Street | Cahill Room (Main Floor)
Presenters: Judge Daniel Stewart, Mr. Peter Moschetti and Mr. John Maloney

Learn how to prepare for and examine experts in all facets of civil litigation from three of the region’s most experienced practitioners. Judge Daniel Stewart (U.S. Magistrate, NDNY), Peter Moschetti, and John Maloney have deposed and examined countless experts in a variety of fields. They will discuss how to select and prepare your own expert and how to prepare for and conduct the examination of your opponent’s expert, in both state and federal litigation.

2.0 Skills Credits available.

$60 for ACBA Members | $100 for Non-Members. No Refunds.
CLE Hardship Scholarships are available for those who financially qualify.

Register at albanycountybar.com