2015
YEAR IN REVIEW

Suffolk County's Premier Law Firm

CM&M

Campolo, Middleton & McCormick, LLP

ABOUT CMM

Located in both the heart of Long Island in Ronkonkoma and on the East End, Campolo, Middleton & McCormick, LLP is a full-service law firm with the expertise and experience to represent clients with every legal need they may face. We have an established record of results for our clients, who range from individuals to global companies, and approach each matter with a unique understanding of the issues and the highest level of integrity.

We maintain a laser focus on client service. Whether you are involved in a complex litigation or business transaction, or simply have a routine legal matter, you will receive our complete and devoted attention. Our philosophy is to offer clients the highest quality of service and the most cost-effective solutions. Our team is experienced at developing and executing a legal strategy that includes negotiating and, if necessary, litigating the most complex and difficult issues. We pledge to keep you fully informed during all phases of your representation. We promise to work every day to become your trusted advisor.

OUR MISSION & VALUES

At CMM we promise our clients that:

1. We will take the necessary time to understand their unique needs.

2. We will establish mutually agreed upon expectations about fees, service, and results.

3. We will work every day to exceed their expectations.

We promise our clients that all of our actions shall reflect:

1. **Integrity** – We stand by our representations to our clients, courts, and adversaries.

2. **Honesty** – We are fully transparent in all of our dealings and communications.

3. **Loyalty** – We are concerned only about our clients and their matters.

4. **Dependability** – We will always be available and responsive.

5. **Responsibility** – We hold ourselves accountable for our actions.

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MESSAGE
FROM THE MANAGING PARTNER

Our firm enjoyed a remarkable 2015 marked by growth of our legal team, service offerings, office space, and client success. We worked every day to thank our clients and the community for naming us the Best Law Firm on Long Island, and I am proud to share the highlights of the year with you in this book.

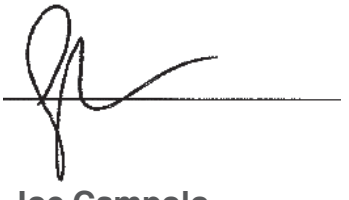
We added seven attorneys in 2015, bringing our total to 30. The knowledge and experience of these professionals enabled the firm to greatly expand the practice areas in which we service clients. Fred Eisenbud and Lilia Factor joined us last spring and built our Environmental and Land Use practice, which spans criminal, civil, and administrative litigation, trial and appellate work, and private and public advocacy. Entrepreneur and former state assemblyman Marc Alessi joined our Corporate and Real Estate groups, counseling clients on business transactions and employment issues, with a particular focus on the technology and healthcare sectors. This past fall, Joseph Poe brought his extensive experience litigating business, intellectual property, and insurance coverage disputes to the firm's aggressive Litigation and Insurance practices.

As the year drew to a close, we established our International Regulation, Enforcement & Compliance group with the addition of Jack Harrington, whose experience counseling multinational corporations and individuals in the international business arena will serve our clients as they engage in global transactions and growth. We also welcomed Adam J. Gottlieb, an attorney and Certified Public Accountant who focuses on wills, trusts, estate planning, sophisticated tax planning, elder law, and high net worth asset planning. Chair of our Trusts & Estates, Tax & Elder Law practice, Adam also works with clients on tax consulting and disputes. Finally, we expanded our Criminal Defense practice with the addition of Meghan Dolan, a former Assistant District Attorney with a wealth of experience in a wide range of criminal matters as well as personal injury, Labor Law, and general liability matters.

In addition to our firm being named the 2015 Best Law Firm on Long Island, our attorneys won numerous awards and honors (including Long Island Business News Leadership in Law and Who's Who, Innovator of the Year, and Super Lawyers) and shared their advice and experience in presentations and on panels. Our attorneys gave their time and skills to dozens of charitable and professional organizations, and the firm provided financial support to numerous nonprofits, including a major pledge to Stony Brook University for scholarship, athletics, and the arts.

We closed the year with the addition of 4,000 square feet of space at our Ronkonkoma headquarters at 4175 Veterans Memorial Highway. Our office now encompasses two floors and features brand new conference rooms, a suite of offices and workstations, a library, and a new cafeteria for special events and employee gatherings. There was no question that we wanted to stay in Ronkonkoma, the site of major Long Island growth and investment, and an area that has been very good to us. The new space complements our growing East End practice in Bridgehampton, which opened in 2014.

None of these successes, however, would be possible without the tremendous support of our clients and friends. In 2015 we helped our clients close deals in the millions, add tens of thousands of square feet to their real estate holdings, achieve favorable outcomes at trial and by settlement, expand their businesses abroad, and plan for their continued success in the future. We are thankful for your friendship and your trust in us, and we look forward to working with you to make 2016 even brighter.

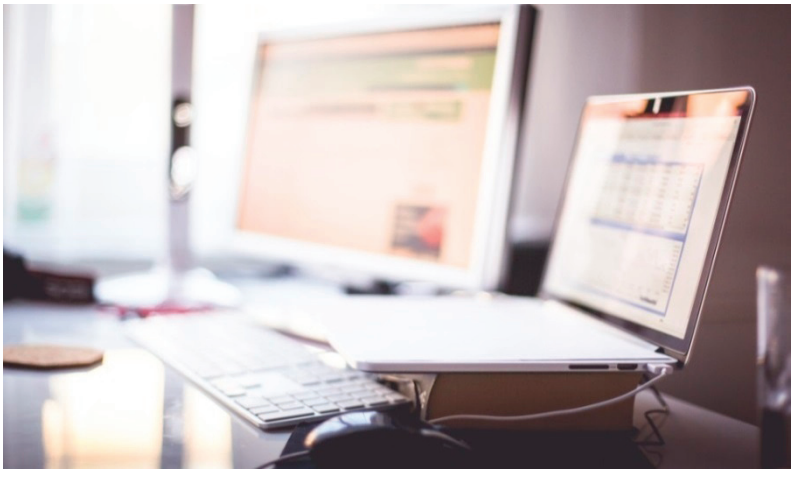


Joe Campolo
Managing Partner | Campolo, Middleton & McCormick, LLP

FIRM GROWTH

ENVIRONMENTAL & LAND USE PRACTICE

Because environmental, zoning, and land use issues are so frequently intertwined, Campolo, Middleton & McCormick has formed the Environmental & Land Use practice group, chaired by Fred Eisenbud, to help our clients overcome any such problem. As trusted advisors to individuals and community groups as well as industrial, commercial, residential, and municipal entities, our team has the legal skills, in-depth experience, regulatory relationships, technical understanding, and comprehensive knowledge to address our clients' environmental, land use, regulatory, and compliance needs. The practice spans criminal, civil, and administrative litigation, trial and appellate work, and private and public advocacy for clients throughout Long Island, New York City, and the Hudson Valley.



OFFICE EXPANSION

We are pleased to announce the addition of 4,000 square feet of space to our Ronkonkoma headquarters. The firm has acquired half of the space on the third floor at 4175 Veterans Memorial Highway, connecting it to the existing fourth floor office by an internal staircase. The new space features conference rooms, a suite of offices and workstations, as well as a new cafeteria for use for special events and by employees. The existing space on the fourth floor has been reconfigured to encompass additional offices, a library, and expanded meeting spaces.

"Our expansion reflects our continuing commitment to our clients and the surrounding community," said Joe Campolo, managing partner of the firm. "We needed additional space to meet the demands of our growing client base, and we chose to do that right here in Ronkonkoma."

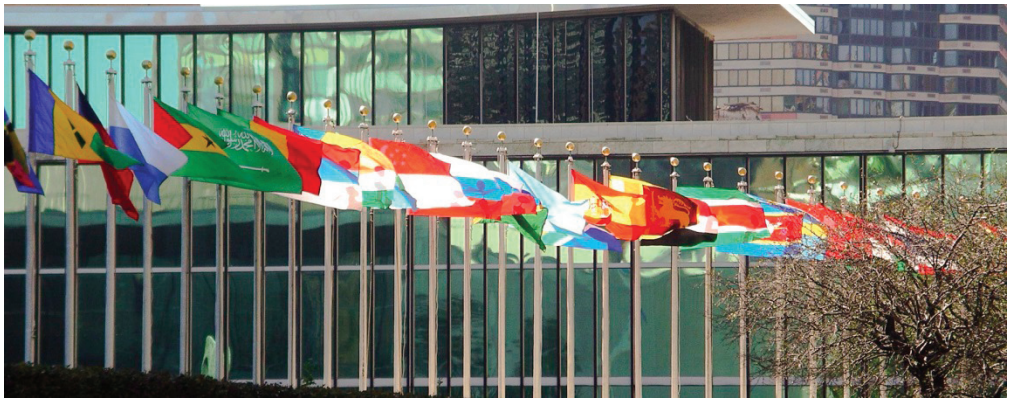
FIRM GROWTH

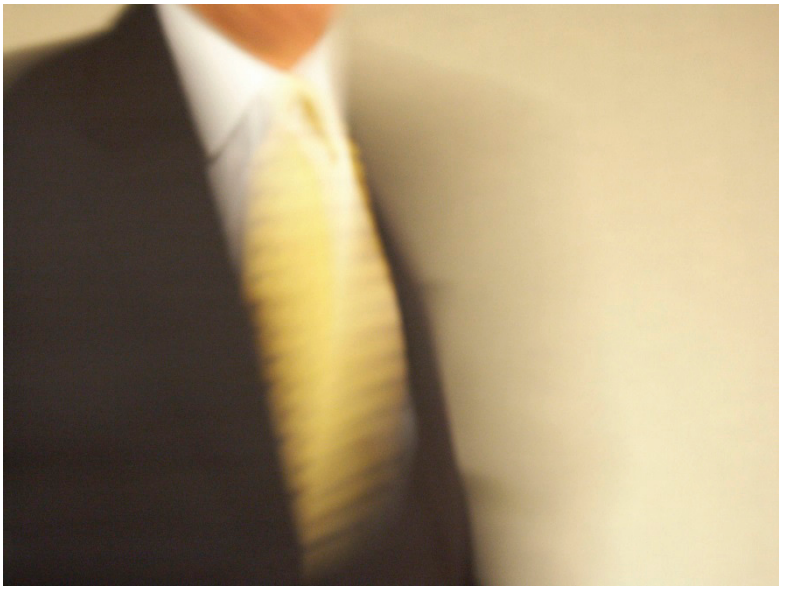
CORPORATE TEAM

Our Corporate department worked with clients to close multimillion dollar sales and transactions in 2015. We worked on a private placement for the purchase of one of the most coveted properties in the Hamptons and counseled retail, real estate, healthcare, education, and technology clients on expansion plans and corporate governance matters.

EAST END TEAM

Our Bridgehampton office continued to grow as we increased our service offerings. Our East End clients now have access to a full suite of sophisticated services in the Environmental & Land Use, Trusts & Estates, Tax & Elder Law and International areas, in addition to the Real Estate, Litigation & Appeals, and Corporate services they already know us for.





INTERNATIONAL REGULATION, ENFORCEMENT & COMPLIANCE PRACTICE

Our International Regulation, Enforcement & Compliance group is comprised of staff attorneys with an international focus and a network of providers throughout the world. Headed by Jack Harrington, our International team understands that our clients operating in multiple jurisdictions face a complex web of local regulations, tax issues, and business customs. Our breadth of knowledge and experience in the international arena, coupled with our local connections worldwide, allows us to counsel clients in a variety of matters with an international component.

We counsel clients in matters including compliance with the Foreign Corrupt Practices Act (FCPA); international trade, investment, and national security; cross-border investigations and compliance; and the Bank Secrecy Act and anti-money laundering issues for financial institutions.

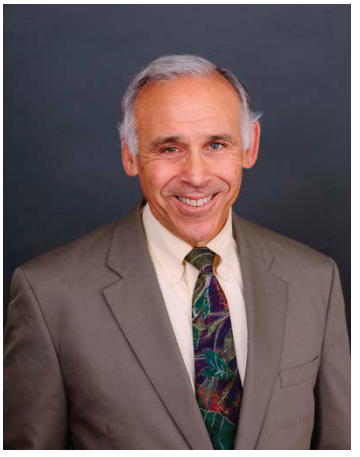
NEW ADDITIONS

MARC ALESSI, ESQ.
Of Counsel

Marc Alessi focuses his practice on corporate law and real estate, advising small to mid-sized companies and the entrepreneurs that run them. His work includes counseling clients and negotiating on their behalf on a variety of transactional and business matters including financing, expansion plans, and employment issues, with a particular focus on the technology and healthcare sectors.

Marc's advice to clients stems from his own experience navigating Long Island's entrepreneurial ecosystem: he has helped launch and finance a number of early stage companies across a variety of industries, including biotechnology, IT, construction, and real estate. A founding member of the Hamptons Angel Network and former Executive Director of the Long Island Angel Network, Marc helped establish Accelerate Long Island, and currently serves as Chairman and Founding CEO of one of their portfolio companies, SynchroPET. The company has licensed patents from Brookhaven National Lab for a new way to build medical imaging.

malessi@cmmllp.com



FREDERICK EISENBUD, ESQ.
Of Counsel

Frederick Eisenbud leads the firm's Environmental & Land Use practice. He handles environmental and related legal disputes including cost recovery litigation, State Environmental Quality Review Act (SEQRA) issues, challenges to administrative and municipal determinations via Article 78 petitions, and environmental crimes defense. He also assists potential purchasers of contaminated Brownfield sites in resolving various environmental challenges in commercial real estate transactions including Brownfield applications, environmental cleanup, preparing and recording environmental easements, and handling insurance claims arising from contaminated properties. Fred's practice also includes the representation of clients before Zoning Boards of Appeal, Planning Boards, and Town and Village Boards with regard to subdivisions, variances, and special use permits.

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LILIA FACTOR, ESQ.
Counsel

Lilia Factor concentrates her practice on environmental compliance in the areas of petroleum spills, solid and hazardous waste, pesticides, wetlands, air emissions, and sanitary requirements. Lilia also handles environmental cost recovery litigation, insurance claims, environmental easements, Brownfields, and administrative permitting for individual and corporate clients. Her practice also includes civil litigation and appeals on a variety of subject matter.

Lilia is an active member of the local legal community, chairing several environmental committees and organizing numerous programs on environmental topics for the general public and fellow practitioners. She has also volunteered with the post-Sandy legal aid clinics offered by the Nassau County Bar Association. Lilia is fluent in Russian and Hebrew and provides pro bono and translation services for clients.

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ADAM J. GOTTLIEB, ESQ.
Counsel

Adam J. Gottlieb chairs the Trusts & Estates, Tax & Elder Law practice group.

Also a Certified Public Accountant, or CPA, Adam focuses his practice on wills, trusts, estate planning, sophisticated tax planning, and generation-skipping transfer planning for high net-worth families, as well as elder law planning. Adam also advises fiduciaries in administering estates and trusts, including the preparation of estate and gift tax returns. Further, he represents fiduciaries and beneficiaries in estate and trust litigation in the Surrogate's Court. Finally, he represents taxpayers who need a tax lawyer, either for tax consulting or to assist with tax disputes with the Internal Revenue Service and New York State in the estate planning arena.

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JACK HARRINGTON, ESQ.
Counsel

Jonathan ("Jack") Harrington counsels multinational corporations and individuals in securities, white-collar, anti-money laundering, and Foreign Corrupt Practices Act (FCPA) matters. He also represents clients in litigation and appeals before state and federal courts and in commercial arbitrations, often with an international component. Jack's combination of legal, policy, and international business experience enables him to advise clients on transactions and strategy.

Jack's diverse legal career includes practicing at a large multinational firm and interning at the U.S. Attorney's Office for the District of Connecticut. He served as a post-graduate legal intern in the White House Counsel's Office, where he advised White House lawyers and policy makers on a range of international, criminal, and constitutional law matters. Jack was also a member of the Yale Supreme Court Advocacy Clinic—providing pro bono clients representation before the United States Supreme Court—and a legal fellow on the Senate Homeland Security Committee.

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JOSEPH K. POE, ESQ.
Counsel

An experienced litigator, Joseph K. Poe represents clients in complex commercial litigation and insurance coverage litigation in state and federal court.

Joe's commercial litigation practice focuses on the representation of clients in lawsuits alleging breach of contract, tortious interference, and violation of intellectual property rights, as well as shareholder derivative lawsuits and dissolution disputes. His experience includes the successful defense and settlement negotiation in the Ephedra Multi-District Litigation, the defense of clients against Article 78 proceedings challenging the award of transportation and other contracts, and the representation of technology companies in intellectual property disputes. Joe has also prosecuted violations of the New York Civil Rights Law and the New York Public Health Law, and has argued numerous motions and appeals in state and federal court.

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NEW ADDITIONS

MEGHAN DOLAN, ESQ.
Associate

Meghan Dolan litigates personal injury, premises and general liability, Labor Law violations, and other general litigation matters, representing corporations, municipalities, and individuals. She is also an experienced criminal lawyer, bringing the knowledge and experience she gained as an Assistant District Attorney to her representation of the firm's clients in a wide range of criminal matters.

Prior to joining the firm, Meghan was an in-house litigator for a Fortune 100 insurance company, representing commercially-insured clients on cases including premises liability, property damage, motor vehicle accidents, and Labor Law. Her clients ranged from major national corporations to local family-owned businesses. Meghan managed all phases of litigation from inception through and including depositions, trial, mediation, and arbitration.

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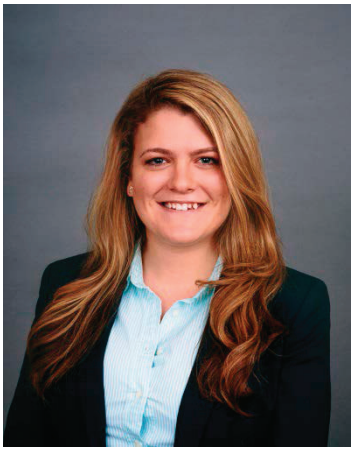

DEVON PALMA, ESQ.
Associate

Devon Palma focuses on litigation in varied subject matter including contract issues, business disputes, personal injury, and civil rights litigation. She drafts a variety of litigation documents including pleadings, motions and opposition papers (including summary judgment, dismissal, default judgment, and discovery motions), and discovery demands and responses. She also has experience in preparing matters for trial in state and federal court, including gathering exhibits, drafting trial memoranda and motions in limine, and assisting with trial strategy. Devon's research and writing have led to many successful outcomes, including claims in several lawsuits against the firm's clients being dismissed in their entirety.

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Nancy Portmore, Litigation Paralegal

Nancy Portmore joined the firm as a litigation paralegal in December 2015. She works on a variety of commercial and civil litigation matters and also assists the Trusts & Estates, Tax & Elder Law practice group. Prior to joining CMM, Nancy worked as a paralegal at a defense litigation firm, working on all aspects of workers' compensation, no-fault, and personal injury cases. Nancy is a graduate of Stony Brook University.

Maria Mennella, Corporate Paralegal

Maria Mennella, a paralegal in the firm's Corporate and Intellectual Property departments, joined the firm in January 2015. She focuses on matters pertaining to trademark infringement, employment discrimination, mergers and acquisitions, and a variety of corporate business matters. Maria received a Bachelor's degree in American History from Stony Brook University and also holds a New York State paralegal certificate.

Cheryl Mazarowski, Marketing Coordinator

Cheryl Mazarowski brings a wealth of marketing experience to CMM. As a coordinator in our marketing department, Cheryl assists with all aspects of event planning and execution and coordinates attorney networking events. She also creates newsletters, ads, and flyers, maintains contact databases, and maintains the firm website and social media presence. Prior to joining CMM, Cheryl honed her marketing skills at a Washington D.C. nonprofit and at New York businesses in a variety of industries including real estate, accounting, consulting, and fabric/furniture. The James Madison University graduate says that her role enables her to work with and get to know everyone at the firm.

ACHIEVEMENTS

CMM VOTED BEST LAW FIRM ON LONG ISLAND

CMM was awarded the Best Law Firm on Long Island in the Long Island Press Best of Long Island 2015 Awards.

JOE CAMPOLO VOTED BEST LAWYER ON LONG ISLAND

Managing Partner Joe Campolo also won in the 2015 BOLI Awards, being voted the Best Lawyer on Long Island.

LEADERSHIP IN LAW AWARDEES

CMM congratulates Patrick McCormick, William McDonald, and Jeffrey Basso on being chosen to receive 2015 "Leadership in Law" Awards. Each year the Long Island Business News recognizes select attorneys for their leadership, both in the legal profession and in the community, and their positive impact on Long Island.

INNOVATOR OF THE YEAR

Marc Alessi was honored with an Innovator of the Year Award by Innovate Long Island, which recognizes Long Island's best and brightest ideas. Marc's lifelong passion for entrepreneurship earned him an honor in the Biotech category for his launch of SynchroPet, a biomedical device company .

SUFFOLK GIRL SCOUTS HONOR CAMPOLO

The Girl Scouts of Suffolk County honored Joe Campolo at their 26th Annual Golf Classic on July 27, 2015. Yvonne Grant, President/CEO, shared that the Girl Scouts are "delighted to honor Joseph, as his impressive tenure of community service and giving back to others aligns with our mission of building the strong, confident leaders of tomorrow."

2015 U.S. NEWS – BEST LAWYERS

CMM is proud to announce it has been named to the 2015 U.S. News – Best Lawyers "Best Law Firms" list, which recognizes the top law firms in the country for professional excellence.

MIDDLETON & MCCORMICK AMONG NEW YORK'S 2015 SUPER LAWYERS

Two CMM partners were selected for inclusion in the 2015 New York Super Lawyers – Metro Edition for the third year in a row. Scott Middleton and Patrick McCormick were among the top five percent of attorneys in the state to earn the title "Super Lawyer."

CAMPOLO APPOINTED TO LI AMERICAN RED CROSS BOARD

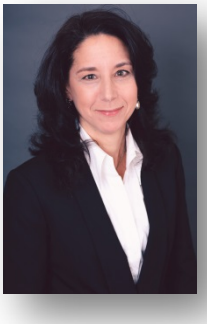
LI American Red Cross appointed Joe Campolo to the Board of Directors, where he joins civic and business leaders responsible for implementing the group's mission on Long Island. The Long Island Red Cross responds to approximately 200 disasters each year and serves more than 2.8 million residents.

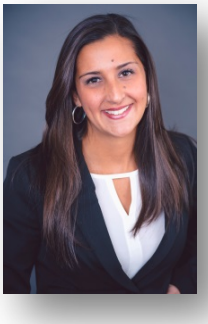
WEINBERG RECOGNIZED AS CMM ATTORNEY OF THE YEAR

The firm proudly recognized Alan Weinberg as the 2015 Attorney of the Year. The annual award recognizes a lawyer who demonstrates exceptional achievement and contribution to the practice. Alan focuses on mergers and acquisitions as well as corporate work. He has negotiated and closed a wide range of complex matters including stock sales, asset purchases, joint ventures, financings, intellectual property licensing, and commercial property sales.

CMM PROFESSIONALS FEATURED IN LIBN WHO'S WHO AWARDS

The Long Island Business News featured three of our professionals among their "Who's Who" of Long Island business leaders. Counsel Eryn Y. Truong was named to Who's Who in Intellectual Property Law, partner Christine Malafi was included in Who's Who in Labor Law, and Director of Operations Kristen Navas earned a spot in Who's Who in Women in Professional Services.





ORGANIZATIONS WE SUPPORT

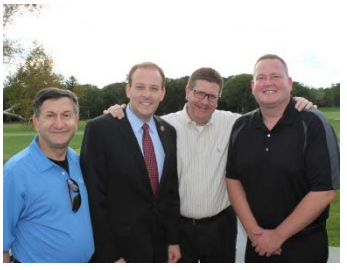
Accountant Attorney Networking Group (AANG)
Alzheimer's Disease Resource Center (ADRC)
American Bar Association (ABA)
American Cancer Society Relay for Life
American Heart Association (AHA)
American Intellectual Property Law Association (AIPLA)
American Red Cross on Long Island
Angela's House
Ascent School
Brehon Society of Suffolk County
Brookhaven Business Advisory Council (BBAC)
Center for Cost Effective Government
Child Abuse Prevention Services (CAPS)
Claims and Litigation Management Alliance (CLM)
Cleary Foundation for the Deaf
Comsewogue for Students Foundation
Cornell Alumni Admissions Ambassador Network (CAAAN)
Defense Research Institute (DRI)
Developmental Disabilities Institute (DDI)
Down Syndrome Advocacy Foundation (DSAF)
East End Disability Associates (EED-A)
East End Women's Network (EEWN)
Easter Seals New York
Fordham Law School Alumni Association
Gotham City Networking, Inc.
Greater Westhampton Chamber of Commerce
Girl Scouts of Suffolk County (GSSC)
Habitat for Humanity (Suffolk County)
Hauppauge Industrial Association (HIA-LI)
Jewish Lawyers Association of Nassau County
Long Island Association of Professional Geologists (LIAPG)
Long Island Builders Institute (LIBI)
Long Island Capital Alliance (LICA)
Long Island Metro Business Action (LIMBA)
Long Island Software & Technology Network (LISTnet)
Los Ninos Services
Lymphatic Research Foundation
Make-a-Wish Foundation (Suffolk County)
Marine Corps Scholarship Foundation
Muscular Dystrophy Association (MDA)
Nassau County Bar Association (NCBA)

Nassau-Suffolk Trial Lawyers Association
Natasha's Justice Project
New York Intellectual Property Law Association (NYIPLA)
New York State Bar Association (NYSBA)
New York Supreme Court Civil Task Force Subcommittee
NYS Tax Relief Now!
Parrish Art Museum
Partnership with Children
Pet Peeves – The Voice of Long Island Pets
Riverhead Foundation for Marine Research & Preservation
The Rollstone Foundation
Ronald McDonald House of Long Island
Ronkonkoma Chamber of Commerce
Social Enterprise Alliance – Long Island Chapter
Southampton Business Alliance
Southampton Chamber of Commerce
Special Olympics New York
Stony Brook University
Stony Brook University Alumni Association
Stony Brook University Athletics
Stony Brook University Children's Hospital
Stony Brook University Staller Center for the Arts
Strength for Life
Suffolk Academy of Law
Suffolk County Bar Association (SCBA)
Suffolk County Community College Foundation
Suffolk County Court Officers Association
Suffolk County Police Department Cops Who Care
Suffolk County Restaurant & Tavern Association
Suffolk County Women's Bar Association (SCWBA)
Sunrise Fund
Touro Law
Touro Law Alumni Association
Transportation Lawyers Association (TLA)
Trucking Industry Defense Association (TIDA)
United Cerebral Palsy Association of Greater Suffolk, Inc. (UCP)
U.S. Green Building Council - Long Island Chapter (USGBC-LI)
United Way of Long Island
Victims Information Bureau of Suffolk (VIBS)
Women Economic Developers of Long Island (WEDLI)
YMCA of Long Island

FIRM EVENTS

CMM Annual Golf Outing & Reception

On September 21, 2015, the firm celebrated clients and friends at our annual golf outing at St. Georges Golf and Country Club in East Setauket. The event raised funds for LI Red Cross (the local chapter of the American Red Cross), which responds to approximately 200 disasters a year and serves more than 2.8 million residents. Contributions help further the mission of the Red Cross to provide disaster relief services, support America's military families, collect and distribute blood donations, provide health and safety services such as First Aid and CPR training, and perform lifesaving humanitarian work throughout the world.



CMM East End Holiday Party

Holiday cheer was in full swing at the CMM East End holiday party at Almond restaurant in Bridgehampton on December 16. Guests enjoyed French fare at the bustling Hamptons bistro as a thank you for helping the firm grow its East End practice. Established in 2014, our Bridgehampton office offers clients the full suite of services available at our Ronkonkoma headquarters.

2015 EXECUTIVE BREAKFAST SERIES

Prepare for Success in 2015

January 2015

Featured presenter Joe Campolo inspired business leaders to plan for success in the year ahead. Building on his popular "Bleed to Succeed" series, Joe shared strategies and perspectives to plan for 2015.

Align Your Team for Success

February 2015

Abbe Meehan, President of TEC Resource Center, discussed how to uncover areas where your team needs to become better aligned and what steps to take to get there.

Master the Art of Meaningful Networking

April 2015

Terri Alessi-Miceli, President of the HIA-LI, shared networking strategies to successfully market yourself and your business. She discussed how to master the art of networking to develop genuine, meaningful, and useful relationships to strengthen your business.

Lost Knowledge: What is the Cost?

May 2015

Featured presenter Gail Trugman-Nikol, President of Unique Business Solutions, discussed how to manage risk in your business currently and in the future, focusing on documentation of procedures before selling or before key employees leave.

Are You in Control of Your Business? Or is Your Business in Control of You?

June 2015

In this seminar designed for senior executives, Brian Turchin of Capehorn Strategies explored the reasons that many companies lose momentum, become less profitable, and add stress to the lives of owners and executives. He shared his process for identifying growth obstacles, demonstrating real-world ways to improve systems and manage people.

Execution - The Art of Getting Things Done!

September 2015

Following up on his popular "Bleed to Succeed" presentation, which compels Long Island professionals to set goals and develop plans to reach them, featured presenter Joe Campolo helped attendees look at their progress to date and identify what needed to be done to finish 2015 on a high note.

Tax Update

December 2015

As 2015 drew to a close, Robert Quarté of Albrecht, Viggiano, Zureck & Company, P.C. (AVZ) shared year-end tax tips and strategies to help minimize tax season surprises and start 2016 off on the right foot. Attendees learned strategies to get their businesses in order for a successful new year.

ATTORNEY PRESENTATIONS

Claims and Litigation Management Alliance
"New York Labor Law: Mitigation of Losses" – Scott Middleton

Greater Westhampton Chamber of Commerce
"Bleed to Succeed" – Joe Campolo

HIA-LI
"A CEO's Perspective: What It Takes to Thrive in the Long Island Economy" – Joe Campolo, Moderator

Health & Wellness Conference, "The Affordable Care Act: What's in Store for 2016?" – William McDonald

Hofstra Law School
First Year Students Appellate Advocacy Oral Arguments – Patrick McCormick, Judge

New York State Bar Association
Insurance Coverage Update CLE – Christine Malafi

Southampton Chamber of Commerce
"Prepare for Success in 2015" – Joe Campolo

Stony Brook Alumni Panel
Vincent Costa

Stony Brook Healthier U Caregiving Series
Marty Glass

Suffolk County Bar Association
Bridge the Gap – Environmental Law – Fred Eisenbud

Objections and Trial Practice – Scott Middleton

"Appellate Practice Nuts and Bolts" – Patrick McCormick, Moderator

Suffolk County Women's Bar Association
"Residential Oil Tanks and Disposal of Pharmaceuticals" – Lilia Factor

Touro Law School
Hon. Stephen L. Ukeiley's Landlord/Tenant Course – Patrick McCormick, Guest Lecturer

Queens Chamber of Commerce
Healthcare Summit – William McDonald

IN THE NEWS

Law internships emphasize real-world experiences

By Joseph Kellard
Long Island Business News

When Joe Campolo, managing partner at Ronkonkoma-based Campolo Middleton & McCormick, started his law firm in 2006, the first person he hired was a legal intern from Touro College Jacob D. Fuchsberg Law Center in Central Islip.

That intern, Arthur Yermash, remained with the firm and is now a senior associate.

As with many other private firms across Long Island, Campolo Middleton continues to work with interns and externs during the summer and school semesters.

"We think that the firm's interns are critical to the firm's growth as well as to the legal education process," Campolo said.

Each summer the firm accepts one to three interns or externs from Touro or the Maurice A. Deane Law School at Hofstra University in Hempstead, and an attorney liaison manages their workflow and has them rotate to different departments throughout the summer. The intern's primary role is to perform legal research and write first drafts of legal briefs, motions, transactional documents and the like, providing them hands-on experience not found in the classroom.

This fall, Campolo Middleton will keep two summer interns on board throughout the semester in a part-time capacity. Historically, the firm hires one intern upon completion of law school per year. The firm currently employs five former interns.

"It's a good way for us to get a good sense of the talent pool that's out there – folks that fit a need both in personality and work ethic and in areas where we have a need for particular legal work," Campolo said.

http://libn.com/2015/09/04/law-internships-emphasize-real-world-experiences/

Long Island BusinessNEWS

Employees: Better with Age

By Jacqueline Birzon
Long Island Business News

State lawmakers will once again try to prevent older residents from leaving the state, pushing a bill in Albany that would create a tax incentive program to reward small businesses that hire more experienced workers.

Under the terms of the bill, companies with fewer than 100 employees that hire people age 55 or older would receive a tax credit ranging from $5,000 to $25,000 per year per eligible employee. The bill mirrors a similar tax incentive the state offers to businesses that hire individuals with developmental disabilities.

According to the legislation, introduced in the state Assembly on Jan. 8, while the rate of unemployment among older workers "is lower than that for their younger counterparts," persons 55 and older remain unemployed for "longer periods of time" and often encounter "challenges when trying to remain or re-engage in the work force."

Christine Malafi, partner with Ronkonkoma law firm Campolo, Middleton & McCormick, said that if passed, the bill could help "negate" claims of discrimination as it instructs the employer to consider a person's age as it relates to the economy of the business.

Malafi, a member of the firm's labor and employment group, said that coupled with the incentive, an employer could be better positioned to hire someone older than 55, who may ask for a higher starting salary than a potentially younger job candidate.

"It's a positive step [that would] negate an employer's thoughts that somebody who is older wouldn't be as beneficial to my organization," Malafi said.

http://libn.com/2015/02/02/better-with-age/

Lawyers are taking to tech

By Joseph Kellard
Long Island Business News

Patrick McCormick, a partner at Campolo, Middleton & McCormick in Ronkonkoma and an officer and CLE lecturer at the Suffolk Academy of Law – the educational branch of the Suffolk County Bar Association – also finds that a diverse cross-section of lawyers are taking many technology and social media programs. These technologies impact every facet of law, he said, from lawyers selecting juries to juries on break using Google to investigate the case.

"It used to be if we had a law suit, I would ask the other side to give me all the paperwork you have on it, and he'd ask the same of me and we'd move on," said McCormick, who has practiced law for 28 years. "Now you have privacy issues: what to do with a person's cell phone and text messages and the posts they put on Twitter and Instagram, and that area of law is developing almost every day. So there's a need for it and lawyers are asking for it."

http://libn.com/2015/07/06/lawyers-are-taking-to-tech/

Q&A with Marc Alessi

By Joseph Kellard
Long Island Business News

Why did you decide to join forces with Campolo, Middleton & McCormick? I decided to join Campolo, Middleton & McCormick because of their reputation as a firm that is entrepreneurial and flexible when dealing with startup enterprises. It is important to not only service companies that are more established with their needs, but we also need to help companies that are just starting out and are in their infancy. When a company is pre-revenue, you need to give them patient advice to help them grow. Sometimes you need to delay billing so that what little capital a startup has does not just go to initial legal fees. This firm has a track record of finding a way to make things work and to help companies at every stage grow.

How will you assist entrepreneurs of small to midsized companies in your new position with the firm? Entrepreneurs need a broad spectrum of support. An attorney is not just someone who drafts corporate documents or a contract. An attorney in this area needs to intrinsically understand the business and be able to act as a sounding board on a host of issues. So, primarily I act as a trusted adviser to entrepreneurs. Sometimes they call me when they just want to flesh out their thoughts, their long-term planning.

http://libn.com/2015/08/11/qa-with-marc-alessi/

New York Real Estate Journal Professional Profile: Joe Campolo, Esq.

July 2015

Name: Joe Campolo, Esq.
Title: Managing Partner, at Campolo, Middleton & McCormick, LLP
Location: Ronkonkoma & Bridgehampton, N.Y.
Birthplace: Brooklyn, N.Y.
Education: B.A., Stony Brook University; J.D. Fordham Law School
First job outside of real estate: McDonald's
First job in real estate or allied field: Attorney
What do you do now and what are you planning for the future? Now – manage a very busy law firm; Future – involves a beach and golf.
How do you unwind from a busy day in real estate? Shorts, BBQ, drinks
Favorite book or author: "A Walk in the Woods" by Bill Bryson
Favorite movie: "Godfather II" (Is there another movie?) OK, also "Gladiator."
Last song you purchased/downloaded? "Ghost Stories" album by Coldplay
One word to describe your work environment: Urgency
Rules to live by in business: Work hard, be fair, pay your debts
If you could invite one person to dinner (living or dead, but not related to you) who would it be and where would you go? Winston Churchill, my house
What is your DREAM job? Manager, New York Mets (I enjoy frustration.)

http://nyrej.com/83973

Stony Brook Alum Joe Campolo '94 Voted Best Lawyer on Long Island

By Brian Harmon

Stony Brook graduate Joe Campolo — a former president of the University's Alumni Association — is the best lawyer on Long Island, according to the Long Island Press' "Bethpage Best of Long Island 2015."

Campolo's firm, Campolo, Middleton & McCormick, LLP in Ronkonkoma, was named the "Best Law Firm on Long Island" in the contest, which is the region's largest business and professional awards program.

"You can't be the best lawyer unless you're surrounded by the best law firm," said Campolo, who earned a bachelor's degree in history from Stony Brook in 1994. "It was very gratifying to present these awards to the entire staff.

"We are all completely aligned in the firm's mission. We all share the same values and the same vision — everyone comes here every day and works as hard as they possibly can to service our clients," he added.

Campolo, who lives in Stony Brook, is hardly the lone Seawolf at his firm. Partner Scott Middleton '84, as well as other attorneys and paralegals at the firm, are Stony Brook graduates.

"This is a very Stony Brook-centered practice," said Middleton, who, like Campolo, is a past president of the Alumni Association.

Middleton and Campolo remain active members of the association and both have taught masters-level classes at the University. They also have donated generously to the University, giving to athletics, the Staller Center and Children's Hospital, while establishing student scholarships.

"If it wasn't for Joe and I meeting on the Stony Brook Alumni Association Board, our firm would never have come about," said Middleton, who studied political science at Stony Brook.

The firm even has a "Stony Brook Conference Room" decorated with Stony Brook football jerseys, flags from the Alumni Association's annual golf outing and photos from the yearly Wolfstock homecoming event, said Campolo, a season-ticket holder for Stony Brook basketball and football games.

Middleton called Campolo "hands down one the best lawyers I know," adding, "This award is just great recognition of his efforts, as well as for the firm as a whole."

Nominations are accepted from the public for the "Bethpage Best of Long Island" awards from January 1 until August 31. Once the top nominees are identified, voting is open from October 1 until December 15. One vote per IP address per day is accepted.

Stony Brook was voted the "Best College or University on Long Island."

Campolo and Middleton, partners since 2008, said that much of their client base has come by way of the business leaders they have met through their work on Stony Brook's Alumni Association Board.

"Stony Brook has been one of the biggest driving forces in the success of our law firm," said Campolo, who grew up in Port Jefferson Station.

Carol Gomes, current president of the University's Alumni Association, said the successful partnership between Campolo and Middleton exemplifies the value of a Stony Brook education and the importance of remaining active with your alma mater.

"Stony Brook is what brought Joe and Scott together," said Gomes, who is also the chief operating officer at Stony Brook University Hospital.

"The Alumni Association couldn't be prouder to have a Stony Brook graduate be voted the best lawyer across Nassau and Suffolk, and to have a firm featuring two partners who are Stony Brook graduates be deemed the region's best law firm."

Winning the "Best Lawyer" award is a long way from Campolo's time at Stony Brook, when he was a full-time student going to school at night while working full-time during the day as a computer salesman for RadioShack. "Now, my firm represents RadioShack," he noted.

http://sb.cc.stonybrook.edu/happenings/homespotlight/stony-brook-alum-joe-campolo-94-voted-best-lawyer-on-long-island/

STONY BROOK Matters
News for Alumni & Friends

OUR PUBLICATIONS

Our bylines feature prominently in many publications of interest to the legal and professional community. In our monthly newsletter, we also share our insights and report on legal updates affecting our clients. Below are the articles that generated the most discussion in 2015.

Defamation Claim Brought by Former Employee Against Company Dismissed	By Jeffrey Basso, Esq.
Court Holds Successor Corporation Liable for Judgment Against Defunct Entity	By Jeffrey Basso, Esq.
Note from My Grandmother: Spit Out the Pacifier	By Joe Campolo, Esq.
Six Leadership Lessons I Learned in the Marine Corps	By Joe Campolo, Esq.
When It Comes to Your Employees, Stop Complaining and Start Training	By Joe Campolo, Esq.
Holding of Lease Security Deposits	By Kelly Canavan, Esq.
Importance of a Survey When Purchasing Real Estate	By Kelly Canavan, Esq.
Shifting Credit Card Transaction Liability – The Potential Impact on Your Business	By Vincent Costa, Esq.
5 Tips to Protect Your Trademark	By Eryn Truong, Esq.
Joint Accounts May Be a Poor Estate Plan	By Martin S. Glass, Esq.
Purchase Order Scam Hits Long Island	By Lauren Kanter-Lawrence, Esq.
Client Advisory: Holiday Party Guide for Employers	By Christine Malafi, Esq.
United States Supreme Court Rules on the Accommodation of Pregnant Workers	By Christine Malafi, Esq.
When is a Volunteer Intern Entitled to be Paid?	By Christine Malafi, Esq.
Court of Appeals Enforces Rent Acceleration Clause in Commercial Lease	By Patrick McCormick, Esq.
Can an E-mail Exchange Create a Binding Contract?	By Patrick McCormick, Esq.
Loss Mitigation in Labor Law Cases	By Scott Middleton, Esq.
Medical Providers Must Take Steps to Protect Out-of-Network Reimbursements under New York's "Surprise Medical Bills" Law	By William McDonald, Esq.
DWI – To Blow or Not to Blow?	By William McDonald, Esq.
Client Advisory: NYC's "Ban the Box" Legislation Now in Effect	By Arthur Yermash, Esq.

Defamation Claim Brought By Former Employee Against Company Dismissed

By Jeffrey Basso, Esq.

"A business should consult with its attorneys before sending out communications that may be privileged."

In prior months, I have discussed cases involving businesses pursuing lawsuits against former employees due to perceived violations of, among other things, non-compete and/or non-disclosure agreements, as well as alleged misappropriation of trade secrets. While the former employer is usually the one to commence the lawsuit, there are times when the former employee may also fight back with claims of his or her own. This is exactly what happened in a recent case out of the New York County Commercial Division. Luckily for the employer, certain of the former employee's claims were dismissed.

In the case of International Publishing Concepts, LLC v. Locatelli (J. Bransten), International Publishing Concepts, LLC ("IPC") commenced a lawsuit against one of its former salespeople, Thierry Locatelli ("Locatelli"). IPC is a company that publishes books and magazines for placement in hotels. IPC generates revenue by selling advertising within the publications themselves. Locatelli was a salesperson for IPC for approximately five years, beginning in 2007, and generated significant revenue for IPC during the time he was employed.

In mid-2012, Locatelli left IPC and allegedly began to compete against the company, which led to a significant drop in sales. IPC alleged that Locatelli used similar materials in an effort to mislead IPC's clients to do business with him instead. IPC commenced the lawsuit against Locatelli alleging claims for breach of fiduciary duty, fraud, unjust enrichment, tortious interference, unfair competition, and theft of corporate opportunity. After IPC commenced the lawsuit against Locatelli, Locatelli served an Answer containing counterclaims against IPC for defamation, among other things. Locatelli alleged that IPC forwarded several disparaging emails and letters to Locatelli's clients, which caused him to lose business and damaged his reputation. Locatelli also commenced a third party action against the president and CEO of IPC for the same defamation claim as alleged against IPC.

As it turns out, the letters that were forwarded to two of Locatelli's clients by email were actually letters from IPC's counsel in this lawsuit. The first letter was originally sent to IPC's President and addressed the firm's analysis of the claims against Locatelli and provided the firm's recommendations as to what claims and relief to pursue. [As an aside, it is unclear if the law firm was okay with its client sending out an attorney-client privileged communication, but it is not something that would be recommended regardless of intent.] The second letter was a "cease and desist" letter from IPC's counsel to Locatelli which essentially restated the legal claims against Locatelli for engaging in violative conduct. It was these letters and the emails forwarding them that formed the basis for Locatelli's defamation counterclaim and third party claim.

IPC and IPC's President sought to dismiss the defamation counterclaim and third party claim respectively, among other relief. In reviewing the defamation claim under New York law, the Court noted that Locatelli would have to establish that there was "(1) a false statement, (2) published without privilege or authorization to a third party, (3) constituting fault as judged by, at a minimum, a negligence standard, and (4) it must either cause special harm or constitute defamation per se." Frechtman v. Gutterman, 115 A.D.3d 102, 104 (1st Dep't 2014).

The Court ultimately held that the defamation claim must be dismissed because the statements contained in the letters and forwarding emails were protected by "absolute privilege," "qualified privilege," and were also non-actionable statements of opinion rather that actionable assertions of fact.

The Court held that the absolute privilege applied because the statements made in the letters were made by individuals participating in a public function such as a judicial proceeding. Because the statements made were pertinent to the litigation, absolute privilege applied and the defamation claim could not stand.

The Court held that qualified privilege also applied because both parties (the communicating party and the receiving party) had an interest in the communications and Locatelli could not establish that the communications were made with spite or ill will or with knowledge that the statements were false or made in reckless disregard for the truth.

Lastly, the Court held that the statements in the letters were merely non-actionable opinions rather than actual assertions of fact. Considering that the letters merely contained statements of IPC's lawyers' beliefs and opinions, rather than statements of fact, the defamation claims were dismissed on that ground as well.

While the defamation claim was ultimately dismissed here, it is important that any business in this type of situation consult with its attorneys before sending out potentially inflammatory communications, especially attorney-client privileged communications. The claims asserted by Locatelli, which include tortious interference claims that were not part of the motion to dismiss, potentially could have been avoided if IPC sought the advice of its counsel before forwarding letters to Locatelli's clients. It is unclear if IPC consulted with its attorneys here, but it does not appear so based on the facts presented by the Court.

Court Holds Successor Corporation Liable For Judgment Against Defunct Entity

By Jeffrey Basso, Esq.

In litigation, it is one thing to obtain a judgment against an individual or entity, but it is another thing to actually collect on that judgment. One scenario that often plays out occurs when a plaintiff has obtained a judgment against a business entity only to find out that the company is out of business and/or has transferred its assets and popped up under a different name. This strategy is undertaken for obvious reasons – to avoid collection efforts on the judgment while continuing to do business under a different identity. However, if you are the judgment holder, all is not lost. A recent decision from the Commercial Division in Suffolk County awarded a judgment holder with summary judgment against a successor corporation making it liable for the judgment of the defunct entity.

In *All County Paving Corp. v. Darren Construction, Inc.* (J. Emerson), plaintiff All County Paving Corp. ("All County") had obtained a judgment against an entity known as Darren Construction Services, Ltd. ("Darren Construction Services") back in 2011 in the sum of $82,275.74. Darren Construction Services was owned by Michael Fusco ("Fusco") who acted as the sole officer, director and shareholder of that entity. All County then commenced this action against Fusco and a different company, Darren Construction, Inc. ("Darren Construction") alleging that Fusco created Darren Construction in an effort to avoid paying All County and other creditors. The lawsuit alleged claims for fraudulent conveyances under the Debtor and Creditor Law and also sought personal liability against Fusco by piercing the corporate veil. Both All County and the defendants ultimately moved for summary judgment with respect to plaintiff's claims.

In deciding the respective motions, the Court noted that New York permits recovery of transfers when there has been a fraudulent conveyance that unfairly diminishes a debtor's estate. Under Debtor and Creditor Law § 273 and § 273-a, constructive fraud can be shown when the debtor transfers assets without fair consideration and the debtor is or becomes insolvent or the debtor has a judgment docketed against it that has not been satisfied. Additionally, transfers to controlling shareholders, officers or directors of an insolvent corporation are presumed to be fraudulent and made in bad faith. *Matter of CIT Group/Commercial Servs. Inc. v. 160-09 Jamaica Ave. Ltd. Partnership*, 25 A.D.3d 301, 303 (1st Dep't 2006). Under Debtor and Creditor Law § 276, the creditor must show actual intent to defraud on the part of the transferor in order to set aside a transfer as fraudulent.

In its examination of the facts here, the Court found that Darren Construction (the successor company) was formed August 22, 2011. Darren Construction Services then failed to appear at a Court conference in the prior litigation a mere two weeks later on October 4, 2011 and, as a result, a default judgment was entered against Darren Construction Services on October 11, 2011. The Court further noted that Fusco is the sole owner, shareholder and director of Darren Construction (as he was with Darren Construction Services) and the two businesses are the same, use the same phone number, and operate out of the same address. Even more telling was the fact that, as soon as Darren Construction was formed, Darren Construction Services went out of business. While the defendants attempted to argue that there was no transfer of assets between the two companies, the Court held otherwise, noting that the "good will" of Darren Construction Services, a saleable asset, was transferred to Darren Construction without any consideration being exchanged for such good will. Further, at the time of the transfer, Darren Construction Services was insolvent and the judgment was unsatisfied.

As a result the Court found the transfer to be in violation of both § 273 and § 273-a of the Debtor and Creditor Law. The Court also found that, based on the circumstances of the transfer, there was an intent to defraud in violation of § 276 of the Debtor and Creditor Law which was further confirmed by Fusco's deposition testimony. As such, the Court held that All County was entitled to summary judgment against Darren Construction due to the fraudulent conveyance. As an aside, the Court denied summary judgment against both sides as it pertained to the claims against Fusco individually under a corporate veil theory noting that neither side had met its burden to warrant summary judgment.

The important takeaway from this decision is that all is not lost if you have a judgment against what appears, on its face, to be a defunct entity. It is vital to conduct the proper due diligence even before a judgment is obtained to determine if the entity is still doing business under a different name and whether the defunct entity fraudulently transferred assets to avoid collection efforts. It is very possible, as was the case here, that a new door will open that will allow you to collect against an entity and/or individual with assets.

"All is not lost if you have a judgment against what appears to be a defunct entity. A new door may open that will allow you to collect."

Note from My Grandmother: Spit Out the Pacifier

By Joe Campolo, Esq.

Lately, I've heard business leaders complain about the economy, trouble attracting high-paying customers, a lack of skilled workers, employees not pulling their weight and taxes as reasons for business not doing well.

It's time for Long Island business leaders to realize that we – not the government or anyone else – are responsible for the future of work and life on Long Island. We must take action to protect the amazing ecosystem of resources available to the business community here instead of merely complaining and wishing for change. As my grandmother would have said: "It's time to spit out the pacifier and get back to work."

My grandmother grew up during the Great Depression. She raised my father on her own by working long days as a seamstress. She was paid pennies for each garment she sewed. She didn't watch the clock. Instead, she stopped working when her fingers were raw and bleeding from being struck by the sewing needle. She never complained or blamed anyone else.

Eventually she earned enough money to purchase a Brooklyn brownstone. Some people say that it's more difficult today. I don't think that my grandmother would agree – I don't either.

Long Island business leaders have access to better resources than almost anywhere else in the country. We have an educated, world-class workforce with access to universities, four-year colleges, community colleges and technical institutions. We have the ability to monetize our ideas with access to capital and resources others only dream about. All we have to do is accept responsibility and take action to grow our businesses and train our employees.

Align yourself and your business with other growth-oriented business leaders, those who aspire to change the cult of negativity into a positive force for business transformation. It might be difficult; you may need to stop doing business with the complainers.

My grandmother would have said, "Stop hanging around with those boys, they're nothing but trouble," and she would have been correct. Instead look for business groups and organizations that have a vested interest in helping their members become stronger leaders. They are there, I promise, if you just look.

Long Island businesses are the keys to Long Island's future and it is time to stop complaining and get back to work, smarter and harder, to build our future.

Published in the Long Island Business News

Six Leadership Lessons I Learned in the Marine Corps

By Joe Campolo, Esq.

In a recent opinion article I challenged the Long Island business community to be leaders instead of complainers. The response was overwhelming, with many people asking for some guidance; they wanted to know if I had any rules that I could share. The best rules I know I learned as a Marine.

The U.S. Marine Corps is all about mission, discipline and dedication – principles Long Island business leaders can use to grow their business. Here are six of those lessons:

1. **Lead by example.** Before you expect your employees to demonstrate personal and professional integrity in their work, you must demonstrate it yourself. Are you the hardest-working person in the company? Taking professional advancement courses? It's hard to expect it from others if your answer is no.

2. **Know your troops.** The Marines stress that a leader must know how the people under their command will respond or react during different situations. Whether they require supervision or training or they are ready to take on new challenges on their own, you need to know the difference and provide your employees with the individual support, training and tools that each person requires.

3. **Keep everyone in the loop**. Want to know what makes for the quickest confusion and poor morale? Lack of information. You can't expect everyone on your team to know what to do and why they are doing it if you haven't communicated the situation and made sure everyone knows his or her role. You must be the chief visionary officer and communicate that vision on a regular basis.

4. **Make sure everyone understands the goal**. Do you know what you're doing today to build your business? Do your employees know the same thing? Attending a trade show? Does everyone manning the booth know their tactics and objectives? You must be clear and concise when directing your employees and what you expect them to accomplish.

5. **Be decisive. Making decisions is tough**. When you can't or won't or hesitate for a long time to make a business decision, it sends a poor message to your team. It's your job to get the information you need, make a decision and stick with it. This builds confidence with your team and helps them learn to make decisions on their own, as well.

6. **Troops eat first.** Too often, business leaders decide how to reward their employees by paying just enough so they won't leave. That is not a recipe for success; you must build a culture where your employees are rewarded first and fairly. This will be respected and appreciated, and will directly increase morale as well as your bottom line.

The Marine Corps has a list of 11 leadership principles. Last among them says, as leaders, we are ultimately responsible for the decisions and consequences of the people under our command. Take the time to take that seriously.

Who's with me?

Published in the Long Island Business News

When It Comes to Your Employees, Stop Complaining and Start Training

By Joe Campolo, Esq.

Much of the griping I hear from other business owners is about how the work effort of their employees is lacking. When I hear these complaints I'll ask, "What are you doing to train your employees?" The usual response is something like, "Well I pay them and I don't have time to train them. They either get it or they don't." In this scenario, it's the business owner who doesn't get it.

Continual training of your team is one of my greatest takeaways from serving as a U.S. Marine. Their mission is simple: Marines are at war or training for war. It is the quality of these training programs that have made the Marine Corps so successful. Young Marines who complete basic training at Paris Island are filled with esprit de corps, motivation and confidence that serves them on and off the battlefield. As business owners you can learn to motivate your team as well – by training them.

I've taken this lesson into my law firm today. The members of our professional team, attorneys and support staff, are constantly training in new technology, emerging areas of the law, team building, client relations and other skills they can put to work for both their own and the firm's benefit. I view this training as a non-negotiable part of the employee experience at our firm. The benefits clearly outweigh any of the perceived negatives:

Training increases employee engagement. Training your employees helps convey that they are valued members of your company. A recent Dale Carnegie study showed that engaged employees are enthusiastic, inspired, empowered and confident—are yours?

Increased productivity. While it may temporarily sting to sacrifice an hour or two for a training session, your employees will learn skills and tactics during that session that will increase their productivity and boost production in the future.

Increased customer satisfaction. Management must be aware of customers concerns and should conduct regular training with the staff as to how to address and correct any problems. If they aren't, then those managers should also get training on that issue. These sessions always result in an immediate bump in client satisfaction.

With these types of benefits, I recommend that every organization – no matter how large or small – implement a formal training program. Training increases employee engagement and job satisfaction, which means lower turnover and higher profits for the business.

Who's with me?

Published in the Long Island Business News

Holding of Lease Security Deposits

By Kelly Canavan, Esq.

Landlord and tenant stories can be entertaining, especially so with a Hamptons summer residential rental. The seasonal rent could be six figures–akin to a starting salary. The purpose of the security is to protect the landlord from damages cause by the tenant at the end of the lease.

I am reminded of one landlord in Southampton who wished to make a claim against the lease security deposit in order to repair a pock-marked wall after his summer tenant departed post Labor Day weekend. The landlord was baffled as to how hundreds of dime-sized holes punctured the sheetrock in the closet of the master bedroom. As it turned out, the tenant's girlfriend would kick-off her Jimmy Choo heels at the end of every evening with such force that the shoes got stuck in the wall.

Thankfully, there was more than enough security to make the needed repairs. However, if the landlord fails to follow the law with regard to the security, a difficult tenant who damages the property can recover their entire security deposit at the end of the lease term, even if they cause damages in excess of the security amount.

The New York General Obligations Law §7-103 provides that the security deposit held by the Landlord must be maintained in a segregated bank account and not co-mingled with the Landlord's own money. The bank selected must have a place of business in the state. If the security amount is more than seven hundred and fifty dollars and is for a rental term of more than one hundred and twenty days, the segregated account must be an interest bearing account. The landlord also has to notify the tenant, in writing, of the name and address of the bank and the sum deposited.

If the landlord commingles a security deposit with personal funds, the commingling of the funds constitutes a conversion under the law, and the tenant is entitled to the immediate return of the commingled funds. Failure by the landlord to maintain the funds in a segregated account will preclude the landlord from using the security deposit for unpaid rent or to repair any damages caused by the tenant to the premises.

For the unwitting landlord who has commingled the security deposit with personal funds, there is good news. Case law provides that the landlord can correct the conversion if the landlord places the security in a segregated account before the end of the lease term and before the tenant vacates the premises.

Importance of a Survey When Purchasing Real Estate

By Kelly Canavan, Esq.

Clients often ask when purchasing a home, "Do I *really* need a new survey?" My reply ninety-nine percent of the time is, "Yes!" Clients are purchasing what is most likely to be their largest asset and the survey is the blueprint of what they are purchasing. It is the way in which the title company confirms and ultimately insures the property's boundary lines. The title company will defend the purchaser's clear title and ownership of the property as of the date of closing.

Title companies will accept an old survey as long as it is guaranteed to a title company, even a different company than the one being used. In that instance, the title company will conduct a survey inspection before closing and compare what is physically noted at the property as against the old survey. If there is something new – for example, a fence – the title company's survey reading will note the fence, but state that it "is not located." That means the location of the fence is an exception to the property description on the title policy. If it turns out that the fence is not on the correct property line and creates what is know as an "out-of-possession," there is the potential for an adverse possession claim by a neighbor.

Last year, a gentleman came to me after his real estate sale fell apart because of a neighbor whose fence encroached by six feet all along his entire backyard. The encroachment was discovered because the gentleman's purchaser in 2014 obtained a new survey. When the gentleman purchased back in 2008, he did *not* obtain a new survey and used one that his seller provided from 2000. Sometime in 2002, the neighbor erected the fence, which gave that neighbor six additional feet of property all along their common boundary line. Because the gentleman didn't get a new survey when he purchased, he never discovered that the fence encroached because he never knew exactly where the fence was located in relation to the boundary line separating the two pieces of land. In 2014, when the gentleman wanted to sell, the neighbor's fence had been in place for more than a decade, making it a ripe adverse possession claim. In addition, the gentleman's title company would not have to defend his ownership of that six-foot parcel, because the location of the fence was excepted in the title policy.

Had the gentleman done a new survey in 2008 when he purchased, the location of the fence would have been known. It could have easily been addressed by removal, relocation, or getting a boundary line agreement from the neighbor. The neighbor would have no choice but to cooperate if he wanted it to keep the fence in its existing location. There would be no adverse possession claim because the fence had only been in place for six years, not the requisite ten years.

Shifting Credit Card Transaction Liability – The Potential Impact on Your Business

By Vincent Costa, Esq.

Beginning October 1, 2015, a shift in credit card security and in-store fraud liability could place unwary merchants and business owners at risk.

EMV, which stands for Europay, MasterCard, and Visa, is a relatively new form of credit card (in the United States) that utilizes computer chip technology intended to help prevent transactional data breaches and credit card fraud. In the U.S., most EMV credit cards contain the computer chips as well as the traditional magnetic stripe. If a merchant does not have a payment processing system that accepts the computer chip, payments may be processed via the magnetic stripe as usual. However, after October 1, 2015, those businesses that have not upgraded their in-store technology and processing systems to accept the computer chip portion of the card will be at risk.

Prior to the October deadline, depending on the card's terms and conditions, the payment processor or issuer would typically be liable for consumer losses related to fraudulent transactions. After the deadline, Visa, MasterCard, Discover, and American Express have announced that the liability for chargeback related costs of fraudulent transactions will shift to party who has not adopted the chip technology.

Generally, the EMV liability shift will have the following impact:

• If the business has upgraded its processing systems, the issuer will continue to bear the responsibility of counterfeit or fraudulent activity.
• If the business has not upgraded its systems and a consumer presents an EMV card, the payment will be processed via the magnetic stripe only, as it had been in the past. Here, the credit card issuer will be relieved of liability and the business will be now held responsible for consumer loss.
• Liability for automated fuel dispensers will remain unaffected until 2017.

EMV use is already widespread in Europe. Following suit, millions of EMV cards have already been issued to consumers in the United States, with millions more on the way. It appears that the U.S. will eventually phase out the old magnetic stripes and smart card technology will be the wave of the foreseeable future. Business owners may be hesitant to shoulder the costs of upgrading their current payment processing systems, but they should be aware that an upgrade now could mitigate exposure connected to EMV non-compliance in the future.

In an era of increasing consumer fraud and data theft, will your business be prepared for the EMV liability shift?

Joint Accounts May Be a Poor Estate Plan

By Martin S. Glass, Esq.

Many of my senior clients see joint ownership of all their assets (such as investment accounts, bank accounts and real estate) as a cheap and easy way to avoid probate since joint property passes automatically to the joint owner at death. They feel that joint ownership can also be an easy way to plan for incapacity since the joint owner has the immediate ability to pay bills and manage investments. These are all true benefits of joint ownership, but there are a number of potential drawbacks that I feel greatly outweigh the benefits.

The first drawback is that there's an inherit risk involved. You need to remember that each joint owner of each account has complete access and the ability to use the funds for their own purposes. It wouldn't be the first time that I've seen children who are caring for their parents take money in payment without first making sure that their siblings are all on board. Or worse, they use the money for their own purposes. In addition, the funds are available to the creditors of all joint owners (such as in bankruptcy or in a lawsuit) and could be considered as belonging to all joint owners should they apply for public benefits or financial aid.

Another drawback is that there may end up a very inequitable distribution in the end. If you have one or more children on certain accounts, but not all children, at your death some children may end up inheriting more than the others. While you may expect that all of the children will share equally, and often they do, there's no guarantee. Having several different children on different accounts becomes extremely difficult and confusing. You have to constantly work to make sure the accounts are all at the same level, and there are no guarantees that this constant attention will work, especially if funds need to be drawn down to pay for care.

Further, as silly as it sounds, you need to expect the unexpected. A system based on joint accounts can really become a mess if a child passes away before the parent. Take the example of someone putting their house in joint names (with rights of survivorship) with her son to avoid probate and Medicaid's estate recovery claim. If the son died unexpectedly, the daughter-in-law or grandchildren would be left with only a small piece of what they were supposed to get. This non-probate asset just became a probate asset and would be (typically) divided up as per the Will, between all the children.

I will admit that joint accounts do typically work well in two situations. First, when you have just one child and everything is to go to him, joint accounts can be a simple way to provide for succession and asset management. It has some of the risks described above, but for many clients the risks are outweighed by the convenience of joint accounts.

Second, it can be useful to put one or more children on your checking account to pay customary bills and to have access to funds in the event of incapacity or death. Since these working accounts usually do not consist of the bulk of your estate, the risks listed above are relatively minor. I actually recommend this quite often to clients as banks prefer working with a joint account holder than a person with a power of attorney for everyday transactions.

For the rest of your assets, Wills, trusts and durable powers of attorney are much better planning tools. They do not put your assets at risk. They provide that your estate will be distributed according to your wishes, without constantly reassessing account values in the event of a child's incapacity or death, and they provide for much simpler asset management in the event of your incapacity.

"Wills, trusts, and durable powers of attorney are better planning tools. They do not put your assets at risk."

Purchase Order Scam Hits Long Island

By Lauren Kanter-Lawrence, Esq.

"Unfortunately, what may appear to be a profitable order or a promising new customer could instead be an effort to drag your company into a complex scheme the FBI calls 'purchase order fraud.'"

A large order comes in from a new customer – a major research university. Excited at the prospect of developing a long-term relationship with such a well known institution, you have no problem shipping out the order right away, with the invoice to follow a couple of days later.

The following week, several orders come in from an established client. Your sales reps have strong relationships with this client, who has always paid on time. Eager to showcase the customer service the client has come to expect from your company, you ship the order as soon as possible, never doubting that the client will pay the bill.

Unfortunately, what may appear to be a profitable order or a promising new customer could instead be an effort to drag your company into a complex scheme the FBI calls "purchase order fraud."

According to a recent FBI news release, the global scam generally follows these steps:

Cyber criminals based in Nigeria set up fake websites with domain names almost identical to those of real schools, companies, and institutions. Matching e-mail addresses and spoofed phone numbers (to make a call appear to be coming from the real company and area code) are used to request price quotes from vendors, mostly small businesses, for a variety of products including electronic equipment, hard drives, and pharmaceuticals. The perpetrators do online research to obtain employees' names and other information to make the requests appear legitimate. The companies or schools being impersonated are typically large or well known, or are existing clients of the business being targeted.

The criminals then place orders, requesting that shipments be made on credit (typically 30 days). Because the vendor believes the order is coming from an established client or well known institution – some of which even provide credit references – the vendor agrees.

A U.S. shipping address is provided, which is typically a warehouse, storage facility, or even the residence of a work-from-home or online romance scam victim. From there, the orders are shipped to Nigeria. The FBI refers to these home Internet users as "unsuspecting accomplices" in the complicated scam.

By the time the packages reach Nigeria, the vendor has billed the real institution and the fraud has been discovered – but the goods are long gone.

As highlighted in a recent Newsday article, many Long Island businesses have been the target of purchase order fraud. In October, Bohemia-based Chromate Industrial Corporation – a distributor of maintenance, repair, and operations supplies – received two orders from the University of Michigan for fluke meters, which measure voltage. The orders, totaling $40,000, were shipped to three separate locations as requested in the purchase order. After the packages were shipped, Chromate invoiced the University of Michigan. The university did not recognize the orders, and after reviewing the purchase orders, determined they were fraudulent. Eventually, with information provided by the FBI, one of the Chromate shipments was intercepted in the United Kingdom before being shipped to Nigeria and was returned to Long Island. However, $30,000 worth of goods never made it back.

Donna Galan, Vice President of Operations at Chromate, described the situation as "very disturbing, especially since we don't know what the products are ultimately being used for." But the experience has turned customer service into amateur FBI investigators; Chromate still receives frequent fraudulent orders, but employees now know what to look for. The FBI has published the following indications of fraud:

- Incorrect domain names. In Chromate's case, the University of Michigan e-mail addresses ended in .com, not .edu.
- The shipping address on a purchase order is different from the business location, or is a residence or storage facility.
- Poorly written correspondence with grammatical errors and misspellings.
- Phone numbers not associated with the business or institution or are not answered by a live person.
- Orders for large quantities of merchandise, with a request for priority shipment and delayed billing.

The FBI has urged the business community to report any fraud to the FBI or local authorities as soon as the fraud is discovered, as the chance of recovering the shipments drops dramatically once the packages leave the country.

Ms. Galan wants local small businesses to learn from Chromate's experience. "There were a number of things, looking back, on the e-mails that we could have picked up on," she says. Now that Chromate's employees are savvy to the scam, however, the scam is one step closer to being put out of business.

Published in the Hauppauge Reporter

Client Advisory: Holiday Party Guide for Employers

By Christine Malafi, Esq.

It's that time of the year again! Many employers are hosting holiday parties, where employees, and sometimes clients and customers as well, get a chance to relax, socialize, and take a break from the work to celebrate the holiday season. Raising employee morale during the holiday season is a good way to say thank you for their work all year, but despite the fun of a party, there are potential legal issues which could quickly make you forget the fun. To avoid problems from arising, it is advisable to act before the party to minimize potential headaches after the party.

Serving alcohol is always a risk–the potential for accidents and injuries, as well as inappropriate behavior, and lawsuits. Risk can be reduced by advanced planning. While liability generally does not attach to "social hosts" for accidents or injuries suffered off-premises by third parties as a result of alcohol served by the host, at least in New York, if an employee leaves a holiday party, and travels directly to another state, New York law may not prevent liability. Additionally, no one under the age of 21 years may be served alcohol at a holiday party, or liability will result if someone is injured by that underage holiday party drinker. The safest way to prevent potential liability relative to physical injuries involving alcohol use at a holiday party is to hire bartenders to serve the alcohol and make sure alcohol is not served to underage party guests.

Another risk associated with alcohol consumption is the level of "celebration." As an employer, you do not want managers and/or supervisors acting inappropriately or provocatively, or flirting, with your staff. Some people tend to exude an excessive amount of cheer during the holiday season. The same workplace standards of a non-hostile work environment and non-harassing conduct apply to and should be enforced at holiday parties.

If the party will have music, employers should check the song list, and gift-giving should have limits. Joking and teasing, while permissible, should be within the bounds of a work setting. You don't want to start the New Year with a humiliated employee commencing a hostile work environment or discrimination lawsuit.

Additionally, it is probable that a court will find that employees' attendance at a holiday party relates to their employment, even if attendance is voluntary, potentially triggering workers' compensation benefits for injuries sustained during the party (and potentially afterwards). Employers must take reasonable steps to protect their employees (and guests) from injury, whether at the workplace or an off-site location where the holiday party is held.

Finally, to avoid potential wage claims, if attendance at the party is required, the party should be held during normal work hours.

To help set your mind at ease before your holiday party, consider doing the following:

- Have transportation to and from the party available;
- Hire a professional bartender or caterer with sufficient liability insurance;
- Provide non-alcoholic drinks;
- Serve food, not only snacks;
- Have management/supervisors at the party on the lookout for excessive drinking and/or inappropriate behavior;
- Have a lunch holiday lunch instead of a dinner;
- Invite employees' family members to participate in the party;
- Make sure employees know that they do not have to attend the party if they chose not to; and
- Do not focus on one religion or holiday to the exclusion of any employee's beliefs or observances.

A little advance planning can go a long way to help the success of your holiday party!

If you have any questions about your holiday party, please feel free to contact us.
Happy Holidays!

"Raising employee morale during the holiday season is a good way to say thank you for their hard work all year, but there are potential legal issues that could quickly make you forget the fun."

United States Supreme Court Rules on the Accommodation of Pregnant Workers

By Christine Malafi, Esq.

Last year, I wrote about the then-new pregnancy guidelines issued by the Equal Employment Opportunity Commission (EEOC), under the Pregnancy Discrimination Act (PDA) and the Americans with Disability Act (ADA), which apply to all employers with more than fifteen employees. While a "normal" pregnancy does not constitute a disability under the ADA, it is a serious health condition under the Family Medical Leave Act (FMLA), entitling a pregnant employee to FMLA leave. The EEOC's 2014 Guidelines addressed the "middle" ground, where a pregnant employee is not "disabled" and does not seek leave, but requests light duty instead. The EEOC requires that employers reasonably accommodate a pregnant employee with light duty or modified assignments.

Earlier this year, the United States Supreme Court decided the case of *Young v. United Parcel Service*, 575 U.S. ___ (2015). In that case, UPS denied a pregnant worker's request for light duty after her doctor told her not to lift heavy packages. She was a part-time UPS driver and her position required her to be able to lift up to 70 pounds. Her doctor told her to lift no more than 20 pounds. In response to her request, UPS told her that light duty was only available to employees with job-related injuries or to those employees with disabilities recognized under the ADA. In Young, the Supreme Court held that if accommodations are given to employees with similar activity restrictions (albeit for other reasons), similar accommodations must be provided to pregnant employees who request accommodation.

The case had been dismissed outright by the lower courts, and the Supreme Court found a "genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from [Ms.] Young's." The Court asked "why, when [UPS] accommodated so many, it not accommodate pregnant women as well?" The Court did not go so far as to find that UPS had discriminated against Ms. Young, but the decision enables Ms. Young to continue her lawsuit, and to argue that the reason she was not accommodated was her pregnancy.

Employers who have "neutral" light duty accommodations should consider how to reasonably accommodate pregnant workers as well, in light of the Supreme Court's decision in *Young*.

When is a Volunteer Intern Entitled to be Paid?

By Christine Malafi, Esq.

Last year, I discussed circumstances under which a volunteer may be considered an employee for the purposes of the Fair Labor Standard Act. As discussed previously, the Federal Fair Labor Standards Act ("FLSA") requires both public and private entity employees to be paid minimum and overtime wages. The question of who qualifies as an "employee" under the FLSA is not as simple as you would expect. Last year, we discussed the 2014 opinion of the Second Circuit Court of Appeals, *Brown v. New York City Department of Education*, as to when a public volunteer may be considered to be an employee entitled to wages.

Earlier this month, in *Glatt v. Fox Searchlight Pictures, Inc.*,[1] the Second Circuit Court of Appeals provided some parameters as to when an intern must be a paid employee. The Court opined that the focus should be upon whom is receiving the primary benefit of the internship (the intern or the entity), and laid out seven factors to be weighed and considered in determining whether an intern must be paid as an employee:

1. The extent to which both the intern and employer clearly understand that there is, or is not, an expectation of compensation (any promise of compensation, express or implied, suggests that the intern is entitled to wages);
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including clinical and other hands-on training;
3. The extent to which the internship is tied to the intern's formal educational program by integrated coursework or the receipt of academic credit;
4. The extent to which the internship accommodates the intern's academic commitments (i.e, following the academic calendar);
5. The extent to which the duration of the internship is limited to the period in which the intern will receive beneficial learning experiences;
6. The extent to which the intern's work compliments, rather than displaces, the work of paid employees, while providing significant educational benefits to the intern; and
7. The extent to which both the intern and the employer understand that there is no entitlement to a paid job at the conclusion of the internship.

No one factor is primary to determining whether the intern must be paid under the law for his or her work. Every factor need not point in the same direction, and the courts may consider other relevant evidence (beyond the above seven factors) in determining who is the primary beneficiary of the relationship, and hence, whether wages to the intern are required.

The decision in *Glatt* serves as an important victory for employers, as private employers now have been given parameters under which to determine whether an intern must be paid under the FLSA.

[1] Nos. 13-4478-cv, 13-4481-cv (July 2, 2015).

Court of Appeals Enforces Rent Acceleration Clause in Commercial Lease

By Patrick McCormick, Esq.

"This decision serves to caution both tenants and guarantors that upon a material default under a commercial lease, they may be liable for significant damages."

Commercial landlord/tenant matters do not often reach the Court of Appeals.

However, in December 2014, the Court of Appeals issued a decision addressing the enforceability of a rent acceleration clause in a commercial lease where the landlord obtained possession of the demised premises after tenant defaulted in paying rent and abandoned the premises. Landlord/tenant practitioners should be aware of this significant decision.[i]

Landord, 172 Duzer Realty Corp., entered into a one year commercial lease with tenant Globe Alumni Student Assistance Association, Inc. under which the premises was used as a dormitory by Globe Institute of Technology. Before the end of the initial term, landlord and tenant extended the term for a nine-year period and Globe Institute of Technology signed a guarantee. Shortly after executing the extension, tenant defaulted under the lease and landlord served a notice to cure. Tenant failed to cure, vacated the premises, and stopped paying rent as of February 2008. Landlord terminated the lease as of March 28, 2008, on notice to tenant, and commenced an action to recover possession and past due rent. In August 2008, the Civil Court awarded landlord possession of the premises but did not award a money judgment.

In September 2009, landlord commenced a Supreme Court action to recover rent arrears and the future remaining rent under the lease. As explained by the Court of Appeals, landlord "thereafter moved for summary judgment based on an acceleration clause in the leasehold agreement which provides that upon the tenant's default the landowner may terminate the lease, repossess the premises, and 'shall be entitled to recover, as liquidated damages a sum of money equal to the total of . . .the balance of the rent for the remainder of the term. . . .' The provision also states that '[i]n the event of Lease termination Tenant shall continue to be obligated to pay rent and additional rent for the entire Term as though th[e] Lease had not been terminated.'" Defendants opposed summary judgment, alleging that under *Fifty States Management Corp. v. Pioneer Auto Parks, Inc.*,[ii] landlord could not collect under the acceleration clause once it terminated the lease and took possession of the premises. The Supreme Court granted summary judgment and referred the matter to a referee to calculate damages. Judgment was entered in favor of landlord for $1,488,604.66, comprised of rent remaining due under the lease reduced by an amount landlord collected during a two and one-half year period it was able to re-let the premises. The Appellate Division affirmed.

In affirming, the Court of Appeals rejected tenant's reliance on *Fifty States Management Corp.*, holding that, despite retaking possession of the premises, landlord was permitted to seek "damages in accordance with the acceleration clause after terminating the lease, once defendants defaulted and breached their leasehold obligations to maintain the property and pay rent." The Court of Appeals also rejected tenant's claim that the acceleration clause amounted to an unenforceable penalty. The Court held that the acceleration clause was enforceable and not a penalty because defendants "committed material breaches of the lease by ceasing all rental payments as of February 2008 and simultaneously abandoning the premises." CitingHoly Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.,[iii] the Court also briefly addressed and rejected defendants' claim that landlord had an obligation to mitigate its damages.

The Court of Appeals did, however, remit the matter to Supreme Court for further proceedings to determine whether the undiscounted accelerated rent was disproportionate to landlord's actual loses, "notwithstanding that the landowner had possession, and no obligation to mitigate." The Court was persuaded by defendants' argument that the damages measured by the accelerated rent were disproportionate to landlord's actual damages because landlord had possession and immediately collected all rent due for the balance of the lease in one lump sum. The Court seemed to credit the argument that because landlord obtained possession of the premises, the accelerated rent should have been discounted to present-day value. The Court held that "Defendants should have had the opportunity to present evidence that the undiscounted accelerated rent amount is disproportionate to [landlord's] actual damages . . ."

While acceleration clauses are not common and are often heavily negotiated, this decision serves to caution to both tenants and guarantors that upon a material default under a commercial lease, they may be liable for significant damages in the amount of accelerated rent due for the balance of the term of the lease.

[i] *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Association, Inc., et al.,* 2014 WL 7177502 (2014)
[ii] 46 N.Y.2d 573 (1979)
[iii] 87 N.Y.2d 130 (1995)

Can an E-mail Exchange Create a Binding Contract?

By Patrick McCormick, Esq.

Can an e-mail exchange create a binding contract? The short answer is yes!

With the proliferation of electronic communications, it is not surprising that courts are increasingly called upon to address claims alleging the creation of a binding contract based upon an exchange of e-mails.

The Appellate Division, Second Department recently held that e-mail communications between parties were sufficient to create a binding contract. *Law Offs. of Ira H. Leibowitz v. Landmark Ventures, Inc.,* 131 A.D.3d 583, 15 N.Y.S.3d 814 (2d Dep't 2015) involved breach of contract claims related to services provided by the plaintiff. In examining e-mail communications between the parties, the Court found "[b]y the plain language employed" by the parties in e-mail communications, it was clear that the plaintiff made an offer to provide services for a certain fee and that the defendant accepted the offer, creating a binding contract.

The Appellate Division, Third Department addressed a similar situation in the recent case *In re Estate of Wyman,*128 A.D.2d 1157, 8 N.Y.S.3d 493 (3d Dep't 2015). The decedent and the respondent purchased an improved parcel of real property. After the decedent's death, her executor commenced a proceeding against the respondent to turn over ownership of the entire parcel to the estate, claiming that a series of e-mails between the decedent and respondent had created an enforceable contract to transfer sole ownership of the property to decedent. Upon examining the e-mails, the Appellate Division found that there was no contract because the e-mails did not establish a necessary term of the claimed contract: the price to be paid for the transfer of the property. It appears from this decision that if the e-mails in question contained evidence of an agreement on price, the Court would have found a binding and enforceable contract in the e-mail exchange.

While communicating by e-mail may seem informal, these cases make clear that parties to an e-mail exchange must exercise care to avoid unintentionally creating a binding contract. An otherwise valid contract cannot be undone simply by concluding with "Sent from my iPhone."

Loss Mitigation in Labor Law Cases

By Scott Middleton, Esq.

Many of our clients own commercial buildings or multifamily residential buildings and may not be aware of their legal exposure when having construction, renovation, or repair work performed on these buildings.

Labor Law sections 240 and 241 apply to these types of buildings and can be devastating to the unknowing owner. If any worker falls from height, or has an accident involving a gravity-related risk while the work is being performed, the owner and general contractor are absolutely liable.
To adequately protect owners, first and foremost, only reputable contractors should be hired. In the contract between the owner and contractor, the parties must agree that the contractor and any subcontractor will indemnify and hold the owner harmless for all losses arising out of the work to be performed. It is imperative that the owner be named as an additional insured on all policies of insurance and that the policies be reviewed to ensure they contain the proper language.

Assuming all of the foregoing is done and an accident occurs, what happens immediately after the accident is very important. Do not rely upon the contractor or subcontractor to do what is right. As the owner, get involved or have your attorney or other representative become involved in the investigation immediately. This initial investigation is of paramount importance in terms of preparing a defense.

The steps to take immediately are: prepare an accident report, secure and preserve any equipment involved, photograph the area, obtain statements from all involved parties and witnesses, make copies of all contracts and insurance policies (as well as certificates of insurance), and notify all primary and excess insurance carriers.

For large projects, the burden of the investigation is usually shifted to a general contractor or construction manager. For small projects, the owner should have a simple and clear policy for doing its own initial investigation. Of course, our office can always assist in this process.
All incidents involving gravity-related risks or industrial code violations resulting in injuries to construction workers must be considered serious. This is true no matter how minor or inconsequential an accident seems. Even minor injuries can develop into career-ending injuries, thereby exposing property owners to astronomical damages.

Medical Providers Must Take Steps to Protect Out-of-Network Reimbursements under New York's "Surprise Medical Bills" Law

By William McDonald, Esq.

Medical providers must plan now to comply with New York's new "Surprise Medical Bill" law, which takes effect April 1, 2015. In short, for "surprise bills," the law caps a patient's financial responsibility for out-of-network medical services to an amount no greater than if the patient saw an in-network provider. Medical providers who do not comply with the mandatory disclosures under the law will find their bills classified as "surprise bills," which means that they must pursue arbitration directly with the insurance carrier to obtain reimbursement. For surprise out-of-network medical bills, medical providers may not pursue reimbursement directly from the patients.

New York's law, the toughest in the nation, was included as part of the Governor's Executive Budget Bill in 2014 (S.6914, A.9205). The law is a response to endless horror stories from individuals who thought they received treatment from in-network providers, but who later received bills from out-of-network providers such as anesthesiologists, radiologists, pathologists, assisting surgeons, etc., who did not participate in a patient's insurance plan. After receiving meager, if any, reimbursement from insurers, these out-of-network providers then send large bills to patients, who must pay out of pocket. Various consumer advocacy groups claim that surprise medical bills have been one of the largest causes of consumer bankruptcy.

The law places new requirements on insurers to ensure that they provide an adequate network of providers for members to receive medical care, as well as "fairer" out-of-network reimbursement methodologies. Insurers in many cases have moved away from reimbursing out-of-network services as a percentage of the "usual and customary rate" and have instead adopted a percentage over Medicare rate reimbursement, such as paying 140% of the Medicare rate for a particular service. Using the Medicare rate scale, out-of-network services now result in much lower reimbursements from insurers, leaving patients liable for much larger coinsurance or "balance billing" liabilities, since medical providers are required to bill patients for the balance of what insurance does not cover for out-of-network services.

In order to receive greater reimbursement for out-of-network services, medical providers must preserve their ability to seek full reimbursement from patients after insurance has paid its portion. To preserve this ability, providers must comply with the New York State Public Health Law, which added a new Section 24.
This section provides:

- Providers shall disclose to patients or prospective patients in writing or through an internet website the health care plans in which the provider participates and the hospitals with which the provider is affiliated. This disclosure must be done prior to
- providing non-emergency services, and the
- information must be conveyed verbally at the time an appointment is scheduled;
- Providers who do not participate in a patient's insurance plan shall, prior to providing non-emergency services, inform a patient that the amount or estimated amount that the provider will bill the patient is available upon request; and upon such a request the provider shall provide such an estimate in writing to the patient. The provider must also identify insurance plans in which physicians at a hospital who are reasonably expected to provide services to a patient, such as anesthesiologists, radiologists, and pathologists.

While these disclosure requirements seem onerous, failure to comply will likely lead a provider's out-of-network bill to be classified as a "surprise bill," and thus require the provider to seek reimbursement from the insurer only.

A "surprise bill" is defined in the new Article 6 added to the New York State Finance Law. Section 603(H) provides:

"Surprise bill" means a bill for health care services, other than emergency services, received by:

> An insured for services rendered by a non-participating physician at a participating hospital or ambulatory surgical center, where a participating physician is unavailable or a non-participating physician renders services without the insured's knowledge, or unforeseen medical services arise at the time the health care services are rendered; provided, however, that a surprise bill shall not mean a bill received for health care services when a participating physician is available and the insured has elected to obtain services from a non-participating physician;
>
> An insured for services rendered by a non-participating provider, where the services were referred by a participating physician to a non-participating provider without explicit written consent of the insured acknowledging that the participating physician is referring the insured to a non-participating provider and that the referral may result in costs not covered by the health care plan; or
>
> A patient who is not an insured for services rendered by a physician at a hospital or ambulatory surgical center, where the patient has not timely received all of the disclosures required pursuant to Section 24 of the Public Health Law.

Providers should prepare prior to April 1, 2015 in order to avoid having their bills for out-of-network services falling under the "Surprise Bill" definition in the new law.
Proactive steps include:

- Update your practice's website and marketing materials to include all insurance plans in which a practice participates;
- Prepare office staff to make required disclosures when booking appointments;
- Get familiar with plan affiliations of physicians to whom you regularly refer patients;
- Prepare cost estimates for commonly-treated conditions to provide to out-of-network patients

DWI – To Blow or Not to Blow?

By William McDonald, Esq.

Lately, it seems not a weekend goes by without another news story about a DWI crash into a house, or tragically, a fatality. With such horrible trends continuing, law enforcement is sure to step up DWI prevention through checkpoints and aggressive policing.

As a DWI defense attorney, I am always asked: "If I am arrested, should I blow or refuse?" This seemingly simple question is actually rather complex. Many factors affect whether taking the chemical breath test is a good or bad idea. For example, there may have been an accident involving a fatality or serious injury; the driver may have a commercial driver's license who drives for a living; the person may have a prior DWI and thus will face a felony DWI charge; the local District Attorney's Office may have plea bargaining policies where no reduction is offered if a person refuses the test, or it may not offer reductions for readings above a certain level.

With all of these considerations in play, whether to take the test is in many cases a matter of opinion. Here, I will share my opinions, while acknowledging that others may disagree for perfectly valid reasons.

For any refusal, a driver will face immediate revocation of his driver's license for at least one year. This is a civil sanction imposed by the DMV, and it applies regardless of whether a person is convicted or acquitted of the DWI charge in criminal court. For commercial drivers, the revocation period is a minimum of 18 months, even if the person was driving a personal vehicle. If a commercial driver is a repeat offender, meaning he has been convicted of any alcohol-related offense, or he has refused to take a chemical test before, he will be permanently disqualified from operating a commercial motor vehicle.

For DWI cases involving an accident with serious physical injury or death, it is usually better to refuse the test. The civil sanctions imposed by the DMV are minor compared to the potential criminal penalties attached to such cases.

For felony DWI cases, it is also usually better to refuse the test. The civil sanctions will normally not exceed the criminal sanctions against a driver's license. Furthermore, the DMV refusal hearing may provide vital discovery prior to indictment that may result in obtaining a better plea offer. If the case goes to trial, it is harder for the prosecution to prove that a defendant's blood alcohol content ("BAC") was above .08 if the defendant refused to take the test.

For misdemeanor DWI cases, if the person needs to drive to earn a living, it is usually better to take the test. The civil sanctions against commercial drivers for refusing will result in longer suspension periods than the criminal sanctions imposed.
For misdemeanor DWI cases that don't involve commercial drivers, it is usually preferable to refuse the test, unless the local District Attorney has plea policies in place that penalize those who refuse.

These recommendations are general rules of thumb and are subjective. Unfortunately, these decisions usually take place in the middle of the night and under stress. The best decision you can make is to stay off the road after drinking.

5 Tips to Protect Your Trademark

By Eryn Y. Truong, Esq.

With the internet and social media, information and content moves so quickly that companies may lose control of their trademarks. A trademark is what distinguishes your product or services from the competition, but improper uses may cause the mark to become generic, and thus not protectable. To help avoid the same fate as "aspirin," "escalator," and "thermos" – all of which started out as trademarks but have become generic – here are some tips on how to protect your trademark before it becomes generic.

1. **Use Notice Markings**. Placing a TM marking after your trademark gives notice to others that you are claiming rights to the mark. It also helps distinguish the mark and draws it out of the context for the reader. If you have a registered the trademark with the U.S. Patent & Trademark Office, use the ® symbol.

2. **Distinguish Your Mark**. Make the trademark stand out from the surrounding text so that it is distinguishable. Marks should be CAPITALIZED, underlined, italicized, bolded, or placed in "quotation marks." The goal is to create a distinct impression to consumers who see the mark in print or electronic media.

3. **Use Your Mark Correctly**. A trademark should be used as an adjective. This can be accomplished by adding the generic noun for the product or service after the mark. Further protection can be achieved by adding the word "brand" after the mark, and before the generic name. For example, "Kleenex® brand facial tissue," "Xerox® brand photocopier," and "FedEx® brand overnight courier service."

4. **Be Consistent**. Do not change the spelling or abbreviate the mark. Also avoid modifying it into a plural. For example, use "buy Lego® bricks," not "buy Legos."

5. **Register Your Trademark**. Registration with the U.S. Patent & Trademark Office (USPTO) provides nationwide notice of your claim and creates a legal presumption of validity and ownership. The USPTO also bars registration of confusingly similar marks. Registration further allows you the ability to use the ® symbol.

In sum, proper trademark usage is extremely important. A company may be unknowingly using or allowing others to use its mark improperly, which will undercut the mark's value and cause it to become generic. All of this can simply be avoided by properly using, protecting and policing the mark.

Client Advisory: NYC's "Ban the Box" Legislation Now in Effect

By Arthur Yermash, Esq.

"The Fair Chance Act prohibits NYC employers from asking candidates about their pending arrests or criminal convictions until after extending a conditional offer of employment."

Joining state and local jurisdictions across the country, New York City has enacted a "Ban the Box" law that limits employers' inquiries into the criminal background of job applicants and imposes stringent requirements on employers who intend to make hiring decisions based on such information.

The Fair Chance Act, effective as of October 27, 2015, prohibits employers who are based in NYC or otherwise have employees in NYC from asking candidates about their pending arrests or criminal convictions until after extending a conditional offer of employment. Further, employers are restricted from publishing job postings that state or imply that a person with a criminal record is automatically ineligible for the position.

An NYC employer who chooses to inquire about an applicant's criminal history at that time faces strict requirements. An employer cannot take adverse employment action against the applicant before:

- Providing a written copy of the inquiry to the applicant in a manner to be determined by the NYC Commission on Human Rights;
- Performing an analysis of the applicant pursuant to the New York State Correction Law (discussed below) and providing a written copy of the analysis to the applicant specifying the basis for the adverse employment action; and
- Giving the applicant at least three business days to respond, during which time the position must be held open.

The Fair Chance Act incorporates the New York State Correction Law, which already prohibits employment discrimination against candidates with criminal backgrounds and requires employers in New York State to consider the following factors when evaluating a prospective employee with a criminal background:

1. New York State's public policy to encourage the employment of individuals with prior criminal convictions
2. The duties of the position
3. The bearing of the criminal offense(s) on the applicant's fitness to perform those duties
4. The amount of time that has passed since the offense(s) occurred
5. The applicant's age at the time of the offense(s)
6. The seriousness of the offense(s)
7. Any information produced by or for the applicant regarding his or her rehabilitation and good conduct
8. The employer's interest in protecting property and ensuring safety

An exception to the Fair Chance Act applies when the employer is required by federal, state, or local law to conduct criminal background checks or to hire only those applicants who pass certain screening requirements. Applicants for employment as police officers and in certain city departments and agencies are also not covered by the law. The Act also specifies that it is not intended to prevent an employer from taking adverse action against an employee or denying employment to an applicant for reasons other than criminal background history.

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