



# WESTCHESTER COUNTY BAR ASSOCIATION NEWSLETTER

www.wcbany.org

February 2011

## President's Message

BY DONALD K. SANDFORD, ESQ.



### THE TUCSON SHOOTINGS: AN INTERSECTION OF RIGHTS AND RESPONSIBILITIES

The nation was rocked last month by the attempted assassination of U.S. Representative Gabrielle Giffords, the senseless slaughter of six individuals including U.S. District Court Judge John M. Roll, and the unwarranted injury of thirteen other individuals. Arrested at the scene and charged with all of these crimes was one Jared Loughner. His mental faculties at the time he allegedly committed these heinous crimes will certainly be brought up at his trial, where he will face federal charges of attempted assassination of a member of Congress, killing an employee of the federal government and attempting to kill a federal employee.

The shootings brought to the fore ardent debate on the issues of free press, free speech and the right to bear arms; liberties enshrined in the First and Second Amendments of our Bill of Rights and limited in their applications. The issue, as I see it, is the need for responsible and fact-driven debate. I spoke to this issue in my President's message in June 2010, and revisit it here as a result of these events.

Within minutes of the shootings, NPR reported that Representative Giffords had died. This "news" reached her husband and other family members. It is hard to

*(continued on page 2)*

## Estate Tax Update

BY MICHAEL MARKHOFF, ESQ.



On December 17, 2010, the President signed "The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010" (the "Act"). The Act includes an extension of various provisions of the Bush-era tax cuts, but this article will focus on

the changes to the estate tax law.

Contrary to media reports, estate planning in 2011 is not a concern only for high net worth individuals. While the tax planning aspect has always been of particular concern for most

people, the basic need for the use of trusts for asset protection, safeguarding family members and addressing personal issues remains paramount. Also, just to complicate the matter more, the Act is only a two

year patch. Based on the partisanship of Congress in the last few years, it would be impossible to predict how much of this Act will survive after 2013, but for now, the Act provides some excellent planning opportunities.

### ESTATE, GIFT AND GENERATION-SKIPPING TAX

For individuals dying after 2010, the estate tax exemption will be \$5,000,000 per individual for 2011 and 2012 with a tax rate of 35% on the amount exceeding the exemption. The gift tax exemption for the next two years is now unified with the estate tax exemption so that an individual can now gift up to \$5,000,000 without

*(continued on page 12)*

...2011 and 2012 may prove to be the best opportunity to plan to transfer the largest amount of wealth in history and exemplifies the importance of taking advantage of this two year window of opportunity.

## INSIDE...

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## President's Message

(continued from page 1)

imagine a more grievous error by the fourth estate than inaccurately reporting the demise of a loved one. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court found that freedom, but not responsibility, is mandated by the First Amendment.

The airwaves were immediately filled with politicians and pundits, many of whom placed responsibility for these despicable acts at the doorstep of the Tea Party and Sarah Palin. Federal investigators, however, found materials in a safe in Mr. Loughner's home that suggest he had been angry at Congresswoman Giffords for several years, after having met her at a constituent event in 2007. These motives pre-date the rise to national prominence of either the Tea Party or Governor Palin. Others blamed talk radio, an interesting condemnation of free speech by those practicing free speech!

With respect to the right to bear arms, it is certainly noteworthy that Mr. Loughner was suspended from college on September 29, 2010 because of his mental instability. The semiautomatic Glock that he allegedly used was legally purchased two months later. This raises an issue as to who is carrying guns and whether or not they should be. Interestingly, Congresswoman Giffords is known as a proponent of gun rights and is reported to have a Glock of her

own. She opposed the Washington D.C. gun ban, signing an amicus brief to the U.S. Supreme Court to support its overturn. (*District of Columbia v. Heller*, 554 U.S. 570 (2008).)

With each of the aforementioned rights comes tremendous responsibility. Those who own guns, obviously, have the highest level of responsibility to exercise their rights in a manner that is not harmful to others. Those who are protected by freedom of the press have a moral (but not a legal) obligation to exercise that freedom responsibly. And clearly, those who exercise their right of free speech are in no position to question others who exercise that same right.

It is at this very intersection of rights and responsibilities that our society and our democracy is shaped, and we must remain ever vigilant to prevent this intersection from becoming gridlocked by limiting one view over another.

**SAVE THE DATE!**

**THURSDAY, MAY 19, 2011**

**6:00 pm cocktails, 7:30 pm dinner**

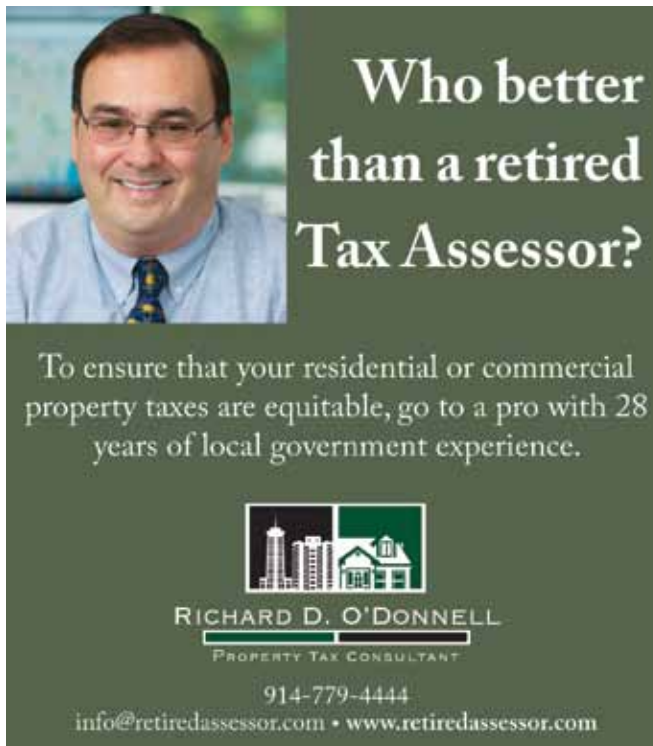
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**NYS Attorney General**

**Eric T. Schneiderman**



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WESTCHESTER COUNTY BAR ASSOCIATION

# Past Presidents Dinner

## AND ANNUAL MEETING

*We invite you to join us*  
for our cocktail reception, dinner  
honoring our past presidents and  
our annual meeting and election  
of Officers and Directors.

**Wednesday**  
**March 16, 2011**

Cocktail Reception  
at 6:00 pm, followed by the  
dinner meeting at 7:00 pm.

Mamaroneck Beach & Yacht Club,  
555 South Barry Avenue,  
Mamaroneck, NY

### GUEST OF HONOR: STEPHEN J. PITTARI



*We will be honoring*  
Stephen J. Pittari  
Executive Director,  
Legal Aid Society  
*upon his retirement*

**Cost: \$65 on or before March 8, 2011.**  
After March 8<sup>th</sup> or at the door, cost is \$80.

#### HOW TO REGISTER

There are four options to register: **WEBSITE:** Search for "PRESIDENTS DINNER" at [www.wcbany.org](http://www.wcbany.org) / **EMAIL:** Fill out the form below and email to: [cl@wcbany.org](mailto:cl@wcbany.org) / (You may omit credit card information for security purposes and we will contact you.)

**FAX:** Fill out the form below and Fax to: (914) 761-9402 / **MAIL:** registration and form with check made out to "WCBA" to: WCBA, One North Broadway, Ste. 512, White Plains, NY 10601

Name(s)\*: \_\_\_\_\_

Email: \_\_\_\_\_

Firm: \_\_\_\_\_ Business Telephone: \_\_\_\_\_

\*Law Firms: Please attach a list of attendees.

Method of Payment: Check/money order enclosed \$ \_\_\_\_\_ or Charge to:  Mastercard  Visa  AMEX

Card Number: \_\_\_\_\_ Expiration Date: \_\_\_\_\_ Sec. Code \_\_\_\_\_

Credit Card Billing Address: \_\_\_\_\_

Authorized Signature: \_\_\_\_\_

#### For additional information or sponsorship opportunities:

Please contact Bill Egan (ext. 16) or Donna Drumm, Esq. (ext. 19) at (914) 761-3707.

The New Lawyers Section of The Westchester County Bar Association and Pace Law School present

# Passing The Bar Party 2011

Sponsored by:  
Westlaw.



*Jennifer Bienenstock, Lauren Nagle, Jennifer Kennedy, and David Siguenza enjoying our 2010 Passing the Bar Party.*

**Tuesday, March 1, 2011**

**6:30 pm – 8:30 pm**

Vintage Bar & Restaurant  
171 Main Street, White Plains  
(across from the Galleria Mall)

Cost: \$15: Includes free food. Cash Bar.

A celebration for new attorneys as well as members of the Judiciary and seasoned WCBA members. Network and reminisce with colleagues while congratulating the newest members of our profession!

**TO REGISTER:** See "HOW TO REGISTER FOR CLEs and EVENTS" on page 8.

## Pro Bono Committe Addresses Criminal Law Issues in High Schools



*Michael Lambert Esq., partner, law firm of Ortiz and Lambert*

High Schoolers are often blissfully unaware of the consequences of their actions. Fighting, drug use/sale, harrassment of their peers, and drunk driving are all too common among high school aged children, and these actions can have real consequences

within the criminal justice system. As a criminal defense attorney and member of the Pro Bono section of the WCBA, Michael Lambert recently presented a seminar series at Port Chester High School explaining to students how to avoid common pitfalls that often result in high schoolers wearing the unwanted title of "defendant". The format itself was participation focused. Other topics included lessons on the American justice system, and civic awareness. Students were encouraged to participate with questions and to relate the format to situations they encountered on a daily basis.

The Pro Bono section of the Westchester Bar Association will be holding more of these seminars

**Tues. Feb. 15th**

### Chairpersons Acknowledgement Cocktail Reception & Strategy Session Supper

Chairs of Sections and Committees chartered with presenting CLE programs will meet for a cocktail reception and strategy session supper.

Bar leaders will acknowledge the Chairpersons for their contributions to the CLE program.

*Thanks to our hosts  
Wilson Elser and The Kelsey Company*

in the future. If you are interested in vounteering or know a school that would be interested in this program, please contact Co-Chairs Margaret Nicholson at nicholslaw@optonline.net or Marc Bergman at mbergesq@aol.com.

# Examining the Fine Print of Insurance



BY JEFFREY PITCHER

The mass marketing of auto and home insurance has driven a misconception that low cost is the primary consideration when choosing an insurance policy. After all, policies are pretty much the same, or are they?

Insurance premiums represent a significant expense. However, premiums are only one side of the equation. More focus needs to be on the extent of coverage in the event of a claim. An effective insurance plan with meaningful levels of coverage does not automatically mean higher premiums. It is a matter of finding the correct balance of coverage and premium through careful plan design.

There is typically a real opportunity for improvement, since most of us overinsure against minor risks and underinsure against major risks. Removing coverage for small losses and reallocating premium dollars to protect against a catastrophe is smart planning.

Policies are full of fine print that can be helpful or hurtful. Few policyholders know what their policies say or promise to do. It is common for insurance policies to be purchased and then renewed year after year, as if by inertia. The adequacy of coverage is discovered only after a claim occurs. The insurance policy forms the contract between the policyholder and the insurance company, and it needs to be reviewed carefully with a focus on value, not lowest cost.

The price of an uncovered or under-covered claim is the largest potential cost of any insurance plan. While the perfect plan may be hard to achieve, striking a reasonable balance of low premium, thorough catastrophic coverage with a high level of service and a financially sound insurance carrier is a very attainable goal. The levels of coverage shown on a policy declarations page only tell part of the coverage story.

A home insurance policy begins with the declarations, typically 1 - 3 pages detailing:

- Named insured
- Underwriting company
- The subject of the insurance

- Coverage limits
- Time period of coverage
- Premium

Following the declarations pages you find page upon page of agreements, definitions, terms, conditions, exclusions and loss settlement provisions that drive the scope of coverage.

Now let us look at the fine print behind the declarations pages using a claim scenario.

## HYPOTHETICAL CLAIM WITH TWO DIFFERENT INSURANCE COMPANIES

The declarations pages from both companies look very similar in the way coverage limits are listed:

### *Company A*

Homeowner's policy declarations pages shows dwelling \$1,000,000 Replacement Cost

### *Company B*

Homeowner's policy declarations pages shows dwelling \$1,000,000 Replacement Cost

Now a claim occurs (fire, smoke and ensuing water damage) causing a total loss:

*Company A* agrees that this is a total loss at \$1,000,000

*Company B* agrees that this is a total loss at \$1,000,000

*(continued on page 14)*

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# EXITING YOUR BUSINESS IN STYLE

## *The Importance of Using a Systematic Process in Business Exit Planning*

BY JEFFREY A. KERMAN AND MARK W. MCGORRY



This article will continue our discussion of the Seven-Step Business Exit Planning Process by focusing on Step 2: Identifying the Owner's Business and Personal Financial Resources, and Step 3: Building and Preserving the Value of the Company. Readers are encouraged to remember that this systematic process uses the Owner's unique Personal Objectives (identified in Step 1: *WCBA Newsletter*, November 2010, page 8) to convert their current reality into their desired outcome. The Exit Planning Process helps maximize the financial return, minimize tax liability, plan for contingencies and increase the likelihood of a successful transfer of the business, all with a significant role for you as their attorney.

Clients often want all aspects of their planning tied together in one coherent plan. Using a systematic approach allows them to either accomplish this one step at a time or work through an entire Exit Plan, culminating in their Personal Wealth and Estate Planning. If the Business Owner client decides to work through an Exit Plan in stages, the client and advisors can prioritize the steps and complete each

### THE SEVEN STEP EXIT PLANNING PROCESS

- Step 1: Owner Objectives
- Step 2: Business and Personal Financial Resources
- Step 3: Maximizing and Protecting Business Value
- Step 4: Ownership Transfers to Third Parties
- Step 5: Ownership Transfers to Insiders
- Step 6: Business Continuity Planning
- Step 7: Personal Wealth and Estate Planning

component sequentially. Let's discuss...

### STEP 2: BUSINESS AND PERSONAL FINANCIAL RESOURCES

Much of an Owner's wealth is often locked up in an illiquid business that must be converted to cash—and taxes paid upon that conversion—in order to exit favorably. In

Step 2, we establish: 1) the value of what the Business Owner client has today (i.e. the value of the business), and 2) the potential cash flow of the business over the next few years. We will learn whether there is a shortfall between the amount the client needs or wants from the business (when they exit), and the amount that they have now. Unless we know the value of the Company or the amount of after-tax cash they can expect to receive from the transfer, it is impossible to determine if the financial objectives can be met.

Importantly, the combination of Steps One and Two tells us the extent of value or cash flow increase that is necessary to meet the Business Owner's goals. The starting point for reaching the Exit Objectives begins with: How much is the business worth today?

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How much cash flow does it currently generate? How much income do the non-business assets produce? We can then project future cash flow, as well as the future value of the business and non-business assets. However, without an initial determination of what the Business Owner client has, both business and personally, we cannot measure our progress toward the stated objectives.

If the financial objectives cannot be met today, a business valuation will tell us how much the Company must grow before the Business Owner client can exit. Therefore, a business valuation determines if a sale can provide needed cash, and it provides a benchmark of what the Owner deserves if the business is to be transferred to a non-cash buyer.

If, on the other hand, the client is ready to exit and the Company will sell for an amount that will make the client financially secure for life, there are significant risks if they choose to delay their exit.

Practice Note: Every attorney has a story about how the client thought their business was worth X, when reality is that it is worth “less than X”. A professional business valuation from an objective Appraiser is best when balancing the expectations of the client and the realities of the situation.

**When Step 2 is Completed, the Client & Advisor(s) Will Know:**

- What the Company is Worth;
- The current and future value of the personal assets the client has in place, and

- What those assets might be worth in the future.

### STEP 3: BUILD AND PRESERVE VALUE

The value of the Business will determine not only the quality of the Business Owner Client’s life once they leave the business, but how long they will have to stay in the business before they can leave. The simple, but unpleasant fact is that growing business value takes years of concentrated effort. Working to grow and preserve value – well before the date the Owner needs the monetary value – is what Step 3 is all about.

The elements that build the value of a business or preserve the value that the Owner client worked so hard to create and that buyers will pay for are called Value Drivers.

In this Component, Value Drivers which are important to meeting the client’s objectives are identified, and design strategies are then recommended to protect the tangible and intangible value of the business. Value Drivers include (but are not limited to) a stable and motivated Management Team, a realistic growth strategy and operating systems that improve the sustainability of cash flows.

Based on the Company’s needs, recommendations may also include installing or updating financial reporting systems, aligning employee performance with the attainment of your profitability goals, or protecting proprietary information through covenants not to compete with key employees.

We utilize a Value Driver Analysis which covers three critical areas:

1. *Strategic Objectives*: identifying the long-term business and personal goals for the client,
2. *Quantify Resources*: assessment of the client’s business and personal financial landscapes, and
3. *Close the Gap*: targeting specific areas in the business that can drive up the Value and close the Gap between where the client is today and where they want to be after they leave the business.

### STRATEGIC ADVANTAGES OF BUSINESS VALUE DRIVERS:

- To strengthen the Company to better withstand competitive pressure;
- To create a more systematic way to attract, motivate and retain their best employees, and
- To build the Business Value needed to one day sell or transfer the Company for the amount the Business Owner client needs to retire comfortably.

*(continued on page 11)*

**You've mastered the Law's "fine print." We've mastered the fine print of insurance.**

Jeffrey Pitcher

**Most attorneys agree** that an insurance policy is the one contract that nobody reads because it is thought that all policies are pretty much the same. The truth is that they vary widely. Insurance is not a commodity where the purchase decision should be made solely on lowest cost. Policies are full of fine print that helps or hurts when you have a claim.

Let us worry about the fine print in your insurance policies. We are an independent insurance agent, so we'll recommend a policy that's right for you. For a no-obligation homeowners, automobile, umbrella or professional liability insurance consultation, contact **Jeff Pitcher** at 914-381-2040 x13 or [jpitcher@ajbenet.com](mailto:jpitcher@ajbenet.com)

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## Tuesday, February 15, 2011

### The State of the Estate Tax: 2010 and Beyond: A Look at the New Estate, Gift and Generation-Skipping Tax Laws

**Registration Closed Due to popular demand**

**Speakers** Laurence Keiser, Esq.  
David Bruckman, Esq.  
Karen Walsh, Esq.

**Location** Willow Towers  
355 Pelham Road  
New Rochelle, NY

**Time** 8:00 am–10:00 am CLE Presentation  
7:45 a.m. Registration and  
Light Breakfast

**Price** \$30 Members; \$40 Non-Members  
**CLE** 2 credits: Prof. Practice

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## Thursday, February 17, 2011

### Section 1031 Exchanges: Beyond Real Estate Artwork, Collectibles, Intellectual Property, Vehicles, Equipment and More

**Speaker** David Gorenberg, Esq.

**Location** Sanford I. Weil Center for  
Executive Development  
188 King Street, Armonk, NY

**Time** 5:30 pm–6:00 pm Networking  
Reception  
6:00 pm–8:00 pm CLE Presentation  
and Dinner

**Price** \$20 Members; \$30 Non-Members  
**CLE** 2 credits total (.5 Ethics,  
1.5 Prof. Practice

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#### HOW TO REGISTER FOR CLEs and EVENTS

There are four options to register for a **CLE** or **EVENT**:

**WEBSITE:** Go to [www.wcbany.org](http://www.wcbany.org)  
Select Calendar and Select CLE title of interest

**EMAIL:** Fill out the form below and email to:  
[cle@wcbany.org](mailto:cle@wcbany.org) \*(You may omit credit card information for security purposes and we will contact you.)

**FAX:** Fill out the form below and Fax to:  
(914) 761-9402

**MAIL:** Registration form with check made out to  
“WCBA” One North Broadway, Suite 512, White  
Plains, NY 10601

## Wednesday, March 9, 2011

### The Trusts and Estates Section presents: Basic Training for Guardian Ad Litem

**Speakers** Judge Anthony A. Scarpino, Justice,  
Surrogate’s Court  
Joseph M. Accetta, Esq., Chief Clerk  
Surrogate’s Court

**Location** Westchester County Courthouse  
111 Dr. Martin Luther King, Jr.  
Blvd., White Plains, NY, Surrogate’s  
Court, Rm 1800, 18th Floor

**Time** 11:30 am–12:00 pm Registration  
and Lunch  
12:00 pm–4:00 pm CLE Presentation

**Price** FREE of charge  
**CLE** 4 credits total (1 Ethics,  
3 Prof. Practice)

**Register** Contact Joseph M. Accetta, Esq.,  
Chief Clerk Surrogate’s Court  
Westchester County by email:  
[jaccetta@courts.state.ny.us](mailto:jaccetta@courts.state.ny.us)

## Thursday, March 10, 2011

### WCBA & WWBA Trusts and Estates Sections present: Attorneys Beware: Conflicts, Privity and Other Issues in Estate Planning

**Speakers** Both from Fiduciary Trust Co. Intl.  
Elisa Shevlin Rizzo, Esq.,  
Managing Director & Trust Counsel  
Erin Gilmore Smith, Asst. Vice. Pres.

**Location** Bleakley Platt & Schmidt, LLP,  
Lobby at One North Lexington Ave.,  
White Plains, NY

**Time** 5:30 pm–6:00 pm Registration  
6:00 pm–7:30 pm CLE Presentation  
Light Supper

**Price** \$20 Members, \$30 Non-Members  
**CLE** 1.5 credits total (.5 Ethics,  
1 Prof. Practice)

**Register** Veronica Magana at (914) 251-1115  
or [vm@walsh-amicucci.com](mailto:vm@walsh-amicucci.com)

*Thanks to Fiduciary Trust Co. Intl. for  
their sponsorship*

*continued on next page*

## Thursday, March 24, 2011

### Making The Most Of Mediation: Panel Perspectives From Mediator, Judge, and Advocate

**Speakers** Hon. John DiBlasi, Justice of the Supreme Court of the State of NY (RET)/Mediator  
Ruth D. Raisfeld, Esq.  
Mediator/Owner, Alternative Dispute Resolution Services  
Andrew Schriever, Esq., Partner,  
Cuddy & Feder, LLP

**Location** TBA  
**Time** 5:30 pm Registration  
6:00 pm–8:00 pm CLE Presentation  
**Price** TBA  
**CLE** 2 credits: Skills

**Price** FREE for Members of WCBA;  
Non-Members: \$35  
**CLE** 2 credits total (1 Ethics,  
1 Prof. Practice)

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## Thursday, March 31, 2011

### Social Networking: Building Your Practice Effectively; Protecting Your Firm; Advising Your Clients

**Speakers** John R. McCarron Jr, Esq.  
Partner, Montes & McCarron, PLLC  
Terri Freeman, Esq.  
Partner, Jackson Lewis LLP

**Location** Hudson Valley Bank Headquarters  
21 Scarsdale Road, Yonkers, NY  
(914) 961-6100

**Time** 5:30 pm–6:00 pm Registration and  
Light Dinner  
6:00 pm–8:00 pm CLE Presentation

**Price** FREE for Members of WCBA;  
Non-Members: \$35  
**CLE** 2 credits total (1 Ethics,  
1 Law Practice Management)

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## Wednesday, March 30, 2011

### Panel Discussion with the Matrimonial Judges As To the “Do’s and Don’ts” of Appearing Before Them

**Speakers** Justices of the Supreme Court of the State of NY:  
Hon. Francesca E. Connolly  
Hon. Linda Christopher  
Hon. Robert M. Berliner

**Location** Hudson Valley Bank Headquarters  
21 Scarsdale Road, Yonkers, NY

**Time** 5:30 pm–6:00 pm Registration  
6:00 pm–8:00 pm CLE Presentation

**Time** 5:30 pm–6:00 pm Registration and  
Light Dinner  
6:00 pm–8:00 pm CLE Presentation

**Price** FREE for Members of WCBA;  
Non-Members: \$35  
**CLE** 2 credits total (1 Ethics,  
1 Law Practice Management)

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## CLE and EVENT ORDER FORM

Please register in advance whenever possible. Registration later than 12 pm 24 hours PRIOR to the CLE will incur a \$10 late fee and applicants will be seated and provided written materials ONLY if space permits.

| CLE TITLE   | Date   | Fee  |
|---|--------|--|
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| EVENT TITLE   | //     | \$   |
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| <input type="radio"/> CD <input type="radio"/> DVD Title: |        | \$   |
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Copies of the WCBA CLE Rules and Procedures and the Hardship Policy may be obtained by emailing [cle@wcbany.org](mailto:cle@wcbany.org) or calling 914/761-3707 ext. 19. Your knowledge of the CLE rules and procedures is presumed when you register for a CLE. If you have paid for a program in advance and circumstances require cancellation, full credit will be applied to a future program, provided written notification (by mail/fax/email) is received by the WCBA at least 1 business day in advance of the program.

**JOSEPH M. ACCETTA APPOINTED AS CHIEF CLERK OF THE WESTCHESTER COUNTY SURROGATE'S COURT**

The Trusts and Estates Section of the Westchester County Bar Association extends its heartfelt congratulations to Joseph M. Accetta and his family on his appointment as Chief Clerk of the Westchester County Surrogate's Court. If there is anyone up to the task of filling the shoes left by former Chief Clerk Charles Scott, it is Joe Accetta. We also want to congratulate the Office of Court Administration and the Honorable Anthony A. Scarpino, Jr. on their exemplary choice of Joe Accetta as the new Chief Clerk.

**LAWRENCE R. REICH SELECTED FOR 2011 EDITION OF "THE BEST LAWYERS IN AMERICA"**



Lawrence R. Reich has been selected for inclusion in the 2011 edition of "The Best Lawyers in America" in the specialty of Bankruptcy and Creditor-Debtor Rights Law. He was also named by "Corporate Counsel" magazine to its list of "Top Lawyers-Bankruptcy & Creditor-Debtor Rights Law" for 2010.

**DEBORAH HOPE WAYNE, ESQ.**



Deborah Hope Wayne, Esq. is pleased to announce the opening of her Collaborative Law and Mediation practice with offices in New Rochelle and New York City.

**LITTMAN KROOKS PARTNERS NAMED TO 2010 "NEW YORK SUPER LAWYERS" LIST**



Ellyn S. Kravitz and Bernard A. Krooks, partners in Littman Krooks LLP have been named to the 2010 "New York Super Lawyers" list.



Ms. Kravitz is the Co-Chair of the WCBA's Elder Law Committee, Mr. Krooks will be presenting a CLE for the WCBA in April.

It is the fifth time since 2006 that Krooks has received this honor and the second time for Kravitz.

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**NEWLY ELECTED JUDGES INDUCTED AT COURTHOUSE CEREMONY**



*From left Hon. Colleen D. Duffy, Hon. Barry E. Warhit, Hon. Alan D. Scheinkman, Hon. Lawrence H. Ecker, Hon. Hal B. Greenwald and Hon. Michelle I. Schauer. Photo by Barry L. Mason.*

Five judges, elected last November took the oath of office Monday, January 10, 2011, at the Westchester County Courthouse. Administrative Judge of the Ninth Judicial District, Alan D. Scheinkman presided over the ceremony.

Hon. Colleen D. Duffy of Mount Vernon and Hon. Lawrence H. Ecker of Irvington were inducted as justices of the Supreme Court of the State of New York, serving Westchester, Putnam, Orange, Dutchess and Rockland Counties. Hon. Barry E. Warhit of Scarsdale took the oath as Judge of Westchester County Court and Hon. Hal B. Greenwald of Yonkers and Hon. Michelle I. Schauer of Ossining were sworn in as judges of Westchester Family Court.

Among the many speakers was WCBA's President Donald K. Sandford who said: ". . . As President of the Bar Association representing all lawyers in Westchester County, I am delighted to welcome to the bench five lawyers who embody the diversity of experience that we seek from our judiciary."

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## Exiting in Style

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### POSSIBLE RECOMMENDATIONS (VALUE DRIVERS) TO BUILD AND PRESERVE VALUE:

- Management Team Development Plan
- Plan to Transition Management Responsibility
- Employee Compensation Review and Analysis
- Qualified Retirement Plan Changes
- Key Person Insurance Planning
- Key Employee Incentive Compensation Plans
- Separation of Business Assets from Business Operations
- Covenants Not to Compete.

### IN CONCLUSION

It should be noted that Step 1: Identifying the Owners Objectives and Step 2: Identifying the Business and Personal Financial Resources are always completed in order to provide the fundamental basis for Step 3: Building & Preserving Value. Utilizing the information and objectives from the first two Steps, we make specific recommendations to help grow the business value, protect existing value from the actions of others, and preserve Company value by minimiz-

ing income taxes. Once the recommendation details and decisions are finalized, an implementation schedule is created to systematically implement each. At that point, attention can be turned to the next Component of the Exit Planning Process.

In our next article, we will continue to break down and discuss the Seven Step Business Exit Planning Process by focusing on either selling the Company to a Third Party or Transferring the Business to Insiders.

---

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## Estate Tax Update

(continued from page 1)

incurring a gift tax. Furthermore, the generation-skipping exemption is also \$5,000,000, which means that a large amount of wealth (up to \$5,000,000 per taxpayer or \$10,000,000 for husband and wife) can now pass down two generations (such as to grandchildren). All three exemptions will be indexed for inflation after 2011.

This does not mean that individuals with assets below this level should ignore estate planning, especially since the exemption and rate are set to revert on January 1, 2013 (absent Congressional action) to their pre-2001 levels of \$1,000,000 and 55%, respectively. Instead, 2011 and 2012 may prove to be the best opportunity to plan to transfer the largest amount of wealth in history and exemplifies the importance of taking advantage of this two year window of opportunity.

In the past, in order to take advantage of the estate tax exemption, the estate planning documents of a married couple would have required the use of a "credit shelter trust". The first spouse to die would allocate assets equal to the estate tax exemption (\$3,500,000 in 2009 and \$5,000,000 in 2010, 2011 and 2012) in a trust for the surviving spouse so that when the surviving spouse subsequently dies, the amount in trust will then pass to descendants free from estate tax. Beginning in 2011, the concept of portability has been introduced so that if this technique is not used, the surviving spouse has an opportunity to use

both exemptions without any advanced planning and can shelter \$10,000,000 from estate tax. While this was meant to facilitate planning, there are a number of serious flaws with relying on this provision:

- Portability only extends to the "last deceased spouse". In other words, assume Husband dies in 2011 and Wife remarries and New Husband dies in 2012 leaving his estate to his children from his first marriage. When Wife dies, she only has a \$5,000,000 (not a \$10,000,000) estate tax exemption. In essence, there is no ability to "collect" exemptions through remarriage.
- The credit shelter trust can be used as a hedge to ensure that any future appreciation is sheltered from estate tax and that the combined assets of a married couple stay within the \$10,000,000 exemption.
- Portability is set to expire after December 31, 2012. Assume Husband dies in 2011 without sheltering his \$5,000,000 exemption in a "credit shelter trust" and leaves everything to Wife in the hopes that she will be below the \$10,000,000 combined exemption. If Wife dies many years later under a new tax regime with a lower exemption, the couple incorrectly gambled and wasted an opportunity to save estate tax in exchange for simple planning.
- There is no portability for generation-skipping planning, so if the ultimate goal of the estate plan is to keep the assets in the bloodline and away

(continued on page 13)

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## Estate Tax Update

(continued from page 12)

from sons-in-law and daughters-in-law. Wills must have credit shelter trusts.

- Trust planning is still necessary for (i) asset protection purposes since assets in a trust are exempt from the creditors of the beneficiary, (ii) to protect from remarriage where the new spouse could receive assets instead of children, (iii) to insulate the surviving spouse from the son-in-law who wants financing for a business venture which may not be a prudent investment, (iv) to provide the surviving spouse with a formal structure to manage the estate assets and avoid mismanagement or (v) to avoid problems if the surviving spouse is unable to manage finances by reasons of dementia or similar disorders.

From a gifting perspective, for individuals who exhausted their \$1,000,000 gift tax exemption under the prior law, they will now have an opportunity to gift another \$4,000,000 of assets in 2011 and 2012. All old gifting plans must be reviewed to determine which additional assets can be given away.

### LIFE INSURANCE

Since the Act is only a temporary patch, insurance that was purchased to help pay estate tax (also

known as survivorship or second-to-die insurance) is still an important planning tool which should be reviewed. It would be drastic to cancel existing coverage based on the assumption that the current tax law is sufficient to avoid estate tax. If laws subsequently change and life insurance has to be repurchased at a future date, changes in health and possible uninsurability may result in overall higher costs, if you are lucky to get the coverage at all. Avoid impulsive decisions and review your coverage with your financial advisor.

### STATE ESTATE TAX

While the Act makes significant changes for federal purposes, 21 states (notably New York, New Jersey and Connecticut) still impose separate estate taxes. Based on the fact that most states are suffering economically, it is highly likely that state estate taxes in those states will not disappear and planning to minimize state estate tax will become an important issue.

### BUSINESS SUCCESSION PLANNING

Regardless of exposure to estate taxes, planning to effectively transfer the operations of a closely held business to the next generation is critical. The goal should be to ensure that the individuals who actively participate in the company are given control of business operations while the family of the deceased owner is compensated for the decedent's equity.

Buy/Sell agreements should be reviewed to ensure that the purchase prices in the agreements are consistent with the current value of the company. In the case of family businesses, the \$5,000,000 gift tax exemption is a great opportunity to remove the business from estate tax as well as the future appreciation.

The Act further proves the proverb that there is nothing permanent except for change. No estate plan can be placed on a shelf and left alone until after an individual dies. The Act provides some wonderful opportunities, but like a television offer, may only last for a short time. Now is the time to review your estate plan to determine if changes need to be made and if additional planning is needed.

---

*Michael Markhoff is a partner in the White Plains law firm of Danziger & Markhoff LLP. He is listed in Best Lawyers in America in the Trusts and Estates category and in Super Lawyers in the Estate Planning and Probate category. He is also Past President of the Estate Planning Council of Westchester County, Inc., Past Chairman of the Trusts and Estates Section of the Westchester County Bar Association, and the Ninth District Delegate to the New York State Bar Association Trusts and Estates Section. Contact: 914-948-1556; mmarkhoff*

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## The Fine Print

(continued from page 5)

The next step in the process is the loss settlement (i.e. getting paid):

*Company A* pays \$1,000,000

*Company B* pays \$700,000

It is important to note that *Company B* paid what they should based on the policy contract. Why then the difference in payouts?

The loss settlement provision in *Company A* policy reads, in part:

For a total loss we will pay the reconstruction cost up to the coverage limit shown for that location on your Declarations Page, for each occurrence, **whether or not you actually rebuild your house or other permanent structures.**

The loss settlement provision in *Company B* policy reads, in part:

We will pay no more than the actual cash value of the damage until actual repair or replacement is complete.

With *Company B*, if you choose not to repair or rebuild your home, coverage is limited to Actual Cash Value (this is replacement cost less depreciation). With *Company A* you will get paid the Replacement Cost even if you decide not to repair or rebuild.

Life can be so hectic that it is a wonder how much we manage, even when things are going well. I am in my late 40's with a wife, two school age boys and a dog. God willing I will not have a fire catastrophe at my home. If it does occur, it is likely that fast responding fire departments can put out the fire. Even so, I have seen that fire, smoke and water damage combine to create a major loss. There are certainly worse things that can happen, but the emotional toll of having my home and all its contents destroyed would be very real.

I would file a claim and move into a hotel. My children would need to continue in school and activities. My wife and I would need to continue with our work and other commitments. Documenting my loss in order to submit the claim is a tedious process. An agreement would be reached with the insurer regarding the dollar value of the loss. If I insured with *Company B*, it is at this point that I may find out that I need to rebuild in order to get paid in full. A rebuild could take a year (or more).

For the rebuild I will need to:

- Rent and furnish a temporary house. I like hotels for vacations, but I prefer not living in one long term. Besides, where are we going to put the dog?
- Search for and hire a general contractor

(continued on page 15)

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# The Fine Print

(continued from page 14)

- Hire an architect
- File for permits
- Environmental impact studies may be needed
- Monitor the rebuild and deal with the inevitable issues that arise during a major construction project
- Continually file expense receipts with my insurance carrier for ongoing reimbursement
- Interior design, choosing tiles, paint colors, carpet
- Landscape the property
- Obtain certificates of occupancy
- Furnish the home
- Hire a mover

For my own personal home insurance policy, I want the option to not rebuild and take cash settlement for the replacement cost of the house. The policy I have allows me the option to rebuild if that is what I choose. If I choose not to rebuild, I get paid without deduction for depreciation. I can take this cash settlement, sell my land and buy a new home. Oftentimes, Company A's premium may even be less than Company B's.

Most claim problems and frustrations do not result from bad faith by the insurance company. By and large the companies do honor their obligation to pay as outlined in the policy contract. The key to a successful claim settlement is to know what is in your policy, and if inadequate for your needs or expectations, to make the needed changes. To assist in this process you should find an insurance broker who is a real expert in the technical aspect and inner workings of the insurance policies he or she offers to clients.

In the future I hope to give you more examples of insurance policy fine print and how it effects the claims process. Examples may include:

- Guaranteed replacement cost
- National flood insurance policy vs. private flood insurance
- Agreed value coverage
- Workers compensation for domestic employees
- Auto insurance claims
- Non profit directors and officers liability
- Employment practices liability
- Loss of use
- All risk vs. named perils coverage
- Umbrella coverage vs. excess liability
- Pollution and mold limitations/exclusions

- Professional liability

Seek out a broker who you can value as an advisor, read your policies, identify loss exposures, coordinate your coverage in a cost efficient manner and implement wise risk management strategies.

*"The best way to get something done is to begin."*

~Author Unknown

*Jeffrey Pitcher is Vice President of A. J. Benet, Inc., an independent insurance broker in Mamaroneck that provides coverage for families and businesses in Westchester County.*

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BY RICHARD M. GARDELLA, ESQ.



The U.S. Senate conviction of impeached Louisiana Federal Judge G. Thomas Porteous last December brought the constitutional removal process back into focus for me.

Porteous, convicted by a vote of 96-0, was found guilty of taking money from lawyers and bail bondsmen who appeared before him. He is the eighth federal judge in this country's history to be convicted and removed from office by the Senate after impeachment by the House.

In 1803, Federal District Court Judge John Pickering of New Hampshire became the first judge removed from office by the Senate under the process. Charged with drunkenness, profanity on the bench and unlawful decisions, he apparently suffered from mental illness for at least three years before his removal.

Less than two years later during this month, an associate justice of the U.S. Supreme Court, who was a signer of the Declaration of Independence, was on trial before the Senate. Also, on trial was the concept of judicial independence. Fortunately, cooler heads prevailed and Justice Samuel Chase was acquitted of all charges on March 1, 1805. That result allowed our three branch system of government to grow and develop with an independent judiciary.

Aaron Burr as vice president presided at the trial and was praised for his even-handed and competent performance of that duty. At the time, New York and New Jersey warrants had been issued for Burr's arrest in connection with his fatal duel with Alexander Hamilton. Chief Judge John Marshall, who appeared before Burr as a witness in the Chase trial, would later preside at Burr's treason trial. That trial ended in acquittal of the former vice president.

John Randolph, a radical Republican, instigated and prosecuted the case against Chase, largely because the judge was a Federalist. Randolph apparently wanted to bring the judiciary in line with Congress. The acquittal ended a serious threat to judicial independence and, hopefully, eliminated politics from the judicial removal process.

The same cannot be said in regard to our two presidential impeachment trials. Both of those prosecutions were mostly about politics. Fortunately,

those cases ended in acquittal, preventing an invitation to political and institutional chaos.

Under the constitutional removal process, federal officials, including judges and presidents, but not congressmen, can be removed from office for "treason, bribery, or other high crimes and misdemeanors." Some argue that the above words mean an official may be discharged only for criminal conduct while others maintain an official can be removed when he has lost the confidence of the people and Congress. Congress has not adopted either view, seeming to hold, instead, that an official can be discharged for criminal activity, serious abuse of power and grave misconduct in office.

A majority of the House of Representatives can impeach—indict—an official, but it takes two thirds of the U.S. Senate to convict.

The impeached presidents, Andrew Johnson and William Jefferson Clinton, were tried by the Senate, 131 years apart. Clinton, a Rhodes scholar with charm, and Johnson, a tailor who was taught to read by his wife, had little in common. Johnson, an unpopular, rough-edged, confrontational politician, was an accidental president while Clinton, a smooth, appealing campaigner, was well into his second elected term. What they had in common were implacable political foes.

Radical reconstructionists, wanting to punish the south for the civil war, hated the milder treatment Johnson proposed while 20<sup>th</sup> century conservatives fumed over some of Clinton's policies and personal exploits.

On February 12, 1999, the Senate voted 45 to 55 on a charge of perjury and 50 to 50 on an obstruction of justice count, well below the two thirds needed to convict Clinton. Voting on May 16, 1868, the Senate reached the same result, but by a much closer vote in Johnson's case. The 35 to 19 vote for conviction fell one short of the two thirds needed.

Handpicked to fill an unexpired Kansas senatorial term, Edmund G. Ross cast the deciding vote on the last of 11 articles (charges) of impeachment despite his support for most prosecution moves during the trial; his apparent willingness to find Johnson guilty on the 1<sup>st</sup> Article, and the angry ex parte demands of some of his constituents.\*

After a ten-day adjournment, Ross again voted not guilty on the 2<sup>nd</sup> and 3<sup>rd</sup> Articles. No other votes were taken and Ross never got a chance to vote on the 1<sup>st</sup> Article because there were not enough votes

*(continued on page 17)*

## The Back Bench

(continued from page 17)

on that count to convict Johnson even if Ross voted for guilt. Johnson completed his term and later was elected to the Senate.

The Johnson case demonstrates political complication beyond surface appearance with the people's representatives seeking to serve their constituents and their consciences in different ways at the same time.

Clearly, neither Clinton's tawdry misdeeds nor Johnson's crude, confrontational, clumsiness were sufficient to remove them from office. Thankfully, in the end their disliked political positions also were not enough to convince the Senate to satisfy partisan designs and take a chance with the balance of our three-branch government.

---

\*See *The Impeachment and Trial of Andrew Johnson*, by David Miller Dewitt, published by the MacMillan Company in 1903, at pages 543-545.

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The core of our IP practice includes trademark and copyright clearance, registration and enforcement of intellectual property rights. In conjunction with a patent expert, we provide counseling and litigation assistance in connection with design and utility patents.

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