



DECEMBER 2016 NEWSBRIEF

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President's Post

Thanksgiving is a “feel good” holiday, uniquely American and with no religious symbolism. For most of us, it is a joyful family reunion. This Thanksgiving, I paused to reflect upon what the holiday must have been like for two families closely connected to the Rockland legal community and to the RCBA. I am talking about the families of Michael Fury and Brian Kelly, both of whom were taken from us in the past two months.

Many of our younger members have little or no sense of who Mike Fury was. After all, Mike was in his 86th year when he left us on October 11th. Mike graduated from Fordham Law School and served as an Officer in the United States Army of Occupation in post-war Japan. He was admitted to the New York State Bar in 1952 and began practicing law in Pearl River in 1953. He continued practicing for 57 years. Along the way, he was an Assistant Rockland County Attorney, President of the Rockland County Catholic Lawyers Guild, Chairman of the Board of Trustees for Dominican College, an Incorporator, Director, Officer and General Counsel of Union State Bank, a past President of the Rockland County Bar Association and the man who established the Rockland County Bar Foundation and funded it with a charitable trust from his own personal assets.

We honored Mike 2 years ago, with a Distinguished Service Award, a small token of what we and the people of Rockland County owed to this man for his decades of service. Unfortunately, Mike's last years were difficult as he was slowly overtaken by illness. Mike left behind a large Irish family including brothers, daughters, sons, grandchildren and even a great grandson. His was certainly a life well lived in the service of others.

Last month, suddenly and without any warning, RCBA member Brian Kelly, died in the prime of his life. Unlike Mike Fury, Brian's life ended far too soon. From all accounts, Brian shared several traits with Mike Fury. He was a fine lawyer but an even better human being. Brian, too, came from a large Irish family and left behind parents, brothers, sisters, a wife and 3 young children. There is simply no way to rationalize the death of this vital young man as anything but a tragedy.

As I drove through my neighborhood on Thanksgiving Day, the Christmas lights were already up on many homes and of course we are all well aware of “Black Friday” and “Cyber Monday” and all the other commercial trappings of the ever-expanding holiday season. It is a time of year when everyone seems to be in a hurry to get somewhere or do something. Perhaps we can all find the time to pause and reflect upon the loss of these two fine men and say a prayer for their families.

With Best Regards,
Robert B. Marcus, President



It's A Wonderful Time of Year

THE ROCKLAND COUNTY BAR ASSOCIATION

INVITES YOU TO

Celebrate the Season!

HOLIDAY PARTY

THURSDAY, DECEMBER 15, 2016

6:00 - 9:00 PM

Nyack Seaport

21 Bard Street, Nyack, NY

Cost: \$60/pp

**Includes hors d'oeuvres, pasta, carving station,
beer, wine, soda**

**RSVP via check by
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A group of Hudson Valley Veterans known as The Bob Hope Division will conduct a Bob Hope Christmas Show starring **"The American Bombshells."** At the NYS Veteran's Nursing Home, 2090 Albany Post Road, (Route 9) Montrose, NY, 10548 on Saturday December 10, 2016 & you're invited.

Check out the Bombshells @ <http://www.americanbombshells.com/>

During this Holiday Season, The Bob Hope Division will give the patients an individually wrapped Christmas present containing any of the following items:

Batteries AA, AAA & D size, Socks, Pens, Pencils, Writing Paper, Picture frames 3x5 & 4x6, Game Books, Cross Word Books, Word Find Books, Sudoku Puzzle Books, Pocket Books, Nail Clippers, Nail Files, Phone Cards, Tissue (individual small packages), Playing Cards, Card Games (Uno), Scarves, DVD Movies old or new, T-Shirts, Hair Brushes, Tooth Brushes, Tooth Paste, Soap and White Socks (male & female).

We need your help collecting these items to fill the presents. Any donation of these items, will be gratefully appreciated by the Veterans as they need these items to maintain their quality of life.

Collection point for these items will be the VA Clinic in New City (345 N Main Street, New City, NY), the Kearsing Edwards American Legion Post (20 Station Road, Pomona, NY 10970), The Garnerville Post Office on Route 202, Embroidme, (27 N Middletown Rd, Nanuet, NY), The Rockland County Bar Association (337 N Main Street, New City, NY) or we will pick up the items anywhere you like, call 845 429-8860.

This is a great way for you to help disabled Veterans during this Holiday Season.

If you work in a store, office or building we request you to post this Notice for all to see and help us collect the items or if possible forward this Notice to your e-mail contacts.

COMMERCIAL LITIGATION ISSUES OF INTEREST
Submitted by Paul Savad, Esq.
Chair, Commercial and Corporate Law Committee,
Joseph Churgin, Esq., and Susan Cooper, Esq., of
SAVAD CHURGIN, LLP, Attorneys at Law

December 2016

Your client owns property with a liquor store that shares a common boundary with a neighboring business. In the 1980's, the neighbor constructed a chain link security fence on its property behind its loading dock, creating a triangular grassy area that was owned by the neighbor. Your client and his father have used the grassy area for employee and customer parking for over ten years. You bring an RPAPL Article 15 action to declare your client's interest in the grassy area by adverse possession or by prescriptive easement.

Will you defeat a motion to dismiss your client's claims?

The answer is *yes* for prescriptive easement, but *no* for adverse possession.

In *Houdek Real Estate Co., LLC v. Bayport Postal Realty, LLC*, 13-4465, NYLJ

1202772251347, at *1 (Sup. Ct. Suffolk Co. November 16, 2016), Houdek owned a liquor store that shared a common boundary with the defendant's property. In the 1980's, the defendant constructed a post office branch that was rented to the United States Postal Service. When the post office was constructed, a chain link security fence was constructed behind the loading docks. The fence created a grassy triangle between the fence and the parties' common boundary. Houdek claimed adverse possession of and/or prescriptive easement over the grassy area, which was used for over ten years by Houdek's employees and patrons for parking.

The defendant moved for summary judgment dismissing the complaint, and Houdek cross-moved for summary judgment.

The defendant claims that it permitted the occasional use of the disputed property by Houdek and its patrons. Michael Houdek, plaintiff's president, testified that no such permission was ever given. Moreover, his father planted bushes on the disputed property "years ago," one of which remains; planted a tree there in 1999; planted a small vegetable garden a few times in the mid-1990's and again in 2000; planted grass and installed a water faucet around 2001; mowed the grass since the early 1990's; and occasionally hired a landscaper, who also plowed the disputed area.

The Court noted that adverse possession requires proof by clear and convincing evidence that the possession of the property was hostile, under a claim of right, actual, open and notorious, exclusive, and continuous for a 10-year period, citing *Estate of Becker v. Murtagh*, 19 NY3d 75 (2012). The Court analyzed each of the elements and the various changes in the law in 2008 regarding cultivation, enclosures and other issues too numerous to include here (see RPAPL 522, 501, 543).

The Court ruled that the plaintiff could not prove at trial that its use was continuous and uninterrupted for ten years, and that the use was open and notorious, noting that the vague testimony of sporadic planting of the garden and bushes is insufficient, as a matter of law, to constitute the requisite cultivation or improvement, citing *Robbins v. Schiff*, 106 A.D.3d 1215 (3d Dep't 2013). Furthermore, Houdek could not rely on the fence as a substantial enclosure of the disputed area, because it was built by the defendant, citing *Silipigno v. F.R. Smith & Sons, Inc.*, 71 A.D.3d 1255 (3d Dep't 2010).

The claim for prescriptive easement, on the other hand, does not require exclusive use, nor an enclosure, nor any cultivation. Instead, said the Court, clear and convincing evidence of the open and notorious, continuous, and undisputed use of the subject property raises the presumption the such use was adverse, and the burden shifts to the opponent to show permissive use, citing *Ducasse v. D'Alonzo*, 100 A.D.3d 953 (2d Dep't 2012). The Court ruled there is a triable issue of fact whether the use of property by Houdek was permissive or hostile, requiring denial of summary judgment to the defendant on that issue. Houdek's cross-motion for summary judgment was denied for failure to show good cause for why the motion was not made within 120 days of filing the note of issue, as required by CPLR 3212(a).

The lesson? When your client has used another's property for over ten years, include claims for both adverse possession and prescriptive easement in your lawsuit to declare your client's right. You may prevail on the claim for prescriptive easement even if your proofs of exclusive use, cultivation, and enclosure might not be strong enough to prove adverse possession.

BANKRUPTCY COURTS START TO CHISEL AWAY AT THE NON-DISCHARGEABILITY OF STUDENT LOANS

**By: Allen A. Kolber, Esq.
Suffern, New York**

Under the Bankruptcy Code, Congress created certain exceptions to discharge of debt.

Student loans are specifically excepted from discharge under Sections 523(a)(8)(A)(ii) and 523(a)(8)(B):

“(a) A discharge under section [727](#), [1141](#), [1228\(a\)](#), [1228\(b\)](#), or [1328\(b\)](#) of this title does not discharge an individual debtor from any debt—

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents, for—

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

Most Debtors in Bankruptcy attempt to discharge their student loans under the “undue hardship” doctrine. The seminal undue hardship case is the 1987 case of *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395, Bankr. L. Rep. P 72,025 (2d Cir. 1987). However, the *Brunner* court requires a three-part showing that (1) the debtor cannot maintain a minimal standard of living if forced to repay the loans; (2) the debtor’s disability is likely to persist for a significant period, and (3) that the debtor has made good faith efforts to repay the loan.

In decision after decision, the Bankruptcy Courts have defined undue hardship akin to total disability or inability to work at any job whatsoever and that nonetheless, the debtor has made good faith efforts to repay the loans.

However, in a recent Bankruptcy case of *In Re Tucker*, 2016 BL 364391, Bankr. WDNY (11-1-16), the Debtor’s attorneys took a different approach to the student loan exception.

The *In Re Tucker* attorneys argued, and the court agreed, that because the student debt in question was not an “education benefit overpayment or loan”, the student loan exception to discharge under Bankruptcy Code § 523(a)(8)(A)(ii) would not apply.

Although the debtor had to bring an Adversary Proceeding within her bankruptcy case and file a Motion for Summary Judgment, Judge Michael Kaplan ruled that the specific agreement executed by the student and school in this case was not a “student loan” within the meaning of the Bankruptcy Code.

Cazenovia College v. Renshaw, 222 F.3d 82, 87 (2d Cir. 2000), citing a 1914 opinion by the Second Circuit, defines a student loan as a “contract, whereby one party transfers a defined quantity of money, goods or services to the other, and the other party agrees to pay for the sum of money or transferred goods at a later date”. Id at 87.

The Debtor in *In Re Tucker* argued that she executed a “Financial Agreement” by D’Youville College that was similar to a line of credit: There was no specific amount due, the agreement provided for an adjustment to be made for financial aid that would be received at a later time, and the agreement provided for a monthly interest provision.

The *In Re Tucker Bankruptcy* Court agreed that the Financial Agreement entered into between the student and the parties was merely a promise to pay for tuition fees and other registration costs (whatever they turn out to be) at some unspecified future time. Financial aid disbursements would be applied to the Financial Agreement. However, no “funds” were ever “received” by the debtor.

Therefore, the Financial Agreement entered into between the student and the school was a dischargeable debt and not a student loan under 523(a)(8)(A) or (B) of the Bankruptcy Code.

Interesting Study of Student Debtors:

Based upon a recent study, Bankruptcy Court judges have actually granted student loan discharges to nearly 40% of those who applied for one. At the same time, only .1% of student debtors who have filed for bankruptcy even attempt to discharge their student loans. Therefore, one may reach the conclusion that the student loan discharge in bankruptcy may be rare only because not enough borrowers are filing for it.

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FROM
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OF THE BAR ASSOCIATION*

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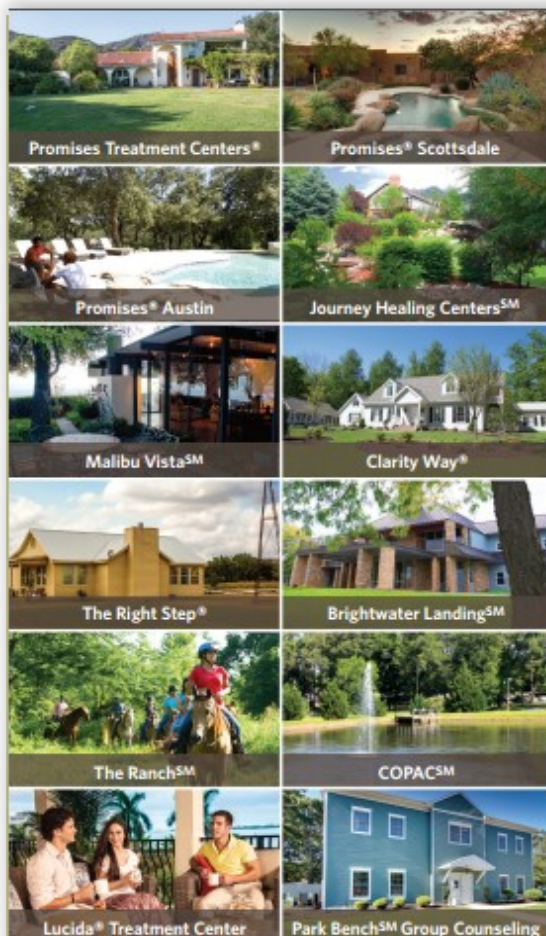
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Real Estate Committee Meeting

December 9, 2016

12:00 –1:00 p.m.

at

Rockland County Bar Association Offices

337 N. Main St - Suite 1

New City, N.Y. 10956

Debt Collection, Bankruptcy and Creditors' Rights Committee Meeting

January 23, 2017 @ 5:30 p.m.

at

Rockland County Bar Association Offices

337 N. Main St - Suite 1

New City, N.Y. 10956

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**13th Annual Columbian Lawyers
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CASE COMPLETED.
DO NOT HOLD YOUR VOUCHERS FOR THE
2017 BILLING CYCLE.**

MEMO

TO ALL RCBA COMMITTEE CHAIRS & VICE- CHAIRS

The Association is seeking articles from your committee for publication in the Bar's monthly Newsletter. The membership would greatly benefit from your input and would appreciate it. The article does not have to be complicated or long - a succinct piece of general interest and importance would be best. If you are able to submit an article for the Newsletter it should be sent via email to Manuela@rocklandbar.org by the 15th of the month so that the Executive Board may review it. Thank you!

READ A GOOD BOOK?

If anyone has read a book that they would like to recommend, please write a short review for publication in our Newsletter.

Need a Place to Meet in New City?

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CLE Corner

BUYING OR SELLING A LAW PRACTICE ETHICAL CONSIDERATIONS AND THE NEW YORK RULES

Synopsis: Selling a Law Practice is not an easy thing to do. However, with thoughtful planning, buying or selling a Law Practice can be a viable option for retiring attorneys and growing firms.

Date: Tuesday, January 10, 2017
Time: 12:00 p.m.– 2:00 p.m. (Registration 11:30 a.m.) (lunch)
Level: Transitional/Non-Transitional
Speaker: Nat Wasserstein, JD, M.B.A., C.F.E., Lindenwood Associates, LLC, Upper Nyack, NY
 Howard Fielstein, CPA/ABV/CFF, CFE, ASA, CIRA, CTP, Citrin Cooperman, NY, NY
 Deborah A. Scalise, Esq., Scalise & Hamilton, LLP, Scarsdale, NY
Place: Italiana's, 253 South Little Tor Road, New City, NY
Cost: \$50.00 in advance; \$75.00 at the door; \$85.00 Non-Members;
 \$20.00 paralegals and students
Credits: 2 CLE Credits: 1 Professional Practice/Skills; 1 Ethics

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LEGAL & ETHICAL CONSIDERATIONS FOR ATTORNEYS WORKING WITH INVESTIGATORS

Synopsis: Almost every litigated matter (and many non-litigated legal matters) today will require some form of investigation. From gathering digital evidence, to interviewing witnesses and collecting information about parties and events that are relevant to the case, there are numerous legal and ethical pitfalls for the unwary / uninformed and the potential liabilities for attorneys may not be obvious. Cases of improper investigative conduct causing legal and ethical problems are on the rise and it is imperative for attorneys to know the boundaries of permissible investigative conduct to avoid these potential liabilities.

- Is it legal to track a party's whereabouts / movements using GPS?
- Is it legal to surreptitiously record in person conversations or telephone calls in New York?
- Is that evidence admissible? What about calls between New York and other states?
- Is it legal to obtain a party's financial records without a subpoena?
- Can you legally obtain a party's phone records without a subpoena?
- When is it legal to obtain Motor Vehicle Records on a party?
- Can you legally obtain a party's credit report?
- When can a witness be contacted and interviewed? What about an employee of a business that is party to the litigation?
- When and how can digital evidence be legally obtained from a party (outside of formal discovery)?
- What are the ethical rules surrounding collection of Social Media evidence?
- What is required to ensure that the work of investigators and other consultants remains legally privileged?

Date: Wednesday, January 25, 2017
Time: 6:00 p.m.– 9:00 p.m. (Registration 5:30 p.m.) (dinner)
Level: Transitional/Non-Transitional
Speaker: Nicholas G. Himonidis, Esq., CFE, CCFS, T&M Protection Resources, LLC, New York, NY
Place: Italiana's, 253 South Little Tor Road, New City, NY
Cost: \$75.00 in advance; \$85.00 at the door; \$95.00 Non-Members; \$40.00 paralegals and students
Credits: 3 CLE Credits: 3 Ethics

CLE REQUIREMENTS

Newly admitted attorneys must complete 32 credit hours of accredited "transitional" education within the first two years of admission to the Bar. Sixteen (16) credit hours must be completed in each of the first two years of admission to the Bar as follows: 3 hours of Ethics and Professionalism; 6 hours of Skills; 7 hours of Practice Management and/or areas of Professional Practice.

Experienced Attorneys must complete 24 credit hours of CLE during each biennial reporting cycle: 4 credit hours must be in Ethics and Professionalism. The other credit hours may be a combination of the following categories: Ethics and Professionalism, Skills, Practice Management or Professional Practice.

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Entire Law Library, located in Nyack, NY. Please call 845 353-0100 if interested.

Domestic Violence Staff Attorney-Temporary 6 months-White Plains, NY office; Legal Services of the Hudson Valley

This position includes intakes and individual case work, litigation in state courts including appellate practice and education and outreach efforts at community members, advocates and service providers. Qualifications include three or more years of legal experience including litigation or its equivalent, and understanding of the dynamics of domestic violence. Please apply through our website: www.lshv.org, under the **Get Involved** link.

Staff Attorney General Practice-Public Benefits, Social Security & Housing- Poughkeepsie, NY office; Legal Services of the Hudson Valley

This is a general practice position focusing on working on the Disability Advocacy Program (DAP) and assisting disabled clients with housing matters, at Administrative Hearings before the Social Security Administration and in Federal Court. A willingness to be admitted to the Federal Bar, one or more years of legal experience including litigation and administrative hearings. Please apply through our website: www.lshv.org, under the **Get Involved** link.

Part-Time (.6 FTE) General Practice Staff Attorney – Newburgh, NY office; Legal Services of the Hudson Valley

This position focuses on work on social security, public benefits and other matters, serving clients living in Orange County with matters such as SSI/SSDI, Medicaid, Food Stamps, Public Assistance, consumer, disability discrimination, landlord/tenant, advanced planning and other housing issues. Three or more years of legal experience including litigation or its equivalent. Please apply through our website:

The Big Brothers Big Sisters Mentoring Program

is considered one of the model substance abuse prevention programs by the Federal Government and New York State as per its OASAS Work plan. In addition to its primary 1 – 1 mentoring program and the Court Ordered Supervised Visitation program, the organization provides School Based and Site Based Programs that measurably impact the quality of life of our county's children and youth by improving their odds for succeeding in school, behaving nonviolently, avoiding drugs and alcohol and breaking negative cycles. Interested in learning more? Interested in serving its mission? Then please consider joining the Board of Directors by contacting: gballard@bbbsofrc.com.