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FOCUS ON FAMILY LAW

HIDDEN HEROES

Suffolk County Family Court 18b Panel

By Jennifer A. Mendelsohn

This article is dedicated to the men and women of the Suffolk County Family Court 18b Panel. These individuals are hardworking, dedicated lawyers who go above and beyond the call of duty, despite the fact that they are paid well below the customary hourly rate for attorneys.

When interviewing members of the 18b Panel I discovered the following altruistic acts performed by these attorneys:


Jennifer Mendelsohn

- Supervision of a client's visitation when no one else would do so. This included allowing the client to put a blow up bouncy house on the lawn of the attorney's office building so that the client's children could play in it.
- Daily phone calls to a client who lives in Ohio, including nights and weekends, to try and get the client's baby returned to her.
- Bringing gifts to a client's child who otherwise would not have received Christmas presents.
- Checking on a client every week to make sure he stayed in his program.
- Giving money out of their own pockets to clients for food and transportation.
- Going to Walmart to buy a stroller and diapers for a client's baby.
- Approaching the Suffolk County Bar Association Charity Foundation and imploring its members to give a gift card to a client so that the client could buy food for Thanksgiving for herself and her seven children.
- Gathering donated holiday gifts and delivering them to clients' homes to give to their children.
- Traveling to a nursing home on many occasions to make sure all of the necessary adoption paperwork was in order and signed by a client who was in renal failure.
- Driving clients to the train station.
- Meeting clients at their homes, which sometimes are rooming hous-

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Photo by Barry Smolowitz

People of all ages enjoy Cohalan Cares for Kids fundraiser at the SCBA

Past president Sheryl Randazzo's daughter, Ruby, decided to take a chance with the auction baskets at the Cohalan Cares for Kids fundraiser at the SCBA. Later she won! See article on page 3 and photos on page 17.

PRESIDENT'S MESSAGE

Top 10 Reasons to Join the Suffolk County Bar Association

Over 2,500 attorneys enjoy these member benefits. You should too...


John Calcagni

By John R. Calcagni

We often hear the question: "Why join the Bar Association?" It's not an easy question to answer as the benefits of joining the SCBA are continually evolving in response to members' needs and requests. The leaders and staff work constantly to provide our members with services that will help them manage their practices more effectively and enhance the quality of their professional lives.

I would argue that bar association membership, especially on a local level, is an integral part of practicing law. While the SCBA serves the public, our primary focus is to serve our members, helping them to advance their careers and practices through professional development and a distinctive array of member benefits.

Just how does our Association work to accomplish these goals and what are the advantages of belonging to our bar association? In no particular order, here are the top 10 reasons to be a member of our Association.

Networking opportunities

Now more than ever networking is an essential tool in business development and professional success. SCBA members can tap into the Association's net-

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BAR EVENTS

Defensive Driving Course
Thursday, April 20, at 6 p.m.
Bar Center
Recognized and approved by all insurance carriers. The presenter is Max Gershfeld, Certified Instructor Empire Safety Council. $70 pp or $80 same day registration.

Annual Meeting
Monday, May 1, at 6 p.m.
Bar Center
Election of officers, directors, members of the Nominating Committee. Awards of Recognition. Everyone is invited to attend.

Charity Foundation Fundraiser
Friday, May 19, at 6 p.m.
Gateway Playhouse, Bellport
Rent, the rock musical, will be performed. Dinner under the tent on the grounds of the playhouse. $100 pp. See more info in this issue.

FOCUS ON
FAMILY COURT
SPECIAL EDITION

CYBER

Authenticating Social Media

By Victor John Yannacone Jr.

The courts have had a long and tortured relationship with digital evidence. In 1999, U.S. District Judge Samuel B. Kent wrote, "While some look to the internet as an innovative vehicle for communication, this court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation. So as to not mince words, the court reiterates that this so-called web provides no way of verifying the authenticity of the alleged contentions…"[1]

The rules for authenticating digital evidence have existed for a long time, but litigants and judges have been slow to adapt the existing rules of evidence — relevance, authenticity, hearsay, the original writing rule, and probative value as compared with possible unfair prejudice — to the digital world.

While there are special challenges in authenticating social media posts and there is always, "potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or user," [2] the "web" itself provides many ways to verify the authenticity of information.

Lawyers often try to enter social media evidence into the record in the form of a website printout, and that is really not sufficient. Any time you take social media out of its context or strip the identifying metadata and links, it makes authentication nearly impossible.

Victor Yannacone

Rule for authenticating social media

Rule 901 of the *Federal Rules of Evidence* applies directly to authenticating social media, but lawyers must never forget to first consider Rule 104(a) and Rule 104(b), which make subtle, but important distinctions.

Authenticating a website post requires, alone or in combination, testimony from a witness with personal knowledge; comparison with an authenticated document; distinctive characteristics; evidence about public records; evidence about a process or system; and official publications.[3]

"A trial judge should admit the evidence if there is plausible evidence of authenticity produced by the proponent of the evidence and only speculation or conjecture — not facts — by the opponent of the evidence about how, or by whom, it "might" have been created. Too many courts that considered admissibility of social media evidence completely overlooked this important distinction and, in doing so, made questionable rulings excluding evidence that should be admitted."[4]

Authenticating website evidence requires answers to three questions: What was actually on the website? Does the exhibit or testimony accurately reflect it? If so, is it attributable to the owner of the site?"[5]

Once the party offering the social media produces sufficient evidence to convince a reasonable juror that it is authentic, the burden shifts to the party objecting to demonstrate the item is not authentic. However, parties do not need to completely authenticate the digital evidence they offer because "the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury might ultimately do so."[6]

Privacy?

There can be no reasonable expectation of privacy in a Facebook profile because the Facebook homepage plainly states "Facebook helps you connect and share with the people in your life." The issue is only whether access to the social media account may reasonably lead to the discovery of admissible evidence.

Where a party alleges disability such as in personal injury and medical malpractice actions or where circumstantial evidence of an attitude or state of mind is important such as matrimonial and defamation actions, the party seeking social media data must at least make a threshold showing that publicly

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FUTURE LAWYERS FORUM

Medicaid Strategies

By Rochelle Verron

Most often people believe that they are not eligible for Medicaid Chronic Care (nursing home) Coverage because his or her resources exceed the allowable level for Medicaid eligibility. However, there are specific tools in which Medicaid eligibility can be achieved. For example, New York State is one of very few states that recognize a Spousal Refusal. A Spousal Refusal is an implied contract that the healthy spouse in the community would sign refusing to contribute his or her income and resources towards his or her sick spouse's care.[1] A Spousal Refusal allows the sick spouse to shift all of his or her assets, including real property, into the healthy spouse's name penalty free. Furthermore, it is important to note that the transfer must be completed the month prior to applying for Medicaid.

Medicaid strategies are also available for a single or widowed individual whose resources exceed the allowable level of $14,850. When an applicant has not protected his or her assets and requires immediate nursing home care, a Medicaid crisis plan does exist. Medicaid will allow an applicant to enter into a Promissory Note Gifting Plan. This plan must have: repayment term that is actuarially sound; provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and prohibits the cancellation of the balance upon the death of the lender.[2] This allows the applicant to split his or her assets in half. The applicant will loan half to a family member or friend to repay them on a monthly basis and gift the other half to a family or friend. The loaned portion would be paid over to the nursing home on a monthly basis in accordance with the terms of the note. Ultimately, the applicant will protect roughly half of his or her assets.

Rochelle Verron

Sometimes you may have an applicant that is slightly over-resourced and a Promissory Note Gifting Plan may not be a viable option. Medicaid does allow an applicant to offset his or her excess resources by purchasing an irrevocable funeral pre-plan or by paying outstanding medical bills.[3] However, certain bills may not necessarily qualify as a medical bill. For instance, in October of 2014, the Appellate Division 2nd Department held that an assisted living bill is not a medical bill.[4] Thus, bills should be reviewed carefully. In order for a prepaid funeral plan to be considered an exempt resource it must be irrevocable. If it is not an irrevocable plan, then the court will count the plan as an available resource to the applicant. In addition to this, an applicant can also prepay an irrevocable funeral plan for his or her family member(s).

In the event that the applicant owns real property when entering into a nursing facility, there may still be a way to protect the real property or at least reduce what is payable to the facility. Real property can be transferred to the following without a penalty: a certified blind or disabled child of any age; a legal spouse; a caretaker child that has resided in the home with the applicant for at least two consecutive years while caring for the applicant; and a sibling with an equity interest that has resided in the home at least one year prior to the applicant's institutionalization.[5] If the applicant does not satisfy any of these exemptions, the applicant can sign an Intent to Return Home, a document that the applicant would sign when he or she is an anticipated long term resident, which allows the County to place a lien on the applicant's primary residence.[6] The lien would be lifted if or when the applicant returns home. Although the idea of a lien does not seem desirable, it can still save the applicant money. When the lien is placed on the applicant's home, he or she will only be charged the daily Medicaid rate rather the private rate. This may be an option for the applicant instead of selling their home immediately and paying the nursing home at a private rate. Another option could be for the applicant to sell his or her home and enter into a Promissory Note Gift Plan with the proceeds from the sale.

The Medicaid process is a game of chess and it can be a very stressful time for a potential applicant. It is imperative that the applicant is guided through the Medicaid process with expertise and competent legal advice. If the applicant is not guided properly, then his or her life savings could be depleted without preserving any assets.

Note: Rochelle Verron is a part-time evening student at Touro Law Center and Juris Doctorate candidate for May 2018. Rochelle is the Competition Editor for Touro Law Center's Moot Court Honors Board. She works full-time with Law Office of Shannon Macleod with offices located in Babylon and Southampton.

[i] 18 NYCRR 360-4.10
[ii] Medicaid Reference Guide, Page 443
[iii] Medicaid Reference Guide, Page 365
[iv] *Matter of Weiss v. Suffolk County Dept. of Social Servs.*, 2014 Slip Op. 06594 (2nd Dept 2014)
[v] 18 NYCRR 360-4.4(c)(ii);
[vi] 18 NYCRR 360-7.11(a)(3)(i)

Authenticating Social Media (Continued from page 19)

available information posted on social media is relevant and material to claims made by the party which it had.

Preservation of social media, an ongoing challenge

Companies, not just private individuals, are interacting and connecting with customers through *Facebook*, *Twitter*, other social media and blogs. With this presence online comes the legal obligation to capture and save these communications.

This means that any user of the internet for commercial purposes of any kind must update their document retention policies to include the records of social media activity. The standard for preservation is "reasonableness and proportionality" so modeling it after the procedure for retention of emails would be internally consistent.

Social media content is dynamic and continually changing and it must be captured and managed in a forensically complete, searchable, and usable format. It is important to capture all of the related data and metadata from an *entire* social media posting, not just a single page or part of a page. Without unconstitutionally restricting freedom of speech and violating of labor laws and collective bargaining agreements, businesses must preserve social media content before user modification or deletion —spoliation — occurs.

Limits on eDiscovery of social media

Courts across the United States have made it clear that discovery of social media is now an integral element modern litigation. Litigants should be aware, however, that while social media postings are generally discoverable, courts are demanding specificity in requests for social media information.

Lurking behind every demand for discovery of social media postings is the shadowy presence of the *Stored Communications Act* ("SCA") which "addresses voluntary and compelled disclosure of stored wire and electronic communications and transactional records held by third-party internet service providers ("ISPs"), and other online services." Today, eDiscovery raises First and Fourth Amendment rights and limitations in an unprecedented fashion.

The resistance of social media sites and ISPs to comply with government discovery requests has led to a great deal of litigation, but has no real relevance in civil litigation because the parties themselves, not the companies which maintain the sites, are responsible for preserving and producing electronically stored information (ESI).

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[1] *Teddy St. Clair* v. *Johnny's Oyster & Shrimp, Inc.*, 76 F.Supp.2d 773 S.D. Texas (1999).

[2] *Antoine Levar Griffin* v. *State of Maryland*, 192 Md. App. 518; 995 A.2d 791; 2010 Md. App. LEXIS 87, Court of Appeals of Maryland.

[3] *Federal Rules of Evidence*, Rules 901(b)(1), 901(b)(3), 901(b)(4), 901(b)(7), 901(b)(9), Rule 902(5).

[4] Grimm, *et al.*, "Keynote Address: Authentication of Social Media Evidence," 36 Am. J. Trial Advoc. 433 (2013)

[5] *Lorraine* v. *Markel American Insurance Company*, 241 F.R.D. 534 (D.Md. May 4, 2007)

[6] *Id.*

Demonstrating Fraud Exceptions to Discharge (Continued from page 20)

indicated that "much ink has been spilled over what is required to prove non-dischargeability under §523(a)(2)(a)," the he nevertheless did a nice job discussing the current state of the law for prevailing under the different legal theories of false pretenses, false representations, and/or actual fraud. *In re Cahill* (Bankr. E.D.N.Y., Case No. 15-08298-reg, Adv. Pro. No. 15-08298-reg.)

In trying to borrow money from two retirees, the debtor urged them to "invest" their life savings in a fancy restaurant in the Hamptons that was about to open. The debtor sought to cultivate a reputation as a successful businessman, formerly in a successful oil business, who was building a big, fancy home in the Hamptons, and was now focusing his energy in this new restaurant venture. He promised the retirees higher rates of interest than what they were receiving at the bank.

It did not occur to the retirees to seek out professional advice or to ask for any financial information about the restaurant, or to even visit it. They simply asked the debtor if he was honest, and he assured them that he was.

They then separately loaned the debtor $50,000 and $150,000. A year later, the debtor sought even more investments from them, and they each gave him another $50,000. The following year, the debtor persuaded the retirees that he was now starting up a solar panel business and that he had various government contracts that were about to be signed. The retirees then gave him another $25,000 each.

The debtor eventually admitted that he held no ownership interest at all in the restaurant, despite referring to himself as a "silent partner." He also admitted at trial that he did not own an oil business. In fact, he worked for his son's oil business.

It was from his employment earnings that the debtor made monthly interest payments to the retirees. The debtor initially testified that he deposited some of the money in the restaurant's supposed bank account but could not provide any evidence of that. He ultimately testified that he could not recall where the money was deposited.

The debtor did not use any of the money for the solar panel business and instead admitted that the money was used to pay back another creditor that the debtor owed, stating that he was taking money from "Peter to pay Paul." Both retirees obtained judgments before the debtor sought bankruptcy relief.

Judge Grossman began his analysis by stating some of the basics — any successful action under §523(a) results in a specific debt being deemed non-dischargeable. This is in contrast to a non-dischargeability action under §727 that denies a debtor's discharge in its entirety.

The creditor has the burden of proving the elements of a section §523(a)(2)(a) claim by a preponderance of the evidence, showing that the debtor obtained money by either of these types of fraud — false pretenses, false representations, and/or actual fraud.

The judge then discussed the recent 2016 Supreme Court opinion in *Husky International Electronics v. Ritz* which clarifies that although some types of fraud might require specific elements that overlap, "actual fraud" encompasses fraudulent acts by a debtor that can be undertaken without a false representation.

He then went on to discuss how the three types of fraud in this provision must be analyzed individually. A plaintiff, in order to be successful, need only satisfy one of the three types of fraud.

"False pretenses" means conscious, deceptive or misleading conduct calculated to obtain, or deprive another of property. The elements required to establish a debt as nondischargeable under false pretenses are: an implied misrepresentation or conduct by the debtor; promoted knowingly and willingly by the debtor; creating a contrived and misleading understanding of the transaction on the part of the creditor; which wrongfully induced the creditor to advance money, property, or credit to the debtor.

To establish "false representations, the creditor must prove that the debtor: made a false or misleading statement with the intent to deceive in order for the creditor to turn over money or property to the debtor.

Finally, a debt may be excepted from discharge where a creditor can establish elements of "actual fraud." The Supreme Court in *Husky* broadened the definition of actual fraud by defining it as "anything that counts as 'fraud' and is done with wrongful intent."

Judge Grossman also held that notwithstanding the expansive reach of *Husky*, justifiable reliance must also be shown, which is subjective.

The judge found that the debtor made false representations to both retirees. One of them, Mr. Romano, testified at trial that he relied on these misrepresentations, which misled him into believing what the debtor told him, even though he had done no investigating. The Judge Grossman found such reliance to be justified. Accordingly, he found the debtor's claim to Mr. Romano to be nondischargeable.

However, with regard to the other retiree, Ms. Argento, there was an unfortunate result since she did not testify at all because she was in a nursing home and in ill health. As such, Judge Grossman found that she failed to meet her burden of proof that she relied upon the debtor's statements. As such, she did not succeed with the same non-dischargeability claim. The judge commented, however, that she might have been successful had she submitted an affidavit or other evidence establishing that she justifiably relied on the debtor's misrepresentations, but "the record was barren of any evidence regarding reliance."

There was no doubt that the debtor made serious misrepresentations. However, that was not enough. Ms. Argento was obligated to demonstrate justifiable reliance.

The different way Judge Grossman ruled in response to the claims of these two retirees demonstrates the importance of establishing each and every one of the required elements. Just as important, since justifiable reliance is subjective in nature, the creditor must prove reliance as well. The existence of reliance is determined by the trier of facts – in this case, Judge Grossman.

Note: Craig D. Robins, a regular columnist, is a Long Island bankruptcy lawyer who has represented thousands of consumer and business clients during the past twenty-nine years. He has offices in Melville, Coram, and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. Please visit his Bankruptcy Website: www.BankruptcyCanHelp.com and his Bankruptcy Blog: www.LongIslandBankruptcyBlog.com.