Maria Dosso is the Pro Bono Project Liaison.

Photo by Ron Pacchiana, JPA Studios

Suffolk attorneys were recognized for their pro bono work at a special luncheon held at the SCBA.

The Honorable Fern Fisher, Deputy Chief Administrative Judge of New York City Courts, attended the celebration.

SCBA Treasurer Patricia Meisenheimer at the luncheon.

Pro Bono volunteer Regina Brandow.

SCBA Pro Bono Foundation Celebrates Pro Bono Week

Since 1981 the SCBA Pro Bono Foundation has collaborated with Nassau/Suffolk Law Services to provide free legal representation to Suffolk's indigent in civil matters. Our pro bono attorney volunteers, which include bankruptcy and matrimonial clinics, a landlord /tenant, and a Foreclosure Settlement Conference initiative, have donated thousands of hours in litigation and court appearances, research and writing, interviewing clients, providing advice and counsel.

To commemorate National Pro Bono Week, on October 22, the foundation held a special luncheon at the Bar Center recognizing pro bono attorney volunteers for their dedication and commitment to representing the underserved in Suffolk County. We know they have made a difference and are proud of our efforts and our pledge to strengthen and expand the Pro Bono Project and our other pro bono activities in the finest tradition of the American lawyer, fulfilling the promise of equal justice for all citizens.

– LaCova

John R. Calcagni, Pro Bono Managing Director, gave certificates to the pro bono volunteers to thank them for their service.

REAL ESTATE

Dog Eat Dog Apartment World

By Andrew Lieb

Your longtime clients, Mr. and Mrs. Goldberg, are empty nesters. They want to downsize to an apartment because they can no longer think of maintaining their property. Your first conversation involves them selling everything that they own and moving to the City. It's not a consultation, but just a chat. Nevertheless, as an attorney, there is never such a thing as only having a conversation with a client. The Goldbergs tell you that they plan to only take themselves and their dog, Skippy, to the City and to rekindle their love once they lay down new roots in their apartment. Have you spotted the legal issue yet?

You see, many apartments, whether rentals, condominiums or cooperatives, have a no pet policy. Did the Goldbergs inquire about the pet policy in the prospective buildings that they are considering to move to? So, to find out, you ask them and Mrs. Goldberg tells you that her girlfriend Sherri said not to worry about what the apartment says with respect to pets as these things can't be enforced anyway. Do you know what she is talking about?

Andrew Lieb

In New York City, the Administrative Code provides, at section 27-2009.1(b), that "where a tenant in a multiple dwelling openly and notoriously for a period of three months or more following taking possession of a unit, harbors or has harbored a household pet … such lease provision shall be deemed waived" when referring to a no pet policy. Nonetheless, while this law applies to both Cooperatives and rentals throughout the City of New York, the First Department (New York and Bronx Counties) does not apply it to condominiums within its jurisdiction while the Second Department (Queens, Kings, Richmond, Nassau, Suffolk, Dutchess, Orange, Putnam, Rockland and Westchester Counties) does. So, in Manhattan and the Bronx a client cannot consider a condominium regardless if they thought they could have the no pets policy waived, while in Queens, Brooklyn and Staten Island there is a chance that it can be waived, but the client must realize the inherent risks associated with banking on such a waiver. Moreover, you must remind the Goldbergs that the Pet Law, the NYC Code provision, or something similar thereto, does not exist in Nassau or Suffolk counties so it is irrelevant about the condominium v. cooperative distinction between the First and Second Departments when dealing with Long Island. Yet, a similar provision to New York City does exist in Westchester County should the Goldbergs want to expand their search for apartments to there.

So, in Nassau or Suffolk, the Goldbergs will have to rely on the common law rule for pets at apartments, which is that a no pet term of a lease cannot be waived if the parties expressly agreed otherwise in their lease, pursuant to *Re Paulsen Real Estate Corp. v. Grammick*, 244 AD2d 340 (2nd Dept., 1997). Therefore, the Goldbergs may want to hire you to review their lease before they agree to take their new apartment to verify what the terms are on this issue. Yet, the Goldbergs are dead set on Manhattan. So, assuming that they are willing to take the three month waiver risk, they can keep all of their options open.

Regardless, you should advise the Goldbergs that a waiver does not constitute a continual waiver for successive pets during the duration of the tenancy pursuant to *Park Holding Co. v. Emicke*, 168 Misc.2d 133 (1st Dep., 1996). So, even if Skippy is waived in, after Skippy's demise there are no further pets unless each subsequent pet gets through the three months as well.

You advise Mrs. Goldberg, as discussed, but she says not to worry as Skippy is not a pet at all, but instead an Emotional Support Animal (ESA). Mrs. Goldberg tells you that her girlfriend, Renee, told her to just go to the National Service Animal Registry (NSAR) and that she can get a prescription from a licensed mental health professional and that she won't even have to mention Skippy to the housing provider when looking at units if Skippy is wearing a uniform

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President's Message (Continued from page 1)

- Strict enforcement of injury reporting and filing requirements by employers and carriers.
- Medical reporting that transmits necessary claim information without imposing undue and overly burdensome requirements on health care providers.
- Initial formal hearings for all injured employees that ensure access to benefits in all cases.
- Access to high-quality medical care resulting from outreach, regulation, and fee schedules that encourage provider participation from high quality health care providers.
- Consistent interpretation and enforcement of statutory and regulatory provisions by the Workers' Compensation Board.
- Discouragement of frivolous litigation by the Workers' Compensation Board.
- Timely scheduling of hearings when required as requested.
- Testimony before the trier of fact to enhance credibility determinations by Workers' Compensation Law Judges.
- Timely decision of claims at the hearing level and, more importantly, those cases on appeal.
- Efficient and effective data collection to inform public policy, legislation, regulation, and administration.
- Professional and respectful communication among the agency, injured workers, employers, insurers, and attorneys.

When comparing these components to the current workers' compensation system, a number of specific concerns emerge.

- The number of claims indexed or assembled by the Board declined from 174,802 in 2001 to 123,245 in 2011. Although there is a long-term trend in declining frequency of claims, it is unlikely that this accounts for the extraordinary decline in indexed/assembled claims. It is probable that there is a significant lack of information and access to benefits by low-wage workers, and that the decline in claims is partially representative of a loss of benefits by this population.
- There are significant obstacles to claim filing. These obstacles disproportionately impact the group of workers that is most likely to require access to the system. The cumbersome initial claim filing form and the hyper-technical requirements for case assembly/indexing are significant factors. The lack of direct outreach by the state agency to injured workers, as well as the absence of a requirement that employers distribute information is also relevant.
- Communication about worker rights in the system is ineffective. The use of non-hearing determinations is problematic as they cannot and do not effectively provide information to injured workers due to language, literacy and other obstacles.
- There is inadequate access to medical care in the workers' compensation system. From 2004 to date the board has removed 330 doctors from its provider lists (through suspension and voluntary resignation). 306 of the 330 have been removed since 2007. There is a clear relationship between the loss of providers and the mushrooming number, length, and content of medical reporting forms. The board's website currently lists 37 forms for use by health care providers, virtually all of which are multi-page forms.
- Benefits remain inadequate despite the increase in the statutory maximum rate. From 1992 -2006 the minimum rate of $40 was 10 percent of the maximum rate of $400. The increase of the minimum rate to $100 in 2007 made it 20 percent of the maximum rate of $500. However by 2012 it had declined to 12 percent of the maximum rate of $792.07 due to the failure to index the minimum rate. The 2013 increase to $150 has restored the minimum rate to 18 percent of the maximum rate (still short of its 2007 percentage). However, it will inevitably sink back into irrelevance until it is indexed to the maximum rate.
- The standard for temporary disability must be revisited. The general principle of total disability is that a worker must be unemployable. However, in cases of temporary disability a worker's hypothetical ability to perform other work is largely irrelevant. As a matter of practicality, it is unreasonable to expect a temporarily disabled worker to seek out other employment or to engage in vocational retraining when that worker has a reasonable expectation of returning to his or her previously employment (and employer) and in fact may be prohibited from seeking other employment due to a collective bargaining agreement, employer policy, or employment contract. A temporarily disabled worker should be paid for total disability as long as they are unable to return to their former employment or any modified duty position reasonably offered by the employer.
- Data must be collected and oversight brought to the use of so-called "independent medical examiners" by insurers. The frequency and extent to which IMEs report disability and need for treatment should be tracked, as well as the frequency with which their opinions are accepted following litigation.
- Administrative inefficiency must be eliminated. Hearing requests must be processed in a timely manner. Litigation should be discouraged in the absence of a "joined issue," as should duplicative or "investigatory" testimony. Depositions should be eliminated in favor of in-person testimony, or restricted to extraordinary circumstances. To the extent that depositions are retained, regulatory guidance must be provided as well as real-time access to a WCL Judge to obtain rulings on disputed matters. Reserved decisions should be issued within 30 days. Appeals should be decided within 60 days.
- A worker-friendly culture consistent with the intent of the statute should be encouraged on the part of Board personnel, including WCL Judges. In the current environment, the carriers' RFA-2 Forms are treated as credible, whereas the claimants'RFA-1 Forms are routinely treated with skepticism. Insurer lack of compliance is routinely excused. Current statutory and regulatory provisions are inconsistently enforced.
- The Medical Treatment Guidelines should be withdrawn.
- The 2012 Guidelines should be applied as intended, and supplemented with a consistent mechanism that creates predictability of claim values and which can be effectively implemented by WCL Judges and attorneys.
- There are many subsidiary issues that must be considered in correcting the systemic problems that obstruct access to benefits for injured workers; the list above is not intended to be comprehensive. Any initiative to "re-engineer" the system must restore the Workers' Compensation Law its original purpose: protecting and compensating those who are injured or become ill in the course of their employment. Over the past twenty years, this purpose has been obscured by disingenuous and well-orchestrated (and well financed) campaigns to boost insurer profits at the expense of worker benefits. It is time for the system to "get back to basics" and take care of injured workers.

Thank you, Mr. Grey, for setting the record straight.

Who's Your Expert (Continued from page 9)

and state trial and appellate courts and in arbitrations. Her practice areas include a variety of complex business disputes, including shareholder and partnership disputes, employment disputes, construction disputes, and other commercial matters. Ms. Frommer has extensive trial experience in both the federal and state courts. She is a frequent contributor to Farrell Fritz's New York Commercial Division Case Compendium blog. Ms. Frommer tried seven cases before juries in the United States District Court for the Southern and Eastern Districts of New York and in all of those cases, received verdicts in favor of her clients.

1. *Fiore v Galang*, 64 NY2d 999 [1985].
2. *See Gross v Friedman*, 73 NY2d 721 [1988]; Thompson *v Orner*, 36 AD3d 791 [2d Dept 2007];
3. *See Rebozo v Wilen*, 41 AD3d 457 [2d Dept 2007]; *Korcz v Merritt*, 10 Misc3d 1055[A] [Sup Ct Onondaga County 2005] [court noted that sworn deposition testimony itself can be sufficient evidentiary proof to support a defendant's summary judgment motion, but then found that the testimony the defendant presented failed to establish that there was no deviation from the standard of care which warranted dismissal of the action]).
4. *See Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002] [stating "[o]rdinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants"].
5. 83 AD3d 18 [2d Dept 2011].
6. *Id*. at 24-25.
7. *See Rivera v Greenstein*, 79 AD3d 564 [1st Dept 2010] [finding the expert's assertion that the doctor could have identified and treated the condition was speculative and did not support malpractice liability]; *DiMitri v Monsouri*, 302 AD2d 420 [2d Dept 2003]; *McCord v Paksima*, 2012 WL 5682662 [Sup Ct, Kings County Oct. 26, 2012] [granting the defendant's motion for summary judgment upon finding that the plaintiff's expert based his opinion on facts that were not supported by the evidence].
8. *Korcz v Merritt*, *supra*; *Bastin v Soldiers & Sailors Hosp.*, 258 AD2d 922 [4th Dept 1999].
9. *See Moshberg v Elahi*, 80 NY2d 941 [1992]; CPLR § 3216[e].
10. 117 AD2d 661 [2d Dept 1976].
11. 60 NY2d 851 [1983].
12. 60 NY2d 685 [1983].

Real Estate (Continued from page 8)

at all times. You are familiar with the Fair Housing Act and know that being handicapped is a protected class thereunder. You also know that the New York State Human Rights Law calls this protected class being disabled rather than handicapped, but that handicapped and disabled mean the same thing under the law.

Nonetheless, while evaluating Mrs. Goldberg's claim, you remember that the Americans with Disabilities Act (ADA) had revised regulations issued by the Department of Justice (DOJ) and on/after March 15, 2011 ESAs are no longer recognized as a reasonable accommodation to people with disabilities, but instead only service animals are recognized. You understand the distinction between ESAs and service animals is that a service animal is trained to perform a specific task whereas an ESA is not. You know that Skippy is not trained. However, you recall that while the ADA is applicable to hotels, motels and inns, the Fair Housing Act and the New York State Human Rights Law are applicable to apartments and therefore Mrs. Goldberg is correct with respect to Skippy and their housing needs.

To maintain your value to your clients there is still legal advice that should be rendered. The Goldbergs do not need to buy a uniform or certificate for Skippy to qualify if Skippy is truly an ESA. Instead, *Green v. Housing Authority of Clackamas County*, 994 F. Supp. 1253 (D. Oregon 1998) renders the ESA's outfit irrelevant to the inquiry. More so, the housing provider cannot charge a pet deposit incident to Skippy's presence as Skippy is not a pet at all, but instead an ESA.

Lastly, you must advise that while Skippy sounds like a sweet dog, you know that he has a propensity to bite and that it may be reasonable for the housing provider to require a muzzle incident to permitting Skippy to walk the halls of the building, as the standard used to evaluate ESAs is a case-by-case balancing of the reasonableness of the accommodation sought. So, it may be a reasonable alternative to the accommodation request being granted outright for the housing provider to grant the accommodation subject to securing the safety of the other residents.

Remember, when you play the game, it's a dog eat dog apartment world.

Note: Andrew M. Lieb is Managing Attorney of Lieb at Law. P.C. and a frequent contributor to this publication.

Judiciary Night (Continued from page 1)

every day serving the public."

This year marked the first time the Alan B. Oshrin Award of Excellence award was given to a member of the court community, an opportunity to recognize outstanding service to the county and court. The late Hon. Oshrin was a District Administrative Judge for Suffolk County. The SCBA named the award of excellence in his memory to show their appreciation for all of his fine work for the Suffolk legal community.

Frederick J. Crockett III, the court clerk at the New York State Supreme Court, was given the honor. Crockett was described as a mentor for others and someone who goes above and beyond serving the members of the matrimonial bar and the judges. He is the highest ranking person in the clerk's office in Central Islip.

"The matrimonial people are a good bunch," Crockett said. "They try hard and do a good job and their job is tough. I appreciate them."