

## OPINION

# Shifting 'the burden from one foot to the other'

By Vesselin Mitev

Lawyers' work, it is often said, is an empire of words. A comma can hang a man, goes the maxim, oft-illustrated by the grammar school tagline of the difference between: "Let's eat Grandma" and Let's eat, Grandma." Words, commas, semi-colons, all these things matter and arranging them in the right order is what lawyers, generally, spend their lives doing, whether it is an opening or oral argument, cross-examination, or drafting a letter or an agreement.

Some foundational documents give our craft its keystone: the words of the statutes, for example, which are then given a shading, if you will, or the appearance of becoming more than two-dimensional, by dint of persuasive argument or by their interpretation of their meaning by trial level and appellate courts.

In contrast, a trend of so-called "trigger" words has appeared, most often associated with college campus-bred projections of a worldview not clearly shaped by world experience and the simple proposition that we live at the intersection of two indefatigable entities: the law of unintended consequences and the second law of thermodynamics, which states that entropy increases over time (layman's version is that things fall apart and we are moving forward into a gradual decline into disorder).

Some of these trigger words are shortcuts for actual analysis or the hard work that comes with actual, thoughtful considerations: e.g., saying the "best interests of the children" is some-

times shorthand for a conclusion wrapped in a trigger word; these words become entities unto themselves to the point they become almost like revered bishops, immune to challenge or question alike.

Indigent legal services are another such series of trigger words. We can all agree that finding quality representation for those who cannot afford it is a cornerstone of our Constitution. Last year, as part of a settlement to a lawsuit brought by the New York Civil Liberties Union, the state agreed to spend millions more to provide counsel to indigent persons in five counties, including Suffolk County.

The thorny crux of the lawsuit is familiar to everyone who has spent even one day at a court complex: a) overworked, spread-thin lawyers, handling dozens of cases each day without any resources to fully service them; b) different, oftentimes *ad hoc* requirements, sometimes differing courtroom to courtroom, on who is eligible to be appointed a lawyer; c) clients, who, once appointed a lawyer, expect the lawyer to service them as if they were paying clients with vast resources: driving a Mercedes for the Kia price.

If signed by Gov. Cuomo, a bill pending in the state legislature would essentially apply, via the Office of Indigent Legal Services, certain criteria and procedures to determine who is eligible for legal representation, with a specific example of exactly what this means set forth in SCBA President John Calcagni's



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update on the matter (in the January Suffolk Lawyer); to recapitulate, then: a criminal defendant in a four-person household with \$60,250.00 in take-home (net) pay would be presumptively eligible for assigned counsel (i.e., someone earning approximately \$100,000.00 per year would likely be eligible for a free lawyer!)

This, coupled with an apparent absence of any safeguards to ensure those seeking free lawyers are telling the truth about their financial status, e.g., no requirement for an applicant to swear to the truth of their claimed income and no penalty for falsifying one's financial status, exposes, via the law of unintended consequences, the system to wholesale, craven fraud.

Social policy reforms such as the one articulated by this bill, as always, tend to fall hardest on the middle class. This change will not affect the lawyers working in white-shoe firms; nor will it affect the lawyers who are exclusively appointed and/or otherwise work for Legal Aid and similar organizations.

Instead, the lawyers who have firms ranging from solos to five to ten people, who depend on "meat and potato" cases in the misdemeanor courts and Family Court disputes to pay the bills and keep the lights on, will likely suffer the greatest hit. To be sure, it is unlikely that any person making \$100,000.00, given the option of a free lawyer, would opt to pay for one, for the simple reason that people confuse the concepts of cost, price and value as interchangeable.

In sum, in the absence of articulable criteria and a requirement that those seeking free counsel are indeed held liable to, at least, their claims of indigency, a wholesale reform of indigent legal services is a trigger concept: it sounds great in sound-bites and draped across self-congratulatory award dinners, but in reality, shifts the burden from one foot to the other (taxpayers are still the primary source of funds for this) and shoots one more arrow into the corpse of the "small law firm as a business model" method of practicing law.

Of course, a more cogent approach to this dilemma would be to allocate state funds to increase the rates at which appointed lawyers are paid, not just to increase the financial ceiling for a person seeking free representation. In the broadest of brushstrokes, if practitioners were guaranteed a "salary" of \$100,000.00 per year in appointed cases, it is likely that many more practitioners would opt to dedicate their practice to servicing only appointed cases, rather than an amalgam of private clients and appointments. This would reduce the caseload problem and would likely improve the quality of representation of indigent clients. But "Indigent Attorney Services" just doesn't have the same ring to it.

*Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100% devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.*

## PRO BONO

## Pro Bono Attorney of the Month Scott B. Augustine

By Ellen Krakow

The Suffolk Pro Bono Project is pleased to honor Scott B. Augustine as its Pro Bono Attorney of the Month. Mr. Augustine has been a tireless advocate for many of the Project's matrimonial clients over the past three years. This distinction is well deserved.

Mr. Augustine has a general solo practice in Bellport and has been practicing law for over 30 years. His wide-ranging practice includes real estate and business law, commercial litigation, wills, trust and estates, matrimonial, and zoning law. He is also of counsel to Davidow, Davidow, Siegel and Stern, the elder law firm in Islandia. Mr. Augustine's career is truly impressive, not only because of the many areas of legal expertise he

has developed over the years, but also because of the many divergent professional paths he has taken along the way.

Mr. Augustine attended college at the University of Richmond and then law school at Rutgers University. In 1986, soon after graduating, he joined the Patchogue

law firm Mars, Sloan and Conlon, a general practice firm that also specialized in zoning law. After a few years, Mr. Augustine and another associate, Bruce Hoyt, set up their own practice, which became quite successful and eventually led to the creation of two offices in Suffolk County. Their multi-dimensional practice included zoning, real estate matters, business formation-sale, complex business financing, and personal injury. When Bruce retired in



Scott B. Augustine

the early 1990's, Mr. Augustine partnered with attorney Harold Steuerwald, who expanded the practice even further to include code violations, criminal defense and commercial litigation.

His practice with Harold was doing well in September of 2001 when, with the events of 9/11, things took a different turn. In the weeks and days that preceded 9/11, Mr. Augustine was appearing frequently in the Court of Claims at the World Trade Center on a wrongful death claim. He came to know the judge and court employees who were in the building when the planes struck. With the sudden realization of how short and precarious life is, he decided to explore some of his passions and obtained a doctorate (Ed.D) in Education

Administration and began teaching School Law at a local college. Soon thereafter, he traded in his position as Village Attorney of the Village of Bellport to be the Village Clerk/Administrator.

Mr. Augustine recalls fondly how much he enjoyed running a village, country club and golf course, marina, highway department, and ocean beach, as well as managing a staff that grew to over 150 people in the summer. He also enjoyed being able to spend more time with his wife and young children.

In 2012, politics had changed in the village and Mr. Augustine decided to return full-time to his legal practice, which he had never completely abandoned. He soon realized that although his time away had rejuvenated his regard for the work he had been doing

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