

LACY KATZEN ANNOUNCES NEW PARTNER AND EXPANSION INTO CENTRAL NEW YORK

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Lacy Katzen LLP is pleased to announce the addition of Francesco Fabiano as a Partner in the Collections and Creditors' Rights area of the firm.

For over 20 years, Mr. Fabiano has concentrated his collection practice representing national, regional and local clients. In addition, Mr. Fabiano has represented creditors in defense of alleged violations of the Fair Debt Collection Practices Act. He is an experienced litigator in complex commercial cases. An entrepreneur in his own right, Mr. Fabiano founded Fabiano & Associates, PC, a successful collections and creditors' rights firm located in Syracuse, New York.

Lacy Katzen has retained the Syracuse office to better serve its clients in Central New York. The Syracuse office will be available Monday through Friday during normal business hours.

Mr. Fabiano received his BA from Syracuse University in Political Science, Public Affairs and Psychology. In addition, he earned his masters degree in Political Science and Public Administration from the Maxwell School of Citizenship and Public Affairs at Syracuse University. He earned his law degree from the University of Idaho College of Law and served on Law Review with several published articles.

Following graduation, Mr. Fabiano served several years as a DEA Special Agent with the United States Department of Justice, concentrating on complex undercover investigations. His work with the Department of Justice earned him several commendations. Before moving to private practice, Frank also served as a Deputy County Attorney for Onondaga County, working extensively in Family Court prosecuting child and sex abuse cases as well as termination of parental rights.

Mr. Fabiano is admitted to practice law in the United States District Courts for the Western, Eastern, Southern and Northern Districts of New York and the United States Supreme Court. He is a member of the Onondaga County Bar Association, the NDNY Federal Court Bar Association, Inc., and the National Association of Retail and Collection Attorneys (NARCA). He lectures locally at various events on creditor's rights, debtor-creditor law, bankruptcy, collections and the enforcement of money judgments. Mr. Fabiano volunteers his time on behalf of various professional and community activities. Currently, he serves as an Officer on the Board of Directors for the Consumer Credit Counseling Services of Central New York, and is an adjunct professor at Syracuse University for the paralegal studies program.

NO-FAULT DIVORCE ADOPTED IN NEW YORK

After many years of opposition, New York State has adopted a law permitting “no-fault” divorce, making New York the last state permitting no-fault divorce in one fashion or another. The no-fault law, together with other new laws impacting divorces (see below), are now in effect for new divorce actions. It does not apply to any action commenced prior to the effective date.

The no-fault law permits either spouse to seek a divorce upon the assertion that “the relationship between husband and wife has broken down irretrievably for a period of at least six months”. There is no requirement that the parties agree that this is the case, as long as one party has made this assertion under oath. This eliminates the necessity of a person seeking a divorce to make specific and detailed assertions that his or her spouse had committed acts which were sufficient to warrant a divorce.

While this provision removes the need to assert “fault” in order to obtain a divorce, a final judgment of divorce will not be granted until the issues of custody, visitation, support, spousal maintenance, counsel and expert fees, and equitable distribution of assets and debts have been agreed upon by the parties or decided by the court. However, by eliminating the need for spouses to make accusations and place blame for the deterioration of the marriage, the no-fault law may enable the parties to address these other issues, without the added emotion surrounding the making of potentially inflammatory allegations. This will also eliminate the need for parties, who mutually wish to be divorced but who do not have sufficient fault-based grounds under the old law, to fabricate grounds simply in order to be divorced.

The addition of the no-fault option does not eliminate the option to assert grounds for obtaining a divorce, which include adultery, abandonment, cruel and inhuman treatment and legal separation for over a year.

REVISIONS TO SPOUSAL MAINTENANCE LAW

While less publicized, New York has also adopted a provision that provides guidelines for temporary spousal maintenance, to be paid while a divorce action is pending, based on a complicated formula that requires two sets of calculations based upon the incomes of the respective spouses. In certain cases, additional factors may also be considered in establishing an appropriate level of temporary maintenance. The purpose of this provision is to attempt to place both spouses on equal financial footing while the divorce is pending, to provide each party equal financial ability to evaluate and present his or her case. This provision also only applies to new divorce actions.

Following the divorce, the financial circumstances of the parties may be changed as a result of the agreements or determinations made in resolving the divorce. As such, the determination of any post-divorce maintenance is determined on yet a different set of factors. The law does not provide any guideline formula for maintenance following the divorce.

Given the complex nature of the calculation, and the fact that it ultimately remains within the discretion of the court to establish both temporary and permanent maintenance, it will be up to the courts as to how they apply this law and the impact it may have on future divorce matters.

REVISIONS TO PROVISIONS REGARDING COUNSEL AND EXPERT FEES

A third law has gone into effect which affects divorce matters. This law is also intended to “level the playing field” during the course of a divorce action by encouraging courts to require that payments be made from the spouse with more available resources to the spouse with less available resources to assist in the payment of counsel fees and/or necessary expert fees. Experts are often required in divorce matters to establish the value of a home, pension, business or other asset, or to review and draw conclusions from financial statements, records and documents.

The court continues to exercise its discretion in assuring that each party is placed in a position to be adequately represented in the divorce. Since this proposed law simply provides presumptions to be applied by the court and does not provide any specific formula for determining an award of counsel or expert fees, and since the decision on whether to award such fees and the amount of any award will ultimately remain within the discretion of the court, it will be up to the courts as to how they apply this law as well and the impact it may have on future divorce matters.

To discuss any issues or questions regarding a potential divorce, please contact Lawrence J. Schwind at lschwind@lacykatzen.com or at 585-225-2470.

MICHAEL SCHNITTMAN HONORED WITH LEADERS IN LAW AWARD

Each year, [The Daily Record](#), Rochester's daily legal publication, presents the prestigious Nathaniel Award to one deserving member of Rochester's legal community who regularly goes above and beyond the call of duty in the name of justice.

The Nathaniel Award recipient is selected from a prestigious group of 20 Leaders in Law – individuals whose leadership has been recognized within the legal community. The Leaders in Law Award recipients are dedicated to their profession and show a selfless and tireless commitment to volunteer efforts or pro bono work, in addition to the outstanding achievements within their practice area.

Michael Schnittman, Partner in the Collections and Creditors' Rights Department of Lacy Katzen LLP was selected one of the recipients of the Leaders in Law Award. Each award winner was asked to answer questions or write an essay about their experience over the year. Mr. Schnittman responded with the following essay:

“As I read the resumes of my fellow nominees, some of whom I have known for many years, I was truly humbled by my selection as one of [The Daily Record's](#) 2010 Leaders in Law.

When a law professor learned more than forty years ago that I would be practicing at Lacy Katzen, he warned me not to work for the (even then) well-known Collection Department. As life takes its course, that is exactly what happened. I still understand his warning. Lawyers for creditors are not the most popular attorneys in the courtroom. For that very reason, procuring justice for them is a hard sell. I have made it my career goal to serve them just as well as those who our society might see as victims or debtors. Creditors have better memories than debtors. It's my job to improve the memories of debtors. To have the judges and opposing counsel understand my clients' rights and the facts that justify the recovery of their claims is my goal.

What makes me want to do it? Solving problems, learning the fine details of the law, and bringing that information to a courtroom that does not have the time or desire to uncover what I have at my disposal, makes it possible for me to bring my clients justice. Researching each case to a sometimes exhaustive point, finding each aspect that might benefit my client – that is what justice means to me. Arriving in court over prepared, coming with passion each time, and seeing each individual client as a new challenge. That's it. Sounds corny, right? Well, it keeps me going. Just like the myriad calls I receive from lawyers who tap my brain for what I've learned.

I was lucky to come under the tutelage of Herb Lacy and Leon Katzen, two of the finest lawyers that I have ever known. Both men were World War II veterans who didn't wear their service to their country on their sleeves. Both, in their own special and unique way, taught me not only to advocate strenuously and vigorously for my clients but to do so in a respectful and ethical way. They led by example. Before I came to the firm, they were appointed counsel for a man accused of murder who was facing the death penalty, William Draper. Although young and inexperienced, they fought long and hard for this indigent man who eventually was the last person executed in Monroe County. Their brief to the Supreme Court advocated positions that eventually became the law of the land, such as the Miranda warnings. Unfortunately, the Court was not ready to accept their argument at that time.

Because of this case and the leadership of Rochester's Judicial Process Commission, I have been outspokenly active against the death penalty. Yes, I'm the guy in the suit with all the demonstrators that you saw for the past fifteen years carrying a sign across the plaza in front of the Hall of Justice to the beat of a drum. Volunteering for this was easy. But following the example of a true volunteer probably changed my life more than anything else.

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NEWS WITH THE FIRM

Matthew Ryen is being honored with the 2011 JCC's Young Leadership Award, "who has exhibited personal commitment, strong leadership qualities, and dedicated involvement in the Jewish Community Center of Greater Rochester and its programs".

Daniel Bryson has been named Chairman of the Municipal Section of the Monroe County Bar Association.

In October, Jacqueline Thomas presented a lecture on Disclosure at a seminar for attorneys entitled; "Precedents & Statutes for Personal Injury Litigators, 2010 Annual Update" sponsored by the New York State Academy of Trial Lawyers. Thomas also lectured at the University of Rochester School of Nursing on the topic of medical malpractice.

Matthew Ryen has recently become a trustee of the Max Adler charitable foundation.

Craig Welch has been appointed to the Foundation for the Finger Lakes Community College Foundation.

Terrance W. Emmens and Timothy Muck recently presented a seminar at the Locust Hill Country Club on estate and income tax consequences associated with the conversion of a traditional IRA into a ROTH IRA.

Mark Stein has been honored with being on the Board of Directors of Delphi Drug & Alcohol Council, Inc. for 10 years of service. Delphi is a not-for-profit agency that provides prevention education, school-based counseling, out-patient treatment and the domestic violence & abuse courses for individuals.

Terrance W. Emmens recently presented a lecture on the basics of estate planning to approximately 120 financial advisors and financial executives at the Doubletree Hotel in Rochester. The lecture included an analysis of the estate planning landscape if Congress fails to act and the Bush estate tax cuts sunset on December 31, 2010.

Karen Schaefer presented on the topic of "Estate Planning for Second Marriages" at the Fall meeting of the Trusts and Estates Law Section of the New York State Bar Association.

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Mr. Fabiano joins Michael Schnittman and Mark Stein in the Collections and Creditors' Rights area of the firm. "We are excited that Frank is joining our firm" says Schnittman. "Frank builds upon our practice area and enhances our ability to represent our clients zealously" says Stein.

During his spare time, Mr. Fabiano enjoys the outdoors, hikes and backpacks extensively throughout the year and is currently well on his way to summiting all 46 of the High Peaks in the Adirondacks. He is a part time Professor at Syracuse University for classes in backpacking and advanced backpacking skills. On frequent occasions, he also likes to test his outdoor survival skills against nature and the elements, sometimes not by choice: so far, he's passed each test. Finally, Mr. Fabiano is active in the Boy Scouts serving as a leader and member of Liverpool Boy Scout Troop 203 and Crew 203, Member of the Order of the Arrow and serves as a Committee Chairperson. Mr. Fabiano may be reached at 585-324-5725 or 315-453-9535.

CLAIMS ARISING FROM INVESTMENT LOSSES

Recent stock market volatility has refocused attention on potential claims against investment advisors and companies. The topic of investment claims is very broad, as are terms such as “investment advisor” and “security.” These disputes come in many shapes and sizes and take a number of forms such as litigation, arbitration or mediation at the state or federal level. This article is limited to arbitration claims against investment advisors because most holders of publicly traded securities (such as stocks, bonds and mutual funds) are subject to agreements that require disputes to be submitted to arbitration.

Basic Definitions

We should start by defining some basic terms. The Financial Industry Regulatory Authority (FINRA) is the largest independent regulator for securities firms doing business in the United States. FINRA is a non-governmental, self-regulatory organization that was formed when the National Association of Securities Dealers (NASD) acquired certain operations of the New York Stock Exchange (NYSE). A “broker-dealer” is a FINRA firm that acts as a securities dealer or broker, or performs both functions. For purposes of this article, “broker-dealer,” “registered representative” and “investment advisor” are used interchangeably.

“Litigation” involves “lawsuits;” it is the most formal type of dispute resolution and is typically heard by a judge or jury in a courtroom. There are a number of securities lawsuits potentially available to investors, many of which are governed by federal law and involve fraud or insider trading. “Arbitration” is a forum in which opposing parties present their cases to one or more arbitrators who render a decision after hearing all of the evidence. Litigation differs from arbitration in several important respects. For example: arbitration proceedings are usually heard more quickly than cases come to trial; parties who arbitrate generally waive their right to a jury trial; and the right to appeal from an arbitration decision is generally much more restricted than are appeals from a trial verdict. Finally, mediation is an:

informal, voluntary process used in securities industry disputes in which a mediator helps negotiate a mutually-acceptable resolution between disputing parties. Unlike arbitration or litigation, mediation does not impose a solution. If the parties cannot negotiate an acceptable settlement, they may still arbitrate or litigate their dispute.

<http://www.finra.org/Glossary/P011116>

The Claims Process

The mere fact of an investment’s decline - even as precipitously as we saw recently - does not, in and of itself, determine whether an investor has a viable legal claim against his or her advisor. Indeed, if that were the case, nearly everyone would have investment loss claims during the past few years.

Suitability

A principal theory underlying many investment loss claims is one of “suitability,” that is, that the advisor selected or recommended investments that were inappropriate for the client. “Suitability” is a seemingly straightforward term that contains within it many diverse factors. For example, in determining whether a particular investment is suitable for a particular client, his or her age, investment sophistication and experience, overall resources, risk tolerance, goals and investment horizon (or time) are all considered.

Proper evaluation of a potential case requires substantial time and effort from attorneys and as discussed below, expert witnesses. At the inception of a new client-investment advisor relationship, the investor usually completes a risk tolerance questionnaire or similar document that is intended, among other things, to determine which investments may be appropriate given the investor’s goals, and to gauge factors such as the investor’s tolerance for various levels of risk. Clients should carefully consider these types of surveys and update them as circumstances warrant. For example, clients who claim that their advisor placed them in an unsuitably volatile investment sometimes have outdated investor profiles suggesting that the client’s tolerance or appetite for risk was much greater than it actually was.

Expert Testimony, Other Potential Claims and Additional Considerations

Whether there ultimately is a viable investment loss claim will usually be determined based, at least in part, on an informed, qualified opinion from an outside expert. The attorney should advise and assist the client in selecting an appropriate

CLAIMS ARISING FROM INVESTMENT LOSSES

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expert, but it is important to remember that regardless of the amount of loss sustained or other circumstances, no matter how apparently egregious, successful investment loss claims typically require at least one opinion from a qualified expert in the field.

Additional considerations include factors such as the manner in which the investment advisor was compensated: is she or he a “fee-only” advisor who is paid the same amount regardless of the securities ultimately selected, or is the advisor paid a commission depending on the investment product purchased? Also, how much discretion did the advisor have in the process: does she or he actually select the investments or simply present various options to the client? Which securities did the advisor recommend to the client and why?

Other potential investment claims include fraud, misrepresentation, churning (excessive trading in an account), breach of fiduciary duty, insider trading, failure to diversify, market manipulation and unauthorized trading. In addition, the New York State Securities Law, commonly known as the Martin Act, is enforced by the Attorney General’s Investor Protection Bureau.

Arbitration

The vast majority of lawsuits never reach trial because a number are disposed of by motion but also because most are settled, owing mainly to the fact that it is rarely worthwhile for litigants, given the costs and other risks involved, to chance the uncertainties of trial when they can reach a more predictable and cost effective resolution through negotiations. Of course, the most favorable resolutions are achieved by those who – with their counsel – secure the best bargaining position in view of the facts, law and demonstrated ability to try the case if needed. The same is often true in securities arbitration, given e.g., the added expense of arbitration because arbitrators’ fees (unlike those of a judge or jury) are typically paid by the parties.

The forum (location) of the arbitration and number of arbitrators is usually determined by the agreement in place between investor and advisor, but most arbitrations are heard by FINRA or the American Arbitration Association (AAA) by at least one or as many as three arbitrators, who are often current or former members of the investment industry. Even in a “contingent” case - in which the investor’s attorney is paid a fee only if there is ultimately a recovery - arbitration costs, including fees for experts and arbitrators, usually are at least several thousand dollars. FINRA and AAA have special procedures for “small claims” arbitrations between approximately \$20,000-\$25,000. Additional information is available from these organizations’ websites: <http://www.finra.org> and <http://www.adr.org/sp.asp?id=28824>.

Conclusion

Arbitration can be an effective way of recouping investment losses but it is essential to consult at the earliest opportunity with an attorney who is qualified and experienced in this “niche” area of legal specialty. If you have any questions, feel free to contact John Refermat at 585-324-5762

New Firm Administrator named for Lacy Katzen LLP

After eight years as Firm Administrator with Lacy Katzen, Suzanne Mayer has moved on to a new opportunity in Rochester. Suzanne drove many process improvements during her tenure with the firm. We have had many system tools added to our portfolio to better serve our clients and streamline our work processes.

Peter Rodgers and the Management Committee conducted an extensive talent search and are pleased to welcome Sandra Harte to Lacy Katzen as the new Firm Administrator. Sandy comes to us with a diverse background. She has experience with a small start up company, a mid range company and a Fortune 500 company. Most recently she was the Director, Worldwide Demand and Supply Planning for Carestream Health, Inc. Sandy graduated from Rochester Institute of Technology where she earned a BS degree in Accounting. She also has been certified in Lean/Six Sigma techniques that she will bring to Lacy Katzen to continue to improve our work processes using a data based approach. Please join us in welcoming Sandy to the Lacy Katzen family.

MICHAEL SCHNITTMAN HONORED WITH LEADERS IN LAW AWARD

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After I met Hanna Cohn, the founder of the Volunteer Legal Services Project, my professional life changed profoundly. I became more involved in pro bono work, which is both satisfying and rewarding. Hanna's untimely death brought home to me the importance of doing work for and contributing to the less fortunate in our community.

Practicing law in Rochester has been a very satisfying experience. When asked why I chose Rochester, I usually responded that I wanted to practice in New York but outside of New York City, although I was born and raised there. I have rarely been "burned" by relying on a Rochester lawyer's word. I hope that my fellow members of the Bar feel the same way about me. One of the most satisfying aspects of my career has been the ability to help my fellow practitioners when they call me for advice. I hope that I am able to steer them in the right direction.

What will I do when I retire? I'll be frank here. I can't imagine. That's exactly what I hope for young lawyers. To be so engaged with the profession of law that they don't long to leave, that their lives, professional and volunteer, reflect a love of the law. Hokey? Sure is.

On a more serious note, our work can be difficult and stressful. I do have a bit of advice. Treat people as they would like to be treated and follow Rabbi Hillel's rule, "Do not do unto others as you would not want done unto you." Lacy Katzen LLP is proud to have Michael Schnittman honored with such a special award.

NO FEE WARRANTY... NEW CONCEPT OR MARKETING HYPE?

Gone are the days when Doctors, Dentists and Lawyers did not see fit to advertise, relying upon word of mouth and referrals to gain your business. In today's marketplace, it is now common for professionals, including attorneys, to advertise on billboards, radio and television. Testimonials, paid spokespersons and even jingles abound, particularly in the arena of personal injury attorneys.

Personal injury attorneys handle claims alleging that you suffered an injury due to the negligence of someone else. Examples of this would be auto accident cases, trip and fall cases, products liability and medical or nursing home negligence cases. It seems the latest catch phrase for attorneys who handle personal injury cases is a "no fee" warranty; a promise that the client will not owe the attorney a fee unless there is a recovery in the case. Sounds great, right? So what is the catch? The catch is that personal injury cases are almost universally handled on a contingency fee basis. By its very definition, an attorney's fee under this type of arrangement is "contingent upon" a recovery. Customarily, the attorney agrees to take a fee of 1/3rd of whatever is recovered on the matter. If there is no recovery, the client does not owe the attorney a fee. No "warranty" required.

The benefit of a contingency fee agreement is it takes the risk and expense of proceeding with a case off of the client, who may be out of work or simply unable or unwilling to risk spending a lot of money to pursue a case. Don't fall for the latest catchphrase. The bottom line is buyer beware. If you suffer a personal injury, call a lawyer who you trust. At Lacy Katzen, our personal injury litigation attorneys have been helping our clients for over 60 years. We would be pleased to serve you. Contact Peter T. Rodgers or Jacqueline M. Thomas with any questions at 585-454-5650.

Legal Notes

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Legal Notes

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