

Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

July/August 2020

www.nassaubar.org

Vol. 69, No. 11

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NCBA 2020-21

Committee List and Calendar Page 18

SAVE THE DATE

BBQ at the Bar Drive-By

TENTATIVELY SCHEDULED

Thursday, September 10, 2020
see pg. 2

WHAT'S INSIDE

Summer Arts/Entertainment

Still "Out of Order" After

All These Years pg. 3

Book Review: *The Round House* pg. 5

Need Career Counseling?

Better Call Saul pg. 6

Book Review: *Know My Name,*

A Memoir pg. 7

Book Review: *Why Fish Do*

Not Exist pg. 8

Book Review: *Cain v. Abel:*

A Jewish Courtroom Drama pg. 9

General

The Impact of Divorce on

Your Will pg.12

Marketing Smart During the

COVID Crisis pg.13

Nursing Home Liability in

the Pandemic pg.14

All Rights Reserved:

Intellectual Property Assets in

Divorce Matters pg.15

OF NOTE

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UPCOMING PUBLICATIONS

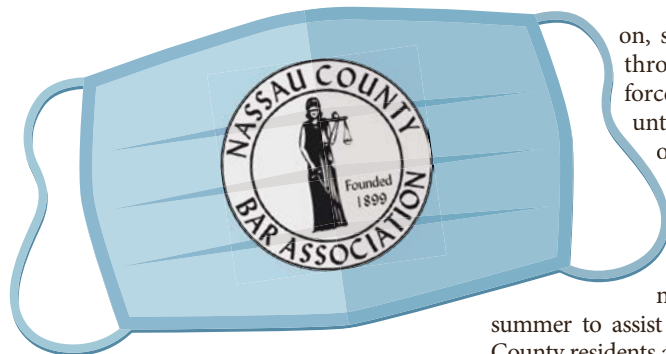
COMMITTEE MEETINGS

Thursday, Aug. 6, 2020 at 12:45 PM

Thursday, Sept. 3, 2020 at 12:45 PM

COVID Help Only One Email Away

Ann Burkowsky



The NCBA prides itself on a longstanding history of lending a helping hand to the community in times of need. When Superstorm Sandy ravished the east coast in 2012, the NCBA created a series of free legal help clinics in response that are still well attended today.

Eight years later, the COVID-19 virus has affected our community, country, and world in ways we could not imagine possible. The NCBA is proud of the programs and services it provides to not only members, but the Nassau County community at large as well.

On Wednesday, April 1, 2020, then Nassau County Bar Association (NCBA) President Richard D. Collins and NCBA Past President Martha Krisel announced the configuration of the NCBA COVID-19 Community Task Force, a group comprised of volunteer NCBA attorney members who made themselves available to assist the local community during these unprecedented times through virtual legal consultations.

The mission of the task force is to connect Nassau County residents and small businesses to skilled NCBA member attorneys who will provide them with assistance and guidance related to the pandemic. Nassau County residents are encouraged to reach out to the NCBA by emailing covidhelp@nassaubar.org with their legal questions.

Following the successful launch of the program, the NCBA had another important group of individuals who needed its help: local law students. As their semesters were cut short, the NCBA wanted to provide law students with the opportunity to gain hands-

on, substantive legal experience through the community task force by being paired with a volunteer member to assist them on the COVID-19 community inquiries.

In addition, the NCBA Mortgage Foreclosure Project welcomed five new law student interns this summer to assist with inquiries from Nassau County residents and research.

In June, the Task Force welcomed fifteen exceptional law students from the Maurice A.

Deane School of Law at Hofstra University, the Touro College Jacob D. Fuchsberg Law Center, and St. John's University School of Law to respond to COVID-19 public inquiries. NCBA Past President Martha Krisel and Hon. Maxine S. Broderick, the program's COVID-19 Law Student Pro Bono Program Student Coordinator, have developed a successful remote mentorship program to connect member attorneys and law students to collaboratively respond to inquiries sent to the bar association.

See COVID HELP, Page 7

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Amanda Geist

Lovashni Khalikapasrad

Bryan Ramdat

Alexander Rogalsky

PROGRAM ADMINISTRATORS

Jovhann Egalite

Ciara J. Villalona-Lockhart



Renew Your Membership Today!

During this unprecedented time, our mission stays consistent—to remain the leading source for legal information and services for the legal profession and the local community in Nassau County.

We are dedicated to providing members with the most current resources and professional guidance needed to move forward together in the wake of COVID-19.

Renew your membership and indicate your

committee choices today! The full committee description list is located on page 17. Indicate your choices on your membership renewal form when you renew online at www.nassaubar.org. Renew online today at nassaubar.org or call the NCBA Membership office at (516) 666-4850 or (516) 747-4876. Payment plan options are available.

We look forward to welcoming you to the NCBA for the 2020-21 Bar year!

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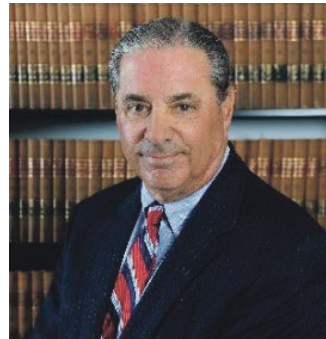
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YOU'RE INVITED! FIRST EVER NCBA MEMBER APPRECIATION

DRIVE-BY BBQ AT THE BAR



THURSDAY, SEPTEMBER 10, 2020
at the Nassau County Bar Association

15th & West Streets, Mineola

5:00 to 6:00 or 6:15 to 7:15 PM

 **RAIN DATE: Wednesday, September 16, 2020**

Please bring a non-perishable food item to be donated to our food drive!

THERE IS NO CHARGE FOR THIS EVENT. YOU MUST PRE-REGISTER.

To register, contact Special Events at events@nassaubar.org or (516) 747-4070 ext. 1226. Specify your desired time slot and if you will be picking up or staying to network for an hour.

Drive by the NCBA to receive a to-go BBQ dinner, beverage, dessert, and swag bag! Or stay an hour and meet and network with our Directors, Officers, Staff, Corporate Partners, and fellow members in a standing-only networking area for up to 50 people per time slot.

FACE MASKS ARE REQUIRED! SOCIAL DISTANCING WILL BE ENFORCED!



Still “Out of Order” After All These Years

These proceedings are here to see that justice is done. And justice is, as any reasonable person will tell you, the finding of the truth. And what is the truth today?

*Al Pacino as Arthur Kirkland
...And Justice for All (1979)¹*

The 1970's were not an easy decade for the United States. Vietnam, Watergate, oil embargoes, and the sexual revolution, all tore at the social fabric. The counterculture of the previous decade became mainstream, with many Americans questioning long-held values and doubting established institutions.

In the movies, it was a creative if chaotic era. Filmmakers defied convention and began reexamining just about every aspect of society. In this vein, Norman Jewison's ... *And Justice for All* does for the legal profession what Robert Altman's *M*A*S*H** did for the military. The film offers a revealing, if satiric, portrait of the law, showing it to be far more volatile than previously presented on the screen.

For though the courtrooms photographed are still majestic,² they are now occupied with people who are all too human while at times all too removed from being humane. It seems as if the stalwart American lawyer, best exemplified by Earle Stanley Gardner's Perry Mason, is no longer practicing law. In his place is Al Pacino's Arthur Kirkland.

What is justice? What is the intention of justice? The intention of justice is to see the guilty people are proven guilty and that the innocent are freed. Simple, isn't it? Only it's not that simple.

Arthur Kirkland could perhaps be described as Frank Serpico with a law degree.³ Pacino portrayed the rebel cop in Sidney Lumet's *Serpico* (1973). As with the earlier film, he is a moral man doing righteous battle within an amoral system. As he tells his grandfather Sam, lovingly played by Lee Strasberg,⁴ “being honest doesn't have much to do with being a lawyer grandpa.”

Having practiced law for a dozen years, he is not naïve. But neither is he embittered nor is he despondent. Like many, he maintains his sanity in an existential fashion, one case at a time. Trying mightily to secure some small measure of justice for his clients, Kirkland does the best he can with all the verve and skill he can muster.

If Perry Mason presented a court-room procedural, the legal process as it should work, then ... *And Justice for All* is a kind-of counter-procedural. As if conjured by a latter-day Voltaire, every case seems to go haywire with the film shining a twisted spotlight on a criminal justice system gone mad. Not too surprisingly, the film opens with Kirkland in a jail cell for having taken a swing at a judge. Watching the movie, one gets the feeling that miscarriages of justices are the norm not the exception.

Whether it is the innocent Jeff McCullough (Thomas Waites) or the guilty, but highly vulnerable, Ralph Agee (Robert Christian), Kirkland's clients are trapped in dramatically surreal situations. His love-interest Gail Packer (Christine Lahti) works for an ethics committee, which is out to get him. His law partner Jay Porter (Jeffrey Tambor) loses his own fragile grip on reality after a former client, whose acquittal he secured, kills again.

The film's depiction of the bench is also illuminating. Judge Rayford, Jack Warden in a sublime performance, is hell-bent on suicide. Whether eating his lunch on the window ledge outside his chambers or flying his helicopter as it runs short of fuel or putting a shotgun to his mouth, Rayford never seems to be questioned about his temperament much less his sanity. Ironically, he is one of the more appealing per-

sonalities in ... *And Justice for All*.

[I]t's the defense counsel's duty to protect the rights of the individual, as it is the prosecution's duty to uphold and defend the laws of the state. Justice for all. Only we have a problem here. And you know what it is? Both sides wanna win. We wanna win regardless of the truth. And we wanna win regardless of justice, regardless of who's guilty or innocent. Winning is everything!

It seems every courtroom drama inevitably pits the prosecution and the defense as antagonists. ... *And Justice for All* is different because Kirkland's foil is not a prosecutor, but rather the character of Judge Henry Fleming (John Forsyth). Fleming is upright and uptight. It was he who sent Kirkland to jail for contempt. Later he becomes Kirkland's client when the judge is charged with raping and brutally beating a young woman.

Cynically, Kirkland is selected as Fleming's counsel for “political reasons” stemming from their prior acrimony. After all, why would Kirkland represent the judge if he didn't believe he was in fact innocent. Kirkland at first refuses. He is then pressured/blackmailed into taking Fleming's case with threats of disbarment when an old ethical lapse is held over his head.

What makes Fleming such a perfect villain is that he appears to act out of genuine conviction. He really means it when he says that “[p]rison should be a frightening place. Let those criminals create their own hell-hole.... the idea of punishment to fit the crime doesn't work. We need unjust punishment. Hang somebody for armed robbery. Try it! We've got nothing to lose.” There are some in the audience who may concur with these sentiments.

Counsel and client are studied contrasts. Whereas Kirkland genuinely cares about his clients, Fleming is arrogant, self-satisfied, and high-handed. Nevertheless, he gives Fleming his all. As Kirkland prepares the defense, a witness suddenly comes forward to bolster the case. A polygraph test is administered that confirms the Judge's story. Being a respected “law and order” judge, testimonials as to Fleming's character are generated. It all however turns out to be a sham.

She doesn't have a motive. You know why? Because she is not lying. And ladies and gentlemen of the jury, the prosecution is not gonna get that man today. No! Because I'm going to get him.... The son of a bitch is guilty!.... That man is guilty! That man there, that man is a slime! If he's allowed to go free, then something really wrong is goin' on here!

In all actuality, Fleming is guilty. The witness, the polygraph, and the testimonials were all fabricated on the Judge's behalf. One of Kirkland's more seedier clients, Carl Travers (Dominic Chianese), turns up with some disgusting photos of Fleming and the head of the Ethics Committee consorting with a prostitute. The Judge, who Forsyth portrays as the symbol of judicial rectitude and moral probity, is really something else entirely behind closed doors.

Hints of Fleming's depravity are dropped throughout the script, which was written by Valerie Curtain and Barry Levinson.⁵ When finally revealed, it comes off not so much as a shock. Instead, it is a confirmation that the courts are not only rotten, they are perverse and hypocritical. But the bar doesn't come off unscathed. When Kirkland and his colleagues first learn of Fleming's arrest, they celebrate and even laugh out loud that the authorities got the Judge on a rape charge.

When Kirkland shows Fleming the



Rudy Carmenty

photos, the Judge nonchalantly acknowledges his guilt knowing he has enough backing to secure his own acquittal. The audience is bolstered in this belief because the prosecutor, played by Craig T. Nelson, is more obsessed with football metaphors, making plea-deals in the hallway, and nailing the Judge so as to advance his career than properly prosecuting the case.

But what sets Kirkland over the edge, resulting in probably the most recognizable opening statement in movie history, is when Fleming cavalierly asserts that he wouldn't mind sleeping with his accuser once more. “You must admit she is an attractive woman,” he says, “I wouldn't mind seeing her again sometime.” The brazen arrogance inherent in Fleming's words serve as a fitting coda to the many insanities visited upon Kirkland during the course of the film:

*You're out of order! You're out of order! The whole trial is out of order! They're out of order! That man, that sick, crazy depraved man raped and beat that woman there, and he'd like to do it again! He told me so! It's just a show! It's “Let's Make a Deal!” ... Hey, Frank, you want to make a deal? I got an insane judge who likes to beat the s**t out of women! What do you want to give me, Frank? Three weeks probation!*

Kirkland and his circle seem to reside in a perpetual Catch-22. It's a bizarre world where the courts conspire on a technicality to crush a little guy like Jeff McCullough, an innocent man brutalized behind bars for a crime he didn't commit. At the same time, every effort is made to protect Judge Fleming, who, baring Kirkland's devastating opening statement, would have presumably been allowed to skate free without even the proverbial slap-on-the-wrist.

The tension between having justice meted out to Fleming and Kirkland's duty to defend a clearly guilty man goes to the crux of the client-lawyer relationship.⁶ In making his opening statement, Pacino validates the visceral needs of the audience to see the Judge exposed. At the same, it substantiates their subconscious fears that in real life justice is seldom done. As one of Kirkland's more perceptive clients wryly notes, “[w]ho says you have to be sane to practice law.”

The film's final denouement proves quite problematic for legal ethicists. As officers of the court, defense attorneys don't ascertain guilt but instead are obligated to provide their client the best representation possible in furtherance of their constitutional rights.⁷ One should note that since the crime has already been committed, there is no issue about preventing a pending offense.

Hold it! Hold it! I just completed my opening statement!

Combining as it does dark humor with visceral drama, ... *And Justice for All* could easily have degenerated into parody. What holds the film together is that its characters are not caricatures. They may constantly be involved in gripping circumstances, but at a minimum these situations have a whiff of reality. Forsyth's Fleming is a worthy adversary to Kirkland, and the supporting cast is, to say the least, never boring.

But what truly sets the film apart is Pacino's riveting performance. As Sidney Lumet once astutely observed, “Al is so completely dedicated to the truth of what he is doing that he becomes a barometer of truth for everyone on the set, including the director.”⁸

... *And Justice for All* is not a time capsule nor a relic of a bygone era. It retains its vitality as an anarchic, fun-house mirror depiction

of the criminal justice system while still serving as a biting, poignant commentary on the law itself. It is also a movie that is a lot of fun to watch for lawyer and layman alike.

Rudy Carmenty serves as a Bureau Chief in the Office of the Nassau County Attorney, is the Director of Legal Services for the Nassau County Department of Social Services, and the Language Access Coordinator for the Nassau County Executive. He is also Vice-Chair of the NCBA Publications Committee.

1. Kirkland's summation is quoted from ... *And Justice for All* (1979) Screenwriter(s) Valerie Curtain, Barry Levinson at “Best Film Speeches and Monologues 1978-1979”. Filmsite.org.
2. The courtroom scenes were filmed at the Clarence M. Mitchell, Jr. Courthouse in Baltimore. See Tim Prudente, *Treasures throughout, Baltimore's Mitchell Courthouse also holds a century of drama*, Baltimore Sun (December 29, 2017) at www.baltimoresun.com.
3. Surinder Singh, *Movie Review: ... And Justice For All, 1979*, (Sept. 9, 2016) at festivalreviews.org.
4. Strasberg was one of the founders of the legendary Group Theater and the director of the Actor's Studio. He was a father figure to Pacino and acted opposite him in *The Godfather, Part II* (1974).
5. Levinson would go on to direct *Diner* (1982), *Rain Man* (1988), and *Wag the Dog* (1997).
6. Adam Banner, *12 pivotal scenes with lessons for lawyers And Justice for All* (1979) at www.abajournal.com
7. Banner, *supra*.
8. Anthony DeCurtis, *Al Pacino: The Rolling Stone Interview*, Rolling Stone (Oct. 17, 1996) 63.

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President's Column

As we approach the first sixty (60) days of this administration, our team had to adapt quickly to the challenges of being open, yet remaining safely apart. Times such as these make you wonder whether the nineteen charter attorneys who met at the Allen's Hotel in Mineola would have envisioned our Association having remain true to the mission of delivering competent legal services to all without regard to their ability to pay; to protect and improve our system of justice; to maintain and increase our levels of professionalism through continuing legal education programs; and to inspire all citizens to have an appreciation and respect for the law while providing benefits and opportunities to enhance professional, personal, and economic growth all the while remaining safely apart.

Thanks to our staff, led by our Executive Director Elizabeth Post, and the Executive Team of President-Elect Greg Lisi, Vice President Rosalia Baiamonte, Treasurer Sanford Strenger, Secretary Daniel W. Russo, and Immediate Past President Rick Collins, all who have tirelessly given of their time and talents to insure that amid a pandemic, and a call for racial equality, we have remained focused on our mission.

Next Phase of COVID-19 and What It Means to Your Practice.

As of July 17, 2020, Hon. Norman St. George, Administrative Judge announced the protective measures used to prevent the spread of the COVID-19 virus as the courts are "slowly and deliberately increase[ing] in-person courthouse proceedings." Allow me to express on behalf of the Bar, Justice St. George we recognize the task at hand and value all that you are doing. Also, I would like to thank the Supreme Court Coronavirus Task Force, Past President Chris McGrath and Bill Croutier, Jr., for their continued efforts in connection with the impact on both plaintiffs and defendants' matters.

COVID is Not Having an Impact on Our Law Students and Pro Bono Services.

We would like to thank our wonderful mentors and law students for their fantastic work with the NCBA COVID-19 Law Student Pro Bono Program thus far this summer. Nassau County residents and small businesses with COVID-19 legal concerns should send an email to covidhelp@nassaubar.org. An immediate response is generated that outlines the next steps and provides specific contact information for those facing family violence (The Safe Center of Long Island) or certain civil legal issues (Nassau Suffolk Law Services). NCBA staff reviews each email and assigns it to one of the NCBA Member Volunteers. The Member Volunteers are attorneys who have agreed to provide consultation in their areas of expertise. That assigned Member Volunteer then contacts the resident or business who has sought consultation. As always, the NCBA Mortgage Foreclosure Program is available for free consultations and can be reached at mortgageforeclosure@nassaubar.org.

Answering the Call

In the weeks following the death of George Floyd in Minneapolis, the nation and the world engaged in protests advocating justice and calls to end excessive police force. Our Board of Directors issued the following statement:

Statement of the Nassau County Bar Association on Changes Needed within the Justice System

The unspeakable acts committed against George Floyd and others by some members of law enforcement are abhorrent. As lawyers, it is our responsibility to improve our system of justice for our communities that are underserved and marginalized.

The Nassau County Bar Association will work with our justice partners—community leaders, government officials,



FROM THE PRESIDENT

Dorian R. Glover

law enforcement and the judiciary—to bring change, correct inequities, and ensure equal justice and fairness for all members of our community who expect ethical, moral, and upright behavior from those constitutionally bound to uphold the law.

We also support local communities and their leaders who are organizing peaceful, anti-racist responses, and we are committed to expanding our efforts to provide additional services to those in need.

Our Diversity Committee Chair, Judge Maxine Broderick, along with Vice Chair Rudy Carmenty and our Civil Rights Committee Chair Bernadette Ford, have taken the mantle by remaining focused on improving our system of justice with educational programs, including reading Between the World and Me by Ta-Nehisi Coates, and a program "How to Deal With Abusive Police Officers" presented by civil rights attorney Frederick K. Brewington. Little did

our viewers of the Brewington presentation know we would experience a "Zoom bomber" who showed the necessity for the Bar to keep moving forward when presented by such hate.

The Diversity Committee has plans for Heritage Month Celebrations in the coming months: Holocaust Remembrance, January 2021; Black History, February 2021; Asian Heritage, May 2021; and Hispanic Heritage, October 2021. They also plan to present the Amistad Case, just to name a few of the activities.

Partnering with the Suffolk County Bar Association

The New York State Bar Association formed a Task Force called "School to Prison Pipeline—Restorative Justice." The Task Force findings concluded that because suspension is the statutorily endorsed discipline that may be issued in accordance with Education Law 3214, students of color and students with a disability will continue to be suspended at a greater frequency than students who are Caucasian unless statutory change is effectuated.

The NCBA, in partnership with the Suffolk County Bar Association, the Suffolk County Sheriff's Office, and the Suffolk Academy of Law, are participating with the Restorative Justice Symposium—Breaking the School to Prison Pipeline.

In addition, following the recent landmark decision *Bostock v. Clayton County*—the U.S. Supreme Court ruled that the 1964 Title VII of the Civil Rights Act protects gay, lesbian, and transgender employees from discrimination based on sex—the LGBTQ Committee Chairs of Nassau and Suffolk County Bar Associations are having a joint meeting to combine talent and energy for a project.

Event Planning

Opening of the Bar

As we all are getting a bit anxious of staying safe at home, we at the Bar join in your desire to attend lunch CLEs and meet with colleagues. We have chosen to put the safety and lives of our staff and members first. Towards that end, we are adhering to New York State's Office-Based Work Guidelines and cleaning guidelines provided by the Centers for Disease Control and Prevention (CDC). With all the safety precautions we are taking at Domus, we believe that it is best to continue to have a reduced staff presence and not permit foot traffic until further notice.

BBQ at the Bar

In response to members who participated in a survey presented by our Communications Manager Ann Burkowsky, we have decided to go forward with our Annual BBQ at the Bar on September 10. The event will be held outdoors with safety measures in place and include a drive-by option for members to pick up dinner and a goodie bag. Following COVID-19 guidelines—including limited attendees, face masks and social distancing—up to 50 members per time slot will be able to network with Officers, Directors, Corporate Partners and colleagues. See page two for additional information.



Nassau Lawyer

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September 2020
Real Estate/Municipal Law
October 2020
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November 2020
Criminal Law

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Book Review: *The Round House*

The Stories

The Round House is one story and many stories.

To begin with, *The Round House* is the story of one summer on a Chippewa reservation in North Dakota in the year 1988. The narrator, a prosecutor, tells the story, and within his story are many other stories, and a secret that must be told.

The Round House is the story of an unspeakable crime that cannot be prosecuted for want of jurisdiction.

*Oliphant v. Suquamish.*¹ He shook the fork and the stink wafted at me. Took from us the right to prosecute non-Indians who commit crimes on our lands.

The Round House is the story of a boy and his parents, forever changed by the crime and its aftermath.

And there was that moment when my mother and father walked in the door disguised as old people. I thought the miles in the car had bent them, dulled their eyes, even greyed and whitened their hair and caused their hands and voices to tremble.

The Round House is the story of Joe, a thirteen-year-old boy, and Joe's father, a tribal judge, schooled in American laws and the tribal code.

I took out the law book my father called the Bible. Felix S. Cohen's Handbook of Federal Indian Law. It had been given to my father by his father; the rust red binding was scraped, the long spine cracked, and every page bore handwritten comments. I was trying to get used to the old-fashioned language and constant footnotes. Either my father or my grandfather had placed an exclamation point on page 38, beside the italicized case, which had naturally interested me also: *United States v. Forty-three Gallons of Whiskey.*² I suppose one of them had thought the title was ridiculous, as I did.

The Round House is the story of Joe's mother, Geraldine, a tribal enrollment specialist, who was raped as one victim of the crime.

My Mother's job was to know everyone's secrets. The original census rolls taken in the area that became our reservation go back past 1879 and include a description of each family by tribe, often by clan, by occupation, by age and by original name in our language...My mother kept her files locked in a safe.

The Round House is the story of Joe's friends, their comic escapades and a tragic outcome.

I had three friends. I still keep up with two of them. The other is a white cross on the Montana Hi-Line. His physical departure is marked there, I mean. As for his spirit, I carry that around with me in the form of a round, black stone...He told me that the stone was one of those found at the base of a lightning-struck tree. A thunderbird egg, he called it.

The Round House is the story of Joe's extended family, colorful and unforgettable characters all, especially Joe's Mooshum, or grandfather.

Mooshum's battle array stood ready in the back entry through October. When the first snow fell, he put on his galoshes. Clemence had glued sandpaper to the bottoms... Mooshum's galoshes fit over his rabbit-fur trimmed moccasins and insulated socks. He wore work pants lined with red flannel and a puffy, fluorescent orange parka that Clemence had given to him so that he could be found if he got lost in the snow. Moosehide mitts lined with rabbit fur and a brilliant blue stocking cap with a wild pink pompom concluded this outfit.

The Round House is a fable of the tribe. Nanapush sang the buffalo song at the top of his lungs, driving onward. And at last, in the white bitterness, the buffalo heard his song. It stopped to listen. Turned toward him...the creature was mainly a hide draped loosely over rickety bones. Yet she'd been immense and in her brown eyes there was a depth of sorrow that shook Nanapush even in his desperation.

The Round House is the story of old laws that dispossessed a people of their lands.

Take *Johnson v. McIntosh.*³ It's 1823. The United States is forty-seven years old and the entire country is based on grabbing Indian land as quickly as possible in as many ways as can be humanly devised...[Chief Justice] Marshall vested absolute title to the land in the government and gave Indians nothing more than the right of occupancy, a right that could be taken away at any time...

Finally, *The Round House* is the story of modern laws that did not protect the women in the tribe from violence. In the end, when those laws fail, an old form of justice is served.

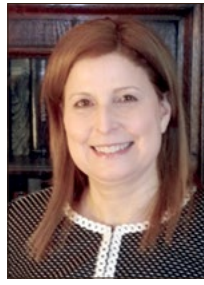
Questions of Justice and Law

The Round House, Louise Erdrich's fourteenth novel, was the winner of the 2012 National Book Award for fiction.⁴ As in Erdrich's other recent novels, *The Night Watchman* (2020) and *La Rose* (2016), in this novel questions of justice and the law, and unequal treatment under the law, are posed to readers.

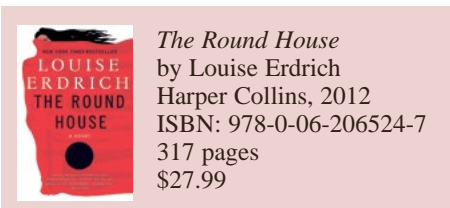
In *The Round House*, historic U.S. Supreme Court decisions with unfortunate, lasting effects on Native Americans are described by Joe or his father, Basil, the Chippewa tribal judge.

One is the 1823 decision, *Johnson v. McIntosh*, in which Chief Judge Marshall held, "[t]he United States, then...maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."⁵

Another is the 1876 decision in *United States v. Forty-Three Gallons of Whiskey*, upholding "the treaty between the United States... and the...Chippewa Indians, [which] pro-



Rhoda Y. Andors



The Round House
by Louise Erdrich
Harper Collins, 2012
ISBN: 978-0-06-206524-7
317 pages
\$27.99

claimed... "The laws of the United States now in force...prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect throughout the country hereby ceded, until otherwise directed by Congress or the President of the United States."⁶

Then there is the 1978 decision in *Oliphant v. Suquamish Indian Tribe*, on the question of tribal jurisdiction.⁷

Finally, we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians. But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians. They have little relevance to the principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.

The Round House is framed by the *Oliphant* decision. In the novel, women on the reservation are victimized sexually by non-Indians who are confident that they will not be punished, either in the courts, because

of indifference or prejudice, or under tribal law, which has no jurisdiction over them. *The Round House* asks, and answers, where else justice can be found.

Of note: On July 9, 2020, the U.S. Supreme Court, decided *McGirt v. Oklahoma*, a case with broad implications for Native Americans, reaffirming treaty rights and recognizing tribal sovereignty. As in *The Round House*, in *McGirt* one key question was which authority has jurisdiction over a crime on reservation land. The Court held, in an eloquent Opinion by Justice Neil Gorsuch, that state and local law enforcement cannot prosecute Native Americans for major crimes on tribal land; only the tribal courts and the federal government have such jurisdiction. No. 18-9526. S.Ct. (July 9, 2020).

Rhoda Y. Andors is an attorney with Bee Ready Fishbein Hatter & Donovan, LLP, in Mineola, where her primary focus is employment law and class actions. She was Co-Editor-In-Chief of Nassau Lawyer from 2016 to 2019.

1. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
2. *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876).
3. *Johnson v. McIntosh*, 21 U.S. 543 (1823).
4. <https://www.nationalbook.org/books/the-round-house/>.
5. *Johnson v. McIntosh*, 21 U.S. 543 (1823).
6. *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876).
7. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).



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LONG ISLAND BUSINESSNEWS



Need Career Counseling? Better Call Saul

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Better Call Saul is hardly a glowing endorsement of the legal profession. We've seen our protagonist, Jimmy McGill/Saul Goodman, fabricate documents, stage accidents, manipulate elderly clients, and join forces with an international drug cartel. Yet, there is one crucial way in which *Better Call Saul* surpasses other legal dramas. Unlike other shows and films, *Better Call Saul* does not focus on one type of attorney, or on making the legal profession seem exciting and glamorous. Rather, it gives an honest look at many of the different roles within the legal profession.

Hollywood has long been fascinated with legal drama, and there are no shortage of attorney depictions in film and on television. It's common for television and movies to focus on one specific type of attorney. Find a group of attorneys and ask them who inspired them to go to law school, and at least a few will likely tell you it was Gregory Peck as Atticus Finch in *To Kill a Mockingbird* or Sam Waterson as Assistant District Attorney Jack McCoy in *Law and Order*. We're drawn to the scrappy but principled solo practitioners, the no-nonsense prosecutors, or the flashy attorneys of *L.A. Law*. Laura Dern won an Academy Award for her portrayal of a matrimonial attorney who could drag her adversaries down to the dirt right after chatting congenially about sandwiches in *Marriage Story*. But for every real-life Vinny Gambini out there, there's a handful of attorneys shaking their heads every time they have to explain to their friends and relatives that their job "isn't really like that."

It's also common for Hollywood to focus on a dichotomy between two different types of lawyers. Think the "simple country lawyer" versus the slick big city prosecutor in *Anatomy of a Murder*, or the brash and scrappy New York City attorney versus the good ol' boy in *My Cousin Vinny*. Indeed, *Better Call Saul* spends a great deal of time during its early seasons exploring the differences between Jimmy's law practice and his brother Chuck's.

When we first meet Jimmy McGill, he's practicing law out of a nail salon boiler room, scrambling for work. If we flash forward (or backwards, depending on your perspective) to the first time we meet Jimmy's alter ego Saul, he's more successful, but working out of a strip mall with gaudy Constitution wallpaper in his office. The first description we hear of him is in the second season of *Breaking Bad*, when Jesse Pinkman famously tells Walter White, "We don't need a criminal lawyer. We need a *criminal* lawyer."¹ Saul's no longer working out of a nail salon, but we don't necessarily respect how he did it.

Chuck McGill, played by the remarkable Michael McKean, is Jimmy's opposite in every way. He's a founding partner of the prestigious Hamlin, Hamlin, & McGill, which occupies gorgeous office space with astounding natural light. Chuck is a legend in the local legal community—admired for both his sharp intellect and savvy advocacy skills. Some may fear him, but everyone respects him, and he is seen as a role model in the legal community.

And yet, Chuck's lifestyle is not aspirational. He struggles deeply with mental illness, which is manageable at first thanks to the goodwill he developed at his firm, and because he is a high achiever. But his mental illness, paired with his deep-rooted resentment towards his brother, is ultimately his undoing. Chuck was who he was, regardless of his standing in the Albuquerque legal community.

In *Better Call Saul*, there is very lit-



Melissa Holtzer-Jonas

tle glamour to be found in the legal profession. In Season 2, we watched Jimmy struggle to adapt to life at Davis & Main. In Season 5, we saw Kim Wexler struggle to find meaning in her work at Schweikart & Cokely. But *Better Call Saul* evolved past just showing the differences between firm life and solo-hustler life. Instead, it exposed the audience to the realities of working attorneys in all areas of the profession.

The Assistant District Attorneys we meet in *Better Call Saul* are not the Assistant District Attorneys we see in *Law and Order*. Deputy District Attorney Bill Oakley is always seen juggling an armload of files, sometimes struggling to keep them straight. Roy Wood Jr. from *The Daily Show* recently appeared as a public defender who seemed appreciative but bemused by Kim's pro bono work. He accepted Kim's offer to take on more pro bono cases, and brought her down to his office's basement to select her next cases. When we see what looks like an endless maze of pending files, we get a glimpse of how public defenders offices all over the country struggle to manage an ever-expanding caseload on an ever-contracting budget.

Better Call Saul shines a light on civil attorneys as well. Kim's regulatory and transactional work for Mesa Verde Bank might sound dry at first, but through Kim, we learn that such work requires a tremendous amount of discipline and attention to detail. In fact, Jimmy orchestrated Chuck's downfall by calling Chuck's attention to detail into doubt. One mistake on a permit application undid months of work, and cost Mesa Verde a substantial sum. Kim, on the other hand, is extremely competent and is always prepared. *Better Call Saul* is probably the most exposure television audiences have had to banking law.

Lest audiences think there's no drama in this practice area, Season 5 had a significant storyline involving Mesa Verde's attempted eviction of a stalwart tenant during the course of its efforts to build a call center. In-house attorneys don't get much airtime on television and in Hollywood. We first met Mesa Verde's in-house counsel, Paige Novick, as an acquaintance of Kim who helps her land Mesa Verde as a client after Kim was banished to Hamlin, Hamlin, & McGill's basement doing document review. Her role subtly expands throughout the series from Kim's point of contact to something that is part-lawyer and part-CEO whisperer to CEO Kevin Watchell. Real-life in-house attorneys may relate to this portrayal, as they are legal counsel, but are also an integral part of their client's internal corporate culture.

It would be a stretch to say that *Better Call Saul* portrays the legal profession in a flattering light, but it is a more favorable representation than one might initially think. The attorneys on the show may not be exciting, but they are serious, hardworking, and dedicated to their clients and their craft. Most of us may not ever be asked to pick up duffel bags full of money from drug dealers in the middle of the desert, but we may still see a lot of ourselves in this show.

Melissa Holtzer-Jonas is CaseSmart Counsel at Littler Mendelson, P.C. She represents employers in labor and employment matters pending before federal, state, and local administrative agencies.

1. <https://bit.ly/2AJO6Gr>



NCBA Updates Regarding COVID-19 Can Be Found:

ON OUR WEBSITE
WWW.NASSAUBAR.ORG

ON OUR FACEBOOK PAGE
[@NASSAU COUNTY BAR ASSOCIATION](https://www.facebook.com/NASSAU COUNTY BAR ASSOCIATION)

At this difficult time, the Nassau County Bar Association wants you to know we will do what we can to help our members with their legal and business responsibilities.

All NCBA, Court, and Nassau County updates regarding COVID-19 can be found on our website at www.nassaubar.org and our Facebook page. We are here if you need us.

Summer Arts/Entertainment

Book Review: *Know My Name, A Memoir*

*I'm a civilian who's been randomly selected to receive an all-access pass to the court system.*¹

Known in the media as the "Stanford Victim," as the "drunk victim," and as "Emily Doe," Chanel Miller in 2015 was sexually assaulted while unconscious. The assault took place behind a dumpster near Stanford University. The assailant was Brock Turner, a student she met at a fraternity party that evening. Stanford graduate students Carl-Fredrik Arndt and Peter Jonsson, known in the media as the "Swedes on bicycles," simultaneously saved Miller from further assault and held Turner for the police.²

Turner, known in the media as the "All-American Stanford swimmer," was convicted of three felony counts of sexually assaulting Miller. He served ninety days of a six-month sentence from Judge Aaron Persky, in response to a probation recommendation for a "moderate county jail sentence, formal probation and sexual offender treatment." The prosecutor had fought for a six-year sentence.³

When the Turner appeal was heard by the Sixth District Court of Appeal on July 25, 2018, his attorney argued that "Brock only intended to have intercourse." Miller notes that Justice Franklin D. Elia responded, "I absolutely don't understand what you are talking about."⁴ Not until August 8, 2018—three years and eight months after her assault—did Miller receive a two-word text from the prosecutor: "Judgment affirmed!"⁵

Forever known as the first judge to be recalled in California since 1932, Persky's lenient sentence and specific remarks about Miller and Turner resulted in the loss of his right to serve as a judge.⁶ Miller wrote:

*The judge was not God. He was one man, wearing a black smock, head of a small domain, ruler of a one-room kingdom on Grant Avenue. He was not the sole truth speaker, the rule maker, the final word. He was an elected official, voted out by 62 percent.*⁷

Miller's painstakingly beautiful prose

includes powerful descriptions of her relationships with those she had known her own life, as well as with those she had never met. Hundreds of strangers poured their hearts out to her in letters and cards sent to the prosecutor's office. And Miller contrasts the signature-by-signature collection of recall petitions (totaling 95,000 by January of 2018) with reams of hate letters and threats against her, so frightening that the police had to be stationed outside her home and the prosecutor had to have meetings to strategize on how to protect her.

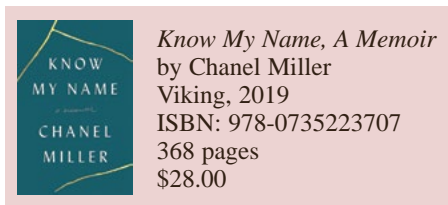
In New York State, the Commission on Judicial Conduct oversees judicial misconduct. Judges may be admonished, censured, retired, or removed from office by the Commission on Judicial Conduct.⁸ But the commission's disciplinary actions are subject to review. Judges of the Court of Appeals and justices of the Supreme Court, which includes the Appellate Division, may be removed by a two-thirds vote of both houses of the Legislature. Other judges may be removed by a two-thirds vote of the Senate on the recommendation of the Governor. Judges may be impeached by a majority vote of the assembly and removed by a two-thirds vote of the court for the trial of impeachments. That court consists of the President of the Senate, the Senators, and the Judges of the Court of Appeals.⁹

In California, however, judges are removed through the recall process, which begins with petitions signed by registered voters to place that decision on the ballot. Stanford University Professor Michele Dauber led the fight for the recall, obtaining the requisite signatures to place the recall on the ballot.¹⁰

Miller's Victim Impact Statement¹¹ and



Martha Krisel



Know My Name, A Memoir
by Chanel Miller
Viking, 2019
ISBN: 978-0735223707
368 pages
\$28.00

her memoir highlight college and university avoidance of thorough investigations out of fear of damage to their reputations, a phenomenon described by Stanford alumna Jennifer J. Freyd as "institutional betrayal."¹² Noting that "the crime of sexual assault depended on our silence,"¹³ the memoir is a roadmap for sexual assault victims unable to or afraid to prosecute their assailants because of shame, because of the lack of resources to miss work and school, and because of a system that opens up their own lives to incredible scrutiny, regardless of the fact that sexual assault is a crime.

Throughout, Miller acknowledges that she is uniquely situated because of the unwavering support of her immediate family, her boyfriend, the hospital personnel where she woke up to discover that she had been assaulted, and her many friends and strangers who never leave her through her four year nightmare.

I began this story alone as a half-naked body. I remembered nothing. There was so much I did not know. I was forced to fight, in a legal system I did not understand, the bald judge in the black robe, the defense attorney with narrow glasses. Brock with his lowered chin, his unsmiling father, the appellate attorney. The obstacles became harder, I was up against men more educated, more powerful than me, the game rougher, more graphic, serious. I read comments that laughed at my pain. I remember feeling helpless, terrified, humiliated. I cried like I've never cried before. But I remember the attorney's still shoulder as guilty was read. I know Brock slept

ninety days in a stiff cot in a jail cell. The judge will never step foot in a court room again. The appellate attorney's claims were shut down.¹⁴ One by one, they became powerless, fell away and when the dust settled, I looked around to see who was left. Only Emily Doe.¹⁵

Since Miller's assault, Title IX guidance has issued.¹⁶ California sexual assault laws have been amended.¹⁷ The dumpster is gone. A contemplative garden, created at the insistence of Stanford students, sits in its place.¹⁸

Martha Krisel is the Executive Director of the Nassau County Civil Service Commission. A Past President of the NCBA, Krisel currently chairs the NCBA COVID-19 Task Force.

1. Chanel Miller, *Know My Name* 315 (2019).
2. Lindsey Bever, *The Swedish Stanford students who rescued an unconscious sexual assault victim speak out*, *The Washington Post* (June 8, 2016), available at <https://wapo.st/37cuKpB>.
3. Miller, *supra* n.1, at 214.
4. Miller, *supra* n.1, at 322.
5. Miller, *supra* n.1, at 322.
6. Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a 6-Month Sentence for Sexual Assault*, *The New York Times* (June 6, 2018), available at <https://nyti.ms/2MSK4yF>.
7. Miller, *supra* n.1, at 321.
8. www.scjc.state.ny.us.
9. SCJC Determinations Database, available at <https://on.ny.gov/30mgjX>. If the Commission determines that public disciplinary action is warranted, it may render a determination to impose one of four sanctions. The Commission may admonish a judge publicly; censure a judge publicly; remove a judge from office; or retire a judge for disability.
10. Miller, *supra* n.1, at 253-54.
11. Katie J.M. Baker, *Here's The Powerful Letter The Stanford Victim Read To Her Attacker*, *BuzzFeed News* (June 3, 2016), available at <https://bit.ly/3f32UyP>; Miller, *supra* n.1, at 333.
12. Miller, *supra* n.1, at 297.
13. Miller, *supra* n.1, at 327.
14. Miller, *supra* n.1, at 322.
15. Miller, *supra* n.1, at 328.
16. 85 FRN 30026, effective 8/14/20, available at <https://bit.ly/2ze2SoA>.
17. See Cal. Penal Code § 289(e).
18. Office of the Provost, Stanford University, *Update on the contemplative garden* (Nov. 12, 2019), available at <https://stanford.io/2YfTY2w>.

IN BRIEF

Forchelli Deegan Terrana LLP is pleased to announce that Gregory S. Lisi, a Partner and Chair of the firm's employment & labor practice group, was installed as President-Elect of the Nassau County Bar Association (NCBA) on Tuesday, June 2, 2020. He will serve a one-year term and then become President of the NCBA in June 2021.

Quatela Chimeri, with offices in Hauppauge and Garden City, welcomes Howard B. Leff as senior counsel concentrating in the matrimonial and family law practice group. Mr. Leff brings more than 40 years of extensive state and federal court litigation, trial and appellate experience to the firm.

Farrell Fritz is pleased to announce that Brian P. Corrigan, a partner in the firm's estate litigation practice group, has been elected to the American College of Trust and Estate Counsel (ACTEC) as a Fellow. ACTEC is a national organization of more than 2,500 lawyers and law professors maintaining an active practice in probate and trust law or estate planning in addition to an outstanding reputation, exceptional skill, and substantial contributions to the field by lecturing, writing, teaching and participating in bar activities.

Ronald Fatoullah of Ronald Fatoullah & Associates presented several educational virtual webinars for the public: "Aging in Place During These Challenging Times," "The NY Statewide Senior Action Council: Now More Important Than Ever!"; "Difficult Conversations With Family Members" a panel presentation with other professionals offering tools to ease the strain of difficult family conversations and suggestions where to find resources; "Confusing, Complicated and Frustrating-How Advocacy is Critical for Legal, Medical, and Insurance Issues" and "Be Prepared: Living Trusts and The New NY Medicaid Home Care



Marian C. Rice

Rules." Mr. Fatoullah was also a featured speaker for the National Business Institute and presented "Strategic Use and Benefits of Medicaid Trusts".

Barrie E. Bazarsky, has joined the Smithtown office of Futterman, Lanza & Pasculli, LLP as a personal injury senior associate bringing decades of experience as a personal injury attorney including as managing attorney for the Jacoby & Meyers LI personal injury unit.

NCBA Past President Marian C. Rice of L'Abbate Balkan Colavita & Contini, LLP has been appointed as a member of the NYSBA Committee on

Professional Ethics and Chair of the Working Group on Public Trust and Ethics within the newly created NYSBA Task Force on Attorney Wellness.

The In Brief column is compiled by Marian C. Rice, a partner at the Garden City law firm L'Abbate Balkan Colavita & Contini, LLP, where she chairs the Attorney Professional Liability Practice Group. In addition to representing attorneys for 35 years, Ms. Rice is a Past President of NCBA.

Please email your submissions to nassaulawyer@nassaubar.org with subject line: IN BRIEF

The Nassau Lawyer welcomes submissions to the IN BRIEF column announcing news, events, and recent accomplishments of its current members. Due to space limitations, submissions may be edited for length and content.

PLEASE NOTE: All submissions to the IN BRIEF column must be made as WORD DOCUMENTS.

COVID Help ...

Continued From Page 1

"I never imagined that the world we are living in, or my first year of law school, would be changed forever from an invisible threat. This scary and unfortunate situation created an opportunity for law students to have an instant impact to assist families, businesses, and the community affected by the global pandemic. In a short period of time, I have built a great relationship and I have learned immensely from Mr. Glenn Wurzel, of the Wurzel Law Group, PLLC. Each inquiry has provided newfound knowledge and compassion that cannot be taught in a classroom setting. Although social distancing has prevented discussions in person, Mr. Wurzel has been committed to helping me understand and be a part of assisting each individual." said St. John's Law student William Bird.

The NCBA would like to thank the members who have so graciously donated their time to make this program a success, and to the law students who were eager to help and learn this summer.

"Being an intern with the NCBA Covid-19 Law Student Pro Bono Program is a very meaningful experience. Covid-19 has certainly affected everyone, and it is rewarding to be able to do something to help those who need assistance. One of our inquirers was someone who was previously in a mixed-status marriage and was therefore not issued a stimulus check. We helped put her in touch with a law firm that could further assist her. After every inquiry, my mentor explains the legal issues and lessons.

The internship has given me hands-on legal experience and an opportunity to give back to the community," said St. John's Law student Abigail Ziegler.

If you are interested in volunteering on the Task Force, please contact NCBA Communications Manager Ann Burkowsky at aburkowsky@nassaubar.org or (516) 747-4071 and indicate your area of practice. The COVID Community Task Force may be reached by email at covidhelp@nassaubar.org. An NCBA staff member will be in touch within two business days to direct the individual to a volunteer attorney skilled in that area of practice. Residents, small business owners, and NCBA members may also visit the NCBA COVID-19 resource web page at www.nassaubar.org for additional resources and helpful information.

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LONG ISLAND BUSINESSNEWS

Book Review: *Why Fish Do Not Exist*

“Chaos is the only sure thing in this world,” Lulu Miller writes in her prologue. “A smart human accepts this truth. A smart human does not try to fight it.” But why, then, does a smart human get up in the morning? If our lives are cosmically insignificant—as flies to wanton boys, in Shakespeare’s words—then why should we act as if we or anyone around us is significant? Perhaps these questions are not what we would look for in a beach read, but Miller’s search for the answers is engaging and enlightening.

Why Fish Do Not Exist is the story of one man’s effort to fight the chaos, and the folly of such a quest. It is the story of David Starr Jordan, nineteenth-century taxonomist and the first president of Stanford University, and his lifelong mission to categorize creation despite a string of personal and professional tragedies. It’s also the story of Ms. Miller, whose own encounters with chaos led her to study Jordan’s life for inspiration—with some success.

Jordan made a name for himself discovering thousands of species of North American fish. Of course, many of these had been harvested by local fishermen for generations. But it was Jordan who captured the holotype, the single type specimen upon which the description and name of a new species is based. By that measure, Jordan created thousands of species, one-fifth of all known fish in his time. By 1906, his offices held towering shelves full of specimens in meticulously labeled jars. Glass jars. At Stanford, just down the road from San Francisco. In 1906.

The infamous earthquake shattered Jordan’s life work in minutes, but it did

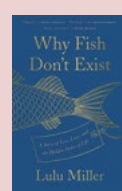
not break his spirit, no more than could the deaths of his first wife and two of his children. He and his staff worked to piece together what they could, and recovered thousands of species. He then ensured that his knowledge was preserved, published, protected from the chaos. And then he resumed his life’s work, discovering even more species.

Jordan’s perseverance certainly appears inspiring. It did to Ms. Miller, whose childhood well acquainted her with this world’s cruelty. Her scientist father assured her that that meaning of life was “Nothing!” Yet he just as confidently asserted: “While other people don’t matter, either, treat them like they do.” Unsurprisingly, such hypocrisy left young Miller unmoored. She drifted to the life and writings of Jordan, seeking a better response to the chaos.

What Miller found, however, was the troubling source of his drive to classify creation. A childhood obsession with naming the stars in the sky and the local flora, combined with a strict Puritan upbringing, led the grown Jordan to the tutelage of renowned naturalist Louis Agassiz. From his mentor, Jordan adopted the belief in the *Scala Naturae*, a divine order of all living creatures, from the lowest parasites to Man himself. A corollary to this “holy



Christopher J. DelliCarpini



Why Fish Do Not Exist
by Lulu Miller
Simon & Schuster, 2020
ISBN: 978-1501160271
240 pages
\$26.00

ladder” theory was that species could rise or fall based on individuals’ behavior. Jordan’s work in discovering species also entailed placing each in the divine order, and discerning how species—including our own—could fall in the rankings.

This concern for “degeneracy,” coupled with a flawed understanding of genetics, made Jordan a vocal advocate for eugenics—and sadly, a very successful one. He argued that poverty, criminality, and other social ills were inheritable traits. Society could therefore eliminate these traits, and forestall our species’ degeneration, by cutting off the tainted bloodlines. And cut we did, with forced-sterilization laws in the 1920’s and state institutions that were concentration camps in all but name. One cannot read Miller’s account without admitting that the intellectual roots of Hitler’s Final Solution were nourished in American soil.

How could such evil spring from the noble desire to discern the order of nature? Because there is no such thing. The natural order that Agassiz preached, that Jordan spent his life searching for, is nothing more than a human construct, an ultimately absurd attempt to constrain the chaos. Like the mythological bandit Procrustes hacking or stretching his victims to fit an iron bed, forcing Nature into a human framework is bound to cause pain.

Jordan’s persistence, Miller learns, was a powerful tool, however disastrous in the wrong hands. “Grit,” a popular topic in modern self-help literature, is the ability to believe in one’s eventual success despite a string of failures. We admire grit in athletes who become champions after getting cut from some team, or best-selling authors who kept typing as the rejection letters piled up. But grit is only a tool, no more or less admirable than the ends towards which it is used.

Indeed, Jordan’s faith in the greater good that he pursued may have led him to commit the unthinkable. Miller takes a detour down a rabbit hole of circumstantial evidence implicating Jordan in the murder of Jane Stanford, widow of the university’s founder and Jordan’s subsequent patroness. She wanted him removed from office, which would have thwarted Jordan’s mission. And Mrs. Stanford did die from an apparent poisoning—shortly after surviving another apparent attempt. And upon her very convenient death, Jordan immediately began arguing that the cause was anything but poisoning—and kept beating that drum for years. This theory has apparently gained little traction, but it serves Miller as a metaphor for the tragic consequences of blind faith in the nobility of one’s cause.

In a final irony, Miller shows how Jordan’s life’s work has since been proved a sham. His commitment to eugenics, born of a desire to strengthen our species against chaos, turns out to have been completely counter-productive. It is genetic diversity that best ensures

survival, as some of a species will have the traits necessary for whatever conditions arise. Ultimately, Jordan’s drive to identify species—create them, really—proves a folly. Modern scientists concede that “fish” do not actually exist; upon close examination, each creature that you pull from the water has more in common with other species on land than with anything that was swimming alongside it. Chaos cannot be contained in glass jars.

This struggle to find order in chaos, or to impose it, is endemic to our profession. The second-largest freestanding metal sculpture in New York City dominates the plaza outside Columbia Law School.¹ *Bellerophon Taming Pegasus* is a metaphor for our efforts to tame with laws the wild forces of nature. As sculptor Jacques Lipchitz put it, “You observe nature, make conclusions, and from these you make rules...and law is born from that.”² Lawyers work to impose order on chaos, whether prospectively as transactional and regulatory attorneys and legislators or retrospectively as litigators, mediators, and judges. But the ultimate futility of the task should make us circumspect. We can alleviate some of the chaos, some of the time. Supplanting chaos with law, however, is as fatuous as trying to lasso a winged horse.

Indeed, our struggles against chaos are commemorated in another metal sculpture that has cropped up across our nation since 9/11. Twisted steel beams dot the countryside, memorials to a day when chaos gained the upper hand. And who unleashed that chaos but a group of men committed to imposing their own order? That these girders have found resting places in contemplative spaces, however, should reassure us. The chaos will always come back, but we can always learn from it, grow from it, and promote a more enduring peace.

Miller shows us that each of us can also claim a personal victory against the chaos. Having been let down by Jordan, she returns to her father’s advice, and finds happiness in caring about others. She loses the compulsion to find meaning in the universe and finds it in her family, the one she grew up with and the one that she makes as an adult. Her journey with Jordan started with a break-up, and ends with her finding love again.

But has Miller found the answer, or just forgotten the question? We intuitively know that we must treat each other as if we matter. But what rational basis is there for doing so? Miller’s father dismissed religion as a comforting lie, but is love itself the opiate, helping us forget the truth that we cannot face? Perhaps Miller’s father had it backwards. Perhaps our inborn imperative to care for others is evidence of a creator who cares for each of us.

Regardless, we can each benefit from knowing our limits in a limitless universe. In this time of pandemic and civil unrest, with so much beyond our control, we can find comfort in accepting that there never was much within our control, and be grateful for the good that we can accomplish. Perhaps, like Miller, we can be content to comfort each other through the chaos, to share some lemonade when life gives us lemons.

Christopher DelliCarpini is an attorney with Sullivan Papain Block McGrath Coffinas & Cannavo, P.C. in Garden City, representing plaintiffs in personal injury litigation. He is also Co-Chair of the NCBA Publications Committee.

1. If you came here looking for the largest such sculpture, try Ellis Island.

2. Sonia von Gutfeld, *Flying Horses, Tighrope Walkers and Other Campus Icons*, Columbia Law School, available at <https://bit.ly/3hcfSG0>.

LONG ISLAND BUSINESSNEWS

Long Island Business News is working tirelessly to keep our communities informed as the effects of COVID-19 continue to impact Long Island and our world.

However, no one works harder than the men and women on the front lines — our doctors, nurses, medical staff and first responders who risk their lives each day to protect our society. Thank you for your dedication to your craft and your community.

You are our heroes.

LIBN salutes those employees operating under essential business guidelines from restaurant staff, to mail couriers, to grocery employees, and every worker in between.

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Book Review: *Cain v. Abel: A Jewish Courtroom Drama*

The reader becomes a member of the jury in the murder trial of Cain in a dramatic reinterpretation of the biblical Cain and Abel story titled *Cain v. Abel: A Jewish Courtroom Drama*, written by Rabbi Dan Ornstein and published by the Jewish Publication Society this past April. The author imagined and presented the story of the world's first murder and fratricide as though it was the trial of Cain, delving into how universal moral principles of justice, compassion, and personal responsibility integral to Cain and Abel relate to present-day juries, the legal system, and the world at large.

The trial in *Cain v. Abel* is not about guilt or innocence. The "Am I my brother's keeper?" defense did not fly, and Cain ultimately confessed to the murder. Instead, the trial is akin to the sentencing phase of a capital trial with the reader (jury) is expected to balance justice and mercy in weighing evidence and evaluating the appropriateness of Cain's punishment (being cast into exile from Eden, but not put to death).

Mercy and Justice

To the author, justice (accountability) and mercy (compassion) are the twin foundations of the story of Cain that must be balanced against each other. He reports that he has given much thought to the biblical story and these concepts ever since he first heard Bruce Springsteen's song "Adam Raised a Cain" on the *Darkness on the Edge of Town* album.

Cain v. Abel cleverly restructures the biblical story as a courtroom drama. The text of the biblical passage in Genesis 4:1-16 becomes the "crime report," a forensic moral assessment is held to determine whether Cain is competent to stand trial (he is), and the chief Investigator in the matter is God, whose pre-trial deposition is taken. Celestial angels are the prosecuting and defense attorneys, respectively named "Truth" for justice and "Lovingkindness" for mercy. Over the course of the four-day trial, Adam, Eve, Cain, and Sin are called to the stand as fact witnesses. Expert testimony is taken from a number of prominent rabbis from throughout the ages.

Among the most interesting aspects of the book, is that what sparked Rabbi Ornstein, who is not an attorney, to envision the story of Cain and Abel as a trial, was his experience serving jury duty on a criminal case. As recounted in the book's introduction, at the beginning of jury selection, the judge admonished the prospective jurors, saying, "I know that this process will be very boring, but it is one of the most significant things you will ever do in your lives. If you are selected

for this jury, you will have a tremendous responsibility placed upon your shoulders."

The author/prospective juror wrote that the judge's admonition made a deep impression on him, confronting him with the realization that no matter how carefully the judge and the lawyers selected the jurors, the jury's sense of fairness in judging the facts and testimony would be critical to the defendant's life. The admonition reminded him of a crucial point about justice that the teachings of the story of Cain and Abel make—that those who would wield the authority of justice and pronounce judgment without giving full consideration to all relevant facts and the grave consequences of their actions become Cain, and the accused Abel.

Through that lense, Rabbi Ornstein imagines the story of Cain and Abel as a detective/courtroom story: facts and circumstances lead up to the crime (Cain has become extremely despondent and angry and is warned by God to control the evil of his passion), the crime is committed, a defense is raised (Am I my brother's keeper?), and, after a conviction and sentencing, the defendant pleads for mercy ("My punishment is too great to bear!").

The book contains "transcripts" from the forensic moral assessment and trial, interspersed with commentary by the author. The order that the trial witnesses take the stand in *Cain v. Abel* differs from the usual order we are accustomed to in that the expert witnesses testified before the fact witnesses. Well-respected rabbis who lived at different times in history were called as experts (no *Frye* hearings in the book). The experts gave their interpretations of the biblical text through the back-and-forth of their answers to questions on direct and cross-examination.

Direct and cross-examination also allowed the lawyers and the expert and lay witnesses to draw out evidence and establish facts that are missing from the biblical text. Examples of such information included the reason for Cain's anger, whether there was a failure to warn, i.e., was God's warning to Cain about Sin sufficiently specific, what Cain and Abel were arguing about (property, religion, or a woman), what Cain said to Abel just before they went to the field where the murder took place, and where precisely the murder occurred.



Ira S. Slavitt



Cain v. Abel: A Jewish Courtroom Drama
by Rabbi Dan Ornstein
The Jewish Publication Society, 2020
ISBN: 978-0827614673
232 pages
\$23.95

Highlights from the Trial

The trial testimony of the fact witnesses provided a few moments of drama. For instance, as the prosecuting angel's cross-examination of Eve was faltering, suddenly the prosecutor motioned to co-counsel, who handed the prosecutor a file containing a recently obtained prior inconsistent statement. Apparently the discovery rules were lax, because Eve's admission that she authored the prior statement outweighed the defense's objection that they had no prior warning of the existence of the note.

Also, a victim impact statement from none other than the murdered Abel himself, in the form of a digital recording, was played to the jury. The presiding judge explained the author's dramatic license: "We read in the crime report that Abel's blood cried out from the ground to God. In preparation for this proceeding, the Prosecution returned to the scene of the crime and found Abel's blood still present there, crying out." Abel's testimony concluded with the surprise exposure of the true identity of the presiding judge in a sort of reverse of the man behind the curtain scene in *The Wizard of Oz*.

Perhaps the most intriguing testimony came from the fact witness, Sin. The transcript begins with the incongruity of Sin affirming to "tell the truth, the whole truth, and nothing but the truth?" Sin testified to being 100 percent God's creation and an employee of God who also works as an independent contractor (possibly making this legal distinction for tax purposes or to advertise availability for side jobs). Sin's testimony was candid and harsh, and included the following: "people are not angels. They listen to God, they listen to parents, judges, teachers, friends, therapists, police, clergy ... Then they usually do whatever I tell them anyway."

The analysis and discussion of Sin's role in the story of Cain and Abel brings the juror to the issue that Rabbi Ornstein has stated lies at the core of his book—the moral question of whether people are truly capable of exercising free will to avoid succumbing to evil temptation. God warned Cain to resist the pull of the ever-lurking Sin and to not let his emotions get the better of him, and told him

that he was capable of mastering Sin. But did God equip humankind with the tools to successfully resist? Rabbi Ornstein's answer is a definitive "Yes."

Another of the key moral points the author derives from Cain and Abel takes us back to the author's jury service and the judge's admonition about the gravity of the responsibility of being a juror, especially in a capital case. The literal translation of the biblical passages of the story emphasizes that taking the life of an innocent person destroys not only that person but also destroys his or her potential progeny who will never be born. (Inasmuch as some biblical characters are said to have lived for hundreds of years and had many offspring, this might be the earliest application of the Fertile Octogenarian Rule.)

Although the case that the author was a prospective juror on was not a capital case, he thought of the potential the jury's decision might have to irrevocably change the defendant's life. He was also reminded of the historical fact that judges in courts of ancient Jewish communities used, of countless quotations in the Bible that could have been used to make the point, the story of Cain and Abel to warn witnesses in capital cases against providing false or inaccurate testimony. Cain and Abel's story was used as a legal teaching in court proceedings.

Timeless, and Timely

The author's goal is to challenge us as "jurors" to use the story as a mirror to reflect on ourselves and our community. That he, who has no professional association with the legal system, sees placing people in the role of jurors as an effective way of stimulating thoughtful study of Cain and Abel is a testament to his reverence to the importance of jury trials in searching for the truth and reaching a just result. Lawyers should be proud to play such a prominent role in that system.

Cain and Abel has received critical acclaim from rabbis and others who have rigorously studied and analyzed the biblical passages and are experts on the subject. For readers who are less learned in the topic, the alternating courtroom transcripts and commentary by Rabbi Ornstein is an engaging way to learn about the story and its paradoxes that have been vigorously debated for millennia.

Ira S. Slavitt is a member of Levine & Slavitt, PLLC, with offices in Mineola and Manhattan. He is Chair of the NCBA Plaintiff's Personal Injury Committee, an NCBA Delegate to the NYSBA House of Delegates, and a past NCBA Director.

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NEW DEAN ANTHONY MICHAEL SABINO



Anthony Michael Sabino was elected as Dean of the Nassau Academy of Law for the 2020-21 Bar year. Professor Sabino is a practicing attorney and nationally recognized expert on a variety of legal subjects, and a tenured full Professor of Law at St. John's University and Tobin College of Business. Formerly judicial law clerk for a prominent federal judge, he has published well over one hundred articles for the nation's leading law reviews and journals, which in turn have been cited by some of the country's highest federal appellate courts, including the Fifth and Seventh Circuit Courts of Appeals, the D.C. Circuit by now-Justice Ruth Bader Ginsburg, as well as by many Ivy League and other renowned law reviews. Professor Sabino has written some of the leading articles on white collar crime, securities fraud, arbitration, bankruptcy, and corporate law. In recent years, he has authored no less than six *amicus curiae* briefs in cases of constitutional import pending before the U.S. Supreme Court.

Professor Sabino has been interviewed on television (including ABC, NBC, CBS, CNN, Bloomberg TV, CNBC, Fox News, and the BBC) and radio (including WCBS, WINS, WWOR, WABC, Bloomberg Radio, AP Radio, and NPR) as an expert on: numerous "white collar" and securities fraud trials, including those implicating Bernard Madoff, Raj Rajaratnam, and Martha Stewart; the GM, Chrysler, Enron, WorldCom, and airline bankruptcies; the Microsoft antitrust cases; and many other legal controversies. He has been quoted by the Wall Street Journal, New York Times, Bloomberg.com, Forbes, MarketWatch, Dow Jones, Washington Post, Chicago Tribune, Boston Globe, Miami Herald, and other newspapers and publications across the nation and the world.

He practices law with Sabino & Sabino, P.C., Mineola, and maintains a vigorous legal practice in a variety of fields, representing corporate and individual clients in the federal courts, in arbitrations and mediations at the stock exchanges, and elsewhere. He is a fully trained arbitrator and mediator for FINRA, the Southern District of New York, the Nassau County State Supreme Court, and other organizations.

Professor Sabino frequently organizes and lectures at continuing legal education seminars. He has chaired the Federal Courts, ADR, and Corporate, Business & Securities Law Committees of the Nassau County Bar Association, and is a former NCBA director. He is active in numerous other charitable and civic organizations, and is an elected Trustee of the Village of Munsey Park, New York.

In addition, the following attorneys were elected to Nassau Academy leadership positions for the 2020-21 membership year: Associate Dean Terrence L. Tarver, Tarver Law Firm, Garden City; Assistant Deans Susan Katz Richman, Principal Court Attorney currently serving as Guardianship Compliance Referee for Nassau County and Michael E. Ratner of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone LLP, Lake Success; Secretary Gary Petropoulos of Catalano, Gallardo & Petropoulos LLP, Jericho; Treasurer, Lauren Bristol, Kerley Walsh Matera & Cinquemani, PC, Seaford; and Counsel, Matthew V. Spero, Rivkin Radler LLP, Uniondale.

CLE On

Please be advised that w
1 to present until m

August 4, 2020

**Dean's Hour: Town Hall Meeting
Division ADR Coordinators**

With the NCBA Alternative Dispute
12:30—2:30 PM

2 credits in professional practice.
Skills credits are available for new

A discussion on the current state of
tion in the time of pandemic.

Moderated by Jess Bunshaft and M

Panel: Lisa Courtney, Statewide AL
Coordinator for 3rd, 4th, 9th & 10th
Judicial District Nassau County; Caro
Second Department; Mary E. Porte
Suffolk County and Court Attorney
tional speakers TBA.



PROGRAM CALENDAR

ALL PROGRAMS PRESENTED VIA ZOOM.




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Membership benefits for the 2020/21 year include 12 credits of On Demand viewing.

We are unable to process CLE credits for On-Demand and Zoom programs including any committee meetings, dated July membership has been renewed for the new membership year that began on July 1 and runs through June 30, 2021.

<p>g with New York State, County, and Appellate Resolution Committee y admitted attorneys. ADR, moving cases forward and maximizing the use of media- arilyn Genoa, Co-Chairs, NCBA ADR Committee DR Coordinator, NYS Unified Court System; Joel Kullas, ADR h Judicial Districts; Yvonne Marin, ADR Coordinator, 10th Ju- l Swidler, Mediation Coordinator for the Appellate Division r, Acting ADR Coordinator for the 10th Judicial District- Referee to the District Administrative Judge’s Office. Addi-</p>	<p>August 12, 2020 Dean’s Hour: Dreams Deferred Amongst Racial Covenants: The US Supreme Court Case Which Inspired Lorraine Hansberry’s <i>A Raisin in the Sun</i> <i>With the NCBA Diversity and Inclusion Committee</i> 12:30—1:30 PM 1 credit in diversity, inclusion and elimination of bias</p>  <p>Program presented by Rudy Carmenaty <i>Vice-Chair, NCBA Diversity and Inclusion Committee</i></p> <p>Lorraine Hansberry’s landmark play, <i>A Raisin in the Sun</i>, finds its origin in a landmark U.S. Supreme Court case <i>Hansberry v Lee</i>. The story depicted on stage was derived from a lawsuit by the author’s father challenging racially discriminatory housing practices in 1930s’ Chicago. The beauty and power of the play lies in its authenticity, an authenticity born of the American legal system.</p> <p><i>Program will be presented via Zoom. Details to follow in future NCBA e-blast. Credit is free to NCBA members and \$35 for non-members.</i></p>
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**Hon. Joseph Goldstein Bridge-the-Gap Weekend
October 17 & 18, 2020
(rescheduled from March 14 & 15, 2020)**

TBD IF PRESENTING IN-PERSON, VIA ZOOM, OR SOME COMBINATION THEREOF*

The Academy wishes to thank the Goldstein Family for their continuing support of Academy efforts.

The Impact of Divorce on Your Will

Every year in the U.S., nearly 2.5 million divorce proceedings are filed (approximately 1 divorce every 13 seconds). In New York alone, nearly 900,000 divorce proceedings are filed annually (approximately 1 divorce every 36 seconds). Second and third marriages are even more likely to end in divorce than a first marriage. In light of the nation's strikingly high divorce statistics, more and more people are turning to attorneys to learn how to effectively plan their estates in light of the uncertainty of marriage, the impact of a divorce, judicial separation, or annulment as such situations effect their estate planning documents (i.e., Wills, Trusts, Health Care Proxies/Living Wills, Powers of Attorney and Statutory Gifts Riders).

Background

New York's Estates Powers and Trusts Law; 5-1.4, enacted in 1966, addresses this very issue. Prior to this pivotal statute's enactment, the mere existence of a divorce, judicial separation, or annulment did not result in the revocation of a bequest or a nomination for a fiduciary appointment made to a new former spouse in a will. When faced with this issue, courts consistently ruled that bequests to, and fiduciary nominations of, former spouses were upheld due to the failure to implement new estate planning documents after a divorce. This finding led to many former spouses being enriched, and many families facing the difficulty of having an ousted former spouse now in charge of their loved one's estate. This result was, unsurprisingly, not the testator's intent immediately prior to

death but rather a result of his/her failure to timely update his/her estate planning documents.

From 1966 through 2008, Section 5-1.4 afforded certain safeguards to divorced individuals. While the statute revoked bequests and fiduciary appointments to former spouses generally, the statute did not address the effect of divorce or annulment on other common estate planning documents. In 2008, Section 5-1.4 was repealed and replaced with a much more robust statute that now includes judicially separated couples, and not just divorces and annulments. The statute, which previously did not address the revocation of an individual's appointment by a former spouse as that spouse's healthcare proxy or agent appointed to control disposition of remains (both previously covered in the Public Health Law §2985 and §4201, respectively), now covered these appointments as well as the appointment of former spouses as agents under a power of attorney.

The Scope of EPTL 5-1.4

Section 5-1.4 states that a divorce, judicial separation, or annulment of a marriage will serve to "revoke" any revocable dispositions or appointments of property made to the former spouse by one or more of the following estate planning instruments: revocable trust, will, TOD beneficiary designation, life insurance beneficiary, bank account beneficiary, power of appointment or power of disposi-



Jonah H. Blumenthal

tion, nomination as fiduciary or representative (including personal representative, executor, trustee, conservator, guardian, agent, or attorney in fact) held by or in favor of the former spouse.

Essentially, the statute terminates the former spouse's interest in all such assets, by deeming the former spouse to have "predeceased" the creator of the document. When assisting clients, attorneys must be careful to review the specific terms of the govern-

ing instruments involved. While the statute's revocation is automatic in most cases, the express terms of the governing instrument will rule the day when the language specifies a different result from the statute.

Of course, individuals are free to make bequests to a former spouse under a will or a trust executed after a divorce, judicial separation, or annulment, if he/she chooses to do so. Furthermore, although certainly not common, especially in the light of the contentious nature of many divorces, clients may choose to have the bequests and nominations still available to his/her soon to be spouse even in the event there is a future divorce, but to do so, the drafter of the instrument must include specific express terms to allow the bequest or nomination to survive. The statute also states that "any disposition, appointment, provision, or nomination revoked solely by this section shall be revived by the divorced individual's remarriage to the former spouse."

Scenarios Not Addressed by EPTL 5-1.4

The application of Section 5-1.4 is only triggered in the event of a divorce, judicial separation, or an annulment. In other words, absent one form of court involvement or another, individuals will not receive the benefits and protections of Section 5-1.4. If, for example, a married couple separates informally and the separation does not constitute a "legal separation," the estate planning documents are not revoked under the statute. Section 5-1.4 (f) (2) defines a "legal separation" as a final decree or judgment of separation rendered against the spouse and recognized as valid by New York State law. No magic number of years spent living apart is long enough to constitute a legal separation decree or judgment of divorce in New York State.

Similarly, if a married couple is in the midst of a matrimonial proceeding but a divorce, judicial separation, or annulment has not been finalized, Section 5-4.1 and its protections are not available. Please consider that as soon as a spouse files a summons in a matrimonial action, the court usually places restrictions on the transfer of certain assets which may delay the outcome of the divorce proceeding. There are, of course, no restrictions on making changes to any estate planning documents prior to filing for divorce or separation. Once a stipulation of settlement is approved by the court

and finalized, it is important for your estate planning attorney to review the settlement document to ensure that the new estate planning documents do not violate the terms of the stipulation of settlement.

Irrevocable trusts are not contemplated by the statute. Even if an individual is the settlor of an irrevocable trust, his/her status as the settlor does not necessarily provide him/her with the authority to revoke the trust or any bequests or fiduciary designations set forth in the trust agreement. For example, if the settlor creates a life insurance trust (ILIT) for the benefit of the current spouse and the couple subsequently divorces, Section 5-1.4 does not revoke this bequest (i.e., the life insurance proceeds) made to the former spouse. The revocation of the former spouse's bequest would need to be addressed by a separation agreement, the express terms of the irrevocable trust, or some other agreement wherein the revocation of the bequest is agreed to between the parties.

While Section 5-1.4 relates directly to dispositions or appointments made to a former spouse, it does not contemplate dispositions or appointments made in favor of the family members of a former spouse.

For example, if a divorced individual nominates a former spouse as his or her executor and the former spouse's sibling as successor executor, Section 5-1.4 would only revoke the appointment of the former spouse as executor but not the sibling of the former spouse as successor executor. Similarly, if the divorced individual provided for a bequest to a former spouse and a bequest to the former spouse's sibling, only the bequest to the former spouse would be revoked but not the bequest to the former spouse's sibling. Of course, as is the case with any provision specifically excluded from Section 5-1.4, the governing instrument can provide that said nomination or bequest is contingent on the divorced individual being married to the former spouse at the time of his or her death.

While individuals are afforded certain protections under Section 5-1.4, it should be viewed as a fallback rather than a preferred course of action. Therefore, it is important to review all your estate planning documents before, during, and after a matrimonial proceeding. As always, you should be an active and knowledgeable participant in your estate plan and not leave important decisions up to the default rules established by our legislature.

Your careful attention to your estate plan can help to avoid certain unintended consequences that are not contemplated by Section 5-1.4, but are no less deserving of your consideration. For these reasons, it is always important to be sure that your estate planning documents are drafted by a knowledgeable estate planning attorney.

Jonah H. Blumenthal is a tax, trusts and estates attorney at Forchelli Deegan Terrana LLP in Uniondale. He primarily focuses on estate and tax planning, business succession planning, estate administration and guardianship matters.

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Marketing Smart During the COVID Crisis

COVID-19 is causing unprecedented challenges in virtually all areas of attorneys' personal and professional lives. While balancing family and work concerns, attorneys may also be facing significant financial repercussions because of the coronavirus pandemic. Some attorneys may find themselves without employment or with a sudden drop in income. Existing clients may have trouble paying for legal services affecting cash flow. New business may be harder to get in the coming months or longer. There are many asking whether this is a good time to be marketing themselves. The answer is yes.

Marketing must continue, but some tactics need to change and adapt to the new circumstances. Attorneys must stay top of mind with their contacts, so they get the business when opportunities arise. These efforts can also be leveraged to help firms reach new audiences and generate future business. However, this is not the time to use marketing to try to "sell" legal services. Instead, firms need to demonstrate value and be helpful. While there are different ways to accomplish that goal, social media marketing is one of the most effective and inexpensive.

The Importance of Building A Strong Online Brand

Unfortunately, many lawyers put little effort into their online brand. Typically, the reasoning is that enough business is generated through word of mouth so digital marketing is not necessary or "worth" the expense. These attorneys may have a basic website and social media profile for legitimacy, but not much beyond that. However, research shows this is a

significant missed opportunity.

Legal software provider Clio recently released its annual Legal Trends Report 2019, which surveyed more than 2500 lawyers and 2000 consumers to help identify why some firms succeed in increasing revenue and others do not.¹ In surveying consumers about how they found an attorney, 59% said they asked someone they knew for a referral, 57% searched on their own, and 16% did both.

However, there were some significant differences based on age. Millennials gave less weight to referrals and more weight to online branding as compared to older generations. The lesson for law firms is that regardless of whether current clients are relying on information found online, future clients are likely to use it as an important factor in decision-making. A strong digital brand is necessary to compete. It may not guarantee the firm gets the business, but the lack of one could lose the business to competitors.

Benefits of Social Media

Attorneys should have a multi-pronged approach to strengthening their online brand, including a website, search engine marketing, publicity, and other methods. Social media is an essential part of this mix because it amplifies all other forms of marketing and business development, both digital and in-person.

For instance, networking is an invaluable way to get new business; however, attending one or even a few networking events is seldom effective. Joining a group, attending



Edie Reinhardt

events regularly, getting to know people, and following up afterwards is what builds relationships that turn into business. The best way to get new clients directly and through referrals is to be consistently visible and engaged with contacts. It has always been difficult to do that in-person even before the pandemic. However, with fewer in-person interactions now, other types of communication must take their place. Social media provides constant touchpoints with contacts helping to network with contacts and strengthen relationships.

Furthermore, using social media helps attorneys build credibility and demonstrate expertise to potential prospects and referral sources. The goal is to share information that is valuable and puts attorneys in a positive light. Targeted efforts can reach new audiences as well as solidify an attorney's reputation among those who know him or her or have been referred to the attorney. Consistently positioning oneself as a helpful resource also makes an attorney more memorable. Every lawyer has competitors. Offering value for "free" helps attorneys stand out and stay top of mind with contacts.

For those who have taken little interest in social media, now is the perfect time to change that.

LinkedIn Profile Essentials

LinkedIn is a must for all attorneys regardless of practice area. Effective social media marketing begins with an attorney's

individual LinkedIn profile. This is more than a resume; it is a valuable marketing opportunity. It should be used to highlight why someone should hire the attorney.

The first step is to have an up-to-date professional headshot for credibility. Next, craft a strong headline (at the top under an individual's name). The default is the attorney's current position (ex. Partner at XYZ Law Firm), but it should be changed. There are 120 characters available to feature what kind of work the attorney does and the types of clients served. Be specific. People prefer to hire or refer someone who has experience with their particular problem—a specialist, not a generalist.

The same principle should guide the "About" section. This is the attorney's elevator pitch and should focus on what the attorney's target audience/client base cares about. The first few lines of text are the most important because that is all that shows when someone first looks at a profile. The goal is to get the reader to click to read more. Then complete the other sections, including publications, volunteer experience, awards, association memberships, etc. It is also important to seek recommendations from others. Online reviews are invaluable to building an attorney's credibility.

Posting Content

Creating a profile and never posting anything is like going to a networking event and sitting in the corner alone. Being active on social media is essential. An important way

See MARKETING SMART, Page 17



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Nursing Home Liability in the Pandemic

Since the beginning of the COVID-19 pandemic, health experts have warned that those over the age of 65 are likely more vulnerable to the virus. Although people of all ages have fallen victim to COVID-19, it comes as no surprise that the elderly, who may already have compromised immune systems, may be much more likely to suffer serious health complications should they contract it.¹

Subsequently, nursing home facilities and other long term care facilities for adults have become breeding grounds for COVID-19 outbreaks, compromising the health and safety of residents and staff as they struggle to provide effective care for residents. From the outset, it was clear that these types of facilities, among others, were not equipped to deal with the stress of the pandemic.

In an effort to track the spread of infection and resources, reporting requirements were imposed by both the federal government and New York State. Despite the lack of transparency and communication between nursing home facilities, their residents, and residents' families, which such reporting requirements seek to rectify, health care providers in these same facilities have been granted limited immunity against liability for their treatment of COVID-19 patients at both the federal and New York state level.

Nursing Home Facilities Under Scrutiny

Concerns about the potentially devastating effects of the virus in nursing home facilities and other long-term care facilities for



Andrew P. Nitkewicz



Roxanne L. Tashjian

adults have continued to grow. Many of these facilities experienced devastating effects on both the residents and staff as COVID-19 infections spread. The Life Care Center nursing home in Kirkland, Washington became ground zero for the COVID-19 pandemic in the United States.² In late February, staff at the nursing home noticed a sharp increase in the number of residents suffering from respiratory issues.³ In the following weeks, hundreds connected to the facility were diagnosed with COVID-19 and dozens have died, making it one of the deadliest concentrations of the outbreak in the country.⁴

As the death toll of residents in other similar facilities rose, so did the scrutiny of these facilities. Family members of nursing home residents and government officials alike voiced their growing concern about the lack of transparency relating to the treatment of COVID-19 within these facilities as visitation hours were either significantly limited or entirely eradicated. These limitations, coupled with the unprecedented demands

on healthcare providers and staff, made it increasingly difficult to obtain information about the health and welfare of residents.

This lack of communication also sparked concerns that the virus may be much more deadly than data suggested due to lack of reporting and proper testing. Some of these fears were realized when 17 bodies were discovered in a nursing home facility in New Jersey.⁵ First responders stated that the nursing home facility was clearly overwhelmed and it was not immediately clear if the deceased residents passed away as a result of COVID-19 or something else.⁶

Federal Reporting Requirements

In response to growing concerns, on May 8, 2020, the United States Department of Health and Human Services ("HHS") issued federal reporting requirements for long term care facilities, including nursing homes.⁷ The new mandates impose weekly electronic reporting to the National Healthcare Safety Network of the Centers for Disease Control and Prevention ("CDC") to be posted by the Centers for Medicare & Medicaid Services ("CMS").⁸

As of May 17, 2020, all CMS-certified long term facilities (skilled nursing facilities and nursing facilities) are required to provide notice of the following: (i) suspected and confirmed COVID-19 infections among residents and staff, including residents previously treated for COVID-19; (ii) total deaths and COVID-19 deaths among residents and staff; (iii) personal protective equipment and hand hygiene supplies in the facility; (iv) ventilator capacity and supplies in the facility; (v) resident beds and census; (vi) access to COVID-19 testing while the resident is in the facility; (vii) staffing shortages; and (viii) other information specified by the Secretary of HHS.⁹

These reporting requirements appear to be designed to more efficiently and effectively track the spread of COVID-19 and the resources available, with an eye toward protecting the public, residents, healthcare providers, and staff. Reporting may also facilitate targeted remedial and mitigation measures.

The new reporting requirements also impose an obligation to notify residents, their representatives, and families of either a confirmed resident infection or three or more residents or staff displaying new symptoms of COVID-19 within 72 hours of each other by 5:00 p.m. the next calendar day.¹⁰ The information reported must protect any personally identifying information of the infected or suspected infected individuals, advise of mitigating and preventative measures taken, and include cumulative updates on additional confirmed infections or suspected infections.¹¹

New York Reporting Requirements

On April 16, 2020, New York State Governor Andrew Cuomo issued Executive Order No. 202.18, which in part, requires facilities to report, within 24 hours, positive COVID-19 infections and COVID-19 related deaths to residents' family members and next of kin.¹² These directives apply to nursing homes, nursing facilities and adult care facilities subject to the licensing and regulation of the Commission of Health and were previously part of guidance issued by the state prior to the mandate.¹³ The next day, on April 17, 2020, Governor Cuomo issued another order modifying Executive Order No. 202.18, imposing a penalty for non-compliance of reporting of \$2,000 per violation per day, with any such violations to be treated as a violation of section 12-b of the Public Health Law.¹⁴

In an effort to enforce compliance, Governor Cuomo announced that the state

would be launching an investigation into nursing homes to ensure that facilities are following COVID-19 related rules.¹⁵ The investigation is to be a joint effort between the New York State Department of Health and the Attorney General.¹⁶

Limitations of Liability

In the interim, the nursing home industry has started to prepare for an anticipated wave of litigation to defend themselves against allegations that facilities failed to adequately protect residents and staff from COVID-19. Generally, nursing home facilities owe a "duty of care" to their residents to ensure that they are properly cared for and are not subjected to any unreasonable health or safety risks.¹⁷ However, in the wake of rising COVID-19 related deaths in nursing home facilities, the industry has started to lobby state and federal lawmakers to issue protections for nursing home facilities insulating them from liability in COVID-19 related lawsuits.¹⁸ So far, both the federal government and at least 20 states have taken some action to limit the liability of nursing home facilities from lawsuits relating to COVID-19 related deaths.¹⁹

PREP Act

At the federal level, the HHS has declared COVID-19 a public health emergency under the Public Readiness and Emergency Preparedness Act ("PREP Act"). Pursuant to the PREP Act, "covered persons" are granted limited immunity from civil liability under federal and state law for claims of a "loss" resulting from "covered countermeasures" during a pandemic with the exception of liability arising from willful misconduct.²⁰

A "covered countermeasure" is any drug, product, device, or security intended for treatment, prevention, facilitation, or mitigation use during a pandemic.²¹ A "covered person" under the PREP Act includes the United States and any individual or entity that manufactures or distributes a "covered countermeasure" or a program planner or qualified individual or entity who prescribes, administers, or dispenses a "covered countermeasure," including the officials, agents, and employees thereof.²²

The term "loss" is broadly defined as: death; physical, mental, or emotional injury, illness, disability, or condition; fear of physical, mental, or emotional injury, illness, disability, or condition, including any need for medical monitoring; or loss of or damage to property, including business interruption loss.²³

Immunity for a "covered countermeasure" only applies if the "covered countermeasure" was administered during the effective time period and used for the treatment of COVID-19, and immunity only applies for a "covered person" if the countermeasure used was by or administered to an individual who was present or had a physical connection to a specific geographical area and population.²⁴ Under the PREP Act, there is a "rebuttable presumption that any administration or use, during the effective period of the emergency...of a covered countermeasure shall have been for the category or categories of diseases, health conditions, or threats to health with respect to which such declaration was issued."²⁵

New York

It appears that under the PREP Act, nursing home facilities, their agents, employees, and staff, have been immunized from liability relating to the treatment and prevention of COVID-19 with the exception of damages resulting from willful misconduct. In *Parker v. St. Lawrence County Pub. Health Dept.*, the

See NURSING HOME, Page 19

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All Rights Reserved: Intellectual Property Assets in Divorce Matters

Family law in New York has undergone significant changes during the past decade. Most of these changes have streamlined the legal process pursuant to a gender neutral paradigm. The changes include no-fault divorce, fairer custody and support laws, and the elimination of licenses and degrees as marital assets. However, a new matrimonial law frontier has emerged with the advent of technology, software apps, startups, and cryptocurrency. As a result, divorce negotiations in many cases are more complex than ever.

Even before the COVID-19 pandemic, there were burgeoning societal trends and cultural shifts that were gaining ground and affecting relationship law: cohabitation, later marriages, prenuptials, and more matters settled by ADR and mediation. As will be set forth in this article, all of these are relevant to how intellectual property and other complex matters are dealt with upon divorce.

How is Intellectual Property (IP) Relevant to Divorce Law?

Intellectual property (“IP”), including music, art, literary works, films, scientific and medical developments, and technology, is normally protected against third parties by copyrights, trademarks, patents and trade secrets. For divorcing couples, a need has developed to protect “creative ideas” conceived by either the bride or groom. Clients seek protection for what may be their most valuable asset: the product of their intellect or invention.¹ The challenge to the practitioner is multifaceted: how is the IP identified and valued, and how can the value be fairly distributed?

There are a scant few reported cases in New York that address IP asset valuation in the context of divorce. On top of this, the emphasis on mediation and ADR has resulted in a lower number of court decisions addressing these complex matters. That means there is less guidance for the practitioner, as different treatments of similar facts and effective ways of addressing IP valuation remain unreported.²

What are the Different Classifications of IP?³

Patents A patent for an invention is the grant of a property right to the inventor, issued by the U.S. Patent and Trademark Office. The inventor or the patent owner has the right to use an invention or to allow others to use it via a license.

Trademarks Trademarks are brand names that enable the public to identify the source of goods or services and distinguish the goods or services of one seller or provider from those of another. A trademark can be a word, name, symbol, graphic, or other distinguishing mark, or even a sound or smell, or any combination of these.

Copyrights A copyright is a form of property that grants exclusive rights to the author of a work. The protected work must be fixed in a tangible medium of expression, such as a video, book, computer program, play, painting, photograph, sculpture, movie, music, or television show. Copyright protects an expression of an idea but does not protect the idea alone.

Trade Secrets A trade secret is any confidential business information that provides an entity, person, or company a competitive edge in business. It can be a formula, practice, process, design, instrument, pattern, or commercial method, which is not generally known by others, and by which a business can obtain an economic advantage over competitors or customers.⁴

Practice Pointers and Case Strategy

How do you know whether you have an IP ownership issue in your legal matter? The first step is to gather detailed facts about your client, the IP “creator.” IP issues tend to come up with entrepreneurs, business owners, creative individuals and businesses, authors, artists, software designers, web site designers, architects, inventors, engineers, and doctors.

Next, you must identify the asset, and “follow the money.” Has the IP been monetized? Determine whether you have a tangible IP asset (i.e. a screenplay) versus an intangible income stream (i.e. royalties). Next, when was the IP acquired, before the marriage or after? If it was acquired before the wedding day, it is separate property. If it was acquired afterwards, it is marital property.

To complicate matters, any increase in value during the marriage can be subject to claim by the creator’s spouse, or to “commingling.” The issues of child support or spousal support, the level of contribution by the creator’s spouse (highly dependent on credibility), and analysis of future revenue from the intellectual property make the resolution subject to very complex negotiations.

Valuation Methods for IP

Even before the intellectual property assets are distributed between the parties, as in any contested divorce litigation, the property must first be identified, classified, and appraised based on fair market value. In most contested matters in court, there is a court appointed forensic expert.

Valuation experts use different approaches in order to reach a reasonable indication of a defined value for IP assets, both tangible and intangible, as of a certain date, most often the date of commencement of the matrimonial action. The most important factors besides the date include the contributions of both the creator and creator spouse, as well as future revenue streams from the IP asset, i.e. cash flow.

The four most common approaches to estimate the fair market value of the intellectual property are the cost approach, market approach, income approach, and relief from royalty approach.⁵ These methodologies are similar to those used by valuation experts for businesses and real property investments in divorce matters.

The Cost Approach The cost approach is based on the economic principle of substitution. This principle states that an investor will pay no more for an asset than the cost to obtain, by purchasing or constructing, a substitute asset of equal utility. This approach works best where the asset is not presently or is not expected to produce income, and is most commonly used when the intrinsic value of the asset must be reported on the books.

The Market Approach The market approach is based on competition and equilibrium. Supply and demand factors will drive the price of an asset at an equilibrium point in a free market. Furthermore, it provides an indication of the value by comparing the price at which similar property, i.e. royalties, have exchanged between willing buyers and sellers. However, it is often difficult to find a suitable comparable transaction in valuing patents because of the lack of disclosed sale or licensure activity and the uniqueness of each patent.

The Income Approach The income approach analysis focuses on the economic value of the future cash flow derived from a



Jacqueline Harounian

specific collective property entity. This approach estimates the fair value of intellectual property by discounting the future economic benefits of ownership at an appropriate discount rate. The accuracy in obtaining the discount rate of interest is critical.⁶

Relief from Royalty Method (RRM) Simply put, the RRM calculates value based on the hypothetical royalty payments that would be saved by owning the asset rather than licensing it.⁷

Equitable Distribution of Marital Assets Under New York Law

IP assets, like all other marital assets are divided equitably between the IP creator and the spouse of the creator. In New York, property is not automatically divided equally to each spouse. Instead, the court takes into account 13 specific factors in determining the equitable distribution of property, considering the circumstances of the case and of the parties involved:⁸

1. The income and property of each spouse at the time of the marriage, and at the time of the divorce;
2. The length of the marriage and the age and health of both spouses;
3. If there are minor children involved, the need of the spouse who has custody of the children to live in the marital residence and to use or own its household contents;
4. The loss of inheritance and pension rights of each spouse because of the divorce;
5. The loss of health insurance benefits of each spouse because of the divorce;
6. Any award of support or maintenance the court will be making;
7. Whether one spouse made contributions to marital property that the spouse does not have title to; for example, where one spouse helps the other spouse increase their ability to earn more money by getting a degree or certification;
8. The liquid or non-liquid character of all marital property (“liquid” means that the property can easily be converted to cash);
9. The probable future financial circumstances of each party;
10. The impossibility or difficulty of determining the value of certain assets, like interests in a business, and whether one spouse should be awarded the business so it can be run without interference by the other spouse;
11. The tax consequences to each party;
12. Whether either spouse has wasted or used up any of the marital property while the divorce was ongoing;
13. Whether either spouse transferred or disposed of marital property at less than market value, knowing that the divorce would be happening.

The Use of Prenuptial and Postnuptial Agreements To Protect IP

Proactively seeking out legal advice before and during marriage is the best way to safeguard intellectual property from the claims of a spouse, or even as part of estate planning. Prenuptial and postnuptial agreements are akin to “divorce insurance.” Careful record keeping and bookkeeping, including tax planning, is a must during the marriage to avoid the “commingling” of marital funds from separate funds. These agreements define separate versus marital property and move assets owned prior to the marriage “off the table” in the event of a future divorce.

This has the advantage of limiting exposure to divorce litigation. Absent a finding of fraud, nondisclosure, lack of consent or unconscionability, New York courts generally uphold these agreements.

According to the *American Academy of Matrimonial Lawyers*, millennials are fueling the trend for prenuptial agreements. This is likely because millennials are marrying later than prior generations, and they have assets to protect, including intellectual property. The number of millennials requesting prenuptial agreements has escalated over the past decade: more than half of lawyers surveyed saw an increase in prenuptials among millennials, and 62% saw a rise in prenuptials overall from 2013 to 2016.⁹ The numbers today are markedly higher.

The main driver behind this uptick in premarital agreements is the delay in marriage. Since 2005, the median age at which men and women married has jumped from 27 to 29.9 and 25.5 to 28.1 respectively, according to the *US Census*.¹⁰ Millennials are also dating longer before heading down the aisle, compared to previous generations. The average couple waits 4.9 years to marry,¹¹ and the longer millennials wait to marry, the more time they have to accumulate assets that need protection, including IP assets. Millennials are creating wealth through their own business startups, intellectual property (apps, software, etc.), and they want to make sure those pursuits will not lose ground in a divorce. Also, prenuptials do not have the same stigma and negative connotations as they did a generation ago.¹²

Conclusion

IP assets in divorce matters are challenging to say the least. In an increasingly technological age, where innovation and entrepreneurship is rewarded, IP assets are highly valued and prone to costly litigation. Just as employers increasingly require employees to sign away all future ideas and opportunities to compete with the company, IP creators hope to keep these assets in case of a breakup.¹³

The importance of protecting the respective rights of parties cannot be overstated in an IP asset case. The IP creator understandably wants to protect the fruits of his intellectual and human capital, however amorphous and undefined. However, the rights of the creator’s spouse must also be strongly considered. Given the changes in the law regarding child custody, spousal support and equitable distribution, the financial and emotional stakes are very high regarding IP assets. This is especially the case if the creator’s spouse raised children, gave up a career, or worked during the marriage to support the efforts of the IP creator. The risks are shared during the marriage, but if there is a divorce, the IP creator reaps most of the rewards.

Jacqueline Harounian is a Partner in the law firm of Wisselman, Harounian & Associates PC. She also serves on the Board of Directors for the Nassau Women’s Bar Association, and Chair of the Matrimonial Committee and Domestic Violence Committee.

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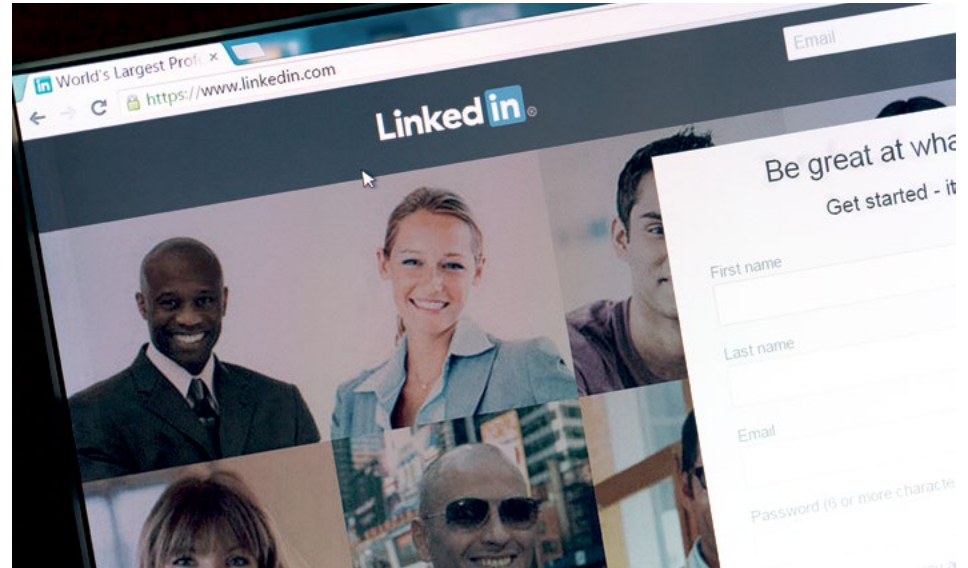
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Marketing Smart ...

Continued From Page 13

to do that is through sharing original and third-party content on a consistent basis. Posting is like talking to people at a networking event. It helps others get to know and remember the speaker. Original content can include something as simple as a few sentences of text with a practical tip, or links to longer content like blog posts, articles, webinars, and podcasts. It also includes visual content such as photos, charts, and video which is particularly effective at getting people's attention. Third-party content similarly can include any form of written, audio, or visual information. It can be useful material written by someone the attorney personally knows or by a stranger.

Both original and third-party content must be interesting and helpful to the attorney's target audience. High quality content bolsters an attorney's reputation. However, it is also beneficial to share content that gives people a broader view of that attorney's personality and interests, just like discussing nonwork interests at a networking event. People hire those they like and trust, and social media can be leveraged to help with that goal.

While regular posting will help attorneys be more visible, there are tactics that can substantially improve results. Paying attention to the timing of posts, using interesting visuals and compelling copy, adding hashtags, and analyzing which posts do the best and worst can help ensure posts reach the right audience and drive results. Some of these can be done by attorneys, others require specific marketing expertise. However, it all starts with making the commitment to create or find content that people want to read.

Engaging with Contacts

Ultimately, it is not enough to be visible online, engaging people is also necessary. Posting is just one side of the conversation or interaction; the other side is paying attention to what others are doing and saying and following up to strengthen the relationship. On social media, this can be done several ways.

- **Check "Notifications"** On the top of a social media page, there is a tab for Notifications. It provides information on contacts' birthdays, anniversaries, and their postings. In addition, it identifies those who have viewed/interacted with an attorney's profile or posts (likes, comments, mentions, profile views). Pay attention to this information and reach out to that person with an appropriate message.
- **React to posts** If a contact posted something, ideally comment on it, instead of just hitting the like button. Adding a comment draws more attention to both parties. In the same way, attorneys should respond if someone made a substantive comment to their posts.
- **Ask others for content** Reach out to contacts with complementary businesses and offer to share their content. Most likely, the

contact will reciprocate or there may be opportunities to create joint content.

- **Offer to give recommendations/reviews** Contact close referral sources, colleagues, vendors, and other contacts and offer to give them a review. Most will reciprocate on their own.
- **Mine LinkedIn contacts** Review connections and develop a list for follow up via phone or email. Check in (without pitching legal services) and offer to make introductions or assist in other ways.
- **Host an event** Take advantage of virtual networking and webinars, not just by attending, but by hosting. LinkedIn and Facebook allow users to create public and private events. However, even without using those features, social media can be used to send invitations to selected contacts as well as promote the event publicly to connect with new people.

Social Media Planning

Random acts of marketing are rarely cost-effective. Doing a little bit of this and that without a coherent strategy is a waste of resources. A marketing plan is essential and should outline an attorney's marketing message, target audiences, the steps that will be taken, and goals. Social media is one piece of a firm's overall marketing strategy, but should be specifically planned out, including developing a calendar and deciding who will be responsible for the various activities like creating/finding content, posting, and monitoring social media.

A big reason why marketing fails is because firms do not put aside enough resources (i.e., people, time, money) to get it done. However, everything does not have to be done at once. Attorneys can start by committing to a few simple activities every week and growing from there. Marketing has a cumulative impact so every effort will add up.

Conclusion

To quote an old adage, "When times are good you should advertise, when times are bad you *must* advertise." This applies to all types of marketing. Out of sight, out of mind is real. While some attorneys may cut back on marketing out of fear of spending money, others will step up their efforts to ensure that they remain visible and their business will recover. Do not be left behind when circumstances improve. Maintain or increase marketing efforts during the pandemic.

Edie Reinhardt, Esq. is Principal of RDT Content Marketing. She is a former practicing attorney turned marketer and writer and specializes in helping attorneys showcase their expertise and successfully target their marketing to attract more clients. Her services include marketing strategy, content development, social media, and websites.

For more information, visit her website at <https://www.rdtcontentmarketing.com/> or contact her at ereinhardt@rdtcontentmarketing.com.

1. Clio Legal Trends Report 2019, available at <https://bit.ly/3fGetfT>.

Nursing Home ...

Continued From Page 14

Third Department confirmed the PREP Act's preemption of state law in dismissing plaintiff's claim for negligence and battery resulting from the administration of the H1N1 vaccine to plaintiff's infant child without parental consent.²⁶

In March, similar immunity was also invoked in New York under the Emergency or Disaster Treatment Act ("EDT Act"). Under the EDT Act, health care facilities and health care professionals are shielded from civil and criminal "liability that may result from treatment of individuals with COVID-19 under conditions resulting from circumstances associated with the public health emergency."²⁷ This limitation of liability applies to nursing home facilities, associated health care professionals, agents, and employees, so long as the individual or entity

was acting in good faith to further treatment and protection against COVID-19.²⁸

Despite these new laws, nursing homes may not be completely protected from liability resulting from COVID-19. Nursing home facilities may still be held liable for acts of gross negligence, willful or intentional criminal misconduct, reckless misconduct, or intentional infliction of harm relating to COVID-19 infected residents or the facility's procedures in response to the pandemic. For example, the New York law protects nursing home facilities from liability resulting from acts or omissions due to resources or staffing shortages that could not be considered willful or intentional. However, if, for example, it is determined that a nursing home facility had access to personal protective equipment, and failed to use such equipment, the facility may still be found liable for damages relating to COVID-19 complications under certain circumstances.

As New York courts have lifted the moratorium on the filing of new, non-essential

lawsuits, families of nursing home residents that have passed away from COVID-19 have already started filing lawsuits claiming that facilities were grossly negligent in their response to the COVID-19 pandemic and their treatment of infected residents.

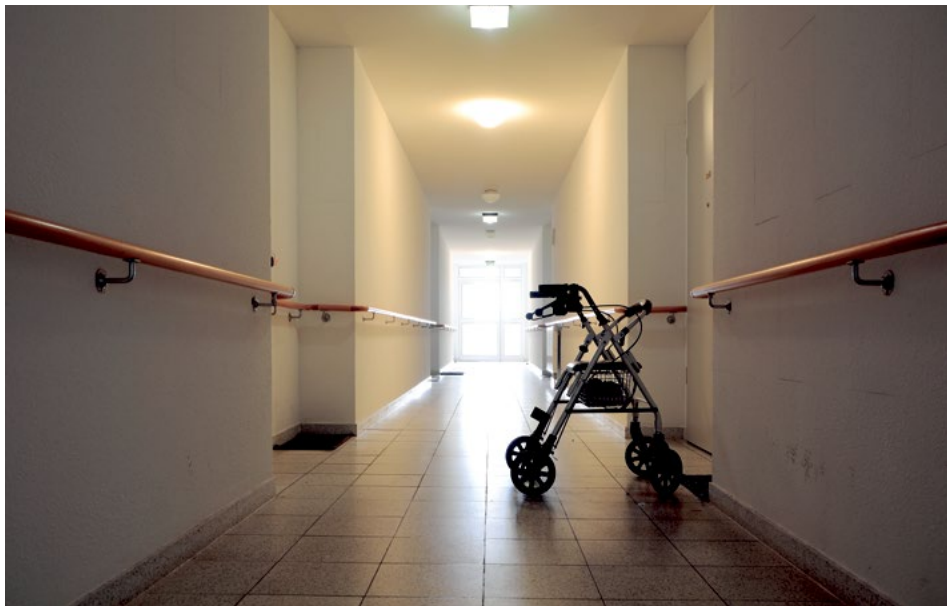
For example, a Manhattan woman has filed suit against a Harlem nursing home for gross negligence and medical malpractice after her father passed away due to complications from COVID-19.²⁹ The woman claims this facility "failed to take the proper steps to protect the residents and/or patients at their facilities from the COVID-19 virus," by not implementing basic health guidelines" before the death of her father including failing to prevent visitors from entering the facility.³⁰

In a separate suit, a Brooklyn man is suing a Brooklyn nursing home facility under similar causes of action after his father passed away due to complications from COVID-19.³¹ The suit claims the facility failed to follow basic federal and state guidelines related to the COVID-19 pandemic "including failing to separate residents, failing to enforce social distancing, not canceling group activities and communal dining, not stopping visitors from coming into the facility in a 'timely manner and other measures.'"³²

It remains to be seen whether either of these plaintiffs, or any future plaintiffs, will be able to meet the high bar required to prove that a nursing home facility acted with gross negligence or committed medical malpractice, particularly in light of the increased protections offered to nursing home facilities during the COVID-19 pandemic.

Andrew P. Nitkewicz is head of the firm's Trusts and Estates Department of Cullen and Dykman LLP in Garden City. Roxanne L. Tashjian is a Partner in Cullen and Dykman's commercial litigation department. Thanks to Ryan Soebke, an associate in the commercial litigation department of Cullen and Dykman, for assisting with this article.

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Installation of NCBA and NAL Officers and Directors June 2, 2020

Photos by Hector Herrera



On Tuesday, June 2, 2020, Dorian R. Glover of The Law Office of Dorian R. Glover, was installed as the 118th President of the Nassau County Bar Association (NCBA) at the first ever virtual 2020 Installation of NCBA and NAL Officers and Directors. Also installed at the Installation ceremony were the following officers: Gregory S. Lisi, President-Elect; Rosalia Baiamonte, Vice President; Sanford Strenger, Treasurer; Daniel W. Russo, Secretary; and Anthony Michael Sabino, Nassau Academy of Law Dean.

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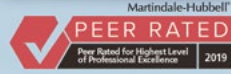
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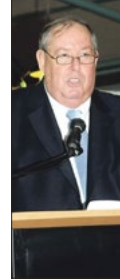
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