Nassau Lawyer

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Thursday, April 29, 2021

See pg. 6 for details

WHAT'S INSIDE

OF NOTE

NCBA Member Benefit—I.D. Card Photo

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UPCOMING PUBLICATIONS COMMITTEE MEETINGS

Thursday, March 4, 2021 at 12:45 PM

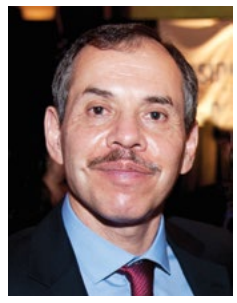
Thursday, April 1, 2021 at 12: 45 PM

NCBA Dinner Gala Update

The NCBA Dinner Gala, held annually in May, is the largest social event of the Nassau County Bar Association. In spring 2020, the COVID-19 Pandemic forced the NCBA to postpone the May 2020 Gala to ensure the safety of all. The Gala was rescheduled to Saturday, May 8, 2021 at the Long Island Marriott. Unfortunately, due to the progression of COVID-19, and concerns for the health and safety of staff and guests, the NCBA has made the difficult decision to further postpone the May Gala. The Bar will announce a new date for later in 2021 when it is determined that it is safe for guests to attend an in-person event.

The honorees being recognized this year include 77th Distinguished Service Medallion Honoree, Christopher T. McGrath, NCBA Past President, Past Co-Chair of WE CARE, and Partner at Sullivan, Papain, Block, McGrath, Coffinas & Cannavo; President's Award Recipient Hector Herrera, NCBA Building Manager; and NCBA Members who have been admitted to the New York Bar for fifty, sixty, and seventy years for their years of service to the legal profession.

Christopher T. McGrath



Hector Herrera

Although the Coronavirus has hindered the NCBA from being able to hold large in-person gatherings, our honorees deserve to be recognized despite the circumstances. In light of this decision, the Bar will move forward with the creation of the Dinner Gala Journal, which highlights the accomplishments of our honorees. The journal is an invaluable way to show support for the honorees in a safe and contact-free way. Due to the event's delay, the NCBA will honor not only last year's fifty-, sixty-, and seventy-year honorees, but this year's as well.

Within this issue, you will find a journal ad form listing ad options, pricing, and the full names of all honorees. To purchase a journal ad, forward the ad form to the NCBA Special Events Department at events@nassaubar.org or contact (516) 747-4071. We hope you will join us in paying tribute to these deserving individuals.

Virtual Recognition Reception to Honor 2018-2019 Attorney Volunteers for Service

Gale D. Berg

Each year, hundreds of Nassau County attorneys donate their time and talent to aid Nassau residents who cannot otherwise afford adequate legal assistance. In years past, the NCBA, the Safe Center LI, and Nassau/Suffolk Law Services have honored those volunteers at a cocktail reception held at Domus. Law firms are recognized in three categories by size—including large, medium, and solo practitioners or small firms—and ranked by the total number of combined pro bono service hours provided to the three organizations.

The most recent event held in May 2018 recognized those who volunteered their time in 2017 to assist Nassau County residents with issues related to mortgage foreclosure, landlord/tenant, bankruptcy, wills, senior issues, and a host of other areas.

Last year's ceremony was postponed due to COVID-19 and scheduling issues. To avoid any further delays in acknowledging volunteers from 2018-2019 for their efforts, commitment to service, and the generous donation of their time, NCBA Access to Justice Committee Chairs Rosalia Baiamonte, Kevin McDonough, Vice-Chair Sheryl Channer, Nassau Suffolk Law Services, and the Safe Center LI will host a virtual recognition event on March 3, 2021.

All members are invited to attend to acknowledge these inspiring professionals. Additional details to follow.

2020 Holiday Staff Fund

A special thank you to the following individuals and firms for generously donating to the 2020 Holiday Staff Fund.

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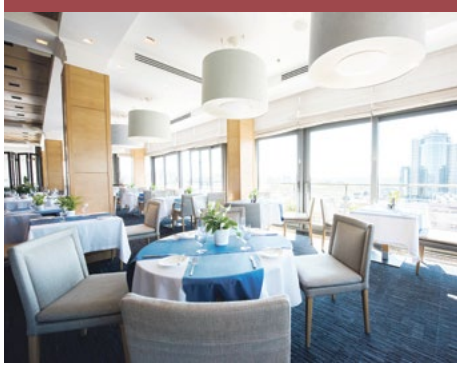
FOCUS:
INSURANCE LAW

S.D.N.Y. Holds That Restaurants Are Not Entitled to Insurance Coverage for Lost Revenues Due to COVID-19



Michael C. Cannata and Frank Misiti

In response to the COVID-19 pandemic, the governor of New York—along with governors in many other states—issued governmental shutdown orders that targeted certain business activities, including restaurant services. Under these orders, restaurants throughout New York were forced—for a period of time—to abandon indoor dining and focus their efforts on take-out and delivery services. As a result of the loss of revenue from the inability to offer dine-in services, many restaurants sought insurance coverage for their lost revenues under commercial property insurance policies.

In that connection, Sparks Streak House ("Sparks") commenced a purported class action lawsuit in the United States District Court for the Southern District of New York against its insurer Admiral Indemnity Company ("Admiral") entitled *Michael Cetta, Inc. d/b/a Sparks Steak House on behalf of themselves and all others similarly situated, v. Admiral Indemnity Company*, 20 Civ. 4612. In the lawsuit, Sparks seeks insurance coverage under an "all-risk" commercial property insurance policy for loss of revenue as a result of New York's shutdown orders.

Sparks claimed entitlement to coverage under three different parts of its policy—that is, the "business income coverage," "extra expense coverage," and "civil authority coverage" sections. "Business income coverage" provides coverage for the actual loss of business income sustained by an insured due to the suspension of the insured's operations. In order to trigger this coverage, the policy requires that the suspension of the insured's operations must be caused by "direct physical loss of or damage to property at [the insured's] premises." "Extra expense coverage" only applies if "business income coverage" applies and includes coverage for costs associated with: (1) temporary relocation; or (2) minimizing the suspension of business operations. Finally, "civil authority coverage" provides coverage when an insured suffers damages because of physical damage to an area surrounding the insured's premises and the government prevents access to the insured's premises as a result of such physical damage.

After being forced to cease indoor dining activities, Sparks tendered its claim for coverage to Admiral. Admiral responded to the tender by disclaiming coverage for the following reasons: (1) Sparks did not sustain any physical damage; (2) Sparks failed to satisfy any of the necessary prerequisites for "civil authority coverage;" and (3) certain exclusions, including the virus exclusion, precluded coverage under the Admiral policy. As a result of the disclaimer, Sparks commenced a declaratory judgment action against Admiral seeking payment for its losses under its insurance policy. Admiral then moved to dismiss Sparks' complaint.

Applying New York law to the interpretation of the Admiral policy, Judge John P. Cronan granted Admiral's motion to dismiss. The court concluded that with respect to the "business income coverage," the loss must be caused by direct physical loss of, or damage to, property at the premises. The court held that while there was a suspension of certain services offered by Sparks—namely, dine-in restaurant services—the complaint failed to allege that any of Sparks' property suffered a physical loss or was damaged.

In examining the policy, the court focused on the fact that in order to be covered, Sparks' suspension of operations "must be caused by direct physical loss of or damage to property." While these words were not defined in the policy, the court concluded, nevertheless, that the words were not ambiguous. Rather, the court examined dictionary definitions to determine the plain and ordinary meaning of these words. Based on those definitions, the court found that the loss at issue must be physical and there must be "a negative alteration in the tangible condition of property." To that end, the court held that losing the ability to use unaltered property did not change the physical condition of the property and was not considered physical loss or damage to property.

The court also pointed to the fact that "business income coverage" runs for the "period of restoration," which is defined as the date when the property should be repaired, rebuilt, or replaced. Thus, "the idea that the premises will be 'repaired, rebuilt or replaced' suggests the occurrence of material harm that then requires a physical fix." Here, Sparks' alleged loss of use requires no physical repair or rebuilding to end the suspension of Sparks' operations. The court's analysis of the plain meaning of the policy is also supported by a review of case law, not only in New York, but throughout the country, interpreting the "business income coverage" provision.

The court further concluded that since Sparks' claim for coverage under the "business income coverage" provision fails, Sparks' claim for coverage under the "extra expense coverage" must also fail. The court noted that "extra expense coverage" only applies if the "business income coverage" applies. Moreover, the "extra expense coverage" requires physical loss or damage to property, which is not alleged in Sparks' complaint.

The court also rejected Sparks' claim for coverage under the "civil authority coverage." The court held that Sparks failed to plead the required prerequisites to coverage, namely, that: (1) there was damage to property other than property owned by Sparks; and (2) an action of civil authority prohibited access to Sparks' premises.

First, the court determined that the complaint failed to allege any specific damage to property near Sparks. While the complaint vaguely refers to the fact that closure orders affected businesses other than Sparks, without specific allegations of damage to property of a neighboring property, the complaint fails to satisfy the first prerequisite.

Second, even if property damage had been alleged, the court held that the complaint did not allege that access was ever denied to Sparks' premises. The complaint did not allege, and the governmental orders make clear, that access was never completely denied to the restaurant. There are no allegations that delivery workers, restaurant employees, or customers could not access the location. Rather, the governmental orders only limited the services to be provided by restaurants to take-out or delivery services, it did not limit access to non-Sparks employees. Thus, Sparks failed to satisfy the second prerequisite for coverage under "civil

See LOST REVENUES, Page 21

Michael C. Cannata, a partner at Rivkin Radler, is a seasoned litigator with extensive experience litigating complex, intellectual property, insurance coverage and other commercial disputes in federal and state courts throughout the country.

Frank Misiti, a partner at Rivkin Radler, is an experienced litigator representing clients in intellectual property, complex insurance coverage, commercial, and other business disputes in state and federal courts throughout the country.

President's Column

FROM THE PRESIDENT

Dorian R. Glover

Black History Month celebrates the achievements of African Americans and is a time to recognize their role in this nation. Dr. Martin Luther King, Jr. once said, "I've been to the mountaintop…I just want to do God's will, and he's allowed me to go up to the mountain. And I have looked over. And I've seen the promised land."

What do you think Dr. King saw on the other side of the mountain? In the wake of the assault on the U.S. Capitol by violent protesters, we are all faced with the question of how to courageously lead in times of danger and difficulty.

During this Black History Month, let us reflect on a vision. "Every great dream begins with a dreamer, you have within you the strength, the patience, and the passion to reach for the stars to change the world," said Harriet Tubman.

There is an internal and external flame in all of us. It is the light of truth leading the way to the promised land. It is incumbent on each of us individually to keep the light burning and to be leaders as described by Rev. Dr. Otis Moss, Jr., Morehouse Class of 1956, at the Washington National Cathedral Sunday morning service.

> "We must know the eternal difference between a leader and a ruler. There is a phenomenal eternal difference between a righteous leader and an unrighteous ruler. Leaders are kind in word, deed, and action. Rulers are dangerous and mean spirited. Rulers generally create a reign of error and that reign of error can lead to a reign of terror. Leaders are compassionate. Rulers are fearful, insecure, and demeaning to others. Leaders are everlasting learners. Disciples of truth. Rulers think they know everything. Rulers take credit for every success and blame others for every failure. Leaders lift others, build others, bless others, pray fervently for others. Rulers destroy others, tear down others, hate others. Leaders love and embrace and protect children and rejoice in their presence. Seeking the best for all of God's children. Rulers spend so much loving themselves and praising themselves and rewarding themselves they have very little time to lift, to serve, to care for others. Leaders, righteous leaders, courageous leaders, believe in civil rights human rights, equal rights, and universal rights. Rulers destroy rights, feel threatened by human rights, feel threatened by equal rights and civil rights."

As a nation, as a community, as a Bar Association, as a citizen, "When a word must be spoken to further a good cause, and those whom it behooves to speak remain silent, anybody ought to raise his voice, and break a silence which may be fraught with evil. Many a time a few simple words have helped further the welfare of a nation, no matter who uttered them; the voice itself displaying its latent powers, sufficed to move the hearts of men," said Aretine scholar and poet Francesco Petrarch, author of *Letters of Old Age*.

"Democracy cannot flourish amid fear. Liberty cannot bloom amid hate. Justice cannot take root amid rage. In the chill climate in which we live, we must go against the prevailing wind. We must dissent because America can do better, because America has no choice but to do better," said Supreme Court Justice Thurgood Marshall.

Our mission remains unchanged—to inspire among all citizens respect for the law and the governing principles of our democracy, by personal and professional example and by public education. This is our time to envision a dream as professed by Harriet Tubman. To realize the dream of Rev. Dr. Martin Luther King, Jr. when he went up to the mountain top and saw the promised land. To keep the internal and external flame, that light of truth, leading our way to the promised land. To be leaders and not rulers. To be champions of civil rights, human rights, equal rights, and universal rights, as Rev. Dr. Otis Moss, Jr. described.

When a word must be spoken to further a good cause, raise your voice to help further the welfare of a nation, as Francesco Petrarch penned. To dissent where necessary, because America has no choice but to do better, as stated by Thurgood Marshall. Finally, to remain true to the NCBA mission, by inspiring all citizens to have respect for the law and the governing principles of democracy.

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FOCUS:
LEGAL SERVICES

Access to Justice: Past, Present, and Future

Rosalia Baiamonte, Martha Krisel, Gale D. Berg, and Hon. Maxine S. Broderick

We are approaching the fortieth anniversary since the formation in 1981 of the first committee of the Nassau County Bar Association to explore providing free legal services for the public good.

The pioneering work of the NCBA Bankruptcy Committee (then chaired by Andrew Thaler) and the Matrimonial Law Committee (then chaired by Stephen Gassman)—the first groups to recognize the need for and value of structured and organized public interest legal services—served as the backbone for the NCBAs pro bono project in the early days.

Likewise deserving of recognition is the late Hon. Arthur Spatt, then serving as the Administrative Judge of Nassau County, who offered his strong support and encouragement of the NCBAs efforts to promote the Volunteer Lawyers Project. Judge Spatt's transformative judicial imprimatur added the gravitas needed to recruit volunteers to the fledgling project.

Commitment to Pro Bono Legal Services

Our first "Pro Bono Committee" was established by Thomas Maligno, who has been part of the organized pro bono movement since 1978, when he helped create the Pro Bono Project on Long Island. In 1989, he became the Executive Director of Nassau Suffolk Law Services, one of the largest legal services program in the country.

Mr. Maligno's commitment to and support of pro bono activities was so profound, that he successfully argued that a step in the leadership "ladder" toward becoming NCBA President must include a one-year tenure as Chair of the NCBA Pro Bono Committee. In this way, each and every NCBA President will have served a pro bono leadership role. For many years, this privilege belonged to the Second Vice President. When that position was eliminated, the role of Chair of the Pro Bono Committee was folded into the responsibilities of the Vice President.

During Past President Martha Krisel's tenure on the Board of Directors and the Executive Committee, the NCBA expanded its pro bono activities and she successfully championed the renaming of the "Pro Bono Committee" to the more descriptive and inclusive "Access to Justice Committee," as it is currently known. This broader title included education about reduced fee services as well as free consultation services and better described the NCBAs commitment to broaden the menu of legal assistance to those in need.

During four decades of evolution, the Access to Justice Committee of the NCBA remains dedicated to improving and increasing the availability of pro bono and reduced fee legal services for lower-income and vulnerable persons in our community.

Meeting the Changing Needs of Our Community

From its inception, the Volunteer Lawyers Project partnered with the Nassau Academy of Law to offer CLEs, and mentoring and training programs, which continue to be invaluable to its success. More than twenty years ago, an Attorney of the Day program was established in Hempstead Landlord/Tenant Court, where private law firms partner with law services staff to represent the interests of low-income tenants. Over the years, thousands of men, women, and children have been provided assistance in court to prevent homelessness. This program continues to the present day, where its need in the face of a financial crisis occasioned by a once-in-a-century global pandemic is ever more palpable.

In 2008, NCBA became the first bar association in New York State to address the looming mortgage foreclosure crisis. Volunteer attorneys provided one-on-one consultations at free monthly clinics held at Domus (the headquarters of our association in Mineola) to any Nassau County homeowner facing foreclosure. In 2012, victims of Superstorm Sandy also attended the clinics and were provided free legal consultations on Superstorm Sandy issues intertwined with mortgage foreclosure, claims, landlord/tenant, debt referral, consumer protection and bankruptcy.

In 2010, the New York State Office of Court Administration granted funding to the NCBA's Foundation to expand its pro bono mortgage foreclosure efforts. Gale D. Berg, then a NCBA Board Member and Past Chair of the Community Relations Public Education Committee of the NCBA, was hired as the Director of Pro Bono Attorney Affairs. Since 2011, as a result of Ms. Berg's exhaustive efforts and outreach to the members of NCBA and the legal community, the number of active participating volunteers has substantially increased.

Following the initial grant, Ms. Berg has continued to obtain grant funding in amounts sufficient to expand and enable NCBA, through its Foundation, to assist no less than 16,900 residents since inception. The NCBA Access to Justice initiatives under Ms. Berg's stewardship have resulted in several awards and recognition, including the New York Law Journal's Annual Pro Bono Award.

In 2011, the National Association of Bar Executives awarded the Lexis/Nexis Community and Education Outreach Award to NCBAs Mortgage Foreclosure Pro Bono Project due to its unique one-on-one consultation clinics.

On October 25, 2011, in celebration of national Pro Bono Week, NCBA together with Nassau/Suffolk Law Services and The Safe Center of Long Island held its first annual Open House under the leadership of Past President John McEntee and Gale D. Berg. At this event, Nassau residents were invited to Domus to meet with volunteer attorneys, one-on-one, who provided free legal guidance in a variety of legal areas, including real estate, matrimonial, immigration, bankruptcy, estate planning, elder care, health, small business, employment/labor, criminal, and any other area which may be requested prior to the event. Volunteer translators were available as well.

When the event was first established, it was known as "the free legal Pro Bono FAIR (Free Assistance, Information and Referral)." It was then renamed

See ACCESS, Page 22

Rosalia Baiamonte is an attorney with Gassman Baiamonte Gruner, P.C. in Garden City, representing clients in matrimonial matters. She is also NCBA Vice President. Ms. Baiamonte can be reached at (516) 228-9181.

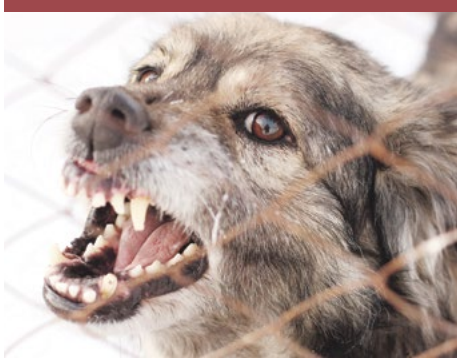
Gale D. Berg is an Associate Magistrate in the Village of Baxter Estates. She is also NCBA Director of Pro Bono Attorney Affairs. Ms. Berg can be reached at (516) 742-4070.

Martha Krisel is Executive Director of the Nassau County Civil Service Commission. She is also a former NCBA President and currently Chair of the NCBA COVID-19 Committee. Ms. Krisel can be reached at (516) 572-1117.

Hon. Maxine S. Broderick presides in Nassau County District Court. She is also a NCBA Director and Law Student Chair of the NCBA COVID-19 Task Force. Judge Broderick can be reached at (516) 493-4200.

FOCUS:
PERSONAL INJURY

Review on Dog Bites in Light of *Hewitt*



David J. Barry

Although the friendship between humans and canines dates back at least 14,000 years,[1] it certainly seems as if the popularity of dog ownership increases year after year. According to a recent national survey, over 63 million households in the United States harbor almost 90 million dogs.[2] New York City alone is home to approximately 600,000 dogs.[3]

But unfortunately for us dog lovers, man's best friend is not always that—approximately 4.5 million dog bites occur each year in the United States, with 800,000 of those bites requiring medical treatment.[4] As such, it should come as no surprise that plaintiff's personal injury practitioners are frequently fielding dog bite injury inquiries, and new dog bite cases are constantly landing on the desks of defense counsel from their insurance carrier clients.

Bard Standard

Prior to 2006, dog bite injury victims in three of the four Appellate Division departments could pursue civil actions against the dog's owner sounding in strict liability (if the dog had exhibited prior vicious propensities) and/or general negligence for failing to exercise reasonable care in the training, restraint or keeping of the dog.[5] But in 2006, the Court of Appeals' decision in *Bard v. Jahnke*[6] narrowed and cemented the rule that a dog bite injury victim's *only* avenue of recovery against a dog's owner is a cause of action based on strict liability.

In *Bard*, Plaintiff was performing repair work within an Ostego County dairy farm when he was attacked by a bull, causing him to sustain fractured ribs, a lacerated liver and an exacerbation of a prior cervical spine injury. Plaintiff subsequently brought a personal injury action in Ostego County Supreme Court sounding in both strict liability and negligence against, among others, Defendant bull owner. Upon a showing that he did not know Plaintiff would be at the farm that day, the Supreme Court granted Defendant owner's motion for summary judgment dismissing the complaint.[7]

The Third Department affirmed on a different basis however, concluding Defendant owner could not be held liable unless he knew or should have known of the bull's vicious or violent propensities. As the record below was devoid of any prior evidence of the bull injuring another person or animal, or behaving in a hostile or threatening manner, summary judgment in favor of Defendant owner was affirmed. Interestingly, the Court disregarded an affidavit of Plaintiff's expert opining that bulls are generally dangerous and vicious animals, noting that "the particular type or breed of domestic animal alone is insufficient to raise a question of fact as to vicious propensities." Further, the Court declined to adopt the enhanced duty rule pertaining to domestic animals other than dogs or cats, which extinguished Plaintiff's negligence claim.[8]

Plaintiff was granted leave to appeal, and the Court of Appeals made it crystal clear moving forward, that when harm is caused by a domestic animal, its owner's liability is determined solely on a theory of strict liability.[9] Reiterating its decision in *Collier v. Zambito*,[10] the Court held "that the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities. Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others in a given situation."[11]

The Court of Appeals elaborated that knowledge of vicious propensities can be established not only by proof of an owner's notice of prior acts of the domestic animal, but also by lesser proofs, including prior growling/snapping/baring teeth or evidence proving if and/or how an animal was restrained.[12]

Accordingly, defense counsel in dog bite injury cases in Nassau County Supreme Court have been very successful in motion practice seeking dismissal based on plaintiffs' failure to raise triable issues of fact as to whether defendants knew or should have known of the vicious propensities of their dogs. Further, the Supreme Court has routinely ruled that New York does not recognize a common-law negligence cause of action for injuries caused by domestic animals.[13]

See DOG BITES, Page 24

David J. Barry is a partner at the Mineola law firm of Collins Gann McCloskey & Barry PLLC, where he focuses on plaintiff's personal injury and criminal defense litigation. David also serves on the NCBA Board of Directors and as the Vice-Chair of the Plaintiff's Personal Injury Committee.

FOCUS:
HOUSING LAW

Housing Discrimination Issues Related to COVID-19

Robert L. Schonfeld

The recent surge in COVID-19 cases will likely result in a corresponding surge in claims of housing discrimination. While many of these complaints will be filed by people who have or have had COVID-19, there will also likely be claims asserted by Asian Americans blamed for the pandemic, persons of particular racial, ethnic or religious groups who live in areas which have an greater numbers of COVID-19 cases, or perhaps physicians and other health care professionals who have treated persons with COVID-19.

This article will explore legal issues related to persons discriminated against when obtaining housing because of COVID-19. There are two general principles that apply in housing discrimination cases. They are (1) anti-discrimination laws do not stop a housing provider from protecting the safety of residents and staff and (2) any exclusions or rules must be based on evidence and not stereotypes, assumptions or conclusions without an evidentiary basis. Those principles will be applied to the issues discussed.

Is COVID-19 a Disability Under Housing Discrimination Laws?

The Federal Fair Housing Act[1] and the Americans with Disabilities Act[2] (for public housing) bars housing discrimination on the basis of a disability. The key question, though, is whether COVID-19 is considered a "disability" covered by these laws. There has been no case law developed on this issue as of yet.

The first element of the definition of "disability" in these laws states that a disability is a condition that substantially limits a major life activity.[3] These functions are usually considered to be ability to work, learn, eat, or partake in daily living activities.[4] Using the first element of the definition, it is not clear whether a person who has or has had COVID-19 would qualify for coverage under the laws. Some people with COVID-19 have been asymptomatic and would not fall under the definition, while others have had lingering impairments and would be covered.

However, the definition of "disability" also covers persons who are regarded as being disabled or have a record or history of disability.[5] If a landlord or a cooperative or condominium board takes an action against a person with COVID-19, it is likely that such person will be "regarded" as having a "disability." Such a person would be covered by the Federal anti-discrimination laws related to housing.

The Federal Fair Housing Act obviously covers landlords, cooperative and condominium boards that exclude people with disabilities from housing because of their disabilities.[6] The laws also cover landlords, cooperative and condominium boards that place different terms and conditions on people with disabilities.[7] The question of whether different terms and conditions placed on people with COVID-19 violate the anti-discrimination laws will likely be the subject of considerable litigation.

Housing rules relating to persons with COVID-19 can generally be broken into two categories — (1) those that specifically affect people with COVID-19 such as required quarantining or exclusion from public rooms and (2) those that are disability neutral such as the exclusion of all visitors from a building. The Fair Housing Act does not require a building to place its residents or staff in danger. However, assumptions or fears about such persons cannot play a role in a determination about housing.

Therefore, if a person with COVID-19 is found by medical evidence to be a risk to other persons in a building if not quarantined or excluded from certain areas, the building will not run afoul of the Federal anti-discrimination laws.[8] However, if a building bases its policies on unjustified assumptions or conclusions, it will be in violation of the Federal Fair Housing Act.[9]

Disability neutral policies must be considered on a case by case basis. If a person with COVID-19 needs visitors to provide medical care or food and cannot leave their home, the building must make a reasonable accommodation of any "no-visitor" rules to allow that person to have visitors.[10] However, if a building closes certain facilities to all residents and a person with a disability does not demonstrate need on account of a disability, the building's conduct will likely not violate the anti-discrimination laws.

The New York State Human Rights Law[11] and the Nassau County Human Rights Law[12] have a somewhat different definition of what constitutes a "disability" under the Federal law, but those definitions are not so drastically different that they would require a different result.

National Origin Discrimination and Discrimination Based on Area

There has been considerable anecdotal evidence that there has been discrimination against Asian Americans on the presumption that Asian Americans brought the pandemic to the United States. Clearly, any discrimination against Asian Americans in housing is barred by current anti-discrimination laws.[13]

As well, African Americans, Latinos, and Orthodox Jews have incurred more cases of COVID-19 than persons of other racial, religious or ethnic groups. Clearly, discrimination against African-Americans, Latinos and Orthodox Jews simply because those groups have had more exposure to COVID-19 than others would violate the anti-discrimination laws.[14]

A more interesting question is whether a landlord who singles out individuals from an area or zip codes that has experienced an influx of COVID-19 cases, rather than because of being part of a particular racial, ethnic or religious group, is in violation of the anti-discrimination laws. The answer depends upon whether an area or zip code has a particular identification with a religious, ethnic, or racial group.

If an area or zip code is associated with a particular group, exclusion of persons from that area or zip code may have a disparate impact on those persons because of their race, ethnicity, or national origin and may therefore violate the anti-discrimination laws.[15] Discrimination against a larger geographic area, such as the entire city of New York City or all of Nassau County, would be less likely to be in violation of the anti-discrimination laws.

Occupational Discrimination

Finally, while it may seem implausible, it is conceivable that persons such as physicians and nurses who work at hospitals treating COVID-19 patients may be subjected to housing discrimination solely because of their contact with COVID-19 patients. With few exceptions, New York State law is simply not applicable.

Except in New York City, there is no bar to occupational discrimination under the anti-discrimination laws. Attorneys and actors have been excluded from cooperative buildings. Such exclusions, based on a person's occupation, does not violate the anti-discrimination laws.

However, an argument might be made that health care workers excluded from housing are being excluded because of their association with people with disabilities, namely people with COVID-19. Associational discrimination is in violation of the Federal Fair Housing Act.[16]

Conclusion

While these issues will likely be decided a case by case basis, the guiding overall principle will most likely be whether a building-wide rule is necessary to protect residents and staff and is not based on speculation, assumptions, or unjustified conclusions. Courts, in all likelihood, will balance the safety of residents or staff while will not condoning factually unsupported assumptions and conclusions.

1. 42 USC § 3604(f)(1).
2. 42 USC § 12132.
3. 42 USC § 3602(h)(1); 42 USC 12102(1)(A).
4. 24 CFR § 100.201; see *Rodriguez v. Village Green Realty*, 788 F.3d 31, 44 (2d Cir. 2015) (working and learning are major life activities).
5. 42 USC § 3602(h)(2), (3); 42 USC 12102(1)(B), (C).
6. 42 USC § 3604(f)(1).
7. 42 USC § 3604(f)(2).
8. 42 USC § 3604(f)(9) (building is not required to allow threats to health and safety of residents and staff).
9. *See, e.g., Human Resources Research Management Group, Inc. v. County of Suffolk*, 687 F.Supp.2d 237 (E.D.N.Y. 2010) (county law regulating substance abuse houses found violative of the Federal Fair Housing Act because it was based on unjustified assumptions and stereotypes).
10. 42 USC § 3604(f)(3)(B); *see, e.g., Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328 (2d Cir. 1995) (building had to make an accommodation for parking space for resident with a disability).
11. Executive Law 292(21).
12. NCAC § 21-9.2(e).
13. 42 USC § 3604(a) (national origin discrimination barred by the Fair Housing Act).
14. 42 USC § 3604(a); *see, e.g., MHANY Management, Inc. v. County of Nassau*, 819 F.3d 581, 606–08 (2d Cir. 2016) (law discriminating against persons because of their race or ethnicity violative of Fair Housing Act).
15. *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507 (2015); *Tsombanidis v. West Haven Fire Department*, 352 F.3d 565, 575 (2d Cir. 2003).
16. 42 USC § 3604(f)(1)(C).

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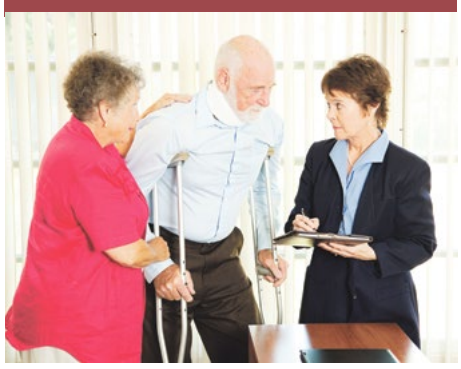
FOCUS:
PERSONAL INJURY

Impact of Court of Appeals' Holding in *Rodriguez v. City of New York*



Ira S. Slavit, Matthew Lampert, and Melissa Manna

"To be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault."[1]

With that holding in *Rodriguez v. City of New York* almost three years ago, the Court of Appeals changed the landscape in personal injury litigation, no longer requiring plaintiffs to establish their complete freedom from comparative negligence to obtain summary judgment on the issue of liability. The Court's rationale, citing to the language and intent of CPLR 14-A, is essentially that comparative negligence relates to damages, not liability.

Impact of *Rodriguez*

Pre-*Rodriguez*, a plaintiff seeking summary judgment on the issue of liability was "required to establish that the defendant was negligent, that the negligence was a proximate cause of the plaintiff's injuries, and that the plaintiff was free from comparative fault."[2] By virtue of *Rodriguez*, plaintiff has been relieved of the burden to prove freedom from negligence to obtain summary judgment on liability.

Post-*Rodriguez*, there has been an influx of plaintiffs' summary judgment motions and court decisions that cite to this significant holding. Plaintiffs have relied on *Rodriguez* in obtaining summary judgment in motor vehicle, premises liability, Labor Law §§ 240(1), 241(6) and 2003, negligent security cases,[4] and General Obligations Law § 11-106 and General Municipal Law § 205-e causes of action involving injury to a police officer.[5]

As applied, arguing plaintiff's comparative negligence is the only summary judgment motion defense *Rodriguez* eliminates. All other defenses in defendant's arsenal are available. In addition, to obtain summary judgment, it remains plaintiff's burden to establish, prima facie, the defendant was negligent and the defendant's negligence was a proximate cause of the alleged injuries.[6]

Arguably, one of *Rodriguez*' biggest impacts is an increase in the number of cases where settlement negotiations take place at earlier stages in the life of the litigation as the threat of pre-verdict interest, generally at the statutory rate of 9% per annum, begins to run on the date of the court's decision granting summary judgment on liability or the date an appellate court reverses the denial of summary judgment.[7]

Thus, in evaluating case value and a reasonable settlement amount, both sides need to take into account that at trial plaintiff's comparative negligence is the only liability issue on the jury interrogatories, and having juries focus on plaintiff's conduct does not always benefit the plaintiff.

It does not appear that *Rodriguez* has or will re-open the door to a reexamination of pre-*Rodriguez* orders that followed then-existing precedent regarding plaintiff's burden when moving for summary judgment on liability.[8]

As a caveat to plaintiff's lawyers, interest does not begin to run upon execution of a stipulation between parties establishing the liability of one of them unless the stipulation explicitly provides for pre-judgment interest.[9]

Comparative Negligence After *Rodriguez*

Where summary judgment on liability is granted post-*Rodriguez*, CPLR Article 14-A affirmative defenses of culpable conduct such as comparative negligence and assumption of risk pled in the defendant's answer remain intact. To obtain dismissal of those affirmative defenses, plaintiff's notice of motion must explicitly include that request for relief.[10] A plaintiff cannot properly request dismissal of the affirmative defenses for the first time in reply papers.[11]

Plaintiff must demonstrate the absence of his or her comparative fault to obtain dismissal of culpable conduct affirmative defenses. In *Poon v. Nisanov*, the Second Department held that "[a]lthough a plaintiff need not demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a defendant's liability … the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where … the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence.[12]

Rodriguez does not ease a plaintiff's burden on a summary judgment motion on liability if the defendant possesses a "primary" assumption of risk defense. Primary assumption of risk applies to claims arising from sporting events, sponsored athletic activities, or athletic and recreational pursuits. Under this theory, a plaintiff who freely accepts a known risk commensurately negates any duty on the part of the defendant to safeguard plaintiff from the risk.[13]

Since no viable cause of action for negligence exists where plaintiff has assumed a primary assumption of risk, comparative negligence is an irrelevant issue. Just as before *Rodriguez*, to obtain summary judgment on liability where a defendant alleges primary assumption of risk, the plaintiff must prima facie establish that the defendant failed to satisfy its duty to make things as safe as they appear to be, that that the known risks of the activity were concealed or unreasonably enhanced, or that the conduct of others was reckless or intentional.

Practice Pointers: Plaintiffs

Plaintiff's counsel must be mindful that all the stringent requirements that a proponent of summary judgment must establish apply to plaintiff's summary judgment motions on liability. The moving papers must eliminate all issues of fact regarding the defendant's negligence and that the negligence was a proximate cause of plaintiff's injuries.

The court should be reminded that opposition relating to a damages issue, rather than liability, will not defeat the motion. For example, defendant's argument that the chain plaintiff tripped on was open and obvious was insufficient to defeat the motion as it was held the issue was relevant to comparative fault.[14] Opposition on the ground that the motion is premature will not prevail if the purportedly outstanding discovery would potentially lead solely to evidence of plaintiff's comparative fault.[15]

Perhaps the biggest pitfall for plaintiffs as movants is that in the quest to eliminate all genuine issues of fact, they fail to make sure none of the exhibits submitted with the motion raise an issue of fact. This will result in denial of the motion, regardless of the opposition's sufficiency.

In *Grant v. Carrasco*, not only did plaintiff submit evidence of a potentially nonnegligent explanation for striking plaintiff's vehicle in the rear, he also submitted an uncertified copy of a police accident report which stated,according to the defendant driver, that plaintiff's vehicle came to a sudden stop even though the traffic light was green. By submitting the report, the plaintiff waived any objection to its admissibility, notwithstanding that it contained self-serving statements not in admissible form.[16]

Summary judgment was similarly denied in *Tejada v. Cedeno*, where plaintiff's motion papers included documents containing a version of the accident indicating that the defendant may not have been negligent.[17]

It is imperative that plaintiffs' counsels carefully review all contemplated exhibits to make certain that, as helpful as they may appear to be, nothing therein can be construed to raise an issue of fact. Only proof needed to demonstrate prima facie entitlement to summary judgment should be submitted. An affidavit from the plaintiff may be the simplest way to get the necessary information to the court even if the information is already established elsewhere.

Practice Pointers: Defendants

Rodriguez' holding benefits the plaintiffs' bar, but the basics of defending a negligence action have not changed. Like any other case, plaintiff's burden to establish a defendant's alleged negligence and proximate causation have not changed. The facts of each case will always be significant. It is critical to obtain detailed information about the accident and its location during depositions. Use of photographs, plans, and maps, if available, will help depict the area where the accident took place and could impact plaintiff's version of the events. A question of fact as to plaintiff's credibility can result in the denial of summary judgment and be quick to highlight when plaintiff's evidentiary submission presents conflicting testimony, warranting a denial of summary judgment.[18]

It is imperative to anticipate that upon plaintiff's summary judgment motion as to liability, plaintiff may also move to dismiss defendant's affirmative defense of comparative negligence. As indicated above, plaintiffs must affirmatively seek this relief and must show that, as a matter of law, they were free from negligence in the happening of the accident.

Here, not only must defendants show a triable issue of fact to defeat summary judgment on liability, they must also make such a showing as to plaintiff's negligence when opposing a motion to strike this affirmative defense. The "existence of an open question as to a plaintiff's comparative

See *RODRIGUEZ*, Page 22

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FOCUS:
EXECUTIVE ORDERS

A Suspension? A Toll? None of the Above? Scope of Executive Order 202.8

Christopher J. DelliCarpini

In a series of executive orders during the current pandemic, Governor Cuomo tolled for over six months every statute of limitations, filing deadlines, and all other time limits in New York civil and criminal procedure. Or did he?

To answer this question once and for all—if that is even possible—we must examine the executive orders, the law that authorizes them, and the few judicial decisions to have considered the matter.

Executive Orders

On March 7, 2020, the Governor signed Executive Order ("EO") 202, "Declaring a Disaster Emergency in the State of New York."[1] As authorized by Executive Law § 28, the Governor declared a disaster from the spread of COVID-19. Under Executive Law 29-a, he also suspended or modified for thirty days several laws and regulations that otherwise "would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster."

The next step came on March 20, 2020, when the Governor signed EO 202.8, "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency."[2] This order suspended a variety of additional statutes, but led with a broad provision purporting to toll every court deadline:

> In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020.

Subsequent executive orders extended this tolling period generally, but did lift it as to particular statutes along the way, and ended it entirely as of November 3.[3]

Initial Commentary

Initial commentary presumed that EO 202.8 did as it purported, and tolled all deadlines through the duration of the period.[4] The effect would be to add the tolling period (228 days, from March 20 to November 3, 2020) to any deadline that fell within it, or add to November 3 the time remaining for any action when the tolling period started.

Just after the last executive order continuing the tolling period was signed, however, a contrary view appeared. In the New York Law Journal, Justice Thomas F. Whelan of Supreme Court, Suffolk County contended that Executive Law § 29-a empowered the Governor only to "temporarily suspend" legal time limits, rather than rewrite them to create a tolling period.[5] In support, he cited executive orders issued after 9/11 and Superstorm Sandy creating "grace periods" rather than tolls. If the deadlines that fell during the period were merely suspended, however, then they ran only to November 4, 2020, the day after the suspension ended.

A subsequent NYLJ column disputed Justice Whelan's position, defending the interpretation of EO 202.8 as a toll.[6] Attorney Souren A. Israelyan argued that "There is no legal distinction between 'suspension' and 'tolling' of a statute of limitation," based on state and federal decisions that used the words interchangeably. He also cited amendments to Section 29-a from the start of the pandemic, broadening the Governor's authority to suspend whole statutes, not just specific provisions. Israelyan concluded that this interpretation of EO 202.8 also best fit "the goals of the disaster action necessary."

Executive Law § 29-a

As quoted above, EO 202.8 expressly meant to toll, rather than merely suspend, court deadlines. The continuing orders confirm this, consistently referring to "The suspension in EO 202.8…that tolled any specific time limit…prescribed by the procedural laws of the state."[7] This formulation also asserts the legal theory: suspending the laws tolled the time limits that they imposed.

It also seems clear that Section 29-a authorizes the Governor to toll time limits, rather than merely suspend them. In Subsection 1, the statute recognizes almost no limits on the Governor's power, "Subject [only] to the state constitution, the federal constitution and federal statutes and regulations." Subsection 2(d) provides for powers so broad as to be virtually limitless:

> [T]he order may provide for such suspension only under particular circumstances, and may provide for the alteration or modification of the requirements of such statute, local law, ordinance, order, rule or regulation suspended, and may include other terms and conditions.

Elsewhere, however, Subsection 2 imposes some conditions. Executive orders can last no more than thirty days (hence the continuing orders). They also must be "in the interest of the health or welfare of the public" and "reasonably necessary to aid the disaster effort." And each executive order "shall provide for the minimum deviation…consistent with the goals of the disaster action deemed necessary."

For our purposes, the most important condition comes in Subsection 2(c):

> [A]ny such suspension order shall specify the statute, local law, ordinance, order, rule or regulation or part thereof to be suspended and the terms and conditions of the suspension.

On its face, EO 202.8 appears not to meet this requirement. The rest of the order specifies each statute being suspended, but the paragraph of concern to us specifies no statutes. Rather it purports to toll "any specific time limit…prescribed by the procedural laws of the state," whatever they may be. The qualifier "including but not limited to" indicates that the order purports to suspend laws that it does not even mention.

Decisions Applying EO 202.8

The good news for those who want the tolling period is that virtually every court to consider the matter thus far has held that the executive order creates a lawful toll. The bad news is that none of these decisions has both the authority and analysis that make for enduring precedent.

The first such decision, from Bronx Supreme Court, offered the lengthiest analysis—and not much at that. In *People ex rel. Hamilton v. Brann*, the petitioner was in custody after arraignment, and moved via writ for his immediate release.[8] He argued that he was entitled to release because he was not indicted within the time limit set by CPL 180.80—which

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FOCUS:
PROFESSIONAL COURTESY

Lessons on Civility for Attorneys

Brian Gibbons

I want you to be nice…until it's time to not be nice.

—Road House (1989)

Putting aside that Road House was a blatant snub at the 1990 Academy Awards, this quote from Dalton, the protagonist bouncer (with a Ph.D in Eastern Philosophy, by the way) at the Double Deuce Bar encapsulates how attorneys deal with adversaries: extending courtesies and acting professionally, until the adversary forfeits that benefit (i.e., until it's time to not be nice).

Litigation is, by nature, adversarial. Unsurprisingly, then, some suggest that no quarter be given to an adversary, because such a concession could benefit the adversary, potentially to the client's detriment. That said, principles of common sense, decency, practicality, and manners dictate the extension of professional civility when appropriate. After all, we may need a favor someday. These principles are not limited to the practice of law, by the way. The idea of a Social Contract goes back to Locke and Rousseau in the 17th and 18th centuries. Should our collective membership to the bar include a similar implicit contract, and by extension, a higher standard of civility?

Having spoken with a number of bar members about this topic, it appears that the vast majority of litigators and trial attorneys, among both the plaintiff's and defense bars, try to practice in a civil manner. But there are exceptions. We have all encountered attorneys who refuse to execute discovery stipulations or consent to adjournments, who obstruct deposition questions, or engage in personal attacks in motion practice. And in terms of perhaps less intentional, but equally unprofessional behavior, virtually every female practitioner has been mistaken for a court reporter at a deposition at least once, either accidently, or as a tactical "mind game" by a counterpart.

When an adversary decides that "it's time to not be nice" with obstructive or unprofessional practice, what recourse do we, as reasonable, courteous attorneys have? And when is the appropriate time to enlist either the court or the grievance committee to address such behavior?

To help us tackle some of these complex issues, the Nassau County Bar Association Plaintiff's Personal Injury Committee and Defendant's Personal Injury Committee, headed by Ira S. Slavit and Matthew Lambert, respectively, co-moderated a program on December 2, 2020, entitled, "Why Civility in the Practice of Law Matters." Our distinguished panel included Hon. Denise Sher, Supreme Court, Nassau County, Hon. James P. McCormack, Supreme Court, Nassau County, defense trial attorney Jacqueline Bushwack of Rivkin Radler LLP, plaintiff's trial attorney Christopher T. McGrath, Esq. of Sullivan Papain Block McGrath Coffinas & Cannavo P.C., and criminal defense attorney and former grievance committee member Marc C. Gann of Collins, Gann, McCloskey & Barry, PLLC.

The general goal of the Zoom presentation was to seek the guidance of our panelists and draw on their experience as members of the judiciary, grievance committee and both plaintiff's and defense bar, to better deal with adversaries who refuse to sign the "Social Contract," in terms of their practice tactics and habits.

To facilitate the panel discussion, we presented various hypothetical scenarios involving some unfortunately common unprofessional situations, to prompt discussion among, and guidance from, the panelists. For example, Justice McCormack addressed personal attacks by opposing counsel in motion papers, of which the Court (and Justice McCormack, specifically) strongly disapprove. If we encounter personally directed in an adversary's papers, we should resist the urge to retaliate. The Court should recognize inappropriate personal attacks for what they are, and responding in kind only hurts your position going forward.

Jacqueline Bushwack discussed how to address sexist or obstructive behavior, specifically during a deposition. She suggested making a clear record, documenting the transgressions by the adversary in a non-combative manner. That way, in the event the unprofessional behavior continues, to the point where you need to end the deposition, the record protects you, and your right to continue the deposition at a later date is preserved. Justice Sher addressed the topic of consent adjournments of trial, if presented with either a family emergency, or other exigent circumstance, such as COVID-19.

For example, assuming COVID trial restrictions lift soon, and a plaintiff's counsel is eager to press trial to keep his client happy, but defense counsel has legitimate personal misgivings about in-person trial practice, where is the middle ground? Justice Sher offered that while both sides have a legitimate basis to "dig in" on their respective positions, a legitimate medical concern should be respected. And to whatever extent plaintiff's counsel has a client relationship to maintain, Justice Sher suggested bringing the client to court for a trial conference, to potentially hear from the judge. The prospect of speaking with a judge in Supreme Court may have more gravitas for the client, and lend credibility to plaintiff's counsel's consent to an adjournment.

Christopher McGrath and Jacqueline Bushwack discussed the nuanced topic of professionalism and transparency during settlement negotiations. Whether we represent plaintiffs or defendants in a personal injury context (or, frankly, in any context) we have all confronted situations where on the eve of mediation, it has become abundantly clear that the client's expectations are unreasonable, and that settlement is highly unlikely. Even if no formal settlement discussions have taken place before mediation, the attorneys involved often have informal discussions about the major issues of the case. To that end, experienced attorneys likely have an idea of what the outcome should be.

What should we do if our client is going to go against our advice, and take an unrealistic position at mediation? Christopher and Jacqueline agreed that transparency with opposing counsel should be considered, where appropriate. No one likes surprises at mediation. To whatever extent an unrealistic position is going to make settlement impossible at mediation, a call to the adversary in advance of mediation makes sense. Such a call enables your adversary to manage his/her client's expectations, and avoid (or at least mitigate) an embarrassing mediation experience.

Justice McCormack, Justice Sher, and Marc Gann addressed the bounds of zealous advocacy during trial, and particularly, during summations. They all pointed out that fortunately, the Appellate Division has provided some guidance on this issue: where improper remarks during summation cross a line, the court may order a new trial, if the remarks are "so prejudicial as to have caused a gross injustice, and where the comments are so pervasive, prejudicial, or inflammatory as to deprive a party

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FOCUS:
LEGAL SERVICES

School During a Pandemic: Legal Counsel for Students

Rebecca Sassouni

As a solo practitioner who represents students in school settings, I am accustomed to consultations with frustrated students and parents. My role is to listen, to guide, and to offer insight on possible legal recourse. The COVID-19 health pandemic, and its economic and political fallouts, continues to exacerbate every aspect of schooling, whether remote or in-person, typical or classified, public or private, kindergarten through high school, college or graduate-level. This is the second school year affected.

Legal Background

Unlike many educators, students have no bargaining unit. Even under the best of circumstances before the pandemic, school personnel were frequently overwhelmed, bureaucratically saddled with unfunded mandates, and working with more scarce resources. None of this improved since COVID-19. Without a union, and, with privacy protections which also effectively sever students from other similarly situated students,[1] each student's matter can ultimately only be addressed one at a time (or, potentially, not at all). This article addresses an assortment of the most commonly raised fact patterns reaching my office since the pandemic began.

After consultation, the student and family may be re-routed to the school to strategize a workable solution, with legal representation a last resort. In other instances, legal recourse is necessary. In any case, one cannot help but note the terrible irony that the pandemic has made it more difficult than ever for students and parents to advocate for themselves when they, too, are overwhelmed. No article can exhaust every individual fact pattern; consult an attorney as circumstances emerge. One hopes that by seeking appropriate counsel fewer students will "fall through the cracks" as the pandemic effects wear on into a second school year.

It cannot be overstated that even during the pandemic, and subject to the Governor's Emergency Executive Orders,[2] the matrix of Education Law,[3] the Federal Education Rights and Privacy Act ("FERPA"),[4] the Every Student Succeeds Act ("ESSA"),[5] the Individuals with Disabilities Education Act ("IDEA"),[6] Section 504 of the Rehabilitation Act,[7] New York State Human Rights Law,[8] New York State Dignity for All Students Act ("DASA"),[9] McKinney-Vento Act,[10] and contract law,[11] still remain in effect, where applicable. Of course, student codes of conduct governing individual schools also remain in effect.

While the COVID-19 pandemic has immeasurably upended lives, schools and students must still operate within legal and regulatory policy frameworks. Every New York State student from kindergartner to age16 (and up to 21 in certain instances involving special education) is entitled to a free and appropriate public education ("FAPE") which is akin to a tenured property right,[12] but also, concomitantly obligates students to compulsory attendance, and to abide by codes of conduct.[13] Even—and perhaps especially—during a pandemic, schools are mandated reporters,[14] and have "child find" obligation to notice abuse and neglect, and to request consent to evaluate students for special education needs.[15]

Scenarios and Suggestions

Student will not wear a mask.

Although most schools were in session since September, New York State did not affirmatively require masks until November of 2020 for those "over age 2 and medically able to tolerate."[16] Students who have documented conditions which preclude them from covering their nose and/or mouth have provided information to schools requesting exemptions, per the NYS order. However, even with the medical documentation, they are not entitled to be unmasked in-person. Rather, they are typically placed on remote learning.

Public school families wish to switch from remote to in-person learning, or vice versa.

After previously choosing one setting for learning, the family concludes that the student would do better in the other setting. While students in public school are entitled to learning, they are not entitled as of right to the placement of their choice. Schools have authority to assign placement, whether to a particular class or building as prior to the pandemic, or in person, hybrid, or remote since the pandemic. Availability of spots in a program is the prerogative of school personnel.

Family wants to switch to homeschooling.

Some erroneously confuse remote learning and homeschooling. "Home schooling" requires advanced notice, giving of intent, following curricula, obtaining materials, and oversight by the school district. It is not synonymous with remote learning and once the deadline has passed it is not available.[17]

Public school students miss sports, drama, and extracurricular activities.

Family demands more. Physical education during the school day is still required by New York State.[18] However, many students and families have been disappointed that extracurricular activities—most especially sports teams, but also musical and vocal performances—have been affected by COVID protocols. Governor Cuomo's Executive Orders are emerging on these.[19]

Public school family chooses remote learning and moves to an out-of-district location to shelter and 'zoom-in' for synchronous and asynchronous learning.

Many families of means chose to move to shelter away from COVID clusters, while other families suffering job loss, and familial and economic hardships, also moved. In either case, many are surprised to learn they cannot continue to receive education remotely from the school district while out-of-residence.[20]

Public school family decides to enroll in private school and seeks tuition reimbursement.

While parents and guardians have the unilateral right to enroll students in nonpublic schools, pandemic or not, they may sometimes obtain tuition reimbursement if they can demonstrate: a record of a denial of free and appropriate public education; an appropriate alternative enrollment; and that the balance of equities favors reimbursement. This typically takes a period of time to demonstrate, whether to document the denial of FAPE or to tip the balance of equities in the student's favor. Nine months into a pandemic that affects everyone is not, in and of itself, sufficient to expect a successful reimbursement claim.[21]

Public school students suspended.

Student codes of conduct remain in effect while the lists of incidents for which students are suspended has grown, and have included: zoom-bombing, refusal to mask, and refusal to social distance. Meanwhile, so-called "zero tolerance" policies that aimed to keep school communities safe prior to COVID-19 are being used to suspend students for safety and insubordination infractions during remote learning. Many students and families are surprised that their school's authority to suspend

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PROGRAM

Pre-registration is REQUIRED for all Academy programs. Go to n
CLE material, forms, and zoom link will be sent to p
All programs will be offered via

February 3, 2021

Dean's Hour: Spirit Which Prizes Liberty—Abraham Lincoln
Sponsored by NCBA Corporate Partner Champion Office Suites
12:30-1:30PM
1 credit in professional practice

February 4, 2021

Recent Rules in Real Estate: An Update on Real Estate Law Trends since the Pandemic
Sponsored by NCBA Corporate Partners Champion Office Suites and Tradition Title Agency, Inc.
5:30-8:30PM
3 credits in professional practice
Skills credit are available for newly admitted attorneys

February 10, 2021

Dean's Hour: Running a Lean Practice in 2021
Sponsored by NCBA Corporate Partner Champion Office Suites
12:15-1:15PM
1 credit in professional practice.
Skills credits are available for newly admitted attorneys

February 24, 2021

Dean's Hour:
Brave New World: Current Legal Issues Involving Artificial Intelligence
Sponsored by NCBA Corporate Partner Champion Office Suites
12:00-1:00PM
1 credit in professional practice
Skills credits are available for newly admitted attorneys

1 CALENDAR

nassaubar.org and click on CALENDAR OF EVENTS to register.
re-registered attendees 24 hours before program.
ZOOM unless otherwise noted.

February 25, 2021

Dean's Hour:
From Cocktails to COVID: DRAM Shop and Social Host Liability Laws
Sponsored by NCBA Corporate Partner Champion Office Suites
12:00-1:00PM
1credit in professional practice
Skills credits are available for newly admitted attorneys

March 2, 2021

Business of Law Lecture Series Presents:
Dean's Hour: Why Attorneys Must Use Performance Data in the Practice of Law
Sponsored by NCBA Corporate Partner Champion Office Suites
12:30-1:30PM
1credit in professional practice
Skills credits are available for newly admitted attorneys
****Zoom networking will precede program from 12:00-12-30PM****

March 3, 2021

Dean's Hour: Scholar, Soldier, Sage—Oliver Wendell Holmes, Jr.
Sponsored by NCBA Corporate Partner Champion Office Suites
12:30-1:30PM
1credit in professional practice

March 5, 2021

Dean's Hour: You Can Do That? The Power of PDFs
Sponsored by NCBA Corporate Partner Champion Office Suites
12:30-1:30PM
1 credit in professional practice.
Skills credits are available for newly admitted attorneys

FROM THE BENCH:
VIRTUAL COURT PRACTICE

Conducting Trials During the Pandemic: Who Is in Charge Here?

Hon. Arthur M. Diamond

Eight months into the year of the creation of the "virtual courtroom," it appears to me that there is still much confusion about a judge's authority to "order" attorneys to do this or that virtually. We know that if both attorneys are in agreement on conducting a deposition, or a trial for that matter, virtually, the court will in all likelihood go along. But, where the parties are not in agreement, what may a judge permissibly order? For the reasons stated below, in my opinion: not much.

In his recent New York Law Journal column,[1] attorney Mark Berman raises the question of whether or not virtual depositions can be compelled. I think the problem is much more pervasive, and without a clear controlling statute or appellate court precedent, "judicial discretion" will no doubt control. As experienced trial attorneys may attest, that may be a slippery slope. This column will discuss a number of scenarios where judicial intervention is warranted, but the authority to act is circumspect.

I think we can all agree that the conduct of a trial is generally held to be within the sound exercise of the discretion of the judge or justice presiding. When dealing with pretrial discovery, likewise, we should all agree that there are two relevant sections of the Civil Practice Law and Rules that may come into play when a judge is asked to be involved in discovery disputes between the parties. First, CPLR § 3103, entitled "Protective Orders," contains the following subdivision:

> (a) Prevention of Abuse. The Court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning, or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

Second, CPLR § 3113(d), states, in relevant part in subsection (d), "the parties may stipulate that a deposition may be taken by telephone or other remote electronic means and that party may participate electronically." This latter section is simply the only reference to any electronic proceeding in the statute.

The case law interpreting these statutes have long recognized that the decision to allow a party or witness to testify via video is within the trial court's discretion.[2] Of course, it is presumed that a deposition will take place in person and in the county where the action is located; thus, if a party seeks an alternative location, there must be showing that appearing in the home county would be an undue hardship.[3] For example, a pre-pandemic scenario that I have dealt with several times typically involves a party who is elderly, lives in Florida, has a heart condition, and has his or her attorney present a letter signed by a physician stating that his or her patient is too frail to fly from Florida to New York. Even if opposed by the adversary, I have ordered in such a case the party participate in the trial—not simply a deposition—via electronic means, with certain conditions.

But what the pandemic has done has taken what was a relatively rare discovery issue and turned it into what has become almost an everyday problem for lawyers and courts: how to apply these statutes and cases to our world as it exists today. As Mr. Berman points out, there have been four post-pandemic reported trial-level, unreported decisions that have involved the compelling of virtual depositions.

First, there was *Johnson v. Time Warner Cable New York City, LLC*, from New York County,[4] in which Plaintiff sought to depose three non-party employees of a contractor of Defendant Time Warner. Acknowledging the dangers of in-person depositions during the pandemic, Plaintiff sought to conduct the depositions virtually, whereas Defendant's counsel wanted to delay the depositions until the pandemic restrictions were lifted in the future.

Defendant's counsel argued that he did not feel comfortable participating in a video deposition and Defendant Time Warner would be prejudiced if it were not allowed to sit with their client during the deposition. Additionally, Defendant Time Warner argued that, in view of the fact that courts were likely to be closed for many more months to come, even if the case were put on the trial calendar sooner rather than later, it was unclear as to when jury trials would be held; therefore, there was no exigency in forcing these depositions under these circumstances. Nevertheless, the Court was unwilling to wait until the "old normal" returned to the practice of law in New York City and instead ordered the depositions to go forward over the next two months by remote means.

Next, there was *Bell v. Stoddart*, from Bronx County.[5] In this matter, Plaintiff moved for an order precluding Defendant from offering evidence at trial if Defendant did not appear for a deposition conducted by remote means. Defendant's counsel here advised that his client was not "tech savvy," that he lacked access to electronic means to appear virtually, and that his attorney would not be able to adequately prepare him for the deposition. Based upon these facts, Defendant argued that forcing an electronic deposition would create an undue burden on his client. The Court rejected this argument but denied the preclusion motion anyway; instead, it gave Defendant an additional ninety days to decide if he wanted the deposition to be conducted virtually or in person, and then ordered the deposition to be conducted within thirty days thereafter.

Of the final two unreported cases dealing with the issue of remote discovery, one arises from a case before my colleague Hon. James P. McCormack right here in Nassau County in case called *MacDonald v. Pantony*.[6] Following post-deposition paper discovery, Defendants sought an additional deposition from Plaintiffs and, in granting the application, Justice McCormack directed *sua sponte* that depositions shall take place via Skype, Zoom, or other electronic means unless all parties and counsel agree to face-to-face depositions with the appropriate social distancing. Lastly, in a matter before a Family Court Referee from New York County from October, an abuse proceeding was ordered to occur virtually over objection.[7]

I would say that there is not anything groundbreaking here, as the courts continue to use the "undue hardship" test, balance the equities, and issue a decision. I do not have any doubt that depositions will get done. The much bigger question, in my opinion, is what happens *after* cases are certified, and thus outside the broad discretion and beyond the reach of the discovery statutes and caselaw. I submit that there are at least three hypothetical scenarios a Judge should be prepared for when a civil case is assigned for trial:

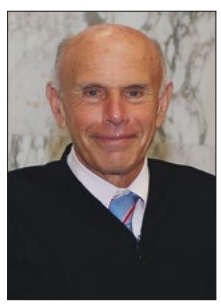
1. One party agrees to come in, pick a jury, and is ready to go. The other party objects for various pandemic-related reasons, stating, "Your honor, I am over sixty years old, have asthma, and have an elderly parent that lives with us and is extremely high risk. I can't expose myself to an in-person trial. There is just too much unknown about what could happen."
2. Both parties agree to an in-person trial, but one party refuses to conduct a cross-examination of any witness virtually. The refusing attorney states, "It must be done in-person or my client will not be getting a fair trial and I will not be able to carry out my duty to represent my client to the best of my ability."
3. Neither party wants to proceed in-person. One party requests an adjournment from the court until such time as she is able to get vaccinated, and the other party does not oppose the application.

In my opinion, the precedent mandating depositions to be held remotely is not at all helpful when it comes to trials. First and foremost, as I read the CPLR, there is not any authority that allows a judge to order a refusing attorney to go to trial using remote technology. Yes, I do have the discretion to conduct a trial as best as I see fit, to make a record as to the request for an adjournment, and to use the various sanctions against a party who says they cannot proceed, such as defaulting him or her, striking of pleadings, and/or entering judgment to name a few options. But, none of the reported decisions available in which a review is made of actions taken by a judge against a party who refuses to proceed involves such applications during a pandemic. The guidelines from the Office of Court Administration on in-court operations are of no help either, as they do not give any authority to a judge, other than what is already acceptable, to order trials to proceed under these conditions.

I submit to you that we may need new orders from the Executive Branch and the Office of Court Administration, announcing clear and specific parameters of authority that trial judges shall have in controlling our trial calendars. I hear often the Chief Judge telling the world that our courts are open for business and that civil and criminal jury trials have commenced and are proceeding, notwithstanding the latest pause on jury trials as of November 16.

While that may be true in principal, what is being left out of the message is this reality: we are open for business, so long as everyone involved wants to proceed and has agreed on how to conduct the trial. I submit that the number of cases where everyone involved wishes to proceed despite the unusual circumstances we find ourselves in is rather small and shrinking. The

See TRIALS, Page 24



Hon. Arthur M. Diamond is a Nassau County Supreme Court Judge in Mineola. He welcomes questions concerning evidence and trial practice and can be contacted at adiamond@nycourts.gov.

FILM REVIEW

Reshaping the World: Abby Mann's Judgment at Nuremburg

Rudy Carmenaty

A few years ago I retired to a room on Fifty-eighth Street in New York and I retired with some legal records of the Third Reich. And I went there because I believe a writer worth his salt at all has an obligation not only to entertain, but to comment on the world which he lives, not only comment, but maybe have a shot at reshaping that world.[1]

–Abby Mann, on receiving the Academy Award for Judgment at Nuremberg

Abby Mann's *Judgment at Nuremberg* depicts the prosecution of four German judges charged with providing the jurisdictional framework for the crimes against humanity committed by the Third Reich. Addressing the issue of Germany's war guilt, the drama ultimately speaks to the shortcomings inherent in the modern nation state.

The story, which never descends into abstraction, operates on many levels. During the course of the drama, it remains clear nevertheless that it is the rule of law that is actually on trial. Accused alongside the four defendants is the very notion that a supposedly civilized people could descend to such unspeakable barbarism and do so under the cloak of legality.

The very soil which once produced Kant, Goethe, and Bach, has now spawned the monstrosity that is Adolph Hitler. Germany also generated countless, faceless men who carried out the horrific orders of their superiors without compulsion. In the case of the accused, they are men of varying ability who gave these travesties legal sanction.

As fascinating as this underlying premise is, the matter is further compounded, and the tension accentuated, by the author putting the actions of American officials, both military and civilian, under scrutiny. The United States does not emerge unscathed in *Judgment at Nuremberg*.

Mann's story takes an uncomfortable look at U.S. foreign and military policy. The Germans are not being tried in a vacuum. Rather, they stand accused in the shadow of the emerging Cold War, after the leveling of Hiroshima and Nagasaki, and in light of the ambivalence felt by the American people as they assume the responsibilities of global leadership

Judgment at Nuremberg began as a live television drama. It was produced by Herbert Brodkin and directed by George Roy Hill, airing on CBS's *Playhouse 90* on April 16, 1959. The program starred Claude Rains as Judge Hayworth, Paul Henried as Janning, Melvyn Douglas as the prosecutor, Colonel Lawson, and Maximillian Schell as Hans Rolfe, the Germans' defense counsel. Schell would reprise his role in the 1961 film.[2]

The teleplay is available on YouTube and is well worth watching. The television version runs a third of the length of the motion picture (sans commercials) and lacks the production values of Stanley Kramer's movie. Yet this compact rendition of *Judgment at Nuremberg* is in some ways superior, exploring the same themes and performed by an inspired cast.

Brigadier General Telford Taylor, who served as the Chief Counsel for the Prosecution at the United States Nuremberg Military Tribunals (1946-1949) and was a technical advisor to the production, introduces the program adding an air of authenticity. In keeping with the crass, commercial nature of 1950's television, the program's alternate sponsor was "*your Gas Company*".

Hill brilliantly intercuts within the *Playhouse 90* telecast documentary film footage, some of which was taken by the Nazi film maker Leni Riefenstahl.[3] This innovation not only enables the actors and technicians to transcend the limitations necessitated by live television, but it also gives a depth to the narrative by blending it with scenes of actual German propaganda.

It was also the first time that films taken by the U.S. Army Signal Corps during the liberation of Buchenwald were aired on American television. These images, along with the accompanying narration, gives the audience a graphic depiction of the horrors that the Nazi visited upon their victims.

The *Playhouse 90* telecast is a tour-de-force offering a neatly distilled, unflinching version of Mann's story. Two years later *Judgment at Nuremberg* was adapted for the cinema by director- producer Stanley Kramer. The script is fleshed out, characters are added, and the film's exteriors were actually shot in Nuremberg.

Kramer was a Hollywood maverick responsible for such films as *High Noon*, *The Defiant Ones*, and later *Guess Who Is Coming to Dinner*. Ever willing to tackle social issues on the screen with conviction and passion, he spent his career defying the old adage that if you want to send a message call Western Union.

Kramer mounted a spectacular production whose cast included Burt Lancaster, Richard Widmark, Marlene Dietrich, Montgomery Clift, Judy Garland, and a young William Shatner. But at the heart of Kramer's film is the performance of Spencer Tracy, who portrays Judge Dan Hayworth.

Kramer and Tracy collaborated on four films, including the final three films of Tracy's long career. Unfortunately a dimly remembered figure now, Tracy was at the time the dean of American actors. Both Tracy and Maximillian Schell would be nominated for Best Actor at the Academy Awards that year. When Schell won, he thanked "*that great old man*."[4]

A truly gifted performer, Tracy personified on screen the decency and integrity that represented the best that our country has to offer. Perhaps U.S. Supreme Court Justice William O. Douglas most succinctly described what Spencer Tracy meant to his audience:

> *I never knew anyone more American than he. I realize the label "American" means various things, even a "vigilante" to some. But Spencer was the opposite. He was Thoreau, Emerson, Frost.*[5]

Traditionally, legal films are told through the eyes of the lawyers. In most movies, judges often sit on the bench stone-faced until they deliver a verdict. In contrast, *Judgment at Nuremberg* is a story about judges. The defendants are German judges and Hayworth, who sits as part of a tribunal, is the story's protagonist.

Hayworth is a judge's judge, a man who embodies fairness and character. Reflecting the tenor of the times, he describes himself as a Republican who admired Franklin Roosevelt. The film portrays Hayworth's sincere attempt to understand what led to the coming of Hitler in Germany.

In dramatic contrast to Hayworth is Ernst Janning (Lancaster), a distinguished, learned jurist who in the name of self-deluded patriotism sells his soul to the Third Reich. Unlike his fellow defendants who are a motley assortment of hacks and sadists, Janning knew better but said nothing. That is

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Rudy Carmenaty 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 and Diversity and Inclusion Committee.

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NCBA Committee Meeting Calendar February 4, 2021 - March 4, 2021

Please Note: Committee Meetings are for NCBA Members. Dates and times are subject to change.
Check www.nassaubar.org for updated information.

COMMUNITY RELATIONS & PUBLIC EDUCATION
Joshua D. Brookstein
Thursday, February 4
12:45 p.m.

PUBLICATIONS
Christopher J. DelliCarpini/Andrea M. DiGregorio
Thursday, February 4
12:45 p.m.

FAMILY COURT LAW & PROCEDURE
Susan G. Mintz
Monday, February 8
12:45 p.m.

CIVIL RIGHTS
Bernadette K. Ford
Tuesday, February 9
12:30 p.m.

LABOR & EMPLOYMENT LAW
Matthew B. Weinick
Tuesday, February 9
12:30 p.m.

ASSOCIATION MEMBERSHIP
Michael DiFalco
Wednesday, February 10
12:30 p.m

MATRIMONIAL LAW
Samuel J. Ferrara
Wednesday, February 10
5:30 p.m.

ENVIRONMENTAL LAW
Nicholas C. Rigano
Thursday, February 11
12:00 p.m.

ALTERNATIVE DISPUTE RESOLUTION
Marilyn K. Genoa/Jess A. Bunshaft
Tuesday, February 16
12:30 p.m.

DIVERSITY & INCLUSTION
Hon. Maxine Broderick
Tuesday, February 16
6:00 p.m.

APPELLATE PRACTICE
Jackie L. Gross
Thursday, February 18
12:30 p.m.

CONSTRUCTION LAW
Raymond A. Castronovo
Monday, February 22
12:30 p.m.

CRIMINAL COURT LAW & PROCEDURE
Dana L. Grossblatt
Monday, February 22
12:30 p.m.

DISTRICT COURT
Roberta D. Scoll/S. Robert Kroll
Tuesday, February 23
12:30 p.m.

PLAINTIFF'S PERSONAL INJURY
Ira S. Slavit
Tuesday, February 23
12:30 p.m.

WOMEN IN THE LAW
Edith Reinhardt
Tuesday, February 23
5:30 p.m.

SURROGATE'S COURT ESTATES & TRUSTS
Brian P. Corrigan
Tuesday, February 23
5:30 p.m.

BUSINESS LAW, TAX & ACCOUNTING
Jennifer L. Koo/Scott L. Kestenbaum
Wednesday, February 24
8:30 a.m.

GENERAL, SOLO AND SMALL LAW PRACTICE MANAGEMENT
Scott J. Limmer
Wednesday, February 24
12:30 p.m.

ELDER LAW SOCIAL SERVICES HEALTH ADVOCACY
Katie A. Barbieri/Patrica A. Craig
Wednesday, February 24
5:30 p.m.

ANIMAL LAW
Kristi L. DiPaolo
Wednesday, February 24
6:00 p.m.

EDUCATION LAW
John P. Sheahan/Rebecca Sassouni
Thursday, February 25
12:30 p.m.

IMMIGRATION LAW
George A. Terezakis
Thursday, February 25
5:30 p.m.

IN-HOUSE COUNSEL
Tagiana Souza-Tortorella
Thursday, February 25
5:00 p.m.

MEDICAL-LEGAL
Mary Anne Wallling/Susan W. Darlington
Friday, Febrary 26
12:30 p.m.

REAL PROPERTY
Alan J. Schwartz
Wednesday, March 3
12:30 p.m.

COMMUNITY RELATIONS & PUBLIC EDUCATION
Joshua D. Brookstein
Thursday, March 4
12:45 p.m.

PUBLICATIONS
Christopher J. DelliCarpini/Andrea M. DiGregorio
Thursday, March 4
12:45 p.m.

Pro Bono Attorney of the Month

By Gail Broder Katz

Catherine Papandrew

Nassau Suffolk Law Services Volunteer Lawyers Project (VLP), along with the Nassau County Bar Association, are privileged to recognize Catherine Papandrew as the most recent Pro Bono Attorney of the Month. This month's award honors a lawyer who has demonstrated great passion and dedication by providing full pro bono legal representation to the community through her volunteer work with the VLP, especially during the COVID-19 crisis. Papandrew is an Associate with the law firm of Peknic, Peknic & Schaefer of Long Beach, and practices in the areas of insurance defense, personal injury, wills and estate planning, matrimonial law, and general litigation.

Papandrew first volunteered for Nassau Suffolk Law Services in 2013 while still a law student. Representing clients pursuant to a student practice order under the supervision of Roberta Scoll, she provided legal representation for low-income persons facing eviction in landlord-tenant court. What is even more impressive is that she embarked on her legal studies as a "second act" after raising two children and enjoying a long and fulfilling career in social work. Keenly aware of the "justice gap" in the underserved population, Papandrew has melded the skills she gained in the two professions to address this need.

A cum laude graduate of Pace University School of Law in 2016, Papandrew is admitted to the New York and North Carolina Bars, as well as the Federal Courts for the Eastern and Southern Districts of New York. She previously earned bachelor's and master's degrees in Social Work from Adelphi University, and a master's in Public Administration from NYU. After graduation and admission to the Bar, she worked for the New York City Law Department, where she gained valuable litigation experience.

Throughout her years of practice, Papandrew has been committed to donating a significant amount of her time to assisting the underserved. She has represented clients in 17A guardianship proceedings, matrimonial matters, and drafted advance directives. Of vital importance during the pandemic has been her pro bono assistance to low- income clients to execute wills, powers of attorney, and health care proxies. These crucial services empower vulnerable individuals with the ability to choose who will make decisions for them, and who will care for their children in the event of their demise. Having advance directives in place can also avoid the necessity of a costly guardianship proceeding down the road. Most importantly, advance directives give these challenged clients the dignity of self-determination, peace of mind, and a sense of control.

The marriage of extensive social work skills to her legal degree has, in Papandrew's opinion, perfectly positioned her to be a better advocate for those having trouble navigating the legal system. But any attorney, regardless of experience level, can use their skills to help a client access the legal system and obtain a benefit that can change these persons' lives. She encourages other attorneys to join her in her effort:

> Everyone deserves the right to legal representation under any circumstances. There is nothing more gratifying than helping someone without means gain access to the legal system. My advocacy can give comfort, peace of mind and dignity to this population of clients, which is especially important during these uncertain times. Helping someone to direct their own affairs is a transformative experience for both of us and the heartfelt thanks received in return is immeasurable.

Susan Biller, Pro Bono Coordinator of the Volunteer Lawyer's Project, states: "We are grateful to Cathy for her enthusiasm and commitment. She truly understood the legal need in the community, and how greater access to the legal system can help an individual. Providing legal services to a low-income client can mean the difference between their ability to pay next month's rent or putting food on the table."

Papandrew is very honored to share her profession with her daughter, Cassandra, with whom she graduated law school, and who is now an Assistant District Attorney. She is also fiercely proud of her son, Paul, a Second Lieutenant in the United States Marine Corps. In her spare time, she enjoys running, walking on the beach with her English Mastiff, Zoe, reading and spending time with family and friends. She looks forward to spending time with her new granddaughter, Charlotte Rita.

In recognition of her dedication to Nassau County citizens in need, the Volunteer Lawyers Project, along with the Nassau County Bar Association, are pleased to honor Catherine Papandrew as our latest Pro Bono Attorney of the Month.

The Volunteer Lawyers Project is a joint effort of Nassau Suffolk Law Services and the Nassau County Bar Association, who, for many years, have joined resources toward the goal of providing free legal assistance to Nassau County residents who are dealing with economic hardship. Nassau Suffolk Law Services is a nonprofit civil legal services agency, receiving federal, state, and local funding to provide free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care, and services to special populations such as domestic violence victims, disabled, and adult home residents. The provision of free services is prioritized based on financial need and funding is often inadequate in these areas. Furthermore, there is no funding for the general provision of matrimonial, guardianship or bankruptcy representation, therefore the demand for pro bono assistance is the greatest in these areas. If you would like to volunteer, please contact Susan Biller at (516) 292-8100, ext. 3136.

We Welcome the Following New Members

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Joyce M. Corsello
Issac Cwibeker
Donald T. Kiley, Jr.
Joshua Krakow
Colin Morrissey

Students
Yelda Bader
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Daniel Morote
Jessica Senzer

In Memoriam
Hon. Elaine Jackson Stack

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In Brief

Marian C. Rice

In January, **Ronald Fatoullah** of Ronald Fatoullah & Associates presented "Legal and Financial Planning for Long Term Care" for the 4th Annual Case Management and Transitions of Care Conference held by the American Case Managers Association. Fatoullah also participated in a panel discussion for the ORION Resource Group with other Nassau County attorneys regarding the newest updates in elder law for 2021.

Steven E. Pegalis, Founder of Pegalis Law Group announces that the firm has been named by *US News & World Report* and *Best Lawyers*© to the 2021 "Best Law Firms" list in two categories: Personal Injury Litigation and Plaintiffs Medical Malpractice.

Karen Tenenbaum was recently featured on Passage to Profit—The Inventor Show on iHeart Radio, where she discussed her Walter the Walt education initiative to teach kids about money. In addition, Tenenbaum was recently selected as a *LIBN* Business Hall of Fame honoree and was invited to speak at the NYSSCPA, Nassau Chapter Virtual All Day Tax Conference on NYS Tax Collection issues. Karen along with members of her firm's legal team recently presented at the 18th annual NCCPAP Accounting & Tax Symposium on resolving IRS tax issues and the implications of COVID-19 on N.Y.S. residency matters. She was also named to the 2020 New York Metro Super Lawyers list.

Marc L. Hamroff, managing partner of Moritt Hock & Hamroff has announced a number of promotions within the firm including **Jill T. Braunstein**, formerly counsel of the firm, elevation to partner and the promotion of **Christine H. Price**, formerly an associate of the firm, to the position of counsel.

Russell Marnell of the Marnell Law Group, P.C., a Long Island law firm that concentrates its practice in matrimonial and family law, has announced that **David N. Schneider** has joined the firm as an Associate.

Joseph Milizio, managing partner of Vishnick McGovern Milizio LLP, is pleased to announce that partner **Andrew Kimler**, head of the firm's Employment Law, Commercial Litigation, and Alternative Dispute Resolution Practices and key member of the LGBTQ Representation Practice, has been appointed to the Advisory Council of the Eastern District of New York Alternative Dispute Resolution Program (EDNY ADR). Milizio, who also leads the firm's Business and Transactional Law; Exit Planning for Business Owners; LGBTQ Representation; and Surrogacy, Adoption, and Assisted Reproduction Practices, was featured in the National LGBT Chamber of Commerce New York (nglccNY) news blog on December 18. He is a founding member of the Long Island Chapter. Milizio co-led an NCBA CLE webinar on January 13, titled "Dean's Hour: Understanding the New Child-Parent Security Act & Second Parent Adoptions." Partner **Avrohom Gefen** of the firm's Employment Law, Commercial Litigation, and Alternative Dispute Resolution Practices was interviewed on the Jim Bohannon Show on January 12, discussing the Capitol Hill violence. Partner **Joseph Trotti**, head of the firm's Family & Matrimonial Law Practice and member of the LGBTQ Representation; Surrogacy, Adoption, and Assisted Reproduction; and COVID-19 Legal Assistance Practices, led a CLE webinar at St. John's Law School on January 27, titled "Family Law Front Lines: Latest Developments and Personal Tips." Partner **Constantina Papageorgiou** of the firm's Wills, Trusts, and Estates and Elder Law Practices led a Medicaid & Estate Planning webinar on January 7 as the first of a year-long series in collaboration with Parker Jewish Institute for Health Care and Rehabilitation. Papageorgiou was also named a "Hellenic Super Lawyer" by the *National Herald (Periodiko)*, featured in a special edition on February 12.

Jeffrey D. Forchelli and **John V. Terrana**, Co-Managing Partners of Forchelli Deegan Terrana LLP warmly congratulate **Gerard R. Luckman**, a Partner and Chair of the firm's Bankruptcy & Corporate Restructuring practice group, on his appointment to the Institute of Management Accountants' (IMA)—Long Island Chapter's Board of Directors. His one-year term began on January 12, 2021.

Christopher J. Chimeri, Founding Partner of Quatela Chimeri (QC), with offices in Hauppauge and Garden City, welcomes **Michele R. Messina** to the firm, merging her banking and real estate law practice with QC.

Michael H. Sahn, Managing Member of Sahn Ward PLLC is proud to announce that **John L. Parker** has joined the firm as its newest Partner. He will lead the Firm's Environmental, Energy and Resources Practice Group.

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.

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The NCBA is grateful for these individuals who strongly value the NCBA's mission and its contributions to the legal profession.

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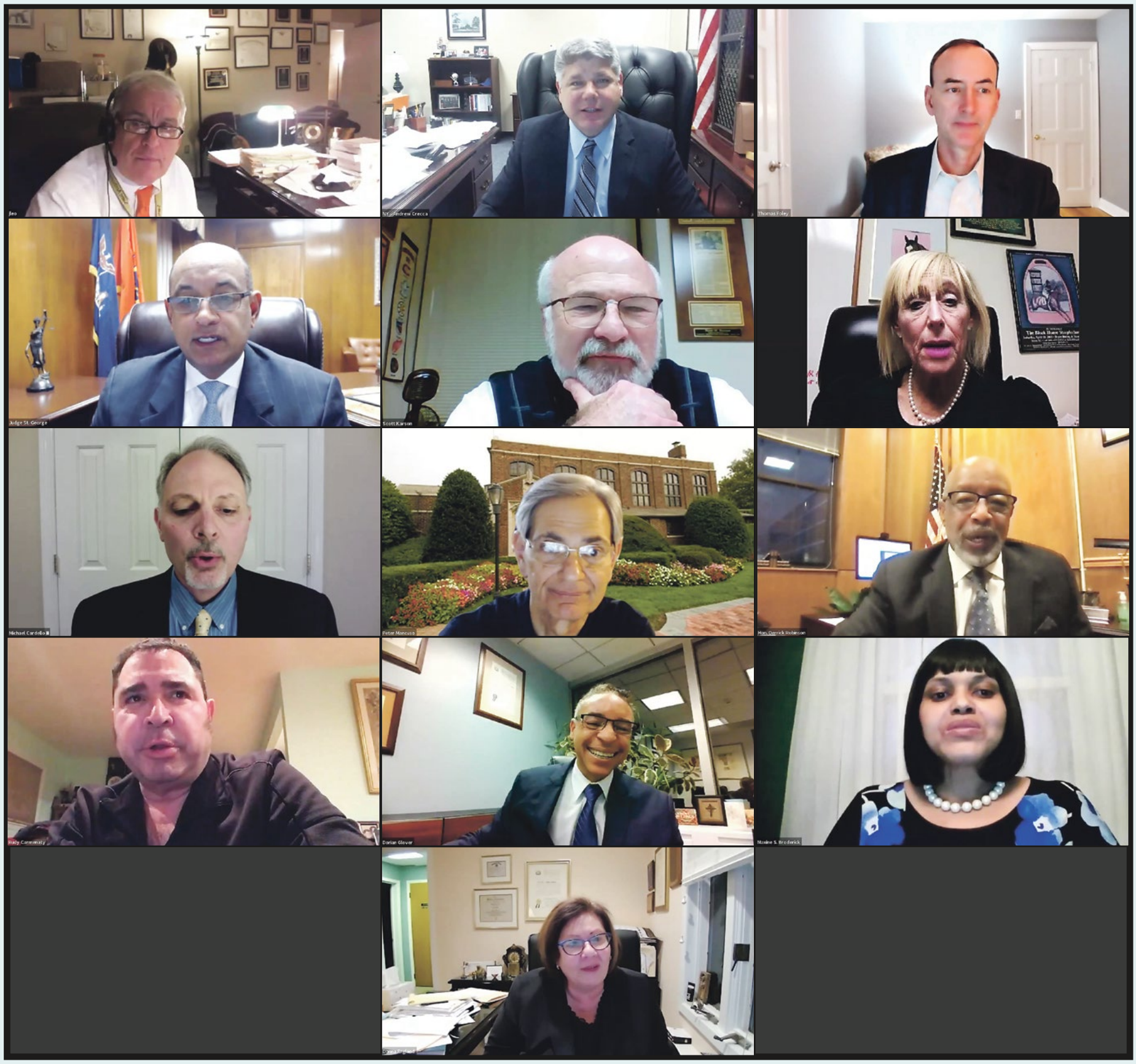
Nassau County Bar Association and Suffolk County Bar Association Joint Meeting

Tuesday, January 12, 2021



Students ...

Continued From Page 11

reaches to off-campus, home-based, behavior and devices.[22]

Private school students suspended.

Just as public school students may be suspended for the incidents listed above, so, too, can private school students. Where public school students at least have a due process right to schooling, nonpublic students do not. Rather, private school students only have resort to tuition contracts and parental leverage for readmission.

College and graduate level students suspended.

Many college and graduate level clients are in for especially rude awakenings when they are suspended. Accused of infractions, whether of COVID protocols, academic integrity violations, or others, they typically face a tribunal without permission to have legal counsel present. They stand to lose academic credits, use of campus facilities, and participation in school-based organizations, and their academic records may be tainted. These are financially and emotionally costly and, also, potentially damaging to future employment and educational prospects. Absent a showing that the student is the victim of discrimination, counsel must rehabilitate the student's character profile to negotiate these situations.

Students who were already classified with special education needs prior to the pandemic who experience more difficulty with pandemic learning, whether hybrid, in-person, or remote.

I remain astonished at how many families who contact my office do not know what their child is classified for, or what their child's IEP goals are.[23] An IEP is akin to an enforceable contract. It can be re-negotiated, but one must know its terms. Often the classification itself needs to be re-evaluated, with the annual goals and student placement revised to follow. Families need to know the terms, and keep track of the goals and the related services (such as speech, occupational, physical, vision, and cognitive therapies) therein. Some may also avail themselves of claims for compensatory education, whereby they can re-claim sessions missed due to the pandemic or otherwise. Compensatory education claims are an equitable remedy designed to make classified students whole.[24]

Students who were not previously classified whose learning struggles became more apparent during the pandemic.

Many students who were "getting by" are no longer able to do so, especially with family support also withering under the weight of the pandemic. Many students present with severe emotional and mental health issues such as depression, anxiety, and drug dependencies, which can impede learning. The duty of schools to identify under "childfind" during the pandemic still applies. Whether schools meet this obligation in the aggregate is a subject of controversy. Nevertheless, parents and students can self-refer for evaluations and possible classification for special learning needs, including for Emotional Disturbance to get therapeutic and other supports in place.[25]

Student a victim of bullying.

Cyber and in-person bullying and harassment were a scourge before the pandemic and have not abated since. All students are entitled to learn in a safe environment. Yet, since the COVID-19 pandemic and the toxic political divisiveness surrounding it, upticks in incidents of anti-Asian, anti-immigrant, anti-Semitic, anti-LBGTQ, and anti-disabled bullying and harassment have been widely reported. In particular, many students are bullied for their personal characteristics. The Dignity for All Students Act[26] requires New York public schools to have policies in effect for taking reports and promptly investigating instances of alleged bullying and harassment. Although DASA does not create a private cause of action, schools are meant to provide an equitable learning environment in which they reduce students' personal characteristics as predictors of academic outcomes. Personal characteristics covered by DASA include race, color, weight, national origin, ethnic group, religion, religious practice, disability, sex, sexual orientation, and gender identity and expression. Although well-meaning, DASA does not allow a personal cause of action or recovery. The NYS Human Rights Law was updated in 2019 to include public schools.[27] It is difficult to prevail in any human rights violation case, as the standard of proof required by the elements includes a showing that: the school has substantial control over the environment; the student experienced severe discriminatory harassment; the school had actual notice; and the school exhibited deliberate indifference. Even though this standard is difficult to meet, and one hopes that instances of actual deliberate indifference are rare, cases of bullying must still be reported and investigated.

As stated above, individual students do not have the benefit of a union, and can be at a disadvantage when issues arise in school. I am gratified by my work representing individual students in my practice because I remain convinced that society has an interest in enabling more students full access to education to learn and thrive.

1. FERPA Family Educational Rights and Privacy Act 20 U.S.C. § 1232g; 34 CFR Part 99
2. https://bit.ly/2XwChf4 4
3. https://www.nysenate.gov/legislation/laws/EDN
4. *Id.*
5. https://www.ed.gov/essa
6. https://sites.ed.gov/idea/
7. https://bit.ly/3i5tbQ38 https://on.ny.gov/39lIakI
8. https://dhr.ny.gov/education-jurisdiction
9. https://bit.ly/35wkhFT
10. https://bit.ly/2Lliflq11 https://bit.ly/2LowJkj
11. https://bit.ly/39xLp8Z
12. https://bit.ly/3qcvLGwand
13. https://bit.ly/2LJXxLv14
14. https://bit.ly/38FzCWU
15. https://sites.ed.gov/idea/regs/b/b/300.111
16. https://on.ny.gov/3qo2CIN
17. https://bit.ly/2XyJR8Q
18. https://bit.ly/3oF6Yuk
19. https://nwsdy.li/35uFa4g
20. https://bit.ly/2LHI1A4
21. *Burlington School Comm. v. Dep't. of Educ.*, 471 U.S. 359 (1985) and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993)
22. https://bit.ly/3buoXQt
23. *Id.*
24. *Mrs. C. v. Wheaton*, 916 F.2d 69 (2d. Cir.1990)
25. Emotional Disturbance is one of thirteen classifications for special education under the IDEA.
26. DASA https://bit.ly/38FzCWU
27. NYS Human Rights Law https://dhr.ny.gov/law

Lost Revenues ...

Continued From Page 3

authority." Since there was no coverage provided under the policy at issue, the court noted it was unnecessary to determine the applicability of any potential exclusion.

The court dismissed the lawsuit brought by Sparks with prejudice, specifically noting that allowing leave to amend the complaint would be futile.

The decision in this matter is consistent with New York law and decisions from the majority of courts throughout the country, requiring direct physical loss of, or damage to, property at the premises in order to trigger coverage under a commercial property policy. Even though the effects of COVID-19 have been devastating on certain businesses, and in particular the restaurant industry, without direct physical damage to the premises there is no coverage under a commercial property policy.

Rodriguez ...

Continued From Page 8

fault [does] not bar summary judgment in favor of plaintiff on the issue of defendant's liability."[19]

In the context of a labor law case, a defendant who establishes plaintiff was a recalcitrant worker or the sole proximate cause of the accident would be entitled to dismissal of the labor law claim, thus defeating plaintiff's summary judgment motion. However, when a defendant cannot make such a showing, but raises a question of fact on the issue, it would seem, even post-*Rodriguez*, that plaintiff's summary judgment motion should be denied.

In *Allington v. Templeton Foundation*,[20] plaintiff obtained summary judgment on his labor law claims where the ladder he used kicked out from under him. In opposition, the defendant relied on its contention that plaintiff was the sole proximate cause of the accident, but the court held the defendant "failed to raise a triable issue of fact with respect to that issue (see generally *Rodriguez v City of New York*, 31 N.Y.3d 312, 324-325 [2018])."

The Fourth Department's citation to *Rodriguez* is unclear. Is the Court implying that had the defendant raised an issue of fact as to sole proximate cause, then plaintiff's motion would have been denied? The "see generally" citation to *Rodriguez* (with no other comment) is perplexing. It could also mean that even had the defendant established a question of fact on this issue, it would be irrelevant based on *Rodriguez*.

Since the recalcitrant worker/sole proximate cause defenses are all-or-nothing defenses which, if successful, bar recovery, they can be viewed as liability, not damages issues. Accordingly, they present questions of fact that even post-*Rodriguez* should defeat a motion for partial summary judgment on liability.

1. *Rodriguez v. City of New York*, 31 N.Y.3d 312 (2018).
2. *Castillo v. Slupecki*, 63 Misc.3d 325, 327 (Sup.Ct., Bronx Co. 2019).
3. *Ortega v. R.C. Diocese of Brooklyn*, 178 A.D.3d 940 (2d Dept. 2019); *Quizhpi v. South Queens Boys & Girls Club, Inc.*, 166 A.D.3d 683 (2d Dept. 2018); *Rodriguez v. Sea Crest Constr. Corp.*, 64 Misc.3d 1214(A) (Sup.Ct., Queens Co. 2019).
4. *Davis v. Commack Hotel, LLC*, 174 A.D.3d 501, 504 (2d Dept. 2019).
5. *Cioffi v. S.M. Foods, Inc.*, 178 A.D.3d 1006 (2d Dept. 2019).
6. *Sanders v. Sangemino*, 185 A.D.3d 617, 618 (2d Dept. 2020), *lv to appeal dismissed,* 35 N.Y.3d 1110 (2020).
7. CPLR 5002, 5004; *Rohring v. City of Niagara Falls*, 84 N.Y.2d 60, 68 (1994); *Van Nostrand v. Froehlich*, 44 A.D.3d 54, 57–58 (2d Dept. 2007).
8. *Rodriguez v. Coca-Cola Refreshments USA, Inc.*, 61 Misc.3d 789 (Sup.Ct., Queens Co. 2018).
9. *Mahoney v. Brockbank*, 142 A.D.3d 200, 205 (2d Dept. 2016).
10. *Castillo v. Slupecki*, 63 Misc.3d 325 (Sup.Ct., Bronx Co. 2019).
11. *Edwards v. Gorman*, 162 A.D.3d 1480, 1481 (4th Dept. 2018).
12. *Hai Ying Xiao v. Martinez*, 185 A.D.3d 1014, 1014–15 (2d Dept. 2020); *see also Flores v. Rubenstein*, 175 A.D.3d 1490, 1491 (2d Dept. 2019); *Poon v. Nisanov*, 162 A.D.3d 804, 808 (2d Dept. 2018).
13. *Custodi v. Town of Amherst*, 20 NY3d 83, 87 (2012); *Morgan v. State*, 90 N.Y.2d 471, 485 (1997).
14. *Derix v. Port Auth. of New York & New Jersey*, 162 A.D.3d 522 (1st Dept. 2018); *Mallory v. City of New York*, 69 Misc.3d 640, 643 (Sup.Ct., N.Y. Co. 2020).
15. *Francois v. Tang*, 171 A.D.3d 1139 (2d Dept. 2019).
16. 165 A.D.3d 631, 632 (2d Dept. 2018).
17. 173 A.D.3d 808, 809 (2d Dept. 2019).
18 *See Sanders v. Sangemino*, 185 A.D.3d 617 (2d Dept. 2020) (summary judgment denied where parties' deposition testimony conflicted as to how accident occurred).
19 *Koyl v. Gaudiuso*, 2019 NY Slip Op 33939(U), 2019 WL 8690151 (Sup.Ct., Nassau Co. 2019).
20 *Allington v. Templeton Foundation*, 167 A.D.3d 1437 (4th Dept. 2018).

Lessons ...

Continued From Page 10

of a fair trial."[1] There is a litany of case law on this topic, but in general, zealous advocacy can remain professional by focusing on the substance of the evidence, and refraining from personal comments on counsel or the witnesses.

An overriding theme of the presentation, in terms of dealing with a discourteous, unprofessional adversary, was simple: Be the Adult in the Room. Unprofessional behavior, whether intentional, tactical, or simply because your adversary is naturally unethical, should be combatted by making clear

records and refraining from similar attacks. If and when conduct gets to the point where the court or grievance committee must be enlisted, the paper trail (transcripts, letters, motion papers, etc.) should reflect who is being nice, and who is not. Bringing an adversary's conduct to the attention of the judge may seem like a painful exercise. But again, we turn to the sage words of Dalton: "Pain don't hurt."

The scenarios discussed, fortunately, do not apply to the vast majority of practitioners in our profession. But when we do encounter uncivil conduct, our panel's insight on how to address such behavior should be heeded by attorneys on both sides of the aisle.

1. *See Kleiber v Fichtel*, 172 A.D.3d 1048, 1052 (2d Dept. 2019).

Access ...

Continued From Page 5

"Free Legal Information Day," until eventually it became known as NCBA Access to Justice "Open House." Regardless of its name, it has become an enormous success. In 2016, due to the large response from the public, it was increased to twice a year under the leadership of Past President Steven G. Leventhal and Gale D. Berg: once in June, and again during Pro Bono Week in late October. NCBA was further aided in these efforts by the Nassau County Supreme Court through its representatives, who joined us during these events to provide the public with important information available through the court system.

Persevering Through the Pandemic

The Open House continued to be held twice each year until October, 2019. Unfortunately, the event slated for June 2020 had to be canceled during the shutdown period occasioned by the pandemic. Despite the fact that our historical and traditional means of pro bono work became exceedingly difficult, the need for such services during these extraordinary times nevertheless grew exponentially. When in-person consultation was not feasible, we focused on ways we can still come together.

Rather than cancel the October Open House, the Access to Justice Committee, Co-Chaired by NCBA Vice President Rosalia Baiamonte and Kevin McDonough and with Sheryl Channer as Vice Chair, were determined to find a creative solution through technological bridges to continue the critical pro bono work. As a result, the event was held virtually, with all services being provided through email or telephone. This virtual Open House drew over 138 Nassau and Suffolk County residents, thereby strengthening NCBA's resolve and commitment to provide much-need legal assistance to those in need despite the obstacles we faced.

NCBA is grateful to the Supreme Court personnel who recorded their public service announcement for this virtual event, as well as the ongoing encouragement and support provided by the Nassau County Administrative Judge, Hon. Norman St. George. This remarkable service to the community was made possible by the dedication and professionalism of the sixty to eighty volunteer attorneys who participated in each Open House, together with the collaboration of our Access to Justice partners, the Nassau Suffolk Law Services and The Safe Center of Long Island. This kind of creative response can empower other pro bono and volunteer teams to continue to have a positive impact.

Since its inception last Spring by then President Richard D. Collins, then President-Elect Dorian R. Glover, and Past President Martha Krisel, the NCBA COVID-19 Community Task Force has assisted Nassau County residents and small business owners in addressing free of charge the unique legal challenges ushered in by the pandemic. Approximately fifty NCBA volunteer attorneys, many of whom worked closely with law students from Hofstra, St. John's and Touro as part of the Task Force initiative, have provided approximately 500 hours of limited scope pro bono representation under the dedication and guidance of NCBA Director Hon. Maxine S. Broderick.

Many of the inquiries posed by community members through covidhelp@nassaubar.org, raise questions regarding unemployment benefits, navigating housing court, and enforcing Family Court orders. However, as vaccines are made available to the public, the Task Force anticipates an influx of inquiries concerning mandatory vaccinations, transportation, travel restrictions, and related privacy concerns. As an additional resource, NCBA staff, with law student assistance, have created helpful FAQs and posted updates to the COVID-19 web page at www.nassaubar.org.

Collaborative Effort

Over the course of four decades, the NCBA Access to Justice Committee has had a profound impact on the lives of the economically disadvantaged residents of Nassau County by helping to maximize the quantity and quality of pro bono assistance available to an otherwise underserved community.

None of this would have been possible without the strong relationships forged by the NCBA with its collaborative partners: The Nassau County Coalition Against Domestic Violence, Nassau Suffolk Law Services, The Safe Center of Long Island, Legal Aid Society of Nassau County, the Assigned Counsel Defender Plan, Hofstra, St. John's, and Touro Law Schools, and the Nassau County government and court system, with whom the NCBA Access to Justice Committee has coordinated legal services for the community to strengthen the core of volunteer attorneys through education and professional development.

Through 2021 and beyond, NCBA leadership and volunteer attorneys stand ready to assist future lawyers in developing skills through practical experience, to provide opportunities for substantial and meaningful interaction with clients, and more importantly, to continue to serve the interests of our community through greater access to justice.

Suspension ...

Continued From Page 9

statute, he argued, was not suspended by EO 202.8. The court disagreed, asserting that simply describing the suspended statutes was preferable to enumerating them:

> This Court does not find that the Governor needed to be so specific. The language of this order sweeps up every procedural time limit imposed in the Criminal Procedure Law and packages them in a broad order that is easy for a court to interpret.[9]

In *People ex rel. Mulry v. Franchi*, the Second Department without comment accepted this reasoning, at least as to CPL 180.80.[10] *Hamilton* was relied upon in two later lower-court decisions, one of them as to the Family Court Act—with language so similar that it appears to have been cut-and-pasted from one to the other.[11] Recent decisions simply assert that EO 202.8 tolled any and all time limits in New York law.[12]

A contrary decision from Cohoes City Court in October 2020, however, both explains and exemplifies the problems with EO 202.8. In *People v. Zeolli*, the defendant's case had been adjourned in contemplation of dismissal under CPL 170.55, but when the state moved to restore the case to the calendar the defendant objected.[13] He argued that the time for restoring the case had lapsed and EO 202.8 did not suspend CPL 170.55. The court agreed, finding that EO 202.8 had suspended CPL 170.55 earlier in the pandemic, but no longer.

The court acknowledged the earlier decisions, but held: "what was 'specific in March 2020 was not 'specific' in July, let alone today."[14] Accordingly, "the executive orders, starting with EO 202.8, were reasonable under the circumstances during the onset of the pandemic," but not once the courts resumed normal operations.[15] The court also recognized the problems presented by EO 202.8's failure to specify the laws suspended:

> This uncertainty also runs the risk that the Governor's orders will be inconsistently applied—a prospect that the legislature undoubtedly sought to avoid by requiring that the executive orders retain a degree of specificity. Indeed, it is not hard to imagine disagreements among courts as to which statutes are covered by the executive orders, and which are not —with the result being that some laws would be suspended in one jurisdiction, but not in another.[16]

Conclusion

Act in haste, repent at leisure. An executive order that does not specify the laws that it suspends has led to months of litigation over that question—and the answer may change over the course of the pandemic. When in-person court operations in New York City ceased again this fall, did EO 202.8 again suspend CPL 170.55? And did it do so statewide, or only in counties with more limited court operations? How much more limited must court operations get to trigger the suspensions, and of which statutes?

Within EO 202.8's ambiguity, however, lies opportunity for argument. Counsel whose clients would benefit from the tolling period can argue that Section 29-a empowers the Governor to toll time limits, and that EO 202.8 satisfies Subsection 2(c) by describing the laws that it suspends. Those who would oppose the toll can press Justice Whelan's argument that Section 29-a only permits suspension, or argue that the executive order is completely invalid in this regard because it specifies no laws. And either side might find it convenient to argue that circumstances changed at some point during the tolling period to place some time limit in or out of the order's ambit.

In fairness to the Governor, the most erudite scholar would be hard-pressed to list each and every one of "the procedural laws of the state" that prescribes a "specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding." The complexity of New York law is no excuse for ignoring its directives, however—nor is the enormity of the pandemic.

With the benefit of hindsight, it is clear that a few more hours spent drafting EO 202.8 would have spared us months of rewriting that order through litigation. In fact, we could begin drafting a comprehensive list of such laws now, in preparation for the next time we face a once-in-a-lifetime disaster.

1. 9 NYCRR § 8.202.
2. 9 NYCRR § 8.202.8. The eighty-second such order was signed December 13, 2020.
3. 9 NYCRR §§ 8.202.14, 8.202.28, 8.202.38, 8.202.48, 8.202.55, 8.202.60, 8.202.67.
4. Thomas A. Moore & Matthew Gaier, *Medical Malpractice, Toll on Statute of Limitations During the COVID-19 Emergency*, NYLJ (June 1, 2020); Patrick M. Connors, *New York Practice, The COVID-19 Toll: Time Periods And the Courts During Pandemic*, NYLJ (July 17, 2020).
5. Thomas F. Whelan, *Executive Orders: A Suspension, Not a Toll of the SOL*, NYLJ (Oct. 6, 2020).
6. Souren A. Israelyan, *The Governor Had Authority To Toll the Statute of Limitations*, NYLJ (Oct. 19, 2020).
7. *E.g.*, 9 NYCRR § 8.202.67.
8. 67 Misc.3d 1205(A) (Sup.Ct., Bronx Co. 2020).
9. *Id.* at *2.
10. 182 A.D.3d 562 (2d Dept. 2020).
11. *See People ex rel. Nevins v. Brann*, 67 Misc.3d 638, 647 (Sup.Ct., Queens Co. 2020); *Matter of M.R.*, 69 Misc.3d 368, 374–75 (Family Ct., Kings Co. 2020).
12. *E.g., Morse v. LoveLive TV US, Inc.*, 69 Misc.3d 1224(A) (Sup.Ct., N.Y. Co. 2020); *464 Gateway LLC v. Wright*, 69 Misc.3d 1212(A) (Sup.Ct., Queens Co. 2020);
13. 69 Misc.3d 927 (Cohoes City Ct. 2020).
14. *Id.*
15. *Id.* at 936.
16. *Id.* at 933.

Judgment ...

Continued From Page 15

until his attorney Hans Rolfe vigorously cross examines a witness triggering Janning to confess his guilt.

Hayworth recognizes the tragic element in Janning's story. When last they meet in Janning's jail cell following the trial, Janning ardently professes that he had no idea that things would turn out as they did. Judge Hayworth passes judgment a second time by declaring: "*Herr Janning, it 'came to that' the first time you sentenced to death a man you knew to be innocent.*"[6]

Rolfe, as portrayed by Schell, is a brilliant characterization. He has to defend the indefensible and he does so with considerable skill and an instinct for the jugular that in effect puts the entire world on trial. Citing the Nazi-Soviet Pack of 1939, the words of Winston Churchill, the dropping of the atomic bomb on Japan, Rolfe convincingly makes the case that there is plenty of guilt to go around.

Most telling of all, Rolfe cites Oliver Wendell Holmes' opinion in *Buck v Bell*. A twisted paean to eugenics, this was a disgraceful decision in which Holmes

upheld a Virginia sterilization statute proclaiming that "*three generations of imbeciles are enough*."[7] Linking Holmes, the most respected of American judges, to the forced sterilization of so-called undesirables, the very issue Janning and the others were charged with, hits too close to home.

Rolfe's defense, which is motivated by his desire for a renewed Germany, does not permit the victors to feel superior. Another recurring theme is the need to show leniency toward the Germans, in spite of their crimes, due of the exigencies of the Cold War. Pressure is exerted on Hayworth to go easy on Janning and the rest.

After all the Americans will need the Germans to confront the Russians. In effect, the entire apparatus of the U.S. Government (as represented by senators, diplomats, generals) are now focused on the new conflict, not the last war. One of the defendants even cites the danger posed to the West by the "Bolsheviks" upon being sentenced.

Therein lies the true genius of Mann's storytelling. It would have been very easy to present one- dimensional characterizations of evil Germans and virtuous Americans. Mann forgoes all that, sensing that the desire for justice is perpetually in conflict with the need for safety and security. The law, much less human nature, is never so simple nor so clear cut. That is what lies at the crux of *Judgment at Nuremberg*.

The trial ends when Hayworth manages to convince a fellow judge to convict the defendants; the third judge rules in favor of acquittal. All of the defendants are sentenced to long prison terms. Yet by the film's end, the audience is informed that of ninety-nine defendants convicted at Nuremberg none is still serving his original sentence.

If there is any victory, any sense of affirmation. to be derived from *Judgment at Nuremberg* it is essentially a moral one. It comes when Hayworth/Tracy renders his decision from the bench. It serves as more than a dramatic denouement; it is a clarion call for justice in furtherance of our common humanity:

> *A decision must be made in the life of every nation at the very moment when the grasp of the enemy is at its throat. Then, it seems that the only way to survive is to use the means of the enemy, to rest survival upon what is expedient, to look the other way. Well, the answer to that is 'survival as what'? A country isn't a rock. It's not an extension of one's self. It's what it stands for. It's what it stands for when standing for something is the most difficult! Before the people of the world, let it now be noted that here, in our decision, this is what we stand for: Justice, truth, and the value of a single human being.*[8]

Judgment at Nuremberg raises many questions. What role should the law play when it is in conflict with national priorities and/or international circumstances? How can the victors justify placing the vanquished on trial when their own hands are not entirely clean? Does the need for survival circumvent the carrying out of justice? Are individuals personally responsible either for the crimes of their government or for failing to resist unlawful state action? Sixty years after the film's premiere these questions remain relevant as well as salient.

One final point, when the film version debuted on ABC television on March 7,

1965, the broadcast was interrupted for a special report from Selma, Alabama.[9] The image of civil rights demonstrators, including the late John Lewis, being beaten bloody on the Edmund Pettis Bridge was reminiscent of the horrors carried out by the Germans.

The connection made by a national television audience between the movie and news from Selma generated wide-spread support for Dr. Martin Luther King's efforts. Many said quite movingly: "*I was watching Judgment at Nuremberg and I just couldn't stay away. I had to come.*"[10] Such is the power of Mann's story and why it continues to this day to "*have a shot at reshaping the world*."

1. Mason Wiley and Damien Bona, *Inside Oscar*, (1st Ed. 1986) p. 339.
2. Werner Klemperer (one of the German judges,) later starred in *Hogan's Heroes*; Torben Meyer and Otto Waldis also appear in both versions.
3. Andrew Horton, *The Films of George Roy Hill* (1st ed. 1984) p. 28.
4. Wiley and Bona, *supra*.
5. William O. Douglas, Introduction to *The Films of Spencer Tracy* (1st ed. 1968) p. 11.
6. Abby Mann, *Judgment at Nuremberg*, in *Best American Screenplays 2*, (1st ed. 1990) p. 340.
7. 274 U.S. 200 (1927).
8. Mann, *supra*, p. 335.
9. Mark Grimsley, *Battle Films: Judgment at Nuremberg* (April 2018) at www.historynet.com.
10. *Id.*

Dog Bites ...

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New Twist in *Hewitt*

With all of the twists and turns 2020 presented to the profession, the same may be said of the Court of Appeals recent decision in *Hewitt v. Palmer Veterinary Clinic*.[14] In *Hewitt*, Defendant veterinary clinic treated a patron's dog for a paw injury. When returning the dog to the patron/owner in the reception area, the dog seemingly observed Plaintiff's cat, slipped out of her collar and grabbed Plaintiff from behind by her ponytail, allegedly causing injuries. Plaintiff subsequently brought an action in Clinton County Supreme Court against, among others, Defendant veterinary clinic, alleging it knew the dog had vicious propensities, and failed to exercise due care by bringing an agitated and distressed dog into the waiting area that was improperly restrained with a loose collar.[15]

Defendant moved for summary judgment dismissing Plaintiff's complaint, asserting it had no prior knowledge of the dog's vicious propensities, and upon Plaintiff's cross-motion on the negligence claim, Defendant argued the dog's discharge did not deviate from the accepted standard of care from doing the same. The Supreme Court granted Defendant's motion, reasoning its liability was contingent upon it having notice of vicious propensities in the same manner as that of an owner. The Third Department affirmed on the same grounds.[16]

On appeal, Plaintiff argued the *Bard* rule does not and should not apply to Defendant, a non-owner veterinary clinic. Agreeing with Plaintiff, the Court of Appeals modified the order of the Appellate Division, concluding that the non-owner Defendant did not need the protection afforded by the vicious propensities notice requirement, and that the absence of such notice did not require a dismissal of Plaintiff's claim. Further, the Court held a negligence claim may lie against Defendant because questions of fact existed as to whether Plaintiff's injury was foreseeable and whether Defendant took reasonable steps to discharge its duty of care to Plaintiff.[17] The Court reasoned that "veterinary clinics are uniquely well-equipped to anticipate and guard against the risk of aggressive animal behavior that may occur in their practices—an environment over which they have substantial control, and which potentially may be designed to mitigate risk."[18]

What Now?

As I mention at the outset to virtually every potential dog bite injury client, representing a Plaintiff in a New York dog bite case presents unique challenges that personal injury practitioners in other jurisdictions generally do not face.[19] As such, the prudent plaintiff's attorney must explore all avenues with the potential client on how to withstand an eventual summary judgment motion by the dog's owner citing the *Bard* standard.

Whether it be through the potential client's own testimony, affidavits of prior victims of the same dog, materials obtained through FOIL requests or otherwise, it is imperative to thoroughly investigate these cases so as to build a sufficient factual record of admissible evidence to oppose summary judgment on the issue of whether or not the owner knew or should have known of the dog's vicious propensities. Especially in light of the *Hewitt* decision, practitioners should be mindful and thoroughly investigate any negligence claim that may exist against certain non-owners.

1. t.ly/iDim.
2. t.ly/YvPh.
3. t.ly/rnWq.
4. t.ly/NBfY.
5. t.ly/dyHM.
6. 6 N.Y.3d 292 (2006).
7. *Id.* at 594-96.
8. *Id.* at 596.
9. *Id.* at 599.
10. 1 N.Y.3d 444 (2004).
11. *Id.* at 596-97.
12. *Id.*
13. *See Curbelo v. Walker,* 81 A.D.3d 772, 773-74 (2d Dept. 2011) (affirming J. Phelan); *see also Claps v. Animal Haven, Inc.*, 34 A.D.3d 715 (2d Dept. 2006) (affirming J. Winslow); *Palumbo v. Nikirk*, 59 A.D.3d 691 (2d Dept. 2009) (affirming J. Iannacci); *Frank v. Eaton*, 54 A.D.3d 895 (2d Dept. 2008) (affirming J. Parga); *Christian v. Petco Animal Supplies Stores, Inc.*, 54 A.D.3d 707 (2d Dept. 2008) (affirming J. Galasso); *Galgano v. Town of North Hempstead*, 41 A.D.3d 536 (2d Dept. 2007) (affirming J. Galasso); *Drakes v. Bakshi*, 175 A.D.3d 465 (2d Dept. 2019) (affirming J. Cozzens).
14. 35 N.Y.3d 541 (2020).
15. *Id.* at *1.
16. *Id.* at *2.
17. *Id.* at *2–3.
18. *Id.* at *2.
19. *See* n.5, *supra*.

Trials ...

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reality on the ground is that we are working without a viable set of rules or guidelines and no one is being ordered to do anything in the way of trials and hearings. Until we have the requisite authority, I see backlogs being created where there were none and trial-ready cases getting older by the day. The time to act is now.

1. Berman, Mark A. "Remote Depositions in State Court: Can they be Compelled?," *New York Law Journal* (Nov. 3, 2020).
2. *American Bank Note v. Daniele*, 81 A.D.3d 500 (1st Dept. 2011).
3. *Rodriguez v. Infinity Insurance Company*, 283 A.D.2d 969 (4th Dept. 2001); *Farrakhan v. NYP Holdings*, 226 A.D.2d 133 (1st Dept. 1996).
4. Index No. 155531/2017 (Sup. Ct., N.Y. Co. May 28, 2020).
5. Index No. 028136/2019 (Sup. Ct., Bronx Co. June 24, 2020).
6. *MacDonald and Clinton v. Pantony et al*, Index No. 612715/2017 (Sup. Ct., Nassau Co. May 28, 2020).
7. *Matter of Haydee F. v. ACS-NY*, Index No. G-15246-19 (Fam Ct., N.Y. Co. Oct. 28, 2020).