

Nassau Lawyer



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March 2021

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MEETING CALENDAR

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LAW DAY

Advancing the Rule of Law Now

Thursday, April 29, 2021

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OF NOTE

NCBA Member Benefit—I.D. Card Photo

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COMMITTEE MEETINGS

Thursday, April 1, 2021 at 12: 45 PM

Thursday, May 6, 2021 at 12:45 PM

Law Day 2021

Advancing the Rule of Law Now

By Ann Burkowsky

The Nassau County Bar Association (NCBA) and the Nassau County Women's Bar Association (NCWBA) will present this year's Law Day celebration—Advancing the Rule of Law Now, which explores the importance of the rule of law and its role to ensure order and justice within our society—on Thursday, April 29, 2021, at 5:00 PM via Zoom. Due to COVID-19, this is the first year that the Law Day celebration will not be held in person, as to ensure the health and safety of honorees and guests.

The NCBA and NCWBA will welcome Keynote Speaker Dr. Sally Roesch Wagner and recognize three special honorees for their dedication and commitment to the legal community.

Keynote Speaker Dr. Sally Roesch Wagner

In addition to being awarded one of the first doctorates in the country for her work in women's studies, Dr. Sally Roesch Wagner is an accomplished author of both the young reader's book, *We Want Equal Rights: How Suffragists Were Influenced by Native American Women*, and the anthology, *The Women's Suffrage Movement*, a

look at the 19th century women's rights movement with a forward written by American Journalist and Social Political Activist Gloria Steinem.

As a historian of the suffrage movement, Dr. Wagner is the founder of one of the first college-level women's studies programs in the United States and has taught women's studies courses for over 50 years. She currently serves as an adjunct faculty member in the Syracuse University Renee Crown University Honors Program.

Dr. Wagner has been featured on numerous media outlets, including CNN Special Report: Women Represented, CNN's Quest's World of Wonder. She has also been quoted in the New York Times, Washington Post, Smithsonian, Nation, and Time Magazine, among others. In 2020, Dr. Wagner was selected as a New York State Senate Woman of Distinction, and one of "21 Leaders for 21st Century" by Women's E-News in 2015.

Liberty Bell Award

The Liberty Bell Award is presented to a non-lawyer who has strengthened the American system of freedom under the law by heightening public awareness, understanding and respect for the law.

The 2021 recipient for this award



Dr. Sally Roesch Wagner

is the League of Women Voters of Nassau County (LWVNC), a nonpartisan political organization that encourages active participation in government. Through education, advocacy, and the power of women, the LWV is able to influence public policy and defend democracy.

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NCBA Annual High School Mock Trial Tournament

By Jennifer C. Groh

One of the highlights of the Bar year is the annual Mock Trial Tournament for high school students. The long-running program has helped further the students' understanding of trial advocacy and the legal system and has perhaps sparked a future career aspiration or two.

In past years, the hallways of the Nassau County Supreme Court have echoed with the excited voices and footsteps of 600 students from nearly 50 schools across Nassau County.

Like so many other events this past year, the COVID-19 crisis forced the re-thinking and re-imagining of this annual competition.

On February 24, the Mock Trial tournament began, albeit virtually, thanks to the dedication of the NCBA members who volunteer their time to serve as attorney advisors for the 40 teams entered in the competition this year, as judges for the seven rounds that make up the competition, and as Chairs who oversee the running of the tournament each year.

The final round in April will

determine the Nassau County champion which will go on to the statewide finals in May, also to be held virtually. The Mock Trial Tournament Chairs are Hon. Marilyn K. Genoa, Peter H. Levy, and Hon. Lawrence M. Schaffer, and the Administrator is Jennifer C. Groh, Director of the Nassau Academy of Law.

Jennifer C. Groh is the Director of Continuing Legal Education for the Nassau Academy of Law at the Nassau County Bar Association. The Nassau Academy of Law hosts CLE programs throughout the year. For additional information, contact Jennifer at jgroh@nassaubar.org or (516) 747-4077.

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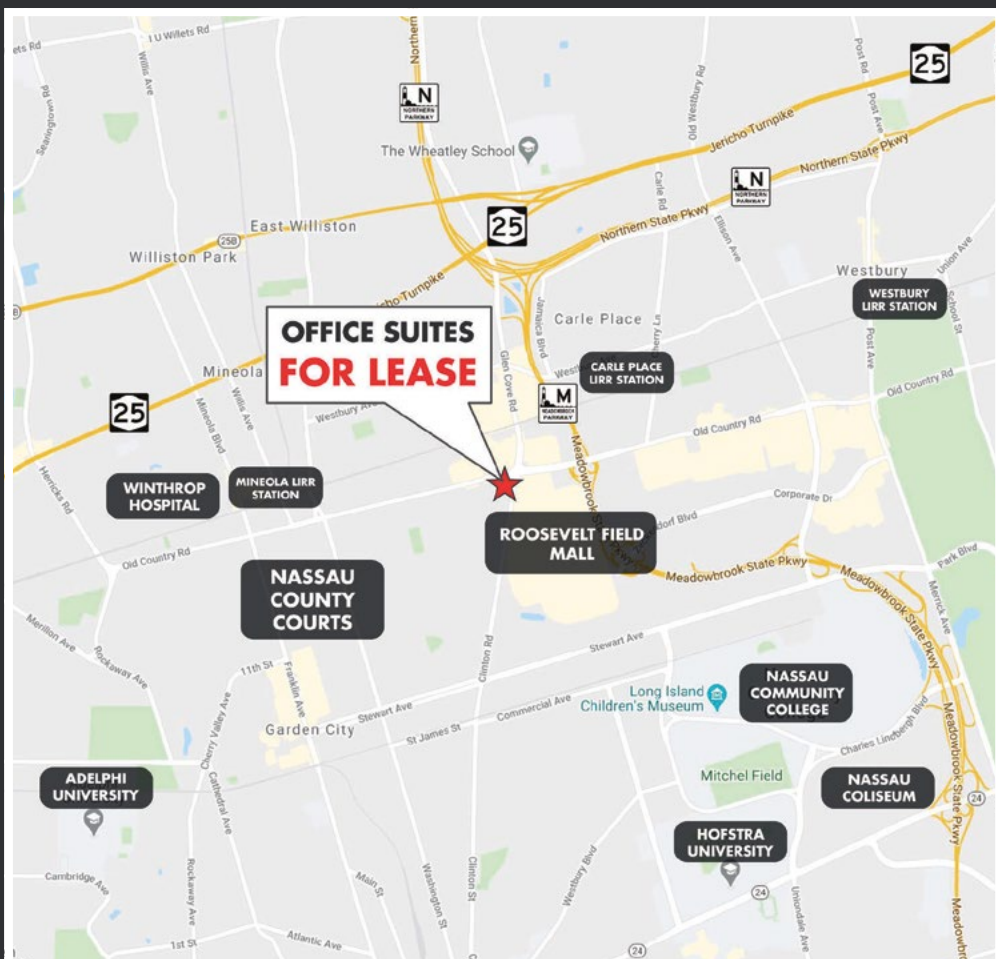
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**FOCUS:
HOSPITAL AND HEALTH LAW**



Giulia R. Marino

COVID-19 has affected the world in many respects, causing an ever-evolving situation that society as a whole has struggled to adapt and overcome. Vaccines worldwide are being pushed through approval processes to ensure mass vaccination, in an effort to gain control over a virus that has wrecked havoc upon all seven continents. But if someone in the United States were to suffer an injury related to a vaccine, what is their avenue of recourse?

**National Vaccine
Injury Compensation Program**

Since 1986, the United States has a program in place called the National Vaccine Injury Compensation Program (NVICP). The NVICP serves as a No-Fault compensation program, under which a person who has been injured by a vaccine cannot bring a civil action for greater than one thousand dollars against the vaccine company or the administrator of the vaccine until they file a petition through the United States Court of Federal Claims.¹ The NVICP is funded by a trust fund that is financed from the vaccine manufacturer's sales, supported by a seventy-five cent excise tax placed on each disease-preventing dose of a vaccine recommended by the Center for Disease Control and Prevention.²

The program covers specified injuries and deaths from vaccines, such as for Measles and Polio, listed on a vaccine table.³ This table sets forth vaccines and corresponding injuries, and a claimant must submit a petition stating that the vaccine caused one of these specified injuries.⁴ If a claimant can show they received the vaccine, and that the corresponding injuries occurred during the time frame specified on the table, then their claim should theoretically be compensated.⁵ If the injury is not listed on the table, then it is considered off-table, and the claimant must prove causation.⁶

The NVICP compensates for medical and rehabilitative care, death benefits, lost earnings, and pain and suffering.⁷ Death benefits are limited to \$250,000, and pain and suffering compensation are capped at \$250,000.⁸ Recovery for punitive damages is prohibited under the NVICP.⁹ The NVICP reimburses reasonable attorney fees and disbursements regardless of the outcome of the petition.¹⁰

Vaccine Court Overview: Where Do You Take Your Shot?

Once a petition is filed, the NVICP assigns a special master, appointed by the judges of the U.S. Court of Federal Claims, to decide whether or not the claim is compensable under the program.¹¹ The special master oversees all aspects of a claim, such as collecting evidence and setting deadlines.¹² The processes of taking depositions and cross-examinations of witnesses are removed from the NVICP in the interest of expediting claims.¹³ The special master will base their decision solely upon expert affirmations and evidence that is deemed admissible.¹⁴ The claimant may appeal the decision.¹⁵

**Public Readiness and Emergency
Preparedness Act**

The Public Readiness and Emergency Preparedness (PREP) Act was enacted on December 30, 2005, to provide liability protections during pandemics and epidemics.¹⁶ The PREP Act states a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration has been issued with respect to such countermeasure.¹⁷ The immunity applies to any claim that has a causal relationship with the administration to or use by an individual of a covered countermeasure, including, but not limited to, its design development, manufacturing, distribution, dispensing, and administration.¹⁸ The only exception to this immunity is willful misconduct.¹⁹

A covered countermeasure is defined as: 1) a qualified pandemic or epidemic product (a product manufactured, used, designed, developed, modified, licensed or procured to diagnose, mitigate, prevent, treat, or cure a pandemic or epidemic, or to limit the harm caused by a pandemic or epidemic); 2) a security countermeasure (a drug, biological product, or device that is used to diagnose, mitigate, prevent, or treat harm from a biological, nuclear, or radiological threat); 3) a drug, biological product, or device; or 4) a respiratory device.²⁰

In making a declaration pursuant to the PREP Act, the Secretary of Health and Human Services must determine that there is a risk that a disease or threat constitutes a public health emergency.²¹ In doing so, the Secretary must declare specifics of the emergency, such as the covered countermeasures, a specified time period, and the geographic area where the emergency declaration will be applied.²²

COVID-19

On January 30, 2020, the World Health Organization declared COVID-19 to be a Public Health Emergency of International Concern.²³ On

January 31, 2020, COVID-19 was declared a United States public health emergency pursuant to the PREP Act by the Secretary of Health and Human Services, effective until October 1, 2024.²⁴ This Declaration has been amended four times, and addresses covered countermeasures that include, but are not limited to, any antiviral, drug, diagnostic, respiratory device, or vaccine used to diagnose, treat, or prevent COVID-19 or a virus mutating from COVID-19, and/or to limit the harm that COVID-19 or a virus mutating from COVID-19 may otherwise cause.²⁵

**Countermeasures Injury
Compensation Program**

The Countermeasures Injury Compensation Program (CICP) was created in 2010 to provide compensation for injuries suffered by covered countermeasures when a public emergency is declared pursuant to the PREP Act.²⁶ The CICP is funded through the Department of Health and Human Services.²⁷

Similar to the NVICP, there is a table that lists covered countermeasures and the corresponding injuries.²⁸ This particular table includes pandemic

influenza vaccines, pandemic influenza respiratory support devices (ex: ECMO), and medications utilized for the treatment of pandemic influenza (ex: Tamiflu).²⁹ Just as with the NVICP, if the injury is not listed on the table, then it is considered off-table, and the claimant must show that the injury occurred as a direct result of the administration or use of a covered countermeasure via compelling, reliable, valid, medical, and scientific evidence.³⁰

The CICP provides medical costs, lost employment income, and death benefits.³¹ It is considered a payer of last resort, and only pays secondary to other sources such as Worker's Compensation, Veteran's benefits, and private health insurance.³² The PREP Act does not provide for payment or reimbursement

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Giulia R. Marino is a Partner at Marino & Marino, P.C., a firm specializing in plaintiffs personal injury law, who is admitted to the Federal Court of Claims to assist in vaccine-related injuries, as well as an active EMT-CC who has been treating COVID-19 patients throughout the pandemic.

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Christopher J. Chimeri is frequently sought by colleagues in the legal community to provide direct appellate representation for clients, as well as consulting services to fellow lawyers.

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March Is Women's History Month

On a short walk recently with my wife and sweetheart, Judge Linda K. Mejias, in Colonial Williamsburg, Virginia, we encountered the nation's second oldest institution of higher learning in the United States, the College of William and Mary, founded in 1693. The roles of women during this time included, "managing the household, including baking, sewing, educating the children, producing soap and candles, and more," according to *Women and Children in Colonial America*, National Geographic.

Of note, according to the College of William and Mary website, during the 18th and 19th centuries, the first women on campus were enslaved women, who cooked and cleaned for the faculty and students. It was not until February 1918 that 24 women were admitted as undergraduate students. Today, "women represent 58 percent of the students and women now include professors, coaches, award winning scientists, playwrights, poets, entrepreneurs, community leaders and more," according to *William and Mary's A Brief History*, wm.edu.

Women's History Month is a time to recognize the notable changes made to a woman's role in society. Achievements include the ratification of the 19th Amendment to the Constitution in 1920, ensuring the right of women, and the passing of Title VII of the Civil Rights Act in 1964, prohibiting sex discrimination in employment. Taking another large step forward in 1975, the U.S. Supreme Court denied states the rights to exclude woman from juries. In 1981, Sandra Day O'Connor became the first woman to serve on the U.S. Supreme Court.

Innovation Does Not Stand Still

Our Association, founded in 1899, has also evolved over the years. Ground was broken for five women attorneys who submitted formal applications to the NCBA (all were rejected) in 1937. Then, by a vote of 138-28, the NCBA constitution was amended to include women membership in 1951.

The first woman elected Judge in Nassau County, the Hon. Kathleen M. Kane, Judge of the District Court (1953), was among the first women members of the NCBA. She also prepared the charter for the Nassau County Women's Bar Association, according to a December 8, 1988 *New York Times* article. Forty-three years after women were permitted to become members, a changemaker within our midst, Grace D. Moran, a true pioneer, became the first woman installed as President of the Nassau County Bar Association in 1994. She broke down barriers so that future changemakers may pass with less resistance. The women who continued to step forward were Hon. Susan Kluewer (2006-2007), M. Kathryn Meng (2001-2002), Emily Franchina (2009-2010), Hon. Susan Katz-Richman (2011-2012), Marian C. Rice (2012-2013), Martha Krisel (2015-2017), Elena Karabatos (2018-2019), and Rosalia Baiamonte (Vice President).

The first woman Vice President of the United States of America, Kamala Harris, stated, "If you are fortunate to have opportunity, it is your duty to make sure other people have those opportunities as well." The above leaders have made it their business to ensure that other women have the same opportunities. Will your name be listed with these changemakers?



FROM THE PRESIDENT

Dorian R. Glover

Justice Ruth Bader Ginsberg said, "Women belong in all places, where decisions are made." In our Association, women are in the key roles where decisions are made: Executive Director Elizabeth Post; Office Manager and Controller Barbara Decker; Continuing Legal Education Director Jennifer Groh; Membership Coordinator and Committees Liaison Stephanie Pagano; Executive Assistant Patti Anderson; Membership Coordinator Donna Sylvia-Gerdik; Pro Bono and Mortgage Foreclosure Project Director Gale Berg; Lawyer Referral Service Coordinators Pat Carbonaro and Carolyn Bonino; Communications Manager Ann Burkowsky; Special Events Assistant and WE CARE Coordinator Bridget Ryan; Lawyer

Assistance Program Director Elizabeth Eckhardt; Paralegal Cheryl Cardona; and Pro Bono Settlement Conference Coordinator Christine Stella. This may look like a list to some, but our active members know the time, talent, and dedication that these women give on behalf of our members daily.

Past President Martha Krisel and the Hon. Maxine Broderick continue to forge ahead with our COVID-19 Help Student Mentor Program. This spring, we are continuing to help residents and small businesses with COVID-19 related issues. This is an ongoing program that guides the community during these challenging times. Updates and resources are readily available to Members, residents, and small businesses on our website at nassaubar.org.

On March 3, NCBA Vice President and Access to Justice Committee Co-Chair Rosalia Baiamonte, Co-Chair Kevin McDonough and Vice-Chair Sheryl Channer—in collaboration with the Nassau Suffolk Law Services and The Safe Center LI—will host a virtual Access to Justice Recognition Reception to honor the 2018-2019 pro bono volunteers whose reception scheduled for last year was cancelled due to COVID-19.

On March 15, our Women in the Law Committee Chair Edith Reinhardt and Co-Chair Sherwin Safir—in conjunction with the Nassau County Women's Bar Association—will welcome U.S. Representative Kathleen Rice (also the first woman elected District Attorney for Nassau County in 2005) as a guest speaker. Join this conversation, to learn from one, who not only has identified the importance of equality, but the significance of representation.

Women have reached the highest echelons of our county and are an integral part of our history. Beatrice S. Burstein became the first Nassau County Supreme Court Justice in 1971. Laura Curran became the first woman County Executive in 2018.

Above the fireplace in the Great Hall of Domus, you will find two heraldic banners. The third panel of the right banner displays the Goddess of Justice, which is the symbol for the Nassau County Bar Association, representative of "wisdom and good counsel." (Britannica). We celebrate the relentless pursuits and milestone achievements of women throughout U.S. history and recognize the wisdom and good counsel that countless women have contributed to us locally and nationally.

While the NCBA has embraced the fact that innovation does not stand still, we encourage the next generation to be changemakers, not to stand still, but embrace the wisdom of good counsel within.

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**FOCUS:
ELDER LAW**



Christina Lamm

This is a refrain many Elder Law attorneys hear quite frequently from clients. Many clients are aware that Medicaid is a means tested program, but too many do not realize that even if they have income over the monthly maximum amount, which in New York is \$904 for Community Medicaid in 2021,¹ you can still qualify for services.

Ostensibly, under the current Community Medicaid program, there are three ways for a disabled individual over age 65 to become eligible for community-based Medicaid services if the client's income exceeds the limit: the Excess Income program, the Pay-In program, and enrolling in a pooled income trust.

Many times, the only fiscally sensible option is to deposit one's surplus income into a pooled income trust each month, which then allows for the funds to be spent on the client's expenses. This article will briefly discuss the first two options and then take a deep dive into pooled trusts discussing what they are, how they work and how to join one.

Excess Income Program

The Excess Income program allows a Community Medicaid recipient to provide paid or unpaid medical bills to their local Department of Social Services that are equal to or greater than the amount of the surplus income for the month.² Upon providing the medical bills to Medicaid, Medicaid will then use the bills to reduce the applicant's surplus income, and pay for additional services above and beyond.³ Each month the Community Medicaid recipient will need to bring in, mail, or fax the medical bills to the local Department of Social Services. The bills can also be provided to Medicaid in increments of six months.

Medical bills including, but not limited to, doctor visits, dental visits, prescription drug costs, medical transportation, deductibles and co-pays for medical insurance, or even chiropractic services can be used towards the excess income amount as long as the balance is owed by the recipient.⁴ This program works well for the Community Medicaid recipient whose surplus income amount is relatively low and who has high uncovered medical expenses. A person with high income will likely not benefit greatly from the Excess Income program.

"I Don't Qualify for Community Medicaid Because I Have Too Much Income"

Pay-In Program

Under the Pay-In program, Community Medicaid recipients can pay the surplus income directly to the local Department of Social Services.⁵ This is the simplest option available to the Medicaid recipient, but it also is the only option that does not allow the person to make personal use of the surplus funds. One can imagine that living in the community with only the Medicaid monthly allowance of \$904, and having to send all of your surplus income to Medicaid is not usually an appetizing prospect.

The Pay-In program can be useful for the client whose surplus income is very low and joining a pooled trust is not an economical option. For example, if a client has a total monthly income of \$1,200, a Medicare premium of \$148.50 and supplemental insurance premiums of \$126 per month, the client's surplus income is calculated to be \$21.50 once you subtract the Medicaid income exemption of \$904. Joining a pooled trust with such a small surplus income amount would likely cost more than it is worth in time and effort. In addition, turning over medical bills to your local Department of Social Services each month would also be cumbersome and not worth the effort. In this case, just paying the \$21.50 to Medicaid each month would likely be the best option.

Pooled Income Trust

A pooled income trust is a special type of supplemental needs trust ("exemption trust") authorized by both federal law⁶ and New York state law⁷ that allows for disabled Community Medicaid recipients to deposit their surplus income into the exemption trust, which eliminates the surplus income. Under the law, a disabled Community Medicaid recipient can deposit his or her income, on a monthly basis, into a trust managed by a non-profit association. Though the trust will pool the accounts for investment purposes, the funds deposited for each disabled individual should be readily identifiable.⁸ This means that each pooled trust beneficiary has his or her own sub-account and access to his or her own monies deposited into that sub-account.

There are a number of different pooled income trusts in New York, each run by different charities. Each of the pooled income trusts have different monthly fees and start-up costs associated with them, so it is beneficial to identify and assess the different pooled trusts available and have knowledge of the costs involved. Some of the pooled trusts also have minimum monthly deposits and minimum balances that must remain in the trust each month. A list of the non-profit associations that offer pooled income

trust options, along with the associated fees can be found on the Western New York Law Center website.⁹

Each and every month the Community Medicaid recipient must deposit the amount of the deemed surplus income into the pooled trust. Once the funds are deposited into the pooled trust, the recipient then makes monthly requests for the trustee to pay bills that were incurred by recipient for his or her own benefit.

The goal is for the recipient to spend down the funds deposited into the account each month, as upon the death of the Medicaid recipient, any funds remaining in the pooled trust remain with the charity. Spending down the surplus income each month is especially important in light of the impending Community Medicaid program changes ordered by Governor Cuomo which will implement a new 30-month look-back for community-based long-term care services which were incorporated

See COMMUNITY MEDICAID, Page 19



Christina Lamm is an attorney at Makofsky Law Group, P.C., located in Garden City. The firm concentrates its practice on elder law, trusts and estates, Medicaid planning, Medicaid applications, guardianships, and probate and estate administration.

**We are pleased to announce that
Diane J. Moffet, Adam S. Ross, Lauren Schnitzer
& Alyssa L. Zuckerman have become Partners
and
Joshua S. Sprague has become Counsel.**



Diane J. Moffet



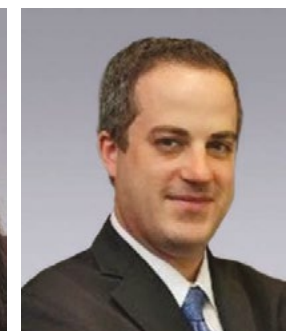
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**FOCUS:
COMMUNITY RELATIONS**



Joshua D. Brookstein

The Nassau County Bar Association Community Relations and Public Education Committee (CRPE) is dedicated to making meaningful connections between Domus and the larger Nassau County community. Community members who are eager to learn more about the law can attend a multitude of programs sponsored by the committee throughout the year, all of which are presented free of charge.

To meet its goals, the Committee is charged with organizing and promoting a number of activities. These efforts include public education seminars on current legal topics, connecting NCBA members with libraries and community organizations for speaking engagements, supporting the annual high school mock trial tournament, and promoting NCBA's annual Law Day program.

Community Relations and Public Education by the Nassau County Bar Association

Public Education Seminars

Since the onset of the COVID-19 Pandemic in 2020, CRPE has been aware that it needed to adapt to the new virtual landscape. The Committee was quick to implement virtual meetings thanks to the supportive and responsive NCBA staff, particularly its technology wizard Hector Herrera. Utilizing the new technology to hold its monthly meetings was initially difficult for some Committee members.

Most eventually embraced the new normal, determined to keep the Committee's work moving forward. Zoom quickly became the new method to not only meet as a committee, but to deliver its programming to the public. Recent virtual public education seminars organized by the Committee have comprised topics such as Recent Changes to Medicaid, Navigating Cyberspace, Recent Changes in the Election Law, and Laws That Protect Your Pets.

In addition to the traditional seminar format, CRPE has used Zoom to expand its programming to target elementary school aged children in Nassau County. On June 9 and 10, 2020, CRPE facilitated a virtual

career day entitled *A Day in the Life: An Exploration of the Legal Profession* for elementary school students.

The program featured the Hon. Denise L. Sher, a Justice of the Nassau County Supreme Court in the 10th Judicial District of New York, and Jon M. Probstein, Esq., a lawyer practicing since 1977, who is also a professional actor who works on stage, screen, and television. Justice Sher and Mr. Probstein discussed their career paths and answered questions from eager young participants.

Additionally, as the November 2020 election was approaching, several members of the Committee shared how their children were asking detailed questions about the electoral process, especially about the Electoral College. Working with the Dean of the Nassau Academy of Law, Anthony Michael Sabino, CRPE produced a short video explaining the electoral process and posted it on the NCBA website. The video was also shared with community and school groups.

Mock Trial Tournament

Breaking down stereotypes, building self-confidence, and fostering a sense

of community are essential elements in the development of the social-emotional intelligence of our youth. The law, by its very nature, can bring people together. In today's world, young people are subject to the diminution of civil discourse and the ability to disagree respectfully. Unfortunately, the state of public discourse is increasingly filled with hyper partisanship and the assignment of blame.

More often than not, these developments are based on preconceived notions rather than actual experiences engaging with those with whom one disagrees. The sad reality is that instead of coming together as Americans, too often seeds of divisiveness are already planted within the next generation of

See COMMUNITY RELATIONS , Page 20



Joshua D. Brookstein is a Partner with Sahn Ward PLLC in Uniondale. He concentrates his practice in litigation and appeals, zoning and land use, and municipal law. He is also Chair of the NCBA Conciliation Committee.

SUPPORT THE DINNER GALA JOURNAL



Christopher T. McGrath

77th Distinguished Service Medallion Honoree
NCBA Past President, Past Co-Chair of WE CARE,
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Hector Herrera

President's Award Recipient
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The journal is an invaluable way to show support for our honorees in a safe and contact-free way. Within this issue's insert, 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.



COVID-19 Updates Can Be Found:

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

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

**FOCUS:
HOSPITAL AND HEALTH LAW**



Andrew P. Nitkewicz and Matthew J. Grasso

One of the many things the COVID-19 global pandemic has taught us is the importance of our medical professionals and the great value of their time. The demands on medical professionals, especially physicians, have never been more daunting. Yet, despite the strain on physicians in the business of healing and saving lives, the burdens of running a medical practice—the business of medicine—also remains constant.

Unlike many other businesses where corporate investors and private equity backers can provide almost unrestricted support in running a business, the medical profession is highly regulated and control by the licensed professional is mandatory. One tool being utilized by many physicians to enable them to run a successful medical practice while affording them the time to concentrate on patient care, is the engagement of a management services organization (“MSO”). But given the prohibition of the corporate practice of medicine, among other restrictions, the details of the physician-MSO relationship are vital.

MSOs and Corporate Practice of Medicine

MSOs are entities that are separate from the health care companies and are contracted to run the day-to-day aspects of the practice. For example, MSOs rent space, purchase or lease equipment, keep records of the accounting and payroll, contract with vendors, etc. Essentially, MSOs allow doctors to focus on the medical side of their businesses without worrying about their day-to-day administrative needs. Over the last decade, the use of MSOs has become more prevalent in the medical field. On the surface, these arrangements seem ideal, the doctors can focus on medicine while the MSOs handle the daily functions of running the office. However, any healthcare provider contemplating a relationship with an MSO must be fully informed of the regulations surrounding such a relationship, and fully aware of the ramifications of breaching these regulations.

In order to protect patients and the integrity of the medical profession, New York strictly regulates the business relationship between physicians and nonphysicians. One major method of regulation is through the prohibition of the corporate practice of medicine. It

Proper Use of Management Services Organizations: The Devil Is in the Details

is deemed professional misconduct for a medical professional to share profits earned in connection with a medical service with a nonmedical professional in New York.¹ This arrangement, known as fee-splitting, is proscribed by Education Law § 509-a. Members of a professional service corporation (PC) may share these profits,² but PCs may be organized only by licensed members of the same profession.³ Similarly, Business Corporation Law § 1508 requires directors and officers of PCs to be authorized by law to practice that profession.⁴

Understanding this prohibition is important when contracting with MSOs because the slightest mistake could lead to an arrangement that could be deemed the corporate practice of medicine. Under Education Law § 6511, punishments for professional misconduct include censure and reprimand, suspension, revocation, or annulment of the professional license, limitations on issuance of a further licenses, additional education, public service, or a fine up to \$10,000.⁵

With statutes as unforgiving as those that govern fee-splitting and the corporate practice of medicine, the line between the MSO and physician must be clearly defined and abided by. But what happens when that line blurs? In 2019, this very issue was taken on by the New York Court of Appeals.

***Carothers v. Progressive Insurance Company*⁶**

The plaintiff in *Carothers* was a PC owned by a radiologist, Andrew Carothers. The PC entered into an agreement to lease MRI equipment and facilities from a nonprofessional company. The fees for the MRI equipment were alleged to be exorbitant to the point that it would have been cheaper for the PC to buy the equipment outright.

It was claimed that Carothers’ oversight of the PC was virtually nonexistent. Specifically, it was alleged that Carothers was not involved in evaluating or disciplining employees; his executive secretary (a nonphysician) was the person tasked with contacting referring physicians; and there was a lack of quality control at the PC, with Carothers reviewing only 79 out of 38,000 reports—many of these reports were alleged to be inadequate due to the advanced age of the MRI machines.

Further compounding these issues were allegations with respect to the PC’s handling of its finances. While Carothers opened a bank account for the PC, doing so was seemingly the extent of his involvement in the PC’s financial matters. It was claimed that Carothers’ executive secretary wrote the checks on behalf of the PC and that oftentimes, these checks were written to herself, or to the owner of the MRI

leasing company, and were used for lease payments on a car and water bills for a house in Las Vegas. It was claimed funds from this account were wire transferred to overseas accounts—reaching as much as \$12.2 million. Eventually, insurance carriers ceased paying the PC’s no-fault claims, and the PC closed at the end of 2006.

The PC sued the defendant insurance carrier, among others. “The jury found that the defendants had proved that plaintiff was ‘fraudulently incorporated.’”⁷ Thus, under *Mallela*,⁸ insurance carriers could withhold payment.⁹ The jury also found that Carothers did not engage in the practice of medicine through plaintiff in 2005-2006.

Ultimately, the Court of Appeals ruled that “*Mallela* does not require

a finding of fraud for the insurer to withhold payments to a medical service corporation improperly controlled by nonphysicians.”¹⁰

In its decision, the Court wrote that the term “fraudulently incorporated” may be misleading, explaining that “a corporate practice that shows ‘willful and material failure to abide by’ licensing and incorporation statutes may support a finding that the provider is not an eligible recipient of reimbursement without meeting the traditional elements of common-law fraud.”¹¹

Further, the Court explained that while fee-sharing arrangements are not a defense to a no-fault action, this case went beyond splitting fees; this was total control by nonphysicians.¹² The Court echoed the view that “the common law in New York has long

See PROPER USE, Page 21



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Mary A. Walling

Unlike commercial cases and those involving non-medical malpractice personal injuries, the importance of discovering the terms of employment contracts in a medical malpractice actions is not always appreciated. These include those between a medical institution and its physicians and other health care providers, as well those between the institution and a third party entity who is providing the staffing or essential service for that institution, without which that institution could not function.

In establishing the entitlement to such a contract, the plaintiff should set forth a factual basis detailing why the contract contains information that is materially necessary for the prosecution of the action. Understanding the identity of these contracting entities is important so that they can be named as defendants,

Discovery of Contracts in Medical Malpractice Actions

along with the individual and the hospital or institution. The contract can also provide proof of an independent basis of liability against the contracting party, beyond that of vicarious liability.

Relationship of Parties

In this age of large health care corporations operating not only hospitals and clinics but individual medical offices, it is essential to understand by whom an individual physician/health care worker is employed.

Institutions attempt to limit their liability and exposure by contracting with third-party groups of specialists, such as anesthesiologists, pathologists, radiologists, and physician's assistants, to provide the essential services that the hospital/institution is obligated to provide and without which they could not operate. These contracting parties may be essential parties to name in the action.

Just as important is discovery of the terms of the contract in order to establish the liability of the parties for the actions of the individual health care providers (e.g., doctor, nurse practitioner, physician's assistant, certified registered nurse anesthetist and midwife). Despite the claim that the health care provider

is an independent contractor and that there is no vicarious liability for their actions by the hospital/institution, this is not always the fact.

Obviously, one of the purposes of establishing liability on the part of the institution is to ensure adequate insurance coverage and funds to satisfy any judgment. This is not only important to the plaintiff, but the individual health care defendant whose actions are in question since they may have limited coverage. If the employer of the health care provider has no insurance coverage then the ability to hold the institution responsible becomes more imperative.

These contracting entities are usually unknown to the patient, and not identified when the patient seeks and receives care at a hospital, office, or other medical institution. On occasion there is small print in a record or consent stating that the particular specialist will be billing separately or are not employees of the hospital. The document may use the word independent contractor, a term a patient would not necessarily understand. The patient often does not see these caveats in small writing, and even if the small print was read, the patient would have no choice but to accept the service of these providers or seek care elsewhere. This latter option is not realistic or feasible.

Sometimes it is only a careful review of the plaintiff's billing documents and third-party collateral source records that identify the contracting entity. Those who do medical malpractice litigation will know from past experience to always ask whether there is a hidden employer.

Identifying Contracting Agency

These contracting entities are usually legal entities, created under New York Law as Professional Corporations and Limited Liability Corporations. However, with the increase in remote medical services being provided by specialists such as radiologists and even remotely located intensivists, the contracting entities may be foreign corporations who are only authorized to do business in New York.

Another type of entity employing physicians and other health care professionals is the Professional Employer Organization (PEO). Such entities are governed by Sections 915 to 924 of the Labor Law. Section 916 defines a PEO as any person or business entity that enters into a Professional Employer Agreement with a client. Client is defined as a person who enters into the agreement with the PEO and in the case of a medical malpractice action would include a hospital, nursing home or other such medical facility.

The Professional Employer Agreement is defined as a written

contract whereby, *inter alia*, the PEO expressly agrees to *co-employ* all or a majority of the employees providing services for the client, the responsibility for the worksite employees, including hiring, firing and disciplining are expressly allocating in the agreement.

Labor Law § 922 requires that the agreement be written and set forth the duties and responsibilities of each party, a description of the type of services to be rendered by the PEO and the respective rights and obligation of the parties. This section states that although the PEO reserves a right of direction and control over the worksite employees:

the client shall maintain direction and control over the worksite employees as necessary to conduct its business and without which the client would be unable to conduct its business, discharge and fiduciary responsibilities and comply with applicable licensure.

Thus the language of the contract is crucial to defining the responsibilities and potential liability for the actions of the employee named.

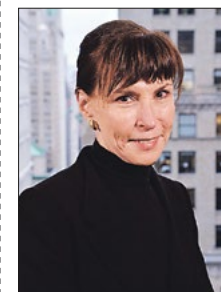
Contract Between Hospital and Contracting Entity

Despite the term independent contractor being set forth in such a contract, that assertion is not dispositive. Vicarious liability can be established by showing that there is apparent or ostensible agency (agency by estoppel) or control in fact by the hospital of the services being provided by the health care provider.¹

It is the latter aspect that requires discovery of the contract, because it will set for the degree of control retained by the hospital. Hospitals are required to have rules and regulations by virtue of their licensure and certification by the State, as well as such other agencies as the Joint Commission. Thus the contract can be expected to require that the healthcare providers being supplied be governed by the rules and regulations of the contracting hospital/entity.

The contract can be anticipated to contain provisions regarding the responsibility and control by the hospital/institution of the standard of care being provided, control of scheduling, the ability to terminate the health care provider under certain circumstances, the ownership of the

See DISCOVERY, Page 22



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Matthew J. Levy and Mauro Viskovic

On November 20, 2020, the Centers for Medicare and Medicaid Services (“CMS”) and the Office of Inspector General (“OIG”) adopted significant changes to regulations regarding the Anti-Kickback Statute (“AKS”)¹ and the Physician Self-Referral Law (“Stark Law”).² Among the changes are those that expand AKS safe harbors and Stark Law exceptions, and create new ones.

As a general matter, AKS and the Stark Law and AKS prohibit medical providers from paying or receiving kickbacks, remuneration, or anything of value in exchange for referrals of patients who will receive treatment paid for by government healthcare programs such as Medicare and Medicaid, and from entering into certain kinds of financial relationships.

There are various exceptions to the Stark Law, together with certain safe harbors to AKS, that permit certain referrals under limited circumstances. The recent changes adopted by CMS and OIG aim to expand those exceptions and safe harbors in order to modernize and clarify regulations that were enacted back in 1989. Summarized below is a general overview of the key AKS and Stark Law changes.

AKS Changes

The main AKS revisions are as follows:

Value-Base Arrangements

Three new AKS safe harbors will be added to protect certain arrangements entered into with, or by, a value-based enterprise (VBE) and its eligible participants for a number of value-based network arrangements, as follows:

- Care coordination arrangements to improve quality, health outcomes, and efficiency, involving “no risk”, where in-kind remuneration such as technology or services are exchanged between VBE participants used to engage in value-based activities directly connected to care coordination for the target patient population.
- Value-based arrangements involving both monetary and in-kind remuneration between a VBE and VBE participants where the VBE assumes “substantial downside financial risk” for providing or arranging for the provision of items and services for the target patient population, and the VBE

CMS and OIG Move to Expand Exceptions and Safe Harbors to Stark Law and Anti-Kickback Statute

participants assume a “meaningful share” of that risk.

- Value-based arrangements involving both monetary and in-kind remuneration between a VBE and VBE participants where the VBE assumes “full financial risk” for all items and services covered by a payor for each patient in the target population for a term of at least one year.

These “value-based” safe harbors vary by the type of remuneration protected, the type of entities eligible to rely on the safe harbors, and the types of safeguards included as safe harbor conditions. The value-based safe harbors exclude pharmaceutical manufacturers, distributors, and wholesalers; PBMs; pharmacies that primarily compound or dispense compounded drugs; laboratories; medical device and supply manufacturers; medical device distributors and wholesalers; DMEPOS suppliers; and physician-owned medical device companies. The care coordination safe harbor can be accessed by medical device and DMEPOS manufacturers to protect digital technology arrangements under certain conditions.

A new safe harbor will be added for patient engagement tools and supports to improve care quality, outcomes and efficiency, furnished by a VBE participant or “eligible agent” to a patient in a “target patient population,”

Patient Engagement

A new safe harbor will be added for patient engagement tools and supports to improve care quality, outcomes and efficiency, furnished by a VBE participant or “eligible agent” to a patient in a “target patient population,” subject to a \$500 annual cap, with an inflation adjuster. This safe harbor includes the same general exclusions as outlined above but allows medical device and supply manufacturers to provide some digital health technology.

CMS-Sponsored Models

A new safe harbor will be added for CMS-sponsored model arrangements and CMS-sponsored model patient incentives that is expected to reduce the need for separate fraud and abuse waivers for new CMS-sponsored models.

Cybersecurity

A new safe harbor will be added to protect non-monetary donations of certain cybersecurity technology, including both software and hardware,

and related services. This safe harbor permits the donation of cybersecurity technology to physician groups or other providers so long as the technology is “necessary and used predominantly to implement, maintain, or reestablish cybersecurity.” The safe harbor limits donors from making donation decisions considering volume or value of referrals or other business generated between the parties.

Electronic Health Records

The existing electronic health records (EHR) safe harbor will be modified to update provisions regarding interoperability, remove the prohibition on donation of equivalent technology, and provide clarification to protections for cybersecurity

technology and services included in an electronic health records arrangement.

Personal Services and Management Contracts

The existing personal services and management contracts safe harbor will be modified to increase flexibility for part-time or unpredictable compensation arrangements, and to provide new protection for outcome-based payment arrangements, with the same entity-exclusions that are applied to the new value-based safe harbors.

Warranties

The existing safe harbor for warranties will be modified to revise to definition of “warranty” and provide protection for warranties for one or more items and related services.

See EXPAND EXCEPTIONS, Page 22

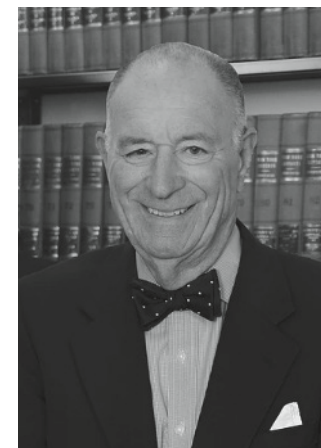


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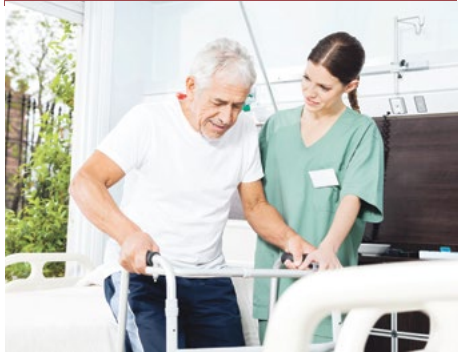


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Deidre M. Baker

As people continue to enjoy longer life expectancies, there have been increases to what the average American can expect to spend on his or her long-term care. In light of the potentially staggering cost of this type of care, irrevocable trusts have become an increasingly popular vehicle to protect assets. While the word “irrevocable” often makes clients leery, for many clients, the benefits of this estate planning tool far exceed the downsides.

A client’s most valuable asset is commonly his or her primary residence. Clients are often, and understandably, anxious about what happens to his or her home in the event long-term care, such as nursing home care, is needed in the future. Depending on the age and health of the client, an irrevocable trust may be a great vehicle for protecting the

Long-Term Care Planning with Trusts

value of the property in the event the client requires care and wants to obtain Medicaid benefits to finance such care.

Medicaid Program

The Deficit Reduction Act of 2005 (“DRA”),¹ enacted in 2006, a federal law implanted in the states, made considerable changes to New York State’s Medicaid program, specifically to the transfer penalty rules for nursing home coverage. The law increased the “look-back” period for nursing home Medicaid eligibility from three years to five years.² The DRA also changed how the penalty period itself is imposed.

Prior to the law’s enactment in 2006, the penalty period was calculated based on when the transfer was made, meaning the day a non-exempt transfer was made, the clock would begin to run. The DRA imposed a new requirement that, for transfers made after 2006, the penalty period would not begin to run until the applicant is in the nursing home, is otherwise eligible for Medicaid (below the asset limit) and has submitted an application for Medicaid.

Following the enactment of the DRA, there was little significant change in the New York State Medicaid program for several years. That changed, however, in 2020 when the State’s annual budget made major

cuts to the Medicaid program.³ The most notable change in the Medicaid program will be the imposition of a lookback period in the home care or community-based coverage.

Traditionally, the home care Medicaid program did not impose any look-back period for individuals seeking community-based services. The changes to the home care Medicaid program were initially scheduled to go into effect on October 1, 2020 but have been delayed several times. It appears likely that the changes will go into effect on July 1, 2021. Now more than ever, it is important to speak with clients about the need to protect assets and to plan for the future.

Under the DRA and the upcoming new home care lookback period, unless the transfer of assets meets one of the Medicaid exemptions, the value of the uncompensated transfer or gift will be used to calculate a penalty period. A penalty period is a number of months where the applicant will be ineligible for Medicaid coverage and is responsible for privately paying for services. The penalty period is calculated by combining all of the non-exempt transfers that occurred within the applicable look-back period and dividing the resulting total by the “regional rate” where services are sought. For example, a nursing home resident in Nassau County seeking services in 2021 would use \$13,834 as the divisor when calculating a penalty period.⁴ It remains unclear, however, how the calculation of a penalty period will work in the context of a home care Medicaid application.

Even with the passage of the DRA, transfers remain that are disregarded or considered exempt when determining an applicant’s eligibility. These exemptions, when applicable to an applicant, allow for greater flexibility in shielding assets. The most commonly used exemption allows for unlimited transfers to the applicant’s spouse, or to another for the sole benefit of the individual’s spouse. Although used less frequently, another exemption is when a transfer was made exclusively for a purpose other than to qualify for Medicaid coverage. This exemption is useful when an applicant is in need of care suddenly and had previously made non-exempt transfers.⁵

When utilizing the spousal transfer exemption, another important tool to consider is the spousal refusal. A spousal refusal is a legally valid Medicaid planning tool in New York. It is designed to insure that the non-applying or community spouse is not impoverished as the result of his or her spouse’s need for long-term care. A spousal refusal is completed by the community spouse and states that he or she is refusing to make his or her income and assets available for the applicant spouse’s care. At the time of application, as long as the applicant spouse’s countable resources are below the individual Medicaid asset

level (\$15,900 in 2021), he or she will be financially eligible for Medicaid. Any excess resources must be transferred to the community spouse during the month prior to the application.

Once the Medicaid recipient is approved and receiving care, some practitioners may believe the job is done. However, the final component to consider for a Medicaid recipient and his or her family is estate recovery. The federal government, the purse strings behind every state’s Medicaid program, has a policy that requires the states to attempt to recover the costs paid on behalf of the Medicaid recipient. While estate recovery is deferred during the lifetime of the applicant’s surviving spouse and minor or disabled children, it is important to plan to ensure assets remain protected.

As the New York State Department of Health explains, the state can attempt to recover from the estate of a Medicaid recipient, up to the amount spent on care. Estate, for purposes of Medicaid estate recovery, includes real property and personal property. It includes assets passed via a will, assets passed under intestacy law, and all “other assets in which the decedent had any legal title or interest at the time of death.”⁶

Medicaid Asset Protection Trusts

When meeting with a client who owns real property and has concerns about the cost of long-term care, an experienced elder law attorney will generally advise the client about the benefits of an irrevocable trust, also known as a Medicaid Asset Protection Trust (“MAPT”). These trusts are particularly useful to protect a client’s primary residence and other real property but can be used to protect other assets as well. This makes them an attractive option for clients whose home is their largest or most valuable asset.

A trust is a legal document that involves three main parties. The Grantor is the person who establishes and funds the trust. The Trustee is the person who is tasked with following the directives contained in the trust, managing property, and administering the trust at its conclusion. The beneficiaries inherit the trust property at the death of the Grantor or at some other pre-determined event outlined in the trust. In order for a MAPT to be effective in having the trust assets disregarded

See LONG-TERM CARE, Page 23



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MOVIE REVIEW

A Fugitive in Pursuit of Natural Law

Rudy Carmenaty

Act I¹

Preceded by a whistle from a moving train, this narration from William Conrad first aired on the ABC television network on September 17, 1963:

Name: Richard Kimble.

Profession: Doctor of Medicine.

Destination: Death Row, State Prison.

Richard Kimble has been tried and convicted for the murder of his wife. But laws are made by men, carried out by men.

And men are imperfect.

Richard Kimble is innocent.

Proven guilty, what Richard Kimble could not prove was that moments before discovering his wife's body he encountered a man running from the vicinity of his home.

A man with one arm.

A man he had never seen before.

A man who has not yet been found.

Richard Kimble ponders his fate as he looks at the world for the last time ... and sees only darkness.

But in that darkness, fate moves its huge hand.²

It set the stage for *The Fugitive*. Moments later, the train carrying Kimble, manacled to Lt. Phillip Gerard, derails. What followed would be an odyssey spanning the highways and by-ways of the land as well as the caprices of the law. Kimble would traverse the country, elusively pursuing justice in order to clear his name.

The story of Dr. Richard Kimble is a morality tale that strikes at the heart of traditional American notions of law and order, right and wrong, truth and falsehood. Series creator Roy Huggins rooted his conception of the series in natural law:

...in the eye of the law he is guilty. But no American of any persuasion will find him so. The idea of natural law is too deeply embedded in the American spirit for anyone to question Kimble's right, after all recourse to law has been exhausted, to preserve his own life.³

As the opening narration from subsequent seasons makes clear, Kimble, having been convicted on circumstantial evidence, is caught in an existential triangle. He is being sought by the authorities, while at the same time searching for the man who in-fact killed his wife:

The Fugitive, a QM Production, starring David Janssen as Dr. Richard

Kimble, an innocent victim of blind justice, falsely convicted for the murder of his wife, reprieved by fate when a train wreck freed him en route to the death house; freed him to hide in lonely desperation, to change his identity, to toil at many jobs; freed him to search for a one-armed man he saw leave the scene of the crime; freed him to run before the relentless pursuit of the police lieutenant obsessed with his capture.⁴

Kimble, portrayed by David Janssen, is adrift in a surreal game of cat and mouse. Ever vulnerable, he fears discovery, recapture and the execution of his sentence. Kimble must locate the one-arm man (Bill Raisch) who is responsible for his wife's death. And he must do so before Lt. Gerard (Barry Morse) in-turn finds him.

Act II

The Fugitive has enthralled viewers for nearly sixty years in reruns and in new versions. Writer/Producer Nick Santora developed the latest incarnation for the Quibi platform which began streaming in 2020. It is the third such reboot. Harrison Ford played Kimble in the 1993 motion picture and Tim Daly starred in a short-lived 2000 TV-remake.

But it's the original with David Janssen that is still the best. *The Fugitive* was "inspired" by the 1954 Sam Sheppard murder case.⁵ Sheppard, an Ohio doctor, was sentenced to life in prison for killing his wife. He claimed her true assailant was a bushy-haired intruder.⁶ The ensuing trial was a media circus that raised doubts as to his guilt.

The United States Supreme Court would order Sheppard's retrial because "the massive, pervasive, and prejudicial publicity attending the prosecution prevented him from receiving a fair trial consistent with the Due Process clause of the Fourteenth Amendment."⁷ F. Lee Bailey, his attorney on appeal, was able to secure the Doctor's acquittal at his second trial in 1966.⁸

Dr. Kimble is an idealized representation of Dr. Sheppard. The character walks a fine line between being a compassionate healer and a man falsely convicted. He was once a respected physician, a pillar of the community. Now he is a forlorn, scorned figure on the margins of society.

The series presents an inversion of traditional archetypes, with the police officer serving as the hero's adversary. When asked if he thinks Kimble really killed his wife, Gerard says matter-of-factly: "I enforce the law. The law pronounced him guilty. Whether that is right or wrong is not my concern."⁹ Morse tailored his performance to make Gerard seem fixated and unfeeling.

Each week the audience roots for Kimble, an inter-state fugitive wanted for murder, to allude capture. At the very same time, they are rooting against the police who are carrying-out the letter of the law. Kimble embodies the conflict between the inalienable rights which are

often professed, and the hard realities of the legal system as actually practiced.

Act III

Living outside the law, Kimble is the ultimate prisoner. In constant peril of being exposed, fate has fashioned a cell that constrains him wherever he goes. Caught in a nearly hopeless situation, he will place himself in jeopardy to help those in need. Kimble's intelligence, his empathy, his humanity have him venture well-beyond his comfort zone.

Kimble is motivated by what Abraham Lincoln called the "better angels of our nature." Not surprisingly, the alias he assumes in the series pilot is that of 'James Lincoln'.¹⁰ In each episode, he touches the lives of others. Yet no act of kindness on his part can absolve Kimble of his precarious reality.

Almost every person Kimble encounters, Gerard excepted, comes to believe he is innocent. After resolving the dramatic issue contained in each episode, he must move on in pursuit of the one-armed man, in effect engaging in a parallel game of cat and mouse. Kimble's vindication can only come when he captures the man responsible for his wife's death, natural law at its essence.

The program's format, that of an anthology with a recurring character,

enables Kimble to wander the country in ever-changing settings and situations.¹¹ As such *The Fugitive* deftly presents a miscarriage of justice as emblematic of the apprehensions and isolation inherent in twentieth century America.

The post-World War II years were marked by consumer affluence, Cold War anxieties, and dislocations involving race and gender. Kimble's story is a metaphor that mirrors these currents in the social fabric. He can never be truly at peace, either within himself or with his environment. Until his situation is resolved, he remains condemned.

David Janssen's acting style is perfectly suited for the television medium. Janssen is low-key, with "a lopsided, weary smile, the vague slouch, the voice full of light gravel and the eyes that looked

See FUGITIVE, Page 21



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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NAL PROGRAM

Pre-registration is REQUIRED for all Academy programs. Go to [www.nassaulawyer.com](#) for CLE material, forms, and zoom link will be sent to participants.
All programs will be offered via Zoom.

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
1 credit 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

MARCH 15, 2021

Vaccines: Inject Yourself with Knowledge
5:30-7:00PM
1.5 credits in professional practice
Skills credits available for newly admitted attorneys

MARCH 19, 2021

Dean's Hour:
Microsoft Teams: The Courtroom and Beyond for Maximum Productivity
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
****Program coordinated with Assigned Counsel, Inc. of Nassau County and is free to all attorneys; must pre-register**

MARCH 22, 2021

Eradicating Implicit Bias in the Courts
5:30-7:30PM
1 credit in diversity, inclusion and elimination of bias
1 credit in ethics
****Program coordinated with Assigned Counsel, Inc. of Nassau County and is free to all attorneys; must pre-register**

MARCH 23, 2021

Anders Briefs Examined
5:30-7:30PM
2 credits in professional practice
Skills credits are available for newly admitted attorneys
****Program coordinated with Assigned Counsel, Inc. of Nassau County and is free to all attorneys; must pre-register**

MARCH 31, 2021

Dean's Hour: Housing Discrimination in Real Estate
Sponsored by NCBA Corporate Partner Champion Office Suites and Tradition Title Agency
12:00-1:00PM
1 credit in diversity, inclusion and elimination of bias

FEATURED PROGRAM

Hon. Joseph Goldstein Skills Saturday:
Anatomy of a Litigation



MARCH 6, 2021

6 credits in skills for newly admitted attorneys

6 credits in professional practice for experienced attorneys

PROGRAM SCHEDULE

8:00 AM	Welcome
8:35 AM	EBTs
9:30 AM	Motions
10:25 AM	Openings
BREAK until noon	
12:10 PM	Direct Examination
1:10 PM	Cross Examination
2:05 PM	Summation

**MUST register for the whole day.
Individual class sign up NOT available.**

MARCH 11, 2021

Dean's Hour:
Reflections on a Life in Animal Law:
Practical Ideas to Help Animals, You, Your Practice, and Life
Sponsored by NCBA Corporate Partner Champion Office Suites
12:30-1:30PM
1 credit in ethics

CALENDAR

Go to nassaubar.org and click on CALENDAR OF EVENTS to register.

Pre-registered attendees 24 hours before program.

ONLINE via ZOOM unless otherwise noted.

APRIL 7, 2021

The Intersection of Discovery (CPL Article 245) and Speedy Trial (CPL 30.30) in the Time of COVID-19

With the NCBA Criminal Court Law and Procedure Committee, the Nassau County Criminal Courts Bar Association, and the Assigned Counsel Defenders Plan, Inc. of Nassau County

5:30-7:00PM— 1.5 credits in professional practice—Guest

Speaker: Hon. Andrew M. Engel, Nassau County District Court

*Registration fee waived for members of above organizations.

Pre-register through the Nassau Academy of Law.

RECENTLY ADDED CLE ON DEMAND

**JAN.
6**

Dean’s Hour: Whatever It Is, I’m Against It! Groucho Marx on Life, Liberty and the Pursuit of Hilarity
1 credit in professional practice

**JAN.
7**

Keeping Up with the Changing Times: Nuts and Bolts of Utilizing Microsoft Teams
1 credit in professional practice

**JAN.
13**

Dean’s Hour: Understanding the New Child Parent Security Act & Second Parent Adoptions
1 credit in professional practice

**JAN.
20**

Dean’s Hour: PPP Loan is a Fake! How to Determine if a Paycheck Protection Program Loan is Fraudulent and How to Handle a Related Criminal Investigation
1 credit in professional practice

**FEB.
20**

Dean’s Hour: Spirit which Prizes Liberty: American Law in the Age of Lincoln
1 credit in professional practice

12 free credits of On-Demand are included with your membership in addition to unlimited live/Zoom CLE offered by the Academy and NCBA Committees for the current membership year.



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IN BRIEF

Mary E. Mongioi, a partner at Forchelli Deegan Terrana LLP (FDT), and chairperson of the firm's Veterinary practice group, will be chairing VetPartners' 2021 Virtual Annual Meeting. **Jeffrey D. Forchelli**, FDT's Managing Partner is proud to announce that the Access to Justice Committee of the Nassau County Bar Association (NCBA), in conjunction with The Safe Center LI and Nassau Suffolk Law Services, will be recognizing FDT as a 2018-2019 Honoree for Volunteer Service. During this time period, the firm provided the greatest number of pro bono service hours of any law firm in Nassau County. A virtual celebration will be held on Wednesday, March 3, 2021.

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP promotes Equity Partners **Jamie A. Rosen**, a member of the Mental Health Law Practice group; **Danielle Visvader**, a member of the Guardianship Law Practice group; and **Alex Leibson**, a member of the Commercial Litigation Practice group. **Jeffrey D. Lebowitz**, NYS Supreme Court Justice, Ret., joined Abrams Fensterman as Of Counsel and is a member of the firm's Family & Matrimonial Law, Commercial Litigation and Criminal Law practice groups.

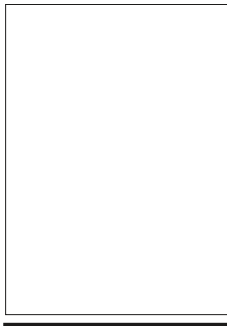
Susan Klein-Wolfson and **Craig Wolfson** are pleased to announce the opening of their new law practice, Wolfson and Klein-Wolfson, PLLC. Their firm is based in Syosset and will primarily be focusing on employment law, estate planning/elder law, and residential real estate.

Ronald Fatoullah of Ronald Fatoullah & Associates presented "The UnSECURE Act: Drastic Changes to IRA Rules" for the Society of Certified Senior Advisors. The firm also participated in a panel discussion for the Brooklyn Borough President's Office with PSS Circle of Care concerning fraud scams targeting the aged community and how to protect your loved ones.

Jacqueline Harounian, partner of Wisselman, Harounian & Associates, presented the ethics requirements and mechanics for connecting with and talking to the media.

Melissa Manna, member of the Cullen and Dykman LLP's General, Tort and Insurance Litigation department, has been promoted to Partner.

Vishnick McGovern Milizio (VMM) partners **Joseph Milizio**, **Joseph Trotti**, and **Bernard Vishnick**, counsel **Jordan Freundlich**, and associate **Meredith Chesler** announced the launch of new practice area Surrogacy, Adoption, and Assisted Reproduction. VMM is also pleased to announce that attorney **Richard Apat** has been promoted to Partner. He heads the firm's Personal Injury and Real Estate Litigation practices. VMM counsel **Edward McCarty**, former Nassau County prosecutor and state Supreme Court judge, is representing pro bono the family of a fallen FDNY firefighter in a dramatic case that has received widespread media attention, including *New York Post*, *Newsday*, *New York 1*, *WNBC*, *1010 WINS*, *WCBS NewsRadio 880*, and *LI News Radio*. Partner **Avrohom Gefen** filed Article 78 proceeding with the Kings County Supreme Court. He was also featured in a front-page article in *Long Island Business News (LIBN)* on January 22, explaining when employees' political expressions become unlawful. VMM managing



Marian C. Rice

partner Joseph Milizio, head of the firm's Business and Transactional Law; Exit Planning for Business Owners; LGBTQ Representation; and Surrogacy, Adoption, and Assisted Reproduction practices, was interviewed about the new Child-Parent Security Act on *News 12 NY* on February 12 and *CBS New York* on February 15. Partner **Constantina Papageorgiou** of VMM's Wills, Trusts, and Estates and Elder Law practices led a Medicaid & Estate Planning webinar on March 4 for patients and caregivers of Parker Jewish Institute for Health Care and Rehabilitation. Part of a yearlong series, future webinars are scheduled for May 6, July 1, September 2, and November 4. They are open to the public.

Karen Tenenbaum, LL.M. (Tax), CPA, tax attorney, was recently selected as a *LIBN* Business Hall of Fame honoree. In addition, Karen was chosen to be the current chair of the Suffolk County Bar Association Tax Law Committee. Karen was also 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 NYS residency matters. She was also named to the 2020 New York Metro Super Lawyers list.

Vincent F. Stempel, PC has combined with **Catterson and LoFrumento, LLP** to form Stempel, Catterson, LoFrumento, Carlson & Biondo, LLP. The new firm is an assembly of two firms very similar in approaches and culture. Partners include, **Vincent F. Stempel**, **Jeffrey L. Catterson**, **Michael F. LoFrumento**, **Amanda L. Carlson** and **John Biondo**.

Marc L. Hamroff, Partner at Moritt Hock & Hamroff LLP, announces that the Maurice A. Deane School of Law at Hofstra University has named Jeffrey Hassan as the recipient of the 2020-2021 Moritt Hock & Hamroff Business Law Honors Fellowship and Korrine Utting as the recipient of the 2020-2021 Marc Hamroff '83 Annual Scholarship.

The ELIJA Foundation, a Levittown-based not-for-profit, serving children, young adults and their parents, educators, professionals, and caregivers affected by an Autism Spectrum Disorder (ASD), has appointed **Melissa Negrin-Wiener** to its Board of Directors.

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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BUSINESSNEWS



2021 Nassau County Virtual Judicial Induction Ceremonies

On January 29 and February 5, 2021, the Nassau County Virtual Judicial Induction Ceremonies for the newly elected members of the Judiciary were held to honor and induct Hon. Lisa A. Cairo, Hon. Christopher J. Coschignano, Hon. Lisa M. Petrocelli, Hon. David W. Wright, Hon. Joseph R. Conway, Hon. Gary F. Knobel, Hon. Caryn R. Fink, and Hon. Christopher E. Hoefenrieg. The ceremonies were presided over by the Hon. Norman St. George, Nassau County Administrative Judge. Guests were invited to view the inductions virtually.

Photos by Hector Herrera



NCBA Committee Meeting Calendar March 3, 2021 - April 7, 2021

Please Note: Committee Meetings are for NCBA Members. Dates and times are subject to change.

Check www.nassaubar.org for updated information.

REAL PROPERTY

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

PUBLICATIONS

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

COMMUNITY RELATIONS & PUBLIC EDUCATION

Joshua D. Brookstein
Thursday, March 4
12:45 p.m.

ADOPTION LAW

Faith Getz Rouso
Thursday, March 4
1:00 p.m.

SPORTS ENTERTAINMENT & MEDIA LAW

Seth L. Berman
Monday, March 8
12:00 p.m.

CIVIL RIGHTS

Bernadette K. Ford
Tuesday, March 9
12:30 p.m.

LABOR & EMPLOYMENT LAW

Matthew B. Weink
Tuesday, March 9
12:30 p.m.

MATRIMONIAL LAW

Samuel J. Ferrara
Wednesday, March 10
5:30 p.m.

WORKER'S COMPENSATION

Adam L. Rosen
Thursday, March 11
12:30 p.m.

FEDERAL COURTS

David Shargel
Friday, March 12
1:00 p.m.

WOMEN IN THE LAW

Edith Reinhardt
Monday, March 15
12:00 p.m.

PLAINTIFF'S PERSONAL INJURY

Ira S. Slavitt
Tuesday, March 16
12:30 p.m.

DIVERSITY & INCLUSION

Hon. Maxine Broderick
Tuesday, March 16
6:00 p.m.

INTELLECTUAL PROPERTY

Frederick J. Dorchak
Thursday, March 18
12:30 p.m.

EDUCATION LAW

John P. Sheahan/Rebecca Sassouni
Thursday, March 18
12:30 p.m.

DISTRICT COURT

Roberta D. Scoll/S. Robert Kroll
Friday, March 19
12:30 p.m.

ALTERNATIVE DISPUTE RESOLUTION

Marilyn K. Genoa/Jess A. Bunshaft
Monday, March 22
12:30 p.m.

GENERAL, SOLO AND SMALL LAW PRACTICE MANAGEMENT

Scott J. Limmer
Tuesday, March 23
12:30 p.m.

BUSINESS LAW, TAX AND ACCOUNTING

Jennifer L. Koo/Scott L. Kestenbaum
Wednesday, March 24
12:30 p.m.

ASSOCIATION MEMBERSHIP

Michael DiFalco
Wednesday, March 24
12:30 p.m.

ELDER LAW SOCIAL SERVICES HEALTH ADVOCACY

Katie A. Barbieri/Patrica A. Craig
Wednesday, March 24
3:00 p.m.

IMMIGRATION LAW

George A. Terezakis
Wednesday, March 24
5:30 p.m.

APPELLATE PRACTICE

Jackie L. Gross
Thursday, March 25
12:30 p.m.

SURROGATE'S COURT ESTATES & TRUSTS

Brian P. Corrigan
Thursday, March 25
5:30 p.m.

ACCESS TO JUSTICE

Rosalina Baiamonte/Kevin P. McDonough
Friday, March 26
12:30 p.m.

COMMUNITY RELATIONS & PUBLIC EDUCATION

Joshua D. Brookstein
Thursday, April 1
12:45 p.m.

PUBLICATIONS

Christopher J. DelliCarpini/Andrea M. DiGregorio
Thursday, April 1
12:45 p.m.

REAL PROPERTY

Alan J. Schwartz
Wednesday, April 7
12:30 p.m.

Vaccine Court...

Continued From Page 3

of legal fees if a person chooses to retain an attorney.³³

The damages available vary by who is requesting the relief. If an injured countermeasure recipient is requesting relief, they may be eligible for medical benefits and/or lost employment income.³⁴ The maximum amount of lost income that can be received is \$50,000 a year.³⁵ Certain survivors of injured countermeasure recipients who died as the direct result of a covered injury are eligible to receive a death benefit.³⁶ Estates of those who are deceased because of injuries through covered countermeasures are eligible for medical benefits and/or lost employment income.³⁷

One must file a Letter of Intent within one year of the administration of a covered countermeasure alleged to have caused an injury, followed closely by a Request Form with all relevant medical records and HIPAA authorizations.³⁸ Additional documentation and verifications may be required depending on the situation and requestor.³⁹

A requestor has a right to seek reconsideration of a denial, which is issued by the Secretary, within sixty days of the denial.⁴⁰ No further judicial or administrative review is permitted unless the President states otherwise.⁴¹

Since 2010, 29 out of 499 claims have been compensated through this program.⁴²

Conclusion

In the current state of affairs, many living in the United States will likely be afforded the opportunity to be vaccinated for COVID-19. If someone unfortunately suffers an injury related to the administration of a vaccine, it is important to be familiar with the

available vaccination compensation programs, such as the National Vaccine Injury Compensation Program and the Countermeasures Injury Compensation Program, in order to take your best shot at recourse.

- 42 USC § 300aa-11.
- Health Resources & Servs. Admin., About the National Vaccine Injury Compensation Program, available at <https://bit.ly/2Za42e2>.
- 42 USC § 300aa-14; see also Health Resources & Servs. Admin., Vaccine Injury Table, available at <https://bit.ly/3jJmOm8>.
- Id.*
- Id.*
- Althen v. Sec'y of Health & Human Servs.*, 418 F.3d 1274, 1278 (Fed. Cir. 2005).
- H.R. REP.99-908 at 21.
- Id.*
- Id.*
- Id.*
- 42 USC § 300aa-12.
- Id.*
- Id.*
- Id.*
- U.S. Court of Federal Claims, Vaccine Claims/Office of Special Masters, available at <https://bit.ly/2MZx4L7>.
- 42 USC § 247d-6d.
- Id.*
- Id.*
- Id.*
- 42 USC § 247d-6d.
- Id.*
- 85 Fed. Reg. 15198 (Mar. 17, 2020).
- Id.*
- Id.*; see also U.S. Dep't of Health & Human Servs., Secretary Azar Declares Public Health Emergency for United States for 2019 Novel Coronavirus, available at <https://bit.ly/3b48xfI>.
- U.S. Dep't of Health & Human Servs., Fourth Amendment to the Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, available at <https://bit.ly/3pmIvd6>.
- Health Resources & Servs. Admin., Countermeasures Injury Compensation Program, available at <https://bit.ly/3qfjHF6>.
- Health Resources & Servs. Admin., Comparison of Countermeasures Injury Compensation Program (CICP) to the National Vaccine Injury Compensation Program (VICP), available at <https://bit.ly/37bVWpI>.

28. 42 CFR § 100.100.
29. *Id.*
30. 42 CFR § 110.20.
31. 42 CFR § 110.1.
32. 42 CFR § 110.2.
33. 42 CFR § 110.44.
34. 42 CFR § 110.81.
35. *Id.*
36. *Id.*
37. 42 CFR § 110.30.

38. 42 CFR § 110.42.
39. 42 CFR §§ 110.42; 110.52; 110.53; 110.60; 110.61; 110.62; 110.63; 110.71; 110.72.
40. 42 CFR § 110.90.
41. 42 CFR § 110.92.
42. Health Resources & Servs. Admin., Countermeasures Injury Compensation Program (CICP) Data, available at <https://bit.ly/3aZg27Z>.

NCBA LAWYER ASSISTANCE PROGRAM PRESENTS

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STARTING MONDAY, APRIL 12, 2021

MEETS SECOND MONDAY OF EACH MONTH

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Community Medicaid...

Continued From Page 5

into the 2020 New York State Budget.¹⁰ It is anticipated that when the new rules regarding home care services are finally implemented the transfer of income into the pooled trust for Community Medicaid recipients over the age of 65 will be viewed as a transfer of assets.¹¹ If the pooled trust pays bills for the recipient's benefit in the month of receipt, those paid bills will offset the amount that was transferred. This means, for example, that if a person deposits \$800 into his or her pooled trust in January and in that same month directs the pooled trust to pay bills equal to \$800, Medicaid will look at it as if the transfers were compensated transfers and the Medicaid recipient will not be penalized.¹²

Before the new transfer penalty for community-based Medicaid came into being, the mechanics of the pooled income trust were not as crucial so long as the surplus funds were deposited each month. However, if the new rules are implemented as currently written, if the funds are not utilized for the recipient's benefit during the month of deposit into the pooled trust, a transfer penalty can be imposed.¹³ Under the current implementation of the rules, the Community Medicaid recipient is able to accumulate income in the pooled trust to be used at a later time for items such as a large upcoming expense, such as property taxes. The only risk would be that if the recipient dies before the funds are used, any remaining funds in the pooled trust account are forfeited. Also, there could be potential issues if the recipient needs to convert his or her Medicaid to nursing home level of care. Advocacy groups are hoping to get the Department of Health to change its position on this, but it has not happened as of yet.¹⁴ The best option at this point is to make sure the client has enough expenses so that his or her surplus income will be used up each month.

Enrolling in a Pooled Trust

Joining a pooled income trust is relatively straight forward. The individual must submit to the trust a completed Beneficiary Profile and Joinder Agreement. Each pooled trust has its own Joinder Agreement that can usually be found on the individual pooled trust's website. When submitting the Joinder Agreement to the pooled trust, the individual will also need to send his or her first month's surplus income deposit in addition to other documentation. At this point, careful attention should be paid to the pooled trust's enrollment fee, making certain that the initial amount deposited is enough to cover the enrollment fee and the monthly maintenance fee. If one month's surplus income does not cover these fees, it will be necessary to make an additional deposit that first month.

An individual should sign up with a pooled trust before the Medicaid



application is submitted. Getting a pooled trust approved by Medicaid first can be a long process as disability approval must first be obtained from the Department of Health.¹⁵ Medicaid can be approved and the client can sign up with a Managed Long Term Care plan to start receiving services while the disability approval is still pending. At this point, it will look as if the Medicaid recipient has surplus income, but once the disability and the pooled trust are approved, the recipient will be re-budgeted and the surplus will be zeroed out to the date of the first pooled trust deposit or the date of Medicaid approval (whichever is later). Most Managed Long Term Care plans will approve a client for services pending the pooled trust approval.

When submitting the Community Medicaid application to Medicaid, the client will want to include the approved pooled trust Joinder Agreement; a Disability Questionnaire form (LDSS-1151) completed by the client or the client's representative; and a Medical Report for Determination of Disability (LDSS-486T) completed by the client's physician.¹⁶ Your local Department of Social Services will send the disability information to the Department of Health to receive disability approval. Once disability is approved, the local Department of Social Services will reach out to obtain verification of deposits into the pooled trust for the months of Medicaid approval and then the pooled trust will be approved. It is very important to remind the Community Medicaid recipient to make the monthly deposits of the surplus income into the pooled trusts. Most of pooled trusts have direct withdrawal options that the Medicaid recipients can take advantage of to ensure that their monthly deposits are being made.

Utilizing a Pooled Trust

As a starting point, it bears noting that the pooled trust cannot distribute funds directly to the Medicaid recipient. The pooled trust will pay the expenses of the Medicaid recipient directly to the provider or vendor. The Medicaid recipient should start requesting expenses be paid the first month of pooled trust approval so that funds do not accumulate. Each pooled income trust has its own disbursement request forms that will need to be completed. As a general matter, the client sends a completed disbursement form and a copy of the bill he or she wants paid each month.¹⁷

Pooled trusts can pay for expenses such as rent or mortgage payments, utilities, cable or phone bills, credit card purchases, food, certain legal fees, and even entertainment. While the

expenses must be for the sole benefit of the Medicaid recipient, the expense can still be paid even if it benefits another person collaterally.¹⁸ For example, if the Medicaid recipient and his wife lease a home jointly, the full rent bill can still be paid from the Medicaid recipient's pooled income trust.

Some pooled trusts will charge a fee for any disbursement requests over a minimum amount. Due to this, advising the Medicaid recipient to pay larger reoccurring bills from the pooled trust each month may be prudent. Advising a client to charge all expenses to one credit card each month and then request the pooled trust to pay that bill can also simplify things. It seems obvious, but keep in mind that the pooled trust will only make disbursements each month that equal the amount it is funded with, less applicable fees.

Conclusion

As discussed in detail, income in excess of the Medicaid income allowance is not a barrier to receiving personal care services in the community. The Excess Income program, the Pay-In program

and pooled income trusts are all tools in the Elder Law attorney's arsenal to help his or her client in need. Which option is right depends on a thorough evaluation of the individual client's circumstances.

1. GIS 20 MA/13.
2. <https://on.ny.gov/3jKRm74>.
3. *Id.*
4. *Id.*
5. *Id.*
6. 42 USC 1396p (d)(4)(c).
7. NY Soc Serv Law § 366(2)(b)(2)(b)(2)(iii).
8. *Id.*
9. <https://bit.ly/379hDXL>.
10. NY Laws Chapter 56, Part MM, Sections 13 & 14. Implementation of the new rules has been delayed until at least April 1, 2021, and is likely to be delayed further.
11. Nolfo, *Matt, Memo to Elder Law and Special Needs Section ("ELSN") Members* (12/15/2020).
12. GIS 08 MA/020.
13. Nolfo, *supra* n.11.
14. *Id.*
15. 05 OMM/INF-1.
16. GIS 12 MA/027.
17. <https://wnylc.com/health/afile/6/4/1/>.
18. *Id.*

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Community Relations...

Continued From Page 6

leaders. This is in lieu of unifying people through compassion, communication, and civil debate and discussion. High school mock trial programs, however, are one way to reverse this disturbing trend.

CRPE is proud to sponsor and coordinate the administration of the County's participation in the annual New York State High School Mock Trial Tournament. On average, nearly fifty high schools in Nassau County participate each year. Student teams are provided with a hands-on opportunity to further their understanding of the law, court procedures and the legal system. At the same time, students are honing their speaking, listening, reading, and reasoning skills.

Many NCBA and CRPE members volunteer to serve as an attorney advisor to a mock trial team. Attorney advisors guide and advise students throughout the process analyzing a case, developing a persuasive case theme, formulating direct and cross-examinations, opening and closing statements, and developing compelling witnesses.

Attorney advisors, along with their school-based coach, provide teams with the tools to argue a case in a courtroom. The trials are presided over by Nassau

County judges, village magistrates, and member attorneys. This year's Mock Trial Tournament took off with the first round held on February 24, 2021.

There are forty teams in the competition from all over Nassau County. The Mock Trial Tournament schedule, case, pairing and orientation information can be found on the NCBA website. If an NCBA member is interested in serving as a judge and/or has any questions about volunteering as an attorney advisor next year, please contact Jennifer Groh at jgroh@nassaubar.org for more information.

Law Day

Each May, the NCBA holds its annual Law Day Awards Dinner. Law Day is a recognized commemoration in the United States to celebrate the role and importance of law within American society. The NCBA's annual dinner introducing a different theme each year. This year's celebration, Advancing the Rule of Law Now, will explore the importance of the rule of law so as to ensure order and justice.

This year's event will take place on Thursday, April 29, 2021, at 5:00 p.m. via Zoom. As is tradition, the NCBA will welcome a guest speaker, and will



honor special individuals for their dedication and commitment to the legal community at the Law Day celebration. The three award categories include the Liberty Bell Award, Peter T. Affatato Court Employee of the Year Award and Thomas Maligno Pro Bono Attorney of the Year Award.

For additional information regarding this year's Law Day celebration on April 29 and how to register on Zoom for the event, please make sure to see with the insert included within this issue.

Upcoming Programs

CRPE's next seminar is titled, "Vaccines: Inject Yourself with Knowledge." The seminar will deliver unbiased, informative content to the community about vaccines and the requirements, if any, to take them. Among the topics that will be discussed at this seminar are the following:

1. School district's rights and obligations;
2. Employer/employee rights and responsibilities;
3. Private industry (airlines, concert venues, Broadway theatres) rights to require proof of vaccination; and
4. Exemptions from vaccination requirements.

The program will be held on Monday, March 15, 2021 from 5:30 PM to 7:00 PM. To register, please visit the NCBA website at nassaubar.org.

Join the Committee

The CRPE meets at 12:45 PM on the first Thursday of every month. New members are always welcomed. For further information, contact Committee Chair, Joshua D. Brookstein, at jbrookstein@sahnward.com or (516) 228-1300.

Law Day...

Continued From Page 1

Peter T. Affatato Court Employees of the Year Award

The Peter T. Affatato Court Employee of the Year Award, named after the NCBA past president, is awarded to an individual or individuals who demonstrate professional dedication to the court system, its efficient operation, and who are exceptionally helpful and courteous to other court personnel, members of the Bar, and the people served by the court system.

The NCBA is pleased to present this award to Christopher Zanchelli, Senior Court Clerk at the Nassau County Supreme Court, who works in the calendar court part and as a foreclosure auction clerk. Previously, Zanchelli was Court Officer in Nassau County District Court from 1991 to 1998, and Senior Court Clerk in Nassau County District Court from 1998 to 2004.

A graduate of SUNY Farmingdale in 1987 and SUNY Oswego in 1989, Zanchelli has been married to his wife Annmarie for 23 years, and has twin 20-year-old sons Joseph and Sam. In his spare time, he volunteers as a coach to a special Olympics basketball team.

Thomas Maligno Pro Bono Attorney of the Year Award

The Thomas Maligno Pro Bono Attorney of the Year Award is being presented to Ronald M. Terenzi, Esq., in recognition of his selfless commitment to the furtherance of the most noble traditions of the organized bar.

Terenzi practices in the fields of commercial bankruptcy and all other

areas of commercial litigation and is Founding Partner of the Garden City law firm, Terenzi & Confusione, PC. In

addition to being recognized as NCBA Pro Bono Attorney of the Month in the July/August 2017 issue of Nassau

Lawyer, Terenzi is an extremely active volunteer on the NCBA Access to Justice Committee and NCBA Open House clinics assisting underserved members of our community.

Terenzi has now been practicing law on Long Island for 35 years and serves a diverse commercial client base. In addition to appearing on various new programs and chairing numerous symposiums in the areas of bankruptcy law and related topics, Terenzi is very active in many Long Island organizations, and is a past NCBA Board of Director, as well as past chair of the Community Relations and Public Education Committee.

Join Us

The NCBA would like to congratulate this year's honorees and looks forward to a wonderful evening. The 2021 Law Day Annual Awards Celebration is chaired by Hon. Ira B. Warshawsky and will be held on Thursday, April 29, 2021 at 5:00 PM via Zoom.

Attendance to this event is available for purchase at \$25 per person and includes a copy of Dr. Wagner's anthology, The Women's Suffrage Movement. Attendance is free of charge for court staff; however, the anthology will not be included. A \$250 sponsorship is also available, which includes attendance for two, two copies of The Women's Suffrage Movement, recognition during the program, logo on all event marketing materials, and in the Nassau Lawyer.

For additional information, see the insert in this month's issue. To register, contact Stephanie Pagano at spagano@nassaubar.org or (516) 666-4850.



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Proper Use...

Continued From Page 7

recognized the need to ensure that providers of professional services are not unduly influenced by unlicensed third parties who are free of professional responsibility requirements and may disregard patient care in operating a ‘corporation...organized simply to make money.’”¹³

Finally, the Court in *Carothers* reiterated the *Mallela* rule “that insurers may ‘look beyond the face of licensing documents to identify willful and material failure to abide by state and local law,’ such as actual ownership or operation of the practice by an unlicensed individual.”¹⁴ Thus, “the jury’s finding that [the PC] was in material breach of the foundational rule for professional corporation licensure—namely that it be controlled by licensed professionals—was enough to render plaintiff ineligible for reimbursement.”¹⁵

Avoiding Ramifications of *Carothers*

Physicians should be mindful of the ramifications of the *Carothers* decision. This awareness is especially important for physicians who wish to enter into agreements with MSOs. While the

standard for fraudulent incorporation set forth by the Court is “willful and material,” it is best to remain vigilant of the possible ramifications.

To best avoid these pitfalls, Physicians should be sure to remain heavily involved in the medical side of the business, while also keeping track of its finances. MSOs should be used to aid in the day-to-day operations of the business, but physicians should not allow those nonprofessionals involved in the MSOs to hold themselves out as representatives of the PC. In *Carothers*, for example, the executive secretary was tasked with contacting referring physicians on behalf of the PC. Similarly, the PC’s tax returns were prepared using a separate nonphysician’s telephone number as the contact. Ultimately, balance is key.

Carothers should be a cautionary tale for many physicians. While not explicitly about MSOs, *Carothers* details (often to extremes) how a business arrangement between a PC and a nonprofessional can quickly drift into the realm of professional misconduct. As the utilization of MSOs, and other methods of business administration, increase in popularity, it is important to draft agreements properly, and make sure clear boundaries are set. The consequences of a failure to do so are

serious, as New York continues to make it clear that there is not much leeway when it comes to the unauthorized practice of medicine and fee-splitting.

Be Aware of Limitations

It is imperative that physicians understand the limitations to these arrangements. One key limitation is that they must maintain control over the medical side of their businesses. A physician who cedes too much control to a nonphysician may face the suspension or revocation of his license, as well as a possible fine. Doctors may contract with MSOs to provide back-end services, but payments to these MSOs cannot be based on the services rendered, nor can they relate to any actual medical treatment. For example, payment should not be based on a percentage of total revenue. Rather, flat fees are preferable.

Similarly, another potential danger for physicians who enter into an agreement with an MSO is that if it is determined that the arrangement constitutes fee splitting, the contract may be unenforceable. Courts have held that they will not hear complaints from parties who enter into an illegal professional/nonprofessional arrangement.¹⁶ Finally, physicians who enter into agreements with MSOs may

also come across issues with insurance companies who have may be legally permitted to refuse reimbursement if the health care provider circumvents the State licensing requirements.

MSOs can be extremely helpful to physicians so as to allow them to concentrate on patient care, as opposed to administrative issues. Consequently, more physicians are utilizing the MSO model, and their rise in prevalence is an overall benefit to the industry. But, as with all increasingly popular aspects of business, it is important not to rush into any agreements, and to fully understand the consequences of the decision.

1. Educ. Law § 509-a.
2. *Id.*
3. Bus. Corp. Law § 1507 (a).
4. Bus. Corp. Law § 1508.
5. Educ. Law § 6511.
6. *Andrew Carothers, M.D., P.C. v. Progressive Ins. Co.*, 33 N.Y.3d 389 (2019).
7. *Carothers*, 33 N.Y.3d, at 400.
8. *State Farm Mut. Auto. Ins. Co. v. Mallela*, 4 N.Y.3d 313 (2005).
9. See *Carothers*, at 404.
10. *Id.*, at 394.
11. *Id.*, at 405.
12. *Id.*, at 406.
13. *Id.*, at 404.
14. *Id.*, at 405.
15. *Id.*, at 406.
16. *Linchitz Practice Mgmt., Inc. v. Daat Med. Mgmt., LLC*, 165 A.D.3d 908 (2nd Dept. 2018) (holding that “[w]here the parties’ arrangement is illegal ‘the law will not extend its aid to either of the parties ... or listen to their complaints against each other but will leave them where their own acts have placed them”).

Fugitive...

Continued From Page 11

far into sadness” making him “TV’s only existential success.”¹² Janssen has a remarkable way of seamlessly blending into any crowd, yet still standing-out.

Act IV

In 1962, Roy Huggins, when making his pitch to the network, made it clear Kimble’s odyssey would eventually end:

*This will be a series which will be brought to a planned conclusion, that conclusion being of course Richard Kimble’s release from his predicament and the ultimate salvation of justice.*¹³

During its fourth season, *The Fugitive* came to a close with a two-part episode where Kimble confronts the one-armed man. At the time of its airing on August 29, 1967, the finale titled *The Judgement Part II* was the then-highest rated program in television history.¹⁴ It was a fitting tribute to a national sensation that had a real-life impact.

F. Lee Bailey believed *The Fugitive* created a climate receptive to his efforts on behalf of Sam Sheppard¹⁵. The series ended just one year after the second trial. But was it “a slap in the face of the American judicial system”?¹⁶ Thankfully, Leonard Goldenson, the president of ABC and a lawyer himself, didn’t think so.¹⁷

The Fugitive was in tune with the spirit of the 1960’s. Seen by millions of viewers every week; the show was as thoughtful as it was suspenseful. Blending solid dramatic story-telling with fine acting, it was also a running commentary influencing the way in which many Americans came to see the law.

This was the heyday of the Warren Court. Each term the Supreme Court would issue, with seeming regularity, a decision expanding the rights of the accused, including Sam Sheppard. For the better part of four years, *The Fugitive* dramatically expounded the idea that the innocent were being unjustly convicted.

The Fugitive no doubt effected public attitudes toward law enforcement. The audience despised Gerard. By contrast, the uplifting portrayal of Dr. Kimble improved the image of Dr. Sheppard and other defendants. If someone of the caliber of Dr. Kimble could be sentenced to death for a crime he didn’t commit, how many others are wrongly languishing in jail or on death row.

It would be presumptuous to believe that a television program paved the way for the Warren Court’s rulings on criminal procedure. But it’s not inconceivable that public opinion, influenced by popular entertainment, played some role. Millions of Americans, each empathizing with the plight of the fictional Dr. Kimble, came to the conclusion that something was amiss.

Epilogue

The following decade, witnessing rising crime rates, saw the pop-culture pendulum swing in the opposite direction. *Dirty Harry*, starring Janssen’s old Army buddy Clint Eastwood, would come to embody the law-and-order positions of Richard Nixon. The character played as a rallying cry against the Warren Court’s expansive view of the Constitution.

But Kimble’s story continues to fascinate. *The Fugitive* has stood the test of time. In the words of novelist Stephen King, it was “groundbreaking television”

making it “absolutely the best series done on American television.”¹⁸ More than that, it serves as a meditation on American justice and the way in which the law is administered in our country. Richard Kimble represents the dramatis personae of natural law.

The author would like to dedicate this article to Ms. Ann Burkowsky, whose insight was an inspiration in the writing process.

1. This distinct talisman, which organized an episode into a four-act structure with a concluding epilogue, was present in *The Fugitive* and in all series by executive-producer Quinn Martin.
2. Ed Robertson, *The Fugitive Recaptured*, 32 (1st Ed. 1993).
3. Roy Huggins quoted in Robertson, supra. 186.
4. *Id.* 78.
5. Arnie Rosenberg, *F. Lee Bailey says ‘Fugitive’ was Sam Sheppard*, (August 7, 1993) at <http://www.baltimoresun.com>.

6. Sheppard Murder Case/Encyclopedia of Cleveland at www.case.edu.
7. *Sheppard v Maxwell*, 384 U.S. 333 (1966).
8. Sheppard Murder Case/Encyclopedia of Cleveland, supra.
9. Mel Proctor, *The Official Guide to The Fugitive*, 78 (1st Ed. 1995).
10. Robertson, supra 22.
11. *Id.* 30.
12. People Magazine, Television’s 50th Anniversary, 67 (Summer 1989).
13. Huggins, supra 188.
14. Entertainment Weekly, 58 (February 19/26, 1999). The episode was the most watched show in television history until the 1981 episode of *Dallas* which revealed who shot J.R. Ewing, which in turn was superseded by the final episode of *M*A*S*H** in 1983.
15. Allen Pussey, *April 13, 1963: Sam Sheppard seeks a new trial*, (April 1, 2018) at <https://www.abajournal.com>.
16. Robertson, supra 13.
17. *Id.*
18. Stephen King, introduction in Robertson, supra xi.

NCBA Building Manager Hector Herrera Recognized by Nassau County Supreme Court



Photo by Dan Bagnuola

On Tuesday, February 23, Nassau County Administrative Judge St. George honored NCBA Building Manager Hector Herrera with a Special Recognition Award for his “dedication to excellence” and commitment to the Nassau County Courts and legal community.

Discovery...

Continued From Page 8

records of the health care provider, and exclusivity of the employee's services to the institution. There may be a provision that one of the contracting entity's employees will serve as an administrator of the relevant department of the hospital, establishing policies and procedures for the hospital. Such contracts can be an essential piece of evidence in successfully opposing a motion for summary judgment made by a hospital/institution or other such contracting medical facility based on a claim of no liability for the employee of the contracting entity.

Such contracts often contain indemnification clauses, and agreements to name one of the parties to the contract as an additional insured on a policy of liability insurance. This is important not only for the plaintiff but a very significant matter for determination of the defendants, including the health care provider, contracting entity, and institution who are bound by the terms of the contract. Limits of liability insurance to be carried by the health care provider and the contracting entity, are also usually identified in the contract provisions.

In addition to control, such a contract may establish the basis of a negligent claim against the hospital or facility for failing to enforce its terms when breach of those terms or a failure to enforce them created circumstances that caused or contributed to the plaintiff's injuries. The contract should set forth the qualifications for the individuals being provided, such as licensure, education and board certification. It should set down the health care provider's compliance with the facilities rules and regulations.

Failure to enforce the terms of the contract for any obligation that contributes to the plaintiff's injury should be alleged as an independent act of negligence against the hospital/

institution. The hospital/institution is responsible for the administration and operation of its hospital which is independent of its vicarious liability for the actions of its employees, or agents by estoppel. In *Haber v. Cross County Hospital*, the Court of Appeals found that the administration is part of the services that a hospital provides and for which it is responsible.²

In the case of a contract under which non-physicians are being provided to the institution, such a physician's assistants, nurse practitioners and certified nurse practitioner, the degree of supervision should be delineated. The contract should identify by name or title the physician who will be responsible for the supervision of these physician extender's care.

The contract by the individual health care provider with his "employer"/the contracting entity will contain essential information such as their qualifications, productivity and incentive payments or bonuses. Incentive bonuses may provide evidence that is relevant to the volume of patients seen or services provided (e.g. studies interpreted) that will reflect on the time spent or not spent in providing the required attention to the patient or the study or the use of diagnostic codes that are not reflected in the documentation of the care provided (e.g. billing for services not rendered or using codes for more complex services allowing a greater reimbursement).

Discovery of Employment Agreements

The demand for such contracts should be included in the initial demands served by a plaintiff upon defendants and then pursued. The demand should be specific to the facts of the case. The anticipated defendant's response will be an objection stating that the contracts are privileged and/or not relevant to the issues in the case. The plaintiff should not accept this boilerplate rebuff and ask the court to compel production of all contracts. Any legitimate concerns regarding the terms of the contract can be dealt with



redaction of irrelevant terms and/or a confidentiality agreement.

In seeking an order for the contract the movant must be factually specific to the facts of the case since the standard to be applied is one of material and necessary. In *Allen v. Crowell-Collier Publishing Co.*, the Court of Appeals explained the importance of the terms set forth in CPLR 3101(a) that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.³ It stated that the word necessary meant needful but not indispensable. The disclosure is not limited to evidence directly related to the issues raised by the pleadings.

In *Redmond v. Hanypsiak*, the Second Department held discoverable a contract for anesthesia services which was executed by a non-party physician, in his individual capacity, pursuant to which

he established a professional corporation for the purpose of providing anesthesia professional services to the hospital.⁴ The court also upheld an order requiring an employee of the defendant medical center to produce a person with knowledge to testify about the contract.

In summary, discovery of contracts in a medical malpractice action can provide important information on the issues of liability, both active and vicarious, potential sources to satisfy a judgment and lead to admissible evidence based on its contents. In order to prevail in obtaining a Court order compelling its production, the Court must be given a detailed and specific recital of the facts of the particular case explaining why it is discoverable in the particular case.

1. See *Hill v. St. Clare's Hospital*, 67 N.Y.2d 72 (1986).
2. 37 N.Y.2d 888 (1975).
3. 21 N.Y.2d 403 (1968).
4. 153 A.D.3d 1374 (2d Dep't 2017).

Expand Exceptions...

Continued From Page 9

Local Transportation

The existing safe harbor for local transportation will be modified to increase mileage limits from 50 to 75 miles for rural areas, and to eliminate distance limitations for transporting patients discharged home from an inpatient or observation setting.

The AKS changes became effective January 19, 2021.

Stark Law Changes

Many of the Stark Law changes track similar revisions made to AKS, with some distinctions. The main revisions are as follows:

Exceptions for Value-based Arrangements

As with the AKS changes, new, permanent exceptions for value-based

arrangements were adopted to permit value-based arrangements that satisfy certain requirements based on the level of financial risk undertaken (full financial risk, meaningful downside financial risk, or no risk). These exceptions will allow health care providers to design and enter into more flexible value-based arrangements without fear that legitimate activities to coordinate and improve the quality of care for patients and lower costs would violate Stark Law.

The new rules clarify how to determine whether compensation meets this requirement.

New Guidance and Clarifications

SMS provided additional guidance on key requirements of the exceptions to the Stark Law to make it easier for health care providers to comply with the law. For instance, compensation provided

to a physician by another health care provider must generally be at "fair market value." The new rules clarify how to determine whether compensation meets this requirement. An additional clarification was effected by adding new definition of "commercially reasonable", which requires that an arrangement "furthers a legitimate business purpose of the parties to the arrangement and is sensible, considering the characteristics of the parties, including their size, type, scope, and specialty" and clarifies that an arrangement may be commercially reasonable even if it does not result in a profit for one or more of the parties.

Other New Exceptions

The final rule establishes new exceptions to protect non-abusive, beneficial arrangements between physicians and other health care providers that apply regardless of whether the parties operate in a fee-for-service or value-based payment system—

such as donations of cybersecurity technology that safeguard the integrity of the health care system. In addition, CMS finalized a new exception to protect compensation not exceeding an aggregate of \$5,000 per calendar year, adjusted for inflation, to a physician for the provision of items and services without the need for a signed writing and compensation that is set in advance if certain conditions are met, including that the compensation does not exceed fair market value and is not determined in any manner that takes into account the volume or value of referrals or other business generated.

The new Stark Law regulations became effective January 19, 2021. Certain provisions relating to value-based care arrangements will not be effective until January 1, 2022.

1. 42 USC § 1320a-7b(b).
2. 42 U.S.C. 1395nn.

Long-Term Care...

Continued From Page 10

by Medicaid, some person other than the Grantor must serve as Trustee. This requirement, partly, ensures that Medicaid cannot argue the Grantor has control over or access to the trust assets.

It is important to note that transfers to an irrevocable trust will result in a penalty period if made within five years of either spouse needing nursing home Medicaid or the applicable lookback for home care Medicaid once the new lookback period goes into effect. This is why irrevocable trusts are a planning tool most appropriate for clients who are healthy enough to have a reasonable belief that they will not require skilled nursing care within five years or home care within two and a half years of creating and funding the trust.

For Medicaid purposes, the Department of Social Services is entitled to count any income or principal as available to the applicant-Grantor that the trustee has the discretion to distribute to the Grantor or use for his or her benefit.⁷ Therefore, in order to ensure the principal of the trust is unavailable for Medicaid purposes, a properly drafted MAPT must include clear language that the principal

of the trust shall not be distributed directly to the Grantor or used for his or her benefit. If the trust requires the distribution of income to be payable to the Grantor, which has additional tax benefits discussed below, the income can be treated as an available asset if not actually distributed to the Grantor for eligibility purposes.

Once the MAPT has been properly drafted and executed, it must be funded by re-titling assets. If this crucial step is ignored or performed incompletely, the trust will not achieve its intended goal of protecting assets from Medicaid. In order to re-title real property in the name of the trust, a new deed and recording documents must be signed by the Grantor and the Trustees.

Advantages of Irrevocable Trust Over Other Changes in Title

It is important to note that there are other changes to the title of a piece of real property that can be made in order to achieve some of the benefits discussed above.

If a client's goal is avoiding probate and/or removing the asset out of his or her name for the purposes of shielding it from creditors, one option is an outright transfer of the property to another person or adding the other individual as a joint owner. An estate planning

attorney frequently hears that a client wants to "give my house to my children," and while this seems like a desirable option, it has several drawbacks.

First, unlike property held in trust, an outright gift to an individual renders the property available to the new owner's own creditors, divorce proceedings, foreclosure, bankruptcy, and any other life circumstance.

Second, unlike property held in trust, if a primary residence is gifted outright, when the new owner or "donee" later sells the property, the appreciated value in the property from when it was originally purchased through the sale would be subject to capital gains tax.

Third, the new owner can also attempt to sell the property over the objection of the Grantor, despite not having to make any financial contribution to the property. These issues can be avoided by instead transferring the property into a MAPT, which offers the Grantor more control and protection.

Another way to avoid probate is to transfer the property to another individual while reserving a life estate for the Grantor. The creation of a life estate involves the Grantor transferring his or her ownership interest to another person by deed, with language indicating he or she reserves lifetime ownership in the property. At the death of the Grantor,

his or her life estate extinguishes and the "remainder-man" owns the property outright, avoiding probate and capital gains tax issues.

While this may be more attractive than an outright transfer, it can still present issues for the Medicaid applicant. First, as discussed above, the life circumstances of the remainder-man still render the property vulnerable in the event of creditor, divorce, or lawsuit issues. Second, the remainder-man can still sell the property or mortgage it, over the objection of the Grantor.

While not an option for all families due to timing, cost, or other factors, irrevocable trusts remain an important tool for Medicaid qualification and asset protection. They allow clients to have the government pay for medical care, home health aides, and nursing home while sheltering assets. A Medicaid trust is a valuable tool that helps protect assets, allowing clients to instead leave them for the next generation.

1. Pub. L. 109-171, S. 1932, 120 Stat. 4, enacted February 8, 2006.
2. 06 OMM/ADM-5; Deficit Reduction Act of 2005-Long-Term Care Medicaid Eligibility Changes.
3. See <https://bit.ly/3agxh5r>; page 259.
4. GIS 19 MA/01, GIS 20 MA/13, GIS 20 MA/12.
5. 1996-ADM-08; OBRA '93 Provisions on Transfers and Trusts.
6. 02 OMM/ADM-3; Medicaid Liens and Recoveries.
7. 18 NYCRR § 360-4.5 (b)(1)(ii).

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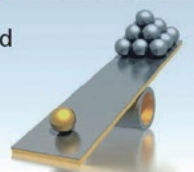
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LONG ISLAND BUSINESS NEWS

Local cheese biz taps into local dairies

Hills Farm in Chester County. Jones pitched the idea of using the CSA format to develop a new way of selling craft cheese to cheese fans. That led Jones, Angstadt and Miller in 2016 to create the Collective Creamery CSA, based out of Angstadt's Oley Creamery, with Jones as the operations manager and Angstadt and Miller as the two primary cheese makers.

"We thought between the three of us, we could pool our resources and move beyond farmers markets," Angstadt said.

"According to Jones, the trio didn't invent a cheese-based CSA. But, she says, "CSA is still pretty unique." It makes sense.

"Options for anything products =



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