

# Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

April 2021

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Vol. 70, No. 8

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NCBA COMMITTEE

MEETING CALENDAR

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LAWYER ASSISTANCE PROGRAM

(LAP)

Monthly Virtual Wellness Groups

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LAW DAY

Advancing the Rule of Law Now

Thursday, April 29, 2021

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## OF NOTE

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## UPCOMING PUBLICATIONS COMMITTEE MEETINGS

Thursday, May 6, 2021 at 12:45 PM

Thursday, June 3, 2021 at 12:45 PM

## What it Means to Be an NCBA Member



### Special Offer for New Members: Join This Spring and Receive up to Three Months Free

When Members are asked what they feel are the most valuable benefits of NCBA membership, their answers are almost always the same. The consensus is the feeling of connection and camaraderie they get from their time at the NCBA. According to Chair of the Association Membership Committee, Michael DiFalco, “I have never been one to join a club, but after just a year or two of practice, I began regularly attending NCBA meetings, in particular the Young Lawyers Committee and Matrimonial Committee. I realized very quickly how valuable it is to simply connect with and spend meaningful time with other attorneys to build a practice. Now, some of my good friends are people I met at Domus. I look forward to a time soon where we can gather again under one roof. The personal connection and regular contact through committee meetings is incredibly beneficial professionally and personally.”

#### Keep Ahead of the Curve with CLE On-Demand

The Nassau Academy of Law offers 150+ engaging and relevant live programs each year, with guest speakers, ranging from fellow Members to notable experts in the legal field thanks to CLE Director Jennifer Groh and Executive Assistant Patti Anderson.

NCBA membership includes **FREE** CLE with dues payment, which means **FREE** unlimited live CLE, **FREE**

Bridge-the-Gap weekend, **FREE** Committee CLE, and **FREE** 12 credits of CD/DVD/CLE On-Demand provided by the Nassau Academy of Law, the educational arm of the NCBA. CLE On-Demand offers an online library of previously recorded CLE programs for Members to watch at their own pace, at their convenience, from the safety and comfort of their own home or office.

Currently, all CLE programs are offered via Zoom. If a Member is unable to attend a live virtual CLE program, they can find it in the CLE On-Demand catalogue on the NCBA website at [www.nassaubar.org](http://www.nassaubar.org). Twelve credits of CLE On-Demand are **FREE** to NCBA members in addition to the other free CLE opportunities previously mentioned.

The Nassau Academy of Law will continue to offer a multitude of programs, both via Zoom and live format for the coming membership year to help members easily fulfill their CLE requirements. If you are not a Member contact Stephanie Pagano at (516) 747-4070, ext. 1230 or Donna Gerdik ext. 1206 in the NCBA Membership office to take advantage of this opportunity. Join now and receive up to three months free.

#### Elevate Your Career

In addition to FREE CLE, more than 50 substantive and working committees are available to join so that Members can cultivate close relationships and referrals,

keep up to date on the newest changes in practice areas, meet with professionals in the legal field, or assist the Bar.

Members can also showcase their expertise by contributing legal articles to the official publication of the NCBA, *Nassau Lawyer*, which is distributed monthly to all Members and twice a year to all OCA-registered attorneys in Nassau County. Members are encouraged to write articles to be published in *Nassau Lawyer* that offer valuable insight into their area of practice or speak at one of many Academy and Committee seminars.

Looking to elevate your career? Members can access new job openings

See SPECIAL OFFER, Page 16

**For NCBA Members  
Notice of  
Nassau County Bar Association  
Annual Meeting  
May 11, 2021 • 6:00 p.m.  
Domus  
15th & West Streets Mineola  
NY 11501**

Proxy statement will be sent by electronic means to the email address provided by the Member and posted on the Association's website. The Annual meeting will confirm the election of NCBA Officers, Directors, Nominating Committee members, and Nassau Academy of Law Officers.

Daniel W. Russo  
Secretary

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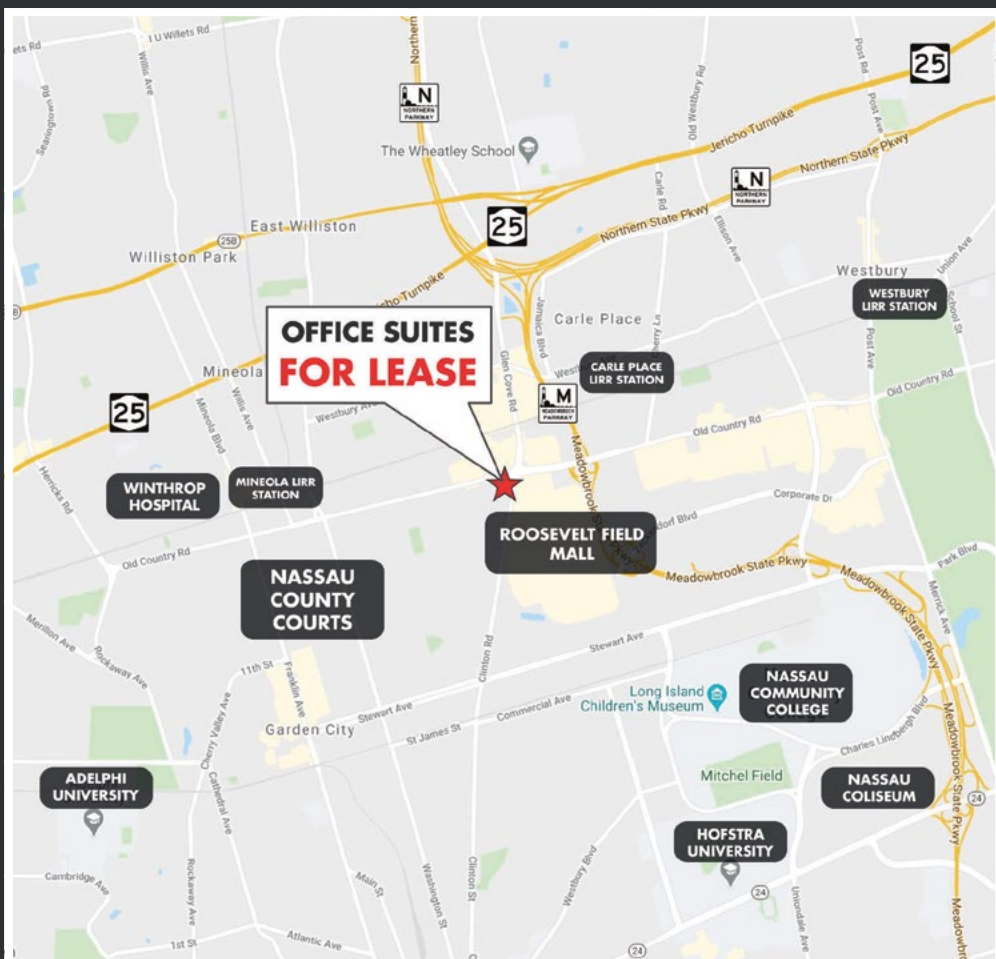
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**FOCUS:  
VIRTUAL BENCH TRIALS**



Matthew F. Didora

In February 2021, the State Court System published its *Virtual Bench Trial Protocols and Procedures* guide to demystify the proceedings and present a roadmap for conducting a virtual bench trial.<sup>1</sup> This guide addresses many of the concerns expressed by those opposed to virtual trials while also building upon the success the court system has had in utilizing the Microsoft Teams platform for a wide variety of virtual appearances.

Recognizing that virtual trials are a new experience for many of the stakeholders, the *Protocols* recommends that courts first select for virtual bench trials cases involving a single plaintiff, a single defendant, and a “modest number of witnesses,” before moving on to more complex and lengthy trials. This is the same way many litigators learned traditional trial practice: by starting on relatively small cases before graduating to bigger ones.

#### Current Perceptions of Virtual Trials

Opinions among trial lawyers concerning virtual trials fall largely into two camps: some lawyers view them as incapable of affording litigants a fair trial and the death of the art of trial advocacy, while others consider them efficient uses of modern technology.

Lawyers in the first camp tend to focus critically on the physical disconnect between the court, the litigants, and counsel when all involved are spread across multiple locations and appear on screen only as talking heads. With the remoteness, these lawyers believe the sanctity of the courtroom is lost. The presiding judge does not have physical control over the layout or activities in the remote rooms from where the witnesses testify, opening the door for the less-than-ethical to influence the witness’s testimony through handwritten notes, documents, scripts on screen, or out-of-view coaching. The ability to assess credibility is impaired when the physically removed fact finder is forced to read critical eye, lip, and other facial cues as well as the witness’s tone and

## OCA Releases New Protocols for Virtual Bench Trials

body language through a screen. And of course, technological issues can and do arise, disrupting the flow of the trial, as recently seen when one attorney was forced to declare “I am not a cat” during a video appearance.<sup>2</sup>

Lawyers from the second camp are less critical and while not dismissing entirely the concerns of their counterparts, adopt a more practical approach and recognize that virtual appearances, including trials, allow cases to proceed while courthouses remain largely inaccessible and are likely here to stay even after the coronavirus pandemic is a thing of the past. Over the past year, the pandemic has forced the courts to transition quickly from nearly all in-person operations to nearly all virtual. Many argue that these virtual appearances are far more efficient for the court, parties, and counsel, eliminating the need to travel to and from the courthouse and wait for your case to be called on the calendar. These same individuals focus on the technological advances in videoconferencing that can replicate to a large extent the same experience as being physically present in the courtroom.

#### Getting Everyone on Board

Once selected for a virtual trial, the attorneys and litigants “must stipulate in writing to waive a Jury Trial (where authorized), and to proceed via Virtual Bench Trial.”<sup>3</sup> For criminal trials, the *Protocols* includes robust waivers a defendant must sign and acknowledge in open court before the virtual bench trial can proceed. While the jury waiver is a common requirement in traditional in-person bench trials, the consent to the virtual trial is a new addition to pre-trial procedures.

In recent months, there has been some debate regarding a court’s power to compel parties to participate in a virtual trial over one side’s objection. Justice O. Peter Sherwood in *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, held that Judiciary Law § 2-b(3) confers upon trial courts the power to decide “in the exercise of its sound discretion based on the circumstances” whether a trial will be held virtually.<sup>4</sup>

However, in the February 2021 edition of *Nassau Lawyer*, Justice Arthur Diamond noted in his “From the Bench” column that there is no authority in the CPLR “that allows a judge to order a refusing attorney to go to trial using remote technology.” While

the power of courts to compel virtual trials will surely be litigated in the ensuing months, the *Protocols* avoids the issue altogether by advising that “best practices recommend having the parties stipulate to the Virtual Bench Trial” where there will be no future challenge to the propriety of proceeding virtually.<sup>5</sup> The *Protocols* includes a sample Stipulation and Order for Virtual Bench Trial Protocols and Procedures that can be tailored by each court.

#### Conduct Yourself Accordingly

Once the virtual bench trial is confirmed, the *Protocols* reminds all participants that the virtual trial is “a formal proceeding” to which all evidentiary rules, the disciplinary rules, and requirements of civility among counsel and litigants remain applicable. Being that the virtual trial remains a formal proceeding, the *Protocols* directs the participants to wear “proper attire” and abstain from eating, drinking, and smoking during the proceeding.

Some lawyers have grown comfortable appearing virtually in casual clothes, leaving their formal attire hanging in the closet. The *Protocols* discourages this. Attorneys should dress, and should direct their clients to dress, for the

virtual trial in the same manner they would if appearing in the courthouse. Recognizing that technical difficulties may occur, the *Protocols* offers the practical recommendation for the parties, counsel, and witnesses to exchange back-up contact information with the court.

The *Protocols* sets parameters for witness testimony that are intended to replicate the formality and sanctity of courtroom testimony. Witnesses should be alone in the room from which they are testifying and have no other information available. There should be no other computer monitors, screens, TV screens, cell phones, or electronic devices with the witness. The *Protocols* make an exception to the prohibition against having others present if the

See PROTOCOLS, Page 20



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## APPELLATE COUNSEL



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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*“I have been a member of the Nassau County Bar Association since I graduated law school in 1978. It has always been a family of caring and supportive lawyers and professional staff. As a sitting judge for 26 years, I am still an active member. I am very happy to give back.” —Hon. Denise Sher*

# Changing Times—Spring is Here

These are changing times! This year's vernal equinox occurred on March 20, bringing with it a much needed:

- Time of reflection
- Time of renewal, more light in our life
- Time to erase the divisions of race, creed and religious intolerance
- Time to celebrate new beginnings

## Upon Reflection

We are mindful that this is also a time to remember those who have passed. The Nassau County Bar family extends condolences to our Members and friends who have lost loved ones. Our loved ones will always be near, missed and loved.

As the 118th President of the Nassau County Bar Association, the focus of this administration has been on membership, retention, and communication. I am pleased to report that our Executive Committee, with the diligent efforts of our Executive Director Elizabeth Post and staff, have accomplished those goals.

Notwithstanding the challenges all organizations have faced with being separate and apart, we have grown our membership outside of traditional channels, keeping pace with the changing demographics of the bench and bar. Retention has been at the forefront of our goals by demonstrating the value of membership, which includes our unique inclusion of continuing legal education with membership dues. Through the Herculean efforts of our Board of Directors, Committee Chairs, and Staff, our model—which provides continuous learning and engagement—has exceeded our expectations. We continue to maintain a strong roster of nearly 4,000 members.

*Communication* is the very essence of what we do. We put down the briefcase and picked up the laptop. Meeting virtually and being on various online platforms has become a part of our tool kit. During this time, virtual court appearances, block buster settlement days, and alternative dispute resolutions with the bench and the bar have proven to be a success.

## Renewal

As we near the light of the end of the tunnel with the fast roll out of COVID-19 vaccines, we continue to thank the health care workers and all essential workers for their dedication and sacrifice.

As we move forward, our intention is to lay out the pathway to in-person activities at Domus. We have communicated with our caterer and discussed dates for reopening. As more and more of the population is vaccinated and the curve of the epidemic continues to bend and flatten, our in-person activities will increase.

Our COVID-19 Task Force learned from the Hon. Norman St. George, Administrative Judge, that the court's "in-person" activities shall also increase with a "measured approach towards expansion." Notwithstanding the challenges going forward of the numerous judicial retirements, foreclosure actions to commence, and hiring freezes imposed—jury



## FROM THE PRESIDENT

Dorian R. Glover

trials have commenced, and normalcy may commence around the end of the summer. The value of virtual appearances has proven to be an asset, such that a hybrid model of virtual and in-person appearances are the way of the future.

## Erase Divisions of Race, Creed and Religious Intolerance

Last month our Diversity & Inclusion Committee presented "Eradicating Implicit Bias in the Courts." The panelists included Hon. Norman St. George, Administrative Judge, 10th Judicial District; Hon. Fern Fisher, Special Assistant for Social Justice Initiatives to the Dean of the Maurice A. Dean School of Law at Hofstra University; Jeh Johnson, Former U.S.

Secretary of Homeland Security and partner in the law firm of Paul, Weiss, Rifkind, Wharton & Garrison; Prof. Audrey Roofeh, Esq., owner of Mariana Strategies, with a focus of facilitating training and workshops across the country to deliver solutions to prevent harassment and build inclusion; and Professor Patrice A. Sulton, Esq., a criminal justice reform advocate who challenges inequities in the criminal justice system.

The focus of the discussion was on the way forward. With 200+ attendees who were willing to listen and learn, a true sense of understanding racial and other bias provided recommendations ensuring equal justice under the law.

Special thanks to Diversity & Inclusion Committee Chair, Hon. Maxine S. Broderick, and Vice-Chair Rudy Carmenaty, Ira Slavitt, and Mickheila Jasmin-Beamon for their extraordinary efforts with our program.

## Time to Celebrate New Beginnings

Our President-Elect Greg Lisi is hitting the ground running and is now preparing for his administration. His transition focus can best be described as having his foot on the gas pedal. He is energetic and enthusiastic to reopen Domus to in-person activities and seeing that our Members receive all the benefits of membership, which include inviting a friend or colleague to Domus for lunch, and a variety of benefits that include networking, mentorship, and professional development.

For law students, membership is free! Students from St. John's, Hofstra, and Touro derive incredible benefits from NCBA membership. We provide opportunities to find internships and clerking openings, potential mentorship connections, and the benefit of meeting judges and lawyers in all areas of practice.

For new lawyers, the first year of membership is free too, just as it was during law school. After that first year of free membership, there are reduced dues for the second through ninth year of practice. We offer free Bridge-the-Gap Weekend, which is not just for new lawyers but also for experienced lawyers who want to learn something new or catch up on credits.

As we have reflected on and embraced this time of renewal, we look forward to our new beginnings. We are making the NCBA more resilient and stronger than ever!



# Nassau Lawyer

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**FOCUS:  
MENTAL HEALTH LAW**



Carolyn Reinach Wolf and Jamie A. Rosen

Even before the COVID-19 pandemic, obtaining a graduate degree, especially a law degree, was extremely stressful and often isolating, requiring hours alone in the library and competing with classmates. Now the new challenges of remote learning, reduced opportunities for networking to secure summer or full-time employment, quarantining from friends and family, and the loss of outlets to reduce stress, have created the perfect storm for mental distress.

Major mental illness often emerges in young adulthood, the ages between 18 and 25, overlapping with the typical age of students who seek higher level degrees. This population also experiences high levels of depression, anxiety, substance use disorders, and suicidal thoughts.<sup>1</sup>

# Mental Health Services for Incoming Legal Professionals

The US Centers for Disease Control reported that suicidal ideation has increased amongst young adults based upon research and surveys completed in June 2020.<sup>2</sup> As recently as December 2020, Tommy Raskin, a second-year student at Harvard Law School, and the son of Maryland Congressman Jamie Raskin, died by suicide after experiencing depression.<sup>3</sup> These young adults are at high risk for mental health issues, now, more than ever, and they need support.

### Threat Assessment Teams

After the 2007 shooting at Virginia Tech, most institutions of higher education created multi-disciplinary Threat Assessment Teams with the goal of identifying at-risk students and intervening before a tragic incident occurs. In fact, in 2008, Virginia and Illinois were the first states to require that higher education institutions adopt policies creating threat assessment teams.<sup>4</sup>

Many of these teams, which now exist country-wide, have continued to operate, and meet virtually throughout 2020 and into 2021, adjusting their intervention plans and identifying new telehealth options for students in need of mental health services during the pandemic. It

is imperative that these teams service graduate students as well if they do not already do so.

In addition to working towards the prevention of violence on campus, these teams are also equipped to identify students in mental health distress, battling anxiety, depression, addiction, or any myriad of concerns that are only heightened during this global pandemic. The school or campus Threat Assessment Team, which may also be known as a Behavioral Intervention Team or Care Team, puts each piece of the puzzle together, collecting the information from the different silos—faculty, administrators, the counseling center, family, and peers.

For this system to work, faculty and staff must receive adequate training on the mental health issues affecting young adults. Namely, how to identify red-flag or at-risk behaviors in students, and how to report such concerns in accordance with school policies and protocols. The teams can then intervene timely and appropriately, collaborating with on-campus or off-campus resources and connecting the at-risk student to those services. The team can also monitor the student's progress to ensure that he or she is suitable to continue coursework.

### Counseling Centers and Telehealth

During this unprecedented time of remote learning, it is still the role of the counseling center to assist in fulfilling the mission of the college or university to retain students and help the students meet their academic goals. Many institutions have offered telehealth services during the pandemic.

See MENTAL HEALTH SERVICES, Page 19



Carolyn Reinach Wolf is an Executive Partner in the law firm of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf, & Carone, LLP and Director of the firm's unique Mental Health Law practice. She serves on the Lawyer Assistance Committee of the NCBA. She may be reached via email at [cwolf@abramslaw.com](mailto:cwolf@abramslaw.com).



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**FOCUS:  
THE COURTS**



Deanne M. Caputo and Christopher J. DelliCarpini

Effective February 1, 2021, the Uniform Rules for Supreme and County Courts were amended to adopt several practices from the Commercial Division.<sup>1</sup> The amendments cover all phases of pretrial litigation; this article will address the new rules on conferences, settlements, and discovery, while a companion article in this issue will address the new rules on papers, motions, summary judgment motions in particular, and pretrial procedure.

After several weeks of applying these new rules, we can see the spirit behind the letter of the law. Enterprising counsel will use these rules to more efficiently and effectively bring cases to resolution.

**A Change Decades in the Making**

The seeds for these amendments were planted when the Commercial Division

# Taking Advantage of New Uniform Rules: Conferences, Settlements, and Discovery

was created in 1993. The aim of the Commercial Division has always been to devise procedures for efficiently handling the complicated and expensive discovery common in commercial litigation, particularly as the need for electronic discovery has grown.<sup>2</sup> The hallmarks of the Commercial Division rules were active case management, strict enforcement of discovery deadlines, and encouragement of counsel to consult and confer.

In July 2018, the Advisory Committee on Civil Practice issued its report on adopting Commercial Division rules more broadly.<sup>3</sup> The Committee recommended adopting certain rules, but felt that others addressed issues already provided for in the Uniform Rules or CPLR, and that some practices necessary in commercial disputes were not worth the effort in every civil matter.

In December 2020, after a period of public comment, Chief Administrative Judge Lawrence A. Marks issued Administrative Order 270/20. The order brought to Supreme and County Courts the Commercial Division rules that the Committee had recommended, but also several that the Committee had advised against adopting. Accordingly, when we consider how to comply

with these amendments, we must look for how to further the aim of these amendments: “the cost-effective, predictable and fair adjudication” of civil cases.<sup>4</sup>

**Conferences**

**Uniform Rule 202.1** is intended to make conferences more productive. It requires appearing counsel to be on time, be familiar with the case and, also, to be fully prepared and authorized to discuss and resolve any and all issues. Failure to comply with this Rule can be treated as a default and/or failure to appear. Going forward, it is important to make sure there is enough coverage for all matters scheduled so as to ensure a timely check-in and that the appearing attorneys are well versed on the matter. It is a good idea to discuss any issues with your adversaries prior to the conference so that the covering attorney is well prepared to make decisions.

**Uniform Rule 202.23** requires that prior to preliminary or compliance conferences, parties *shall* consult about resolution, about any discovery issues, the use of ADR to resolve all or some issues and any voluntary or informal exchange of information that parties agree would lead to early resolution.

This Rule states there must be a good faith effort to reach agreement on these items in advance of conference.

**Uniform Rule 202.10** permits attorneys to request appearances to be done by electronic means and courts are encouraged to grant these requests. This Rule also states that adjournments of appearances will now be granted only upon a showing of good cause, which supports the trend now seen with these rules which is a goal to

See CONFERENCES, Page 22



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**LAW DAY 2021**  
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Co-Sponsored by Nassau County Women's Bar Association

Thursday, April 29, 2021  
5:00 PM via Zoom

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**Court Staff: Free of Charge**

**Law Day Sponsorship: \$250**  
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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.



FOCUS:  
THE COURTS

David Barry and Melissa Manna

Continuing the companion article in this issue addressing the recent amendments to the Uniform Rules for the Supreme and County Courts, this article highlights the new Rules applicable to papers, motions in general, motions for summary judgment and pretrial procedure.

As Chief Administrative Judge Marks noted,<sup>1</sup> the COVID-19 pandemic has presented a unique opportunity for permanent court reform. The adoption of certain Commercial Division Rules to the other courts of civil jurisdiction represents the Office of Court Administration's response to said opportunity, clearly demonstrating a desire to both maintain the technological advances that have assisted the bar and bench alike during the pandemic, as well as utilizing

# Taking Advantage of New Uniform Rules: Papers and Pre-Trial Proceedings

certain methods that have proven to streamline practice in the Commercial Division. As the amendments have been effective since February 1, 2021, it is critical for Supreme and County Court practitioners to familiarize themselves and fully embrace this new litigation landscape.

## Papers

**Uniform Rule 202.5-a** reduces the importance of the law office fax machine by prohibiting the filing of papers by fax without advance approval of the assigned justice. Further, correspondence by fax should not be followed by a hard copy unless specifically requested. Papers and correspondence by fax must still comply with Uniform Rule 202.5.

While email and e-filing have replaced most of the major functions of the beloved fax machine, it still remains a useful tool for the modern-day law office (e.g., ordering medical records, correspondence with insurance companies, etc.). However, the days of filing papers by fax are over. Prior to sending any correspondence to the court via fax, counsel should check the assigned justice's part rules, as some prohibit or have limitations on the same.

**Uniform Rule 202.5(a)** now

requires electronically submitted memoranda of law, affidavits and affirmations exceeding 4500 words to include bookmarks listing the document's content so that a reader may more easily navigate the same. Papers filed with the court must be on 8½ x 11-inch paper, margins no smaller than 1 inch and print must be no smaller than 12-point (10-point minimum for footnotes).

## Motions

Motion practice has been significantly impacted by the new Rules, with the most significant impact to summary judgment motions, as discussed in more detail below. The other item of importance with regard to motion practice is the word count limit and the certification requirement of same.

**Uniform Rule 202.8-a** sets several new rules to govern all motion papers.

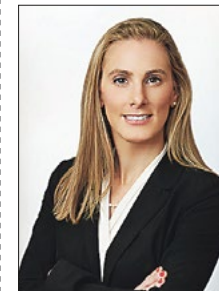
Subpart (a) requires that the movant specify in the notice of motion, order to show cause and in concluding section of a memorandum of law, the exact relief sought. While this has long been the practice of both plaintiffs' and defendants' counsel, the rule makes it mandatory. Furthermore, regardless of whether the motion

papers are e-filed or sent as hard copies, counsel must submit copies of all documents and pleadings as required by CPLR and as necessary for an informed decision on the motion. If any voluminous document is attached to an affirmation or affidavit and only discrete portions are relevant to the motion, counsel shall attach excerpts and submit the full exhibit separately. Additionally, whenever papers rely

See PAPERS, Page 21



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



Melissa Manna is a partner with Cullen Dykman in Garden City, in the firm's General, Tort and Insurance Litigation department. She is also the Vice-Chair of the NCBA Defendant's Personal Injury Committee. Ms. Manna can be reached at (516) 357-3753.



## COVID-19 Updates Can Be Found:

ON OUR WEBSITE  
[WWW.NASSAUBAR.ORG](http://WWW.NASSAUBAR.ORG)

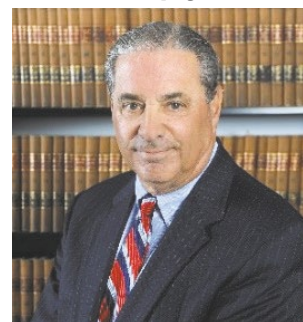
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At this difficult time, the Nassau County Bar Association wants you to know we will do what we can to help our members with their legal and business responsibilities.

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

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**FOCUS:  
COVID-19**



Martha Krisel and Ann Burkowsky

Consistent with its proud history of providing free consultative legal assistance to Long Island’s residents and small businesses, and in rapid response to what the world did not know at the time would be the first global pandemic since the 1918 Influenza outbreak, the NCBA established its COVID-19 Community Task Force in April of 2020. The Novel Coronavirus, more commonly known as COVID-19, was first reported in December 2019 in Wuhan, China. By March 2020, the United States unfortunately became an epicenter of the virus. Although it has changed the world in unimaginable ways, it has also brought forth the commitment to access to justice that exists within our legal community.

In response to this national disaster, NCBA Members immediately sprang

# Help Is One Email Away: Inside NCBA COVID-19 Community Task Force

into action with free legal consultative assistance. In addition, the NCBA developed a COVID-19 resource page, located at [nassaubar.org](http://nassaubar.org), which is updated frequently and is also a helpful tool for attorneys, residents, and small businesses who are looking for guidance and updates.

## COVID-19 Task Force Launch

The Nassau County Bar Association (NCBA) has a long-standing history of assisting the local community in times of economic hardship and natural disasters. Based upon this history, the NCBA not only understood the need but was at the ready to provide legal assistance in the wake of COVID-19.

The NCBA organized its members and acted fast. On Wednesday, April 1, 2020, then NCBA President Richard D. Collins and NCBA Past President Martha Krisel announced the configuration of the NCBA COVID-19 Community Task Force; the Task Force was designed to connect Nassau County residents and small businesses to skilled attorneys who would provide consultative assistance and guidance related to the pandemic. Nearly 50 NCBA Member volunteers donated their time, services, and expertise in

their legal areas of practice, including matrimonial, landlord-tenant, labor and employment, real estate, medical-legal, and many others. Several firms also offered immediate access to their own developing web-based legal resources, in which they rapidly summarized COVID legal developments, including Executive Orders and financial support.

Following an on-air interview with then-*News 12 Long Island* reporter Stone Grissom and then-NCBA President Richard D. Collins, an influx of requests flooded the COVID-19 Task Force inbox. During the interview, Collins explained that “This is opportunity for us to help small business and residents of Nassau County who can get in touch with the Bar Association if they have legal questions related to the Coronavirus pandemic.” Collins also stated, “The consultation is free, and we’re looking to help as many people as we can, it’s not for legal representation, but it’s to give a first line of defense for people to understand what their rights are, what their obligations are, and how to adjust to this new, uncharted territory.”

That inbox, reachable through [covidhelp@nassaubar.org](mailto:covidhelp@nassaubar.org), was designed to generate an immediate response by responding with some emergency contact information and affording an opportunity to inquire specifically about legal concerns. Questions ranging from landlord-tenant, matrimonial, labor and employment issues, wedding venue contracts, travel restrictions and just about everything in between are submitted and answered within two business days. Countless news articles and stories were featured in the media, including *CBS New York*, *Newsday*, and *News 12 LI*, among others. The first few months following the launch demonstrated the value that advice from attorneys provides to the Long Island community.

As the program continued to grow, the New York State Bar Association developed a proposal for a bi-county pro bono collaboration effort, joining together the resources of the NCBA, Suffolk County Bar Association, Maurice A. Deane School of Law at Hofstra University, St. John’s University School of Law, Touro College Jacob D. Fuchsberg Law Center, local legal service providers including Nassau Suffolk Law Services, The Safe Center of Long Island, and many attorneys from Long Island law firms, both large and small.

## Local Law Students as Pro Bono Contributors

In tandem with the successful launch of the task force and bi-county pro bono effort, the NCBA addressed and included another very important group of individuals who needed its help: law students whose lives were

turned upside down when remote learning was immediately put into place, when semesters were cut short, when internships were interrupted, and when summer opportunities rescinded following the outbreak of COVID-19. NCBA Board Member Hon. Maxine S. Broderick, who chairs the long Island Legal Diversity Fellowship Program, agreed to also chair the law student initiative. Judge Broderick recruited St. John’s University School of Law second-year law student Ciara Villalona-Lockhart (Summer and Fall 2020) and recent graduate of SUNY Old Westbury’s Honors College, Ashley Alvarado (Spring 2021) to coordinate the logistics and administrative duties of the Mentor/Mentee program.

Since June 2020, two successful groups of the first-ever NCBA COVID-19 Law Student Pro Bono Program have completed their commitments, with another cohort currently underway. The program provides law students with the opportunity to gain hands-on, substantive COVID legal experience through the task force by pairing them with an NCBA Member volunteer to address the influx of COVID-19 legal inquiries from the community, which includes individuals and small businesses. Working completely remotely, mentors and mentees communicate weekly via Zoom, email, and telephone to respond to the inquiries. Mentee tasks can include management of intake, interviewing and counseling clients, engaging in fact development and analysis, legal research into the ever-changing world of COVID guidance, and interpretation of documents, always under the direct supervision of an NCBA Member Volunteer.

As of today, the COVID Mentor/Mentee program has welcomed 28 bright law students from Hofstra, St. John’s, and Touro. The mentees are permitted to use this experience to meet the 50-hour pro bono requirements for bar admission. The third phase of the program began on February 15, 2021

See COVID HELP, Page 21



Ann Burkowsky is the NCBA Communications Manager. She also assists the administrators of the COVID-19 Community Task Force.



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

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FOCUS:  
BUSINESS LAW

Ira S. Slavitt

Businesses commonly offer subscriptions and purchase agreements for products and services that include an introductory free trial or reduced price tied to automatic renewal or continuous service at a higher price. Concerned that this results in consumers facing unexpected charges to which they did not consent, a new Article 29-BB of the General Business Law has been enacted, effective February 9, 2021. The new statutes impose significant disclosure requirements for automatic renewal or a continuous service offers, and deems the failure to comply with those requirements to be an unlawful practice punishable by civil penalties.<sup>1</sup>

General Business Law § 527 defines “automatic renewal” as a plan or arrangement in which a paid subscription or purchasing agreement is automatically renewed at the end of

## New Consumer Protections on Automatically Renewing Agreements

a definite term for a subsequent term. “Continuous service” is defined as a plan or arrangement in which a subscription or purchasing agreement continues until the consumer cancels the service.

Under GBL § 527-A, at the time an offer is presented to the consumer and before the subscription or purchasing agreement is fulfilled, an automatic renewal or a continuous service offer must clearly and conspicuously disclose the following:

1. That the subscription or purchasing agreement will continue until the consumer cancels.
2. The cancellation policy that applies to the offer.
3. The recurring charges that will be charged to the consumer’s credit or debit card.
4. Any change in the amount of the charge or manner of pricing that will occur after a trial ends.
5. The length of the automatic renewal term or that the service is continuous, unless the length of the term is chosen by the consumer.
6. The minimum purchase obligation, if any.

Upon a consumer’s acceptance of the offer, the business must send an acknowledgment that includes the automatic renewal or continuous service offer terms, cancellation policy, and

information regarding how to cancel in a manner that is capable of being retained by the consumer. The acknowledgment shall provide easy-to-use mechanism for cancellation, such as a toll-free telephone number or email address.

Any material change in the terms of the subscription or agreement together with information of how to cancel in a manner that is capable of being retained by the consumer must be disclosed clearly and conspicuously. A consumer who accepts an automatic renewal or continuous service offer online shall be allowed to terminate it exclusively online.

Importantly, the statute makes it unlawful to charge a consumer’s credit or debit card without first obtaining the consumer’s affirmative consent to the agreement containing the automatic renewal offer. It may therefore be better practice for businesses to get two separate affirmative consents from the consumer, one to the automatic renewal offer and the other to the credit or debit card being charged.

The new law also puts the free back in free trial by making clear that anything sent free to a consumer under a continuous service agreement or auto-renewal purchase without first obtaining the consumer’s affirmative consent is an unconditional gift to the consumer. The

consumer has no obligation whatsoever to the business, including but not limited to bearing the cost of shipping, and may use or dispose of the item in any manner he or she sees fit. Additionally, if an offer includes a free gift or trial, the aforementioned post-purchase acknowledgment must disclose how to cancel and allow the consumer to cancel before the consumer pays for the goods or services.

Article 29-BB vastly expands the subject matter of agreements that were covered under New York’s prior law restricting automatically renewing agreements, General Obligations Law §5-903. That older law applies only to contracts for service, and maintenance or repair to or for any real or personal property. Article 29-BB does not repeal GOB 5-903, and certain businesses must now comply with both statutes.

See CONSUMER PROTECTIONS, Page 24



Ira S. Slavitt is a partner in Levine & Slavitt, PC in Mineola, representing plaintiffs in personal injury matters. He is also the Chair of the NCBA Plaintiff’s Personal Injury Committee. Mr. Slavitt can be reached at (516) 294-8282.

## CONNECT WITH THE NCBA ON SOCIAL MEDIA

For the latest updates on COVID-19 the NCBA, and court information, connect with us on social media.

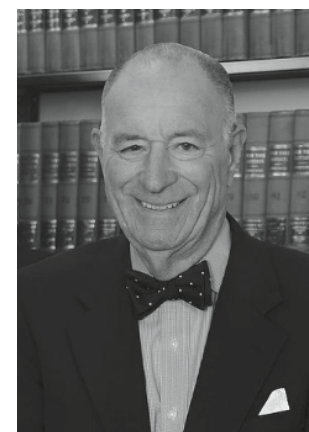


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Harold C. Seligman has been a member of the United States Tax Court since 1987. He has represented individual and corporate clients in hundreds of tax cases, both large and small, over the past 30 years against the IRS and New York State Department of Taxation and Finance.

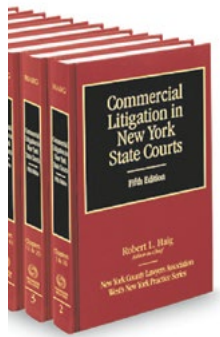
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## BOOK REVIEW



**Publisher:** Thomson Reuters, Fifth Edition (2020)

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**Service #:** 11829009

**Sub #:** 11829008

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**One time purchase**  
(Full set)-\$1,628.00;

**Monthly pricing**  
\$56.00/month

John P. McEntee

The establishment of the Supreme Court Commercial Division in 1995 was an important development in New York's history as a center of national and international commerce. That year, one of the driving forces in the establishment of the Commercial Division, noted commercial litigator Robert L. Haig, introduced the first edition of *Commercial Litigation in New York State Courts*. The three-volume treatise, written by prominent commercial litigators and judges and edited by Haig, soon became an indispensable resource for commercial litigators, dispensing practical advice and insight on a broad variety of procedural and substantive topics.

The value of the treatise lies in the

## Commercial Litigation in New York State Courts, Fifth Edition

fact that while certain practice areas focus on specific laws—e.g., matrimonial attorneys have the Domestic Relations Law, criminal attorneys have the Penal Law and Criminal Procedure Law, tax lawyers have the tax code, and bankruptcy lawyers have the bankruptcy code—commercial litigation is not focused on any particular law or code but rather on a type of client, businesses, and business owners. The types of businesses vary widely, of course, including manufacturers, hospitals, banks, retailers, lessors and lessees, and franchisors and franchisees, as do the sources of law that pertain to disputes among these businesses, including the common law, the Uniform Commercial Code, the General Obligations Law, the Real Property Law, the Limited Liability Company Law, the Partnership Law, and the Business Corporation Law.

Twenty-five years later, the Fifth Edition has just been published. The treatise grew from three volumes in the First Edition to ten volumes in the Fifth Edition while adding twenty-eight new chapters from the Fourth Edition. Some of the new chapters reflect technological

developments in recent years such as the chapter on Artificial Intelligence, some represent recent developments in the practice of commercial litigation, such as the chapter on Third-Party Litigation Funding, and some represent efforts to provide helpful career advice, such as the chapter on Career and Practice Development, the chapter on Diversity and Inclusion, and the chapter on Marketing to Potential Business Clients.

In addition to the new chapters, the existing chapters are updated to continue to provide a wealth of insight and practical advice from seasoned practitioners and judges on both procedural and substantive topics. The first few volumes focus on procedural topics such as: Jurisdiction; Venue; Removal to Federal Court; Complaints; Responses to Complaints; Enforcement of Forum Selection Clauses; Provisional Remedies; Issue and Claim Preclusion; Document Discovery; Sealing of Court Records; and Summary Judgment.

Given the importance of discovery of electronically stored information (ESI) in commercial litigation, there is, in the chapter on Document Discovery, a robust discussion of how to preserve, collect, and produce ESI, with an explanation of production formats, the use of technology-assisted review (keyword searches and predictive coding), inadvertent production and clawback agreements, “quick peek” agreements, cost shifting, and outsourcing of document reviews, going beyond an explanation of technology and the relevant rules and law to provide a sample litigation hold notice, preservation letter, and motion to compel production, together with checklists valuable to both the novice and experienced practitioner.

Once discovery is concluded and you are headed to trial, you can draw upon chapters such as Jury Selection; Motions in Limine; Opening Statements; Presentation of the Case in Chief; Cross Examination; Expert Witnesses; Graphics and Other Demonstrative Evidence; Admissibility Issues; and Closing Statements. In the chapter on Admissibility Issues, you will receive helpful advice about a critical but sometimes overlooked requirement, laying the proper foundation for evidence. The chapter on Jury Conduct, Instructions and Verdicts offers a variety of special verdict forms and jury interrogatories, while the chapter on Cross Examination provides insights on strategy and techniques, including avoiding unnecessary cross examination, mindful of the adage that “more cross examinations are suicidal rather than

homicidal.” And, if things take an unfavorable turn at trial, comfort can be found in the chapters on appeals to the Appellate Division and to the Court of Appeals.

The remaining volumes focus on substantive topics such as: Contracts; Insurance; Bills and Notes; Sale of Goods; Partnership Transactions; Limited Liability Companies; Joint Ventures; Secured Transactions; Fraud; Fraudulent Transfer; Bank Litigation; Shareholder Derivative Actions; Mergers and Acquisitions; Theft or Loss of Business Opportunities; Letters of Credit; Employment Restrictive Covenants; Antitrust Litigation; Fiduciary Duty Litigation; Commercial Defamation; Intellectual Property; Licensing; Director and Officer Liability; and Misappropriation of Trade Secrets.

Among the 256 principal authors of the treatise are 29 current and former judges, including judges currently practicing in the Commercial Division. Suffolk County Commercial Division Justice Elizabeth Hazlitt Emerson, for example, is the author of the chapter on Secured Transactions, while Nassau County Commercial Division Justice Timothy S. Driscoll is the author of the chapter on Motion Practice. In this chapter, Justice Driscoll addresses the CPLR and Commercial Division rules relating to motions, together with the rules regarding decisions and orders resulting from motions. While one can review these primary sources to obtain the required information, their synthesis into one well-organized chapter will save you valuable time. Equally important, though, is the insight you will receive from an experienced Commercial Division Justice on topics such as motion strategy and oral argument, together with several checklists of required steps and information.

For the past twenty years my first step for virtually any research question involving litigation in the Commercial Division has been the Haig treatise, as there is no comparable compendium of information available anywhere. *Commercial Litigation in New York State Courts*, as updated and expanded in its Fifth Edition, will continue to be an indispensable resource for anyone who litigates commercial cases in New York.



John P. McEntee is a member of Farrell Fritz, P.C., a Past President of the Association and Past Chair of the Commercial Litigation Committee.

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MOVIE REVIEW:  
TRUE CRIME



Rudy Carmenaty

*I have been given the choice of being released...or joining the forces of the Symbionese Liberation Army and fighting for my freedom and the freedom of all oppressed people. I have chosen to stay and fight.*

— Patty Hearst

These days Patricia Hearst is a well-heeled matron in her mid-sixties, leading an unadventurous life. But it wasn't always so. At age nineteen, she underwent an odyssey of epic proportions that saw her go from Berkley co-ed, to kidnapped heiress, to wanted fugitive, to convicted criminal.

The abduction of Patty Hearst by the Symbionese Liberation Army (the SLA) resulted in a national obsession that can well serve as an all-American Rorschach test. Her journey touches upon class, sex, race, media, politics, terrorism, and violence.

Hearst ultimately went to prison. Her ordeal was the stuff of high-drama, raising more questions than it answered. Not only was Patty on trial, but in a broader sense, so was the post-war baby-boom generation that, for a brief moment, she came to represent.

**Child of Privilege  
Meets the Urban Guerrillas**

Patty was the granddaughter of William Randolph Hearst, the legendary newspaper baron who served as the inspiration for Charles Foster Kane in Orson Welles' *Citizen Kane*. Millions of Americans read Hearst newspapers and the Hearst name was synonymous with privilege and power.

Until her ordeal began, Patty was an impressionable sophomore at the University of California. Other than being a Hearst, there was nothing unusual about her. But that would all change on February 4, 1974.<sup>1</sup> On that night, she was taken at gunpoint by the SLA.

That an obscure Marxist clique had seized a member of the most prominent media family in the country was major

## The Tale of Tanya or The Trial of Patty Hearst

news. Conversely, the only thing that distinguished the SLA from other leftist radicals was that they had snatched Patty Hearst.

Numbering at most sixteen people, the SLA was a motley band of urban guerrillas sprouting mutilated Marxism coupled with a nihilistic propensity for violence. Their manifesto was outlandish, calling for "closing prisons, ending monogamy, and eliminating all other institutions that have made and sustained capitalism."<sup>2</sup>

Back then the Bay Area proved fertile ground for all manner of would-be revolutionaries. San Francisco offered a haven for the hippies in Haight Ashbury. Oakland was the birthplace of the Black Panthers. The Berkley campus was convulsed by the Free Speech movement and anti-war protests.

Three months prior to Patty's kidnapping, the SLA murdered Marcus Foster, the first African-American school superintendent of Oakland.<sup>3</sup> Patty was initially shanghaied in the hope that she could be exchanged for two SLA members charged with Foster's murder.<sup>4</sup> Foster was killed on the orders of Donald DeFreeze.

Calling himself "General Field Marshall Cinque," DeFreeze was an escaped convict who was the radical group's self-delusional, paranoid leader.<sup>5</sup> He was also its sole African-American member. Adopting the symbol of a seven headed cobra, the SLA proclaimed as its maxim: DEATH TO THE FASCIST INSECT THAT PREYS UPON THE LIFE OF THE PEOPLE.<sup>6</sup>

**A Chaotic Kidnapping—Or Was It?**

Their incoherence is best symbolized by their demands to Patty's parents. For the SLA did not ask for a traditional ransom. Instead, they ordered the Hearsts to offer \$70 worth of free food to every poor person in California.<sup>7</sup> The Hearst family launched People In Need, a food give-away program, to assuage the SLA.<sup>8</sup>

In spite of the \$2 million spent, it proved to be a recipe for disaster, with vast amounts of food-stuffs spoiling and riots over its distribution breaking-out.<sup>9</sup> But as chaotic as this twisted episode was, it paled when compared to Patty's announcement that she was joining the SLA.

At the onset of her kidnapping, Patty was kept bound in a closet. An audio-recording was sent to radio station KDFE consisting of DeFreeze's rantings and reassurances from Patty that she was all-right.<sup>10</sup> Within the span of two months, she became a full-fledged member of the SLA.

On an April 3, 1974 tape, Patty renounced her privileged life, disparaged her parents' values, and expressed her desire to join the revolution.<sup>11</sup> Most startling of all, Patty assumed a new persona. She took on the mantle of "Tanya." Tanya was a communist partisan who was killed alongside Che Guevara in Bolivia in 1967.<sup>12</sup>

Becoming captivated psychologically as well as physically, Patty/Tanya became the ultimate symbol of youthful rebellion. The photo of Hearst toting a machine gun while wearing fatigues and a beret before the symbol of the SLA would become one of the iconic images of the Seventies.

Did Patty willingly become a part of this cult? She unquestionably became a cult figure, as she was a rich kid living-out the revolutionary ideal. In the minds of many sympathetic observers and without a touch of irony, Patty, by becoming Tanya, had finally been

liberated from American society.

But this Bonnie-&-Clyde-style romanticism soon took on a darker tone. On April 15, 1974 Patty, DeFreeze and others stole over \$10,000 from the Hibernia Bank in San Francisco.<sup>13</sup> The incident was captured on surveillance cameras confirming that Tanya, with an automatic weapon in hand, was no longer Patty the kidnap victim.

It would not be the last time that the SLA would be caught on camera carrying guns. On May 17, 1974, the SLA was cornered by the LAPD in Los Angeles.<sup>14</sup> What ensued was a live-televised gun battle rivaling anything captured on film during the Vietnam war, with over 12,000 rounds of ammunition being fired.<sup>15</sup>

See HEARST, Page 23



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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*"Every attorney practicing in Nassau County should join NCBA. In addition to unlimited CLE with annual membership, the Association is a tremendous resource for COVID updates at the state, local, and court system levels. If you are not a member or are considering renewing your membership, now is the best time to do so."*

—Adam D'Antonio





# NAL PROGRAMS

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

## April 7, 2021

Dean's Hour: Remote Execution of Estate Planning Documents: Pitfalls and Best Practices

Sponsored by NCBA Corporate Partner Champion Office Suites and Encore Luxury Living

12:30-1:30PM

1 credit in professional practice

Skills credits are available for newly admitted attorneys

## 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.

## April 14, 2021

Dean's Hour: The Tale of Tanya or The Trial of Patty Hearst

Sponsored by NCBA Corporate Partner Champion Office Suites

12:30-1:30PM

1 credit in professional practice

## April 21, 2021

Dean's Hour: Vessel Owners' Issues and Health Care Crisis

Sponsored by NCBA Corporate Partner

12:30-1:30PM

1 credit in professional practice

Skills credits are available for newly admitted attorneys

## April 22, 2021

Dean's Hour: "May it Please the Court, for Virtual Oral Arguments

Sponsored by NCBA Corporate Partner

12:30-1:30PM

1 credit in professional practice

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## April 23, 2021

Dean's Hour: A Survey of Environmental Construction Projects

Sponsored by NCBA Corporate Partner

1:00-2:00PM

1 credit in professional practice

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## April 27, 2021

Dean's Hour: One Year In: Development Majeure Litigation

Sponsored by NCBA Corporate Partner

12:30-1:30PM

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## April 28, 2021

Protecting Your Practice

5:30-7:30PM

1 credit in professional practice; 1 credit in continuing education

## April 30, 2021

Dean's Hour: Escrow Issues and Accounting Sponsored by NCBA Corporate Partner and Tradition Title Agency

12:30-2:10PM

1 credit in professional practice; 1 credit in continuing education

## FEATURED PROGRAM

### Presumptive ADR—Where Are We Now?



### APRIL 21, 2021

With the NCBA Alternative Dispute Resolution Committee

5:30-8:30PM

3 credits in professional practice

We will hear from leaders from Nassau, Suffolk and New York Counties, including the Administrative Judges—Justice St. George, Justice Crecca, and Justice Kaplan—and the ADR Coordinators of all three counties, as well as key representatives of the NYS Office of Court Administration. These leaders will share what has worked in implementing Judge DiFiore's Presumptive Mediation initiative, as well as where they see us going in the months and years ahead, both as we continue to make our way through the pandemic and as our courts emerge into the "new normal."

Pricing: NCBA Members FREE; Non-Members attorneys \$105; Non-attorneys \$50. Must pre-register.



# CALENDAR

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

pre-registered attendees 24 hours before program.

ZOOM unless otherwise noted.

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**May 5, 2021**

**Dean's Hour: Nixon Before the Bench: The Supreme Court and Richard Nixon**

**Sponsored by NCBA Corporate Partner Champion Office Suites**

**12:30-1:30PM**

**1 credit in professional practice**

## RECENTLY ADDED CLE ON DEMAND

**FEB.  
4**

**Recent Rules in Real Estate : An Update on Real Estate Law Trends Since the Pandemic**

**FEB.  
24**

**Dean's Hour: Brave New World: Current Legal Issues Involving Artificial Intelligence**

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.

# Part 36 Certified Training

**Guardian Ad Litem \* Combined Article 81/Court Evaluator/Attorney for the AIP \* Receiver**

- Separate pricing for NCBA Members and Non-Members
- Order form available within this issue and at <https://www.nassaubar.org/wp-content/uploads/2021/02/Part-36-Order-Form.pdf>
- All material will be emailed, including link to training
- Take at your own pace





## We Acknowledge, with Thanks, Contributions to the WE CARE Fund

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Martha Krisel	The NCBA Pro Bono Honorees
Lois Schwaeber	Christopher T. McGrath and Hector Herrera being honored at the NCBA Gala
Joanne and Hon. Frank Gulotta, Jr.	The 50, 60, and 70 year Honorees in recognition of their service to the legal profession
Hon. Marie G. Santagata	Hon. Andrea Phoenix being installed as President of the Theodore Roosevelt Inns of Court
Hon. Marilyn K. Genoa	The birth of Sandy and Nanette Strenger's first grandchild, Evan Alex
Hon. Ira B. Warshawsky	The WE CARE Fund
Hon. Joy M. Watson	Hon. Andrea Phoenix being installed as President of the Theodore Roosevelt Inns of Court

### IN MEMORY OF ANDREW S. PANARO, FATHER OF PETER PANARO

Jennifer S. Rosenkrantz Hon. Marie G. Santagata Hon. Joy M. Watson

### IN HONOR OF HECTOR HERRERA RECEIVING THE SPECIAL RECOGNITION AWARD FROM THE NASSAU COUNTY COURTS

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Hon. Marilyn K. Genoa	Adrienne Hausch
Alan Hodish	Hon. Joy M. Watson
Hon. Susan Katz Richman, Dave Lieberman, Paige, and Asa	

### IN MEMORY OF THOMAS R. HESSION

Hon. Stephen and Mrs. Elizabeth Bucaria	Joanne and Hon. Frank Gulotta, Jr.	Adrienne Hausch
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### HOW YOU CAN HELP THE WE CARE FUND?

#### MAKE A DONATION

Show your support for the WE CARE Fund by making a donation today by visiting

[nassaubar.org/donate-now](http://nassaubar.org/donate-now).

#### AMAZON SMILE

Do your regular online shopping using [smile.amazon.com](http://smile.amazon.com) and choose **Nassau Bar Foundation, Inc.** as your charity of choice.

Amazon will donate 0.5% of eligible purchases to WE CARE!

*“My favorite WE CARE event, and the one I believe epitomizes what WE CARE is truly about, is the Annual Children’s Festival. For the past 32 years, every February during Presidents’ Week, the Nassau County Bar Association is transformed as WE CARE welcomes over two hundred of our County’s underserved children for a spectacular afternoon of food, entertainment and games, including face painting, a live DJ and magician, game trucks, the Book Fairies, and special appearances by Mr. Met, and Quacker Jack. The Nassau County Police Department and the Garden City Fire Department join in the fun bringing horses, vintage cars, motorcycles, and firetrucks, allowing the children to get to know the first responders in their communities as they climb on the trucks and cars and pet the horses. Members of the Bench and Bar are our face painters, chefs and servers, DJ, Magician, etc., and every child leaves with bags filled with treats, toys, books, and every day necessities such as hats, gloves, sweatshirts and much more.” —Marilyn K. Genoa*

*My involvement with WE CARE has been one of the most gratifying experiences of my legal career. I got as much, if not more, satisfaction serving as WE CARE Co-Chair as I did as President of NCBA. Raising and distributing money to and for local charities focusing on the children in our communities warms the heart in ways that no other experience can. And knowing that 100% of the money raised actually goes to those in need makes WE CARE unlike any other charity.” —Marc C. Gann*

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## IN BRIEF

**Karen Tenenbaum, LL.M.** (Tax), CPA, tax attorney, has been selected for the Long Island Business News Power 25 in Law list. Karen and **Marisa Friedrich** have recently spoken for the NYS Society of Enrolled Agents about residency tax issues during the COVID pandemic.



Marian C. Rice

Planning Webinar Series in collaboration with Parker Jewish Institute for Health Care and Rehabilitation and Willing Hearts, Helpful Hands Alzheimer's Caregiver Support Initiative. The next webinar is scheduled for May 6.

Effective April 1, 2021, **Marian C. Rice**, NCBA Past President and partner at L'Abbate Balkan Colavita & Contini, LLP, announces the firm's move to 3 Huntington Quadrangle, Suite 102S, Melville, New York 11747. The firm's emails, telephone, and fax numbers remain the same.

**Craig Olivo**, managing partner of Bond, Schoeneck & King's Garden City office has announced that effective April 1, 2021, the attorneys of Putney, Twombly, Hall & Hirson, a venerable 155 year of boutique law firm, will join Bond. Fifteen attorneys from Putney will join Bond.

**Joseph A. Quatela**, managing partner of Quatela Chimeri PLLC with offices in Hauppauge and Garden City, is proud to announce Nicole J. Brodsky and Alexander E. Sendrowitz have been named partners to the firm.

In April, **Ronald Fatoullah** of Ronald Fatoullah & Associates collaborated with education law attorney **Rebecca Sassouni**, counsel for students of all ages, and presented "*What All Parents Need to Know for Children with Special Needs—Legal Protection from School Through Adulthood.*" In addition, together with **Adam D. Solomon**, Mr. Fatoullah presented "The Legal & Financial Challenges of Aging: Important Care Issues and Estate Planning Concerns for Aging Parents & Their Adult Children" to the employees and families of BNP Paribas Bank in New York City.

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](mailto: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.

Karen was interviewed by Greg Demetriou for his "Ask a CEO" show where she discussed her professional journey. Her Melville-based firm, Tenenbaum Law, P.C., represents taxpayers in IRS and NYS tax matters.

**Jacqueline Harounian**, Partner of Wisselman Harounian & Associates in Great Neck will be presenting "Religious and Cultural Considerations in Divorce" for the AFCC National Conference in June 2021.

Managing Partner **Joseph Milizio** of Vishnick McGovern Milizio (VMM) warmly welcomes **Thomas Weiss** as a counsel in the firm's Litigation Department. Mr. Weiss focuses on commercial and real estate litigation. Managing Partner Joseph Milizio is also proud to announce the establishment of a pro bono joint VMM-Northwell Health Trans Clinic. The first of its kind, the clinic is designed to inform and assist transitioning and nonbinary persons and their families with both medical and legal matters. It is expected to begin operating July 8, conditions allowing. In addition, VMM and Northwell Health are cohosting an ongoing LGBTQ Health & Life Planning Webinar Series, led by managing partner Joseph Milizio, head of the firm's LGBTQ Representation and Surrogacy, Adoption, and Assisted Reproduction practices and member of the Matrimonial and Family Law practice. The first webinar is scheduled for April 15 with others scheduled throughout June, which is Pride Month. VMM congratulates partner **Joseph Trotti**, head of the Matrimonial and Family Law Practice and founding partner of the VMM Family Institute<sup>SM</sup>, for his Access to Justice Pro Bono Attorney recognition by the Nassau County Bar Association and Nassau Suffolk Law Services. **Constantina Papageorgiou**, a partner in VMM's Wills, Trusts, and Estates and Elder Law practices, was a panelist on the *LI Herald* "50 Plus Health + Wealth Virtual Event" on March 25, where she discussed estate planning matters. Ms. Papageorgiou additionally continues to lead VMM's ongoing Medicaid and Estate



## NCBA Sustaining Members 2020-2021

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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Mark E. Alter  
Vanessa P. Anagnostou  
Michael J. Antongiovanni  
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Ernest T. Bartol  
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## Special Offer...

Continued From Page 1

three days before they are available to the public at the NCBA Career Center located at [www.nassaubar.org](http://www.nassaubar.org).

### Grow Your Business

Reaching your professional goals has never been easier when you are an NCBA Member. The need for legal assistance is high in demand. The Lawyer Referral Information Service Panel—an effective means of introducing people with legal issues to attorneys experienced in the area of law in which they need assistance—is an excellent opportunity to grow your practice and expand your client base. Members interested in joining the panel can visit [www.nassaubar.org](http://www.nassaubar.org) to download an application form. Professional insurance is required. Lawyer Referral Coordinators Pat Carbonaro and Carolyn Bonino are available to answer any questions you may have.

Want to catch up with an old colleague and build business contacts? NCBA hosts countless networking and special events each year. Heading into the spring and summer seasons, we have exciting virtual and in-person events planned. Members are updated each week on the latest information about events and registration. The next upcoming event—*Law Day: Advancing the Rule of Law Now*—is Thursday, April 29, 2021 at 5:00 PM and will be held virtually. See page 6 for more information.

The NCBA is grateful to its Corporate Partners who are committed to providing Members with the professional products and services they need to succeed and are always available to help in any way they can. We are very grateful for their support and are proud to introduce them and their array of services. The 2020-2021 NCBA Corporate Partners include AssuredPartners Northeast, Insurance for Lawyers; Champion Office Suites, The Ready Office Solution; PrintingHouse Press, Appellate Services Provider; Realtime Reporting, Inc., National Court Reporting Services; Tradition Title Agency; vdiscovery, Computer Forensics, Document Review, and Electronic Discovery; and Web Design You, Web Design and Development Company. Learn more about NCBA Corporate Partners and how you can contact them on page 18.

Other business development member benefits include cost-effective mediation and arbitration panels open to qualified Members to join. Members can also find other Members who have office space available, or post your available space on the NCBA website, free of charge. Looking for a quiet space for client meetings, depositions, etc.? Members can rent a conference room for a fee at Domus. Free Wi-Fi and coffee bar are available at no charge.

### Grow Your Community

If you are looking to become more involved with the community at large in

a meaningful and personally rewarding way, consider volunteering your time with one (or more!) of the many volunteer programs that the NCBA has to offer.

The WE CARE Fund is a part of the Nassau Bar Foundation, Inc., the charitable arm of the Nassau County Bar Association. The sole purpose of WE CARE is to give back to the local community through grants and scholarships, volunteer opportunities, and events hosted year-round, both virtual and in-person. Funds raised by WE CARE are disbursed through charitable grants that help to greatly improve the quality of life for children, adults, and others in need throughout Nassau County. Contact WE CARE Coordinator Bridget Ryan at [BRyan@nassaubar.org](mailto:BRyan@nassaubar.org) if you are looking to get involved with WE CARE.

The WE CARE Fund has been able to make a significant difference during the pandemic but is not the only way for Members to get involved. In April 2020, the NCBA created the COVID-19 Community Task Force to help members of the public who are struggling with legal issues brought on by the pandemic. Long Island residents and small businesses send inquiries via email to volunteer NCBA Member attorneys who are able to answer their most pressing questions. This service is free and has helped over 260 individuals to date. If you know someone who would benefit from this service, invite them to send their inquiry to [covidhelp@nassaubar.org](mailto:covidhelp@nassaubar.org). If you would like to volunteer on the COVID-19 Community Task Force, contact Communications Manager Ann Burkowsky at [aburkowsky@nassaubar.org](mailto:aburkowsky@nassaubar.org).

Members can also volunteer their services with the Mortgage Foreclosure Project, which offers free mortgage foreclosure assistance to individuals and families who reside in Nassau County and are unable to afford the cost of an attorney. Prior to COVID-19, in-person clinics were held regularly at Domus. While clinics are currently on pause, Nassau County residents who are struggling can reach out to the program to connect with a volunteer attorney virtually. Volunteer attorneys will provide free consultation, review documents relevant to the matter, and inform clients about their rights and options as well as guidance as to how to proceed given their rights and circumstances. In-person as well as virtual clinics will resume in the coming months. If you are interested in volunteer opportunities with the Project, Members can contact Director of Pro Bono Gale D. Berg at [GBerg@nassaubar.org](mailto:GBerg@nassaubar.org) or Paralegal Cheryl Cardona at [ccardona@nassaubar.org](mailto:ccardona@nassaubar.org).

### Your Mental Health Matters

Through the NCBA Lawyer Assistance Program (LAP), lawyers, judges and law students who are struggling with substance abuse, depression, anxiety, stress, and other mental health disorders can contact LAP Director Beth Eckhardt at our 24/7 hotline. LAP services are



free and confidential. Other services include supportive counseling, stress management/wellness workshops, treatment referrals, and more.

This past year has been exceptionally difficult. In addition to its regular services, LAP hosts numerous virtual programs throughout the year to help you improve the way you feel. Mental health is just as important as physical health. We encourage you to join your fellow colleagues at upcoming, monthly programs, which you can learn about on page 17.

### Weekly COVID-19 Resources and Updates

Keeping members informed remains a top priority. Now more than ever, we want to be of great value. The NCBA COVID-19 online resource center—comprised of pandemic information from New York State, New York State Courts, Nassau County Courts, and the Bar—can be found on the NCBA website and in weekly member, only e-blasts. NCBA staff works diligently to share these updates frequently with useful information and announcements to keep you informed.

### In-House Dining Services

Did you know that the NCBA is one of only four bar associations in the country that has its own building with in-house dining facilities? After a year of closure, we are excited to announce that plans are in the works to reopen Domus in the near future.

The NCBA in-house caterer, The Esquire at the Nassau County Bar Association, will offer an extensive a la carte menu to ensure the safety and health of all guests. Domus is the perfect spot to lunch in a traditional style dining room setting with your clients and colleagues outside of the courtroom.

### Join Today

Domus, the Mineola headquarters of the Nassau County Bar Association (NCBA), is a place for Members to come together, to learn, to network, and to contribute to the betterment of the legal profession. Being an NCBA Member means that you are a part of a diverse and caring community of nearly 4,000 legal professionals. While no one could prepare for what March 2020 would bring—a global pandemic putting a screeching halt to all in-person activities and functions—one year later the NCBA has successfully adapted to the challenges of the pandemic and is looking to the future with optimism.

Exciting things are always happening at the Bar, and there is something for everyone. The NCBA will continue to move forward in the wake of the pandemic. Growing your career is the key to success, and the NCBA provides you with the tools and connections to thrive in your area of expertise.

To join the NCBA and take advantage of countless benefits—including **FREE** CLE as part of membership dues, **FREE** Unlimited Live CLE, **FREE** Committee CLE, and **FREE** 12 credits of CLE On-Demand—call Stephanie Pagano at (516) 747-4070, ext. 1230 or Donna Gerdik ext. 1206 in the NCBA Membership office. You can also join online at [www.nassaubar.org](http://www.nassaubar.org). There is no better time to join. New Members who join in April or later will receive up to three months free; their membership will be current through the end of the 2021-2022 fiscal year ending June 30, 2022.

If you are a current Member, we greatly appreciate your support and look forward to welcoming you back.



**NCBA Committee Meeting Calendar**  
**April 7, 2021 -**  
**May 6, 2021**

Please Note: Committee Meetings are for NCBA Members. Dates and times are subject to change.  
 Check [www.nassaubar.org](http://www.nassaubar.org) for updated information.

**REAL PROPERTY**

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

**ETHICS**

*Matthew K. Flanagan*  
 Wednesday, April 7  
 4:30 p.m.

**LABOR & EMPLOYMENT LAW**

*Matthew B. Weinick*  
 Tuesday, April 13  
 12:30 p.m.

**MATRIMONIAL LAW**

*Samuel J. Ferrara*  
 Wednesday, April 14  
 5:30 p.m.

**EDUCATION LAW**

*John P. Sheahan/Rebecca Sassouni*  
 Thursday, April 15  
 12:30 p.m.

**CIVIL RIGHTS**

*Bernadette K. Ford*  
 Thursday, April 15  
 12:30 p.m.

**WOMEN IN THE LAW**

*Edith Reinhardt*  
 Tuesday, April 20  
 8:30 a.m.

**PLAINTIFF'S PERSONAL INJURY**

*Ira S. Slavitt*  
 Tuesday, April 20  
 12:30 p.m.

**ALTERNATIVE DISPUTE RESOLUTION**

*Marilyn K. Genoa/Jess A. Bunshaft*  
 Tuesday, April 20  
 12:30 p.m.

**SURROGATE'S COURT ESTATES & TRUSTS**

*Brian P. Corrigan*  
 Tuesday, April 20  
 5:30 p.m.

**ANIMAL LAW**

*Kristi L. DiPaolo*  
 Tuesday, April 20  
 6:00 p.m.

**LGBTQ**

*Charlie Arrowood/Byron Chou*  
 Wednesday, April 21  
 9:00 a.m.

**BUSINESS LAW, TAX AND ACCOUNTING**

*Jennifer L. Koo/Scott L. Kestenbaum*  
 Wednesday, April 21  
 12:30 p.m.

**ASSOCIATION MEMBERSHIP**

*Michael DiFalco*  
 Wednesday, April 21  
 12:30 p.m.

**IMMIGRATION LAW**

*George A. Terezakis*  
 Wednesday, April 21  
 5:30 p.m.

**INTELLECTUAL PROPERTY**

*Frederick J. Dorchak*  
 Thursday, April 22  
 12:30 p.m.

**APPELLATE PRACTICE**

*Jackie L. Gross*  
 Thursday, April 22  
 12:30 p.m.

**DISTRICT COURT**

*Roberta D. Scoll/S. Robert Kroll*  
 Friday, April 23  
 12:30 p.m.

**GENERAL, SOLO AND SMALL LAW**

**PRACTICE MANAGEMENT**  
*Scott J. Limmer*  
 Tuesday, April 27  
 12:30 p.m.

**ELDER LAW SOCIAL SERVICES**

**HEALTH ADVOCACY**  
*Katie A. Barbieri/Patrica A. Craig*  
 Tuesday, April 27  
 5:30 p.m.

**HOSPITAL & HEALTH LAW**

*Leonard M. Rosenberg*  
 Friday, April 30  
 12:30 p.m.

**REAL PROPERTY**

*Alan J. Schwartz*  
 Wednesday, May 5  
 12:30 p.m.

**PUBLICATIONS**

*Christopher J. DelliCarpini/Andrea M. DiGregorio*  
 Thursday, May 6  
 12:30 p.m.

**COMMUNITY RELATIONS & PUBLIC EDUCATION**

*Joshua D. Brookstein*  
 Thursday, May 6  
 12:30 p.m.

**Nassau County Courts Virtual Black History Month Ceremony**



The Hon. Norman St. George, Administrative Judge of Nassau County presents Hon. Juanita Bing Newton, Dean, NYS Judicial Institute (Ret.) with the prestigious Alfred S. Robbins Memorial Award at the Nassau County Courts/Amistad Long Island Black Bar Association's 16th annual Black History Month ceremony.

The award presented to Judge Bing Newton honors her for her Extraordinary Commitment to Justice and has inscribed a quote from Thurgood Marshall reading,

"In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute."

Judge St. George also received a Special Tribute Award for his extraordinary and steadfast leadership of the Nassau County Courts during the COVID-19 pandemic. The award was presented to him by Hon. Andrea Phoenix, Chairperson of the Nassau County Courts Black History Committee.

This year's event was held virtually to ensure a safe and socially distanced environment for employees and guests.

**Lawyer Assistance Program (LAP)**

**VIRTUAL EVENTS CALENDAR**

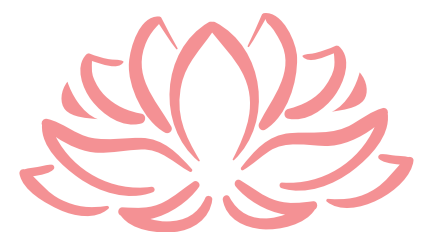


**UN/UNDEREMPLOYED GROUP**  
**APRIL 6 AT 6:00 PM**

Share professional struggles during this difficult time and receive guidance from colleagues in a safe space.

**MINDFULNESS MONDAYS**  
**APRIL 12 AT 6:00 PM**

Join your fellow colleagues for an anxiety management session to kick off the program. Stress is inevitable. This month, we will explore how mindfulness, movement, and meditation can help you manage your stress levels.



**TO REGISTER, CONTACT BETH ECKHARDT AT**  
**ECKHARDT@NASSAUBAR.ORG OR (516) 294-6022.**



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## NCBA Corporate Partner Spotlight



Since 1970, PHP has worked diligently to be the industry's leading appellate services provider delivering innovative solutions that address the needs of clients as well as the appellate industry at large. PHP is a proud corporate partner of WE CARE, the nationally recognized fund of the Nassau Bar Foundation, the charitable arm of the Nassau County Bar Association.

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John Farrell  
(212) 624-9985  
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## Mental Health Services...

Continued From Page 5

Telehealth, telemedicine, or telepsychiatry describe the use of two-way communication technology to provide certain health care services.<sup>5</sup> During the pandemic, providers are encouraged to use telehealth methods to meet with and treat patients, including mental health services. In March 2020, the Office for Civil Rights (OCR) at the Department of Health and Human Services (HHS) announced that it will waive potential penalties for good faith use of telehealth methods during the national public health emergency.<sup>6</sup>

Further, many states have waived certain licensure requirements or renewal guidelines to allow healthcare providers to treat patients in other states via telehealth methods.<sup>7</sup> These legal waivers were essential in the beginning of the pandemic when many students returned home, out of state from their institutions, and continue to be useful in offering comprehensive mental health services to students to date.

To take advantage of the resources offered, students must know they exist. Counseling centers should ensure that their campus website clearly communicates the availability of resources to the student body. Campuses must continue to fight the stigma attached to seeking help, sending the message to students that even the most bright and successful students can benefit from mental health support.

### Lawyer Assistance Programs

Legal professionals are especially vulnerable to mental health issues and substance abuse disorders.<sup>8</sup> Law students, their employers for summer or school-year internships, and their schools must be aware of the mental health resources available to them through local Lawyer Assistance Programs.

These programs, available on a county and state level, are committed to helping members of the legal community stay healthy and productive, especially during these challenging times. For example, according to the website for the Nassau County Bar Association,

The Nassau County Bar Association Lawyer Assistance Program provides a range of services to lawyers, judges, law students, and their immediate family members who are struggling with alcohol or drug abuse, depression, anxiety, stress, as well as other addictions and mental health issues.

LAP services are free and strictly confidential via Section 499 of

the Judiciary Law and the Rules of Professional Conduct. These services include peer support, crisis intervention, evaluation, referrals, professional supportive counseling, outreach, education, prevention, and wellness programs.

### Legal Interventions

In cases where a student is in serious mental distress, exhibiting signs of a mental illness or related mental health issue, there are certain legal interventions to consider. About one-third of young adults might experience a mental health issue that is severe enough to impact their work performance and education.<sup>9</sup> The individual might require inpatient care and psychiatric treatment in a hospital setting.

A family member, friend or other person with direct knowledge of the symptoms and behaviors can apply to the court for a Mental Hygiene Warrant.<sup>10</sup> Hospitalization would allow for a psychiatrist or other physician to evaluate any mental health or medical issues, establish a diagnosis, and recommend a plan to treat the acute symptoms. Once stable and discharged from the hospital, the goal would be to return to school at an improved level of functioning.

Non-compliance with psychiatric treatment in the community may be a contributing factor to experiencing these acute psychiatric symptoms, thoughts or attempts at self-harm or other dangerous behaviors. If the individual has a history of non-compliance with outpatient psychiatric treatment, the hospital or a concerned individual in the community can make a referral for Assisted Outpatient Treatment (AOT) in the county where the individual resides.<sup>11</sup>

Known as “Kendra’s Law” in New York, AOT is court-ordered psychiatric treatment and supervision in the community with the goal of preventing “a relapse or deterioration” in the individual’s psychiatric condition.<sup>12</sup> One of the benefits of AOT is that this program provides for case management services, either an Intensive Case Manager (ICM) or an Assertive Community Treatment (ACT) Team to coordinate the individual’s psychiatric care in the community.<sup>13</sup>

This Team is directed by Court Order to meet with the individual in the community (or virtually, by phone or video-conference), usually four to six times per month, follow the plan for the administration of psychiatric medication and monitor medication compliance. The AOT program can also provide alcohol or substance abuse counseling.

### Conclusion

The COVID-19 pandemic has truly

challenged our legal community and the future members of our profession. Graduate students are often juggling many roles and responsibilities, each one having been significantly impacted by COVID: completing their own coursework, conducting research with faculty or peers, managing their households and family life, and in some cases, also maintaining some form of employment or internship.

The hope is that these students will serve as future members of law firms, employees of the court system, and leaders in government, either local, state, or federal. We owe it to them to provide the mental health support they need now to succeed during this pandemic and develop the necessary coping skills to endure the long-lasting effects of these mental health issues.

1. Dana Alkhouri, *Pandemic’s mental health burden heaviest among young adults*, ABC News, (Feb. 21, 2021),

available at <https://abcn.ws/3rVoFaP>.  
 2. Ryan Prior, *1 in 4 young people are reporting suicidal thoughts. Here’s how to help*, CNN, (Aug. 15, 2020), available at <https://cnn.it/30QMdSf>.  
 3. Emmy M. Cho and Alexandra Topic, *Harvard Remembers Tommy Raskin, an ‘Extraordinary Young Person’ with a ‘Perfect Heart’ And ‘Dazzling Radiant Mind’*, (Jan. 18, 2021) available at <https://bit.ly/3trUTuC>.  
 4. Va. Code Ann. § 23.1-805 (Formerly cited as VA ST § 23-9.2:10); 110 Ill. Comp. Stat. Ann. 12/20.  
 5. *What is telehealth?*, U.S., Department of Health and Human Services (HHS), available at <https://bit.ly/2P2LZoA>.  
 6. *OCR Issues Guidance on Telehealth Remote Communications Following Its Notification of Enforcement Discretion*, (Mar. 20, 2020), available at <https://bit.ly/30QSPA5>. Health care providers may, in good faith, provide telehealth services to patients using remote communication technologies, even if the application, such as FaceTime or Skype, does not fully comply with HIPAA rules. *Id.*  
 7. *Telehealth guidance by state during COVID-19*, APA, (updated Feb. 1, 2021), available at <https://bit.ly/30U8Cy9>.  
 8. Lawyer Assistance Program, Nassau County Bar Association, available at <https://bit.ly/3vzH3bp>.  
 9. Alkhouri, *supra* n.1.  
 10. Mental Hyg. Law § 9.43.  
 11. Mental Hyg. Law § 9.60.  
 12. *Id.* § 9.60(a), (c)(6).  
 13. *Id.* § 9.60(a)(1).

*“The courses have opened a new venue for speakers, bringing them from the NCBA podium to our homes and offices. The visual and audio quality of the CLE courses has become excellent. And, of course, no facemasks are required; it is great to safely see everyone’s face! The relaxed atmosphere of the Zoom courses seems to enhance the learning experience, and the convenience of being able to page through the course materials on the desktop while viewing the speaker provides for better continuity.” —Thomas Deas*

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# Nassau County Courthouse Listed in National and State Registers of Historic Places

Nassau County Administrative Judge Norman St. George joined Nassau County Executive Laura Curran and Nassau County District Attorney Madeline Singas to announce the Nassau County Courthouse has been listed in the National and State Registers of Historic Places. Planned and constructed as a federal Public Works Administration project between 1938 and 1940, the Nassau County Courthouse has been the centerpiece of the Nassau County Court campus for 80 years.

The effort to have the courthouse listed in the Registry was spearheaded by Daniel G. Looney, Nassau County Deputy Executive Assistant District Attorney.

(L-R) Nassau County Administrative Judge Hon. Norman St. George; Nassau County Deputy Executive Assistant District Attorney Daniel G. Looney; Nassau County District Attorney Madeline Singas; Nassau County Executive Laura Curran.



## Protocols...

Continued From Page 3

witness needs technical assistance staying connected to the virtual proceeding, provided the presence of the assistant is disclosed.

### Set the Scene

To ensure compliance with these directives, the *Protocols* recommends that the room where the witness is testifying from be displayed to the Court and counsel before the start of the witness's testimony and periodically thereafter. Witnesses are to be instructed by counsel and "admonished by the Court" that they cannot read or refer to any document during their testimony except what is shown to them by counsel during direct or cross-examination.<sup>6</sup>

Many witnesses will prefer to testify from their office (home or otherwise), where they are likely to have in place the necessary videoconferencing capabilities. But that location is likely not to be compatible with the *Protocols*. For example, the admonition against having documents and other materials available to the witness would seem to prevent most witnesses from testifying from their regular work desk, where there potentially would be work papers, reading material, and all manner of documents within arms' reach. Witnesses who are still working remotely may have a harder time remaining out of sight and

sound of others, depending on the layout of their home.

To ensure compliance with the *Protocols*, counsel should make conference rooms and videoconferencing technology available to their witnesses. Discouraging the witness from testifying from his or her office limits the potential for distraction. When the predictable email pops up on screen or the inevitable telephone call arises, the witness's attention at least temporarily will be diverted away from the matter before the court. Removing the witness from his or her everyday environment avoids that problem.

### Handling Exhibits

The *Protocols* includes extensive guidance on the pre-marking and exchange of exhibits. Counsel are required to exchange exhibits and provide copies electronically to the court and court reporter at a date and time to be set by the court, and all exhibits must be pre-marked for identification purposes. Exhibits exceeding one page are to be Bates stamped.<sup>7</sup>

It is not clear from the *Protocols* how the exhibits are to be shown to the witnesses during trial. I have participated in several virtual evidentiary proceedings over the past year, and different courts have utilized different methods, each with its own advantages and disadvantages. One court had the attorneys use the share-screen function on Microsoft Teams. This was an easy approach; nothing needed to be given to the witnesses in advance. The downside is that the document consumes nearly the entire screen so that the picture of the witness is reduced to a thumbnail. This makes assessing the witness's demeanor—and therefore credibility—difficult. Another court required the witnesses

to be given the exhibits in advance—either physically or electronically—so the witness could refer to them on their own.

In this approach, there is no worry about not seeing the witness, but other practical complications arise. For example, if the witness testifies in such a way that a previously undisclosed document is needed for impeachment, the impeaching paper would not be immediately available to show the witness thus interrupting the flow of trial while the cross-examiner took the necessary digital steps to display the material to the witness, ultimately detracting from the dramatic punch of the impeachment.

### Limits of Virtual Trials

While the *Protocols* anticipates many of the more common issues that would arise in a virtual trial and address how they should be handled, some cases just do not seem appropriate for a virtual trial.

A number of years ago, I was involved in the trial of a case in which the plaintiff accused my client of selling a product the plaintiff invented for which plaintiff claimed to be owed royalties. My client's product had become the market leader in the field, and sales were in the millions of dollars annually. The case proceeded as a bench trial before Hon. Timothy S. Driscoll. Throughout the trial, the two devices were present in the courtroom: the one invented by plaintiff and the one invented and sold by my client. We were able to conduct side-by-side comparisons of the physical components of each device to highlight their different component parts and technology. While the *Protocols* provides procedures to follow in cases involving physical evidence, such as making the physical evidence available to be copied by counsel and the witnesses, photographs would have

been a poor substitute for working with the actual scientific equipment at issue in our case.

The size and complexity of the case may also make a virtual trial impractical. While Justice Sherwood in *Ambac* held that he had the discretion to compel parties to appear virtually for trial, he prudently granted the plaintiff's motion to stay the trial until circumstances had changed. The trial in *Ambac*, a multi-billion-dollar case arising from the sale of mortgage-backed securities, was originally scheduled to start in February 2021 and was estimated to last five weeks; involved teams of 12 or more lawyers and support personnel from each side, some from outside of New York; and required the operation of "war rooms" throughout the trial. Under those circumstances, Justice Sherwood concluded the better option was to adjourn the trial until a safer environment existed.

While recent news from OCA indicates that some in-court operations may resume soon, it is likely that OCA will continue to look for ways to keep courthouse occupancy to a minimum. This likely means that remote proceedings—including bench trials—will remain with us not only for the foreseeable future, but quite likely forever. Trial attorneys therefore should study well the *Protocols* while remaining up to date on all developments affecting the virtual trial environment.

1. Available at <https://bit.ly/3e6CXBr>  
 2. "I'm Not a Cat' Filter Turns Texas Attorney Into a Cat During Zoom Hearing," *YouTube*, uploaded by Bloomberg Quicktake Now (Feb. 10, 2021), <https://bit.ly/3kOYwHP>  
 3. *Protocols* at 6.  
 4. Index No. 651612/2010 (Sup. Ct., N.Y. Co. Dec. 15, 2020.)  
 5. *Protocols* at 6.  
 6. *Id.* at 10.  
 7. *Id.* at 8-9.

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## Papers...

Continued From Page 7

on a decision or other authority not readily available to the court, a copy of the case or pertinent portions of the authority shall be submitted with the motion papers.

Subpart (b) requires that a proposed order should be submitted with motions, except on a dispositive motion.

Subpart (c) succinctly states that unless the court orders otherwise, no motion may be adjourned more than three times or for a cumulative total of more than 60 days.

**Uniform Rule 202.8-b** promulgates a significant change, imposing word count limits on motions and requiring that counsel provide a certification as to the word count of the particular document.

Subpart (a) states, in part, that unless otherwise permitted by the court:

(i) affidavits, affirmations, briefs and memoranda of law in chief shall be limited to 7,000 words each; (ii) reply affidavits, affirmations, and memoranda shall be no more than 4,200 words and shall not contain any arguments that do not respond or relate to those made in the memoranda in chief.

Subpart (b) provides for exclusions from the word count, including the caption, table of contents, table of authorities, and signature block.

Subpart (c) specifies the certification requirement for the word count and provides that counsel may rely on the count of the word-processing system used to prepare the document.

Subpart (d) allows for a party to exceed word limits only upon oral or letter application on notice to all other parties,

and the court must grant such application.

**Uniform Rule 202.8-c** makes clear that, absent express permission in advance, sur-reply papers are not permitted.

**Uniform Rule 202.8-d** makes clear that orders to show cause are to be made in circumstances only where there is genuine urgency. Additionally, reply affirmations are not permitted without court permission.

### Summary Judgment

**Uniform Rule 202.8-g** requires the moving party to annex to the notice of motion a statement of material facts—a separate, concise statement in numbered paragraphs of the material facts for which it is alleged there is no genuine issue to be tried. Opposing counsel in their papers must include a correspondingly numbered statement responding to each paragraph of the moving party, and may also include their own statement of material facts. Importantly, each paragraph in a statement of material facts will be deemed admitted unless specifically controverted by opposing counsel. Further, each paragraph in a statement of material fact or statement controverting the same must be supported by a citation of evidence submitted in support of or in opposition to the motion.

Now more than ever, it is essential for counsel to ensure that each and every factual allegation in their papers be supported by direct citation to evidence in the case, whether in the form of affidavit, EBT testimony, business records or otherwise. Accordingly, building a solid foundation of admissible evidence from pre-litigation investigation through disclosure will pay major

dividends when drafting moving or opposition papers, including statements of material facts.

Note that the new rules on statements of material facts do not apply to motions for summary judgment in lieu of complaint under CPLR 3213.

**Uniform Rule 202.8-f** requires that each court adopt its own procedure governing the request for oral argument of a motion—whether oral argument is mandatory on all motions or granted on a case-by-case basis and how to request oral argument and when counsel must appear. If the court does not adopt a procedure, as a default rule, a party may request oral argument by letter accompanying the motion papers, and the court shall, if practicable, select a date for arguments at least 14 days in advance. Conveniently for counsel, oral arguments may be conducted by the court virtually.

As always, it is important for counsel to be mindful of the court's individual rules, and whether oral argument must be requested in a manner other than the default described in subdivision (b). Especially in novel or extremely nuanced cases, it would be good practice to have a form letter request for oral argument ready to customize and e-file along with the motion papers.

### Pre-Trial Proceedings

Generally, the new Rules regarding pre-trial proceedings require the parties to work together in good faith to resolve issues and engage in meaningful settlement negotiations pre-trial.

**Uniform Rule 202.26** describes new procedures for settlement and pre-trial conferences.

Subpart (a) Settlement Conference: At the time of certification of the case as

ready for trial, the court may schedule a settlement conference which shall be attended by counsel and the parties, who are expected to be fully prepared to discuss settlement.

Subpart (b) Pre-Trial Conference: The rule requires that counsel confer in good faith prior to trial to resolve disputed questions without court intervention and to further discuss settlement. The court may also direct that parties prepare a written stipulation of undisputed facts prior to the commencement of trial.

Subpart (c) Consultation Regarding Expert Testimony: The court may direct that prior to or during trial, counsel consult in good faith to identify those aspects of their respective experts' anticipated testimony that are not in dispute.

**Uniform Rule 202.20-h** sets forth new requirements for pre-trial memoranda, exhibit books, and requests for jury instructions.

The Rule in subparts (a), (b) and (c), requires that counsel for both sides submit pre-trial memoranda, no longer than 25 pages, at the pre-trial conference. On the first day of trial, counsel shall submit an indexed binder or notebook or the electronic equivalent, of trial exhibits for the court's use. A copy for each attorney on trial and the originals in a similar binder or notebook for the witnesses shall be prepared and submitted. If there is a jury trial, counsel shall, on the first day of the trial, provide the court with case-specific requests to charge and proposed jury interrogatories.

The new Rules seeks to create efficiency in trials which benefits the bench, jurors, litigants and counsel alike.

1. AO 270/20 (Dec. 29, 2020), available at <https://bit.ly/3kz5IYK>.

## COVID Help...

Continued From Page 8

(Spring 2021), introducing 10 new law students. This semester, mentors were selected to address the most pressing set of inquires that have come in, including landlord-tenant and labor and employment related questions.

### Insights from Contributing Mentors

NCBA Member Volunteer Mentors Jaime Ezratty and Mindy Roman, experienced practitioners in Landlord/Tenant law who began mentoring during the first round that took place during Summer 2020, report that working with the mentees is extremely rewarding, especially because landlord/tenant law has evolved and continues to evolve rapidly, responsive to Governor Cuomo's Executive Orders on eviction and foreclosure. "With a bright law student as a resource, I am able to understand current information on the latest developments in time to respond to the covidhelp@nassaubar.org inquiry. I include my law student mentee in consultations with the individual seeking consultative advice, which allows the law student to

gain experience in interviewing and counseling," reports Ezratty.

The law student initiative includes regular check-in sessions via Zoom, which allow the law students to "meet" each other, and which include a featured NCBA Member Volunteer presenter who addresses a COVID-specific practice area. Mentee hours are carefully tracked and both mentors and mentees sign a Memorandum of Understanding that solidifies the commitment.

### A Rewarding Experience

The NCBA is grateful for its Members who have worked so hard to bring this program to life, and to the law students who have joined us in our initiative to help the community during this unprecedented time. One of the greatest parts about being an NCBA Member is the countless volunteer opportunities that it provides. Current NCBA Members are invited to join this initiative, which is an incredibly rewarding way to give back to the community and understand COVID's legal challenges. Particularly, the NCBA is grateful that this initiative has attracted long-standing members who have not previously been involved in

hands-on programs of this nature.

As the program continues to grow, NCBA Members who are interested in the mentor program for next semester can contact NCBA Communications Manager Ann Burkowsky at

aburkowsky@nassaubar.org for more information. The commitment is specifically to mentor law students through collaboratively responding to inquiries submitted via covidhelp@nassaubar.org and via Touro's hotline.

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*"At age 86, I graduated from Brooklyn Law School 64 years ago, and I am still being educated about the law, thanks to the Continuing Legal Education programs of the Nassau County Bar Association. So you see, one is never too old to learn. CLE is FREE because it is included in the annual bar association dues, thereby saving bar association members hundreds of dollars in order to comply with the CLE requirements of the Office of Court Administration. The quality of the presentations is superb, and the topics cover a wide range of practical and substantive legal issues. Currently, especially during the COVID-19 pandemic, the easy connection to the zoom sessions makes it safe and most convenient to get updated on the changing statutes, case law and technology, even from sunny Florida. I hope to continue as a member of the Nassau County Bar Association for the next 120 years."*

—Justice Ira Raab (Ret.)

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## Conferences...

Continued From Page 6

facilitate earlier and more expeditious resolutions of cases. Also important to note is the language in this section that adjournments of conferences do not change dates in court orders unless directed by the court.

### Settlements

**Uniform Rule 202.28** mandates that counsel, regardless of the party represented, immediately inform the court or assigned judge when an action is settled, discontinued, or otherwise disposed of. In addition to a stipulation of discontinuance filed with the clerk, attorneys are now required to also send a stipulation or letter to the clerk of the handling part, along with notice to chambers of the assigned judge via telephone or email. This is a continuing obligation that counsel or self-represented litigants have and must also be done if a case or motion has become wholly or partially moot or if party died or filed for bankruptcy.

**Uniform Rule 202.29** gives counsel the ability to jointly request a separate settlement conference in a case with the assigned judge or a judge not assigned to the case. The request can be made at any time during litigation, is granted in the discretion of the justice or judge and if granted, a “settlement judge” is designated. This is a great means to resolve matters and to confer with different judges such as in a case where a bench trial is on the horizon and the parties do not want to reveal their entire case to the assigned justice.

### Discovery

**Uniform Rule 202.20** limits interrogatories, even in consolidated actions, to 25 including subparts. Interrogatories are common in matrimonial actions but rare in

personal injury actions, where parties cannot compel deposition of a party after serving interrogatories on that party.<sup>5</sup> But nothing prevents counsel from agreeing to a limited interrogatory—say, on some discovery matter—and a subsequent deposition on unrelated matters.

**Uniform Rule 202.11** simply directs parties to the guidelines on discovery of electronically stored information (ESI) in Appendix A to Part 202. Article V of that Appendix, which addresses the defraying of costs for discovery from nonparties, used to enumerate such expenses but now simply authorizes “reasonable production expenses.” The change suggests that what once were obviously reasonable expenses may no longer be so, given advances in technology.

**Uniform Rule 202.20-e** requires strict compliance with discovery deadlines, and particularly provides that if a party has failed to produce demanded documents that are necessary for that party’s deposition, then the party seeking disclosure may ask the court to preclude those documents from trial. To keep on schedule, however, plaintiffs might want to start producing not just authorizations but records as well

### Depositions

**Uniform Rule 202.20-b** limits the total number of depositions that can be taken in a case to 10 and the duration to 7 hours per deponent unless there is a stipulation of the parties or order of a judge agreeing or ordering otherwise. But the rule contains a lot of nuances and requires an attorney to strategize on what depositions are necessary. For example, the deposition of an entity through one or more representatives shall be treated as one deposition. However, each deposition of a fact witness produced on behalf of an entity

as opposed to an entity representative shall constitute a separate deposition. The court may alter the number and duration of depositions but good cause must be shown. This Rule reminds all that a party has right to seek any relief that it deems appropriate but its requirements once again call for attorneys to plan out their cases early on, move the depositions along and work towards resolution.

**Uniform Rule 202.20-d** addresses subpoenas and states that a notice of subpoena may name as a deponent a corporation, estate, trust, partnership, LLC, association, joint venture, public corporation, government, governmental subdivision, agency or instrumentality or any other legal or commercial entity. Attorneys have the option to enumerate matters upon which a person is to be examined but it must be detailed. If a notice of subpoena does not specify a name but does set forth the matters to be examined, then no later than 10 days before the deposition, the named party must designate one or more individuals to testify. The designation must include the identity and description or title of person and if more than one person is designated, then the designation must set out what topics each will testify on. If the notice does specify a specific name, the named entity shall produce the individual designated unless it notifies the requesting party no later than 10 days before the deposition that another individual will testify, along with the identity, description or title of the specific person. The subpoena must also advise a non-party entity of its duty to make designations as set out in rule. This Rule does require a careful read and an attorney once again is forced to plan ahead to decide what strategy best suits their goal.

### Discovery Objections and Privilege Logs

**Uniform Rule 202.20-a** encourages a categorical approach to privilege logs, rather than the document-by-document log required by CPLR 3122. The categorical approach, common in commercial litigation, is laid out quite well in a paper by the New York City Bar Association.<sup>6</sup> While CPLR 3122 still governs, the new rule encourages parties to agree on a categorical approach to save time and labor when the volume of discovery warrants, and whichever procedure the parties adopt for handling privilege issues, their plan must be set forth in detail and ratified in a court order.

**Uniform Rule 202.20-c** forces parties to actually respond to discovery demands rather than merely objecting. Most notably, each response must actually state either that it is complete; that the responder possesses no responsive documents; or just what part

of the demand is objected to, what is being withheld accordingly, and why. This rule appears to do away with the boilerplate objection to demands. The objection now is meant to form a discussion between counsel and hopefully, to reach a consensus without the court’s involvement.

### Discovery Disputes

**Uniform Rule 202.20-f** not only encourages parties to resolve discovery disputes without a motion, but makes it much more difficult to resort to motion practice. Counsel must confer in person or by phone in an attempt to resolve such disputes, and in motion papers must affirm the details of such conference, down to the date, time, and duration. This effectively ends the perfunctory and pretextual “good faith letter” that used to precede such motions.

**Uniform Rule 202.20-g** encourages the clear memorialization of discovery conference decisions handled by non-judicial personnel. Any party may request that: the decisions be either dictated into the transcript to be so-ordered; the parties reduce the resolution to writing then and there for court approval; or the parties outline the resolution and submit a proposed order within 24 hours. This is not mandatory, but clearly encourages clarity in discovery resolutions to avoid delays down the road. With the ubiquity of personal computer and devices, there seems little reason why counsel cannot type up the results of these conferences as they proceed.

### Conclusion

The theme that runs through these amendments is that counsel should confer and cooperate, early and often, to conclude discovery efficiently. Indeed, however we want a case to resolve, each side has an interest in reaching resolution without protracted disputes over ancillary matters. Too often, however, counsel are reluctant to resolve with a phone call what they can put off with a letter or motion. While those old habits may have less impact in most civil cases than they do in complex commercial litigations, they still make cases longer and more expensive to resolve. These new rules call us to change our attitudes, and to view opposing counsel as partners in concluding discovery, so that we can engage on the ultimate issues in each case.

1. 22 NYCRR § Part 202.

2. New York State Unified Court System, *History, Commercial Division - NY Supreme Court*, available at <https://bit.ly/3q2Obt0>.

3. Request for Public Comment on the Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction (Oct. 15, 2018), available at <https://bit.ly/2O7YL14>.

4. AO 270/20 (Dec. 29, 2020), available at <https://bit.ly/3kz5IYK>.

5. CPLR 3130(1).

6. NYCBA Committee on State Courts of Superior Jurisdiction, *Guidance and a Model for Categorical Privilege Logs*, available at <https://bit.ly/3b21GEX>.

## COMMITTEE REPORTS

### Elder Law, Social Services & Health Advocacy

Co-Chairs: Katie A. Barbieri, Patricia A. Craig

This committee addresses legal issues related to health, mental hygiene, and social services for the public and special population groups, including the poor, the aged and the disabled.

On February 5, 2021, a committee meeting was held by videoconference and topics discussed included the case of *In re Dousmanis* (a 2021 decision of the Appellate Division, Second Department, regarding use of assets to satisfy a Medicaid lien), how a child support obligation affects an AIP’s budget, the look-back implementation on Community Medicaid, and the use of mediation in guardianship proceedings.

On February 24, 2021, the committee



Michael J. Langer

meeting was held by video-conference and featured guest speaker, Ellen Makofsky, Chair of the NYSBA Task Force on Powers of Attorney, who presented a lecture regarding the new Power of Attorney statute and practice tips and was joined by now-retired Nassau County Supreme Court Justice Arthur Diamond, who provided updates on the guardianship program. This presentation is available on the NCBA website, at the “CLE on Demand” page. CLE credit is available.

The Committee Reports column is compiled by Michael J. Langer, a partner in the Law Offices of Michael J. Langer, P.C. Langer is a former law clerk in the United States Court of Appeals for the Second Circuit, and a former Deputy County Attorney in the Office of the Nassau County Attorney. Langer’s practice focuses on matrimonial and family law, estate and commercial litigation, and criminal defense.



**Hearst...**

Continued From Page 11

The SLA hideout was burned to the ground with De Freeze and six others being killed.<sup>16</sup> Patty/Tanya was elsewhere when the shootout took place. She would be on the lam for a year-and-a-half, the subject of a nationwide manhunt. Wanted by the FBI, she became the nation's best-known fugitive.

The saga ended on September 18, 1975 with her arrest in San Francisco.<sup>17</sup> With a flair for the dramatic, Patty/Tanya stated "*Urban Guerrilla*" as her occupation when she was booked.<sup>18</sup> Among her many alleged crimes was another bank robbery where a pregnant woman was killed.<sup>19</sup> As the driver of the get-away car, Patty could have been indicted for felony murder.

**Terrorist or Brainwashed Victim?**

Not long after, it must have dawned on Patty that her revolutionary joy ride was over. Facing serious consequences, it is almost certain that she realized that she would be better off as a Hearst than as Tanya. She recanted her past affiliation with and affinity for the SLA.

It was asserted that she had been "brainwashed," hence not responsible for her actions. It would be an extraordinary defense. After all, Patty was not insane nor had she experienced, despite claims of both her weight and IQ dropping, any diminished capacity.<sup>20</sup> Patty had previously and explicitly rejected the notion of being brainwashed. In one of her audio recordings she declared: "*Greetings to the people, this is Tanya...As for being brainwashed, the idea is ridiculous beyond belief. I am a soldier in the People's Army.*"<sup>21</sup>

The term "brainwashing" refers to the use of psychological techniques to coercively control individuals involuntarily altering their actions and beliefs. The concept gained wide-currency during the Korean War as a rationale for explaining why American POWs held by the Communists had collaborated with the enemy.

Concurrent with brainwashing is the Stockholm syndrome. This is where hostages come to identify completely with their abductors. The name is derived from a 1973 Swedish bank robbery where the victims so identified with their assailants, that they refused to testify against them at trial.<sup>22</sup>

All manner of experts were engaged by the prosecution, the defense and the court to explain what in fact led Patty to act the way she did. Although she was convicted in a court of law, no satisfactory answer to this question was ever arrived at in the court of public opinion.

One person who did believe Patty was acting involuntarily was F. Lee Bailey. Bailey, at the time, was the most recognizable criminal defense attorney in the United States. Among his clients were Dr. Sam Sheppard, the Boston

Strangler, and later O.J. Simpson. He argued "coercion," that Patty was under such duress that she was coerced when committing her alleged crimes.<sup>23</sup>

It should be noted that Patty was charged only with the Hibernia Bank robbery. She stood trial in January 1976 in the Northern District of California with Judge Oliver Jesse Carter presiding.<sup>24</sup> The prosecution argued that she was a willing participant with the SLA, barely acknowledging the initial kidnapping.

Patty testified that she was under constant threat and was sexually abused. Yet her testimony on the stand would prove unconvincing. She made for a poor witness and she asserted her Fifth Amendment privilege forty-two times when cross-examined about her actions subsequent to the Hibernia Bank robbery.<sup>25</sup>

Patty claimed she had been raped. Yet one of her former compatriots asserted she was involved in a "consensual relationship" with a fellow SLA member.<sup>26</sup> He had given her a charm as a keepsake. The prosecution then presented the item in court. The jury would ultimately see Patty's having kept the charm as an indication that she was not being truthful.<sup>27</sup>

**A Verdict, But Not the Final Word**

Patty's trial took eight weeks resulting in a guilty verdict for armed robbery. Judge Carter originally sentenced Patty to thirty-five years in prison.<sup>28</sup> In another strange twist, Judge Carter died after successive heart attacks.<sup>29</sup> Judge William Orrick reduced her sentence to seven years.<sup>30</sup>

Yet, in one sense, it could be argued that the defense was successful in that Patty never faced felony murder charges. She served about two years in

prison having her time commuted by President Carter in 1979.<sup>31</sup> She was later pardoned by President Clinton on his final day in office in 2001.<sup>32</sup>

Patty's trial concerned more than just a wayward heiress whose aberrational behavior was later smoothed over by her family's wealth and connections. Clearly once she was in the docket, the inherent privilege of being a Hearst worked decisively in her favor.

Whether she became radicalized or was brainwashed, from February 1974 to September 1975 Patty became the ultimate exemplar of the generational strife that characterized the 1960's and 1970's. She did more than just tune in, turn on and drop out. She actually took up the gun against all that her parents represented.

In doing so, she became a potent symbol for the times. One can also find in her story harbingers of the various currents that still vex American society. Although less spectacular and surely less publicized, there are countless young people today who find themselves adrift, alienated, unfulfilled, not unlike Patty Hearst.

The unrest that ripples across much of contemporary American society may be seen as a manifestation of the discontentment and the dislocations that Patty/Tanya once symbolized. If so, the Patty Hearst case still echoes a half-a-century later, and all Americans should take heed.

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## Consumer Protections...

Continued From Page 9

### Defenses and Exclusions

GBL § 527-A(7) provides businesses a safe harbor from liability under the statute if a business shows, by a preponderance of the evidence, that the violation was not intentional and resulted from a bona fide error made notwithstanding the maintenance of procedures reasonably adopted to avoid such error. Thus is it imperative that businesses establish procedures to ensure their automatic renewal offer disclosures are clear and conspicuous and keep contemporaneous records documenting that those procedures were followed.

GBL § 527-A(8) exempts from its provisions entities regulated by the NYS Department of Financial Services, security system alarm operators, banks and credit unions, and entities doing business pursuant to a franchise issued by a political subdivision of the State.

Highly notable is that GBL § 527(4) defines “consumer” as being any individual who seeks or acquires, by purchase or lease, any goods, services, money, or credit for *personal, family, or household purposes.*” (italics added). Thus the law does not apply to purchases made for business use, in direct contrast to GOB § 5-903, which defines “person” as “an individual, firm, company, partnership or corporation.”<sup>2</sup>

### “Clear and Conspicuous” Standards

The statute defines “clear and conspicuous” as being “in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to the language.” In the case of an audio disclosure, “clear and conspicuous” mean “in a volume and cadence sufficient to be readily audible and understandable.” The definition notably contains no standards regarding a minimum font size.

Due to the necessarily subjective nature of evaluating whether the mandatory disclosure in an automatically renewing or continuous service agreement is sufficiently clear and conspicuous, this issue appears to be one likely to be the subject of litigation notwithstanding even the best efforts of businesses to comply with the law. Businesses and attorneys seeking guidance may want to refer to the federal Restore Online Shoppers’ Confidence Act (ROSCA)<sup>3</sup> and California’s auto-

renewal law,<sup>4</sup> and to related case law. Article 29-BB is very similar to California’s law.

For example, ROSCA requires consumers making internet-based sales to perform an additional affirmative action, such as clicking on a confirmation button or checking a box, that indicates the consumer’s consent to be charged the amount disclosed.<sup>5</sup> It might be prudent for a business to design its website to prevent a consumer from confirming their consent to be charged unless they have first clicked on a link to the terms and conditions.

The issue becomes more complicated inasmuch as consumers often enter into agreements using their smart phones which have screens that are likely too small to display all of the terms and conditions at one time. As the U.S. Supreme Court has observed:

“[M]odern cell phones...are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.”<sup>6</sup> The small screen likely requires the user to scroll through the terms, pinch and manipulate their fingers to zoom in and out, navigate between multiple windows, click on a hyperlink or take some other actions in order to view the terms and conditions in their entirety.

The U.S. Second Circuit Court of Appeals analyzed whether under California law the design of the screen and language used in a web-based agreement provided the consumer with reasonable notice of a compulsory arbitration agreement contained in the agreement in *Meyer v Uber Tech., Inc.*<sup>7</sup> The court applied “a reasonably prudent smartphone user” standard, stating that “the inquiry on notice turns on the clarity and conspicuousness of arbitration terms; in the context of web-based contracts...clarity and conspicuousness are a function of the design and content of the relevant interface.”<sup>8</sup> The design and layout of the website were held to have provided adequate notice, and the use of a hyperlink to provide the consumer with access to the terms and conditions was found proper. This decision is well worth reading for its discussion of the factors the court considered in evaluating the defendant’s web-based agreement.

In contrast, in *Starke v SquareTrade, Inc.*,<sup>9</sup> the Second Circuit held that a mandatory arbitration clause was unenforceable. The decision discusses several factors that militated against enforcing the agreement, including that the website did not adequately direct the user to the

hyperlink to the terms and conditions and that the layout and design of the screen was cluttered and unclear.

Other examples of web-based agreements that have been held enforceable or unenforceable and the legal analysis therefor can be found in case law analyzing clickwrap agreements, which are agreements that require users to click an “I agree” box to indicate their affirmative assent to the terms of the agreement.<sup>10</sup>

Additional guidance on whether a disclosure is clear and conspicuous comes from the Federal Trade Commission, which ROSCA authorizes (together with State attorney generals) to enforce the federal statute. The FTC uses the mnemonic it dubs “The 4Ps”: prominence, presentation, placement and proximity.<sup>11</sup> According to the FTC, clear and conspicuous is a performance standard not a font size, and no one knows better than advertisers how to convey information clearly and conspicuously.

### Enforcement

Article 29-BB gives enforcement of its provisions to the Attorney General. Remedies provided include obtaining an injunction and imposing a civil penalty of not more than \$100 for a single violation and not more than \$500 for multiple violations resulting from a single act or incident. A knowing violation raises the maximum penalties to \$500 and \$1,000 respectively.

The new law does not establish a private right of action to its enforcement. However, an unlawful practice as defined in the statute could serve as a predicate deceptive act or practice to establish liability under GBL § 349, which does provide a private right of action.<sup>12</sup> Courts have discretion to increase the award of damage to up to three times the actual damages up to \$1,000, and, giving GBL § 349 some teeth, may also award reasonable attorney’s fees to a prevailing plaintiff.

1. GBL Art. 29-BB, §§ 527, 527-A.
2. GOB § 5-903(1).
3. 15 USC §§ 8401-8402.
4. Cal. Bus & Prof. Code § 17600 *et seq.*
5. 15 USC § 8402(a)(2)(B).
6. 868 F.3d at 77 (quoting *Riley v California*, 573 U.S. 373 (2014)).
7. 868 F.3d 66 (2d Cir 2017).
8. 868 F.3d at 75.
9. 913 F.3d 279 (2d Cir 2019).
10. *See, e.g., Hidalgo v. Amateur Athletic Union of United States, Inc.*, 468 F.Supp.3d 646 (S.D.N.Y. 2020); *Valelly v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 464 F.Supp.3d 634 (S.D.N.Y. 2020).
11. Lesley Fair, *Full Disclosure*, Federal Trade Commission (Sept. 23, 2014) available at <https://bit.ly/3tdsyZ3>.
12. GBL § 349(h).

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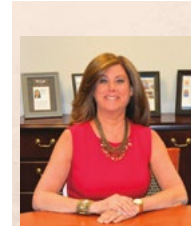
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