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OF NOTE

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UPCOMING PUBLICATIONS

COMMITTEE MEETINGS

Thursday, December 2, 2021, at 12:45 PM

Photo by: Hector Herrera

WE CARE's Hole in One

By: Bridget Ryan

After over a year of having to delay and reschedule programming due to the COVID-19 pandemic, the WE CARE Fund was finally able to host the **25th Annual Golf and Tennis Classic** on September 20, 2021. The Classic is WE CARE's largest and most successful fundraiser, raising hundreds of thousands of dollars each year, and this year was no exception, raising nearly $300,000.

As is tradition, the Classic was held at two separate golf clubs—The Muttontown Club and Brookville Country Club. There was something for everyone at the Classic, whether it was golfing, tennis, yoga, or swimming. The day didn't include only activities, but numerous amenities for all attendees, including a Blue Point Brewery station, breakfast, lunch, and dinner buffets overflowing with delicious food, and a standout raffle room, filled with over 30 baskets attendees could purchase tickets for and enter to win. Because of COVID, the dinner this year was held outside under a heated tent to accommodate over 400 guests, and it was truly a beautiful night to be outside.

During the dinner, attendees heard from WE CARE Classic Co-Chairs Jeffrey Catterson and Joseph Lo Piccolo, WE CARE Co-Chair Deanne Caputo, NCBA Past President and past WE CARE Co-Chair Christopher McGrath, and five of this year's honorees. Howard Fensterman and Elena Karabatos were honored, along with Barbara Gervase and Martha Haesloop, who received the Stephen Gassman Award, and Stephen W. Schlissel, who received the Lifetime Recognition Award.

Money from WE CARE fundraisers—the Classic included—is disbursed through charitable grants to organizations throughout Nassau County that help those most in need. Many of these organizations provide necessities including shelter, food, and clothing—all things that many take for granted, but families less fortunate are desperately in need of. In total, WE CARE has raised over $4 million to help those in need and continues to do so.

To learn more about the WE CARE Fund, make a donation, learn how you can help, and see a video highlighting some of WE CARE's recent grant recipients, please visit our website, www.thewecarefund.com.

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FOCUS:
TRANSGENDER DAY OF REMEMBRANCE

In Observance of Transgender Day of Remembrance

Charlie Arrowood

Each year on November 20th, the transgender community and allies observe Transgender Day of Remembrance (TDOR) to acknowledge and reflect on the epidemic of violence against the transgender community, particularly transgender women of color.

Importance of TDOR

As of October 2021, at least 37 transgender people have been murdered in the United States this year—already more than the total number of transgender people murdered in all of 2020.[1] Because transgender people are often misgendered in death, just as they are in life, that number is likely very low. Many victims die at the hands of a romantic partner who is fearful of their community learning they have a transgender partner. Others are murdered because, due to employment and housing discrimination, they are forced to engage in unregulated underground economies like sex work that put them in unsafe situations with little protection.

For many transgender people, who arguably need their desires memorialized in writing more than most, estate planning documents are simply not on the table for financial and other reasons. Even in life, transgender people are not always able to obtain accurate identity documents. Thus, unless someone is able to advocate on the deceased's behalf, family and media are able to speak about them in a way other than they would like to be spoken about. TDOR is an opportunity for a person's community to honor them in the way they would have liked to be remembered.

History Of TDOR

TDOR began in 1999 in response to the murder of Rita Hester in Massachusetts,[2] but soon became a day for transgender people and their allies everywhere to recognize and honor all transgender people, known and unknown, who were murdered the past year. TDOR is now observed all over the world, including here on Long Island, where veteran and advocate (and veteran advocate) Barbara Salva has organized meaningful and impactful programs for years.

Generally, communities observing TDOR hold a memorial program where the names of those killed are read and several speakers share their stories, whether they be about transition, violence, or any other aspect of living as a transgender person. Not only do the ceremonies remember those killed, but they also educate cisgender people (people who are not transgender) about the risks and realities of living as a trans person. According to the Human Rights Campaign (HRC), there are currently more than 2,000,000 transgender persons living in the United States today and three out of every ten adults in the United States today personally knows someone who is transgender.[3] This number is steadily increasing as more people come out as transgender; with the increased availability of resources and community, more people are putting words to the way they feel and sharing that part of themselves with those around them.

Hope For the Future

This TDOR, while we remember those we have lost in the name of hate and intolerance, we also recognize all of the impressive transgender individuals who continue to be trailblazers in the community. In the 2020 general election, six transgender candidates were elected to state office.[4] On the Federal level, President Biden nominated Doctor Rachel Levine to be the Assistant Secretary for Health in the Department of Health and Human Services. Dr. Levine is the first openly transgender official to be confirmed by the Senate, who voted her into office in March 2021.[5] Dr. Levine has brought LGBTQIA+ issues, specifically transgender issues, to the forefront and continues to fight for transgender rights from a position of influence. Several members of Congress, including Congresswoman Marie Newman and Congresswoman Pramila Jayapal, have been vocal about having transgender children,[6] which means those voices are able to speak up when they see harm being done through policymaking.

In New York, we have made strides towards equity in the past few years. This year, the legislature repealed the Walking While Trans Ban, an antiquated law that allowed police to stop transgender women on suspicion of prostitution for simply existing in public while looking transgender—a charge that was aggravated by possession of a condom (in the midst of a state and national policy push to end the HIV epidemic). The legislature also passed the Gender Recognition Act, which removes several administrative and logistical barriers to updating your identity documents, thereby facilitating access to everyday life. Both of these efforts—and many before—were spearheaded by transgender community members who were able to get a seat at the table.

There are now transgender lawmakers and cisgender allies "in the halls of power" who are listening to what advocates and community members have to say and amplifying our voices. Even though more progress is made every day, transgender Americans continue to encounter a hodgepodge of legal protections, poverty, stigma, violence, lack of healthcare coverage, and discrimination. Protections often vary state by state, so we are left with a patchwork that makes some places far more dangerous or risky to live in than others. There is much more to be done, but the work being done at both the state and federal level is necessary and valuable, and will hopefully one day lead to a safer and kinder world for us all.

In Memoriam

Below are the names of (known) transgender people who were murdered during 2021:[7]

Tyianna Alexander; Samuel Edmund Damián Valentín; Bianca "Muffin" Bankz; Dominique Jackson; Fifty Bandz; Alexus Braxton; Chyna Carrillo; Jeffrey "JJ" Bright; Jasmine Cannady; Jenna Franks; Diamond Kyree Sanders; Rayanna Pardo; Jaida Peterson; Dominique Luscious; Remy Fennell; Tiara Banks; Natalia Smut; Iris Santos; Tiffany Thomas; Keri Washington; Jahaira DeAlto; Whispering Wind Bear Spirit; Sophie Vásquez; Danika "Danny" Henson; Serenity Hollis; Oliver "Ollie" Taylor; Thomas Hardin Poe Black; EJ Boykin; Aidelen Evans; Taya Ashton; Shai Vanderpump; Tierramarie Lewis; Miss CoCo; Pooh Johnson; Disaya Monaee; Briana Hamilton; Mel Groves; Royal Poetical Starz.

1. Human Rights Campaign, Fatal Violence Against the Transgender and Gender Non-Conforming

See REMEMBRANCE, Page 22

Charlie Arrowood (they/them) is an attorney licensed in New York state. They primarily provide transition-related legal services to transgender clients, including name and gender marker change assistance and guidance regarding health insurance coverage and employment matters.

In addition to their private practice, Charlie is Name Change Project Counsel at the Transgender Legal Defense & Education Fund (TLDEF), where they manage the Name Change Project's advocacy efforts, develop materials, and provide technical assistance to TLDEF's pro bono partners.

Charlie is a Commissioner on the Richard C. Failla LGBTQ Commission of the New York State Courts, the Chair of the LGBTQ Committee of the Nassau County Bar Association, and a board member at Gender Equality NY. Charlie is also the recipient of the LGBT Bar Association of New York's 2021 Community Excellence Award and was named one of the National LGBT Bar Association's 2021 Top 40 Lawyers Under 40. They are a parent of two and graduate of Tulane University (B.A. History, 2009) and New York Law School (2013).

Charlie Arrowood thanks Elizabeth Vaz—Founder of the Long Island Collaborative Divorce Professionals, and Moxxie Network East End Director (www.VazLaw.com)—for her contributions to this article.

Giving Back to The Community We Live in Without Taking Away from Your Practice

FROM THE PRESIDENT

Gregory S. Lisi

I am often asked, "What can I do to help without taking on a full pro bono case?" One of the most important aspects of the Nassau County Bar Association is our outreach to the people of Nassau County. Much of our volunteer/pro bono work consists of just getting information out to the people of this great county. Some of the exciting programs include:

1. Access to Justice Open House: I do this every year. I get such a warm feeling from the people we help, and it takes so little time. This year, the Access to Justice Open House took place on October 28th from 3:00 PM to 7:00 PM. The Access to Justice Open House allows any member of the general public to speak to an attorney for 15 to 30 minutes who has knowledge in the field they require assistance in, with no charge. Normally this happens at Domus, and the members of the public sit with the volunteer attorney and speak privately. This year, however, we will be having the members of the general public speak to the attorney via telephone or Zoom. Sometimes, all the person needs is a 15-minute consultation. In other situations, the attorney will refer the person to the appropriate agency which can be the Nassau County Bar Association Lawyer Referral Service, the Safe Center LI, the New York State Division of Human Rights, etc. It is a wonderful experience. A few hours a year can help the people of Nassau County and make the attorney feel remarkable.

2. Mortgage Foreclosure Clinics: In 2008, the NCBA became the first bar association in New York State to address the mortgage foreclosure crisis. Volunteer attorneys provide one-on-one consultations at free monthly clinics to any Nassau County homeowner who is facing foreclosure. Clinics are 3:00 PM to 6:00 PM at Domus. Contact Gale D. Berg at the NCBA (516) 747-4070 ext. 1202 or gberg@nassaubar.org for more information.

3. Superstorm Sandy Recovery Clinics: Victims of Superstorm Sandy attend clinics with issues regarding mortgage foreclosure, claims, landlord/tenant, debt referral, consumer protection and bankruptcy. (Pro bono legal consultation only; no legal services are performed.) Contact Gale D. Berg at (516) 747-4070 ext. 1202 or gberg@nassaubar.org for more information.

4. NCBA Community Relations and Public Education Committee: The Committee provides a series of volunteer programs designed to help members of the General Public. Ira Slavit, Chair and Ingrid Villagran and Melissa Danowski, Vice-Chairs; have set up a series of programs. For example:

- **Hate Crime Victims Program—November 18, 2021 (5:30-7:30PM)** — (part of the "Know Your Rights Series" being presented with the Diversity and Inclusion Committee) Program Chair: Ingrid Villagran
- **Landlord and Tenant's Rights and the end of the eviction moratorium — Program rescheduled to January 25, 2022 (5:30-7:30PM)** (part of the "Know Your Rights" series co-sponsored by CRPE and the Diversity and Inclusion Committee). Program Chairs: Ingrid Villagran and Marcus Monteiro
- **Protecting Yourself from Scams in The Time of COVID—February 15, 2022 (5:30-7:30PM)** Program Chairs: Moriah Adamo & Gale Berg
- **Housing Discriminatory Practices—March 10, 2022** (2–3-hour evening program) Joint CLE/Program with the Real Property Committee (part of the "Know Your Rights" series). The program will have three components: (1) prior discriminatory practice; (2) how to avoid such practice; and (3) penalties and your rights if you are a victim of such a practice. Program Chairs: Michael Markowitz and Charlene J. Thompson
- **Animal Law Committee Community Education Program—April 5, 2022 (5:30-7:30PM)** Program Chairs: Kristi L. DiPaolo and Florence Fass
- **Social Security Disability Law—May 12, 2022 (5:30-7:30PM)**– This program will be a joint program with the Workers Compensation Law Committee.

5. COVID-19 Task Force: The NCBA COVID-19 Task Force connects Nassau County residents and small businesses to skilled NCBA attorney members who will provide them with assistance and guidance related to the pandemic. Contact Task Force Chair Martha Krisel at kriselmartha@gmail.com for more information.

6. Speakers Bureau: Love to talk about the law? We have an audience for you! Members love to participate in our Speakers Bureau, the most important component of our public education program, which brings an understanding of the law to local citizens. Our attorney speakers go into the community, addressing students, business groups, and organizations of every description to educate the public by disseminating accurate information regarding local, state, and federal law and legal issues.

I have spoken through this program many times—at churches, hospitals, businesses, and libraries. It helps the public and gets your name and face out there. Furthermore, it does not take much time to prepare at all, as you will be speaking about your area of law. Contact Jennifer Groh at the NCBA (516) 747-4070 ext. 1209 or jgroh@nassaubar.org for more information.

7. High School, and Law School, Mock and Moot Court Trial Tournaments: Encourage and motivate students to consider a career in the legal profession by serving as a team coach or trial judge as teams argue a case in a real courtroom during the annual Mock Trial competition. Some of these kids are rising stars—you will be impressed! For many years, I have participated as both a coach, and later a judge, and love it.

Many of these talented students go on to attend law school, and while there, they take part in the Academy's Moot Court Competition, named in honor of Hon. Elaine Jackson Stack. Every March, local law schools enter teams to compete to Moot Court glory. Interested in serving as a brief scorer? Contact Jennifer Groh at (516) 747-4070 ext. 1209 or jgroh@nassaubar.org for more information.

8. Student Mentors: A labor of love for our wonderful member Alan Hodish, student mentors provide valuable adult guidance and serve as a role model for at-risk middle school students in one-on-one sessions at a local middle school all around Nassau. The commitment is twice a month for less than an hour, but the rewards you receive are incalculable. Mentors are always in demand. Contact Stephanie Pagano at the NCBA (516) 747-4070 or spagano@nassaubar.org for more information.

These suggestions do not take much time and the benefits to you, and the people of Nassau County, are immeasurable. There is so much more to do at the Nassau County Bar Association. Come on down and learn how we can help you, and how you can help the people of Nassau County.

I know this is a difficult time for us all. Some of us are happy just to get out of the house. Others are still concerned about what is out there. None of us are without fears as to what is coming next. You do not have to let these anxieties dictate your life. You do not need to deal with these fears alone. The NCBA, though the Lawyer Assistance Program, is here, and equipped to help.

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FOCUS:
VETERAN'S AND MILITARY LAW

Protecting Those That Protect and Serve the Country: Issues Concerning the Employment of Veterans

Cynthia A. Augello and Joel Thomas

The global pandemic afflicting the world since March of 2020 has wreaked havoc on unemployment numbers, not least of which concerns the unemployment rates of veterans. While unemployment amongst the veteran community has been a reoccurring issue for decades, data emerging in recent months saw a significant uptick during the height of the pandemic. In March of 2021, the Bureau of Labor Statistics ("BOL") reported a notable increase in the levels of unemployment reportedly facing veterans returning to civilian life.

In particular, the unemployment rate for veterans rose to 6.3 percent in 2020 because of the global pandemic.[1] The BOL noted that there were 581,000 unemployed veterans in 2020.[2] Data from the BOL indicates that of those 581,000, 54 percent of unemployed veterans, in 2020 were between the ages of 25 and 54.[3] It should be noted that unemployment rates for disabled veterans did not materially change throughout the pandemic, and the rates of unemployment amongst that segment of the veteran community are not a reflection of the general trend of increase during the height of the pandemic.

Improvements in Unemployment

In September of 2021, the BOL reported that the overall veteran unemployment rate had dropped to 3.8 percent by August.[4] This was in comparison to the overall unemployment for the non-veteran population, which the BOL reported as being 5.2 percent in the same reporting period. These metrics were clearly indicative of a trend towards pre-pandemic rates of unemployment amongst the veteran population, as the rate of unemployment at the end of 2019 and early months of 2020 reflect percentages ranging between 2 and 4 percent unemployment.[5] Data indicates that the effects of the pandemic have begun to wane as it concerns rate of unemployment amongst veterans.[6]

Federal Laws Protecting the Employment of Veterans

The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") prohibits employment discrimination against a person on the basis of past military service, current military obligations, or intent to serve.[7] An employer must not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment to a person on the basis of a past, present, or future service obligation.[8] In addition, an employer must not retaliate against a person because of an action taken to enforce or exercise any USERRA right or for assisting in an USERRA investigation.[9]

A pre-service employer must reemploy servicemembers returning from a period of service in the uniformed services if those servicemembers meet five criteria:

- The person must have been absent from a civilian job on account of service in the uniformed services;
- The person must have given advance notice to the employer that he or she was leaving the job for service in the uniformed services, unless such notice was precluded by military necessity or otherwise impossible or unreasonable;
- The cumulative period of military service with that employer must not have exceeded five years;
- The person must not have been released from service under dishonorable or other punitive conditions; and
- The person must have reported back to the civilian job in a timely manner or have submitted a timely application for re-employment, unless timely reporting back or application was impossible or unreasonable.[10]

Additionally, if an individual leaves employment to perform military service, the service member has the right to elect to continue their existing employer-based health plan coverage for themselves and their dependents for up to twenty-four months while in the military.[11] Even if the employee does not elect to continue coverage during military service, they have the right to be reinstated in the employer's health plan when they are reemployed, generally without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for service-connected illnesses or injuries.[12]

Protection Under Disability Laws

Under USERRA, employers must make "reasonable efforts" to help a veteran who is returning to employment to become qualified to perform the duties of the position he or she would have held but for military service whether or not the veteran has a service-connected disability. If the veteran has a disability incurred in, or aggravated during, his or her service, the employer must make reasonable efforts to accommodate the disability and return the veteran to the position in which he or she would have been employed if the veteran had not performed military service.

If the veteran is not qualified for that position due to a disability, USERRA requires the employer to make reasonable efforts to help qualify the veteran for a job of equivalent seniority, status, and pay, the duties of which the person is qualified to perform or could become qualified to perform. This could include providing training or retraining for the position at no cost to the veteran.[13] USERRA applies to all veterans, not just those with service-connected disabilities, and to all employers regardless of size.[14] USERRA is enforced by the U.S. Department of Labor (DOL) and the U.S. Department of Justice (DOJ).

In addition to USERRA, the Americans with Disabilities Act ("ADA") also protects veterans from employment discrimination. Title I of the ADA, which is enforced by the U.S. Equal Employment Opportunity Commission (EEOC), prohibits private, state, and local government employers with 15 or more employees from discriminating against individuals on the basis of disability. Any veteran with a disability who meets the ADA's definition is covered, regardless of whether the veteran's disability is service connected.

Employers must be aware of appropriate and inappropriate questions to ask during an interview of a disabled veteran. Specifically, an employer should not ask about how the veteran sustained disabilities even when such disability is obvious. However, where it seems likely that the veteran will need a reasonable accommodation to do the job, an employer may ask if an accommodation is needed and, if so, what type.

In addition, an employer may ask a prospective employee to describe or demonstrate how they would perform the job with or without an accommodation. For example, if the job requires that the employee lift objects weighing up to 30 pounds, the employer can ask whether the individual will need assistance or ask them to demonstrate how they will perform this task. Similarly, if a prospective employee voluntarily reveals that they have an injury or illness and an employer reasonably believes that an accommodation s necessary, it may ask what accommodation the individual needs to do the job.[15]

Moreover, an application may request a prospective employee to indicate whether they are a "disabled veteran" if, and only if, the information is being requested for affirmative action purposes.[16] Where an employer invites prospective employees

See VETERANS, Page 22

Cynthia A. Augello, Esq. represents companies of all sizes in labor and employment matters. She is also the Vice-Chair of the Publications Committee of the Nassau County Bar Association.

Joel Thomas is a graduate of the Maurice Deane School of Law at Hofstra University.

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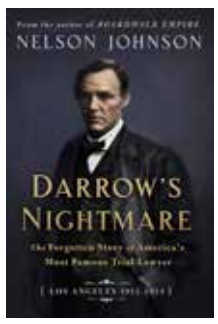
FOCUS: BOOK REVIEW

Darrow's Nightmare



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Also available as audio-book

A Book Review by Andrea M. DiGregorio

"Darrow was a larger-than-life figure who filled the courtroom, like a fictional character come to life in an exciting, page-turning novel."[1]

--Nelson Johnson, Author of *Darrow's Nightmare*

Clarence Darrow is considered by many legal historians to be one of America's finest trial attorneys, and has left a legacy of near-mythological proportion. Numerous books have been written about him.[2] Several plays have featured his character, including, and perhaps most famously, *Inherit the Wind*, a dramatization of the 1925 Scopes "Monkey" Trial, in which Mr. Darrow defended John Scopes against criminal charges for teaching Charles Darwin's theory of evolution in a Tennessee public school.[3] Clarence Darrow has been referenced in over 300 reported decisions nation-wide, including twelve United States Supreme Court cases; Justice Stevens appears to have been a particular fan.[4] As perhaps befitting someone who often espoused causes that were unpopular with the majority and who had the fortitude to "swim against the stream of popular opinion,"[5] Darrow is often invoked in dissenting and concurring opinions in those Supreme Court decisions. New York courts too have invoked the name of Clarence Darrow, most often in the context of discussing whether an attorney has provided effective representation, and assuring attorneys that even though they may be "no Clarence Darrow," they may nonetheless have afforded their clients representation that comported with constitutional requirements.[6]

Darrow's Nightmare does not attempt to compete with books that have thoroughly chronicled Mr. Darrow's career—a category that includes Mr. Darrow's own autobiography, *The Story of My Life*—but instead focuses on a two-year period in Los Angeles (1911-1913) when Darrow was himself a criminal defendant, having been twice charged and brought to trial on allegations that he bribed jurors in a case in which he was defense counsel. As noted by the author, Nelson Johnson—who himself is an intriguing figure, having penned the book Boardwalk Empire (which is the basis for the well-received HBO series of the same name)—"few people, including practicing attorneys who admire Darrow," are even aware of the bribery trials.[7]

For individuals who would like to know about this troubling and overlooked period of Darrow's career, *Darrow's Nightmare* may be of interest. The author—who, until recently, served as a New Jersey Superior Court Judge, and is a graduate of New York's St. John's University — clearly spent much time researching his topic. He reviewed over 8,500 pages of trial transcript, and made himself well-acquainted with the events of the time and circumstances of Darrow's life that led to the bribery charges.

Darrow's Modest Beginnings

Johnson's succinct chronicling of Darrow's formative years is one of the more engaging aspects of the book. Johnson recounts that Darrow was raised in the "tiny" village of Kinsan, Ohio, by parents who were "eccentrics" and poor, but nonetheless instilled in Darrow a love of the written word. Although Darrow enjoyed reading, he "never attained distinction in any school he attended" and found his school days "an appalling waste of time." Darrow's attitude towards educational institutions was that they "promoted conventional thinking at the expense of independent thought."[9] As to his legal education, Darrow joined the ranks of well-respected, historical attorneys—such as former Supreme Court Chief Justice John Marshall and President Abraham Lincoln—who did not graduate from law school. Instead, after a "lackluster" year at the University of Michigan Law School, Darrow went to Youngstown, Ohio, where he spent a year "reading the law" under the "direction" of a local attorney. After this study, Darrow took an oral examination to test his knowledge of the law. He passed the exam and began practicing law in 1879. In 1887, the young, ambitious lawyer moved to Chicago, where he embarked on a spectacular career that would make him a "household name in America."[10]

Darrow Emerges As "Labor's Champion"

Darrow inherited his father's "contempt for government and institutions," viewing both as "tools of the wealthy."[11] It is perhaps that philosophy that propelled Darrow to espouse the cause of the "working man" over that of "capital." Eventually, Darrow became known as "Labor's Lawyer" and represented unionists in high-profile cases, such as that of Western Federation of Miners leader William D. ("Big Bill") Haywood, who had been charged with conspiring to murder former Idaho Governor Frank Steunenberg in 1905. It is Darrow's association with labor that led to his eventual charges of bribery in California.

More specifically, in 1910, a horrific explosion rocked the Los Angeles *Times* building, killing about twenty workers in the resulting inferno and collapsing part of the structure. "Organized labor" was immediately suspected to be the culprit because the powerful *Times* owner was staunchly anti-union, and Los Angeles was predominantly pro-business. Eventually, brothers John and James McNamara, who were active in the Iron Workers union, were arrested for the blast. Fearing that the labor movement would be set back if unionists were found to be responsible for the deadly explosion, labor leaders—including AFL president Samuel Gompers—implored Darrow to represent the *McNamaras*. Darrow accepted the case, as he was steadfastly pro-labor and believed that his profession was "a means to pursue economic justice for the working class."[12] As his investigation of the *McNamara* case progressed, however, Darrow became less convinced of his clients' innocence and was dubious if an acquittal could be secured, despite Gompers's contrary assurances to the nation. In December 1911, the McNamaras pleaded guilty, with James acknowledging that he had caused the explosion, using sixteen sticks of dynamite.

Darrow's association with the *McNamara* case did not end with the guilty pleas. Instead, on January 26, 1912, Darrow was indicted on two bribery charges: one indictment charged him with bribing prospective juror George Lockwood to vote for an acquittal in the *McNamara* case; and a second indictment charged Darrow with trying to buy the vote of juror Robert Bain, also in the *McNamara* case. Darrow chose, as the lead attorney in his defense, Earl Rogers, a renowned California lawyer who "single-handedly brought more courtroom innovations to trial advocacy than anyone in American history," including use of demonstrative evidence, which was a novel practice at the time.[13] The dapper and

See DARROW'S NIGHTMARE, Page 23

Andrea DiGregorio works for the Nassau County District Attorney's Office, where she is Unit Chief of FOIL Operations, and also serves as Senior Appellate Counsel in the Appeals Bureau. Statements made in this article are those of the author and not the District Attorney or her Office.

FOCUS:
DAMAGES: WRONGFUL DEATH

Loss Of Parental Guidance in Wrongful Death Cases

Ira S. Slavit

New York law prohibits the family of a person who dies as a result of negligence from recovering damages for their emotional grief from their loss. The only recovery permissible for pain and suffering is that of the decedent. However, children of the decedent, even adult children who not been receiving any financial support from their parent, can be compensated for the loss of parental guidance.[1]

This article will review recent Appellate Division and U.S. District Court decisions that evaluated damages awards for loss of parental guidance in wrongful death cases. Practitioners should not overlook relatively older decisions that may also offer useful guidance.

First, some background: Under the common law in New York, it was not possible to maintain a damages action for wrongful death. "The result was that it was cheaper for the defendant to kill * * * than to injure [the plaintiff], and that the most grievous of all injuries left the bereaved family of the victim, who frequently were destitute, without a remedy." (Prosser and Keeton, Torts § 127, at 945 [5th ed.].)[2]

In 1847, New York was the first state to create a remedy by enacting a statutory cause of action for wrongful death, now embodied in EPTL 5–4.1.[3] Pursuant to EPTL 5-4.3(a), compensation may be recovered "for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought."

New York has steadfastly restricted recovery to "pecuniary injuries," or injuries measurable by money, and denied recovery for grief, loss of society, affection, conjugal fellowship and consortium.[4] Pecuniary loss has long been recognized to include a child's loss of parental nurture and care and of physical, moral and intellectual training. [5]

Inasmuch as the common law does not recognize causes of action for wrongful death, there can be no recovery for any kind of loss other than those expressly permitted under EPTL -4.3(a).[6]

The standard to be applied by the court in reviewing whether an award of damages is excessive or inadequate is whether the award "deviates materially from what would be reasonable compensation."[7] This standard replaced the old "shocks the conscience of the court" standard of review.

State Court Decisions

The Appellate Division, Second Department this past summer had occasion to consider jury awards to adult surviving children for loss of parental guidance in *Bacchus-Sirju v Hollis Women's Center*, an action to recover damages for medical malpractice and wrongful death. The decedent, 69-years old when she died, was survived by two adult children, a 38-year old daughter and a 39-year old son. The decedent was not a wage earner, and the court observed that "In the case of a decedent who was not a wage earner, 'pecuniary injuries' may be calculated, in part, from the increased expenditures required to continue the services she provided, as well as the compensable losses of a personal nature, such as loss of guidance."[8] It appears from the parties' appellate briefs that the only evidence of monetary loss presented was that the decedent babysat for her daughter's five children and possibly that she contributed financially to her daughter's education. The decedent's daughter testified at trial but her son, for whom no evidence of monetary loss was presented, did not.

The jury awarded each of her children $500,000 from the date of her death to the date of the verdict (approximately three years), and $25,000 each for future pecuniary loss, intended to provide compensation for a period of five years. The Second Department determined that the daughter's award for past pecuniary loss should be reduced from $500,000 to $250,000 and the son's from $500,000 to $100,000.

In *Hyung Kee Lee v New York Hosp. Queens*, the decedent was survived by his 32-year old daughter, who had been diagnosed with schizophrenia and seizure disorder, and had a mental disability resulting in her having the IQ of an eight-year-old child.[9] The jury's verdict included an award of $336,000 for past economic loss, which the Appellate Division noted could only have been based on the decedent's daughter's loss of parental care and guidance since there was no evidence of past lost earnings or housekeeping expenses. Approximately four years passed between the date of the decedent's death and the jury verdict. The court held that the award was excessive to the extent that it exceeded $250,000.

In *Gardner v State*, the decedent was survived by two sons, ages 19 and 15.[10] The Fourth Department declined to disturb the awards for past and future loss of parental guidance which totaled $875,000 to both children.

To perhaps state the obvious, courts have permitted larger recoveries by younger children. In *In re New York City Asbestos Litig.*, the decedent was survived by 11-year old twins.[11] The jury verdict included awards for loss of parental guidance of $17 million to the decedent's son and $18 million to the decedent's daughter. The awards were reduced at the trial court level to $9 million to the decedent's son and $10 million to the decedent's daughter. The Appellate Division directed a new trial on damages unless plaintiff stipulated to further reduce the award for loss of parental services for each of the decedent's children to $1 million.

In *Grevelding v State*, the decedent was survived by a 21-month old son and an 11-week old daughter. The Court of Claims granted judgment in favor of the claimant that included an award of damages of $900,000 to each of decedent's two children for past loss of parental care, guidance, and nurturing and an award of damages of $1,100,000 to decedent's son and $1,300,000 to decedent's daughter for future loss of parental guidance. The Fourth Department concluded that the award of damages for loss of parental guidance deviated materially from what would be considered reasonable, and that awards of damages of $500,000 per child for past loss of parental guidance, and $900,000 for decedent's son and $1,000,000 for decedent's daughter for future loss of parental guidance would be reasonable compensation for their losses.[12]

Federal Court Cases

In *Viera v United States*, the plaintiff alleged that employees of a federally funded health clinic committed medical malpractice by failing to properly evaluate and timely diagnose the decedent's breast cancer.[13] The court awarded the decedent's eight-year old son $1 million for the loss of his mother's parental guidance.

Evaluating loss of parental guidance of adult children in their 50s and 60s, the court after a bench trial in *Coolidge v United States* awarded the sum of $3,000.[14] The court noted, among other things, that none of the children had medical or other conditions that required assistance or care, none lived with him, the total amount evidenced of loans and gifts from the decedent to his children was approximately $2,100, and no proof was offered of the value of the guidance the decedent provided to his children, such as life advice about completing education, relationships, skills training, or advice on home maintenance.

In *Mann v United States*, the decedent was survived by his wife and their four children, all in their 20s.[15] The court found that he did not provide his children with huge sums of money or regular financial assistance, but did provide some financial help to his children, as well as advice, guidance, and other compensable services. The Court found that his children were entitled to $25,000 each in pecuniary damages.

In *Dershowitz v United States*, the decedent was survived by a 44-year old son and a 41-year old daughter.[16] Both had families and were highly successful in their professional careers, one living in Colorado and the other in California. Finding the children's testimony credible and sincere and that their professional and personal success made clear that they benefitted tremendously from their mother's training and guidance, the court awarded $25,000 to each of them for their loss of parental guidance.

The decedent in *Ramirez v Chip Masters, Inc.* was 22-years old at the time of his death, survived by his 7-month old infant daughter.[17] The court confirmed the Magistrate Judge's recommendation of an award of $1,000,000 for loss of parental care and guidance.

In *Collado v City of New York*, the court found the jury's award of $1.5 million in compensatory damages for monetary losses sustained by his family, including his six children, to be reasonable.[18] The court noted that although little evidence was presented of the monetary value of the decedent's services, the award was reasonable even considering that pecuniary damages were awarded only to the decedent's widow and the four younger children, who ranged in age from two to fifteen years old when their father was killed.

Future Legislative Amendment?

Earlier this year the Judiciary Committees of both the New York State Senate and Assembly passed what is known as the "Grieving Families Act," although neither chamber passed it.[19] The proposed legislation would have amended EPTL 5-4.3(a) to permit recovery of compensation for damages including: (1) grief or anguish caused by the decedent's death, and for any disorder caused by such grief or anguish; (2) loss of love, society, protection, comfort, companionship, and consortium resulting from the decedent's death; pecuniary injuries, including loss of services, support, assistance, and loss or diminution of inheritance, resulting from the decedent's death; and (3) loss of nurture, guidance, counsel, advice, training, and education resulting from the decedent's death. The allowance of recovery for the emotional grief of a decedent's distributees would align New York with the majority of states in the country. The fate of any similar legislation that might be proposed in the future is unclear.

Conclusion

The cases cited herein demonstrate that seven-figure awards to very young children for loss of parental guidance are sustainable on appeal. Bacchus-Sirju v Hollis Women's Center establishes that a six-figure award to an adult child where no evidence of monetary loss exists is sustainable in state court. The results have been much more conservative in federal court bench trials.

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Ira S. Slavit is Chair of the NCBA Community Relations and Public Education Committee and immediate past-Chair of the Plaintiff's Personal Injury Committee, and is an attorney with Levine & Slavit, PLLC with offices in Mineola and Manhattan. He can be reached at islavit@newyorkinjuries.com or 516-294-8282.

FOCUS:
COURT OF APPEALS

Listen to This: Court of Appeals Endorses Eavesdropping on Entirely Out-of-State Phone Calls

Christopher J. DelliCarpini

In *People v. Schneider*, handed down this summer, the Court of Appeals held that state courts may issue warrants for prosecutors to eavesdrop on cell phone calls between individuals out-of-state as long as the prosecutors do their eavesdropping within the court's geographical jurisdiction.[1] While the United States Supreme Court may weigh in on the case, for now, prosecutors and defense counsel should understand the ground rules that currently apply.

From Wiretapping to "Listening Posts"

New York has long protected individuals' right of privacy in telephonic communications. Since 1938, the New York Constitution has protected "The right of the people to be secure against unreasonable interception of telephone and telegraph communications," imposing strict requirements on warrants to intercept such communications.[2] Section 813-a of the old Code of Criminal Procedure required "that the Justice or Judge who grants the order must be satisfied on oath or affirmation that there is reasonable ground to believe that evidence of crime may be obtained through eavesdropping."[3]

Federal law may have lagged behind New York on this score, but soon raised its standards above New York's. Not until 1967 did the Supreme Court, in *Katz v. United States*, hold that the Fourth Amendment protected phone conversations.[4] That same year, in *Berger v. New York*, the Court held that Section 813-a fell short of the protections required by the Fourth Amendment.[5]

Congress and the New York Legislature each responded to these court decisions with statutory schemes for legitimate eavesdropping. In 1968, Congress imposed minimum standards for electronic surveillance while letting States adopt stricter standards.[6] New York then enacted Article 700 of the Criminal Procedure Law, "Eavesdropping and Video Surveillance Warrants," setting forth detailed requirements for such warrants.

Schneider: Where Is an Eavesdropping Warrant "Executed?"

It was against this backdrop that Kings County District Attorney's Office in 2016 sought to listen in on the cell phone conversations of Joseph Schneider. During an investigation into illegal online gambling, an informant placed bets on Mr. Schneider's website, "thewagerspot.com," from a location in Brooklyn.[7] The DA applied for and received successive warrants to intercept calls on three cell phones linked to Mr. Schneider, which ordered the cell service providers to assist as provided by Article 700.[8] But the DA never averred that Mr. Schneider, a California resident, had ever spoken, by phone, with anyone in New York.[9]

After being indicted, Mr. Schneider moved to suppress the evidence obtained under those warrants. He argued that Kings County Supreme Court lacked jurisdiction to issue the warrants because they were not "executed" in Kings County as required by CPL 700.5(4).[10] The suppression court denied the motion, and after Mr. Schneider pleaded guilty, the Second Department affirmed the judgment, and a Court of Appeals judge granted leave to appeal.[11] By a vote of 4–2, the Court of Appeals affirmed.[12]

The four-judge majority held that eavesdropping warrants "are executed in the geographical jurisdiction where the communications are intentionally intercepted by authorized law enforcement officers."[13] As the majority put it:

When section 700.05(4) is read as an integrated whole and in a commonsense manner along with other sections of the CPL and correlative Penal Law definitions, the statute makes plain that a warrant is "executed" at the time when and at the location where a law enforcement officer intentionally records or overhears telephonic communications and accesses electronic communications targeted by the warrant.[14]

Judge Wilson's dissent, in which Judge Rivera concurred, contended that to define "executed" so broadly, violated the letter and spirit of New York law:

Stripped bare, the majority claims that because New York has a long history of protecting privacy rights in telephone communications and the legislature did not say what it meant by "executed," the legislature meant to grant New York courts the ability to issue warrants to listen in on any cell phone calls between anyone in the United States, or perhaps in the world, so long as a U.S. telephone carrier can divert the call to New York. To the contrary, the obvious conclusion from those points is that we should not interpret an undefined term to permit New York courts to authorize the issuance of warrants requiring the diversion into New York of telephone calls between people with no connection to New York and which calls neither originated nor terminated in New York.[15]

The majority and dissent also disagreed on whether such warrants were permissible under federal law. The majority characterized its position as in accord with the federal circuit courts' "listening post" rule "which focuses on the point of 'interception' in analyzing a court's jurisdiction to issue such warrants."[16] The dissent pointed out that none of the decisions cited by the majority applied the listening post rule to eavesdropping on conversations where no party was in the jurisdiction, and that in any event, the federal statutes do not use the term "execute," on whose definition the majority opinion hinged.[17]

The majority also buttressed its holding with several policy arguments. The majority envisioned "centralized oversight by a single issuing court," which it contended would be more workable and better protect individual liberties than would the dissent's "multiple plant" approach, which would spread jurisdiction to every court where the intercepted phones could be found.[18]

The dissent derided these arguments as "pure conjecture" and "having nothing to do with the statutory language or legislative intent."[19] But the dissent also observed that "Not a single state or federal wiretap request was denied in 2017, 2018, or 2019," dispelling the notion that the dissent's approach would erode oversight: "there is no oversight to erode."[20] The dissent also pointed out the ease with which the Kings County prosecutors obtained warrants in California to arrest Mr. Schneider and search his home, and noted that New York state and federal prosecutors account for a disproportionate share of wiretap applications: "One should not expect the majority's grant of nationwide wiretapping authority to New York courts to provide enhanced protection of the right to privacy."[21]

Listen Up, and Stay Tuned

As discussed below, the Court of Appeals may not have the final word on this, but for now prosecutors and defense counsel should understand the current constraints on eavesdropping warrants. The Court recognized that a warrant is required to intercept phone communications, and that for a court to have jurisdiction to issue a warrant conduct establishing an element of the offense must have taken place within the court's geographical jurisdiction.[22] In fact, Article 700's entire procedural mechanism for applying for an eavesdropping warrant remains in effect. Service providers still must cooperate as the law previously required, though the prosecutors must execute such warrants—that is, actually listen to the intercepted conversations—within the geographical jurisdiction of the issuing court.

It also bears noting the other challenges that other defendants might be able to raise. Schneider did not assert that the eavesdropping violated any Constitutional right to privacy, or that the DA lacked jurisdiction to prosecute him. And while the majority and dissent dismissed out of hand Schneider's arguments that these warrants violated his rights as a California resident,[23] the decision offers no precedent to preclude another defendant under some other circumstances from challenging on such grounds.

While Judge Wilson did not carry the day, his dissent, like many others, may prove prophetic.[24] If New York prosecutors were already obtaining an outsized share of eavesdropping warrants, how much will that increase with Schneider's express authorization? Will we see prosecutors in other states eavesdropping on New Yorkers' phone calls, based on warrants from their home courts? Will such intrusions foster resentments among law enforcement authorities, or will it engender cooperation at the expense of individual privacy? Will that cooperation lead to overreach, provoking a new round of litigation over these warrants?

The United States Supreme Court may yet weigh in on this matter. On August 18, Mr. Schneider filed a petition for a writ of certiorari.[25] By the time you read this, the Court may have decided whether to grant the petition. A Supreme Court decision on the matter might prove a welcome reconciliation of the power of state and federal courts to issue eavesdropping warrants, though that reconciliation might circumscribe that power. Until then, as long as a New York State court has jurisdiction to issue any warrants in a given case, it may issue warrants to eavesdrop on conversations anywhere in the nation, even if the participants never set foot in the court's jurisdiction.

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1. 37 N.Y.3d 187 (2021).
2. N.Y. Const. Art. I § 12.
3. People v. McCall, 17 N.Y.2d 152, 155 (1966).
4. 389 U.S. 347, 352 (1967).
5. 388 U.S. 41, 54–55 (1967).
6. 18 U.S.C. § 2510 et seq. See People v. Capolongo, 85 N.Y.2d 151, 158–59 (1995).
7. Schneider, 37 N.Y.3d at 190.
8. Id.
9. Id. at 204 (Wilson, J., dissenting).
10. Id. at 195.
11. Id. at 191–92.
12. Id.at 224.
13. Id. at 189.
14. Id. at 196.
15. Id. at 208 (Wilson, J., dissenting).
16. Id. at 201.
17. Id. at 215–17 (Wilson, J., dissenting).
18. Id. at 202–03.
19. Id. at 220–21 (Wilson, J., dissenting).
20. Id. at 221 (Wilson, J., dissenting).
21. Id. at 222–23 (Wilson, J., dissenting).
22. Id. at 194–95.
23. Id. at 203; id. at 203 n.1 (Wilson, J., dissenting).
24. Damon Root, At SCOTUS, Today's Dissent Can Become Tomorrow's Majority Opinion, Reason (Oct. 22, 2015), available at https://bit.ly/3CXeibM.
25. Schneider v. New York, No. 21-246. The Kings County DA waived the right to respond to the petition.

Christopher J. DelliCarpini is an attorney with Sullivan Papain Block McGrath Coffinas & Cannavo P.C. in Garden City, representing plaintiffs in personal injury matters. He is also Chair of the NCBA Medical-Legal Committee and Counsel for the Nassau Academy of Law. He can be reached at cdellicarpini@triallawl.com.

FOCUS:
VETERANS AND MILITARY LAW

Serving Military Clients—Beware of the Landmines

Gary Port

Many fine attorneys get nervous when a military client walks in their door, as if the client's mere status as a service member alters fundamental legal issues. It doesn't. What the practitioner should be aware of is how civilian law interacts with the military environment.

There is nothing mysterious or particularly unusual in representing a military client. They are clients with legal issues just like any other client. And like other clients, the main reasons a service member needs an attorney is to buy a house, resolve a family law/divorce situation, handle a criminal matter or to assist in a bankruptcy proceeding.

Real Estate Transactions

The biggest difference with a house closing is that service members and veterans tend to use the V.A. loan. Otherwise, the purchase of the house is pretty standard. Most of the major lenders know how to process a VA loan, making counsel's job much less difficult and more akin to a typical house closing.

Divorce and Family Law Proceedings

In the area of divorce and family law, the biggest concerns are understanding the military retired pay system, a defined benefit retirement plan, and how to calculate military pay for support purposes. Despite what the client tells you, there is no "military divorce." The Federal Government has specifically stated that the state law where the divorce is situated governs the divorce.[1]

While this article introduces a basic overview of the military retired pay system, it is highly recommended that counsel consult Mark Sullivan's *Military Divorce Handbook, A Practice Guide to Representing Military Personnel and Their Families*, published by the ABA.[2] The military does not have a pension, instead it is called "military retired pay." The difference in terminology is important, but not relevant to the point of this article. Suffice to say, it is a defined benefit system. Service members who joined before 2018 fall under the "old" system. Service members who joined after 2018 fall into the "new" system. Service members who joined between 2016 and 2017 could choose which system to join.

The old system is relatively straight forward. For each year of service, 2.5% of the member's salary is earned towards the retired pay.[3] The minimum service time is 20 years. (There is a special rule governing disability retirement which is both complicated and arcane.) Twenty multiplied by 2.5 percent is 50%. Next, we average the base pay for the member's last 36 months of service. Let's say, for example, that number is $5,000. Therefore after 20 years, the service member will receive 50% of the $5,000 or $2,500 per month. If the member serves twenty-five years, then the percentage increases to 62.50% of the base pay or $3,125 per month.

Under the old system, it is imperative that 20 years be served. If 19 years and 364 days are served, not twenty, the service member leaving one day before that magic 20-year mark gets nothing in retirement.[4] Because this system was so unfair, the new system was introduced in 2018.

In the new system, instead of receiving 50% of the base pay at 20 years, the service member receives 40%. In exchange, the Military will match funding for the Thrift Savings Plan. This is the same Thrift Savings Plan which the Federal Civilian Employees participate in.[5] Now, with this new system, the service member creates a retirement account, partially funded by the government, and partially funded by employee contributions, which is portable. To receive this benefit, the service member does not have to serve 20 years or more to retain it.[6]

Let's turn next to what is meant by "military pay". A service member's W-2 does not reflect his/her true income. The W-2 only reports taxable income. A service member can easily earn double their taxable income due to non-taxable benefits. The Basic Allowance for Subsistence is a fixed monthly amount paid for food.[7] The next important non-taxable benefit is the Basic Allowance for Housing (the "BHA"). The BHA is a monthly payment for non-governmental housing.[8] The amount paid is determined on the rank and the zip code of the duty location. For example, New York and D.C. have the highest BHA rates.[9] In these regions, the BHA can easily double the salary of the service member. Conversely, places like Fayetteville, N.C. are exceedingly low. There are other allowances as well. Drill Sergeants get "DI" pay.[10] Submariners get submarine pay.[11] Jump qualified service members can get Jump pay.[12] Additionally, depending on where in the world the service member is stationed, they may receive a Cost-of-Living Adjustment or an Overseas Cost of Living Adjustment. [13]

The best way to understand how much compensation a service member is receiving is to look at their Leave and Earning Statement ("LES"). This is the military paystub. It lists all the monies which the service member is receiving, whether taxable or not.

Representation of a military member or family member in a custody matter will involve a good working knowledge of the Uniform Child Custody Jurisdiction Act (UCCJEA),[14] Parental Kidnapping Prevention Act (PKPA)[15] and Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (HCCH 1980 Child Abduction Convention) referred to as "The Hague Convention."[16]

Jurisdiction in custody cases can be complicated to untangle. It is typical for the Father to be from Alabama, the Mother to be from New York, the child born in Texas, and the parties are now residing in Germany. If one of the parties is a foreign national, then the Hague Convention could apply.

Visitation agreements or orders can also be daunting. If the child and custodial parent are residing in New York, and the Non-Custodial parent is currently stationed outside of the state, then the attorneys need to come up with creative solutions to ensure parental access to the noncustodial parent.

Practitioners should also be aware of an important amendment to the Domestic Relations Law. Section 75-I, added in 2009, specifically states that if a parent is "activated, deployed or temporarily assigned to military service" the court "may enter an order to modify custody if there is clear and convincing evidence that the modification is in the best interests of the child."[17] Note the standard is "clear and convincing" evidence. The statute further states that "the return of the parent from active military service, deployment or temporary assignment shall be considered a substantial change in circumstances."

This amendment specifically prevents a court from changing custody merely because a service member has been deployed or a Reserve service member or National Guardsperson has been mobilized.

Criminal Law

It is in the criminal realm where the military client is most at risk. Even a non-jail disposition can have severe and adverse consequences. If a service member is convicted of a crime, that conviction can be used as a basis to discharge them with the worst possible administrative discharge, Other than Honor ("OTH"). It is only at a judicial proceeding, called "the court-martial" where worse discharges are awarded: the Bad Conduct Discharge and the Dishonorable Discharge.

The OTH is considered quite bad. It can be a bar to veteran benefits[18], and it typically creates difficulties in members procuring after-service employment due to the stigma associated with the designation. Experience has shown that many government employers and a large number of civilian employers care about the type of discharge a service member receives.[19] This topic regarding types of discharges, and re-enlistment codes is complex and beyond the limited scope of this article but I've done a CLE for the Academy of Law on it as well as one for the New York State Bar Association on it..

Even if the service member's command does not take immediate action, other adverse actions can lead to cascading negative consequences. Any crime involving domestic violence can trigger the Lautenberg Amendment.[20] This provision amends the Federal Gun Control Act of 1968 by banning the possession of firearms by individuals convicted of a misdemeanor crime of domestic violence. Basically, any service member convicted of domestic violence is prohibited from carrying a weapon. A service member who runs afoul of the Lautenberg Amendment is going to be administratively discharged.[21]

A plea for DWI, DWAI, or use or possession of drugs will be a career ender. Despite the national trend, use of marijuana is still illegal under military law and state law is irrelevant. While in the past drinking was not merely condoned in the military but actively encouraged, the opposite is now true. A DWAI will end a career.[22]

An adverse plea or conviction can also result in the service member's security clearance being removed. A person cannot be an officer or senior Sergeant without a security clearance.[23]

Finally, military members do go bankrupt. Even a bankruptcy can result in the loss of a security clearance.[24] 32 CFR §154.7(l) includes "excessive debt" as criteria in determining eligibility. Appendix D of the regulation states that bankruptcy is significant adverse information. Thus, when a service member enters bankruptcy a security manager must consider this adverse information and the security clearance can be suspended or revoked. Once a security clearance is lost, the service member will be eliminated from the military.

While the state laws governing the military client are the same for the civilian client, the savvy practitioner must be aware of the military environment and how civilian laws can have an impact on the service member's military career. While representing a military client can, at first, seem daunting, there are resources in the form of statutes, regulations, and organizations which are available to help. The Nassau Bar has a Veterans and Military Law Committee, as does the New York State Bar Association. The members of these committees are only too happy to help a colleague who is representing a service member or veteran.

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1. 10 USC § 1408
2. The Military Divorce Handbook, A practical guide to representing Military Personnel and their families, Mark

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Lieutenant Colonel, U.S. Ret.

Army Reserve Ambassador

Port and Sava

FOCUS:
LAW AND AMERICAN CULTURE

Louis Brandeis: Keeper of the Flame

Rudy Carmenaty

True human progress is based less on the inventive mind than on the conscience of men such as Brandeis.
–Albert Einstein

Louis Dembitz Brandeis was the personification of the rule of enlightened reason. Brandeis was lawyer, reformer, and jurist. In his hands, the law, skillfully and thoughtfully applied, would affirm the dignity of the individual in a more complex world. Prescient to the ever-evolving demands of American society, Brandeis strongly identified with the vision of Thomas Jefferson.

Brandeis prospered as an attorney in Boston. He then dedicated his considerable talents to promoting economic reform. He confronted moneyed interests. He championed laws designed to improve social conditions among the working poor. He devised the "Brandeis Brief," changing the very grammar of how a case is presented, earning the moniker "the People's Lawyer."

President Wilson appointed Brandeis to the Supreme Court in 1916, making him the first Jewish justice. Brandeis, along with Oliver Wendell Holmes, would serve as the conscience of their age. Whether in the majority or through his landmark dissents, later adopted by subsequent courts, Brandeis carved out entire new realms of law.

Many personal freedoms, now taken for granted, began with Brandies. As a legal theorist, it was Brandeis who originated modern-day notions of privacy. Although his initial conception underwent various permutations, its implications remain vivid to the present day. Brandies became a harbinger of what the law would become.

Brandeis the lawyer was proficient at every aspect of his craft. He always had a command of the law, a firm grasp of procedural details, and the ability to marshal the facts so as to frame a cogent and compelling legal argument. As a jurist, his opinions were lucid, logical distillations of his thought. Brandeis was the epitome of the judicial statesman.

It was said, after he joined the Court, that once Brandeis decided an issue the question was settled for half-a-century. In dissent, he also spoke to the future. Both legal advocacy and, to a lesser degree, but only slightly, jurisprudence in the United States, can literally be divided between the time before Brandeis and the time after.

Now held in nearly universal esteem, Brandies was controversial and reviled in many quarters a century ago. His confirmation was contentious. Accused of being a radical, critiques of his views delayed but did not derail his confirmation. Anti-Semitism fueled much of the antipathy directed against him. Yet, he persevered.

Brandeis was troubled by the rise of the modern corporate paradigm that would dominate American business during the 20th century. He deplored monopolies. Conversely, Brandeis felt workers, consumers, and small businesses needed to be protected against abusive labor practices, price gouging, and unfair competition. But Brandeis never challenged capitalism per se.

What he did challenge was concentrations of wealth and economic power in fewer and fewer hands. The philosophical heir of Jefferson, he was rather Burkean in his outlook. Possessing a nostalgic longing for the Jeffersonian notion of a self-regulated economic order, he sought an open democratic society where all could compete on more or less equal terms

In 1907, Brandeis represented Oregon before the Supreme Court in *Muller v Oregon*.[1] The case involved the constitutionality of an Oregon statute limiting the working hours for women laundry workers. Brandeis crafted his approach to the case relying on the state's inherent "police powers" to protect public health and safety.

He structured his case by providing the court with a profusion of facts. The Brandeis Brief, as it was called, consisted of medical data, factory inspection reports, expert testimony, and even interviews with impacted workers. Brandeis compiled statistics from medical and sociological journals and other non-traditional sources.

The brief was a landmark in that it not only relied primarily on extra-legal information to substantiate its contentions, but, more importantly, because it was so persuasive. It was specifically cited by Justice David Brewer, a judicial conservative, in the court's majority opinion for its convincing arguments justifying the need for upholding the law in question.[2]

The Brandeis Brief ushered in an entirely new approach that would become a model for future Supreme Court cases. The most noted example of this strategy of combining legal argument with social science data was *Brown v Board of Education*.[3] In the NAACP's briefs, Thurgood Marshall's advocacy was both enhanced and reinforced by Dr. Kenneth Clark's sociological studies.

Brandeis began his political life as a progressive Republican. In 1912, Brandeis switched to the Democratic party to support Woodrow Wilson's presidential campaign. Brandeis would go on to be a major policy advisor providing the theoretical framework for Wilson's *New Freedom* agenda.

When Wilson ran for reelection in 1916, the President nominated Brandeis to the Court. Prior to his nomination, the Senate Judiciary Committee had never held a public hearing on a judicial nominee. Brandeis was opposed by the legal establishment, business interests, and anti-Semites. Brandeis waited 125 days between his nomination on January 28, and his confirmation on June 1.[4]

Brandeis as a litigator was an activist. On the bench however, he subscribed to judicial restraint in the mode of Holmes and as later exemplified by his protégé Felix Frankfurter. He often voted to uphold state measures, even if he personally disapproved or thought them unwise. It should be noted, the Supreme Court was then a stalwart institution known for striking down progressive legislation.

Brandeis felt that unless the Constitution unequivocally prohibited a given measure, then courts should generally defer, permitting the states to function as laboratories of democracy. It is this aspect of his jurisprudence that makes him an admired figure among conservatives such as Chief Justice John Roberts and the late Antonin Scalia.

Brandeis wrote only 74 dissents during his 23 terms on the Court.[5] His dissents made clear that the judiciary had no business second-guessing state legislatures by invalidating laws the justices disagreed with. Brandeis was unwavering in his belief that state legislative power was needed to regulate business activity.

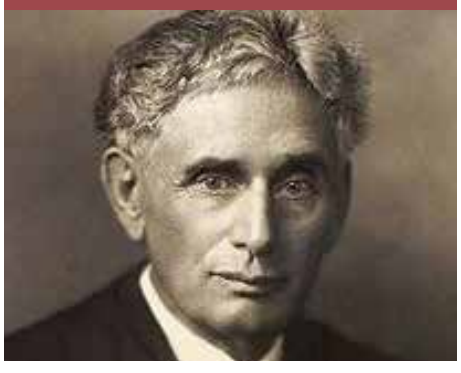
Yet he still remained an advocate or better yet an educator of sorts. Brandeis wrote his opinions to instruct the Court on the facts justifying why a measure should be upheld.

See LOUIS, Page 24

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 Co-Chair of the NCBA Publications Committee and Vice-Chair of the Diversity and Inclusion Committee.

FOCUS:
LAW AND AMERICAN CULTURE

Brandeis' Ode to the First Amendment



Rudy Carmenaty

Louis Brandeis' concurrence in *Whitney v California*[1] endures as a vibrant paean to the First Amendment. The opinion affirms that in a democratic society, free speech cannot be some abstraction, but a tangible value worth defining and defending.

Charlotte Whitney moved for review of her conviction under the California Syndicalism Act of 1919. Ms. Whitney was prosecuted for helping to establish the Communist Labor Party, which was accused of advocating the violent overthrow of the United States.

In his concurrence, Brandeis transcends the "*clear and present danger*" marker laid down by Oliver Wendell Holmes. In order to be deemed a clear and present danger, the risk of harm arising from the speech at issue must be acute, credible, and imminent. The mere promotion of ideas, no matter how incendiary or noxious, is insufficient.

Brandeis' prose reads and resonates as if it were poetry. Such was the power of his arguments that within a month of the concurrence being issued, Ms. Whitney received a pardon from the Governor of California.[2] Justice Elena Kagan has referred to the decision as her "*favorite Supreme Court opinion of all time.*"[3]

But the opinion's true legacy lies in its ringing affirmation of the freedom of thought and expression under the Constitution. Brandeis breathes life into the First Amendment, providing it a depth and texture that future courts would later adopt. Prescient though he was, Brandeis' concurrence touches on themes which continue to be of persisting concern.

Below is the text of Brandeis' concurrence in *Whitney v California*.

Miss Whitney was convicted of the felony of assisting in organizing, in the year 1919, the Communist Labor Party of California, of being a member of it, and of assembling with it. These acts are held to constitute a crime, because the party was formed to teach criminal syndicalism. The statute which made these acts a crime restricted the right of free speech and of assembly theretofore existing. The claim is that the statute, as applied, denied to Miss Whitney the liberty guaranteed by the Fourteenth Amendment

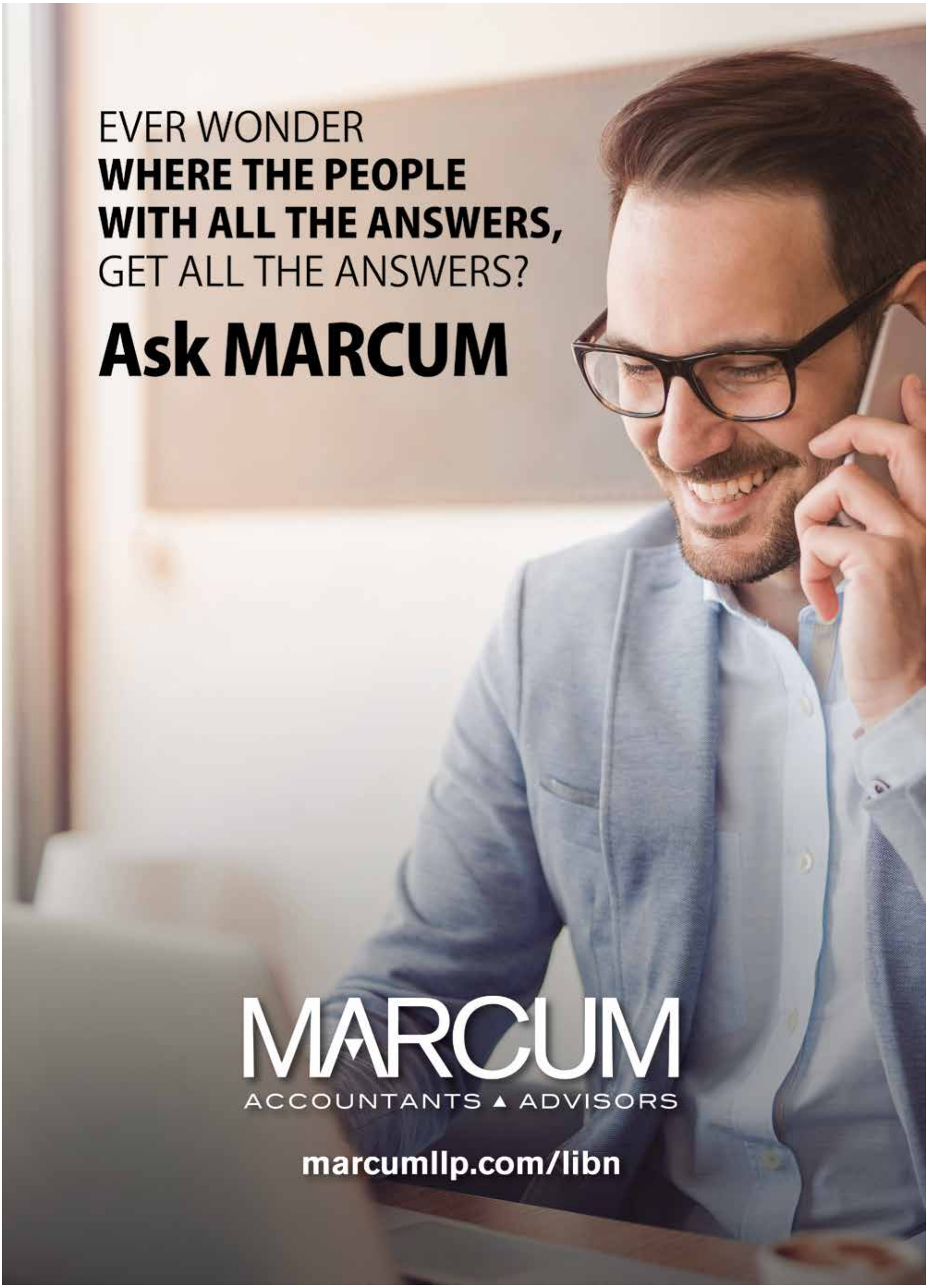
The felony which the statute created is a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly. The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or assembling with others for that purpose is given the dynamic quality of crime. There is guilt although the society may not contemplate immediate promulgation of the doctrine. Thus the accused is to be punished, not for attempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely. The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.

Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights. These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled.

It is said to be the function of the

See AMENDMENT, Page 26

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 Co-Chair of the NCBA Publications Committee and Vice-Chair of the Diversity and Inclusion Committee.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All programs will be offered via HYBRID unless otherwise noted. Please RSVP to acade

November 1, 2021
Dean's Hour: The Risen Christ: The New Law (HYBRID)
With the Catholic Lawyers Guild of Nassau County
1:00-2:00PM
1 credit in ethics

November 1, 2021
Real Estate Companies - A Valuation Primer (ZOOM ONLY)
Program presented by NCBA Corporate Partner MPI Business Valuation and Advisory
5:30-7:00PM
1.5 credits in professional practice
Skills credits available for newly admitted attorneys

November 3, 2021
Dean's Hour: Current Procedures for E-Filing at the NYS Appellate Division (HYBRID)
Program presented by NCBA Corporate Partner PHP
With the NCBA Appellate Practice Committee
12:30-1:30PM
1.5 credits in professional practice
Skills credits available for newly admitted attorneys

November 4, 2021
Dean's Hour: Plant Inventions in Everyday Life (HYBRID)
With the NCBA Intellectual Property Law Committee
Program sponsored by NCBA Corporate Partner Champion Office Suites
12:30-1:30PM
1 credit in professional practice

November 4, 2021
The American Presidency and the Constitution: A Study in Political Power, the Law and Popular Culture (Law and American Culture Lecture Series) (ZOOM ONLY)
With the NCBA Diversity and Inclusion Committee
Program sponsored by NCBA Corporate Partner Investors Bank
5:30-7:30PM
2 credits in professional practice

November 9, 2021
Dean's Hour: Referees and Receiver Partitions and Other Actions (HYBR
With the NCBA Real Property Law C
Program sponsored by NCBA Corpo Title Agency, Inc.
12:30-1:30PM
1 credit in professional practice
Skills credits available for newly ad

November 10, 2021
Dean's Hour: Business Losses (HYB
With the NCBA Business Law, Tax a Committee
Program sponsored by NCBA Corpo Champion Office Suites and MPI Bu Advisory
12:30-1:30PM
1 credit in professional practice

November 16, 2021
Dean's Hour: Pitfalls of Debt for You (HYBRID)
Program sponsored by NCBA Corpo Champion Office Suites, Tradition T Investors Bank
12:30-1:30PM
1 credit in professional practice

November 16, 2021
Successful Court-Ordered Mediatio Preparation and Execution (ZOOM
5:30-7:30PM
2 credits in professional practice
Skills credits available for newly ad

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November 17, 2021
Dean's Hour: Best Practices for Summary Judgment Motion Practice (HYBRID)
With the NCBA Medical-Legal Committee and the Assigned Counsel Defenders Program Inc. of Nassau County
Program sponsored by NCBA Corporate Partners Champion Office Suites and MPI Business Valuation and Advisory
12:30-1:30PM
1 credit in professional practice
Skills credits available for newly admitted attorneys

November 18, 2021
Know Your Rights: **Identifying Hate Crimes in the Community: Prosecution, Penalties and Victims Services (HYBRID)**
With the NCBA Community Relations and Public Education Committee, the NCBA Diversity and Inclusion Committee, the Criminal Court Law and Procedure Committee and the Assigned Counsel Defenders Plan Inc. of Nassau County
5:30-7:30PM
2 credits in professional practice
Skills credits available for newly admitted attorneys

December 1, 2021
An Evening of Ethics: Networking and Discussion (LIVE ONLY)
Networking 5:00-5:30PM; Discussion 5:30-6:30PM
1 credit in ethics

Please join us for an Evening of Ethics. This event will combine the Academy's two goals of providing outstanding CLE opportunities to our members, plus in-person networking and socializing opportunities that have been greatly missed these past months. Our speakers for this evening will be Tom Foley, Past Dean of the Nassau Academy of Law, and Clifford S. Robert, a frequent lecturer on attorney ethics.

Appetizers sponsored by NCBA Corporate Partner MPI Business Valuation and Advisory.

WE CARE Fund 25th Anniversary Golf and Tennis Classic

Photos by: Hector Herrera

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Charoula Ioannou
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Investors Bank was founded in 1926 and today is one of the largest banks headquartered in New Jersey. With more than $25 billion in assets and a network of over 150 retail branches throughout New Jersey, New York City and Long Island, Investors delivers a broad range of financial services and products tailored to the needs of its retail and business customers.

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In Brief

Ellen G. Makofsky of Makofsky Law Group, P.C. was named a 2021 *Super Lawyer* and received recognition for the seventh time as one of the *Top 50 Women Super Lawyers* in the New York Metropolitan area. **Deidre M. Baker** and **Christina Lamm**, associates at Makofsky Law Group, P.C., were each named on the *Super Lawyers Rising Stars* list in the Elder Law category. Ellen G. Makofsky and Deidre Baker were also named as *Best Lawyers* in 2021.

Douglas M. Lieberman, a partner at Markotsis & Lieberman, P.C., has been named a 2021 *Metro New York Super Lawyer* in Business Litigation. This is his eighth consecutive award.

Terry O'Neil of Bond, Schoeneck & King's Garden City office has been recognized as 2021 *New York Metro Super Lawyers*: Employment & Labor.

The following attorneys of Certilman Balin Adler & Hyman, LLP have been named to the 2021 *New York Metro Super Lawyers* list: M. Allan Hyman (resident of Sands Point); Marie Korth (resident of Rockville Centre); Thomas J. McNamara; Douglas Rowe, Partner in the Employment Law Group; Howard M. Stein, Partner in the Real Estate Group; and Paul Sweeney, Partner in the Litigation Group. Carrie Adduci, Associate in the Real Estate Group, has been named to the 2021 *New York Metro Super Lawyers Rising Stars* list.

Jeffrey D. Forchelli of Forchelli Deegan Terrana LLP (FDT) is pleased to announce that **Judy L. Simoncic** was appointed Chair of the Nassau County Bar Association's Municipal Law and Land Use Committee. She will serve a two-year term. FDT congratulates the following twenty-one attorneys for being selected to the 2021 *New York Metro Super Lawyers* list: **Joseph P. Asselta** (Construction Litigation); **William F. Bonesso** (Land Use & Zoning); **Andrew E. Curto** (Business Litigation); **Daniel P. Deegan** (Real Estate); **Kathleen Deegan Dickson** (Land Use & Zoning); **Jeffrey D. Forchelli** (Land Use & Zoning); **Gregory S. Lisi** (Employment & Labor); **Gerard R. Luckman** (Bankruptcy: Business); **Mary E. Mongioi** (Business & Corporate); **Elbert F. Nasis** (Civil Litigation: Defense); **James C. Ricca** (Banking); **Brian R. Sahn** (Real Estate); **Judy L. Simoncic** (Land Use & Zoning); **Peter B. Skelos** (Appellate); **John V. Terrana** (Real Estate); **Russell G. Tisman** (Business Litigation) and **Andrea Tsoukalas Curto** (Land Use & Zoning). The firm also congratulates the following sixteen attorneys for being selected to the 2021 New York Metro Rising Stars list: **Stephanie M. Alberts** (Estate & Probate); **Michael A. Berger** (Employment & Labor); **Jonah H. Blumenthal** (Estate & Probate); **Gabriella E. Botticelli** (Civil Litigation); **Lisa M. Casa** (Employment & Labor); **Raymond A. Castronovo** (Construction Litigation); **Jane Chen** (Real Estate); **Danielle B. Gatto** (Business Litigation); **Jessica A. Leis** (Land Use & Zoning); **Lindsay Mesh Lotito** (Banking); **Robert L. Renda** (Real Estate); **Erik W. Snipas** (Land Use & Zoning); **Brenna R. Strype** (Land Use & Zoning) and **Danielle E. Tricolla** (Business Litigation). The firm also extends special congratulations to first time selectees: **Michael A. Berger**, **Jonah H. Blumenthal**, **Gabriella E. Botticelli** and **Jane Chen**; 10th year on the list: **Kathleen Deegan Dickson**, **Gregory S. Lisi** and **Russell G. Tisman** and all female attorneys who will be included in the *Super Lawyers Women's Edition*.

Marian C. Rice

Alan J. Schwartz, Principal & Managing Attorney of the Law Offices of Alan J. Schwartz, PC in Garden City, has been appointed as a Board Member of the Investors Bank Long Island Advisory Board. Mr. Schwartz resides in Dix Hills.

Ronald Fatoullah of Ronald Fatoullah & Associates has been recognized by *Super Lawyers*® for the 15th consecutive year in the practice area of Elder Law for the New York Metro area for 2021.

Every year since 2007, Pegalis Law Group Founder **Steven E. Pegalis** and Managing Partner **Annamarie Bondi-Stoddard** have been selected by *Super Lawyers*® for their professional excellence and dedication to obtaining justice for clients. Partners **James B. Baydar** and **Sanford S. Nagrotsky**, along with attorneys **Robert V. Fallarino** has also been recognized for multiple years. Additionally, Attorney **Isabel C. Mira** has been named to the 2021 *Rising Star* list for her second year.

Stephen J. Silverberg of the Law Office of Stephen J. Silverberg, PC has been selected to the *New York Metro Super Lawyers* list as one of the top New York metro area lawyers for 2021.

Richard K. Zuckerman of Lamb & Barnosky, LLP, has again been selected by his peers for recognition in the 2022 28th edition of *The Best Lawyers in America*© in the practice areas of Education Law, Employment Law—Management, Labor Law—Management and Litigation— Labor and Employment. **Sharon N. Berlin** has again been selected by her peers for recognition in the 2022 28th edition of *The Best Lawyers in America*© in the practice areas of Labor Law—Management. Sharon was also named Best Lawyers' "Lawyer of the Year" for Labor Law-Management (Long Island) for 2020. **Lisa Dvoskin** has joined the firm as Counsel. **Michelle Capobianco** has joined the firm as a Law Clerk. On October 22, 2021, **Eugene R. Barnosky** was a speaker/facilitator on the topic entitled "Collective Bargaining—A Look at the Present and Where We Might Be Headed" at the Virtual 25th Annual Pre-Convention School Law Seminar co-sponsored by the NYS School Boards Association and NYS Association of School Attorneys. Eugene R. Barnosky was also selected for inclusion on the *New York Super Lawyers*® list for 2021 in the practice area of schools and education and Sharon N. Berlin and Richard K. Zuckerman were selected in the practice area of employment and labor law.

Karen Tenenbaum, LL.M. (Tax), CPA, tax attorney, was honored as a Top Lawyer by Herald/Richner Communications. She was also recognized by *Super Lawyers* for the eighth consecutive year. Karen presented a webinar on "Delinquent Taxpayers: Offers in Compromise and Installment Agreements, Obtaining the Best Arrangement" for Strafford. She also moderated "Financial Programs for Business Growth" at the Competitive Edge Conference. Her article discussing IRS Offers in Compromise and Installment Agreements was recently featured in the National Conference of CPA Practitioners, Nassau/Suffolk newsletter.

Vishnick McGovern Milizio LLP (VMM) managing partner **Joseph Milizio** is proud to announce that the firm has been named the 2021 Top Legal Firm of Long Island in its size category by the *LI Herald* (Herald Community Newspapers). It's VMM's second consecutive recognition in this category, in addition to four "Top Lawyers of Long Island" awards: partner **Bernard McGovern** was named Top Lawyer of Long Island in the Estates & Trusts category; partner **Joseph Trotti** was named Top Lawyer of Long Island in the Family Law category; Mr. Milizio was named Top Lawyer of Long Island in the Pro Bono Project category; and of counsel **Hon. Edward W. McCarty, III** was also named Top Lawyer of Long Island in the Pro Bono Project category. On October 6, Mr. Milizio received a Citation from Nassau County Executive Laura Curran and a Certificate of Achievement from Suffolk County Executive Steven Bellone for his pro bono and community involvement work

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

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

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

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

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2021-2022

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Any contribution is greatly appreciated.

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Luis Velez

The WE CARE Fund Presents
Gingerbread University

Saturday, December 4, 2021
9:30–11:30AM or 1:00–3:00PM
Nassau County Bar Association

THIS IS A FULLY MASKED EVENT.

Children of all ages will enjoy decorating their own gingerbread houses at the Annual Gingerbread University Holiday Workshop at the Nassau County Bar Association.

PREFERRED TIME:
◯ MORNING SESSION (9:30–11:30) ◯ AFTERNOON SESSION (1:00–3:00)

REGSTRATION FEES:
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Remembrance…

Continued From Page 3

Community in 2021, available at https://bit.ly/2YKLmFj.
2. https://nbcnews.to/3v8vMyX
3. https://www.hrc.org/resources/understanding-the-transgender-community
4. https://n.pr/3v4F0w2.
5. https://www.npr.org/2021/03/24/980788146/senate-confirms-rachel-levine-a-transgender-woman-as-assistant-health-secretary
6. https://inthesetimes.com/article/transgender-rights-equality-act-lgbtq--congress-gender-marie-newman
7. Human Rights Campaign, Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021.]

Veterans…

Continued From Page 5

to self-identify as a disabled veteran or an individual with a disability, it must clearly inform the prospective employee in writing (or orally, if no written questionnaire is used) that:

1. that the information is being requested as part of the employer's affirmative action program;

2. that providing the information is voluntary;

3. that failure to provide such information will not subject the individual to any adverse treatment; and

4. the information will be kept confidential and only used in a way that complies with the ADA.[17]

Federal law requires employers to notify employees of their rights under USERRA, and employers may meet this requirement by displaying a notice where they customarily place notices for employees such as notices regarding other labor related laws.

New York State and New York City Laws Protecting Veterans in the Workforce

In August 2017, the New York City Human Rights Law was amended to establish a protected class for veterans and active military service members. This was done to protect veterans and service members from discrimination, bias, and harassment by employers,[18] landlords, and providers of public accommodations. Specifically, these protections include representing that a position is not available when it actually is, refusing to hire or employ, or to bar or discharge from employment, someone in the uniformed services, or to discriminate against uniformed service members in the compensation, terms, and conditions of their employment.[19]

The New York City Human Rights Law is enforced by the NYC Commission on Human Rights, and has the authority to fine violators with civil penalties of up to $250,000 for willful and malicious violations of the Law and can award unlimited compensatory damages to victims, including emotional distress damages and other benefits.

Likewise, the New York State Executive Law prohibits discrimination against an individual based on military status or disability.[20] Until as recent as two years ago, the New York State law largely tracked the Title VII, military service protection is a deviation from Title VII, under which veterans are not a protected class. The New York State Division on Human Rights enforces the New York State Human Rights Law.

Conclusion

Employers should review their policies and practices to make sure that they are in compliance with both federal and New York State so as to ensure they are not performing a disservice to those that have served our country.

1. *See* U.S. Bureau of Labor Statistics Economic News Release: Employment Situation of Veterans News Release, (March 18, 2021) , https://www.bls.gov/news.release/vet.htm
2. *Id.*
3. *Id.*
4. *See* Latest Employment Numbers, August Jobs Report, (September 3, 2021), Department of Labor, https://www.dol.gov/agencies/vets/latest-numbers
5. *See* Databases, Tables & Calculators by Subject, U.S. Bureau of Labor Statistics, https://data.bls.gov/timeseries/LNS14049526&series_id=LNS14049601
6. *Id.*
7. 38 USC §§ 4301-4333.
8. *Id.*
9. *Id.*
10. *Id.*
11. 38 USC § 4317
12. *Id.*
13. *See* 38 USC § 4313; 20 C.F.R. §§ 1002.198, 1002.225-.226
14. https://www.dol.gov/agencies/vets
15. https://www.eeoc.gov/publications/veterans
16. *See* EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act of 1990 (1995) at https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical.
17. *Id.*
18. Employers or prospective employers in NYC, if they have four or more employees (owners, part- and full-time workers, interns, and most independent contractors count as employees). Title 8, Chapter 1, of the Administrative Code of the City of New York, N.Y.C. Admin. Code § 8–101 et seq.
19. *Id.*
20.. NY Exec. Law § 296.

Parental…

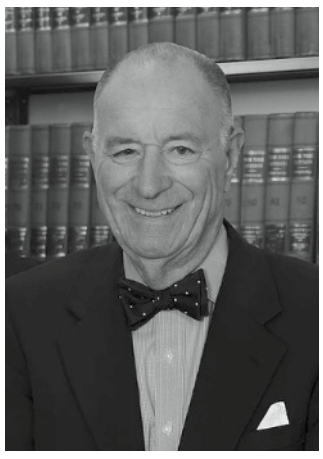
Continued From Page 8

1. Gonzalez v New York City Housing Auth,, 77 NY2d 663, 668–669; Gardner v State, 134 AD3d 1563, 1565 [4th Dept 2015]
2. quoted in Gonzalez v New York City Hous. Auth., supra. At 667 [1991]
3. *Id.* at 667
4. *Id.* at 667-668; Motelson v Ford Motor Co., 101 AD3d 957, 962 [2d Dept 2012], affd, 24 NY3d 1025 [2014]
5. Hyung Kee Lee v New York Hosp. Queens, 118 AD3d 750, 755 [2d Dept 2014]; Zygmunt v Berkowitz, 301 AD2d 593, 594 [2d Dept 2003]
6. Liff v Schildkrout, 49 NY2d 622, 631-32 [1980]
7. CPLR 5501(c)
8. 196 A.D.3d 670 [2d Dept July 28, 2021]
9. 118 AD3d 750 [2d Dept 2014]
10. 134 AD3d 1563 [4th Dept 2015]
11. 173 AD3d 529 [1st Dept 2019]
12. 132 AD3d 1332 [4th Dept 2015]
13. 18-CV-9270 (KHP), 2020 WL 5879035 [SDNY Oct. 1, 2020]
14. 10-CV-363S, 2020 WL 3467423, at *40 [WDNY June 25, 2020], amended in part, 10-CV-363S, 2021 WL 1206514 [WDNY Mar. 31, 2021]
15. 300 F Supp 3d 411, 421 [NDNY 2018]
16. 12-CV-08634 SN, 2015 WL 1573321 [SDNY Apr. 8, 2015]
17. 11-CV-5772 WFK MDG, 2014 WL 1248043 [EDNY Mar. 25, 2014]
18. 396 F Supp 3d 265, 281 [SDNY 2019]
19. 2021 New York Senate Bill No. 74; 2021 New York Assembly Bill No. 6770

Military…

Continued From Page 10

Sullivan (ABA 2019)
3. Department of Defense Financial Management Regulation, Volume 7B, Sec. 101 et seq.
4. Department of Defense Financial Management Regulation, Volume 7B Sec. 301 et. Seq.
5. 5 U.S.C. 8474., and 5 CFR Part 1600 et. Al.
6. https://bit.ly/2Z4xqWr
7. 37 U.S. Code § 402
8. 37 U.S. Code § 403B and Department of Defense Financial Management Regulation, Volume 7A, Chapter 25.
9. 37 U.S. Code § 403B
10. 37 U.S. Code § 307
11. 37 U.S. Code § 301c
12. 37 U.S. Code § 307
13. Department of Defense Financial Management Regulation, Volume 7A, Chapters 26 and 67
14. N.Y. Dom. Rel. Law § 75 et seq
15. 28 U.S. Code § 1738A
16. https://bit.ly/3DZkTTj
17. DRL § 75-I
18. https://bit.ly/2Z5AamC
19. Harvard Civil Right-Civil Liberties Law Review, May 29, 2018, https://bit.ly/3G8PaAU
20. 18 U.S.C. § 922(g)(9)
21. *See* Army Regulation 600-20, paragraph 4-4.
22. https://bit.ly/3C26UM4
23. 32 CFR §154.15
24. 32 CFR Part 154. Some attorney websites claim that a bankruptcy won't necessarily result in the revocation of a security clearance. However, a security manager will always er r on the side of revocation of a clearance when there is adverse information.



Darrow's Nightmare…

Continued From Page 7

eloquent Rogers is believed by many people to have been the inspiration for the "Perry Mason" character created by author Earle Stanley Gardner.

By various means, the author of *Darrow's Nightmare* tries to breathe life into his account of the initial twelve-week trial. For example, Mr. Johnson contrasts Darrow (a "slovenly lawyer" who was a "somber, philosophical crusader who cared little for the law but entered the arena for the sake of the struggling masses") with Rogers (whose "sartorial splendor was unrivaled" and who was a "passionate student of the law . . . whose mind never stopped thinking about how best to gain an advantage for his clients in the courtroom"). The author also inserts some salacious material in his narrative: Darrow's trial was attended by his wife, as well as his mistress (who was a journalist and twenty-one years his junior); Earl Rogers was an alcoholic who, during a one-and-one-half day midtrial recess, disappeared, presumptively to go on one of his frequent "benders"; and the district attorney (who was the lead prosecutor) had a volatile temper and injured Rogers during trial by hurling a heavy inkwell at his adversary. Mr. Johnson also skillfully intertwines the labor-versus-capital struggle throughout his account of Darrow's trial. In the end, after months of testimony and scores of witnesses, the jury took only forty minutes to render a verdict of "not guilty."

But, Darrow's troubles from the *McNamara* trial did not end with his acquittal of bribing George Lockwood. A second trial ensued, this one for Darrow's purported bribery of juror Robert Bain. The author's discussion of the second trial is more succinct than his review of the first, as there are no preserved transcripts from the later proceeding. Accounts of what occurred were gleaned from news reports, which showed that the second trial differed in many respects from the first: Rogers had only a minor role in the case (the author suggests that there was animosity between Rogers and Darrow, and Rogers's health had deteriorated from his exertion during the first trial); there was a different judge in the case (William M. Conley), and he had much better control of the courtroom and more experience with criminal law than his predecessor (whose legal forte was Western water rights); and there was a different prosecutor (Wheaton Gray, who was a Harvard Law School graduate). Perhaps because of the changed courtroom dynamics, the second trial lasted only five weeks. And, although the evidence in the second case was believed by the author to have been weaker than that presented in the first case, Darrow was not handed an acquittal. Rather, the jury deadlocked 8 - 4 in favor of conviction. A mistrial was declared. However, the district attorney eventually dismissed the charge, and Darrow returned to his home in Chicago.

Darrow Reimagines His Career

Darrow's sojourn as a criminal defendant did not derail his extraordinary career. Although labor felt "sold out" when the McNamaras pleaded guilty under Darrow's guidance, and, consequently, Darrow was no longer the "go-to" champion of unions, Darrow "reimagin[ed] his career," which launched into a "new and equally bold trajectory."[14] In fact, Darrow had several notable cases that occurred after his California experience. For example, in 1924 Darrow saved Richard Loeb and Nathan Leopold from a death sentence for the brutal murder of fourteen-year-old Robert Franks. In 1925-1926, Darrow secured an acquittal for Dr. Ossian Sweet, an African American man who, along with family and friends, had fought a mob that was trying to expel the Sweets from their residence in a White neighborhood in Detroit; during the struggle, one of the mob was fatally wounded. And, of course, there was Darrow's representation of John Scopes for Scopes's violation of the Tennessee law that criminalized teaching evolution. Although Scopes was convicted, Darrow's reputation as one of America's foremost trial attorneys was not sullied. Indeed, it has been memorialized that "[e]ven a Clarence Darrow . . . lost cases."[15]

1. Nelson Johnson, Darrow's Nightmare – The Forgotten Story of America's Most Famous Trial Lawyer (RosettaBooks 2021) at 63 (ISBN 978-1-9481-2273-3) ("Darrow").
2. *See,* e.g., Irving Stone, Clarence Darrow For The Defense (Garden City: Doubleday, Doran & Co., 1941); John Aloysius Farrell, Clarence Darrow: Attorney for the Damned (Doubleday, New York 2011); Donald McRae, The Last Trials of Clarence Darrow (New York: William Morrow, 2009).
3. *See* also David Rintels, Clarence Darrow; Laurence Luckinbill, Clarence Darrow Tonight!
4. See Smith v. Spisak, 558 U.S. 139, 164 (2010)(Stevens, J., concurring); Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 812 (1995) (Stevens, J., dissenting); Leis v. Flynt, 439 U.S. 438, 450 (1979) (Stevens, J., dissenting); Wolman v. Walter, 433 U.S. 229, 264 (Stevens, J. concurring and dissenting, in part) (1977), overruled by Mitchell v. Helms, 530 U.S. 793 (2000).
5. Darrow at 52.
6. Wise v. Smith, 735 F.2d 735, 738 (2d Cir. 1984).
7. Darrow at 331.
8. *Id.* at 51.
9. *Id.* at 52.
10. *Id.* at 259.have been the inspiration for the "Perry Mason" character created by author Earle Stanley Gardner.
11. *Id.* at 52.
12. *Id.* at 56.
13. *Id*. at vi.
14. *Id.* at 155, 330-31.
15. Franza v. Stinson, 58 F. Supp. 2d 124, 135 (S.D.N.Y. 1999).

NCBA Committee Meeting Calendar November 3, 2021 - December 9, 2021

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

IMMIGRATION LAW
George Terezakis
Wednesday, November 3
12:30 p.m.

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

PUBLICATIONS
Andrea M. DiGregorio/ Rudolph Carmenaty
Thursday, November 4
12:45 p.m.

COMMUNITY RELATIONS & PUBLIC EDUCATION
Ira S. Slavit
Thursday, November 4
12:45 p.m.

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

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

ANIMAL LAW
Kristi L. DiPaolo
Tuesday, November 9
6:00 p.m.

MEDICAL-LEGAL
Christopher J. DelliCarpini
Tuesday, November 10
12:30 p.m.

MATRIMONIAL LAW COMMITTEE
Jeffrey Catterson
Tuesday, November 10
5:30 p.m.

ALTERNATIVE DISPUTE RESOLUTION
Michael A. Markowitz/Suzanne Levy
Monday, November 15
5:30 p.m.

WOMEN IN THE LAW
Edith Reinahrdt
Tuesday, November 16
8:30 a.m.

PLAINTIFF'S PERSONAL INJURY
David J. Barry
Tuesday, November 16
12:30 p.m.

SURROGATE'S COURT ESTATES & TRUSTS
Brian P. Corrigan/Stephanie M. Alberts
Tuesday, November 16
5:30 p.m.

LEGAL ADMINISTATOR
Virginia Kawochka/Linda Tierney
Wednesday, November 17
8:30 a.m.

BUSINESS LAW, TAX & ACCOUNTING
Jennifer Koo/Scott Kestenbaum
Wednesday, November 17
12:30 p.m.

ASSOCIATION MEMBERSHIP
Michael DiFalco
Wednesday, November 17
12:45 p.m.

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

ELDER LAW SOCIAL SERVICES HEALTH ADVOCACY
Ariella Gasner/Suzanne Levy
Thursday, November 18
12:30 p.m.

DIVERSITY & INCLUSION
Rudolph Carmenaty
Thursday, November 18
6:00 p.m.

DISTRICT COURT
Roberta Scoll
Friday, November 19
12:30 p.m.

REAL PROPERTY
Alan J. Schwartz
Wednesday, December 1
12:30 p.m.

PUBLICATIONS
Andrea M. DiGregorio/ Rudolph Carmenaty
Thursday, December 2
12:45 p.m.

COMMUNITY RELATIONS & PUBLIC EDUCATION
Ira S. Slavit
Thursday, December 2
12:45 p.m.

IMMIGRATION LAW
George Terezakis
Tuesday, December 7
5:30 p.m.

MEDICAL-LEGAL
Christopher J. DelliCarpini
Wednesday, December 8
12:30 p.m.

MATRIMONIAL LAW COMMITTEE
Jeffrey Catterson
Wednesday, December 8

MUNICIPAL LAW AND LAND USE
Judy L. Simocic
Thursday, December 9
12:30 p.m.

Louis…

Continued From Page 11

Brandeis would labor over each decision. His purpose was to be as informative as possible, using his skill to enlighten if not the present-day majority, then future generations of lawyers and judges.

Brandeis also saw big government as a problem. Brandeis always sought to achieve equilibrium. He believed that bigness in and of itself was a threat to democracy. He was philosophically wedded to the founding principles of the republic and wished to have them implemented in the 20th Century. Concentrations of power in any form were for him a cause for concern.

Brandies was in an intellectual quandary during the *New Deal*. He generally favored social reform and supported legislative innovation, but he favored it at the state level. Franklin Roosevelt's *New Deal* consisted of broader federal authority at the expense of the states. Brandeis was on principle adverse to the centralization of power by the federal government.

Although he practiced judicial restraint when it came to economic regulations, Brandeis took an expansive view when it came to the protecting of civil liberties. In keeping with the principles of Jefferson, he vigorously and in a visionary way, affirmed constitutional values safeguarding personal freedom when he believed the Constitution compelled it.

Brandeis first conceived of the right to privacy in an article published in the Harvard Law Review in 1890. Entitled appropriately enough *The Right to Privacy*, he asserted *"that the individual shall have full protection in person and in property is a principle as old as the common law; but has been found necessary from time to time to define anew."*[6]

Originally directed against intrusions by the popular press and the use of photography, this concept would evolve into protections against intrusions by the government itself. Years later, after joining the Supreme Court, Brandeis developed the right to privacy more fully in his groundbreaking minority opinion in *Olmstead v United States*.[7]

In his dissent, Brandeis, frames personal privacy not as a principle stemming from the Common Law but as rooted in the Constitution and subject to full protection. Olmstead involved the use of wiretapped telephone conversations secured by federal authorities without a warrant. This evidence was used in a criminal prosecution/ conviction of a bootlegger during Prohibition.

In a 5-4 decision by Chief Justice Taft, the Court issued a pedestrian decision upholding the conviction which failed to take into account the changes in technology that had occurred since the Bill of Rights was first adopted. Taft's ruling stated that since no physical penetration of the subject's premises occurred, the actions by the authorities did not require a warrant hence there was no Constitutional infringement.[8]

Brandeis contended otherwise. For him the Fourth and Fifth Amendments confer a general right to individual privacy rather than only the protection of *"persons, houses, papers and effects against unreasonable searches and seizures."*[9] Brandies felt that the exclusionary rule should apply and admitting such evidence rewards the government for itself breaking the law.

As Brandies noted in his dissent, "*It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense."*[10]

The Court would, within a decade, extend the exclusionary rule to wiretapping in federal cases in *Nardone v United States*[11] and would explicitly overrule *Olmstead in Berger v New York* [12] and *Katz v United States*.[13] Admittedly, the text of the Constitution does not actually contain the word "privacy;" Brandeis was the first to develop and enshrine privacy rights as they are now understood.

Brandeis' conception has evolved and been felt in matters going far beyond the exclusionary rule. *Griswold v Connecticut*[14] (overturning a ban on the dissemination of birth control to married couples), *Roe v. Wade*[15] (legalizing abortion), *Lawrence v. Texas*[16] (outlawing laws criminally proscribing sodomy), among others can trace their lineage to the dissent in Olmstead.

Brandeis' devotion to personal autonomy is again rooted in Jeffersonian values. The right to privacy, as predicated on Brandeis' writings, endures. His words resonate, if rather uneasily. Whether Brandies would concur with the extent to which privacy has been expanded is an open question. There can be little doubt, however, that the Constitution, as now interpreted, embraces privacy with its parameters being determined on a case-by-case basis.

Brandeis retired from the Court in 1939 and died in 1941. In thought and in deed, he seemed larger than life and his legacy continues. Louis Dembitz Brandeis was the keeper of the flame first lit by Jefferson in 1776. It falls to all of us, as Americans, to carry that torch for he blazed a trail for others to follow.

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1. 208 US 412 (1908).
2. *Id.*
3. 347 US 483 (1954).
4. NCC Staff, On this day, Louis D. Brandeis confirmed as Supreme Court Justice, Constitution Daily (June 1, 2021) at https://constituioncenter.org.
5. Andrew Hamm, Kagan and Urofsky share admiration for Justice Louis Brandies, (Oct. 20, 2016) at https://scotusblog.com.
6. Samuel D. Warren & Louis D. Brandies, The Right to Privacy, Harvard Law Review Vol. 4, No. 5 (Dec. 15, 1890), at 193.
7. 277 US 438 (1928).
8. *Id.*
9. *Id.*
10. *Id.*
11. 308 US 338 (1937).
12. 388 US 41 (1967).
13. 389 US 347 (1967).
14. 381 US 479 (1965).
15. 410 US 113 (1973).
16. 539 U.S. 558 (2003).

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Amendment…

Continued From Page 12

Legislature to determine whether at a particular time and under the particular circumstances the formation of, or assembly with, a society organized to advocate criminal syndicalism constitutes a clear and present danger of substantive evil; and that by enacting the law here in question the Legislature of California determined that question in the affirmative. The Legislature must obviously decide, ***in*** *the first instance, whether a danger exists which calls for a particular protective measure. But where a statute is valid only in case certain condition exist, the enactment of the statute cannot alone establish the facts which are essential to its validity. Prohibitory legislation has repeatedly been held invalid, because unnecessary, where the denial of liberty involved was that of engaging in a particular business. The powers of the courts to strike down an offending law are no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly.*

This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection. To reach sound conclusions on these matters, we must bear in mind why a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of lawbreaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. Thus, a state might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross uninclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.

The California Syndicalism Act recites in section 4:

'Inasmuch as this act concerns and is necessary to the immediate preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place in this state advocating, teaching, and practicing criminal syndicalism, this act shall take effect upon approval by the Governor.'

This legislative declaration satisfies the requirement of the Constitution of the state concerning emergency legislation. But it does not preclude inquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the federal Constitution. As a statute, even if not void on its face, may be challenged because invalid as applied, the result of such an inquiry may depend upon the specific facts of the particular case. Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger, whether the danger, if any, was imminent, and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the Legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the State, creates merely a rebuttable presumption that these conditions have been satisfied.

Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed below that the statute as applied to her violated the federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court of a jury. On the other hand, there was evidence on which the court or jury might have found that such danger existed. I am unable to assent to the suggestion in the opinion of the court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes, and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgment of the State court cannot be disturbed.

Our power of review in this case is limited not only to the question whether a right guaranteed by the federal Constitution was denied, but to the particular claims duly made below, and denied. We lack here the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases vital errors, although the objection was not taken in the trial court. This is a writ of error to a state court. Because we may not inquire into the errors now alleged I concur in affirming the judgment of the state court.

1. 274 U.S. 357 (1927).
2. Historic Brandeis Opinion in 'Whitney v California' at https://todayinclh.com.
3. Andrew Hamm, Kagan and Urofsky share admiration for Justice Louis Brandies, (Oct. 20, 2016) at https://scotusblog.com.

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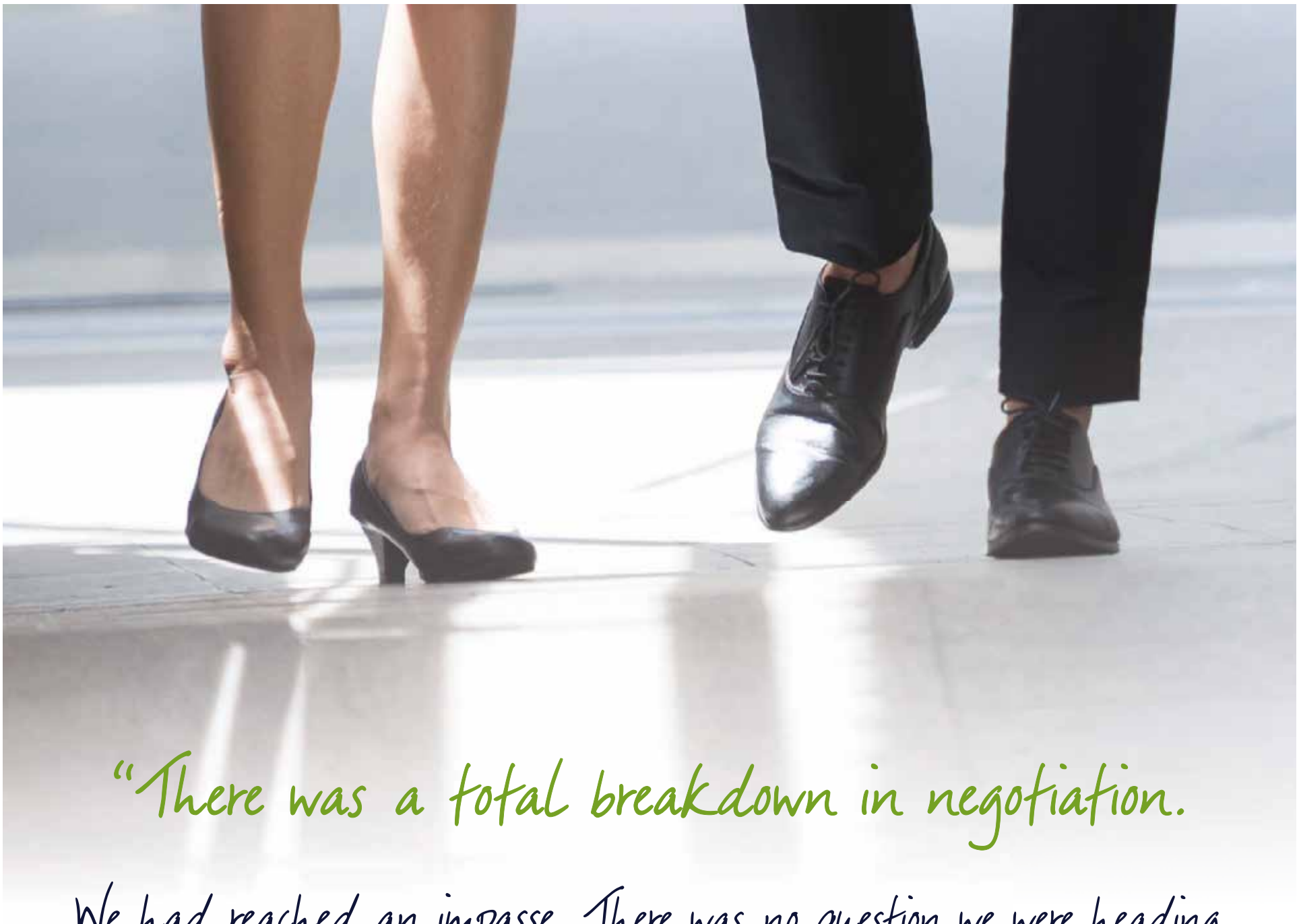

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