# Nassau Lawyer

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# Law Day 2024: Voices of Democracy

This year's Law Day theme chosen by the American Bar Association, The Voices of Democracy, encourages Americans to participate in the 2024 elections to ensure that our government remains responsive to the wishes of the people.

The NCBA will celebrate Voices of Democracy at its Annual Law Day Dinner on Thursday, May 9, 2024, at Domus. The event will feature keynote speaker Lawrence C. Levy, Executive Dean of the National Center of Suburban Studies at Hofstra University, and an expert in politics of the suburbs. Before helping to create the National Center in 2007, Levy worked 35 years as a reporter, chief political columnist, and senior editorial writer for *Newsday* and cohost of the PBS series Face-Off.

The evening also includes the Bar Association bestowing three awards to deserving individuals: the Liberty Bell Award to NYS Department of Veterans' Services Commissioner Viviana DeCohen, the Peter T. Affatato Court Employee of the Year Award to District Court Senior Court Clerk Lisa St. Rose, and the Thomas Maligno Pro Bono Attorney of the Year Award to Scott Stone.

### Liberty Bell Award

The Liberty Bell Award is presented to an individual or organization who has strengthened the American system of freedom under the law by heightening public awareness, understanding and respect for the law. This year's Liberty Bell Award will be presented to Viviana DeCohen, the Commissioner of the New York State Department of Veterans' Services. A veteran of the U.S. Marine Corps, Viviana DeCohen previously served as the Commissioner of the Mount Vernon Veterans Service Agency, and Associate Pastor at Mt. Vernon Heights Congregational Church.

DeCohen has dedicated her time and talent to assisting veterans, ensuring food, shelter, clothing, education, employment, and a little motivation, earning her the affectionate title of "Mama V." Her military service allowed her to earn a bachelor's in behavioral science, and a master's in health service management, both from Mercy College where she received her start formally working with veterans and developing programs to enhance their academic and overall wellness.

### Peter T. Affatato Court Employee of the Year Award

The Peter T. Affatato Court Employee of the Year Award will be bestowed upon Senior Court Clerk Lisa St. Rose. With 24 years of exemplary service in the Unified

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# Benefits of Membership

**Jennifer Koo**

Whether you live or work in Nassau County, there are multiple benefits to joining the Nassau County Bar Association. Membership is open to attorneys, law school students, paralegals, and legal administrators.

### Networking Opportunities and Social Events

The NCBA holds many events that provide Members an opportunity to network and socialize, including an annual BBQ, Dinner Dance, and holiday celebration. Members meet new people, discover new firms, and may even connect with a mentor. Simply being present repeatedly at events and committee meetings make others think of your name when an attorney in your field of expertise is needed. This year the NCBA held its first Lunar New Year Celebration, which was a fun social event filled with catered Asian cuisine and traditional Asian performances.

### Committees

The NCBA offers over 50 committees that are free to join. Many are substantive law committees such as the Business Law, Tax, and Accounting Committee, or the Criminal Court Law & Procedure Committee. These committees give members an opportunity to stay up to date in their specific area of practice. The Bar Association also offers more general committees such as the New Lawyers Committee (for attorneys admitted to practice 10 or less years) or Women in the Law Committee. These committees target conversations towards their specific members, rather than a specific area of law.

### Free CLE

Members can attend CLE programs for free. There is no limit on the number of free CLE credits that can be received. The Nassau Academy of Law—the educational arm of the Bar Association and an accredited CLE

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# From the President

**Sanford Strenger**

"Stressed, Lonely and Overcommitted" sounds like the title of a new country music song, but it is not. Instead, it is the title of an article in a healthcare journal which sets forth the results of a study conducted by Patrick R. Krill, an attorney and licensed and board-certified addiction counselor, and others concerning whether there is an increased risk of suicide among attorneys compared to the general population. Obtaining sampling data from members of the California Bar and DC Bar, the study results disclosed that attorneys are twice as likely as the general population to contemplate suicide. The study stated that mental health issues—including depression, anxiety, and substance abuse (both alcohol and drugs)—are leading factors to the increased rate.

ALM/Law.com conducts an annual survey of attorneys and professionals working in law firms. The survey found in 2023 that nearly 38% of those surveyed responded that they experience depression; 65% responded that they are physically and mentally overwhelmed and fatigued; 70% responded they are exhausted; and 25% responded that they have increased use of drugs or alcohol because of their work/work environment. There are many other studies which support the idea that we as attorneys are stressed and overworked and put our well-being at risk.

The issues disclosed by the studies are not new. In 1978, the President of the New York State Bar Association created a committee named the Special Committee on Lawyer Alcoholism which was later renamed the Committee on Lawyer Alcoholism and Drug Abuse. In 1985, the American Bar Association adopted a resolution which provided in part "State Courts and Bar authorities should establish and support peer support programs for attorneys recovering from alcohol or other drug abuse." On September 16,1999, the Honorable Judith S. Kaye, Chief Judge of the State of New York, announced the creation of the Commission on Alcohol and Drug Abuse in the Profession. That Commission was chaired by the Hon. Joseph Bellacosa, retired Associate Judge of the Court of Appeals and then Dean of St. John's University Law School. The Commission issued a report on December 15, 2000. The Commission in the Executive Summary of its report stated:

> Thousands of people in New York's legal community are suffering from the effects of the diseases of alcohol and substance dependency. They include lawyers, judges, and law students. These diseases cause enormous personal suffering to those who are afflicted, their families, their professional colleagues, and their friends. They pose obvious risks to law clients, litigants, and the general public.

As a result of the work and recommendations of the Commission, Judge Kaye created the Lawyers Assistance Trust, which from 2000 to 2012 implemented the recommendations of the Commission and provided funding through grants for lawyer assistance programs in New York State. In May of 2012, the Lawyers Assistance Trust was closed by Chief Judge Lipman due to fiscal constraints. Since 2012, efforts to address and assist attorneys have been funded by a patch work of grants from the Office of Court Administration and bar association foundations such as NCBA's WE CARE Fund and The New York Bar Foundation.

Among the recommendations of the Bellacosa Commission was that financing of the Lawyer Assistance Trust should be by the legal profession, not taxpayers, through a portion of the then existing $300 attorney registration fee, which is required of practicing attorneys. This financing mechanism was never implemented. Some assert it is due to the organized bar being fearful that increasing the registration fee, by even a few dollars, would be too unpopular and open the flood gates to put other costs associated with our legal system on the exclusive backs of lawyers. Yet all subscribe to the need for funding, and ever-increasing mental health problems facing our profession and our colleagues.

So why such a gloomy President's article as we exit the doldrums of winter and have changed the clocks? Because it needs to be said. We at NCBA are only one of three bar associations in this state to employ a mental health professional and make her services available to attorneys in need free of charge. We through our LAP Committee have, and are, providing well-being programing for our members. This April 6 our LAP Committee is holding a walkathon at Jones Beach to raise funds and awareness of mental health care concerns. We need not only your financial support, but we need you to take a breath and do so for your family. On May 28, the Nassau Academy of Law and LAP will present a Dean's Hour on Suicide Prevention.

NCBA's Board of Directors has passed a resolution calling for a modest increase in the attorney registration fee by $10 to be deposited in a segregated and distinct fund to only be used to fund lawyer assistance efforts, including well-being initiatives. I and others have taken this concept to OCA leadership and NYSBA leadership. While OCA finds the concept a good one and may include it in their legislative efforts (the creation of a fund must be passed by the NYS Legislature), NYSBA has not been so welcoming to the concept, even though they acknowledge the issues facing our profession. A $10 increase ($5 per year) would generate over $2.4 million dollars of available funds to assist our profession.

It is time that we as a profession take a stand to assist our colleagues and ourselves. May is Mental Health Awareness Month, and LAP and our Lawyer Assistance Committee have programming scheduled for each week of the month. Attend one or more of these. Take a hard look at your daily activities and try to find some time to smell the roses.

Come to our NCBA Gala on May 4 at the Cradle of Aviation Museum with your significant other and enjoy the fabulous food, environment and demonstrate your support for those being honored and the good work this Association does. More importantly, have fun. We had a fantastic free kick off to NCBA's 125th Anniversary with a well-attended game show night. WE CARE held its Dressed to Tea event on March 21 where over 250 attorneys, court support staff and judges had a wonderful fun night.

There is never a need to be lonely or feel adrift at NCBA. I look forward to seeing you around and sharing with you the beauty of Domus as Hector's tulips come up. If you or a colleague need help, call Dr. Beth Eckhardt, LAP Director, at (516) 512-2618 or (888) 408-6222. All calls are confidential. We got your back.

**FOCUS: CRIMINAL**

# CPL Article 245 and *People v. Bay*

**Christopher M. Casa and Amanda Vitale**

In 2019, the New York State Legislature enacted sweeping criminal justice reforms that expanded and restructured prosecutors' discovery obligations.[1] Those reforms, which took effect on January 1, 2020, repealed the discovery scheme set forth in Criminal Procedure Law ("CPL") Article 240 and replaced it with a new Article 245.[2] Those reforms now require prosecutors to disclose to defendants "all items and information that relate to the subject matter of the case" in their possession.[3] Additionally, prosecutors now cannot be ready for trial until they have complied with their discovery obligations under Article 245.[4]

On December 14, 2023, the Court of Appeals issued *People v. Bay*, its first decision discussing Article 245. In *Bay*, the court unanimously held that defendant's motion to dismiss the case on speedy trial grounds should have been granted because the prosecution failed to establish that they had exercised due diligence in identifying and disclosing all discoverable material to defendant prior to filing a certificate of discovery compliance and statement of trial readiness.[5] The decision, written by Judge Halligan, will have a significant impact on how courts resolve disputes over discovery in criminal cases.

### Prosecutors' Discovery Obligations Under CPL Article 245

Article 245 requires prosecutors to "disclose to the defendant, and permit the defendant to discover, inspect, copy, photograph and test, all items and information that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control . . . ."[6] Accordingly, materials and information which are both "relate[d] to the subject matter of the case" and "are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control" must be automatically disclosed.[7] In addition, all material and information "related to the prosecution of a charge in the possession of any New York State or local police or law enforcement agency shall be deemed to be in the possession of the prosecution."[8]

Prosecutors are required to "make a diligent, good faith effort to ascertain the existence of [discoverable material] and to cause such material or information to be made available for discovery where it exists but is not within the prosecutor's possession, custody or control[.]"[9] The statute also provides a lengthy but non-exclusive list of what constitutes discoverable material.[10]

After complying with their statutory discovery obligations, prosecutors must then file a certificate of compliance ("COC") stating "that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery."[11] Prosecutors may subsequently provide additional discovery and then file a supplemental COC.[12] "No adverse consequence to the prosecution or the prosecutor shall result from the filing of a [COC] in good faith and reasonable under the circumstances; but the court may grant a remedy or sanction for a discovery violation as provided in section 245.80 of this article."[13] However, prosecutors "shall not be deemed ready for trial" until they have filed "a proper certificate pursuant to [section 245.50]."[14]

### The Factual Circumstances in *Bay*

Bay discusses the effect of a post-COC disclosure on the prosecution's trial readiness. After the prosecutor filed a COC, defense counsel stated that she believed there was additional discoverable material outstanding, including police reports and a recording of a 911 call, which would normally be routinely disclosed.[15] The prosecutor responded that all discoverable material had been disclosed.[16] Later, however, about one week before the scheduled trial date, the prosecution disclosed additional police reports and a 911 call recording.[17] Defendant filed a motion to dismiss the case on speedy trial grounds, arguing that the prosecution's failure to disclose all required material invalidated its COC and statement of trial readiness.[18]

The prosecution opposed the motion and argued that the subsequent disclosure did not invalidate their initial COC because at the time they filed it they had provided all known discoverable material after exercising due diligence and making reasonable inquiries.[19] The prosecution also argued that their COC was valid despite the failure to disclose some discoverable material because the failure was inadvertent, the statutory scheme permits the prosecution to provide supplemental discovery without necessarily invalidating the COC, the belated disclosure did not prejudice the defendant, and courts should only dismiss cases as a sanction of last resort.[20]

### How the Court Applied Article 245 in *Bay*

The Court of Appeals rejected the prosecution's arguments and held that the COC was invalid because the prosecution failed to demonstrate that they satisfied the statutory requirements for a proper COC.[21] The court reasoned that "the key question in determining if a proper COC has been filed is whether the prosecution has 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery.'"[22] The court explained that "due diligence," although not defined in the statute, is "a familiar and flexible standard that requires the People 'to make *reasonable* efforts' to comply with statutory directives."[23] Whether the efforts made are reasonable is a "fundamentally case-specific" analysis, and courts should consider, among other things, the efforts made by the prosecution to comply with their discovery obligations, the "volume of the discovery provided and outstanding," the "complexity of the case," "how obvious any missing material would likely have been to a prosecutor exercising due diligence," "the explanation for any discovery lapse," and "the People's response when apprised of any missing discovery."[24] Notably, the court stated that prosecutors are not held to a standard of "strict liability" or perfection.[25]

Applying that standard, the court held that the prosecution failed to establish that they satisfied the requirements of Article 245 prior to filing their initial COC. The prosecution did not establish that they made reasonable efforts to provide all discovery, because when the defense alerted the prosecution that they had failed to disclose materials that were routinely disclosed, the prosecutor merely asserted—incorrectly—that those materials did not exist and all discoverable material had been disclosed.[26] Nor did the prosecution satisfactorily explain how they could have performed due diligence and filed a COC in good faith without discovering that those routinely discoverable materials did exist even after defense counsel brought the lapse to their attention.[27] Thus, the COC should have been invalidated and the prosecution's statement of trial readiness stricken as illusory.[28]

In addition, the court explained that a dismissal on speedy trial grounds for failure to comply with discovery obligations pursuant to CPL §§ 30.30 and 245.50 is distinct from a sanction under CPL § 245.80.[29] The court noted that sanctions and trial readiness are dealt with in two separate sections of Article 245, and that the provision of CPL § 30.30 that requires dismissal if the prosecution did not file a proper COC and speedy trial time has expired is not qualified by CPL § 245.80.[30] Thus, dismissal in this case was required not as a sanction under CPL § 248.80, but because the prosecution would have exceeded their speedy trial time under CPL § 30.30 after the invalidation of their COC and the striking of their statement of trial readiness as illusory.[31]

Notably, however, the court also stated that prosecutors can take steps to prevent cases from being dismissed before they are able to comply with their discovery obligations and file a proper COC.[32] For example, prosecutors could "request additional time for discovery upon a showing of good cause,"[33] ask for "an individualized finding of special circumstances" to be deemed ready despite the failure to file a "proper certificate,"[34] or try to exclude from the speedy trial calculus "periods

of delay occasioned by exceptional circumstances."[35] Thus, the court's decision suggests that periods of delay that would ordinarily be excludable from speedy trial calculations would still be excludable even absent a valid COC.[36] This is consistent with the language of CPL §30.30(4), which expressly states that such periods —including adjournments granted with the consent of defendant or his counsel[37] and delays caused by motion practice[38]—"*must* be excluded" when calculating the time within which the prosecution must be ready for trial.[39]

### The Impact of Bay

*Bay* provides much-needed clarity to lower courts in deciding motions to dismiss for discovery violations, how to evaluate the sufficiency of a COC, and the extent to which the People must make efforts to obtain and disclose discoverable material. It is now clear that to file a proper COC and be ready for trial, the prosecution must first exercise due diligence and undertake reasonable, good faith efforts to identify and disclose any materials and information which "relate to the subject matter of the case" and "are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control."[40] Under those circumstances, that COC would not be invalid even if after filing it in good faith and exercising due diligence, the prosecution thereafter obtains and discloses discoverable material to the defendant and files a subsequent COC.[41] However, while a belated disclosure will not necessarily invalidate a COC, a post-filing disclosure and a supplemental COC "cannot compensate for a failure to exercise diligence before the initial COC is filed."[42] In addition, it is not necessary for defendants to demonstrate that they have been prejudiced by a discovery violation in order to obtain a dismissal of an indictment on speedy trial grounds if a COC is deemed invalid.[43]

Many other questions surrounding Article 245 and prosecutors' discovery obligations remain, including whether certain material, such as law enforcement personnel records, is discoverable. Article 245 does not define the phrase "relate to the subject matter of the case."[44] Nor does it explain whether there is any practical difference between that phrase and the phrase "related to the prosecution of a charge," used in another provision to define items that are deemed to be in the possession of the prosecution.[45] Nor does it specify what type of information "tends to . . . impeach the credibility of a testifying prosecution witness,"[46] or whether the prosecution must disclose material that would tend to impeach the credibility of a prosecution witness in general but otherwise does not "relate to the subject matter of the case."[47] The appellate courts will likely address those questions in future decisions.

1. *See People v. Bay*, ___ N.Y.3d ___, 2023 NY Slip Op. 06407, *1 (2023); *see generally* CPL Article 245.
2. *See generally* CPL Article 245.
3. *See* CPL § 245.20(1).
4. *See* CPL §§ 30.30(5); 245.50 (1), (1-a), (3).
5. *See Bay* at *18.
6. CPL § 245.20(1).
7. *See id.*
8. CPL § 245.20(2).
9. *Id.*
10. *See* CPL § 245.20(1)(a)-(u).
11. CPL § 245.50(1).
12. *Id.*
13. *Id.*
14. CPL § 245.50(3).
15. *Bay* at *3.
16. *Id.* at *4.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at *11.
21. *See id.* at *13.
22. *Id.* at *12 (citing CPL § 245.50(1)).
23. Id. (emphasis added) (citing *People v. Bolden*, 81 N.Y.2d 146, 155 (1993)).
24. *Id.* at *12 – *13.
25. *See id.* at *12.
26. *See id.*
27. *See id.*
28. *Id.* at *18.
29. *See id.* at *17 – *18.
30. *See id.*
31. *See id.*
32. *See id.* at *17.
33. *Id.* (citing CPL § 245.70(2)).
34. *Id.* (citing CPL § 245.50(3)).
35. *Id.* (citing CPL § 30.30(4)(g)).
36. *See id.*
37. CPL § 30.30(4)(b).
38. CPL § 30.30(4)(a).
39. CPL § 30.30(4) (emphasis added).
40. *See* CPL §§ 245.20 (1), 245.50(3); *Bay* at *13.
41. *See Bay* at *13.
42. *Id.*
43. *See id.* at *15 – *17.
44. *See* CPL § 245.20(1).
45. *See* CPL § 245.20(2).
46. *See* CPL § 245.20(1)(k)(iv).
47. *See* CPL §§ 245.20(1), 245.20(1)(k)(iv).

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**FOCUS: LITIGATION**

# Fighting Back: Sometimes It's a Bad Idea

**Paul F. Millus**

The Random House dictionary defines retaliation as "to requite or make return for (a wrong or injury) with the like." One who is wrongfully accused in court—or in life—often feels the desire to fight back—ergo to retaliate. Retaliation can take many forms; some are lawful, and some are not. When accused in a legal proceeding, the accused may simply defend against the accusations while also stating, directly or through one's lawyer, that he or she intends to "vigorously defend against the claims asserted." But what if the defendant goes too far? What if the almost insatiable need to assert one's "rights" to be free from false accusations exposes the accused to more than he or she bargained for or expected.

This scenario can play out in a variety of ways. A client could be accused of an offensive act, and rather than simply have that client's denials in court speak for themself, the client may go further with his or her own legal threat to seek vindication outside of the court proceeding by engaging in acts to retaliate above and beyond the legal denials. This is when the client needs to take a breath, assess the possibility of the consequences associated with such "vindication," and proceed cautiously.

Take, for example, a person accused of something truly terrible, i.e., sexual assault. Rather than letting the denials contained into a pleading, and those asserted by the lawyer engaged to defend the accusations, the client lashes out on his own. Right before us is a recent highly publicized example in the case of *E.J. Carroll v. Trump*, 22-cv-10016 (Carroll II). In that case, after being on the receiving end of a $5,000,000 defamation verdict, Mr. Trump was faced with yet another defamation claim by Ms. Carroll, Mr. Trump spoke out, with vigor, regarding the nature of his views concerning the claim itself, his very personal views on Ms. Carroll (and her motivations) as well as other commentary concerning the outcome of Ms. Carroll's first defamation action. In other words, he retaliated.

As for the law as it applies to the retaliation engaged in by Mr. Trump, under New York common law, the "litigant's privilege" shields "one who publishes libelous statements in a pleading or in open court for the purpose of protecting the litigants' zeal in furthering their causes."[1] Such statements are absolutely privileged, provided that they are considered to be "material and pertain to the litigation."[2] Outside of court, however, the absolute privilege disappears, such that, the speaker may only potentially be protected by the "fair report privilege" under Section 74 of the New York Civil Rights Law that states that a civil action cannot be maintained against one who publishes a "fair and true report of any judicial proceeding."[3] The standard to determine "whether a report qualifies for the fair report privilege is whether 'the ordinary viewer or reader' can 'determine from the publication itself that the publication is reporting on [a judicial] proceeding.'"[4]

Mr. Trump's problem was that his statements were deemed not to be "a fair report of judicial proceedings" as a matter of law by U.S. District Judge Kaplan in denying Mr. Trump summary judgment. Therefore, no immunity was available, leaving only the truth or falsity of his (and the plaintiff's) statements to be decided and we are all aware how that turned out.[5]

So, what you do in response to a claim you (or your client) find frivolous or scurrilous, or even an outright lie, can be consequential. This leaves us to a discussion of retaliation in the workplace and where one may attack a claim that an individual (or entity) had violated someone else's civil rights.

In 2023, the New York State Court of Appeals, inundated with potential cases for final appellate review, eventually issued 57 decisions, 22 of which dealt with criminal cases, and one case addressed a retaliation claim brought by a plaintiff who had initially asserted a civil rights complaint against a party that was not particularly valid.[6]

On February 15, 2024, the court decided in the *Matter of Clifton Park Apartments, LLC v.* New York *State Division of Human Rights*,[7] holding that the threat of litigation may support a retaliation claim. Accordingly, the court held that the New York State Division of Human Rights ("DHR") "rationally concluded" that the element of a retaliation claim had been established and remitted the case so that DHR could address whether the respondent, CityVision Services, Inc. ("CityVision"), had engaged in protected activity.

### The Facts

Briefly, CityVision is a Texas-based, not-for-profit tester organization. In such cases, the tester seeks to determine whether or not the property owners are engaging in discrimination by posing as a prospective tenant. One of their testers placed a call to petitioner Clifton Park Apartments LLC ("Clifton Park") purportedly seeking to rent an apartment and later complained of housing discrimination. The DHR investigated CityVision's complaint and dismissed it, concluding there was no probable cause. The owner, feeling vindicated, went on the offensive and "retaliated" by sending a letter to CityVision stating it considered the underlying complaint to be "false, fraudulent and libelous."

Based on that letter, CityVision filed a second complaint alleging retaliation against the property owner, asserting that it sent the letter to intimidate CityVision and interfere with the tester's rights, which resulted in DHR adopting a portion of the ALJ's recommendation to award CityVision attorneys' fees. The owner commenced an action under Executive Law §298 to annul the DHR's determination. The Appellate Division, Third Department did so, concluding that, in regard to the retaliation claim, the ALJ and the DHR improperly shifted the burden to the owner and its attorney "to prove … that CityVision did not hold a reasonable belief that Pine Ridge was engaging in housing discrimination."

It did not remit the matter to DHR and instead held that the evidence failed to demonstrate that the owner and its attorney took an adverse action against CityVision under the third prong for a test of retaliation (the requirement that there be an "adverse action" by the alleged retaliator). The court found that the sending of the letter itself by the owner did not rise to the level of actionable retaliation, thus, dismissing the retaliation complaint.[8]

### The Holding

The Court of Appeals thought differently. While addressing the

retaliation claim, the court cited the *Burlington N. & S. F. R. Co. v. White* decision by the U.S. Supreme Court in 2006.[9] Much has been written about this decision which many employment practitioners believe expanded what could be considered actionable retaliation in the workplace.[10] The court cited the well-known standard that the adverse element action is satisfied "when a reasonable employee would have found the challenged action materially adverse" in that "it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." The court rejected the notion that such a letter could not, as a matter of law, amount to an adverse action, thus ruling that the question whether the threat of litigation amounts to an adverse action to be a fact specific determination. The court specifically rejected a rule precluding litigation threats from constituting adverse actions under New York's anti-retaliation statute (Executive Law §296(7)) since it was the New York Legislature's directive to liberally construe the statute to eliminate discrimination in this state.

Thus, the matter was put back in the hands of the DHR to review the entire record to determine whether there was a rational basis supporting the agency's decision which, as many know, puts the "retaliator" in an unenviable position.

### Takeaway

Whether it be in an employment case, or in a myriad of other matters where one litigant wants to act in "righteous" indignation in response to an affront, according to Newton's Third Law, every action can result in an equal and opposite reaction. Where a retaliation claim is involved, it must be acknowledged that, as it has been previously reported, according to EEOC statistics as of 2023, the number one claim filed with the EEOC in employment discrimination settings was retaliation. Moreover, the federal court statistics on jury verdicts over the prior five years readily demonstrate that even when claims involving the underlying complaint of discrimination are unsuccessful, the retaliation complaints enjoy greater success by far.[11] Considering this incontrovertible fact, clients should be counseled accordingly so that the bad situation they find themselves in does not become exponentially worse.

1. *D'Annunzio v. Ayken*, 876 F. Supp. 2d 211, 217 (E.D.N.Y. 2012) *quoting Bridge C.A.T. Scan Assocs. v. Ohio-Nuclear Inc.*, 608 F. Supp. 1187, 1195 (S.D.N.Y. 1985).
2. *Id.*
3. N.Y. Civil Rights Law §74.
4. *Carroll v. Trump*, 664 F.Supp.3d 550, 559 (S.D.N.Y. 2023).
5. *Carroll*, 664 F.Supp.3d at 562 (while the court did not decide as a matter of law whether the many statements attributed to Mr. Trump were or were not a "fair and true" report of a judicial proceeding, he did rule that a jury, a jury of residents from the boundaries of the S.D.N.Y would have to make that determination (and they did) to the tune of $83.300,000.
6. law.justia.com/cases/new-york/court-of-appeals/2023.
7. *Matter of Clifton Park Apartments, LLC v. New York State Division of Human Rights*, 2024 WL 628036, 2024 N.Y. Slip Op. 00793 (Feb. 15, 2024).
8. *Id.*
9. *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53 (2006).
10. *See e.g. A Bridge Too Far: The Supreme Court Overextends the Anti-Retaliation Provision of Title VII*, 56 Cath. U. L. Rev. 715 (2007); *Standard for Retaliatory Conduct*, 120 Harv. L. Rev. 212 (2006).
11. https://www.msek.com/blog/workplace-retaliation-claims-a-far-greater-problem-than-employers-realize.

**Paul F. Millus** is a Litigation Partner at Meyer, Suozzi, English & Klein, P.C. He can be reached at pmillus@msek.com.

**FOCUS: LAW AND AMERICAN CULTURE**

# The Trials of the Little Tramp

**Rudy Carmenaty**

In this age of satellite communications and social media, the silent movie is little more than a quaint relic from a bygone age. A century ago, it was the preeminent means of human expression. For the first time since the Tower of Babel, there was a universal language of cinematic pantomime.

On the silent screen, Charlie Chaplin's alter ego the "Little Tramp" reigned supreme. Chaplin observed at the time that "I am known in parts of the world by people who never heard of Jesus Christ."[1] This poignant, lovable character remains very much with us today.

While the Little Tramp was embraced, Chaplin himself was reviled. Perpetually beset by scandal, he faced a litany of court proceedings which undermined his popular appeal. The distinction in the public's mind between the on-screen persona and the off-screen person would haunt both the artist and the man.

The first consequential lawsuit involving Chaplin was emblematic of the endless fascination generated by the character of the Little Tramp. Imitation being the sincerest form of flattery and the surest way to box office success, the Little Tramp spawned numerous impersonators seeking to cash in on the novelty.

Among those endeavoring to exploit Chaplin's likeness was Mexican actor Charles Amador. Amador performed under the stage name "Charles Aplin." Adopting all the trappings of the Little Tramp, Amador/Aplin appeared in a movie called *The Race Track* (1920).

Chaplin sought to prevent Amador/Aplin from imitating him "in such a way as to deceive the public and work a fraud upon the public."[2] At trial, Amador/Aplin and the film's backers acknowledged that using the name "Charles Aplin" might be confusing to moviegoers.[3] This was their sole concession.



Defendants maintained that Amador/Aplin should be permitted to perform in the guise of the Little Tramp, contending Chaplin did not hold any exclusive right to the characterization. The bowler hat, the cane, the baggy pants, the oversized shoes, even the little mustache, were all in fact borrowed from other comics.[4]

Chaplin countered that the Little Tramp was, in all actuality, his creation because he imbued these disparate elements with his own distinct personality and mannerisms. The Superior Court in Los Angeles sided with Chaplin. *The Race Track* was deemed deceptive and the judge ordered prints of the film destroyed.[5]

The District Court of Appeal affirmed, and the California Supreme Court declined to hear the matter. *Chaplin v Amador* is a landmark in the field of intellectual property. It enables an artist "to be protected against unfair competition" by "those who would injure him by fraudulent means…counterfeiting his role."[6]

*Chaplin v Amador* is indicative of Chaplin's enormous fame. It could be argued that it was his iconic stature which insured this courtroom victory. Future trials would, however, turn out quite differently. For Chaplin had a penchant for young women. Three of his four wives were teenagers when he married them.[7]

His divorce from his second wife Lita Grey almost ended his career. The couple, appropriately enough, first met on the set of The *Kid* (1921). Grey was twelve. By the time they married in Mexico in 1924, she had just turned sixteen. He was thirty-five.

It was a shotgun wedding.[8] Charlie Jr. was born six months later. Had they not married, Chaplin might well have faced charges for statutory rape.[9] Not long after the birth of their second child, the marriage fell apart. Grey sued for divorce in 1926 alleging abuse, infidelity, and that Chaplin had "forced her to perform illegal sex acts."[10]

Anxious to protect his image, Chaplin paid Grey the then astronomical sum of $825,000 to avoid any further humiliation.[11] He had paid his first teenage-bride, Mildred Harris, a $100,000 settlement a few years earlier.[12] These divorce actions would not be the last time that Charlie's fetish for young girls would cause him anguish.

Chaplin met ingénue Joan Barry, aka Joan Berry, in 1941. She was of age, twenty-two. Still, he was thirty years older. Their tryst proved to be unhappy, and she proved to be unstable. Barry would later be committed to a mental hospital for schizophrenia.[13] After their affair ended, Joan revealed that she was pregnant.

But was it Charlie's child? The parties entered a stipulation. Barry agreed to delay a threatened court action in lieu of an out-of-court paternity determination. Chaplin compensated Barry lavishly for doing so. The parties agreed blood tests would be conducted by a trio of doctors to settle the matter.[14]

The blood tests proved conclusively that Chaplin was …. not the father.[15] Nonetheless, Berry reneged and filed a paternity petition. Blood tests were at the time inadmissible under California law.[16] After two salacious jury trials, Chaplin was adjudicated the child's father and ordered to pay support.

During each proceeding, Chaplin was condemned in the tabloids. Eighty years before the #MeToo Movement, hostile press coverage destroyed Chaplin's standing with the audience. No longer the lovable vagabond beloved by motion-picture fans, he was denounced in court as a "pestiferous, lecherous hound."[17]

The lawsuit also provided grounds for an indictment under the Mann Act. This law makes it a federal felony to transport across state lines "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."[18] Barry visited Chaplin in New York, and he covered the tab. Chaplin was later acquitted.

Chaplin's fourth wife was Oona O'Neill, daughter of playwright Eugene O'Neill. The couple wed in 1943 and they remained together until Chaplin's death on Christmas day 1977. Oona was devoted to Charlie, "He is my world, I've never seen or lived anything else."[19] Among their eight children is the actress Geraldine Chaplin.

The only issue was their respective ages, she was eighteen and he fifty-four. Their marriage, coming on the heels of Barry's paternity suit, provided more grist for the gossip columnists. Hedda Hopper portrayed Chaplin as a degenerate. Eugene O'Neill, who was the same age as his new son-in-law, disowned his estranged daughter.

Chaplin's behavior also provided cover for a well-orchestrated, behind-the-scenes campaign to punish the comedian for his political views. Let there be no doubt, Chaplin was a man of the left. Born in London, his childhood could have been crafted by Dickens. No doubt his poverty-stricken youth molded his politics.

Winston Churchill, upon meeting Chaplin, opined: "he is a marvelous

comedian—bolshy in politics and delightful in conversation."[20] Churchill's observations aside, Chaplin's opinions were neither commonly known nor particularly pronounced until the 1930s.

In *Modern Times* (1936), the Little Tramp confronts the dehumanization inherent in factory work. Released during the Great Depression, the movie offered biting social commentary in the guise of humor. This was the first inkling of Chaplin's sympathies. A masterwork, *Modern Times* makes a definitive statement.

His next film, *The Great Dictator* (1940), was a satirical condemnation of Adolf Hitler. Chaplin plays dual roles. That of "Adenoid Hynkel," the dictator of the fictitious "Tomania," and he pointedly transforms the Little Tramp into a character called "The Jewish Barber." In the movie, the barber is mistaken for the dictator.

Chaplin and Hitler are a study in contrast. Both men were born days apart in 1889. Both were recognized for their mustaches. There the similarities end. Chaplin brought laughter and delight. Hitler proffered death and slaughter. Chaplin believed he could address the menace of fascism by undercutting the Führer with comedy.

His first genuine talkie, Chaplin concludes *The Great Dictator* with a stirring soliloquy. Finding his voice, Chaplin speaks directly to the audience. He goes on to articulate his utopian vision of a better world:

> *Let us all unite.*
> *Let us fight for a new world, a decent world that will give men a chance to work, that will give youth a future and old age security.*
> *Let us fight to free the world, to do away with national barriers, do away with greed, with hate and intolerance.*
> *Let us fight for a world of reason, a world where science and progress will lead to all men's happiness.*
> *Let us all unite!*[21]

Chaplin, once a silent cipher, had at last spoken. Applauded by some, he became the bête noire of reactionaries. Franklin Roosevelt, for his part, admired the speech. On a radio broadcast of FDR's 1941 inaugural festivities, Chaplin recited the address wherein he was introduced as "a man who belongs to the world."[22]

During the war-time alliance with the Soviet Union, Chaplin's views were tolerated, even accepted. The onset of the Cold War changed everything. Anti-Communist sentiment ratcheted. Chaplin always denied being a communist. Instead, he described himself as a "peacemonger."[23]

No proof exists that Chaplin was ever a member of the Communist party. Yet his views did parallel the party line. His critiques of capitalism, his support for socialism, and his professed pacifism, put him on the wrong side of a growing ideological divide. Subjected to FBI surveillance, Chaplin was considered a subversive.

Charlie also ran afoul of the House Un-American Activities Committee for promoting peaceful coexistence with the Communist bloc.[24] Further complicating matters, he had never applied for American citizenship despite living in the United States for four decades. Many saw this as indicative of his perceived disloyalty.

It also left him vulnerable. The premiere of Chaplin's film *Limelight* (1952) took place in London. The movie tells the story of an aging music hall comic who falls in love with a young ballerina. The film is infused with autobiographical elements. It alludes to the comedian's real-life disenchantment with his admirers in the United States.

Chaplin's family sailed for England from New York in September 1952. While on board the Queen Elizabeth, Attorney General James McGranery rescinded Chaplin's reentry permit.[25] Chaplin would now have to submit to an interview about his politics and his private life before he would be allowed back.

Wounded by this indignity, Charlie accepted his fate with equanimity. A legal challenge might have been successful. Instead, he refused to contest the matter altogether. Having lost in the court of public opinion, Chaplin left America with his reputation in tatters. His fall from grace was complete.

Denied reentry, Charlie sent Oona to Los Angeles to sell his properties and wind down his business affairs. Oona would subsequently renounce her American citizenship, eventually taking British nationality.[26] Forced into involuntary exile, the Chaplins retreated to a chalet in Switzerland with their growing family.

Chaplin did not come back to the United States until 1972. The political climate having shifted somewhat, he was feted at a tribute by the Film Society of Lincoln Center and presented with an Honorary Oscar by the Motion Picture Academy. At 82, he had returned from Europe a shadow of his former self.

It could rightfully be argued that Chaplin was hounded out of this country for his radical opinions. His views were antithetical to the burgeoning Cold War establishment. In retrospect, this harassment was violative of at least the spirit, if not the letter, of the First Amendment.

His private conduct, which under any rubric is revolting, provided a convenient excuse for the government's actions. His voluminous FBI file consists of much rumor and innuendo, but few hard facts. It was his recurrent ordeals in the courts which provided the fodder that brought him down, leading to his ostracism and exile.

The power of the moving image enables the media to elevate the obscure while retaining the power to humiliate the eminent. The various trials of Charlie Chaplin demonstrate that the bright lights of celebrity can be toxic when mixed with the grim realities of the courtroom.

This phenomenon becomes particularly acute when these means are employed at the behest of the state to destroy its opponents. All the same, Chaplin's endearing Little Tramp survives while the controversies, legal and political, which bedeviled him and damaged his reputation are now forgotten.

A fitting tribute to an artist who brought so much mirth, but often found so little reason to smile.

1. Bosley Crowther, *Charlie Chaplin Dead at 88; made Film an Art Form*, New York Times (December 26, 1977) at Https://archive.nytimes.com.
2. *Chaplin v Amador*, 93 Cal.App. 358 (1928).
3. Suzanne Raga, *Charlie Chaplin Once Sued An Imposter Named 'Charlie Aplin'*, Mental Floss (July 17, 2015) at www.mentalfloss.com.
4. *Id.*
5. *Id.*
6. *Chaplin v Amador*, supra.
7. Among his brides, only actress Paulette Godard was not a teenager. She was twenty when they married.
8. Burt Folkart, *Lita Grey; Married Chaplin at 16*, Los Angeles Times (December 30, 1995) at https://ww.latimes.com.
9. *Charlie Chaplin, the Sexual Predator?* at https://family.lawguys.com.
10. *Id.*
11. *Folkart, supra.*
12. Critics Rant, *The Controversies of Charlie Chaplin* at https://criticsrant.com.
13. *Hollywood Celebrity Scandals Charlie Chaplin & Joan Barry Affair part 2* at https://www.trivia-library.com.
14. *Berry v Chaplin*, 74 Cal.App.2nd 669 (1946).
15. Crowther, *supra.*
16. *Berry v Chaplin, supra.*
17. *Charlie Chaplin persecuted for sex with Joan Berry* at https://www.purplemotes.net.
18. *The Full Text of the Mann Act* at https://www.pbs.org.
19. Alessandra Stanley, *Oona O'Neill Chaplin Dies at 66; She Lived in the Shadow of Fame* New York Times (September 28, 1991) at https://www.nytimes.com.
20. Richard Langworth, editor, *Churchill By Himself*, (1st Ed. 2008) 331.
21. *The Final Speech for The Great Dictator* at https://www.charliechaplin.com.
22. *Charlie Chaplin at Franklin D. Roosevelt's Third Inaugural Gala* at https://www.amazon.com.
23. *Charlie Chaplin's Birth Once Vexed FBI, MI5 Agents* at www.thesmokinggun.com.
24. In the 1950's, Nikita Khrushchev and Chou Enlai visited Chaplin in Switzerland.
25. Goran Blazeski, *Charlie Chaplin: accused of being a communist and exiled from the USA*, Vintage News (November 29, 2016) at https://www.thevintagenews.com.
26. Stanley, *supra.*

**Rudy Carmenaty** is the Deputy Commissioner of the Nassau County Department of Social Services. He can be reached at rudolph.carmenaty@hhsnassaucountyny.us.

# 10th Annual
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| Joseph R. Feehan | Andrew B. Seiken | Mary P. O'Reilly |
| Arianna F. Faucetta | Laura M. Brancato | Sandra D. Glazier |
| Thomas M. Dixon | Members of NCCPAP | Michael Greenwald |
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- Maximizing the Basis Step Up on Negative Capital Account Partnership Interests in Grantor Trusts
- Insights into the Current Trends of Guardianship Litigation
- Elder Abuse: Tackling Fraud in the Family

**Day 2**

- Navigating the Different Form of Charitable Remainder Trusts and Using Trust to Defer the Gain on the Sale of an Asset
- Tax Professional Panel hosted by NCCPAP
- Using Installment Sales to Non-Grantor Trusts
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- Hot Topics in Estate Planning
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## Benefits of Membership...

Continued from Page 1

provider—puts on approximately 140 CLE programs a year. Programs focus on training as well as new and changing laws and most are currently being offered both in person and virtually. Members can also receive up to 12 on-demand CLE credits where the credits are obtained through watching a prerecorded seminar. Some of the most popular programs during the current Bar year were:

- *Creative & Effective Appellate Brief Writing Workshop* with Chief Judge Rowan D. Wilson
- *Evidentiary Issues at Trial for Personal Injury Attorneys* by Judge Arthur Diamond
- *Forensic Entomology* by Denise Gemmellaro
- *The Supreme Court's Harvard/UNC Affirmative Action Ruling—Where do We Go from Here?*
- *Fireside Chat: This Light Between Us with Andrew Fukuda and Ching-Lee Fukuda*

### *Nassau Lawyer*

The NCBA publishes a monthly newspaper, *Nassau Lawyer*. Members have an opportunity to write articles to showcase their knowledge and expertise. They also receive a discount if they choose to advertise in the *Nassau Lawyer*. The newspaper goes out to all members and, twice a year, it goes out to all attorneys in Nassau County.

### Lawyer Referral Program

The Lawyer Referral Service matches people with legal problems to member attorneys experienced in the area of law in which they need assistance. When a person calls into the Bar Association looking for an attorney for their specific problem, experienced staff will connect them to a panel member. This is a great way to bring in new clients.

> "Above all, the greatest benefit is the friends that you will make.I encourage all attorneys, law school students, paralegals, and legal administrators who live or work in Nassau County to join the Nassau County Bar Association."

### In-House Caterer

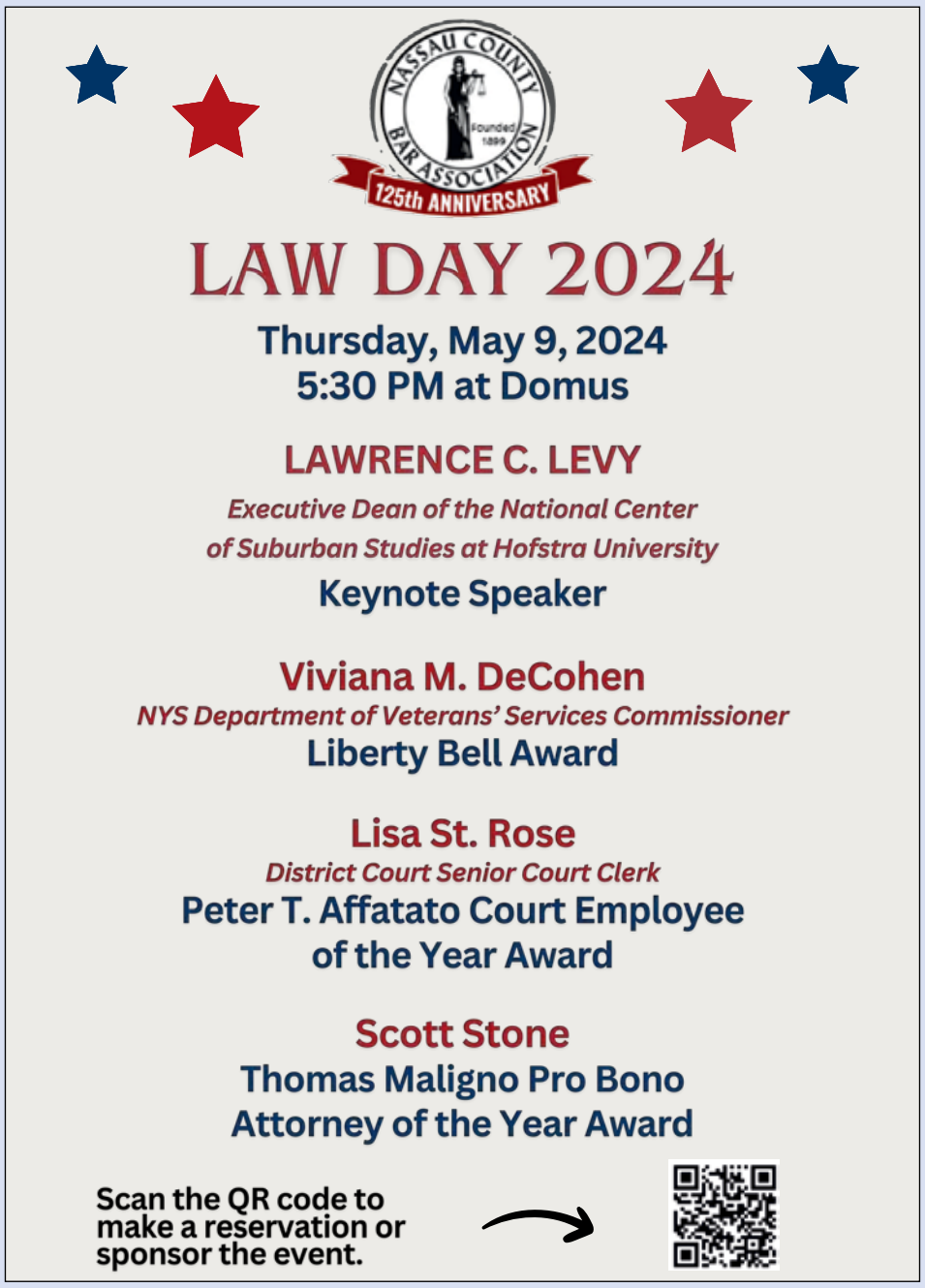
There is an on-site caterer at the NCBA who serves lunch nearly every day. Members can stop by to enjoy lunch with their peers or have lunch while listening to a CLE program. A member can also invite non-members to join them for lunch.

### Chance to Influence the Law

The NCBA Board of Directors—the governing body of the Nassau County Bar Association—will, at times, take a stance on different pending laws that affect the legal community. The Board's position is often considered by legislative bodies, which in turn, influences law and policy.

Above all, the greatest benefit is the friends that you will make. I encourage all attorneys, law school students, paralegals, and legal administrators who live or work in Nassau County to join the Nassau County Bar Association. In addition, for those who are not just members, but active members, you will see your efforts returned many times over.

**Jennifer Koo** is a Partner at Sales Tax Defense LLC, Chair of the Association Membership Committee, and Chair of the Asian American Attorney Section. She can be reached at jkoo@SalesTaxDefense.com.




## Law Day 2024...

Continued from Page 1

Court System, St. Rose, nominated by District Court Supervising Judge Tricia M. Ferrell, has become an indispensable member of the District Court team, showcasing her skills across various departments.

As the lead court clerk in the Landlord-Tenant section of the District Court, she plays a pivotal role in one of the courthouse's busiest sectors, where hundreds of cases are adjudicated weekly. Many litigants in the LT division, particularly respondents, navigate their legal challenges without formal representation, often grappling with a lack of legal knowledge and high emotional stakes due to the potential loss of their homes. St. Rose's exceptional ability to provide outstanding customer service, maintaining professionalism and courtesy under pressure, ensures that all parties receive the support they need during these tense proceedings.

### Thomas Maligno Pro Bono Attorney of the Year Award

Long-time NCBA Member Scott Stone will receive the Thomas Maligno Pro Bono Award. In 2021, Stone was awarded the New York State Bar Association President's Pro Bono Service Award for the Tenth Judicial District and, in September 2014, the Pro Bono Attorney of the Month by the NCBA for his work in landlord tenant court on behalf of Nassau Suffolk Law Services' Volunteer Lawyers Project. Stone was also recognized as a Top Pro Bono Honoree for 2014-2018 and 2021. Since entering the legal profession in 1993, Stone has built a general practice, concentrating in the areas of commercial and residential real estate transactions, leasing and property tax challenges; traffic and building department violations; wills and estates; probate and administration proceedings; landlord/tenant matters; business and corporate representation; and general litigation.

Tickets to Law Day are $80, or $65 for court staff, with sponsorship options available. For details, see this month's insert or contact NCBA Communications Manager Han Xu at Hxu@nassaubar.org or (516) 747-1361.

# NASSAU ACADEMY OF LAW

## April 8 (IN PERSON ONLY)

**An Evening with the Guardianship Bench 2024**

*With the NCBA Elder Law Committee*

5:30PM Dinner Reception; 6:30PM Program

2.0 CLE credits in Professional Practice

Jurists from across the tri-county will participate in an hour-long meet and greet, followed by a round-table discussion of guardianship practice and procedure. Pre-registration is required for headcount purposes.

**Guest Speakers:**

Hon. Arthur M. Diamond (Ret.), Moderator
Hon. Gary F. Knobel (Nassau County)
Hon. David J. Gugerty (Nassau County)
Hon. Gary Carlton (Nassau County)
Hon. Bernice D. Siegal (Queens County)
Hon. Lee A. Mayersohn (Queens County)
Hon. Wyatt N. Gibbons (Queens County)
Hon. Chris Ann Kelley (Suffolk County)
Hon. Rachel Freier (Kings County)

NCBA Member $60; Non-Member Attorney $80
Court Support Staff: $40

## April 15 (IN PERSON ONLY)

**Dean's Hour: Expeditated Jury Trials in Supreme Court by Hon. R. Bruce Cozzens, Jr., Steve Gokberk, Esq., and Giulia R. Marino, Esq.**

12:30PM

1.0 credit in Professional Practice

The expediated trial permits personal injury litigants to achieve a jury verdict in a speedy manner. Justice Cozzens will discuss how prior to trial, counsel shall prepare trial exhibits notebooks and the procedures for objections to the notebook contents, expediated jury selection, trial procedure, and the verdict.

NCBA Member FREE; Non-Member Attorney $35

## April 18 (IN PERSON ONLY)

**Matrimonial Law Update by Stephen Gassman, Esq. — Senior Partner, Gassman Baiamonte Gruner, P.C.**

*With the NCBA Matrimonial Law Committee. Dinner sponsored by NCBA Corporate Partner Complete Advisors.*

5:30PM Dinner Reception; 6:30 PM Program

2.0 CLE credits in Professional Practice

This program will include an extensive review and update on many of the groundbreaking cases decided in matrimonial law since our last Matrimonial Law Update. Mr. Gassman will discuss a summary of new cases during his program that will be a valuable tool for your matrimonial law practice.

NCBA Member FREE; Non-Member Attorney: $70

## April 18 (IN PERSON OLD WESBURY GARDENS)

**The How To's of Land Conservation by Ellen Fred, Conservation Partners, LLP**

*Sponsored by North Shore Land Alliance*

9:30AM – 12:30PM

3.0 CLE credit in Professional Practice

Discover the essential steps of private land conservation with Ellen Fred, Esq., a nationally recognized expert in conservation. Gain invaluable insights and practical knowledge to navigate the intricacies of private land conservation. Highlighted topics include the fundamentals and drafting of conservation easements; evaluating advanced tax issues, including the deductibility of charitable contributions; and structuring, negotiating, and closing purchase, sale, bargain sale, and donation transactions.

NCBA Member: $75
Non-Member Attorney: $225


## PART 36 CERTIFIED TRAINING PROGRAMS ON DEMAND

**To serve as Guardian, Court Evaluator, or Attorney for Alleged Incapacitated Persons (API), pursuant to Article 81 of the Mental Health Law, a person is required to receive training approved by the Guardian and Fiduciary Services of the Office of Court Administration.**

**Part 36 of the Rules of the Chief Judge establishes training requirements for appointment as a guardian, court evaluator or attorney for API. The Nassau Academy of Law offers on demand certified training programs for Part 36 Fiduciaries and Appointees for NCBA Members, Non-Member Attorneys, and Lay Persons.**

**Our Nassau Academy of Law On Demand Programs Include:**

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- **Guardian Ad Litem**
- **Receivership**
- **Supplemental Needs Trustee**

**Included in the purchase are the seminar material as well as the paperwork to be submitted to the court for proof of training. Attorneys receive CLE credit for completing the training.**

**The Academy staff is here to answer your Part 36 Training questions. Contact the Academy at academy@nassaubar.org.**

# CALENDAR | COMMITTEE MEETINGS

## COMMITTEE CHAIRS

| | |
|---|---|
| Access to Justice | Hon. Conrad D. Singer and James P. Joseph |
| Alternative Dispute Resolution | Suzanne Levy and Ross J. Kartez |
| Animal Law | Harold M. Somer and Michele R. Olsen |
| Appellate Practice | Amy E. Abbandondelo and Melissa A. Danowski |
| Asian American Attorney Section | Jennifer L. Koo |
| Association Membership | Jennifer L. Koo |
| Awards | Rosalia Baiamonte |
| Bankruptcy Law | Gerard R. Luckman |
| Business Law Tax and Accounting | Varun Kathait |
| By-Laws | Samuel J. Ferrara |
| Civil Rights | David A. Bythewood |
| Commercial Litigation | Christopher J. Clarke and Danielle Gatto |
| Committee Board Liaison | Daniel W. Russo |
| Community Relations & Public Education | Ira S. Slavit |
| Conciliation | Salvatore A. Lecci |
| Condemnation Law & Tax Certiorari | Michael P. Guerriero |
| Construction Law | Anthony P. DeCapua |
| Criminal Court Law & Procedure | Christopher M. Casa |
| Cyber Law | Thomas J. Foley and Nicholas G. Himonidis |
| Defendant's Personal Injury | Jon E. Newman |
| District Court | Bradley D. Schnur |
| Diversity & Inclusion | Sherwin Safir |
| Education Law | Syed Fahad Qamer and Joseph Lilly |
| Elder Law, Social Services & Health Advocacy | Lisa R. Valente and Mary Beth Heiskell |
| Environmental Law | Kenneth L. Robinson |
| Ethics | Mitchell T. Borkowsky |
| Family Court Law, Procedure and Adoption | James J. Graham, Jr. |
| Federal Courts | Stephen W. Livingston |
| General, Solo & Small Law Practice Management | Scott J. Limmer and Oscar Michelen |
| Grievance | Lee Rosenberg and Robert S. Grossman |
| Government Relations | Michael H. Sahn |
| Hospital & Health Law | Douglas K. Stern |
| House (Domus) | Steven V. Dalton |
| Immigration | Pallvi Babbar and Patricia M. Pastor |
| In-House Counsel | Michael DiBello |
| Insurance Law | Jason B. Gurdus |
| Intellectual Property | Sara M. Dorchak |
| Judicial Section | Hon. Gary F. Knobel |
| Judiciary | Marc C. Gann |
| Labor & Employment Law | Marcus Monteiro |
| Law Student | Bridget M. Ryan |
| Lawyer Referral | Gregory S. Lisi |
| Lawyer Assistance Program | Daniel Strecker |
| Legal Administrators | Barbara Tomitz |
| LGBTQ | |
| Matrimonial Law | Karen L. Bodner |
| Medical Legal | Bruce M. Cohn |
| Mental Health Law | E. Christopher Murray |
| Municipal Law and Land Use | Elisabetta Coschignano |
| New Lawyers | Byron Chou and Michael A. Berger |
| Nominating | Gregory S. Lisi |
| Paralegal | |
| Plaintiff's Personal Injury | Giulia R. Marino |
| Publications | Cynthia A. Augello |
| Real Property Law | Suzanne Player |
| Senior Attorneys | Stanley P. Amelkin |
| Sports, Entertainment & Media Law | Ross L. Schiller |
| Supreme Court | Steven Cohn |
| Surrogate's Court Estates & Trusts | Michael Calcagni and Edward D. Baker |
| Veterans & Military | Gary Port |
| Women In the Law | Melissa P. Corrado and Ariel E. Ronneburger |
| Workers' Compensation | Davin Goldman |

**TUESDAY, APRIL 2**
*Women in the Law*
*12:30 p.m.*

**WEDNESDAY, APRIL 3**
*Real Property Law*
*12:30 p.m.*

*Access to Justice*
*12:30 p.m.*

**THURSDAY, APRIL 4**
*Hospital & Health Law*
*8:30 a.m.*

*Publications*
*12:45 p.m.*

*Community Relations & Public Education*
*12:45 p.m.*

**TUESDAY, APRIL 9**
*Education Law*
*12:30 p.m.*

*Labor & Employment Law*
*12:30 p.m.*

**WEDNESDAY, APRIL 10**
*Medical Legal*
*12:30 p.m.*

*Commercial Litigation*
*12:30 p.m.*
*Hon. Jerome C. Murphy and his Principal Law Clerk Nancy Nicotra, Esq. will be speaking about Part 5's practices and preferences.*

*Matrimonial Law*
*5:30 p.m.*

*Diversity & Inclusion*
*6:00 p.m.*

**THURSDAY, APRIL 11**
*Asian American Attorney Section*
*12:30 p.m.*

**FRIDAY, APRIL 12**
*Appellate Practice*
*12:30 p.m.*

**TUESDAY, APRIL 16**
*Intellectual Property*
*12:30 p.m.*

*Surrogate's Court Estates & Trusts*
*5:30 p.m.*

**WEDNESDAY, APRIL 17**
*Ethics*
*12:30 p.m.*

*Association Membership*
*12:30 p.m.*

**THURSDAY, APRIL 18**
*Business Law, Tax & Accounting*
*12:30 p.m.*

**FRIDAY, APRIL 19**
*Sports, Entertainment and Media Law*
*12:30 p.m.*

**WEDNESDAY, APRIL 24**
*District Court*
*12:30 p.m.*

**WEDNESDAY, MAY 1**
*Real Property Law*
*12:30 p.m.*

**THURSDAY, MAY 2**
*Hospital & Health Law*
*8:30 a.m.*

*Publications*
*12:45 p.m.*

*Community Relations & Public Education*
*12:45 p.m.*

**TUESDAY, MAY 7**
*Women in the Law*
*12:30 p.m.*

**WEDNESDAY, MAY 8**
*Access to Justice*
*12:30 p.m.*

*Medical Legal*
*12:30 p.m.*

*Commercial Litigation*
*12:30 p.m.*

*Matrimonial Law*
*5:30 p.m.*

**THURSDAY, MAY 9**
*Asian American Attorney Section*
*12:30 p.m.*

**FOCUS: CIVIL LITIGATION**

# False Prophets—The Downfall Of "Ravenous" Experts

**Ian Bergström**

Litigants may utilize professionals to prove or disprove civil liability within the context of civil lawsuits. Although purported experts may initially appear indestructible, the civil litigation attorney should attack the legitimacy of the affidavit and/or report proving the lack of evidentiary value. The mere presentation of expert materials does not automatically establish *prima facie* entitlement to civil liability. The creative attorney should be empowered to refute the purported expertise by means of citing precedent and challenging baseless assertions.

### The Omniscient Expert

The Bible warns the public to evade individuals professing omniscience. "Beware of false prophets, who come to you in sheep's clothing, but underneath are ravenous wolves."[1] Basically, litigants retain professionals to explain concepts that may be outside the purview of the judiciary. The term "expert" should not indicate to the legal profession that the individual is omniscient. Rather, the purported expert can expose their flaw(s) scrutinizing affidavits, testimony, and reports.

Civil litigation attorneys should be cognizant of the fact that the purported expert likely lacks legal training and admission to the practice of law. If the expert lacks the requisite legal training, then he or she is fundamentally a layman. Attorneys should attack the purported expert's use of legalese, legal phrases, Latin phrases,[2] legal analysis, and recitation of legal concepts within their writings.

### The "Ravenous" Expert

The statutory basis of expert witnesses is CPLR article 45.[3] Litigants may proffer expert testimony and/or "reports" moving for summary judgment.[4] Supreme Court of New York County disregarded the "unsigned expert report" setting forth "conclusory statements … support[ing] its erroneous legal conclusion."[5] The purported expert is not permitted to declare "the legal obligations of parties under a contract …."[6] Further, the purported expert is not permitted to "interpret[] … a statute" because the court is tasked with such responsibility.[7]

In *Measom v. Greenwich & Perry Street Housing Corp.,* the First Department determined the testimony lacked evidentiary value because the "legal conclusion" was improper.[8] The inquiry whether the "apartment[]" was "legal[] … involv[ed] statutory interpretation" requiring the court to adjudicate same.[9] The appellate division declared the purported expert lacked the skill and legal acumen to interpret the municipal law, thereby disadvantaging the municipality.[10] If the professional does not assert or otherwise demonstrate legal experience within their writings, then the use of legal concepts can be easily attacked. The municipal defendant(s) is recommended to refute the potential baseless assertion the municipality was served with prior written notice of a defect by means of proffering testimonial evidence to the contrary pursuant to their local law(s).[11] The purported expert may execute an affidavit and/or report setting forth nebulous, conjectural, and "conclusory" assertions accusing the defendant(s) of tortious liability.[12] Such statements lack evidentiary value.[13]

In *Hutchinson v. Sheridan Hill* House Corp., the First Department determined the affidavit lacked evidentiary value because the purported expert, inter alia, "visited" the accident location two years "after the accident."[14] Apparently, the purported defect was fixed during the two-year delay.[15] In *Claro v. 323 Firehouse, LLC*, the Third Department disregarded the affidavit setting forth "conclusory" assertions that the purported defect at issue was not hazardous after the purported expert reviewed photographs.[16]

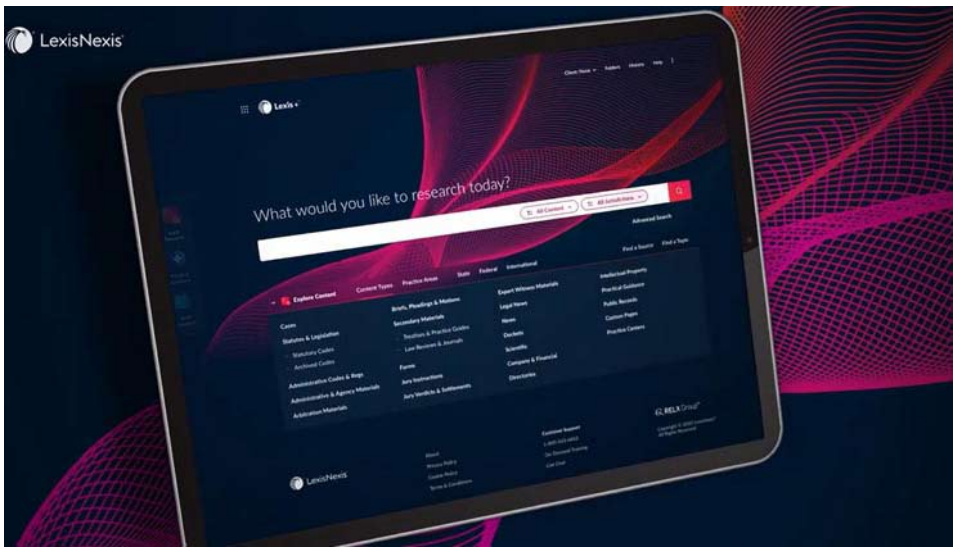
The purported expert is required to establish "specialized knowledge, experience, training, or education" regarding the applicable circumstances to qualify as an expert.[17] The professional setting forth "conclusory" statements "based on unidentified and unproduced records" are refutable proving the "lack[] [of] probative value …."[18] Second Department guides the attorney to ensure the strength of "expert opinions …."[19] The purported expert should assert "an explanation of the reasoning and rel[iance] on specifically cited evidence in the record," rather than unfounded assertions.[20] The "[g]eneral and conclusory allegations of medical malpractice" should be disregarded because the movant is required to proffer "competent evidence" proving malpractice.[21]

Civil litigation attorneys are urged to challenge expert testimony and/or expert reports before the trial court to preserve the aforementioned arguments for appellate review. If the attorney does not sufficiently challenge expert materials, then the appellate division may disregard such arguments as unpreserved for appellate review.[22] The appellate division can exercise discretion to consider "unpreserved" arguments "in the … interest of justice," but the attorney is recommended to properly preserve challenges.[23]

### Beware of False Prophets

Litigants are statutorily required to disclose expert witness information under CPLR §3101.[24] The court may "preclu[de]" the purported "expert," whereby the party discloses expert information upon the eve of trial "prejudic[ing]" the opposing party and "willful[ly]" refusing to disclose same.[25] The party disclosing the information is statutorily required to set forth "items … bear[ing] upon the skill, training, education, knowledge and experience of … experts."[26] The trial court can prohibit the purported expert to "testify[]" regarding "new theory of liability not … discernible from the … bill of particulars and … expert disclosure."[27]

Healthcare professionals are not required to be deemed "a specialist … to testify regarding accepted practices in that field," but the professional must "la[y]" the requisite "foundation" establishing dependability "of [her] opinion" testifying about concepts "outside … her area of specialization …."[28] Surprisingly, the purported "expert" is not required to practice their craft within the same geographical area as the incident(s) at issue.[29] The professional can testify "to familiarity with … the standard of care in the locality or … minimum standard … locally, statewide, or nationally."[30] The Supreme Court of Nassau




County scrutinizes the qualifications of purported experts. In *Gittler v. Pinsky*, the trial court admonished the "expert submissions" lacking "probative value" because the purported opinions, inter alia, failed to "detail a … departure from accepted standards of care …."[31] In *Asher v. Walordy*, the Supreme Court of Nassau County determined that the purported expert's "conclusion" should be deemed to lack "probative force," whereby the individual admits the "conclusion [is] unsupported by facts or data …."[32] In *O'Donnell v. Gupta*, the trial court disregarded the baseless opinion that the combined use of "Clindomycin and Augmentin" caused the "infection" at issue.[33] The trial court believed challenges to the "qualif[ications]" of purported experts are "unavailing" because "the trier of fact" should "weigh[] … the testimony …."[34]

Consequently, the successful challenge to the purported expert's credentials should not be deemed to consist of inadmissible evidence.[35] The trial court should deny the summary judgment application within the context of "medical malpractice action[s]" if the "opinions" contradict.[36] Third Department indicates that the trial court can sua sponte determine the purported expert lacks the requisite qualifications.[37]

The professional can circumvent strict compliance with the aforesaid inquiries by means of establishing "long observation and actual experience."[38] The party challenging the expert witness should persuasively attack the legitimacy of the "observation and actual experience" proving to the trial court that the individual lacks the requisite knowledge to be deemed an expert.[39] The jury has the ability to disregard the credibility of purported experts.[40] Supreme Court of Nassau County indicates that "conclusory [statements], speculative [statements], or [statements] unsupported by the record" are not within the purview of the jury to determine "credibility issues …."[41]

### The Internet can Expose False Prophets

Civil litigation attorneys should perform Google searches to acquire information about the professional. The professional may have a website and/or social media accounts setting forth an overview of their work experience. The citation to publicly available information within motion practice is permissible. The LexisNexis legal research database offers public record searches and expert witness information. The attorney should compare and contrast the nature of the lawsuit to the work experience set forth throughout the affidavit, report, and/or publicly available information undermining the credibility of the purported expert. The intention is to undermine the legitimacy, knowledge, and skill of the purported expert to aggressively advocate for your client(s).

1. *Matthew 7:15* (Holy Bible); *State v. Beasley*, 108 N.E. 3d 1028, 1054 (Ohio 2018) (J. O'Connor); *People v. Bryant*, 278 A.D.2d 7, 8 (1st Dept. 2000); *People v. Adams*, 267 A.D.2d 140, 141 (1st Dept. 1999).
2. See 1 Corinthians 14:21 (Holy Bible).
3. CPLR 4515; *Knutson v. Sand*, 292 A.D.2d 42, 46 (2d Dept. 2001); *Gumbs v. NY Prop. Ins. Underwriting Asso.*, 114 A.D.2d 933, 934–35 (2d Dept. 1985).
4. See *Sharinn v. Icon Parking Sys.*, 2020 NYLJ LEXIS 1137, 161244/2013 (Sup. Ct., N.Y. Co. 2020) (J. Levy); see *also* CPLR 3212.
5. See *Sharinn*, n. 1.
6. See *Colon v. Rent-A-Center, Inc.*, 276 A.D.2d 58, 61 (1st Dept. 2000).
7. See *id.*
8. See *Measom v. Greenwich & Perry Street Housing Corp.*, 268 A.D.2d 156, 159 (1st Dept. 2000).
9. See *id.* See *also Newark Valley Central School Dist. v. Public Emp. Relations Bd.*, 83 N.Y.2d 315, 320 (1994).
10. See *Marquart v. Yeshiva Machezikel Torah D'Chasidel Belz*, 53 A.D.2d 688, 689 (2d Dept. 1976).
11. See *generally Corey v. Town of Huntington*, 9 A.D.3d 345, 346 (2d Dept. 2004); see *generally Fornuto v. County of Nassau*, 2015 N.Y. Slip Op. 32738(U), *11 (Sup. Ct., Nassau Co. 2015) (J. McCormack).
12. *Cardia v. Willchester Holdings, LLC*, 35 A.D.3d 336, 337 (2d Dept. 2006); *Hutchinson v. Sheridan Hill House Corp.*, 110 A.D.3d 552, 553 (1st Dept. 2013); *Vazquez v. JRG Realty Corp.*, 81 A.D.3d 555 (1st Dept. 2011); *Abraido v. 2001 Marcus Ave.*, 126 A.D.3d 571, 572 (1st Dept. 2015); *Fox v. Watermill Enterprises, Inc.*, 19 A.D.3d 364 (2d Dept. 2005); *Figueroa v. Haven Plaza Housing Dev. Fund Co.*, 247 A.D.2d 210 (1st Dept. 1998); *Goodwin v. Guardian Life Ins. Co. of Am.*, 156 A.D.3d 765, 767 (2d Dept. 2017); *Mathis v. D.D. Dylan, LLC*, 119 A.D.3d 908, 909 (2d Dept. 2014).
13. *Cardia*, 35 A.D.3d at 337; *Hutchinson*, 110 A.D.3d at 553; *Vazquez*, 81 A.D.3d 555; *Abraido*, 126 A.D.3d at 572; *Fox*, 19 A.D.3d 364; *Figueroa*, 247 A.D.2d 210; *Goodwin*, 156 A.D.3d at 767; *Mathis*, 119 A.D.3d at 909; *Brown v. City of Yonkers*, 119 A.D.3d 881, 882–83 (2d Dept. 2014).
14. *Hutchinson*, 110 A.D.3d at 553; *Figueroa*, 247 A.D.2d 210; *Abraido*, 126 A.D.3d at 572.
15. See *Hutchinson*, 110 A.D.3d at 553.
16. See *Claro v 323 Firehouse, LLC*, 177 A.D.3d 1052, 1053–54 (3d Dept. 2019).
17. See *Dalder v. Inc. Vill. of Rockville Centre*, 116 A.D.3d 908, 910 (2d Dept. 2014).
18. See *Residential Credit Solutions, Inc. v. Gould*, 171 A.D.3d 638, 638–39 (1st Dept. 2019).
19. See *Schwartz v. Partridge*, 179 A.D.3d 963, 964 (2d Dept. 2020); see *also Mendoza v. Maimonides Med. Ctr.*, 203 A.D.3d 715, 717 (2d Dept. 2022).
20. Schwartz, 179 A.D.3d at 964; *Clayton v. Meadowbrook Care Ctr., Inc.*, 2021 N.Y. Slip Op. 32091(U), *4 (Sup. Ct., Nassau Co. 2021) (J. Gianelli); *Sotomayor v. Braithwaite*, 2020 N.Y. Slip Op. 35140(U), *16 (Sup. Ct., Nassau Co. 2020) (J. Marber).
21. See *Mendoza*, 203 A.D.3d at 716–17.
22. See *Korn v. Korn*, 222 A.D.3d 1058 (3d Dept. 2023); see *also Fuschi v. JPMorgan Chase Bank*, N.A., 2024 N.Y. Slip Op. 00023, *1 (1st Dept. 2024).
23. See *Ladesso v City of N.Y.*, 229 A.D.2d 565, 566 (2d Dept. 1996).
24. See *Schmitt v. Oneonta City School Dist.*, 151 A.D.3d 1254, 1255 (3d Dept. 2017) (citing CPLR § 3101(d)(1)(i)).
25. See id.
26. See *Kanaly v. DeMartino*, 162 A.D.3d 142, 148 (3d Dept. 2018) (citing CPLR § 3101(d)(1)).
27. See *Owens v. Ascencio*, 210 A.D.3d 686, 688 (2d Dept. 2022).
28. See *M.C. v. Huntington Hosp.*, 175 A.D.3d 578, 580–81 (2d Dept. 2019).
29. See *id.* at 580–81.
30. See *id.*
31. See *Gittler v. Pinsky*, 2021 N.Y. Slip Op. 32970(U), *14 (Sup. Ct., Nassau Co. 2021) (J. Sher).
32. See *Asher v. Walordy*, 2021 N.Y. Slip Op. 33382(U), *4 (Sup. Ct., Nassau Co. 2021) (J. Steinman).
33. See *O'Donnell v. Gupta*, 2020 N.Y. Slip Op. 35137(U), *16 (Sup. Ct., Nassau Co. 2020) (J. McCormack).
34. See *Miller Law Offices v. S. South Shore Record Management*, 2017 N.Y. Misc. LEXIS 5631, *3–4, 601634/2015 (Sup. Ct., Nassau Co. 2017) (J. Feinman).
35. See *id.*
36. See *id.* at 581; see *also* CPLR 3212.
37. See *Superhost Hotels Inc. v. Selective Ins. Co. of Am.*, 160 A.D.3d 1162, 1164 (3d Dept. 2018).
38. See *id.*
39. See *generally id.*
40. See *Felt v. Olson*, 74 A.D.2d 722 (4th Dept. 1980).
41. See *Sotomayor*, 2020 N.Y. Slip Op. 35140(U), *17.

**Ian Bergström** is the founder of Bergstrom Law, P.C. He can be contacted at Ian@IBergstromLaw.com.

## 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.

**Robert S. Barnett**, Partner at Capell Barnett Matalon & Schoenfeld LLP, presented a webinar for Strafford, titled *S Corp Basis, Distributions, and Form 7203: Calculating Stock and Debt Basis, Losses, Loan Repayments*. Partner **Yvonne R. Cort** has been selected to receive the *Long Island Herald*'s 2024 Premier Business Women of Long Island Award.

NCBA Corporate Partner **Abstracts, Incorporated** is pleased to announce that they are celebrating their 40th Anniversary in 2024 and are incredibly grateful for their long-term relationship with members of the Nassau County Bar Association.

Keane & Beane, P.C. is excited to announce that **Richard Zuckerman, Sharon Berlin, Adam Ross** and **Alyssa Zuckerman** have joined the firm as of January 1, 2024. All were previously with Lamb & Barnosky, LLP. With this addition, Keane & Beane has opened a Long Island office, located in Melville.

Schroder & Strom, LLP is proud to announce that **Partner Joseph C. Packard** has been recognized by *Long Island Business News* as an "Influencer in Law" for 2024.

**Aaron Futterman** is pleased to announce that Futterman, Lanza & Pasculli, LLP celebrates its 20-year milestone in 2024. In 2004, the firm Futterman & Lanza was opened in Smithtown with a mission to serve their clients in all aspects of estate planning and elder law and be strongly connected with the local community. Over the last 20 years, Futterman & Lanza grew to Futterman, Lanza & Pasculli, LLP, with offices in Smithtown, Bay Shore, and Garden City.

**Adam D'Antonio** was recently promoted to the position of Supervisory Attorney Advisor for the New York State Field Operations at the U.S. Department of Homeland Security/Transportation Security Administration. He is responsible for overseeing TSA-related legal matters and field attorneys at all New York airports and providing legal guidance to the New York federal air marshals.

**FOCUS: COMMUNITY RELATIONS**

# Opportunities Abound to Provide Community Service

**Ira S. Slavit**

The Nassau County Bar Association's Community Relations & Public Education ("CRPE") Committee provides a plethora of community service programs for residents of Nassau County. Programs are presented at Domus and, increasingly, are brought to locations throughout the county. None of it would be possible without members of the Committee generously volunteering their time. But no need to feel left out, there is much more on the horizon.

Ira Slavit chairs the CRPE Committee alongside Co-Vice-Chairs Ingrid J. Villagran and Melissa A. Danowski, and Nassau Academy of Law Director Stephanie Ball. The Committee meets at lunchtime on the first Thursday of each month. The meetings are hybrid, but, encouragingly, in-person attendance has been growing.

CRPE Committee members range from stalwarts who have been on the Committee for more years than they would like to admit to those who have recently joined and have charged full speed into the Committee's work. The invaluable continued support of past Committee chairs is also a testament to their dedication to the Committee.

Distinguished jurists consistently and graciously give their time, ideas, and support to the work of the Committee. One long-serving member is Hon. Denise Sher, who deserves special mention for her exceedingly valuable guidance and insight. Judge Sher makes sure that the Committee always has its mission in mind—to serve the needs of the community.

To appreciate the extent of the Committee's robust activities, one needs only to look at the agenda of its March 2024 meeting. The topics included public education programs at Domus and other locations in Nassau County, the School Engagement Subcommittee, the Law Day Dinner, the high school mock trial tournament, civics education programs, the Ask-A-Lawyer program at Freeport Memorial Library, and the Kids in Nature Program.

Providing public education programs at Domus is a long-standing tradition of the CRPE Committee. Over the past few years, public education programs addressed hate crime victims' rights, landlord/tenant rights, patient advocacy, social security disability benefits, veteran's rights, animal owners' rights, how to obtain care assistance for your senior or disabled loved ones, and combatting anti-consumer fraud/scams. The Committee has held annual programs for Domestic Violence Awareness Month (October) and presents programs jointly with the NCBA Lawyer's Assistance Program.

The Committee also coordinates a program for Nassau County legislators, "How to Use the Law to Serve Your Constituents." For over 30 years, this annual program, led by Tom Maligno, has highlighted the partnerships between legislative offices and advocacy groups to serve the public. The NCBA Access to Justice Committee, coordinated by Pro Bono Attorney Activities Director Madeline Mullane, and Nassau Suffolk Law Services provide crucial planning for and assistance with the program.

In addition to programs at Domus, the CRPE Committee has taken its public education and community service programs "on the road." Every month at Freeport Memorial Library, community members attend the Ask-A-Lawyer program staffed by volunteers from the NCBA. Monthly programs staffed by attorneys from Nassau Suffolk Law Services, The Safe Center Long Island, and the NCBA are offered at the Farmingdale, Franklin Square, Hicksville, and Long Beach libraries.

The public is grateful for the assistance they receive, and the attorneys find it to be extremely rewarding. More volunteer attorneys are needed to staff these programs. Please contact Ira Slavit for more information about the program at Freeport Library and Roberta Scoll at rscoll@nsls.legal for the other libraries.

This year's Law Day Dinner is on May 9, 2024. The Law Day Dinner Subcommittee, chaired by Hon. Ira Warshawsky (Ret.), meets to plan the dinner, select the keynote speaker, and recommend honorees of the awards given at the dinner. NCBA members are encouraged to join the subcommittee and share their fresh ideas for the event. Please purchase your tickets if you have not already.

Forty-eight high schools in Nassau County competed in this year's Mock Trial Tournament, which is coordinated by Peter Levy, Lawrence Schaffer, and Stephanie Ball. Please consider judging or being an attorney-advisor in next year's competition.

### School Engagement Subcommittee

A most exciting new development is the formation and growth of the School Engagement Subcommittee. The goal of the subcommittee is to create lasting and meaningful partnerships between the Bar Association and schools throughout Nassau County by developing and implementing civics programs to educate children about the role of the law in society.

This School Engagement Subcommittee was established and is chaired by Joshua D. Brookstein. The accomplishments of Josh and the subcommittee cannot be overstated and will leave their mark on the students who participate.

The subcommittee offers programs for high school, middle school, and elementary school students. One program is Legal Shadow Day in which students visit a Nassau County courthouse and observe a trial in the morning and visit a law firm in the afternoon for lunch, speed networking, and the opportunity to get a glimpse of how a law firm operates.

The subcommittee has also partnered with Hon. Joseph F. Bianco and several school districts for students to attend and participate in naturalization ceremonies at the U.S. District Courthouse in Central Islip. Students have sung the National Anthem and distributed American flags to new citizens while their peers watch the ceremony via Zoom. Following the ceremony, Judge Bianco participates in a virtual Q&A with the students who watched the ceremony remotely. After the Q&A session, Judge Bianco leads a mini mock trial with the students in his courtroom.

An exciting new program in its second year is the mock trial program for elementary school children. The purpose of the program is to expose and engage youngsters to the foundation of the rule of law, the court system, and the trial process. Starting in October and running through June, between eight and fifteen fourth- and fifth-grade students meet weekly before school for approximately 40 minutes. Volunteer lawyers attend and present lessons bi-weekly. All the lessons are prepared by members of the School Engagement Subcommittee.

Last year's case was a criminal problem: *The People of The State of New York vs. Goldilocks*. This year's trial involves a civil assumption of risk case centering around a game of donkey basketball gone awry. The competition is held at the Nassau County Supreme Court. Hon. Conrad D. Singer, Hon. David J. Gugerty, Hon. Helene Gugerty, Hon. Gary F. Knobel, and the Hon. Joseph R. Conway have volunteered to preside over the trials this year.

Programs in civics development will be coming to middle schools. Contacts are being developed with local school districts who are interested in the NCBA's support for civics readiness and debate programs.

### Upcoming Programs

A full slate of public education activities is planned for this spring. On March 25, a program on human trafficking will be presented and foster parenting and adoption is the topic for a presentation on May 23. Shortly thereafter, on May 29, a program to educate the public about resources that are available for families facing sudden illness and disease will be given. Jesse Giordano, of NCBA Corporate Partner Opal Wealth Advisors, is taking the lead in preparing this program. The panel will include speakers from the Leukemia & Lymphoma Society and the Alzheimer's Association.

A program on the new cannabis law in New York is being planned for June. Topics will include how the new recreational cannabis law applies to employment, driving, and other everyday situations. Discussions will also explore the potential mental health issues that can result from the misuse of cannabis. This program will be

presented together with the Lawyer's Assistance Program (LAP) and the Nassau Academy of Law (NAL). CLE credit will be offered.

The focus of the Kids in Nature (KIN) program, created by Hon. David J. Gugerty, is to promote health and provide disadvantaged youth an opportunity to enjoy nature and learn about the environment. Contact Judge Gugerty, past Vice-Chair of the CRPE Committee, for more information about outings planned for this spring.

Also in the works is a public education program to be held at public venues throughout Nassau County that will provide basic legal information to immigrant communities. Topics include information about serving jury duty, basics of the court system in Nassau County—including the types of cases that are handled by each of the various courts in the county—and what opportunities, such as internships, are available to help youngsters become lawyers or work in the court system. Ideally, contemporaneous translation from English to the language of the immigrant community would be provided.

**Join the CRPE Committee**

The loyalty and enthusiasm of the CRPE Committee members is due to the immense satisfaction they receive from serving the community and helping residents obtain needed information and assistance. More NCBA members are welcome to join the Committee (or resume their pre-COVID participation) to engage in its countless programs, suggest new ideas, and help generate more publicity for the Committee's activities. The next meetings are on April 4 and May 2 at 12:45 p.m.

**Ira S. Slavit** is an NCBA Director, Chair of the NCBA Community Relations & Public Education Committee—for which he is receiving this year's Directors' Award—and past Chair of the Plaintiff's Personal Injury Committee. Slavit is Co-Chair of the Nassau County Equal Justice in the Courts Committee's Community Outreach and Programs Subcommittee. An attorney with Levine & Slavit, PLLC, he can be reached at islavit@newyorkinjuries.com or (516) 294-8282.

**FOCUS: APPELLATE**

# Creative Storytelling with a Focus on Humanity: A Perspective on Effective Appellate Brief Writing


**Stephanie Ball**

***"I jumped at the chance to do this because I saw it was about legal writing, something I adore." —Hon. Rowan D. Wilson***

The Nassau County Bar Association had the honor of hosting Chief Judge Rowan D. Wilson as the keynote speaker at the *Creative & Effective Appellate Brief Writing* seminar held at Domus on February 29 and March 1. Presented by the Nassau Academy of Law, in coordination with the NYS Office of Indigent Legal Services, Appellate Defender Council, the seminar was an intensive two-day program designed specifically for appellate defenders on criminal and family court (parent representation appeals).

Because the stakes are very high, appellate brief writing is extremely important. It involves people's liberty and sometimes affects whether they can keep their homes, their jobs, custody of their children. Although he wouldn't want to say that oral arguments aren't important, Chief Judge Wilson would say that he thinks most of the time after having read and studied the briefs and read the cases cited that he and his colleagues have, in most cases, a pretty good idea of how each justice wants to decide.

Chief Judge Wilson asked the audience "What is effective legal writing of any sort?" His reply was effective legal writing is to use plain English. To paraphrase Judge Wilson, basically if someone picks up your writing, someone who is not a lawyer, possibly someone with only a high school education, they can read it and understand it. They don't need to think it is the best writing they have ever read but they can get through it without saying it was boring. If they can read some of it and can say they understand what's going on, that is effective storytelling and persuasive writing. Except in extraordinary cases, you should not think of yourself as writing for a technical audience, you should think of yourself as writing for a general audience.

Chief Judge Wilson reminded the audience it is important to treat people as humans. Use people's names unless there is a confidentiality issue. To refer to someone as the defendant tends to dehumanize them. There is always a human story that requires creative story telling.

Chief Judge Wilson gave the audience an overview of why the organization and structure of the brief—with topic headings, topic sentences, and conclusionary sentences—helps the reader understand where you're going and where you have been. It makes the brief more readable and more persuasive. He does think it is important not to simply summarize but to get into the details of the cases and facts. If there's precedent that you're trying to distinguish, go back to the trial record in the case because sometimes there's little nuggets there that you won't find in the court of appeals decision, but you will find if you trace the case back. It's hard work but worth the research.

Chief Judge Wilson read passages from three seminal cases that emphasized how simpler, shorter, more declarative writing is better. It's just more understandable for everybody. It is a better way to paint a scene and to get people to read what you've written and to understand what you are saying. Now Chief Judge Wilson had everyone's undivided attention. No one was looking at their phones. The audience was here for a very rare opportunity to hear tips from a master wordsmith. He didn't disappoint as he gave five tips for effective and persuasive brief writing.

### Tip No. 1—Facts

The facts are very, very important to write. You want to write facts in a way that sounds neutral, that isn't charged with adjectives and adverbs. You can use verbs and nouns effectively without throwing in a lot of adjectives and adverbs. By doing that, you remove your own voice from it in a way you're sticking to what the record has, but you can frame it and organize it in a way that will tell your story. And by the end of the facts, the readers should be convinced of your position.

### Tip No. 2—Precedent

When relying on precedent, dig into the nuances. When researching cases, don't just read the headnotes, read the entire case, look at the facts in the case, see if they really support the proposition you were citing them for. Think about the ways that they could be distinguished and were different. And there is usually something on the other side that is troublesome, difficult and it's very important to engage the best you can in the brief instead of trying to duck it and get hit with a bunch of questions.

### Tip No. 3—Organization and Structure

Legal writing is really its own genre. There are standard forms of briefs that people expect. The rules require the attorney to follow the format. But it's also important when structuring the brief, arguments are separated. Put the more important ones first. There are organizational signposts throughout the brief such as topic sentences and conclusionary sentences. Each paragraph should have a topic sentence. If not, the reader may have a hard time figuring out if you've moved to a different topic or if it relates to what came before. Make it easy for the reader to follow the story.

### Tip No. 4 — Rewriting

This in some ways is the most important point, that good writing is really good rewriting. It's the rewriting in which you can really make the writing perfect, or at least extraordinarily persuasive. And it's not just to rewrite once, it's to rewrite again and to go back over what you've done. Read your brief out loud or have your computer read it back to you. Have somebody else read the brief, and, even better, somebody who doesn't know anything about the matter you're working on.

### Tip No. 5—Storytelling

Remember you are telling a story. Take whatever you have in the way of facts and arguments and turn them into a story. You're trying to tell a story, ultimately, that is more persuasive than the story that somebody else is telling. And that means to think about all the traditional elements of storytelling. You need a beginning that sets the stage that draws people in that they can relate to; a middle that is the action of the story; and an end that summarizes the story and takes the reader where you want the reader to go.

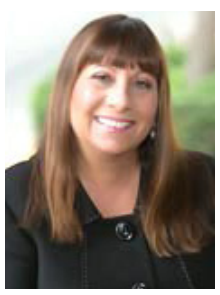
### Bonus Tip — Reply Briefs

Reply briefs are often the hardest to write because you have to think very carefully about what you are going to address. Don't restate the arguments that you made in the opening brief. The first question is to ask yourself "Do I need to do anything?" That's a hard question. "Could I just let this go?" "Is there anything here?" And if the answer is yes, "What are those things?"

Make a list of the things you must respond to. Was there something in the responsive brief that wasn't adequately addressed in the opening brief or perhaps in the responsive brief? They've made a mistake, they said something that you can really knock off? You need to pick a small number of things that you think you need to respond to. Organize those points to tell a story again about why your client should win.

You want your reply brief to be concise, you want it to be punchy and you want to stick to what you said in the beginning. And if they called you names here or there, don't respond the same way. Take the high ground and write in a flatter, more neutral way, but make the points you want to make. Then leave it to the reader to decide. Anger does not really get you anything in substance.

And just like that, the time with Chief Judge Wilson was up! He told a story that left the audience wanting more. When the author had time to speak to Chief Judge Wilson after his keynote speech, she asked him what he thought of AI to help write briefs? But that is material for a whole new article!



**Stephanie Ball, JD**, is the Director of the Nassau Academy of Law. She can be reached at sball@nassaubar.org.

**Lawyer Wellness Corner**

# LAWYER ASSISTANCE PROGRAM (LAP) SPRING ROUNDUP

## APRIL EVENTS

- **SHARING BALANCE**: Join us on **Tuesdays from 1:00-1:45pm (via Zoom,** link provided upon registration) for Sharing Balance, our ongoing **support group series open to members of all aspects of the legal profession and their families**. Just fill out a brief, one-time registration form (found by scanning this QR code), then attend as many sessions as you like. There's no obligation or limit. We hope to see you there!
- **ADHD SUPPORT GROUP**: Starting April 11th, this group will meet every other Thursday at 12:00pm (via Zoom).

## MAY EVENTS (in honor of Mental Health Awareness Month)

- The first week of May is Lawyer Well-Being Week. What better time to begin a month-long **Lawyer Well-Being series**?
  - May 7: LAP Dinner Event
  - May 14: Dean's Hour - Vicarious Trauma and Trauma-Informed Lawyering
  - May 21: Dean's Hour - Substance Use Awareness
  - May 28: Dean's Hour - Suicide Prevention
  -

**** For more information and/or to register for any of these events, please email doreilly@nassaubar.org. ****

If you would like to make a donation to LAP or learn about upcoming programs, please visit nassaubar.org and click our link under the "For Members" tab.

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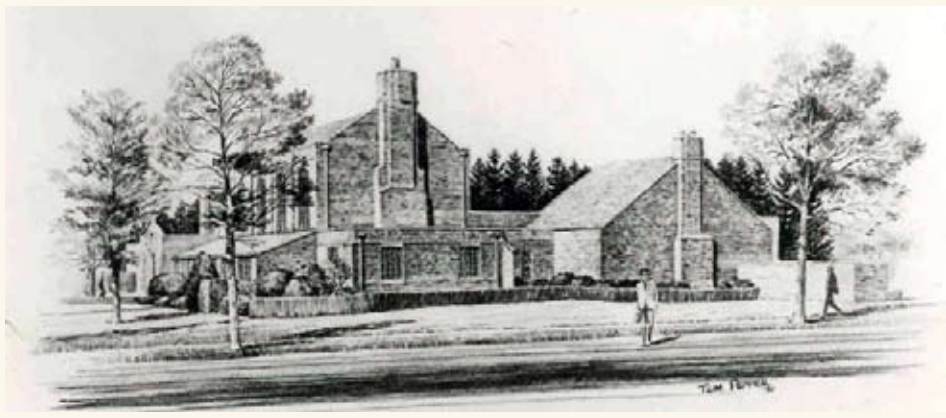
The NCBA Lawyer Assistance Program is directed by Beth Eckhardt, PhD, and the Lawyer Assistance Committee is chaired by Dan Strecker, Esq.
LAP is supported by funding from the NYS Office of Court Administration, the NY Bar Foundation, Boost Nassau,
and the WE CARE Fund of the Nassau County Bar Foundation. *Strict confidentiality protected by Section 499 of the Judiciary Law.

# A Toast to Domus: The Legacy of the Nassau County Bar Association (Part 3)

***In tribute to the 125th anniversary of the Nassau County Bar Association's founding in 1899, throughout 2024, Nassau Lawyer will publish excerpts from the history book, A Toast to Domus: The Legacy of the Nassau County Bar Association, to familiarize readers with the NCBA's past. An online copy of A Toast to Domus, published in 2020, can be found at NassauBar.org under the About Us dropdown menu.***

In the early years, the Association held its meeting in the law library of the Court House, but as more and more business was transacted there, the organization was forced to relocate. Throughout the 20s, the annual meetings were held in local county clubs, but the growing membership and higher profile of the organization necessitated acquiring a permanent home. The directors first considered the possibility in 1927, and appointed a committee to investigate the various options. In the spring of 1929, C. Walter Randall, later a president of the Association announced that he had arranged to purchase lots from the Garden City Company for $12,050. The contract stipulated "that within two years a substantial dwelling or club house, costing not less than $25,00 shall be erected, the exterior plans to be submitted to the Garden City Company prior to erection."

Complying with such restrictions proved to be no problem for the Bar, for they selected an architectural firm well versed in the revival styles popular in the 20s. A.J. McKenna had designed several suburban homes on Long Island,



and his partner Louis E. Jallade had designed the International House near Columbia University and the Flatbush Congregational Church. They modeled the home of the Nassau County Bar Association after Middle Temple, one of the Inns of Court in London. One explanation for that decision may be found in the career of John W. Davis, who joined the Association after his defeat in the presidential election in 1924. Davis had served as ambassador to Great Britain at the end of the Wilson administration and in 1919 he had been made an honorary bencher of Middle Temple.

The decision to build in the late 20s was more fortuitous than the directors realized at the time. Even though real estate investment had leveled off by 1927, the stock market continued its spectacular rise, and most expected the decade's booming economy to go on forever. But in October, the stock market crashed, and within a year or two, lawyers who had prospered during the boom found themselves in financial difficulties. The groundbreaking ceremony took place on January 27th, 1930, "a bleak, cheerless, overcast day," according to Randall, only three months after the stock market crash. The Association had decided to build without a mortgage, depending on members to subscribe to the building fund. In the beginning, the process went well, but subscriptions lagged as the economy sank even lower; eventually they were compelled to borrow $15,000 from a local bank to finish construction. Fortunately, one of the Bar Association's directors was a vice president, and founder, of the Glen Cove Bank, and the loan was arranged without difficulty, secured only with the Association's note. The Association also created a special category of guest memberships of $500, "to which twenty-five of the most prominent men of the County (other than attorneys) were invited." Twenty accepted, including Robert Moses. Moses, however, never actually wrote a check and eventually had his subscription cancelled. Throughout the 1930s, however, the directors had to remind members to make good on their pledges, a rather difficult task for dozens of members had fallen years behind in the dues and were eventually dropped from the rolls.

Despite the financial hurdles, work progressed quickly. The cornerstone laying ceremony followed the groundbreaking by only two months. Inside the cornerstone, they placed copies of the speeches delivered for the occasion by Judge Frederick E. Crane, Justice Edward Lazansky, and Association President Frederick L. Gilbert, copies of the day's New York Times, Brooklyn Daily Eagle, and the New York Law Journal, lists of the Association's members and subscribers to the building fund, a copy of the subscription agreement, a description of the property and a print of the building.

In his address, Justice Lazansky stated, "It is in the name of this spirit of fraternal cooperation that this edifice will be erected. Under its cheerful room brethren of the Bar will meet in social and cultural intercourse. Out of a common purpose there will develop a bond of fellowship richer in its expressions of cooperation and helpfulness, for the benefit not only of the members of the Association, but for the Bar generally, and for the general welfare." With the privilege of practice, he added, comes a serious obligation: "Admission to the Bar means not only person advantage, but calls for service to the general welfare. Your body should arouse a greater interest in the service to public affairs." Lazansky emphasized the role of the Bar in maintaining the standards of the profession and "find ways and means to limit the privilege of practice to those who are really qualified. The doors must be kept wide open but the mere desire to practice should not be the card of admission." Judge Crane sounded a similar note, noting the role of the Bar in assuring that lawyers possess "those fundamental requirements of high and noble purpose. The leaders of the Bar, men of standing and of reputation…by composite action form the standards of the Bar. These standards are not necessarily written; they are felt; they for part of the atmosphere which surrounds the lawyer in such an association. These standards are not the laws of the land; neither are they the laws of ethics, but they constitute well understood principles, courses of conduct and of action which all the profession must live up to."

Domus was dedicated on March 21, 1931. The final cost was $300 less than the original estimate of $61,415 for the bare building, plus an additional $7,000 for fixtures, furnishings, and kitchen equipment. The dedication featured speeches by Judges Benjamin N. Cardozo and Frederick E. Crane of the Court of Appeals, Justice Edward Lazansky, Right Reverend Ernest M. Stires, Bishop of the Episcopal Diocese of Long Island, and John W. Davis. On June 15th, two hundred members sat at the long tables arranged in the manner of the dinners held at the Middle Temple for the first annual dinner held in the Association's new home. Governor Franklin Roosevelt was the guest of honor.

# Lunar New Year Celebration

**The NCBA hosted its first-ever inaugural Lunar New Year Celebration on Monday, February 26, an event that brought together 150 attendees. A special thank you goes out to our generous sponsors, talented performers, and valued guests who truly made this event successful!**





# Pro Bono Recognition Dinner

On Tuesday, March 5, Chief Judge Rowan D. Wilson joined members of the Bench and Bar to honor the hundreds of volunteers who completed pro bono work in 2023. The annual Pro Bono Recognition Dinner—hosted jointly by the NCBA Access to Justice Committee, The Safe Center LI, and Nassau Suffolk Law Services—recognizes the crucial role that pro bono service plays in community wellness.



# 125th Anniversary Kickoff Game Night

The NCBA kicked off its 125th Anniversary celebrations on Thursday, March 7 with a well-attended Game Night. This special event gathered members, corporate partners, and guests for an evening filled with comradery, competition, and lots of fun!




Photos by: Hector Herrera

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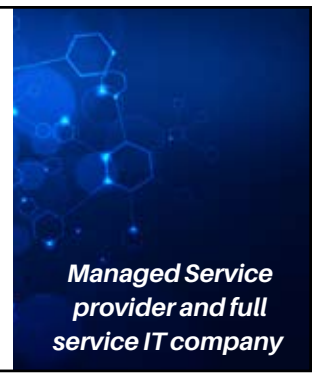


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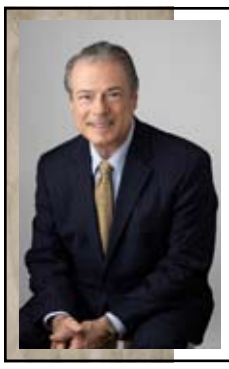

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