Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

April 2023 www.nassaubar.org Vol. 72, No. 8

Follow us on Facebook

WHAT'S INSIDE

When an Accident is Just an Accident pg. 5

The Severance Package Employees Can't Refuse pg. 6

Defending Against Traumatic Brain Injuries: What We Can Learn from Athletes pg. 8

Straight to Video: Legality and Admissibility of Surreptitious Recordings in the Workplace pg. 10

Escaping Burdensome Real Estate Leases in Bankruptcy: Relief for the Tenant? Grief for the Landlord? pg. 12

We Are "Entrusted" to Explore All Viable Avenues for Compensation pg. 13

The Case for Non-Competes pg. 16

Loss of Chance Gets Its Own Pattern Jury Charge pg. 18

The Socratic Method Comes to the Movies pg. 20

SAVE THE DATE

LAW DAY: CORNERSTONES OF DEMOCRACY

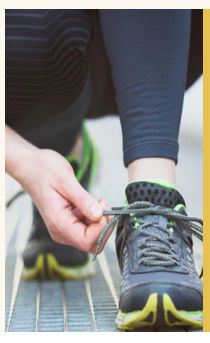
MONDAY, MAY 1

See insert

123RD ANNUAL DINNER GALA

SATURDAY, MAY 13

See insert



LAP WALK-A-THON

SATURDAY, JUNE 3

See pg.19

Law Day 2023: *Cornerstones of Democracy—Civics, Civility, and Collaboration*

The Nassau County Bar Association (NCBA) is pleased to present its annual Law Day Awards Dinner, exploring the theme *Cornerstones of Democracy: Civics, Civility, and Collaboration* on Monday, May 1, 2023, at Domus. The event will feature a cocktail hour, buffet dinner, keynote program, and recognition of three honorees for their dedication and commitment to the legal community.

Keynote Presentation

This year's keynote presentation will be led by Rudy Carmenaty, Chair of the NCBA Diversity and Inclusion Committee and Publications Committee. The program features attorneys and members of the judiciary who will explore musings of law and lore inspired by the works of one of America's most beloved artists—Norman Rockwell.

Renowned for his covers for *The Saturday Evening Post*, Rockwell's art became a staple of popular culture. Rockwell depicted our collective history, from the Roaring Twenties, the Great Depression and World War II, to the Civil Rights Movement, and other pivotal moments in America's past, while demonstrating the ability to appreciate tolerance and understanding amongst the American people—a true testament to our democracy and the shared values of community.

The presentation will feature works of art created by Rockwell inspired by key historical figures and events. A particular highlight will be the *Four Freedoms*. A phenomenon during World War II, these images, derived from a speech by Franklin Roosevelt, served as an inspiration during the war years and remain a vibrant paean to American ideals eighty years later.

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 **Dorian V. Segure**, seventh grade Law and Civics Responsibility Teacher at Alverta B. Gray Schultz Middle School in Hempstead. Segure began his law career in 1987 working as a Philadelphia Assistant City Solicitor in the Bonds and Contracts Department. His career in education began in 1993 as a member of the Adjunct Faculty at Temple University School of Law in the Urban Education Initiative Clinical Program. He also served as the Associate Director of Temple's LEAP Program, with a mission to teach nonlawyers law and conflict resolution skills, and to train law students how to teach middle school and high school students' aspects of law and civic rights and responsibility.

In 1999, Segure joined the sixth-grade team of teachers at Alverta B. Gray Schultz (ABGS) Middle School where he spent the following 21 years teaching English and Social Studies. In addition, he founded the ABGS Middle School Law Club, which worked in collaboration with lawyers and judges of the NCBA Mentoring Program.

Throughout his career, Segure has also worked with Hofstra Law, Colombia University, the Nassau County Peer Diversion Program, and the American Debate League.

See LAW DAY 2023, Page 23

Nassau Lawyer

The Official Publication
of the Nassau County Bar Association
15th & West Streets, Mineola, N.Y. 11501
Phone (516)747-4070 • Fax (516)747-4147
www.nassaubar.org
E-mail: info@nassaubar.org

Printed by Richner Printing, LLC
(516) 569-4000

Nassau Lawyer (USPS No. 007-505) is published monthly, except combined issue of July and August, by Richner Printing, LLC 2 Endo Blvd., Garden City, NY 11530, under the auspices of the Nassau County Bar Association. Periodicals postage paid at Mineola, NY 11501 and at additional entries. Postmaster: Send address changes to the Nassau County Bar Association, 15th and West Streets, Mineola, NY 11501.

123rd Annual Dinner Gala—Highlight of the Bar Year

FROM THE PRESIDENT

Rosalia Baiamonte

On Saturday, May 13, 2023, the Nassau County Bar Association will be holding its **123rd Annual Dinner Gala** at the Long Island Marriott in Uniondale. The high point of this signature event will be the presentation of the NCBA's Distinguished Service Medallion.

The Distinguished Service Medallion is awarded annually to an individual who is outstanding in his/her field of endeavor, of high moral character and integrity, and with a record of distinguished service to the public. Past recipients of the Medallion have included U.S. Presidents (Herbert C. Hoover and Dwight D. Eisenhower), Vice Presidents (Nelson Rockefeller), Governors (Alfred E. Smith, Thomas Dewey and Mario M. Cuomo), Supreme Court Justices (Earl Warren, Arthur Goldberg, Thurgood Marshall and Antonin Scalia), Senators (Jacob Javitz, Kenneth Keating, Daniel P. Moynihan and Alfonse D'Amato), Court of Appeals Justices (Bernard S. Meyer and Sol Wachtler) and other influential figures in American jurisprudence (Milton Mollen, Barry C. Scheck and Preet Bharara), just to name a few.

This year's 79th Distinguished Service Medallion Recipient is **Geri Barish**, Executive Director of Hewlett House, Nassau County Commissioner of Health Special Assistant, and President of 1 in 9: The Long Island Breast Cancer Action Coalition, who has dedicated her life to raising awareness, helping patients and their families, and eradicating cancer.

Barish is a five-time cancer survivor and activist, whose mother died of breast cancer and whose oldest son, Michael, died in 1986 at the age of 25 from complications of Hodgkin's Lymphoma approximately twelve years after first becoming ill and shortly after Barish's own cancer diagnosis. It was Michael's diagnosis which began Barish's crusade to become more informed, to raise cancer awareness and to advocate for cancer patients, a journey that would become her lifelong pursuit.

Four years after her initial diagnosis, the State Health Department issued a study on breast cancer on Long Island, which concluded that high socio-economic status, diet, and a large population of Jewish women were factors contributing to a high rate of breast cancer in the region. Astonished and unsettled by findings which implied that religion and finances could affect a woman's susceptibility to being diagnosed with breast cancer, Barish, together with two schoolteachers from Wantagh (Fran Kritchek and Marie Quinn), were galvanized and determined to secure a new study.

That meeting was the beginning of The Long Island Breast Cancer Coalition, dubbed 1 in 9 after the national statistic that one in nine women will be diagnosed with breast cancer in her lifetime. By reaching politicians at every level of government, Barish and "1 in 9" were able to secure funding for an additional study, which cited environmental toxins and carcinogens as possible causal links to cancer. Since then, the group embarked on a journey of outreach, education and environmental advocacy that continues to this day. Through her efforts, Barish has spearheaded changes to local, state, and federal laws that resulted in new policies and helped clean-up toxins in our environment.

In 2001, Barish opened Hewlett House, a non-profit community learning resource center open to patients of all cancers that services Long Island and the five boroughs of New York City. Located at 86 East Rockaway Road (just across the street from Hewlett High School), Hewlett House was purchased by Nassau County for $1 in 1995. Town of Hempstead Councilman Bruce Blakeman, then the presiding officer of the County Legislature, pushed for the acquisition with the help of then Hewlett-Woodmere Board President Richard Braverman. For more than 20 years, this 300-years-old white colonial house has been used as a sanctuary and resource center for people and their families who are enduring cancer.

The mission of Hewlett House is to support cancer patients at every stage of treatment. All services are provided free of charge. Every visitor to Hewlett House is treated like family and provided full access to educational materials and research on different treatment options; access to peer-reviewed doctors, oncologists, and specialists; free access to psychologists and counselors; wigs for chemotherapy patients; 24/7 peer-to-peer support systems; and a network of cancer survivors and their families who are ready to guide patrons throughout every physical, psychological and emotional stage of the cancer journey.

Walking through the doors of Hewlett House, you are immediately enveloped by charm and warmth. It is a "home" in the purest sense of the word, a refuge for those who need information, honesty, comfort, and compassion. The entry way is welcoming and warm with plenty of light which shines through the beautiful multi-colored stained glass. There is a large farmhouse table attached to a working kitchen which can easily accommodate large gatherings and celebrations.

All of the rooms are cheerfully decorated with homey touches, children's arts and crafts, a variety of knitting and needlepoint made by patients, letters and cards of gratitude, photos of Barish's family, friends, supporters, volunteers, and many

others who have been touched by her activism. There are plenty of cozy places for knitting, reading, or just sitting quietly. There are educational rooms, and even special rooms for children and teens to gather.

Hewlett House is able to provide such services through the generosity of the local community, individual, and corporate donations and a deep well of volunteerism. Their fundraising also supports ongoing research projects that benefit all cancer patients, across the United States and around the world.

Justice Ruth Bader Ginsburg famously said, "*Fight for the things that you care about, but do it in a way that will lead others to join you*." So, through her own very personal battles and unimaginable loss, Geri Barish has emerged as a standard-bearer in the fight against cancer and in the more than three decades of her crusade, she has amassed a veritable army of "guardian angels" who have and continue to provide countless patients and their families with courage, compassion, and more importantly, hope.

Additional celebrations at the dinner gala include the special recognition of our 50, 60 and 70-Year Honorees:

50 Year Honorees

Gilbert L. Balanoff • Kenneth J. Balkan • Sol Barrocas • Anthony B. Barton • Michael Coco • Hon. Randall T. Eng • Eugene Kirby Ferencik • Richard G. Fromewick • Edward D. Gewirtz • Martin Glushakoff • Amy C. Haber • Stanley Hirsch • Thomas J. Killeen • Steven A. Klar • James R. Klein • Hon. Stephen L. Kunken • Raymond J. McRory • Elaine G. Miller • Howard A. Minsky • Scott E. Mollen • Francis D. Quigley, Jr. • Robert P. Rovegno • Jerome A. Wisselman • Gerald P. Wolff

60 Year Honorees

Paul F. Belloff • John P. Bracken • Roland P. Brint • Nicholas DeSibio • Frederick S. DiStephan • Rita Eredics • Howard M. Esterces • Stephen F. Gordon • David M. Green • Carl Saks • Leon H. Tracy

70 Year Honorees

Hon. Zelda Jonas • Hon. George C. Pratt

Finally, the following individuals will also receive special recognition for their contributions to the bar association:

The **2022-2023 NCBA Board of Directors' Award** will be given to **Michael J. Antongiovanni** for his outstanding service as Chair of the Financial Oversight Committee.

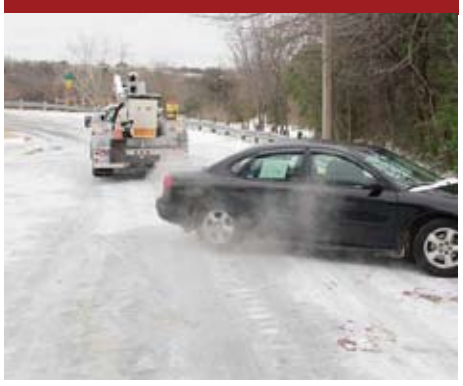
The **President's Award** will be given to **Elizabeth Eckhardt, LCSW, PhD**, for her compassionate and dedicated leadership as Director of the Nassau County Bar Association Lawyer Assistance Program.

The **Past President's Award** will be given to **Elena Karabatos**, in recognition of her outstanding leadership of the bar association during a period of unprecedented challenges and for her continuing dedication and service to the bar association, most notably, her vision and contribution which formed the basis of the NCBA Karabatos Pre-Law Society.

Please join us in celebrating the accomplishments of the country's premier suburban Bar Association and in honoring Geri Barish's remarkable achievements as well as our other honorees, by attending the 123rd Annual Dinner Gala, and/or by claiming a sponsorship opportunity or by placing a commemorative ad in the Journal. This year's Journal will feature Pink Pages, which can be dedicated in honor of or in memory of a loved one whose life has been impacted by cancer. Details on these opportunities can be found on the NCBA Dinner Gala website at www.ncbadinnerdance.com.

FOCUS: INSURANCE LITIGATION

When an Accident is Just an Accident



Andria Simone Kelly

An accident is defined as "an unforeseen and unplanned event or circumstance" that occurs unintentionally and often results in injury.[1] "The term *accident* implies that nobody should be blamed, but the event may have been caused by unrecognized or unaddressed risk."[2] The happening of an accident alone, however, does not mean someone was negligent.

Many accident scenarios result in lawsuits as they present obvious issues of legal liability. The motor vehicle accident, for example, where Vehicle One runs a stop sign and T-bones Vehicle Two, calls into question the negligence of the driver of Vehicle One. The slip and fall on ice in a parking lot suggest that the premises owner may have been negligent. While these types of accidents may result in legal liability, there is a class of accidents that falls into the category of "everyday occurrences" that are simply not actionable.

New York Courts, including the Court of Appeals, have made it clear that the mere happening of an accident does not, in and of itself, establish liability of a defendant.[3] Those accidents which involve an accidental bump, trip, or some other unintentional contact (or maybe even non-contact) often fall within the class of cases for which liability does not attach. The Court of Appeals has long acknowledged that sometimes accidents "occur without anybody's fault amounting to negligence,...The law does not provide recovery for every accident. There is a large field of non-liability for injury."[4]

In order to establish liability, "[i]t is necessary to demonstrate both the existence of a legal duty and the breach of that duty, by an act or omission which falls well below the standard of care which may be expected of a reasonably prudent person in the same position."[5] In *Peralta v. La Placita Dominica Mkt. Corp.*, the plaintiff, a customer of the defendant's store, was injured when an employee stepped on his foot, causing him to fall.[6] The plaintiff in *Peralta* had taken a step to the right just prior to the employee stepping on his foot.

The Court in *Peralta* held: "The mere occurrence of an accident, standing alone, does not result in the imposition of liability. Stated otherwise, not every accident is compensable. In the usual case, it is the plaintiff's burden to demonstrate conduct which falls below the standard of care which one might reasonably expect from the hypothetical reasonably prudent person. This plaintiff has failed to do so."[7]

The *Peralata* Court noted:

> There are certain occurrences which one might consider sufficiently recurring as to be incidental to the usual routine of life in our society, and, while one might strive to avoid them, their occurrence is not necessarily actionable without some proof of negligence. A few examples come to mind—accidental bumping into another while walking or in a crowded airport or terminal; getting up from a table in a crowded restaurant and accidentally striking one with the back of the chair as one stood up; bumping into another customer with a shopping cart in a supermarket; accidentally stepping on the back of someone's foot while walking behind a person; or, as here, accidentally stepping on someone's foot as a person backed or turned into one's path.[8]

Kleiner v. Crystal Ball Group, Inc., adopted the *Peralta* Court's opinion. In *Kleiner*, the plaintiff, who was a guest at a wedding reception, was standing and speaking with another guest when the defendant Yanelis Rodriguez, an employee of the wedding venue, stepped backwards and bumped into the plaintiff, causing her to fall.[9]

The plaintiff in *Kleiner* commenced this action against Rodriguez and her employer, the defendant Crystal Ball Group, Inc., to recover damages for injuries she allegedly sustained as a result of the accident. The defendants moved for summary judgment dismissing the complaint. The Supreme Court granted the motion, and the plaintiff appealed.[10]

In *Kleiner*, the Second Department, relying on *Peralta, supra*, affirmed finding that the defendants established, *prima facie*, that the employee, Rodriguez, was not negligent in the happening of the accident as a matter of law and the plaintiff failed to raise a triable issue of fact.[11]

In *Weinstein v. Seawane Golf and Country Club, Inc.*, the plaintiff was at the defendants' premises, a country club, when the general manager of the club,

who was standing next to a table with his back to the plaintiff, backed up and bumped into the plaintiff as she passed causing her to fall and sustain injuries.[12] Thereafter, the injured plaintiff, commenced a personal injury action against the defendants. The defendants moved for summary judgment dismissing the complaint, and the Supreme Court granted the motion. The plaintiffs appealed.[13]

The *Weinstein* Court affirmed finding: "Contrary to the plaintiffs' contentions, the defendants made a prima facie showing of entitlement to judgment as a matter of law by tendering evidence that [the general manager] was not negligent in the happening of the accident and that the defendants did not create a dangerous or defective condition in the placement of the table."[14] In opposition, the plaintiffs failed to raise a triable issue of fact.

In *Simmons v. The Stop & Shop Supermarket Company LLC*, the plaintiff claimed that she was tripped by a store employee as he bent down into the register lane in which she was walking. Video surveillance, however, showed the employee questionably bump the plaintiff as he encroached the lane next to his register where he was working.[15] The *Simmons* Court, after reviewing all the evidence including the enhanced video surveillance, concluded, "While it is not clear whether the Plaintiff and cashier ever even made physical contact, it is apparent that no negligence occurred here."[16]

There is a presumption that when a lawsuit is commenced arising out of an accident that someone is to blame. This is not always the case. Depending on the facts, and the evidence presented, there is a chance that no one is at fault and that the accident is just that: an accident.

Clearly, having witness testimony to corroborate the circumstances of the accident or having video surveillance showing the accident could support the argument that the accident is the type that falls within that "large field of non-liability for injury." If an accident on its face makes you scratch your head and ask, "Where's the negligence here?," there is a good chance it falls within the category of cases for which there is no recovery.

From a defense standpoint, time should be spent collecting evidence that supports your position. Locating, preserving, and authenticating video and even having video enhanced all go a long way to establishing that the accident is a common, everyday occurrence and not a negligent act. Locating witnesses who can confirm the circumstances surrounding the bump or trip event could bolster the argument that the accident was "incidental to the usual routine of life in our society, and, while one might strive to avoid them, their occurrence is not necessarily actionable without some proof of negligence."[17]

1. Accident, Merriam-Webster Dictionary (Revised Ed. 2022).
2. Wikipedia, the Free Encyclopedia, Accident, at http:// en.wikipedia.org/wiki/Accident (last visited Feb. 22, 2023).
3. *Lewis v. Metro. Transp. Auth.*, 64 N.Y.2d 670, 671(1984); *Scavelli v. Town of Carmel*, 131 A.D.3d 688, 690 (2d Dept. 2015).
4. *Naffky v. Yosovitz*, 268 N.Y.1d 118, 122(1935).
5. *Peralta v. La Placita Dominica Mkt. Corp.*, 170 Misc. 2d 340, 341, 656 (Sup Ct., Queens Co 1996).
6. *Id.* at 341.
7. *Id.* at 342.
8. *Id.* at 342-343.
9. *Kleiner v. Crystal Ball Group, Inc.*, 186 A.D.3d 588, 126 N.Y.S.3d 681 (2d Dept. 2020).
10. *Id.*
11. *Id.* at 589.
12. *Weinstein v. Seawane Golf and Country Club, Inc.*, 153 A.D.3d 582, 59 N.Y.S.3d 438 (2d Dept. 2017).
13. *Id.* at 582.
14. *Id.* at 582-583.
15. *Simmons v. Stop & Shop Supermarket Co. LLC.*, Sup. Ct., Dutchess Co., January 9, 2023, Davis, T., Index No. 53983/2019.
16. *Id.*
17. *Peralta*, 170 Misc. 2d at 342.

Andria Simone Kelly is a partner with Cullen and Dykman LLP in Garden City in the firm's General Tort and Insurance Litigation Department. She has over 25 years of experience handling a wide variety of cases in the New York courts, including representing large retailers in premises liability, automobile liability, New York Labor Law, and property damage cases.

FOCUS:
LABOR & EMPLOYMENT

The Severance Package Employees Can't Refuse

Rhoda Andors

Severance is a compelling TV series that premiered in early 2022, followed by a critically acclaimed first season. Severance is both familiar and strange because it takes the norms of the corporate workplace into the realm of dystopian science fiction. In that bleak near future, the high degree of employer control over employees approaches and exceeds the limits of the law. (*Spoiler alert: read later if planning to watch Severance.*)

Severance is only superficially similar to the earlier TV series, the *Office*, with mismatched employees facing off at desks uncomfortably close to each other, but with none of the light comedy. The workers in *Severance* are subjected to threats and a dark conspiracy and extreme intrusiveness by their managers, who are always watching, like Big Brother in Orwell's *1984*.

The four main characters in Severance are employees of Lumon Industries, a monolithic corporation, who have chosen to have their brains "severed." (Skip the surgical scene.) The result of "severance" is that the employees' minds at work and their minds outside of work are completely separate and unknown to each other. Inside the workplace, the employees (called "innies") have no memory of their outside selves and outside of work the employees (called "outies") have no memory of what they do or who they know at work. The main character, Mark S, has chosen severance so when he is at work he cannot remember that his wife has died; when he is at work he does not remember his wife at all or that he was ever married.

The severed employees in *Severance* are searched on arriving at work, spied on by their managers, disciplined by extreme measures, brainwashed in the "break room" and discouraged from interacting with employees in other departments. A new innie, Helly R., who attempts to leave work with a concealed note to her outie self, is immediately confronted with flashing red lights and alarms and a hulking, grim-faced "security" guy. Even worse, Lumon employees cannot resign.

In short, *Severance* takes the rules of the normal workplace way over the line to the extreme, and the illegal—maybe. These are just a few of the legal issues raised by Severance.

Informed Consent

Lumon Industries does its mysterious business in a colossal modern building that is set in a grey landscape in an unnamed town. The location could be anywhere, but if this were New York, the employees would be entitled to informed consent before undergoing the severance procedure.

Under New York Public Health Law §2805-d, "lack of informed consent means the failure of the person providing the professional treatment…to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical…practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation."

Although Lumon employees consent to severance in advance, apparently their consent is not informed. During the surgical procedure, a tiny implant is injected into their brains that does who knows what, which the managers must keep secret by radical measures. One severed employee who escapes Lumon and attempts to recall memories from both of his selves at the same time suffers dire consequences. Although the severed employees would likely have a medical malpractice claim, it would be difficult for their outies to assert the claim, since they usually have no idea what happens to their innies at work.

False Imprisonment

In *Severance*, employees who break the work rules are taken by "security" to the "break room," where they are closely confined in a small dark room and made to sit opposite their manager for long hours under blinding lights before a screen that displays a single, self-deprecating phrase, coined by Lumon's founder, which they must repeat over and over until they say it like they "mean it." False imprisonment?

"To state a claim for false imprisonment under New York law, a plaintiff must allege that (1) the defendant intended to confine her; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged." In addition, "[a] false imprisonment claim requires a *prima facie* showing of actual confinement or threatening conduct."[1]

To illustrate, in *Cellamare v. Millbank, Tweed, Hadley & McCloy LLP*, a word processor at a law firm was disciplined for contacting a reporter by being summoned to a late night "meeting," kept "against her will in a conference room," called names, accused unjustly and was not told she could leave or have counsel present. "[A]fter more than five hours of interrogation," "the ill, thirsty, and worn-out Plaintiff" was told that "if she signed a statement saying she shared confidential information even though she didn't, that they would let her leave" or else she would be fired. She was "so desperate and sick at that time" she "would have done anything to leave" and she signed the statement at 4:00 a.m.[2]

Nonetheless, the court held "the incident does not rise to anything more than a lengthy interview by an employer." The employee's false imprisonment claim failed because she was not informed that she was not free to leave and there was no allegation that she was forced to stay.[3]

Would a court rule similarly for the wayward Lumon employees? Maybe, as actual confinement and the threat for attempting to leave the break room are implied more than expressed. When Helly R. is led to the narrow corridor before the break room by the security guy, he does not say she cannot leave, but after she enters the corridor she hears what sounds like a lock clicking behind her. In the break room, Lumon manager Mr. Milchick dispenses with his usual broad smile and grimly orders Helly R. to repeat the founder's phrase "again," 1072 times, without voicing a direct threat.

As to the severed employees' overall confinement at Lumon during working hours, since their outies have consented to be at work from nine to five and are not conscious that their innies cannot leave the building or quit, the outies would not consider themselves falsely imprisoned.

Intentional Infliction of Emotional Distress

While long time employees of Lumon have adopted a facade of acceptance of their working conditions, Helly R. is so psychologically distressed that she is driven to the brink after she is taken to the break room. Does she have a claim for emotional distress?

"The tort of intentional infliction of emotional distress consists of four elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress. The standard of outrageous conduct is strict, rigorous, and difficult to satisfy. However, that is not the case when there is a deliberate and malicious campaign of harassment or intimidation. Additionally, the outrageous nature of the conduct can be established when it arises from the abuse of a position of power…"[4]

For example, in *Vasarhelyi v. New School for Social Research*, an employee

was made the target of a supposed criminal investigation and singled out for ten hours of interrogation over several days after a confidential memorandum mildly critical of the school's trustees was circulated. The interrogators were "hostile, abusive and threatening" and stated that "the FBI in Washington was assisting in the investigation." They "humiliated her for her use of English (which [was] not her native language) and probed into her personal relationships," including with her husband, and "impugn[ed] both her honesty and her chastity." "As a result of her experience…she suffered physical symptoms, including significant weight loss and cessation of menstruation, as well as anxiety and sleeplessness, requiring medication."[5]

The court in *Vasarhelyi* held that these were not mere "threats, annoyances or petty oppressions or other trivial incidents which must necessarily be expected and are incidental to modern life no matter how upsetting" and "the acts complained of could…amount to extreme and outrageous conduct which cannot be tolerated in a civilized community and that they, therefore, adequately state a cause of action for intentional infliction of emotional distress."[6]

It seems likely that Helly R. has an emotional distress claim. The Lumon managers' conduct is repeatedly extreme and outrageous and intended to intimidate her into submission, and she suffers extreme emotional and physical distress as a result. However, proving damages for her injuries might be difficult without her outie's corroboration of her distress.

Searches

While searches of employees by public employers may raise the issue of unreasonable search and seizure under the Fourth Amendment, there is no guarantee of such constitutional rights for employees of a private company like Lumon.

When Mark S., as a new department head, confronts Helly R. and requests to see what she is writing, she complies, showing him her bare arms, on which she has written messages to her outie self. When he suspects Helly R. has swallowed a paper message he requests that she disgorge it; she does.

Such requests to inspect the body of a person, if made by the police, could constitute an unreasonable and unconstitutional search under the Fourth Amendment.[7] However, for the private sector, there is a paucity of cases concerning the possible illegality of such searches.[8]

In one case, under Ohio common law, *Aker v. New York & Co.*, an employee brought a claim on a theory of "publicity invasion of privacy" for an unwarranted and unreasonable search of her personal articles and body conducted by her employer, a store.[9]

Under Ohio law, one form of invasion of privacy is a "wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities; commonly referred to as the exploitation, publicity, and intrusion." "[T]o recover under the intrusion theory, a party must show that a defendant intentionally intrudes, physically or otherwise, upon the solitude or seclusion of his or her private affairs or concerns, and that the intrusion would be highly offensive to a reasonable person." In that case, the court upheld the employee's invasion of privacy claim.[10]

However, "New York State does not recognize the common-law tort of invasion of privacy except to the extent it comes within Civil Rights Law §§50 and 51. Although the tort has assumed various forms in other jurisdictions…in New York privacy claims are founded solely upon Civil Rights Law §§50 and 51. These statutes protect against the appropriation of a plaintiff's name or likeness for a defendant's benefit and create a cause of action in favor of any person whose name, portrait, or picture is used for advertising purposes or for trade without the plaintiff's consent."[11]

Under New York law, then, it is unlikely that Helly R. has a claim for an illegal search based on an invasion of her privacy by Mark S., and of course even if she did, Lumon could argue that Helly R. consented, so the search was voluntary.

Protected Concerted Activities

Lumon employees are not free to interact with employees in other departments and are dissuaded from doing so by scary rumors and paintings of interdepartmental violence generated by their employer. Even so, Helly R. inspires Mark S. and their co-workers to secretly organize and rebel against their working conditions. Without giving too much away, suffice it to say their managers are not pleased.

Lumon may be violating the National Labor Relations Act ("NLRA"), which "protects the rights of employees to engage in 'concerted activity,' which is when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment."[12] "[T]he NLRA was enacted generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment…it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by the NLRA.[13]

Whether Lumon's employer-generated rumors and depictions of violence discouraging employee interactions cross the threshold to employer interference with the exercise of employee rights under the NLRA may be debatable, but when Lumon acts to stop the employees from banding together for their common good, that threshold is crossed.

Conclusion

Do the severed Lumon employees prevail against their oppressive employer? The first season of *Severance* ended before that question was answered, and fans must wait for season two. But in one short season *Severance* has raised profound questions about the permissible degree of employer control in our workplaces and the laws that may or may not limit that control.

1. *Cellamare v. Millbank, Tweed, Hadley & McCloy LLP*, No. 03-CV-0039, 2003 WL 22937683, at *7 (E.D.N.Y. Dec. 2, 2003).
2. *Id.*, *1-3, 8.
3. *Id.*, *8.
4. *Scollar v. City of New York*, 160 A.D.3d 140, 145–46, 74 N.Y.S.3d 173, 178 (1st Dept. 2018).
5. *Vasarhelyi v. New School for Social Research*, 230 A.D.2d 658, 658-660, 646 N.Y.S.2d 795, 795-796 (1st Dept. 1996).
6. *Id.*, 661-662, 797.
7. *See generally Gonzalez v. City of Schenectady*, 728 F.3d 149, 152 (2d Cir. 2013).
8. Richard E. Kaye, 42 Causes of Action 2d 255 (Originally published in 2009).
9. *Aker v. New York & Co.*, 364 F. Supp. 2d 661, 667-668 (N.D. Ohio 2005)(*possibly called into question by Welling v. Weinfeld*, 2007-Ohio-2451, ¶¶ 59-62, 113 Ohio St. 3d 464, 473, 866 N.E.2d 1051, 1058–59 (Ohio Sup. Ct. 2007)).
10. *Id.*
11. *Farrow v. Allstate Ins. Co.*, 53 A.D.3d 563, 563–64, 862 N.Y.S.2d 92, 93 (2d Dept. 2008).
12. 29 U.S.C. §157; Employee Rights, National Labor Relations Board. https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/employee-rights.
13. 29 U.S.C. §§151-169.

Rhoda Andors is an attorney with Bee Ready Fishbein Hatter & Donovan LLP, in Mineola. She practices in the areas of employment law, defense of municipalities, and appeals.

FOCUS: PLAINTIFF'S PERSONAL INJURY

Defending Against Traumatic Brain Injuries: What We Can Learn from Athletes

Brian Gibbons and Christopher Palmieri

The term "traumatic brain injury," or "TBI" refers to a group of neurological symptoms such as clouded thinking, dizziness and even loss of consciousness, that follow head trauma.[1] The CDC has reported that about 1.5 million Americans experience a TBI per year, yet among those, only 230,000 (around 15%) are hospitalized.[2] In 2000 there were only 10,958 official TBI diagnoses in the United States. By 2015, that number had skyrocketed to 344,030.[3] As for litigation, TBI allegations are both difficult to disprove and among the most expensive to defend. In fact, TBIs have an estimated economic cost of $76.5 billion.[4]

The clinical diagnosis of a TBI is generally reliant upon self-reported symptoms.[5] Moreover, the symptoms can often manifest themselves at seemingly random times, and symptom-severity can vary between individuals.[6] This dynamic renders quantification of sustainable damages related to TBI difficult to predict. A recent CDC study shows that a person with a diagnosed and confirmed TBI has a 52% chance of having worse symptoms, or death, a 22% chance of staying the same and a 26% chance of improvement.[7] In other words, TBI prognoses are consistently inconsistent.

As a result, the defense bar has been put into a precarious position: how does a litigant defend against a claim that is diagnosed from self-reported symptoms, where the majority of those who experience TBIs suffer symptoms that worsen over time? To obtain the right answers, one must be asking the correct questions. Some of the most thorough documentations of TBI's come from athletes' accounts and experiences, and so we look to these experiences and related litigation for guidance.

The Sporadic and Unpredictable Nature of TBIs

The Missouri Court of Appeals case *Parker v. South Broadway Athletic Club*[8] outlines the unpredictable nature of a TBI. Curtis Parker, 28, was training at a gym with the aspiration of becoming a professional wrestler. During his fourth training session his head started to hurt, and he was advised to get out of the ring and sit down; he did not train again that day.[9] He returned a week later, stating that it took about five days to get rid of his headache, but he was feeling great now.[10] However, after landing a move called a "power bomb," which Curtis "landed perfectly," his eyes rolled back and he went into a seizure.[11] Curtis died nine days later.[12]

His estate filed suit against the gym for the alleged failure "to exercise reasonable care in not requiring Curtis to obtain medical clearance before allowing him to resume his lessons."[13] During the trial, plaintiff's expert witness Dr. Mary Case testified that the symptoms of a concussion can include dizziness, nausea, lack of awareness of surroundings and fatigue. Dr. Case further stated that "you don't have to have a concussion to get a headache," and that a headache, "lasting five days, '*may*' [be indicative" of a concussive-type injury."[14] Finally, Dr. Case proffered that to determine if someone has experienced a TBI, one must try to elicit certain types of symptoms or signs,[15] noting that common symptoms are usually "confusion, dizziness, visual problems, balance problems, nausea, and vomiting."[16]

What Symptoms Do Athletes with a Diagnosed TBI Experience?

The NFL consists, exclusively, of elite athletes, many of whom weigh upwards of 300 pounds, who run at 4.4 second 40-yard dash speeds, and who are encouraged to run into each other at maximum force and speed. Head trauma is inescapable. The inevitability of head trauma took center stage on September 29, 2022, when Miami Dolphins' quarterback Tua Tagovailoa experienced a traumatic incident, as he was violently thrown to the ground and experienced spasticity, with both arms reaching outward in a "prone"[17] position, resulting in a visually disturbing scene and requiring him to be transported to a hospital immediately.[18]

Only four days prior, Tua had struggled to get to his feet after a hit, something that the Dolphins originally said was a head injury, but then later claimed to be ankle and back issues.[19] Tua spoke out a few weeks later, stating that "I would not say it was scary for me at the time because there was a point where I was unconscious. I could not tell what was going on. I remember the entire night up until the point I got tackled. I don't remember being carted off. I do remember some things from the ambulance and the hospital."[20] Thus, in an apparent effort to downplay the "scary" nature of the incident, Tua admitted to losing consciousness, and thereby corroborated a telltale concussion symptom.

Unfortunately, Tua is not alone. Former NFL player Thomas Jones, was quoted saying "[u]ntil you've had a concussion, you really can't know how it feels."[21] Jones echoed some of the same sentiments as Tua, that after experiencing a TBI he was barely able to remember the games that he played in.[22] Jones further stated he experienced black spots, double vision, light sensitivity, and loss of consciousness shortly after a concussion.[23]

NFL players describe experiencing a TBI as having the "seeing stars" moment, often coupled with having short term memory loss, with the inability to remember the remainder of the day of the occurrence. For years, coaches viewed this "seeing stars" phenomenon as "having your bell rung." But now, we know better—many of these players had sustained concussions. To that end, while concussion diagnoses are more common than in past years, the most likely reason for that increase is failure to diagnose concussions in the past, as opposed to a significant increase in trauma.[24]

What Do the Most Severe TBIs Look Like?

When a party has experienced head trauma, he or she is more susceptible to chronic traumatic encephalopathy ("CTE"), which can only be formally diagnosed and confirmed via autopsy.[25] The symptoms include memory loss, depression, suicidal thoughts, aggression and reports of significant changes in personality.[26]

One of the most famous cases of CTE was that of NFL hall of famer, Junior Seau. Seau shot himself in the chest, which many believe was because he wanted to preserve his brain to be studied. Seau's ex-wife stated that he became emotionally detached in the later years of his playing career.[27] Additionally, his son Tyler stated that he noticed drastic changes to his father "during the final years of his life, including mood swings, depression, forgetfulness, insomnia, and detachment."[28] Further adding that he would lose his temper more frequently, Junior would often get "irritable over very small things, and he would take it out on not just [his son] but also other people that he was close to."[29] Yet, in his 20-year playing career, he was never listed as having a concussion.[30]

Before Junior Seau, Mike Webster, former center for the Pittsburgh Steelers, was the first former NFL player officially diagnosed with CTE. "Iron Mike," a man who was once only known as an all-time great, is now often more associated with his death and exploration of TBIs. After he retired from the game, Mike's behaviors became sporadic. He would walk up to strangers and rant "Kill 'em, I'm gonna kill em!"[31] His teeth started to fall out, so he got Super Glue, "squirted each fallen tooth, and tried to stick them back in."[32] He later purchased a taser and would zap himself unconscious, just to get sleep.[33] Webster went on to die of a heart attack at the age of 50.

During the autopsy of his brain, it was found to look completely normal during a gross examination. It was only under further investigation that there were findings of "concentrated masses [acting] kind of like sludge, clogging up the brain and killing healthy cells—in this case, cells in regions responsible for mood, emotions and executive functioning."[34]

In more severe cases, the symptoms can show themselves in behavioral and personality changes. Those who develop conditions of CTE often experience personality and emotional changes that may not take effect until decades after the causing incidents. They also show signs of insomnia, and forgetfulness. Seau and Webster's cases, although well known, are sadly the first of many that have come to light.

What Objective Criteria Can We Use to Assess a Largely Subjective Injury?

From mild concussion with symptoms that dissipate in a few hours, to severe concussion that can lead to CTE, TBI's vary in degree more so than many other litigated injuries. Given the manner in which they are diagnosed, including self-reported symptoms, and the frequency they are being alleged in personal injury claims, the real claims must be deciphered from the unsupported allegations. To that end, in evaluating TBI claims, we must

make sure to ask the right questions. For example:

- Whether plaintiff has experienced confusion, dizziness, balance problems, nausea, or vomiting.
- Whether plaintiff experienced short term memory loss.
- Whether there is any proof / corroboration that plaintiff lost consciousness.
- Whether plaintiff experienced sensitivity to light.
- Whether any of the above-symptoms persisted, and for how long.
- What treatment, if any, did plaintiff seek in the days following the accident, keeping in mind, many who experience concussion expect the symptoms will subside, and do not treat for several days, at least.
- In conjunction with seeking answers to these questions, one might consider asking some "red herring" questions to gauge embellishment. Such questioning can help weed out exaggerated claims, but conversely, can help risk managers substantiate much more significant damages based on the answers given.

In the most severe cases, the questions may be better directed towards plaintiff's loved ones, with regard to documenting change in behavior, unusual emotional outbursts, signs of forgetfulness or trouble sleeping.

TBI Symptoms often manifest weeks, months, or years down the line. As such, pre-accident discovery, particularly about brain trauma or neurological treatment, is critical. As the medical field continues to advance in diagnosing TBIs, there will hopefully be more objective measures for these claims. In the meantime, our goal toward deciphering actual injuries from mere allegations begins with asking the right questions.

1. Kimberly G. Harmon et al., *American Medical Society for Sports Medicine Position Statement: Concussion in Sport*, 47 BRIT. J. SPORTS MED. 15, 16-17 (2013).
2. Alan Georges & Joe M. Das, *Traumatic Brain Injury*, Nat. Library of Med. (Updated Jan. 5, 2022), Traumatic Brain Injury - StatPearls - NCBI Bookshelf (nih.gov).
3. *Id.*
4. This cost encompasses the total "lifetime economic cost of a TBI", comprised of direct and indirect medical costs, such as surveillance, treatment, and reporting, as well as productivity loss, where it was calculated that the probability of an injury that resulted in lost workdays. *Severe TBI*, CDC, http://www.cdc.gov/TraumaticBrainInjury/severe.html (last visited Feb. 10, 2023), citing Finkelstein E, Corso P, Miller T et al. The Incidence and Economic Burden of Injuries in the United States. (N.Y.: Oxford University Press, 2006), 213-14...
5. *Id.*
6. *Id.*
7. *Id.*
8. *230 S.W.3d 642 (Miss. E.D. 2007).*
9. *Id.* at 644.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *W.C. Parker, et al. v. The South Broadway Athletic Club*, Appeal No.: ED88000, Brief of Resp., 23.
15. *Id.*
16. *W.C. Parker, supra* note 15.
17. According to Chris Nowinski, "CEO of the Concussion Legacy Foundation, Tagovailoa had decorticate posturing. 'You usually see it in stroke when you've had massive damage to the cortex,' Nowisnki told Insider. 'It's basically like a primitive movement controlled by the brain stem.'" Scott Davis and Tyler Lauletta, *A Concussion expert says Tua Tagovailoa's stiffened hands were 'primitive' response that suggests damage to brain's cortex*, Insider (Sep. 30, 2022), https://www.insider.com/tua-tagovailoa-decorticate-posturing-bengals-chris-nowinski-2022-9.
18. Spasticity occurs after a brain injury causing the nerve center cells that carry messages from your brain to different parts of your body are damaged, resulting in stiffening, muscle tightness, or spams.
19. Despite calling it a back and ankle issue, the NFL players union still fired the neurological consultant.
20. Joseph Zucker, *Dolphins' Tua Tagovailoa Talks Concussion: Was Unconscious, Doesn't Remember Hit*, BleacherReport (Oct. 19, 2022), https://bleacherreport.com/articles/10052930-dolphins-tua-tagovailoa-talks-concussion-was-unconscious-doesnt-remember-hit.
21. Bradley Geiser, *What Does a Concussion Feel Like for an NFL Player*, SportsCasting (Apr. 16, 2020), https://www.sportscasting.com/what-does-a-concussion-feel-like-for-a-nfl-player.
22. *Id.*
23. *Id.*
24. "It's difficult to determine whether the increase in the number of concussions reported is due to greater public awareness, improved diagnostic guidelines and stricter reporting laws, or if there are actually more concussions occurring than there used to be." Andrea Cohen, *Why Are More People Getting Concussions? Kids Are At Higher Risk*, UVAHealth (Jan. 19, 2022), https://blog.uvahealth.com/2022/01/19/more-concussions-kids-higher-risk/#:~:text=This%20is%20mostly%20due%20to,Involved%20in%20a%20car%20accident. .
25. Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy in a Professional American Wrestler*, 6 J. FORENSIC NURSING. 130, 130-36 (2010)
26. *Id.* at 135.
27. Mark Fainaru-Wada & Steve Fainaru, *Doctors: Junior Seau's brain had CTE*, ESPN (Jan. 9, 2013), https://www.espn.com/espn/otl/story/_/id/8830344/study-junior-seau-brain-shows-chronic-brain-damage-found-other-nfl-football-players.
28. *Id.*
29. *Id.*
30. *Id.*
31. Jeanne Marie Laskas, The Brain That Sparked the NFL's Concussion Crisis, The Atlantic (Dec. 2, 2015), https://www.theatlantic.com/health/archive/2015/12/the-nfl-players-brain-that-changed-the-history-of-the-concussion/417597.
32. *Id.*
33. *Id.*
34. *Id.*

Brian Gibbons is a trial attorney and the managing partner at Wade Clark Mulcahy's Long Island office, located in Carle Place. He can be reached at bgibbons@wcmlaw.com.

Christopher Palmieri is a litigation associate at Wade Clark Mulcahy. He can be reached at cpalmieri@wcmlaw.com.

FOCUS:
LABOR & EMPLOYMENT

Straight to Video: Legality and Admissibility of Surreptitious Recordings in the Workplace

Rachel A. Morgenstern

When it comes to cameras in bedrooms, restrooms, fitting rooms, and other places where public policy and guttural instincts call for complete and inviolable privacy, New York's legislature has left little to question. Video recording in these locations is plainly prohibited under the General Business Law, the New York Labor Law, and the Penal Law.[1]

Legality Depends on the Specific Location

These protections extend into the workplace, but only as far as the above-described "statutorily-designated realms of privacy."[2] Recording in a workplace restroom may have criminal and civil consequences,[3] as it is statutorily prohibited and, in any event, the act is so "outrageous and extreme" as to give rise to emotional distress.[4] Outside the restroom, however, there is little to prevent surveillance in the workplace, surreptitious or otherwise.

To explain, New York does not recognize a common-law right to privacy.[5] Nor does it impose on employers a common-law duty to provide privacy in the workplace.[6]

Indeed, private sector employees in New York cannot even rely on the Fourth Amendment, as the constitutionally protected workplace privacy interest only applies when the government is the employer.[7]

Even where existing statutes apply, not every statute offers a private right of action for employees. In one case, for example, an employer was alleged to have violated General Business Law §395 for surreptitiously recording an employee who was changing her clothing in a shared office.[8] The employee argued that she was forced to change there due to her employer's failure to provide adequate female changing facilities, and that the employer was attempting to view her in a "discreet moment." In dismissing the employee's claims, the court noted that there is no private cause of action under General Business Law §395 and, in any event, an office is not among the "enumerated facilities" protected by statute.

Recent State Law on Electronic Surveillance

That is not to say, however, that anything goes when it comes to surveillance in the workplace. On November 8, 2021, New York's governor signed a bill requiring private employers to notify new employees of internet and communications monitoring, and to obtain their written acknowledgment of the notice upon hiring and once annually thereafter.[9] The amendment became effective on May 7, 2022, and applies to all private employers, regardless of size and type.

Courts Will Consider the Context

Moreover, when it comes to video surveillance, the manner and extent to which an employer surveils a given employee may face scrutiny in civil contexts. For instance, it has repeatedly been held that increased surveillance may constitute adverse employment action in the context of a claim for unlawful retaliation.[10] However, to succeed on these grounds, the plaintiff must show that the surveillance was performed because of her membership in a protected class.[11] In other words, the propriety of a given recording will depend heavily on context.

In one instance, the employer's installation of a hidden camera worked to its benefit. In that case, the court reasoned that the camera was one of several remedial steps taken by the employer to end the complained-of discriminatory conduct and that it weighed against the finding of a hostile work environment.[12]

In another instance, however, the employer's installation of a hidden camera had quite the opposite effect. There, a hotel employee alleged that a hidden camera was installed above his desk in retaliation for complaining about harassment, including vandalism of his workstation and locker. While the employer argued that the installation of a hidden surveillance camera for the purpose of observing an employee who complained of discrimination could never, in and of itself, be retaliatory as a matter of law, the court rejected that reasoning, and found in the employee's favor.[13]

Employers are not the only ones who may face consequences for surreptitious recordings. New York is a one-party consent state, meaning the recording is legal as long as the person recording is party to the conversation.[14] Moreover, certain anti-retaliation provisions in employment discrimination statutes offer an additional layer of protection for employees engaging in protected activity, i.e., documenting discriminatory conduct.[15]

Outside that context, however, the secret taping of a colleague or supervisor may indeed result in termination, especially where it violates company policy or intimidates coworkers.[16] And, in any event, courts often articulate an awareness of the potential for abuse of surreptitiously taped conversations by disgruntled employees.[17]

In one case, for instance, an employee alleging racial discrimination recorded incidents in which the organization's president made allegedly offensive statements. The jury found in her favor and awarded substantial damages, but the court then reduced the award in part because the plaintiff "prompted" or induced some of the discriminatory conduct to gather evidence.[18] In another case, the court affirmed a finding of the Worker's Compensation Board that, in the context of other evidence undermining his credibility, the claimant's surreptitious tape recording of conversations with his superiors was "suspect" and only further diminished the legitimacy of his testimony.[19]

The End Justifies the Means

That being said, surreptitious recordings are often used in court, and the relevance of the motives of whomever was behind the camera is outweighed by the value of a contemporaneous record.[20] This can be seen in the context of employment discrimination[21] and wrongful termination.[22]

This is hardly unexpected, since New York common law does not consider the means through which evidence was obtained. In other words, whether a video was made openly or surreptitiously will not, in and of itself, affect its admissibility.[23] This includes instances where a video is obtained by unethical or unlawful means.[24]

Videotapes are generally considered "visual statements" and, to that end, they are within the scope of CPLR 3101(e).[25] Moreover, they are subject to rules of evidence on hearsay,[26] regardless of whether made surreptitiously or otherwise.[27]

Interestingly, New York recently expanded the party admission exception to the hearsay rule in CPLR 4549.[28] Previously, an employee's hearsay statement was only admissible as a party admission where the employee had authority to speak on behalf of the employer, i.e., the "speaking agent rule" or "speaking authority rule." [29] Now, however, per CPLR 4549, an employee's statement is not hearsay if (1) offered against the opposing party and (2) made by the party's agent or employee on a matter within the scope of the relationship and while it existed.[30]

Advice to Practitioners

Moving forward, attorneys should bear these and other recent developments in mind, not only in determining when and where their clients can surveil their employees, but in advising their clients on setting policies relating to workplace privacy.

1. Gen. Bus. Law §395-b(2); Labor Law §203-C; Penal Law §250.45.
2. See *Clark v. Elam Sand & Gravel, Inc.*, 4 Misc. 3d 294, 296 (Sup. Ct., Ontario Co. 2004). New York State law also prevents employers from surreptitiously recording activities protected under the Labor Law, such as the formation of labor organizations or the pursuit of collective bargaining agreements.
3. See *Sawicka v. Catena*, 79 A.D.3d 848, 849–50 (2d Dept. 2010) ("unquestionably outrageous and extreme"); *Dana v. Oak Park Marina, Inc.*, 230 A.D.2d 204, 208 (4th Dept. 1997) (violation of GBL §395-b(2) provided basis for allegation of negligent infliction of emotional distress).
4. See *Id.* at 849–50.
5. *Messenger ex rel. Messenger v. Gruner Jahr Printing & Pub.*, 94 N.Y.2d 436, 441 (2000); *Thomas v. Ne. Theatre Corp.*, 51 A.D.3d 588, 589 (1st Dept. 2008).
6. *Clark*, 4 Misc. 3d at 296.
7. Peter M. Panken & Jeffrey D. Williams, *Employers Need to Observe Limits on Monitoring the Workplace and Reduce Privacy Expectations*, N.Y. St. B.J., Oct. 1999, at 26.
8. *Chanval Pellier v. Brit. Airways, Plc.*, No. 02-CV-4195 (DGT), at *13–14 (E.D.N.Y. Jan. 17, 2006).
9. Dillon, Danielle, *New York Will Require Employers to Notify Employees of Phone, Internet, and Email Monitoring*, Dec. 9, 2021, https://www.natlawreview.com/article/new-york-will-require-employers-to-notify-employees-phone-internet-and-email.
10. See *Chavis v. Wal-Mart Stores, Inc.*, 265 F. Supp. 3d 391, 402 (S.D.N.Y. 2017); *Bind v. City of New York*, No. 08- CV-11105 (RJH), at *10 (S.D.N.Y. Sept. 30, 2011).
11. *Dotson v. City of Syracuse*, No. 518-CV-750 (MAD/ATB), at *8 (N.D.N.Y. May 7, 2019) (plaintiff failed to show membership in protected class).
12. *Ciulla-Noto v. Xerox Corp.*, No. 09-CV-6451 (MAT), at *5 (W.D.N.Y. Dec. 5, 2012), aff'd, 563 F. App'x 791 (2d Cir. 2014).
13. *Mendez v. Starwood Hotels & Resorts Worldwide, Inc.*, 746 F. Supp. 2d 575, 580 (S.D.N.Y. 2010); see *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 161 (2d Cir. 2014); *but see Thomson v. Odyssey House*, 652 F. App'x 44, 46 (2d Cir. 2016); *Murray v. Town of N. Hempstead*, 853 F. Supp. 2d 247, 267 (E.D.N.Y. 2012).
14. *Gallegos v. Elite Model Mgmt. Corp.*, 1 Misc. 3d 907(A) (Sup. Ct., N.Y. Co. 2004), *aff'd as modified*, 28 A.D.3d 50, 807 N.Y.S.2d 44 (2005).
15. *Vosburgh v. Am. Nat. Red Cross*, No. 5:08-CV-0653 (LEK/TWD), at *12 (N.D.N.Y. Sept. 29, 2014), *citing Heller v. Champion Int'l Corp.*, 891 F.2d 432, 436 (2d Cir.1989); see *also Gallegos*, 1 Misc. 3d 907(A) at *6.
16. §6:31. Eavesdropping and "one-party consent" exemption—Use by employee—Recording communications with employers, 13A N.Y. Prac, Employment Law in New York §6:31 (2d ed.), *citing Rajcoomar v. Wal-Mart Stores E., L.P.*, No. 06-CV-6835 (CLB), at *5 (S.D.N.Y. Apr. 15, 2008), *aff'd*, 361 F. App'x 234 (2d Cir. 2010).
17. *Id.* (noting abuse by disgruntled employees as a "concern").
18. *Id.*, citing *Johnson v. Strive E. Harlem Emp. Grp.*, 990 F. Supp. 2d 435, 457 (S.D.N.Y. 2014).
19. See *Zeltman v. Infinigy Eng'g, PLLC*, 211 A.D.3d 1280, 1283 (3d Dept. 2022).
20. *Abromavage v. Deutsche Bank Sec. Inc.*, No. 18-CV-6621 (VEC), at *7 (S.D.N.Y. Mar. 19, 2021), *aff'd*, No. 21-668 (2d Cir. Sept. 21, 2022).
21. See *Fisher v. Mermaid Manor Home for Adults, LLC*, No. 14-CV-3461 (WFK), at *4 (E.D.N.Y. Dec. 16, 2016).
22. *In re Alegria*, 107 A.D.3d 1290, 1291–92 (3d Dept. 2013).
23. See *Mena v. Key Food Stores Co-op., Inc.*, 195 Misc. 2d 402, 407–08 (Sup. Ct., Kings Co. 2003).
24. *Mena v. Key Food Stores Co-op., Inc.*, 195 Misc. 2d 402, 407–08 (Sup. Ct., Kings Co. 2003) (citing *Stagg v. New York City Health and Hospitals Corp.*, 162 A.D.2d 595 (2d Dept. 1990). Counsel's involvement in surreptitious recordings may, however, implicate ethical rules prohibiting lawyers from engaging in deceitful conduct. *Bacote v. Riverbay Corp.*, No. 16-CV-1599 (GHW), at *11 (S.D.N.Y. Mar. 10, 2017).
25. *Theisen v. Sunnen*, 186 A.D.2d 81, 81 (2d Dept. 1992), *lv. dismissed* 81 N.Y.2d 759 (1992); *Saccente v. Toterhi*, 35 A.D. 2d 692 (1st Dept. 1970); *Bogan v. Nw. Mut. Life Ins. Co.*, 144 F.R.D. 51, 56 (S.D.N.Y. 1992).
26. *Breezy Point Co-op., Inc. v. Cigna Prop. & Cas. Co.*, 868 F. Supp. 33, 36–37 (E.D.N.Y. 1994); *In re 650 Fifth Ave. & Related Properties*, No. 08 CIV. 10934 (KBF), at *2 (S.D.N.Y. June 5, 2017); *Quinche v. Gonzalez*, 94 A.D.3d 1075, 1075 (2d Dept. 2012).
27. *Hernandez v. Money Source Inc.*, No. 17-CV-6919 (GBB) (AYS), at *5 (E.D.N.Y. July 12, 2022); *UPS Store, Inc. v. Hagan*, No. 14-CV-1210 (WHP) at *4 (S.D.N.Y. Aug. 2, 2017); *Schindler v. Mejias*, 100 A.D.3d 1315, 1317 (3d Dept. 2012).
28. *Parcesepe v. Tops Markets, LLC*, No. 2019-50494, 2022 N.Y. Slip Op. 31689(U) at *5 (Sup. Ct., Duchess Co. 2022) (effective December 2021).
29. CPLR 4549; see *Loschiavo v. Port Auth. of N.Y. & N.J.*, 58 N.Y.2d 1040, 1041 (1983).
30. *Hasani v. Community Health Project, Inc.*, No. 150316/2019, at *1 (Sup. Ct., N.Y. Co.. Nov. 23, 2022).

Rachel A. Morgenstern is an Associate Attorney in the Employment Law Practice Group at Ruskin Moscou Faltischek, P.C.

FOCUS: BANKRUPTCY LAW

Escaping Burdensome Real Estate Leases in Bankruptcy: Relief for the Tenant? Grief for the Landlord?

Bozena M. Diaz

With an anticipated increase in brick-and-mortar retailer bankruptcies, landlords may find themselves with little control over the future of their leases with bankrupt retailers.

The Bankruptcy Code was designed to provide a "fresh start" to debtors whose balance sheet was weighed down by too many obligations, too little income or insufficient cash flow. A debtor demonstrating a reasonable likelihood of a successful reorganization may be entitled to rid itself of costly real estate leases. But what are the rights of the landlord?

Subject to court approval, a debtor can assume unexpired leases, *i.e.*, continue to perform under the terms of the lease after it "cures" any arrears and provides "adequate assurance" of future performance) or reject them. A debtor may also assume and assign a lease to another party.[1]

If the debtor rejects a lease, the landlord may assert a claim consisting of (1) prepetition arrearages, (2) capped "rejection damages," (3) damages not "resulting from the termination of a lease" (such as claims for property damage and repair and maintenance), and (4) administrative claim for unpaid rent for the period between the filing of the bankruptcy petition and the rejection of the lease.[2] The Bankruptcy Code limits the "rejection damages" portion of that claim. Calculating that cap has been the subject of differing court decisions.[3]

A recent decision in the Southern District of New York, *In re Cortlandt Liquidating LLC*, split from other decisions in that district, embracing an approach to calculating a landlord's rejection claim that generally favors debtors, to the detriment of landlords.

This alert focuses on calculating the amount of "rejection damages" under *Cortlandt*. Additionally, addressing other potential avenues for recovery, it discusses application of security deposits and the landlord's rights against guarantors.

Calculating the Cap on Landlord's Rejection Damages under Section 502(b)(6)

A landlord's "rejection damages" claim is limited to "the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years of the remaining term of such lease," from the earlier of the bankruptcy filing or the date the landlord repossesses (or tenant surrenders) the premises.[4]

Courts differ on whether the reference to "15 percent" corresponds to the total rent that would have been owing during the remaining term of the lease (the "rent approach") or to the rent that would have been owing for the first 15 percent of the remaining term of the lease (the "time approach"). The difference is particularly significant where the rent increases during the term of a long-term lease. If the rent increases over the term of the lease, the "rent approach" favors the landlord and the "time approach" favors the debtor. In a recent decision,[5] Bankruptcy Judge Michael J. Wiles of the Southern District of New York, split from prior decisions from that Court and applied the "time approach" instead of the "rent approach."

Judge Wiles noted that prior decisions in the Southern District of New York applied the "rent approach."[6] When those prior cases were decided, the "rent approach" may have been the "majority" view across the country but, as Judge Wiles points out, since the most recent of those cases, "the weight of the relevant authorities in other districts has shifted very strongly in favor of the Time Approach."[7]

Based on those recent cases and his analysis of the language of Section 502(b)(6) of the Bankruptcy Code, which he found to be entirely "worded in terms of periods of time," Judge Wiles found that the section "impose[s] a limit on allowable damages that is computed by reference to a period of time," and "[t]hat period of time is equal to 15 percent of the remaining time of the lease, so long as that period is more than one year but less than three years."[8]

Pursuant to this decision, a landlord's rejection claim is determined by calculating the rents reserved under the subject lease for the first 15 percent of the remaining lease term, as long as, that amount is not less than the rents reserved for the first remaining year of the lease and is not greater than the rents reserved for the first three remaining years of the lease.[9]

Security Deposits and Landlord's Rights Against Guarantors

A security deposit being held by a landlord should generally be applied to reduce landlord's pre-petition claims for lease arrearages and lease rejection damages as capped by Section 502(b)(6) but not to any amounts over that cap or any post-petition rent obligations.[10] Additionally, the landlord may be able to recover against a guarantor of a rejected lease. However, the amount of that claim against a guarantor depends on whether that guarantor is also a bankruptcy debtor. Courts will likely apply the Section 502(b)(6) cap to any claims by the landlord against guarantors which themselves are debtors in bankruptcy cases.

On the other hand, the Section 502(b)(6) cap is unlikely to apply to limit non-debtor guarantor's liability since "common sense dictates that the guarantor remain fully liable even when the principal debtor seeks relief under the Bankruptcy Code," because "what good is a guaranteed lease if the guarantor escapes liability when the debtor does?"[11] The bankruptcy court is a court of equity, balancing interests and seeking justice for creditors and debtors.

A tenant's bankruptcy filing, and potential rejection of a lease certainly provides the debtor with significant control. However, the landlord is not without rights and has potential claims against the debtor-tenant and guarantors. Understanding the landlord's rights and the scope of its claims requires a careful analysis of the parties' relationship and understanding of the applicable law which may vary based on the jurisdiction. Landlords should seek advice of experienced counsel to guide them through the process.

Please note this is a general overview of developments in the law and does not constitute legal advice.

1. See *generally* 11 U.S.C. §365.
2. See *generally* 11 U.S.C. §§501 (filing of proofs of claim generally), 502(b)(6)(A) (landlord's claims for damages "resulting from the termination of a lease of real property"), 502(b)(6)(B) (landlord's claim based on prepetition unpaid rent), 503 (administrative expense claims), and 365(d)(3) (requiring a debtor to pay post-petition rent pending a decision to assume or reject a lease by mandating that "trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.").
3. See *for example, In re Andover Togs, Inc.*, 231 B.R. 521, 545 (Bankr. S.D.N.Y. 1999) ("Courts applying section 502(b)(6) have adopted one of two positions in calculating the amount of damages a landlord may receive when a debtor tenant rejects a lease. Some hold that the reference to '15 percent' corresponds to either rent accruing for 15 percent of the remaining time under the lease, others, to 15 percent of the total rent remaining under the lease.") (citing numerous cases and treaties).
4. 11 U.S.C. §502(b)(6)(A).
5. *In re Cortlandt Liquidating LLC*, 648 B.R. 137 (Bankr. S.D.N.Y. 2023).
6. See Cortlandt, supra n.5, at 140-41 (*referencing In re Fin. News Network, Inc.*, 149 B.R. 348 (Bankr. S.D.N.Y. 1993), *In re Andover Togs, Inc.*, 231 B.R. 521 (Bankr. S.D.N.Y. 1999), and *In re Rock & Republic Enters.*, 2011 WL 2471000 (Bankr. S.D.N.Y. June 20, 2011)).
7. *Cortlandt, supra* n.5, at 141 (citing numerous cases and referencing treaties). Judge Wiles also noted that legislative history supports the "time approach." *Id.* at 142-43.
8. *Cortlandt, supra* n.5, at 141.
9. Notably, the amount of landlord's claim may be reduced if the landlord mitigates its damages by reletting the premises. While a landlord may not be obligated to mitigate its damages (for example, in New York, a landlord is generally not obligated to mitigate its damages by reletting commercial premises), if the landlord does relet, the resulting rent may reduce the landlord's total rejection damages, but not the amount capped by Section 502(b)(6). As such, if the landlord relets the premises, the allowed claim will be the lesser of landlord's total rejection damages (as reduced by the resulting rent from reletting) or the amount of the Section 502(b)(6) cap.
10. Courts may treat other forms of security held by landlords, such as letters of credit, differently from security deposits. Whether courts treat proceeds of a letter of credit differently from security deposits will depend on the jurisdiction and may turn on the terms of the lease. For example, if the lease provides that the parties intended to have the letter of credit serve the same function as a security deposit (*i.e.*, "letter of credit is in lieu of tenant's cash security obligation"), the court is more likely to treat it as a security deposit.
11. *Bel-Ken Assocs. Ltd. P'ship v. Clark*, 83 B.R. 357, 359 (D. Md. 1988). *See also In re Modern Textile, Inc.*, 900 F.2d 1184, 1191 (8th Cir. 1990) ("[T]he liability of a guarantor for a debtor's lease obligations is not altered by the Trustee's rejection of the lease.").

Bozena M. Diaz is a partner with Cullen & Dykman LLP in New York City and the Chair of the firm's Tax Department and a member of the Corporate and Bankruptcy and Creditors' Rights practice groups.

FOCUS: PLAINTIFF'S PERSONAL INJURY

We Are "Entrusted" to Explore All Viable Avenues for Compensation

David J. Barry

The recent Comprehensive Insurance Disclosure Act[1] is a welcome device to assist plaintiffs' attorneys in personal injury actions. Through its amending of CPLR 3101(f), the Act requires defendants to provide, among other things, proof of all primary, excess and umbrella insurance information no later than ninety days after service of an answer to any complaint.[2] But by its express terms, this compulsory insurance disclosure is only available *after* commencement of an action, and necessarily limited to named defendants in an action.

Upon assuming the responsibility of representing a victim of a serious injury from a motor vehicle accident, it is elementary to conduct an immediate and comprehensive pre-action investigation to obtain evidence, determine potentially responsible parties, formulate possible causes of action and accordingly, discover avenues for ultimately recovering compensation for the client's economic and non-economic damages. These absolutely critical efforts prior to the filing of commencement papers will reduce unnecessary amendments and undue delay, solidify the client's case against future motions for summary judgment and streamline issues to be litigated as the action proceeds to trial.

Thankfully, many of the answers to important initial questions and leads to various other vital pieces of information are often conveniently contained within the relevant Police Accident Report/MV-104A. Together with the Police Accident Report Cover Sheet/MV-104COV,[3] plaintiffs' attorneys can quickly analyze the data of a motor vehicle accident, including conclusions of the police investigation, and information on the operators, registered vehicle owners, the involved vehicles and their corresponding insurance carriers.[4]

If more extensive police activities occurred, such as the taking of photographs or witness statements, accident reconstruction or an arrest for a Vehicle and Traffic Law or Penal Law violation, a Freedom of Information Law request to the relevant law enforcement agency and/or District Attorney's Office should be considered to obtain these valuable materials. If the offending motorist was arrested for driving while intoxicated, further investigation is necessary to explore a potential cause of action pursuant to the Dram Shop Act,[5] which may entitle the client to not only actual damages, but also punitive damages.

Every owner of a vehicle operated in New York State is liable for death or injuries resulting from the negligent operation of such vehicle by any person operating the same with the express or implied consent of its owner.[6] After obtaining the insurance carrier information for the adverse vehicle, a letter of representation and a demand for insurance information should promptly follow to discover the coverage limits for said vehicle. If you are in the precarious position of having the offending vehicle woefully underinsured relative to your client's damages, or uninsured for that matter, a private investigator should be retained to conduct a relatively inexpensive asset search for involved individuals.

Simultaneous to investigating coverage for the adverse vehicle, efforts should be made to discover any available supplementary underinsured or uninsured motorist (SUM) coverage.[7] In the typical case where your client was driving their own vehicle, the SUM limits are easily found on the declarations page of their insurance policy, and the relevant carrier should be notified of the potential claim as soon as possible. It is also good practice to provide the SUM adjuster with a copy of the commencement papers, medical records, and periodic updates on the action. Remember—in the event of a full-policy tender from the adverse vehicle that falls below the SUM limits and implicates corresponding coverage, it is absolutely mandatory to obtain express permission from the SUM carrier before accepting the same.

Although most motor vehicle accidents involve only primary and SUM coverage implications, the investigation into available coverage simply cannot end here. The prudent plaintiff's attorney *always* visits the scene of the accident as soon possible thereafter. First and foremost, a quick canvass of the accident scene may reveal possible availability of surveillance footage or eyewitnesses, which may be immensely important in proving the client's case.

But just as important, the visit to the accident scene is the juncture where a myriad of theories for liability can be properly evaluated. Are there any glaring issues with the roadway surface or markings? Does the roadway appear to be improperly designed? Is there any construction ongoing in the area? How are the lighting conditions? Are the pertinent traffic control devices clearly visible to motorists, or are they instead obstructed by foliage? Although each of these theories of liability, especially with potential municipal defendants, presents its own unique procedural and substantive challenges, the accident scene visit serves as an optimal time to rule out or decide to further evaluate, and possibly pursue, the same.

After coverages are confirmed and the aforementioned, non-exhaustive list of theories of liability are considered, an important and often overlooked question must be asked—how did the offending motorist gain access to the offending motor vehicle? The vast majority of cases will fall under the umbrella of VTL §388 and involve the typical owner/operator defendant or individual who was operating with consent of the owner of the motor vehicle, together with the vicariously liable owner as defendants. In the situation where an offending motor vehicle was transferred to the registered owner subject to a finance, lease or rental agreement, the Graves Amendment[8] immunizes owners who are engaged in the trade or business of renting or leasing motor vehicles from vicarious liability, including car dealerships and rental car companies.

However, as the Graves Amendment does not immunize car dealerships or rental car companies from their own negligence or criminal wrongdoing,[9] there are certain scenarios where a car dealership or rental car company may be liable for damages resulting from a motor vehicle accident.

Specifically, the cause of action for negligent entrustment is an often overlooked, but potentially invaluable, path to obtain just compensation for the victim of a serious injury from a motor vehicle accident. To establish a cause of action under a theory of negligent entrustment, a defendant must either have some special knowledge concerning a characteristic, or condition peculiar, to the person to whom a particular chattel is given which renders that person's use of the chattel unreasonably dangerous.[10] With respect to motor vehicles, an owner may be liable "if it had control over the vehicle and if it was negligent in entrusting the vehicle to one who it knew, or in the exercise of ordinary care should have known, was incompetent to operate the vehicle.[11]

In this context, a rental company may be liable if it allows an unlicensed driver, or a driver without a valid license to operate a vehicle.[12] While a rental car company is not required to investigate a renter's driving record, a rental car company is certainly required to assess the facial validity of a driver's license before renting to that driver or otherwise allowing that driver to operate a vehicle.[13]

Accordingly, in instances where an offending vehicle was operated pursuant to a rental agreement, it is incumbent upon plaintiffs' attorneys to determine if the vehicle in question was entrusted to a legally competent driver, or if your client has a valid claim for negligent entrustment as against the relevant rental car company. Furthermore, despite their increasing popularity, a claim of negligence may arise when a defendant entrusts a scooter, e-bike or moped to an individual legally incompetent to operate the same.

In conclusion, the vast majority of motor vehicle accident cases will involve primary coverage for the offending vehicle and potentially SUM coverage. However, during the critical initial phase after an accident, the prudent plaintiff's attorney will not only fully investigate the facts of the case, but at the same time, properly evaluate all potential avenues to obtain just compensation for their injured client.

1. https://www.nysenate.gov/legislation/bills/2021/S7052.
2. CPL 3101(f)(1).
3. https://dmv.ny.gov/forms/mv104cov.pdf.
4. Insurance carrier information by code is available at https://www.dfs.ny.gov/consumers/auto_insurance/dmv_insurance_codes_and_contacts.
5. GOL §11-101.
6. VTL §388(1).
7. For a comprehensive review of SUM coverage and practice, see Jonathan A. Dachs, *New York Uninsured and Underinsured Motorist Law* (Matthew Bender, 2016).
8. 49 U.S.C.A. §30106.
9. 49 U.S.C.A. §30106(a)(2).
10. *See Cook v. Shapiro*, 58 A.D.3d 664, 666 (2d Dept. 2009).
11. *See Graham v. Jones*, 147 A.D.3d 1369, 1371 (4th Dept. 2017).
12. *See Palacios v. Aris, Inc.*, 2010 WL 933754 at *7 (E.D.N.Y. 2010).
13. *Id.*

David J. Barry is a partner at the Mineola law firm of Collins Gann McCloskey & Barry PLLC, where he focuses on prosecuting complex personal injury cases on behalf of accident victims. David serves on the NCBA Board of Directors and as the Chair of the Plaintiff's Personal Injury Committee.

NAL PROGRAM CALENDAR

April 5 (HYBRID)

Dean's Hour: Abuse in the Family Lecture Series Part 4—Financial Abuse

With the NCBA Criminal Court Law and Procedure Committee, NCBA Elder Law, Social Services, and Health Advocacy Committee, and the Nassau County Assigned Counsel Defender Plan, Inc.

12:30PM-1:30PM

1 credit in professional practice.

Skills credits available for newly admitted attorneys.

This 5-part lecture series will address the challenges attorneys face when handling criminal and civil cases involving various types of abuse within the family, including elder abuse, financial abuse, spousal abuse, and child abuse. Our expert presenters will provide guidance on numerous legal issues confronting vulnerable members of society—the elderly, domestic violence victims, and children. Please join us for a series of discussions including physical abuse, financial abuse, guardianship issues, and other topics relevant to these special cases.

April 20 (HYBRID)

Dean's Hour: Into the Weeds on the Marijuana Industry

With the NCBA Intellectual Property Law Committee

12:30PM-1:30PM

1 credit in professional practice

Guest speakers: Brooke Erdos Singer, Esq., and Louis DiLorenzo, Esq., Davis+Gilbert LLP, New York

In 2021, New York legalized marijuana for recreational use, becoming the largest state to do so since California legalized marijuana in 2016. However, because marijuana is still a Schedule 1 controlled substance under the U.S. Controlled Substances Act, the sale or distribution of marijuana (as well as aiding and abetting the same) remains a federal felony. This presentation will provide an overview of the federal and state legal framework applicable to marijuana and discuss some hot topics—including advertising and intellectual property issues—impacting the industry today.

April 26 (HYBRID)

Dean's Hour: Abuse in the Family Lecture Series Part 5— Spousal Abuse

With the NCBA Criminal Court Law and Procedure Committee, the NCBA Elder Law, Social Services, and Health Advocacy Committee and the Nassau County Assigned Counsel Defender Plan, Inc.

12:30PM-1:30PM

1 credit in professional practice. Skills credits available for newly admitted attorneys.

This five-part lecture series addresses the challenges attorneys face when handling criminal and civil cases involving various types of abuse within the family, including elder abuse, financial abuse, spousal abuse, and child abuse. Our expert presenters will provide guidance on numerous legal issues confronting vulnerable members of society—the elderly, domestic violence victims, and children. Please join us for a series of discussions including physical abuse, financial abuse, guardianship issues, and other topics relevant to these special cases.

April 26 (IN PERSON ONLY)

Legal History: Chief Justice John Jay and the Earliest Momentous Cases of the U.S. Supreme Court

With the NCBA Appellate Practice Committee

6:00PM-8:00PM

2 credits in professional practice

Guest speaker: Hon. Mark C. Dillon, Associate Justice of the Appellate Division, Second Judicial Department

This program examines the nature of the practice of law in the latter 1700s, and the personal, professional, political, and diplomatic, endeavors that led to John Jay being the First Chief Justice of the Supreme Court, and the influence he had upon the institution. The program also examines three of the earliest crucial cases handled by the Supreme Court that have been enduring influences on the law we know today. The subject matter comes from Justice Dillon's published book, *The First Chief Justice: John Jay and the Struggle of a New Nation*.

May 2 (IN PERSON ONLY)

An Evening with the Guardianship Bench 2023 (RECEPTION AND PROGRAM)

With the NCBA Elder Law, Social Services, and Health Advocacy Committee

5:30PM-6:30PM Sign-in and cocktail hour/buffet dinner (Kosher options available)

6:30PM-8:30PM Program

2 credits in professional practice

Back by popular demand and bigger and better than ever! Jurists from six counties will participate in an hour-long meet and greet, followed by a roundtable discussion of guardianship practice and procedure. The program will be held in-person only here at the Nassau County Bar Association and space will surely be limited. Pre-registration required for headcount purposes.

Registration fees:

NCBA Member $60

Non-Member Attorney $80

Court Support Staff $40

NAL PROGRAM CALENDAR

May 3 (HYBRID)

Dean's Hour: A Tutorial on Bookkeeping and Reconciling Escrow Accounts
12:30PM-1:45PM
1.5 credits in ethics

Guest speaker: Mitchell T. Borkowsky, Esq., Law Offices of Mitchell T. Borkowsky, Melville; Former Chief Counsel to the NYS Grievance Committee for the Tenth Judicial District of the Supreme Court, Appellate Div., Second Dept.

Attorneys know all too well the consequences of mishandling escrow funds and accounts. Poor or nonexistent bookkeeping practices are frequently the cause and always an aggravating factor. This presentation will provide a tutorial on basic escrow account bookkeeping practices that will help practitioners comply with the rules and avoid grief.

May 9 (IN PERSON ONLY)

Long Island 10th Annual Trusts and Estates Conference
Presented in conjunction with the American Heart Association
Continental breakfast: 8:00AM—8:30AM
Program: 8:30AM-11:00AM
2.0 credits in professional practice

*This is a complementary program for NCBA Members and non-members.

May 11 (IN PERSON ONLY)

These Lesser Sacrifices: *Buck v. Bell* and the American Eugenics Movement (RECEPTION AND PROGRAM)
5:00PM-5:25PM Sign-in and reception
5:30PM-7:00PM Program
2 credits in diversity, inclusion, and elimination of bias

In 1927, the United States Supreme Court handed down *Buck v. Bell,* affirming the states' right to forcibly sterilize the "feeble-minded."

This decision was the high-water mark of the American eugenics movement, which sought to improve the human race by preventing the genetically unfit from procreating—and which inspired similar movements worldwide. And while eugenics has been discredited for decades, *Buck v. Bell* is still good law.

The program will draw from court transcripts, briefs, and other primary sources to tell the story of *Buck v. Bell* and its lasting impact on our country.

May 16 (HYBRID)

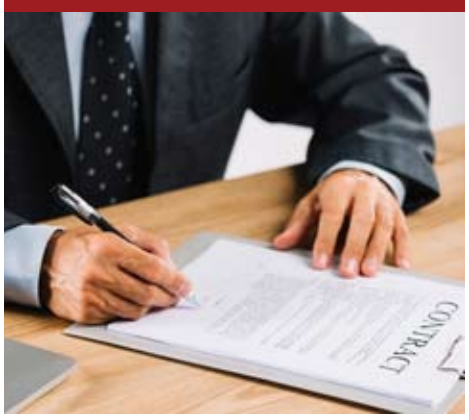
Dean's Hour: Your Family and Practice—Estate Planning, Asset Protection and Risk Management Strategies to Benefit the Attorney
12:30PM-1:45PM
1.5 credits in professional practice. Skill credits available for newly admitted attorneys.

Guest speakers: Vincent J. Russo, JD, LL.M, CELA, Russo Law Group, P.C., Garden City; **Henry Montag, CFP, CLTC,** The TOLI Center East, Dix Hills

This program is designed to prompt attorneys to create an action plan to protect themselves, their families, and their practices. The program will review practical asset protection and estate planning strategies and steps practitioners should consider. The program will also discuss the current generation of risk management and insurance options to mitigate varying degrees of acceptable risk.

FOCUS: LABOR & EMPLOYMENT

The Case for Non-Competes



Paul F. Millus

Non-competition agreements between employers and employees are under wholesale attack. On January 25, 2023, the Federal Trade Commission ("FTC") released a Notice of Proposed Rulemaking relating to non-competition agreements to prohibit employers entirely from imposing and enforcing non-compete clauses with their workers.[1] According to the FTC, non-competes:

- significantly reduce office wages;
- stifle new business and new ideas; and
- exploit workers and hinder economic liberty.[2]

The proposed rule and its breadth are presently under intense scrutiny. Nevertheless, in its present form, it is so broad as to significantly impact the employer-employee relationship. For example, it has been posited that the proposed rule also would stop companies from requiring workers to reimburse them for certain kinds of training if they leave their employ before a certain period of time has elapsed. The training repayment could be banned if it "is not reasonably related to the costs the employer incurred for training the worker."[3]

From the FTC's standpoint, employers have other ways to protect trade secrets and other valuable investments that are significantly less harmful to workers and consumers. The FTC's proposed rule is nothing new, but rather, it is a culmination of several years of efforts by Congress to restrict the use of non-competition agreements.

First, a little history. The oldest recorded legal action involving a non-compete agreement dates back to 1414. In that matter—known as The Dyer's Case[4]— John Dyer had promised not to exercise his trade in the same town as his former master for six months. The court invalidated the agreement on the grounds that the master had promised nothing in return. Protecting the apprentice's right to earn a living was a paramount concern for the court.

Indeed, non-competes were disfavored under English common law until 1711. In that year, in the matter of *Mitchell v. Reynolds*,[5] Mr. Reynolds opened a bakery within a specific distance from the bakery he had leased to Mr. Mitchell violating the terms of their non-compete. Ruling in Mr. Mitchell's favor, the court found that Mr. Reynolds had received financial benefit of rent, that the restrictions were limited and specific and that there was no injury to the public. This case established the basic principle whereby reasonableness became the determinative factor as to whether a noncompetition agreement would pass legal muster.

At present, New York non-competes are still permitted. The general standard under New York law is that non-compete agreements are enforceable where the restraint is "reasonable" and only if:

- it is no greater than required for the protection of legitimate interests of the employer; and
- does not impose undue hardship on the employee; and
- is not injurious to the public.[6]

New York further recognizes the availability of injunctive relief (where the non-compete covenant is found to be reasonable and the employee's services are unique).[7]

This article does not attempt to analyze the myriad of circumstances in which non-competes in New York are found to be valid or invalid based on the reasonableness standard and the factors set forth in the seminal *BDO Seidman* decision. Rather, the prevailing question is whether non-compete agreements should exist under any circumstances, which question appears to be answered in the negative by virtue of the FTC's new proposed rule, as well as in state legislation across the country seeking to prohibiting non-competes.

The FTC's ruling attempts to address what has become low-hanging fruit. Specifically, as has been enacted in many states and has been promoted by both Republicans and Democrats in Congress, there is significant support for the abolition of non-compete agreements as they pertain to low-wage workers. It is difficult to argue the reasonableness of a non-compete agreement which would prevent a kitchen worker at McDonald's from working at Burger King because of the "trade secrets" he learned or knowledge he obtained while employed at McDonald's. An example of the absurd lengths that some employers would go to prevent competition can be found in the fast food franchise Jimmy John's attempt to enforce a prohibition on its former workers at its sandwich shops from taking jobs with competitors in Illinois. In 2016 the Illinois State Attorney General entered into a settlement with Jimmy John's which required the franchise to, inter alia, notify all current and former employees that their non-competition agreements were unenforceable and confirm that Jimmy John's did not intend to enforce them.[8] Likewise, former New York State Attorney General Schneiderman announced his office's own settlement with Jimmy John's.[9]

In light of these legal actions, and the press that followed, congressional members of both parties sponsored several pieces of proposed legislation, such as the "Mobility and Opportunity for Vulnerable Employees Act," seeking to prohibit the use of non-competes for "low wage employees" in 2015. The bill was not passed. Thereafter, in April 2018 the "Workforce Mobility Act" was proposed to impose a complete federal ban on the use of employee non-competes, and in January of 2019, the "Freedom to Compete Act" was introduced to amend the Fair Labor Standards Act of 1938 to ban non-competes for most nonexempt employees. Likewise, these bills could not garner sufficient support.

With the failure of these bills, the underpinnings of more drastic action, such as executive branch action, were in place. The problem is that when bureaucrats seek to change common law that has existed for centuries, they do so by citing to the most egregious examples of abuse they can to muster up the necessary support for their proposition, i.e. Jimmy John's. Notwithstanding the deadlock in Washington D.C., states such as California, North Dakota and Oklahoma have each passed laws banning non-competes in their entirety.[10] In many other states, while non-competes are not void ab initio, they have been limited in significant ways or by various professions. In Idaho, for example, "non-key employees (those who have not gained a high level of insider knowledge, influence, credibility, notoriety, fame, reputation, or public persona as a representative spokesman of the employer)"

are exempt from non-compete agreements. Yet, in most states, the "reasonableness standard" abounds with various nuances applied on a state-by-state basis.

Based on the broad definition of the worker as defined by the FTC's proposed rulemaking, if enacted, the FTC ban would arguably de facto prohibit non-competition agreements of all shapes and sizes in their entirety leaving employers to wonder if there is any way to protect themselves from the detrimental effects of highly skilled and highly trained employees leaving their employ to be employed by a competing entity. Accordingly, the FTC's proposal has been characterized as another "throw the baby out with the bathwater" approach where much less intervention would be warranted to achieve more reasonable, common sense reforms.

It has been argued that there are other protections available to employers in the event they want to protect their trade secrets or other confidential information shared with employees to prevent former employees from utilizing that information unfairly after being employed by a competitor. For example, the FTC argued that nearly every state has approved the Uniform Trade Secrets Act (UTSA) and that Congress enacted the Defend Trade Secrets Act of 2016 (DTSA), both of which provide a civil cause of action for trade secret misappropriation.[11] However, trade secret enforcement through civil litigation very often only provides merely after-the-fact consequences once the harm has already occurred. This "closing the barn door after the horse has left" approach has proved dissatisfactory as well as costly for employers. Discovering that trade secrets have been misappropriated can also be daunting, and the time and energy utilized proving damages (and collecting them) can dissuade employers from engaging in litigation in the first place. Finally, not all anti-competitive effects come from the disclosure of that is generally narrowly considered a "trade secret."

It is true that nondisclosure agreements ("NDAs") can be used to protect a broader range of confidential and competitive information than what might be considered a "trade secret" (which, based on practical experience, is a limited protection at that). However, the FTC's proposed definition of "non-competes" can be interpreted so broadly that NDAs would be prohibited as well or, at a minimum, considered a "de facto" non-compete.

For sure, legal challenges will arise irrespective of the outcome of the FTC's rulemaking process. However, the introduction of the FTC into this dispute appears to be a way of sidestepping the fact that Congress cannot come to an agreement on what limits—total or something less—should be placed upon non-competes, and it raises the question of the FTC's rulemaking authority. Many in opposition will cite to the Supreme Court's decision in *AMG Capital Management v. FTC*, which unanimously rejected the FTC's claim that it had remedial powers it was permitted to utilize without an express grant of authority from Congress.[12]

In sum, the road will be long and the outcome uncertain as it pertains to this proposed FTC rule. However, it should not be forgotten that courts and juries have been imbued with the power to determine reasonableness based on the facts of a particular case and applicable law in a whole host of cases to reach a lawful and just outcome. This begs the question: does the FTC really need to use such a blunt instrument as the proposed rule to remedy the specific instances where reasonable people can agree that a particular non-compete is simply unreasonable where a more precise and limited tool could be used to reach the right conclusion? Time will tell.

1. https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking.
2. The FTC could have been directly relying on the decision in *Alger v. Thacher*, 36 Mass. 51, 19 Pick. 51 (1837).
3. See proposed Rule, §910.1(b)(2)(ii).
4. *Dyer's case* 2 Hen V, fol. 5 pl. 26 (1414).
5. *Mitchel v. Reynolds*, Court of King's Bench, 24 Eng. Rep. 347 (1711).
6. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 690 N.Y.S.2d 854 (1999).
7. *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 70 (2d Cir. 1999).
8. https://illinoisattorneygeneral.gov/pressroom/2016_12/20161207.html.
9. https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete.
10. Cal. Bus. & Prof. Code sec. 16600; N.D. Cent. Code sec. 9-08-06; Okla. Stat. Ann. tit. 15, sec. 219A.
11. DTSA and UTSA.
12. *AMG Capital Management v. FTC*, 141 S. Ct. 1341 (2021).

Paul F. Millus is a Member at Meyer, Suozzi, English & Klein, P.C. and former chair of the NCBA Labor and Employment Law Committee.

FOCUS: MEDICAL MALPRACTICE

Loss of Chance Gets Its Own Pattern Jury Charge

Christopher J. DelliCarpini

The 2023 New York Pattern Jury Instructions—Civil introduced PJI 2:150.1, a charge on the "loss of chance" theory of recovery in medical malpractice cases.

The importance of this charge should not be underestimated, as it standardized a legal theory that had been phrased differently across the New York courts. But this theory as restated in the PJI is not without limits, the precise extent of which litigants must argue in future litigation.

Three Approaches to Loss of Chance

The loss of chance theory provides for recovery where the alleged malpractice reduces the patient's chances of a better outcome. To establish liability for medical malpractice generally, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice and that such departure proximately caused the plaintiff's injuries.[1] Where a plaintiff claims that the malpractice decreased the plaintiff's chances of survival or cure, there is legally sufficient evidence of causation "as long as the jury can infer that it was probable that some diminution" in the chance of survival or cure had occurred.[2]

The doctrine is controversial, and far from universally accepted. A 2021 Nebraska Law Review article counted 27 states as having adopted loss of chance and 12 states as having rejected it.[3] Some states had limited the doctrine to where the plaintiff's chance of recovery had been greater than 50%.[4] The South Dakota Supreme Court had recognized the doctrine before the state legislature abrogated the decision, declaring that loss of chance "improperly alters or eliminates the requirement of proximate causation."[5]

The states have settled on three approaches to loss of chance, summarized by the Supreme Court of Kansas in the 1994 decision *Delaney v. Cade*.[6]

The "all or nothing" requires proof "that there existed a better-than-even chance of avoiding the physical injury or resulting death," in which case "compensation is awarded for the particular injury or wrongful death suffered, not the lost chance of a better recovery or survival."[7] In other words, if the plaintiff was more likely to die than live anyway, there can be no causation.

At the other extreme, some states take a "loss of any chance" approach, under which "[i]f the plaintiff is able to provide evidence that the defendant's conduct resulted in any lost chance, even a de minimis amount, summary judgment would be precluded and the case submissible to the jury."[8] One commentator noted that under this approach "[d]amage awards are not discounted for the percentage of harm caused by the physician and death is frequently the compensable injury."[9]

An apparent middle path is the "distinct compensable injury" approach, under which "the jury must find by a preponderance of the evidence that the alleged negligence was the proximate cause of the lost chance, but the lost chance itself need only be a substantial or significant chance, for a better result, absent any malpractice, rather than a greater than 50 percent chance of a better result."[10]

Conflict in the Appellate Division

New York has long recognized the loss of chance theory of recovery, but the departments of the Appellate Division appeared to be split among the two approaches.

The Second Department has held that "there is legally sufficient evidence of causation 'as long as the jury can infer that it was probable that some diminution' in the chance of survival or cure had occurred."[11] Similarly, the Third Department has required "evidence ... from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased his [or her] injury."[12] This would appear to follow the "loss of any chance approach" described above.

The Fourth Department, however, has required proof of "a 'substantial possibility' that the patient was denied a chance of the better outcome as a result of the defendant's deviation from the standard of care."[13] The First Department has also required a "substantial" possibility, which must

be "more than slight" but need not be 50%; even a 5–10% reduction in chance of better outcome would suffice.[14] This language tracks most closely the "substantial chance" approach.

Wild: The Court of Appeals Takes a Side?

The Court of Appeals has never resolved these differences, but it came close to affirming the "substantial" test in the 2013 decision *Wild v. Catholic Health System*.[15]

The plaintiff was a patient at Mercy Hospital of Buffalo when she suffered a seizure.[16] The staff intubated her, but only days later discovered that during the intubation they had perforated her esophagus. The perforation could not be repaired, and Ms. Wild could never again consume liquids or solid foods normally.[17] She and her husband sued for medical malpractice, and at trial the jury awarded $1 million in damages. The physician defendant who was held liable appealed, arguing in relevant part that the trial court erred in instructing the jury only on loss of chance when the plaintiffs had alleged injury in perforating the esophagus as well as belatedly diagnosing the perforation.

The Fourth Department held that the direct injury allegations did require the standard proximate cause charge, but that its omission here was harmless error because the defendants did not dispute that they perforated Ms. Wild's esophagus. The court also held that even if the error were not harmless, the defendants never requested a special verdict sheet separating out the theories of liability, therefore they could not seek reversal for having used a general verdict sheet.

The Court of Appeals affirmed the Fourth Department decision but did not directly affirm the loss of chance charge. The Court held that the challenge to the that charge was not preserved for appeal, and that any error in it was harmless because the trial court had in fact also given the standard charge on proximate cause, PJI 2:70.[18] So while the Court let stand the charge approved by the Fourth Department, it did not speak to the different formulation in other departments.

Pattern Jury Charge Requires "Substantial Chance"

The PJI editors evidently read the Court of Appeals' decision in *Wild* as approving the formulation in the Fourth and First Departments, as PJI 2:150.1 tracks the language of the "substantial chance" approach:

> If you find that AB has established *[state the deviations or departures to which the loss of chance theory applies]*, you must then consider whether (those deviations, those departures, CD's conduct) (were, was) (a) substantial factor(s) in depriving AB of a substantial (possibility, chance) for a (better outcome, recovery, cure).
>
> AB is not required to quantify the exact extent to which CD's conduct deprived (him, her) of a substantial (possibility, chance) for a (better outcome, recovery, cure). A substantial (possibility, chance) does not have to be more than fifty percent, but it

has to be more than slight. The mere possibility that AB would have had a better chance for an improved outcome or a decreased injury is insufficient.

Note that this charge on its face is not limited to any particular kind of medical malpractice. True, in *Wild* and virtually all cases where loss of chance is claimed, the alleged malpractice is a failure to timely diagnose or treat. On its face, however, this charge would apply to any medical malpractice that reduced a patient's chance for a better outcome.

Is Anything Settled?

A new pattern jury charge suggests that a point of law is settled for the moment, and for now counsel can at least use "substantial possibility," "more than slight" and other phrases from PJI 2:150.1 in their opening statements.

But it may be that PJI 2:150.1 does no more than restate the law in the Fourth Department, leaving the rest of the Appellate Divisions to continue with their formulations of this theory. In *Wild*, the Court of Appeals made clear that "[d]efendants' broad challenge to the loss-of-chance doctrine is unpreserved and is not properly before the Court."[19] Plaintiffs in the Second and Third Departments may request charges that track controlling Appellate Division authority, which might set the stage for further clarification from the appellate courts.

Apart from the applicability of the new charge, the definition of "substantial" may be the most contested issue. There is no indication in case law that the definition should be greater than 50%, but how low is "more than slight?" "Mere possibility" suggests that conclusory statements from an expert about a lost chance of recovery will not suffice. But does this phrase imply that some percentage loss of chance will be insufficient?

Regardless of how a court will charge the jury on loss of chance, wherever a plaintiff alleges physical injury and loss of chance, defendants should request a special verdict sheet as to both theories of causation. *Wild* shows that where a defendant did not request a special verdict sheet, they will not be allowed to appeal the use of a general verdict sheet. Indeed, plaintiffs may also want a separate sheet to clarify for the jury the two independent bases for liability.

Even under loss of chance, the plaintiff's conduct may be relevant to damages if not liability. A patient's behavior before treatment, failure to fully disclose their medical history, or failure to follow medical advice after the alleged malpractice may constitute comparative negligence.[20] Such conduct is immaterial to liability, however, and will not even preclude partial summary judgment for plaintiffs.[21]

It may be that the final battle over loss of chance is yet to come. In the right procedural setting, the Court of Appeals may choose a formulation or clarify that any differences among the Appellate Division departments are merely semantic. Counsel can bring that about by promptly requesting their preferred charge, fully briefing the issue before the trial court, and unambiguously preserving the issue for appeal.

1. *Mi Jung Kim v. Lewin*, 175 A.D.3d 1286, 1287–88 (2d Dept. 2019).
2. *Jump v. Facelle*, 275 A.D.2d 345 (2d Dept. 2000).
3. Remington Slama, *So You're Telling Me There's A Chance: An Examination of the Loss of Chance Doctrine Under Nebraska Law*, 99 Neb. L. Rev. 1014, 1016 n.2 (2021).
4. *Id.*
5. *Id.*(citing *Jorgensen v. Vener*, 616 N.W.2d 366 (S.D. 2000), *abrogated by* S.D. Codified Laws §20-9-1.1))
6. 873 P.2d 175, 211–15 (Kan. 1994).
7. *Id.* at 212 (citing *Cooper v. Sisters of Charity*, 272 N.E.2d 97 (Ohio 1971)).
8. *Id.* at 214 (citing cases).
9. *Id.* at 215 (quoting Boggs, *Lost Chance of Survival Doctrine: Should the Courts Ever Tinker with Chance?* 16 So.Ill.U.L.J. 421, 432–33 (1992)).
10. *Id.* at 212–13 (discussing *Herskovits v. Group Health*, 664 P.2d 474 (Wash. 1983)).
11. *Mi Jung Kim v. Lewin*, 175 A.D.3d 1286, 1288 (2d Dept. 2019)(quoting (*Jump v. Facelle*, 275 A.D.2d 345, 346 (2d Dept. 2000)).
12. *D.Y. v. Catskill Regional Medical Center*, 156 A.D.3d 1003, 1005 (3d Dept. 2017)(quoting *Flaherty v. Fromberg*, 46 A.D.3d 743, 745 (3d Dept. 2007)).
13. *Lieberman on behalf of Miller v. Glick*, 207 A.D.3d 1203, 1206 (4th Dept. 2022)(quoting *Clune v. Moore*, 142 A.D.3d 1330, 1331–32 (4th Dept. 2016)).
14. *Stewart v. NYCHHC*, 207 A.D.2d 703, 703–04 (1st Dept. 1994).
15. 21 N.Y.3d 951 (2013).
16. *Wild v. Catholic Health System*, 85 A.D.3d 1715, 1716 (4th Dept. 2011). The plaintiff died during the litigation, and was substituted in the action by her coexecutors.
17. *Id.* at 1716.
18. *Wild*, 21 N.Y.3d at 955–96.
19. *Id.* at 954.
20. *See* PJI 2:150.1 Comment C. Effect of Patient's Conduct (citing cases).
21. *Rodriguez v. City of New York*, 31 N.Y.3d 312 (2018).

Christopher J. DelliCarpini is an attorney with Sullivan Papain Block McGrath Coffinas & Cannavo P.C. in Garden City, representing personal injury plaintiffs in appellate litigation. He is also Chair of the NCBA Medical-Legal Committee and Treasurer of the Nassau Academy of Law. He can be reached at cdellicarpini@triallaw1.com.

FOCUS: LAW AND AMERICAN CULTURE

The Socratic Method Comes to the Movies

Rudy Carmenaty

The study of law is something new and unfamiliar to most of you, unlike any schooling you've ever been through before.
We use the Socratic Method here.

I call on you, ask you a question and you answer it.
Why don't I just give you a lecture?
Because through my questions you learn to teach yourselves.

Through this method of questioning, answering, questioning, answering, we seek to develop in you the ability to analyze that vast complex of facts that constitute the relationships of members within a given society. Questioning and answering.

At times you may feel that you have found the correct answer.
I assure you that this is a total delusion on your part.
You'll never find the correct, absolute, and final answer.
In my classroom, there is always another question, another question to follow your answer.

As you're on a treadmill.
My little questions spin the tumblers of your mind.
You're on an operating table.
My little questions are the fingers probing your brain.
We do brain surgery here.

You teach yourself the law, but I train your mind.
You come in here with a skull full of mush; and you leave thinking like a lawyer.[1]

—Charles W. Kingfield, Jr.

John Jay Osborn, Jr.'s *The Paper Chase* has manifested itself in three incarnations—as a novel, as a major motion picture, and as a television series. But it is the film version released in 1973, starring Timothy Bottoms and John Houseman, that is treasured most by lawyers and laymen alike.[2]

James Hart and his experiences as a 1L at Harvard have served as a touchstone for aspiring attorneys across the generations. At the center of this tale is the multifaceted relationship between Hart and his contracts professor, the daunting Charles W. Kingsfield, Jr.

For half-a-century, Houseman's portrayal of Kingsfield has made him the cinematic exponent of the Socratic method. What is depicted on screen is, of course, a dramatic overstatement. It is a performance embellished by Houseman's biting, withering questioning of his hapless pupils from the lectern.

Kingsfield's severe visage rekindles memories best left forgotten by all of us who have endured the ordeal of a legal education. In my case, Professor Hans Smit was our 'Kingsfield.'[3] Indeed, it has been said that if you attended Columbia Law School and you didn't encounter Hans Smit, you really didn't go to Columbia.

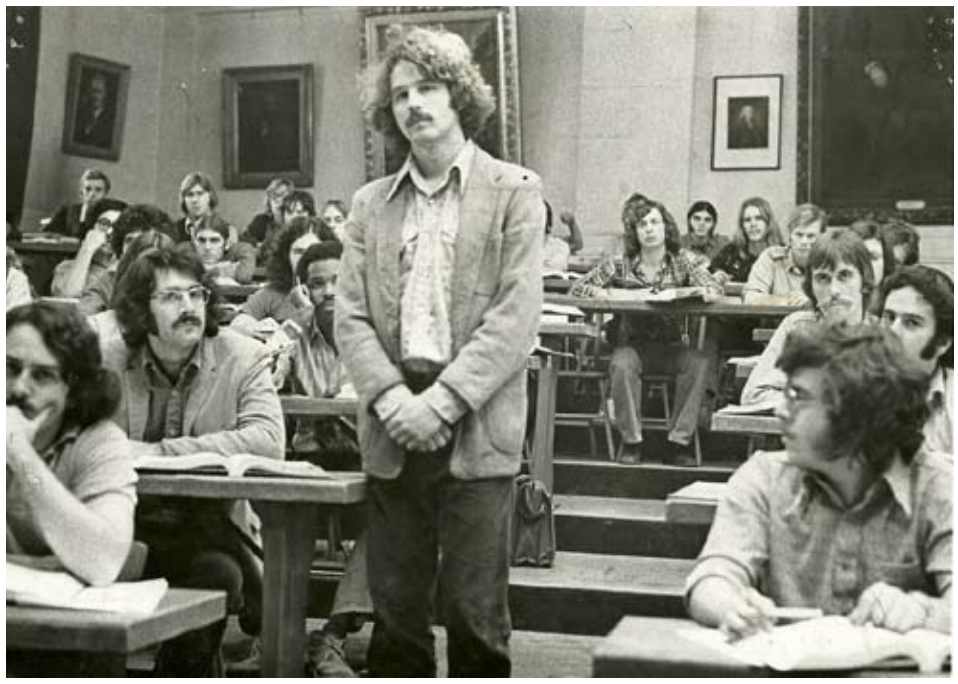
Law school by its very nature entails commitment and scholarship. More than that, there is the motif of learning how to 'think like a lawyer.' In effect, to reorient one's reasoning to navigate the requirements of a life in the law. It is this dynamic and its accompanying pedagogy which distinguishes legal training in the United States.

The American law school experience unquestionably provides a rite of passage that tests the mind and spirit. And although its use has been deemed ethical, it should come as no surprise that law students have repeatedly stated that the Socratic method was "*the worse part of law school.*"[4]

Hart comes to Harvard because of Kingsfield. The young man is fixated by this brilliant, yet remote professor. He goes to great lengths to have a true Socratic dialogue with the master. Therein lies the inherent tension of *The Paper Chase*. Kingsfield, far from an avuncular figure, will challenge Hart every step of the way.

The grip that Kingfield holds on his imagination is such, that Hart breaks into the archives of the law library to read Kingsfield's notes on contracts from his student days some forty years earlier. In doing so, Hart realizes that he and Kingsfield are cut from the same tapestry.

In his quest or 'chase' for the 'paper'—his degree, Hart assumes his place in a long lineage that is a 'holy grail' of sorts personified by Kingsfield. However, his austere disposition and the dictates of the



Socratic method, prevent the Professor from ever acknowledging their somewhat awkward camaraderie.

They engage in an intellectual game of cat and mouse. Even Hart's one moment of outright rebellion seems to commend him to Kingsfield, as seen in this exchange:

Kingsfield: ***Mr. Hart, here's a dime. Call your mother and tell her there is serious doubt about you becoming a lawyer.***
Hart: ***You... are a son of a bitch, Kingsfield!***
Kingsfield: ***Mr. Hart! That is the most intelligent thing you've said today. You may take your seat.***[5]

Their relationship is further complicated by Hart's affair with Susan, Kingsfield's strong willed and soon to be divorced daughter. Susan, as attractive as she may be, is every inch her father's child. Having already married one law student, she is not eager for similar commitment no matter what she may actually feel for Hart.

This triangle of sorts is best symbolized by Hart's willingness to sleep with Susan in Kingsfield's bed, while feeling chasten when he wanders around the master's private study. The latter being the more intimate violation of the older man's domain. Hart is captivated by the mystique enveloping father and daughter.

The final encounter between teacher and student is rather telling. After first year exams are over, Hart attempts to convey to the Professor his sentiments. In many ways Hart has subsumed his own identity. His effusiveness is civilly, but firmly, rebuffed. Kingsfield's response is to nonchalantly ask the young man his name:

Hart: ***What I mean is, you have really meant something to me, and your class has truly meant something to me.***
Kingsfield: ***What is your name?***
Hart: ... ***Hart.***
Kingsfield: ***Thank you, Mr. Hart. Thank you very much.***[6]

Mind you, he has been calling on Hart in class by name the entire academic year. There can be no doubt that he knows full well what his name is. Nonetheless, Kingsfield mien is never compromised. He simply won't allow it. To the Professor, Hart can "*never be anything more than a number on the seating chart.*"[7]

The characters in *The Paper Chase* are essentially archetypes. At the outset, Hart is just that, he is all heart and mid-western charm. It speaks to the transformative nature of law school that at film's end he is Kingsfield's top student and, not surprisingly, vaguely a more callous young man.

Hart's classmates are known almost exclusively by their surnames. There is Ford, and Anderson, and Bell. Only Brooks, who doesn't make the grade and attempts suicide because of his inability to think like a lawyer, is called by his given name—Kevin. The fact that he is referred to simply as 'Kevin' speaks to the character's shortcomings.

The novel was derived from Osborn's own experiences in law school. As he recalls, Harvard then was "*a big dark institution*" which "*did not allow for reciprocity between faculty and students … it really had no desire to be loved, or even respected … [it] only wanted to be feared.*"[8]

What separates *The Paper Chase* from other coming-of-age tales, including *One L* by Scott Turow (also set at Harvard) or Martha Kimes's *Ivy*

Briefs, which takes place at Columbia, is Kingsfield. The character was a "*composite of several people*," as Osborn recalls "*It wasn't like it was hard to find role models*."[9]

The man on the Harvard faculty who most eagerly embraced the mantle of Kingfield was the late Clark Byse. Justice Elena Kagan eulogized Byse thusly:

> *"He insisted on excellence, but always with a twinkle in his eye. He was Kingsfield, but also so much more than Kingsfield—a wonderfully generous and caring human being."*[10]

Kingsfield, as a fictional character, has taken on a life of his own. This is in no doubt due to the Academy Award winning performance by John Houseman (1906-1988).[11] The artist and the role are one in the public's mind. "*I'll be 'the professor' into eternity*" was Houseman's verdict.[12]

Houseman was not an actor by profession.[13] Nevertheless he had been steeped in theater and film most of his adult life. Born in Bucharest as Jacques Haussmann, his true education began during his association with Orson Welles, a genius thirteen years his junior. Houseman described it as Welles "*was the teacher, I, the apprentice*."[14]

Their collaborations were legendary. Among them, the all-Black voodoo *Macbeth* for the Federal Theater Project, the original mounting of Marc Blitzstein's proletarian musical *The Cradle Will Rock*, the Mercury Theater's *War of the Worlds* radio broadcast which panicked the entire nation, and Welles's movie masterpiece *Citizen Kane*.

After parting company with Welles, Houseman became a Hollywood producer. He was the force behind such classics as *Letter From an Unknown Woman, The Bad & the Beautiful*, and *Lust for Life*. "*I found him honest and sensitive*," was Vincente Minnelli's assessment, "*more creative than any producer had any right being*."[15]

Houseman also engaged in theatrical training and instruction. He acted as the artistic director for the American Shakespeare Festival, led the Professional Theater Group at UCLA, and founded the drama school at Julliard.[16] He was a mentor to filmmaker James Bridges, who adapted *The Paper Chase* for the movies.

Bridges cast Houseman after a screentest convinced the studio that he was right for the part.[17] At the time of Houseman's passing, Bridges noted "*Before there was Kingsfield there was John Houseman*.[18] Adding, "*He was the Kingsfield to many of the actors, producers, directors on the American stage today*."[19]

Houseman was well-prepared by his life experiences, and Kingsfield was indeed the role of a lifetime. At seventy, he embarked on a second career as a performer. Featured mostly in supporting parts, he starred in the TV version of *The Paper Chase* with the blistering Socratic method displayed in the film watered-down for television.

Bridges, who also developed the series, surely understood the medium called for a milder Kingsfield. A curmudgeon instead of a sadist. The program aired on CBS for twenty-two episodes during the 1978-1979 season until it was cancelled. It resumed on Showtime for a further thirty-six installments during the 1980's.[20]

Nevertheless, the Kingsfield persona Houseman carefully crafted, with his aristocratic bearing, made him a much in-demand commercial pitchman. Most notably for the investment firm Smith Barney, his ubiquitous tagline— "*They make money the old-fashioned way—they earn it*"—being quite memorable.[21]

Houseman, as a personality in his own right, earned the respect of the audience. He became the crusty professor we both feared and venerated. Viewers over the decades have anxiously squirmed in their seats as if on tenterhooks, vicariously hoping for Kingsfeild's approval no matter how much they may resent him.

Frankly, the character is a magnificent anachronism. It is inconceivable that someone on the order of a Kingsfield could serve on a present-day law faculty. Just as it's inconceivable that a personality like Vince Lombardi would be hired in today's NFL. For better or for worse, times and people have changed.

Osborn, who passed away last October, became a law professor himself. He employed a more benign rendition of the Socratic method at the University of San Francisco Law School. Unlike his enigmatic creation, Osborn called on his students only when they raise their hands in class.

On a personal note, I met Clark Byse once. I found him charming and gracious. Then I never had him as an instructor. As for Hans Smit, as ferocious as he was in the classroom, off-stage there was no professor at Columbia who was more supportive of his students.[22] He too carried himself with 'a twinkle in his eye.'

1. *Paper Chase*, The (1973) Movie Script at https://www.springfieldspringfield.co.uk.
2. Released by Twentieth Century Fox, the film was written and directed by James Bridges, a protégé of Houseman. Lyndsay Wagner played Susan, Kingsfield's daughter.
3. Hans Smit (1927-2012) taught at Columbia for more than half-a-century beginning in 1960. He was a noted authority on civil procedure, international arbitration, and comparative law.
4. Mitchell M. Handelsman, *Is the Socratic Method Unethical?, Psychology Today* (July 27, 2018) at https://www.psychologytoday.com.
5. *The Paper Chase (1973) – John Houseman as Charles W. Kingfield* at https://www.imdb.com.
6. *Id.*
7. *An Essay by John Jay Osborn Jr. '70: A Change in Professor Kingsfield – and His Creator* at https://today.law.harvard.edu.
8. *Id.*
9. Colleen Walsh, *The Paper Chase at 40*, Harvard Gazette (October 2, 2012) at https://news.harvard.edu.
10. Emily Dupraz, *Clark Byse*, 1912-2007 Harvard Law Today (October 9, 202) at https://today.law.harvard.edu.
11. Houseman received the Oscar as Best Supporting Actor.
12. *John Houseman Dies*, Washington Post (November 1, 1988) at https://www.washingtonpost.com.
13. Prior to *The Paper Chase*, Houseman appeared in John Frankenheimer's *Seven Days in May* (1964).
14. Marilyn Berger, *John Houseman, Actor and Producer, 86, Dies*, New York Times (November 1, 1988) at https://archive.nytimes.com.
15. Tom Shales, *The Grand Old Grouch*, Washington Post (November 1, 1988) at https://www.washingtonpost.com.
16. Berger, *supra.*
17. Among those considered for the role of Kingsfield were Melvyn Douglas, James Mason, and Paul Scofield.
18. Berger, *supra.*
19. *Id.*
20. All episodes are available on YouTube.
21. Berger, supra.
22. Smit help launch the academic career of future U.S. Supreme Court Justice Ruth Bader Ginsburg when he hired her for Columbia's Project on International Procedure in 1961.

Rudy Carmenaty is the Deputy Commissioner of the Nassau County Department of Social Services. He also serves as Co-Chair of the NCBA Publications Committee and Chair of the Diversity and Inclusion Committee.

Three Cheers for Hofstra — 38th Annual Hon. Elaine Jackson Stack Moot Court Competition

By Christine T. Quigley

The final round of the 2023 Hon. Elaine Jackson Stack Moot Court Competition was held on March 21 in the Great Hall at Domus. Six teams from four local law schools — CUNY School of Law, Maurice A. Deane School of Law at Hofstra University, St. John's University School of Law, and Jacob D. Fuchsberg Touro College Law Center — entered this year's competition.

Hofstra team members Carisa McKillop and Denise Trerotola won the First Place Award, prevailing over Touro team members Natalie Segev and Kira Shcherbakova. In addition, McKillop and Trerotola were recognized for their superior legal research and writing skills, with the Hofstra team also winning the Best Brief Award. To top off the evening, Hofstra's McKillop took home the Best Oralist Award, the only award recognizing an individual's performance in the competition.

The final round was held before a panel of five "Justices of the Supreme Court of the United States" comprised of the Hon. Vito M. DeStefano, Nassau County Administrative Judge (presiding as "Chief Justice"), and four "Associate Justices" including NAL Past Dean, Hon. Andrew M. Engel, Nassau County District Court; NCBA Past President and NAL Dean, Hon. Susan Katz Richman, Village Justice; NCBA President Rosalia Baiamonte of Gassman, Baiamonte Gruner, P.C.; and, NCBA Past President and NAL Past Dean Peter J. Mancuso, Nassau County Assistant District Attorney (Ret.).

Christine T. Quigley authored this year's hypothetical problem and wrote the bench brief based on two issues derived from multiple cases recently filed, and pending certiorari, in the U.S. Supreme Court. Both issues arise from First Amendment claims made in the context of social media users and platforms alleged "censorship" practices and the constitutional limits of state laws that threaten to impose restrictions on the free speech rights of private individuals and entities. The questions presented to this court were (1) whether a public official's use of her personal social media account constituted state action when she blocked a constituent from accessing her Facebook page; and (2) whether a state law prohibiting large social-media platforms (such as Facebook, Instagram or Twitter) from "censoring, blocking, shadow-banning, or deplatforming" social media users is unconstitutional under the First Amendment.

The Best Oralist Award was presented by NCBA Legal Administrator Member Dede Unger (daughter of the late Judge Stack, for whom the competition is named), who congratulated the four finalists and all 14 competitors, saying how impressed she was with their oratory skills. She reminisced about her mother's deep commitment to the Academy of Law's Moot Court program, saying that to Judge Stack, "speaking was everything" and it "held tremendous weight in her courtroom."

Unger shared some childhood memories of her mother, when she regularly reminded her children that "when you speak, you look the other person in the eye, and make sure that you can back up the point you want to make." She concluded: "Tonight, you would have made her proud."

A SPECIAL THANK YOU TO OUR VOLUNTEERS

The 2023 Hon. Elaine Jackson Stack Moot Court Competition was coordinated by NCBA Executive Director Elizabeth Post, former NAL Director Jennifer Groh, and NAL Advisory Board Member and Moot Court Chair, Christine T. Quigley. This would not have been possible without the invaluable assistance from dozens of volunteers, including many members of the judiciary, practicing and retired attorneys, NAL Advisory Board Members, and NCBA staff who contributed their time and efforts to make this year's competition a success. We are extremely grateful for their participation.

A very special thank you goes out to Gary Petropoulos and the partners of Catalano, Gallardo & Petropoulos, LLP for providing us with timekeepers for the competition (again) this year! And an extra thank you to our incredibly talented and versatile timekeepers for so seamlessly acting in a dual role as bailiffs as well!

FINALS JUDGES

Hon. Vito M. DeStefano
Hon. Andrew M. Engel
Hon. Susan Katz Richman
Rosalia Baiamonte, Esq.
Peter J. Mancuso, Esq.

SEMI-FINALS JUDGES

Hon. David Goodsell
Hon. William Hohauser
Kent Moston, Esq.
N. Scott Banks, Esq.
Michael Scotto, Esq.
Jaime D. Ezratty, Esq.

PRELIMINARY ROUNDS JUDGES

Hon. Stephen Falanga
Hon. Stephen G. Leventhal
Hon. Robert Bogle
Hon. Maxine S. Broderick
Hon. David Levine
Hon. William P. Bodkin
Ralph Catalano, Esq.
Gary Petropoulos, Esq.
Michele Levin, Esq.
Mili Makhijani, Esq.
Omid Zareh, Esq.
Bruce Robins, Esq.
Christopher Casa, Esq.
William Schleifer, Esq.
Christopher DelliCarpini, Esq.
Lauren Bristol, Esq.
Sanford Strenger, Esq.

MOOT COURT CHAIR, PROBLEM AUTHOR AND BENCH BRIEF AUTHOR

Christine T. Quigley, Esq.

BRIEF GRADERS

Tammy Feman, Esq.
Bruce Robins, Esq.
William Schleifer, Esq.
Michelle Russo, Esq.
Elisa Rosenthal, Esq.

TIMEKEEPERS AND BAILIFFS

Angela Crisculo
Jason Egielski
Kayla Schmidt
Ian Glick

NCBA DIRECTOR OF OPERATIONS

Hector Herrera

Cornerstones of Democracy—Civics, Civility, and Collaboration...

Continued from Cover

Peter T. Affatato Court Employee of the Year Award

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

This year's award will be presented to **Jeffrey M. Carpenter**, Chief Court Attorney of Nassau County Family Court. Carpenter has worked for the NYS Court System for over 30 years—serving as the Chief Court Attorney of Nassau County Family Court for the past 15 years. Carpenter has represented the Nassau County Family Court at several statewide conferences addressing child welfare issues and has served as the annual update author for the LexisNexis AnswerGuide on New York Family Court proceedings since 2017. A well-respected individual amongst the court, Carpenter is described as a true professional of the highest integrity.

Thomas Maligno Pro Bono Attorney of the Year Award

The Thomas Maligno Pro Bono Attorney of the Year Award will be presented to **Michael Aronowsky, Esq**. in recognition of his selfless commitment to the furtherance of the most noble traditions of the organized bar.

Aronowsky's legal career began at the Legal Aid Society. He later established Battiste, Aronowsky & Suchow, Inc., the sole providers of indigent criminal defense in Richmond County. The firm was commonly referred to as "The Staten Island Defenders." Following his retirement, Aronowsky worked at Touro Law Center with the Hurricane Sandy Hotline—which later grew into their disaster clinic. In 2017, Aronowsky began pro bono work with the NCBA Mortgage Foreclosure Project and continues to volunteer his services.

Tickets and Sponsorships on Sale

The NCBA would like to congratulate this year's honorees and looks forward to a wonderful evening. The 2023 Law Day Annual Awards Celebration is chaired by Hon. Ira B. Warshawsky and will be held on Monday, May 1, 2023, at 5:30 PM at the NCBA.

Tickets are available for purchase at $80 per person, with a special price of $65 for court staff, and includes buffet dinner and drinks. Special sponsorships are also available. For additional information, see insert. To register, contact Ann Burkowsky at aburkowsky@nassaubar.org or (516) 747-4071.

New Members

We Welcome the Following New Member Attorneys:

Martha Alexandra Brancato

Ramon Cabrera Esq.
Gacovino, Lake & Associates, P.C.

Alivia Mae Cooney

Carissa Danesi
Weiss Zarett Brofman Sonnenklar & Levy, PC

Amber Denise Eden

Thomas E. Herman

Michael Hilt

Nicholas G. Himonidis
The NGH Group

Kevin Hutzel
Meister Seelig & Fein

Robert Matthew Marx

Connor J. Mulry

Max Rayetsky
Meltzer Lippe Goldstein & Breitstone LLP

Catherine Anne Savio
Rivkin Radler LLP

Karen E. Solis-Murphy

Christopher M. Volpe Jr.

NCBA Sustaining Members 2022-2023

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

Robert A. Abiuso
Mark E. Alter
Michael J. Antongiovanni
Rosalia Baiamonte
Ernest T. Bartol
Howard Benjamin
Jack A. Bennardo
Ian Bergstrom
Jennifer Branca
Hon. Maxine Broderick
Adam L. Browser
Neil R. Cahn
Jeffrey L. Catterson
Hon. Lance D. Clarke
Michael J. Comerford
Brian P. Corrigan
Hon. Chris J. Coschignano
Joseph Gerard Dell
Dina M. De Giorgio
Christopher J. DelliCarpini
Hon. Joseph A. DeMaro
John P. DiMascio Jr.
Nicole M. Epstein
Charo Ezdrin
Samuel J. Ferrara
Ellen L. Flowers
Thomas J. Foley
Lawrence R. Gaissert
Marc C. Gann
John J . Giuffre
Alan B. Goldman
Mark A. Green
Hon. Frank A. Gulotta Jr.
Robert M. Harper
Jay M. Herman
Alan B. Hodish
James P. Joseph
Elena Karabatos
Hon. Susan T. Kluewer
Jennifer L. Koo
Abraham B. Krieger
Martha Krisel
John F. Kuhn
Donald F. Leistman
Marilyn M. Levine
Peter H. Levy
Gregory S. Lisi
Michael G. LoRusso
Mili Makhijani
Peter J. Mancuso
Michael A. Markowitz
Michael H. Masri
Tomasina Mastroianni
John P. McEntee
Christopher T. McGrath
Maura A. McLoughlin
Oscar Michelen
James Michael Miskiewicz
Anthony J. Montiglio
Anthony A. Nozzolillo
Teresa Ombres
Hon. Michael L. Orenstein
Hon. Lisa M. Petrocelli
Michael E. Ratner
Marc W. Roberts
Robert P. Rovegno
Daniel W. Russo
Rebecca Sassouni
William M. Savino
Jerome A. Scharoff
Stephen W. Schlissel
Hon. Denise L. Sher
Andrew J. Simons
Hon. Peter B. Skelos
Ira S. Slavit
Sanford Strenger
Terrence L. Tarver
Ellen B. Tobin
Craig J. Tortora
Hon. Joy M. Watson
Scott C. Watson
Stewart E. Wurtzel
Omid Zareh

The financial contribution of a Sustaining Member enables the NCBA to continue its legacy for years to come. Becoming a Sustaining Member is a demonstration of not only your commitment to this Bar Association, but also your dedication to the legal profession.

To become a Sustaining Member, please contact the Membership Office at (516) 747-4070.

We Care

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

DONOR	IN MEMORY OF
Lee Rosenberg	William B. Saltzman
Columbian Lawyers' Association of Nassau County	Frank Simone, father of Andria S. Kelly, Esq.
Hon. Andrea Phoenix	Lillian Gewirtzman, mother of Dr. Rena Schwartbaum
Hon. Andrea Phoenix	Anna Geneva Gillim, mother of Cynthia Gresham

IN MEMORY OF DAVID DEITERS, BROTHER OF HAROLD L. DEITERS III

Sherry Turpin
Dana J. Finkelstein
Neil Cahn
Hon. Andrea Phoenix
Kenneth L. Marten
Rosalia Baiamonte
Hon. Denise L. Sher
Kathleen Wright
Gregory S. Lisi
Martha Haesloop
Joanne Rynn
Joshua B. Gruner
James Istchenko

IN MEMORY OF MONICA NOEL, MOTHER OF HON. GEOFFREY N. PRIME

Kenneth L. Marten
Hon. Denise L. Sher
Hon. Colin F. O'Donnell
Hon. Joy M. Watson

THE WE CARE FUND THANKS ALL THOSE WHO MADE THE 33RD ANNUAL CHILDREN'S FESTIVAL A SUCCESS

AAA PARTY RENTAL
ALL THE WAY EVENTS
MARILYN Q. ANDERSON
BALLOONS BY LOU
GLENN BEYER
DYLAN'S CANDY BAR
ENZO'S OF GARDEN CITY
FRANCHINA LAW GROUP
GASSMAN BAIAMONTE GRUNER, P.C.
GEMELLI, GROSS, SHAPIRO & MARINO
HEDAYATI LAW GROUP, P.C.
HON. SARIKA KAPOOR
LORRAINE M. KORTH

DEBRA KELLER LEIMBACH
KENNETH L. MARTEN
MICHAEL H. MASRI
PIERCE DAY CAMP
REALTIME REPORTING, INC.
FAITH GETZ ROUSSO
DANIEL W. RUSSO
SCHLISSEL OSTROW KARABATOS, PLLC
SEND IN THE CLOWNS
STONE STUDIN YOUNG & NIGRO
TARVER LAW FIRM, P.C.
FRANK TISCIONE
KATHLEEN L. WRIGHT

Dressed to a Tea

On March 23, 2023, the WE CARE Fund hosted Dressed to a Tea, a beloved event that has not been held since 2019 due to the pandemic. This year's event was masquerade themed, and Domus was packed with attendees waiting to cheer on 12 models—all Nassau County court staff—as they walked down the runway in new spring fashions provided by Chico's of Garden City and Mur-Lee's of Lynbrook. The night was possible thanks to the generous sponsors, hairdresser Nina Schlueter, and makeup artist Corrine Amey.

Photos by: Hector Herrera

NCBA Committee Meeting Calendar
April 3, 2023– May 4, 2023

Questions? Contact Stephanie Pagano at (516) 747-4070 or spagano@nassaubar.org.
Please Note: Committee meetings are for NCBA Members.
Dates and times are subject to change. Check www.nassaubar.org for updated information.

MONDAY, APRIL 3
Surrogates Court Estates & Trusts
5:30 PM
Stephanie M. Alberts/
Michael Calcagni

TUESDAY, APRIL 4
Hospital & Health Law
8:30 AM
Douglas K. Stern

TUESDAY, APRIL 4
Community Relations & Public Education
12:45 PM
Ira S. Slavit

TUESDAY, APRIL 4
Women in the Law
12:30 PM
Melissa P. Corrado/
Ariel E. Ronneburger

WEDNESDAY, APRIL 5
Real Property
12:30 PM
Alan J. Schwartz

WEDNESDAY, APRIL 5
Association Membership
12:30 PM
Jennifer L. Koo

THURSDAY, APRIL 6
Publications
12:45 PM
Rudolph Carmenaty/
Cynthia A. Augello

TUESDAY, APRIL 11
Labor & Employment Law
12:30 PM
Michael H. Masri

WEDNESDAY, APRIL 12
Medical Legal
12:30 PM
Christopher J. DelliCarpini

WEDNESDAY, APRIL 12
Law Student
6:00 PM
Bridget Ryan

TUESDAY, APRIL 18
Appellate Practice
12:30 PM
Amy E. Abbandondelo/
Melissa A. Danowski

TUESDAY, APRIL 18
Plaintiff's Personal Injury
12:30 PM
David J. Barry

WEDNESDAY, APRIL 19
Construction Law
12:30 PM
Anthony P. DeCapua

WEDNESDAY, APRIL 19
General, Solo & Small Law Practice Management
12:30 PM
Scott J. Limmer/Oscar Michelen

WEDNESDAY, APRIL 19
Government Relations
12:30 PM
Nicole M. Epstein

WEDNESDAY, APRIL 19
Ethics
5:30 PM
Avigael C. Fyman

THURSDAY, APRIL 20
Intellectual Property
12:30 PM
Frederick J. Dorchak

MONDAY, APRIL 24
Alternative Dispute Resolution
5:30 PM
Suzanne Levy/Ross J. Kartez

TUESDAY, APRIL 25
District Court
12:30 PM
Bradley D. Schnur

TUESDAY, APRIL 25
Commercial Litigation
12:30 PM
Jeffrey A. Miller

WEDNESDAY, APRIL 26
Education Law
12:30 PM
Syed Fahad Qamer/
Joseph Lilly

WEDNESDAY, APRIL 26
Business Law Tax & Accounting
12:30 PM
Varun Kathait

THURSDAY, APRIL 27
New Lawyers
12:30 PM
Byron Chou/Michael A. Berger

TUESDAY, MAY 2
Women in the Law
12:30 PM
Melissa P. Corrado/
Ariel E. Ronneburger

WEDNESDAY, MAY 3
Real Property
12:30 PM
Alan J. Schwartz

WEDNESDAY, MAY 3
Surrogates Court Estates & Trusts
5:30 PM
Stephanie M. Alberts/
Michael Calcagni

THURSDAY, MAY 4
Hospital & Health Law
8:30 AM
Douglas K. Stern

THURSDAY, MAY 4
Publications
12:45 PM
Rudolph Carmenaty/
Cynthia A. Augello

THURSDAY, MAY 4
Community Relations & Public Education
12:45 PM
Ira S. Slavit

In Brief

Marc Hamroff, Partner at Moritt Hock and Hamroff, LLP is pleased to announce that the Maurice A. Deane School of Law at Hofstra University has named Juliana Gonzalez as the recipient of the 2022-2023 Moritt Hock & Hamroff Business Law Honors Fellowship and Estelle Gregory as the recipient of the 2022-2023 Marc Hamroff Annual Scholarship.

Ronald Fatoullah of Ronald Fatoullah & Associates presented a two-part educational series entitled, "Trust in Your Trusts," which was hosted by the New York City Public Library. In addition, together with John Leland, the *New York Times* journalist and author of "Happiness Is a Choice You Make—Lessons From A Year Among The Oldest Old," Mr. Fatoullah spoke at the grand opening of The Apsley by Sunrise.

Charlene Thompson has been appointed Deputy County Attorney for the Office of the Nassau County Attorney, Family Court Bureau.

Karen Tenenbaum was named by the *LI Herald and RichnerLIVE*, a Premier Businesswomen of Long Island. For the Suffolk County Bar Association's Tax Law Committee alongside the Elder Law & Estate Committee, Karen moderated "Is the SECURE Act Really Securing Our Future? Income Tax Impacts & Effects on Elder Law" by Donna Stefans. For the Suffolk Bar Association's Academy of Law, Karen oversaw Brooke Lively's seminar "From Panic to Profit: Running Your Practice More Efficiently."


Marian C. Rice

Jeffrey D. Forchelli, Chairman and Co-Managing Partner of Forchelli Deegan Terrana LLP, was selected as one of *Long Island Business News*' Long Island Business Influencers in Law. **Robert Barnett**, Partner at Capell Barnett Matalon & Schoenfeld LLP will be presenting "Elder Law Planning and Related Income Tax Aspects and Current Issues in Trust Design" at the New York State Society of CPA's Estate Planning Conference. Robert has also published the article, "Open Account Debt & Form 7203" for the New York State Society of CPA's publication, *TaxStringer*. Partner **Stuart Schoenfeld** presented "Long Term Care & Medicaid Planning" along with Michael Fliegelman at the Center for Wealth Preservation. In other news, Partner **Yvonne Cort** was recently interviewed on *Mastering Your Financial Life* Podcast where she discussed risks and resolutions for non-filers, IRS and NYS audits, and other topical tax issues. Partner **Gregory Matalon** and Partner Robert Barnett will be presenting *Boxing Match—Wills v. Trusts* for Webinar Planet.

Melissa Holtzer-Jonas of Littler Mendelson P.C. has been promoted to Program Manager LCS— Charges.

Hon. A. Gail Prudenti, former Chief Administrative Judge of the State of New York and former Presiding Justice of the Appellate Division, Second Department, along with **Allison C. Johs** of Legal Ease Consulting, Inc. are proud to announce the opening of Mediation Solutions of NY, LLC, along with other prominent Long Island attorneys.

The IN BRIEF column is compiled by Marian C. Rice, a partner at the Garden City law firm L'Abbate Balkan Colavita & Contini, LLP, where she chairs the Attorney Professional Liability Practice Group. In addition to representing attorneys for 40 years, Ms. Rice is a Past President of NCBA.

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

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

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

NCBA 2022-2023 Corporate Partners

Nassau County Bar Association Corporate Partners are committed to providing members with the professional products and services they need to succeed. Contact the Corporate Partner representatives directly for personalized service.

NCBA Corporate Partner Spotlight

Realtime Reporting

Ellen Birch
(516) 938-4000
ebirch@realtimereporting.com
realtimereporting.com

Realtime Reporting, Inc. is a national court reporting staff that provides reliable court reporting and litigation support services for depositions, examinations before trial, arbitrations, hearings, and meetings, at anytime and anywhere in the United States. Attorneys, administrators, and staff trust Realtime to manage all their court reporting, transcription, and litigation support needs.

Realtime Reporting prides itself on its exclusive Three-Point Quality Control System. Each transcript is reviewed three different times, meeting specific criteria before it is declared final and ready for shipment. Realtime has brought back old-time, personal service that allows all clients to feel confident that their specific and unique needs will be met. Realtime Reporting has been voted Best Court Reporting Firm on Long Island for two years in a row. Realtime Reporting works with PrintingHouse Press to provide full appellate services.

Scheduling court reporters, videographers, interpreters, and conference rooms is made easy by submitting your request through realtimereporting.com or a quick phone call to owner Ellen Birch at (516) 938-4000.

LAWYER TO LAWYER

CONSTRUCTION LAW

- Construction Contract preparation, review and negotiation
- Defective / Incomplete construction
- Post-Sandy House Raisings
- Non payment - Lien filings - Bond Claims
- Lien Foreclosures
- Union Hearings
- Construction Arbitrations, Mediation, Litigation

THE LAW OFFICES OF JOHN CARAVELLA, P.C.
A CONSTRUCTION LITIGATION AND ARBITRATION FIRM
Member FL and NY Bars; Assoc. AIA

www.LIConstructionLaw.com
(516) 462-7051
Offices Uniondale, Melville, Ft Lauderdale

DISABILITY INSURANCE LAW

FRANKEL & NEWFIELD, PC
Practice Exclusive to Disability Insurance Matters

- Pre-Disability Filing Strategy
- Disability Claim Management
- Appeals for Denied or Terminated Disability Claims
- Disability and ERISA Litigation
- Lump Sum Settlements

Rated by Super Lawyers: Jason A. Newfield, 10 YEARS
Rated by Super Lawyers: Justin C. Frankel, 10 YEARS

Martindale-Hubbell AV PEER RATED Peer Rated for Highest Level of Professional Excellence 2022
Avvo ★★★★★

516.222.1600 • www.frankelnewfield.com
ATTORNEY ADVERTISING

IRS AND NYS TAX ATTORNEY

Tenenbaum Law, P.C.
Representing Taxpayers in IRS and New York State Tax Matters
We Make Taxes Less Taxing!

For over 25 years, our attorneys have been assisting taxpayers with:

- IRS & NYS TAX MATTERS
- NYS & NYC RESIDENCY AUDITS
- NYS DRIVER'S LICENSE SUSPENSIONS
- SALES AND USE TAX
- LIENS, LEVIES, & SEIZURES
- NON-FILERS
- INSTALLMENT AGREEMENTS
- OFFERS IN COMPROMISE

631-465-5000
taxhelpline@litaxattorney.com
Learn more: www.litaxattorney.com

GRIEVANCE AND DISCIPLINARY DEFENSE

Law Offices of Mitchell T. Borkowsky

Former Chief Counsel 10th Judicial District Grievance Committee
25 Years of Experience in the Disciplinary Field
Member Ethics Committees - Nassau Bar and Suffolk Bar

- Grievance and Disciplinary Defense
- Ethics Opinions and Guidance
- Reinstatements

516.855.3777 • mitch@myethicslawyer.com • myethicslawyer.com

APPELLATE COUNSEL

NEIL R. FINKSTON, ESQ.
Benefit From a Reliable and Knowledgeable Appellate Specialist
Former Member of Prominent Manhattan Firm
Available for Appeals, Motions and Trial Briefs
Experienced in Developing Litigation Strategies
Free Initial Consultation • Reasonable Rates

Law Office of Neil R. Finkston
8 Bond Street Suite 401 Great Neck, NY 11021
(516) 441-5230
Neil@FinkstonLaw.com www.FinkstonLaw.com

NO-FAULT ARBITRATION

NEW YORK'S #1 NO FAULT ARBITRATION ATTORNEY
ANDREW J. COSTELLA, JR., ESQ.
CONCENTRATING IN NO-FAULT ARBITRATION FOR YOUR CLIENTS' OUTSTANDING MEDICAL BILLS AND LOST WAGE CLAIMS
SUCCESSFULLY HANDLING THOUSANDS OF NO-FAULT CLAIMS
Proud to serve and honored that NY's most prominent personal injury law firms have entrusted us with their no-fault arbitration matters

Law Offices of Andrew Costella Jr., Esq., PC
600 Old Country Road, Suite 307
Garden City, NY 11530
(516) 747-0377 I arbmail@costellalaw.com

VEHICLE AND TRAFFIC ATTORNEY

The Kessler Law Firm
ATTORNEYS AT LAW

Kevin Kessler, Esq.
New York Vehicle and Traffic Attorney

516.578.4160
kevin.kessler@kesslerfirm.com
www.kesslerfirm.com

34 Willis Avenue, Suite #20
Mineola, NY 11501

LAWYER REFERRALS

JOIN THE LAWYER REFERRAL SERVICE INFORMATION PANEL

The Nassau County Bar Association Lawyer Referral Information Service (LRIS) is an effective means of introducing people with legal problems to attorneys experienced in the area of law in which they need assistance. In addition, potential new clients are introduced to members of the Service Panel. Membership on the Panel is open exclusively as a benefit to active members of the Nassau County Bar Association.

LRIS Nassau County Bar Association

(516) 747-4070
info@nassaubar.org
www.nassaubar.org

NCBA RESOURCES

FREE CONFIDENTIAL* HELP IS AVAILABLE

The NCBA Lawyer Assistance Program offers professional and peer support to lawyers, judges, law students, and their immediate family members who are struggling with:

Alcohol • Drugs • Gambling • Mental Health Problems

YOU ARE NOT ALONE

(888) 408-6222
LAP@NASSAUBAR.ORG

JOIN THE NCBA TODAY!

Be a part of a welcoming and supportive community of nearly 4,000 legal professionals who share a passion for not only the law, but for helping others in the community.

NCBA membership includes unlimited FREE live CLE, FREE committee CLE, FREE Bridge-the-Gap weekend, and more!

- 12 FREE CREDITS OF ON-DEMAND CLE PROGRAMS
- REDUCED ADVERTISING RATES IN NASSAU LAWYER
- WEEKLY BAR UPDATES TO MEMBERS
- IN-PERSON NETWORKING AND SOCIAL EVENTS
- FREE MENTAL HEALTH AND WELLNESS SEMINARS
- COMMUNITY AND PRO BONO VOLUNTEER OPPORTUNITIES

VISIT NASSAUBAR.ORG OR CONTACT NCBA MEMBERSHIP DEPARTMENT AT (516) 666-4850.