Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

February 2024 www.nassaubar.org Vol. 73, No. 6

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NCBA Past President Hon. Lance D. Clarke to Receive 80th Distinguished Service Medallion

The Nassau County Bar Association (NCBA) is proud to announce that Hon. Lance D. Clarke will be presented with the 80th Distinguished Service Medallion (DSM) during its Annual Dinner Gala, to be held on May 4, 2024, at the Cradle of Aviation Museum in Garden City. This esteemed award, the highest honor bestowed by the NCBA, is given annually to a person of high moral character and integrity, celebrating their efforts to enhance the reputation and dignity of the legal profession.

Distinguished Career

Lance D. Clarke graduated from Tufts University in 1974 and Suffolk University Law School in 1977. Lance and his wife Carol moved to New York in 1978 where he has practiced law for 45 years. After focusing on personal injury law at Goldblum, Sheehan, Hocket, Ponzan & Jennings, Lance joined the firm started in 1957 by his late father-in-law, John A. Cooke, and the late Hon. Leonard S. Clark. The firm of Cooke & Clarke focuses on the general practice of law and maintains its base in the Hempstead community.

During his career, Lance has served as counsel to numerous local municipalities and agencies, including Counsel to the Deputy Speaker of the New York State Assembly, General Counsel to the Wyandanch Union Free School District, and Hempstead Village Special Counsel and Village Prosecutor. He also served as Commissioner/Counsel to the Town of Hempstead Landmark Preservation Commission for over 30 years, as well as counsel to many religious and not-for-profit organizations. Lance currently serves as General Counsel to the Roosevelt Fire District, General Counsel to the Village of Hempstead Housing Authority, and Special Counsel to the Village of Hempstead Community Development Agency.

Lance is the former Village Justice and Magistrate Judge of the Justice Court of Hempstead, one of the most active Village or Town Justice Courts in the State. Before ascending to the bench, he served as Hempstead Village Trustee from 1986 to 2001 and as Deputy Mayor from 1995 to 2001. Lance has served as an Acting City Court Judge in the City of Long Beach, and as Arbitrator, Referee and Guardian Ad Litem for the Civil Courts of the City and State of New York. He is a member of NYS Unified Court System Civil Practice Committee. He now serves as a Judicial Hearing Officer for the Nassau County Traffic Court and as a Special Referee for the Appellate Division of the Supreme Court Second Department.

Prominent NCBA President

Lance was elected as the first African-American President of the NCBA for the 2007-2008 term. He is very proud of the numerous initiatives he championed with former Executive Director, Dr. Deena Ehrlich, NCBA's awesome staff, Executive Committee,

and fellow members during his term as President. Diversity & Inclusion was his focus from day one. He formed a round table meeting with several other Nassau County affinity bar association presidents. Together, they sponsored a program celebrating their collective and common heritage as Americans with then Deputy Chief Administrative Judge Juanita Bing-Newton as keynote speaker. He went to Albany to lobby the New York State Legislature for pay increases for judges.

He initiated the effort to bring the new Matrimonial and Family Court Center to the site of the former Nassau County Department of Social Services building presenting critical evidence justifying the development of a "court complex" at that location to both the County Legislature and Village of Garden City.

Recognizing that many Long Island residents were in jeopardy of losing their homes during the 2008 economic downturn, Lance saw the need for NCBA to step up and assist homeowners with mortgage foreclosure issues. The NCBA Mortgage Foreclosure Clinic was born. Under the stewardship of Past President Martha Krisel, NCBA developed the clinic into an ABA award-winning program.

At a time when NCBA needed assistance to maintain the physical structure of its home "Domus," Lance worked with then-Deputy Speaker of the NY Assembly Earlene Hooper to obtain a state grant to preserve the building. Lance believes that "Domus' unique structure is a reminder of our nexus to the Middle Inns of Court of England and an embodiment of the professionalism, camaraderie and congeniality that distinguishes attorneys who practice in Nassau County."

In partnership with Dr. Ronald Russo from Hempstead High School and fellow NCBA members, he initiated "Courting Justice," a youth outreach mentoring program for high school students that introduced them to the many careers available in the justice system beyond those of attorney or judge.

"Lance is a role model for his humility, service, and achievements as an attorney, community leader, and past president of this Association," NCBA President Strenger highlighted.

The NCBA Annual Dinner Gala—the Bar Association's largest attended social event of the year—is scheduled for Saturday, May 4, 2024, at the Cradle of Aviation Museum. The special evening celebrates not only Clarke but also honors Members who have contributed 50, 60, and 70 years of service to the legal profession. Visit www.ncbadinnerdance.com or see the insert in this issue of *Nassau Lawyer* for details about sponsorships and journal advertisements. For more information, contact the NCBA Special Events Department at events@nassaubar.org or (516) 747-1361.

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Nassau Lawyer

The Official Publication
of the Nassau County Bar Association
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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. Contents copyright ©2022. Postmaster: Send address changes to the Nassau County Bar Association, 15th and West Streets, Mineola, NY 11501.

From the President

Sanford Strenger

Martin Luther King Jr. wrote on April 16, 1963 from the Birmingham Alabama jail that "Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects us all indirectly."

February is Black History month and I want to share with you some history, as well as NCBA's efforts to further inclusion and diversity in our Association and in the practice of law.

The first African American jurist elected in Nassau County was Judge Moxley Alexander Rigby, elected to the Nassau County District Court in 1959. Our first Nassau County African American Supreme Court Justice was the Hon. Alfred S. Robbins, elected in 1979. It was not for another 21 years in 2000 that the Hon. Michele M. Woodard was elected in Nassau County as its first female African American Justice of the State Supreme Court. The accomplishments of the above jurists have paved the way for those who have followed. Today there is greater representation of jurists of color and other traditionally underrepresented groups in our courts.

The Hon. Rowan D. Wilson was confirmed by the New York State Senate in 2023 as the first African American Chief Judge of the New York State Court of Appeals. He selected the Hon. Joseph Zayas as his Chief Administrative Judge, the first Latino Chief Administrative Judge in state history. Our own Hon. Norman St. George, a person of color, was appointed as First Deputy Chief Administrative Judge, the second highest ranking administrative position within the New York State Unified Court System.

NCBA elected Lance D. Clarke as its first African American President in 2007. Dorian R. Glover was elected President in 2020 as the NCBA's second African American President. Today, the Hon. Maxine S. Broderick serves as Treasurer of the NCBA, and in 2026 will become NCBA's first African American woman President.

This year NCBA will bestow its highest honor, the Distinguished Service Medallion, upon Lance D. Clarke. This is the second time this honor been bestowed on an African American. The previous African American recipient was U.S. Supreme Court Justice Thurgood Marshall. Mr. Clarke has not only been a trail blazer for our Association but has contributed greatly to the legal community and the public of Nassau County.

NCBA is committed to diversity and inclusion. We are not only "talking the talk" but, have, and are, "walking the walk" to further diversity and inclusion in the legal profession. Last year, through a generous gift from Past President Elena Karabatos and the Karabatos Family, the NCBA implemented the Pre-Law Society, with the goal to reach out and mentor college students from traditionally underrepresented communities to assist them in their pursuit of legal careers. The college mentees have been paired with law school student mentors, many also of diverse backgrounds, and meet throughout the year with seasoned attorneys and members of the judiciary.

The Nassau County Assigned Defender Program, an affiliate of the NCBA—which facilitates the representation of indigent defendants in the Criminal and Family Courts of Nassau County under the 18B program—is actively seeking to increase diversity on its panel. The NCADP is providing training and mentoring by experienced criminal defense counsel, who will sit as trial co-chairs to assist less experienced counsel hone their skills as defense counsel.

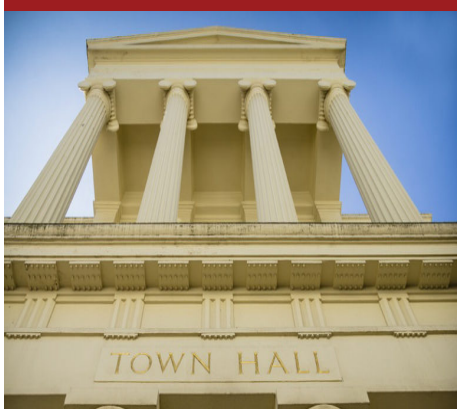
Our Community Relations & Public Education Committee, Diversity & Inclusion Committee, and new Asian American Attorney Section are running innovative programs for attorneys to highlight implicit basis and help to prevent it. They also are fostering inclusiveness and providing informative seminars to the public. We have a long-standing program to provide one-on-one mentoring at local middle schools to students in need of assistance. Our clinics serve underrepresented members of our community through the pro bono efforts of our Members and grants actively pursued by the NCBA. Our Members are active participants in the Court System's Access to Justice initiatives which the Bar supports wholeheartedly.

The NCBA is a major part of the fabric of the legal profession in Nassau County and statewide committed to furthering justice. On March 7, we are launching our 125th anniversary celebration. Please join us at this free event. This month we are launching sponsorship opportunities for our Annual Dinner Gala where Mr. Clarke will be honored on May 4, 2024. Pay tribute to Mr. Clarke's significant contribution to our Association and the community by taking out a sponsorship or journal ad. Join us and be a part of this historic event in a venue in which Long Island's aerospace history is on display and can be viewed during the Gala.

We as a profession are charged with upholding justice and enhancing access to it. NCBA has come a long way since it was formed in 1899. Our history continues to be written with a commitment to inclusiveness as a guiding principle. Let's together write a legacy others will point to as an example of effecting positive progress toward equal justice and representation for all.

On February 1, the courts will celebrate Black History Month by hosting an event in Nassau County Supreme Court. Honorable Rowan D. Wilson will receive the Hon. Alfred S. Robbins Memorial Award, Hon. Alfred D. Cooper (Ret.) will receive the Amistad President's Award, and Peggy Smith, Clerical Assistant Supreme Court, will receive the Hon. Michele M. Woodard Distinguished Service Award. NCBA is a proud supporter of this event and congratulates the recipients of these prestigious honors. This is a free event and having attended it in past years it is a moving and significant event on the Court's calendar.

FOCUS: MUNICIPAL LAW



Snowfall—The Reckless Disregard Defense

Ian Bergström

The reckless disregard defense is founded under Vehicle and Traffic Law §1103(b). The operator(s) of municipal snowplow vehicles and municipal entities can assert the defense potentially avoiding tortious liability because of car accidents that occur during snowstorms. Presently, the Second Department has not assessed whether municipal employees and municipal entities are afforded the protection of the reckless disregard defense "salting" highways or roadways pursuant to Vehicle and Traffic Law §1103(b). Rather, the New York State Court of Claims ("Court of Claims") and Fourth Department assessed the aforementioned issue before October 2023. The *stare decisis* doctrine deems the Court of Claims and Fourth Department determinations as persuasive authority regarding trial courts within the Second Department. Supreme Court of Nassau County recently determined that a municipal employee is afforded the protection of the reckless disregard defense "salting" a highway or roadway, despite the lack of governing precedent and/or persuasive authority within the Second Department.

Precedent

The Court of Claims is the only venue vested with the power to adjudicate lawsuits demanding monetary "damages against the State of New York or certain other State-related entities …."[1] The Court of Claims does not have "jurisdiction over" local municipal entities and "individual defendant[s]."[2] "The Appellate Division is a single state-wide court divided into departments for administrative convenience and, therefore, the doctrine of *stare decisis* requires trial courts in [the Second Department] to follow precedents set by the Appellate Division of another department until the Court of Appeals or [the Second Department] pronounces a contrary rule."[3] The Second Department oversees various trial courts including the Supreme Court of Nassau County.[4] Supreme Court of Nassau County and the Second Department described "the decisions of sister departments as persuasive"[5] and "sound."[6] Moreover, the Second Department deems "the decisions of the" First Department "as persuasive …."[7] Nassau County Family Court believes the First Department and Third Department are "more persuasive than the Fourth Department."[8] To clarify, the Supreme Court of Nassau County acknowledges that the Second Department determinations are "governing … authority" and "authoritative."[9]

Reckless Disregard

The reckless disregard defense is statutory pursuant to Vehicle and Traffic Law §1103(b).[10] The reckless disregard defense is deemed a "higher standard."[11] Although the reckless disregard standard is intended to defend tortious liability, the municipal employee and/or municipal entity are not required to assert "Vehicle and Traffic Law §1103 … as an affirmative defense" within their verified answer.[12] The applicability of the reckless disregard defense depends whether the municipal employee driving the vehicle is "actually engaged in work on a highway" when the car accident occurs.[13] The statutory definitions for "highway" and "roadway" are set forth under the Vehicle and Traffic Law.[14] The judiciary can deem the layout of the "road on which the accident occurred" as a "highway" if same "was publicly maintained and open to the use of the public for the purpose of vehicular travel."[15]

In *Wilson v. State,* the Court of Claims "dismissed" the negligence cause of action pertaining to the car accident involving the "snowplow owned by [New York State] and operated by [New York State's] employee."[16] Further, the Court of Claims "determined" that the reckless disregard defense applied to the "snowplow" at issue.[17] Plaintiff-appellant John Wilson appealed the determination to the

Fourth Department.[18] The Fourth Department upheld the trial court determination because the "record" established "the snowplow operator did not act in reckless disregard for the safety of others" pursuant to Vehicle and Traffic Law §1103(b)."[19]

In *Lynch-Miller v. State of New York*, the Fourth Department "reversed" the determination of the Court of Claims regarding the summary judgment application that defendant-appellant State of New York filed regarding the snowplow-related car accident at issue.[20] The Fourth Department interpreted the statutory reference to "vehicles" as including "snowplows" pursuant to Vehicle and Traffic Law §1103(b).[21] If the municipal snowplow vehicle is "engaged in plowing or salting a road" when the car accident occurs, then the court should determine the vehicle is "actually engaged in work on a highway."[22] Defendant-appellant State of New York did not proffer evidence proving the municipal snowplow vehicle should be afforded the protection of the reckless disregard defense pursuant to Vehicle and Traffic Law §1103(b). Ultimately, the Fourth Department determined that the Court of Claims erred granting the branch of the summary judgment application demanding the negligence cause(s) of action be dismissed because the movant did not establish prima facie entitlement to summary judgment pursuant to CPLR 3212.[23]

Although the Court of Claims and Fourth Department evaluated whether municipal snowplow vehicles should be afforded the protection of the reckless disregard defense "salting a road[way]," the Supreme Court of Nassau County and other appellate divisions did not evaluate such an issue before October 2023.[24] Notably, the Second Department did not adjudicate the issue whether municipal employees and/or municipal entities are afforded the protection of the reckless disregard defense "salting" highways or roadways pursuant to Vehicle and Traffic Law §1103(b).[25] The lack of governing precedent caused the Supreme Court of Nassau County to adjudicate the aforesaid issue by means of citing "sound" and "persuasive" authority.[26]

In *Calderon and Gonzalez v. Thompson,* co-plaintiff Amalia Calderon ("Ms. Calderon") commenced the civil lawsuit against the municipal employee that purportedly caused the rear-end collision at issue.[27] Ms. Calderon asserted her negligence cause(s) of action against the municipal employee.[28] Ms. Calderon complained that she purportedly experienced personal injuries as a result of the car accident.[29] Co-plaintiff Reny Gonzalez ("Mr. Gonzalez") asserted the loss of services and loss of consortium cause(s) of action because his purported wife was injured as a result of the car accident.[30] The loss of services and loss of consortium cause(s) of action is "derivative" of the underlying negligence cause(s) of action.[31]

The municipal employee filed the summary judgment application demanding dismissal of the causes of action pursuant to CPLR 3212 and Vehicle and Traffic Law §1103(b).[32] The municipal employee proffered, inter alia, the parties' deposition transcripts moving for summary judgment.[33] Supreme Court of Nassau County thoroughly assessed the testimonial evidence consisting of deposition transcripts and affidavits.[34] The trial court acknowledged, "[it] was snowing at the time of the [car] accident," and the municipal employee "was salting the roadway immediately prior to the accident."[35] The municipal snowplow vehicle consisted of "a 'hopper'" that "h[eld] salt."[36] Therefore, the municipal employee satisfied his evidentiary burden proving applicability of the reckless disregard defense pursuant to Vehicle and Traffic Law §1103(b).[37] Ms. Calderon and Mr. Gonzalez did not proffer clear and convincing evidence raising the requisite triable issue(s) of fact that the municipal employee recklessly disregarded the rules of the road to defeat the summary judgment application.[38] As such, the Supreme Court of Nassau County dismissed the aforementioned causes of action pursuant to CPLR 3212 and Vehicle and Traffic Law §1103(b).[39]

Honorable Erica Prager, J.S.C. rendered the groundbreaking decision and order enhancing the protections afforded to municipal employees driving snowplow vehicles "salting … roadway[s]" within the Second Department.[40] The *stare decisis* doctrine does not consider the trial court determination governing precedent for other trial courts to adhere, but the determination consists of persuasive authority within the Second Department.[41] The local geographic trial courts must await the Second Department to echo the Supreme Court of Nassau County regarding the inquiry whether municipal employees are afforded the reckless disregard defense "salting" highways or roadways pursuant to Vehicle and Traffic Law §1103(b).[42]

1. See *Welcome*, NYCourts.Gov, *available at* https://ww2.nycourts.gov/COURTS/nyscourtofclaims/index.shtml.
2. See *id.*
3. See *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664 (2d Dept. 1984).
4. See *An Overview of the Appellate Division*, Supreme Court of the State of New York Appellate Division – Second Judicial Department, available at https://www.nycourts.gov/courts/ad2/aboutthecourt.shtml.
5. See *Mountain View Coach Lines, Inc.*, 102 A.D.2d at 665; see *also Halio v. IOD Inc.*, 32 Misc. 3d 593, 595-6 (Sup. Ct., Nassau Co. 2011) (J. Jaeger).
6. See *In re Connolly*, 51 Misc. 2d 975, 976 (Sup. Ct., Nassau Co. 1966) (J. Hogan).
7. See *Maple Med., LLP v. Scott*, 191 A.D.3d 81, 91 (2d Dept. 2020).
8. See *In re: Aileen S. v. Michael* D., 2020 N.Y. Misc. LEXIS 4463, *4 (Fam. Ct., Nassau Co. 2020).
9. See *Board of Managers of Cathedral Tower Condominium v. Sendar Associates LLC*, 2014 N.Y. Slip. Op. 33846(U), *9 (Sup. Ct., Nassau Co. 2014) (J. Driscoll) (*citing Mountain View Coach Lines, Inc.*, 102 A.D.2d 663).
10. Vehicle and Traffic Law §1103(b); *Andreotti v. County of Nassau*, 2011 N.Y. Slip. Op. 32203(U), *3 (Sup. Ct., Nassau Co. 2011) (J. Phelan) (the trial court sets forth the meaning of reckless disregard); *Szczerbiak v. Pilat*, 90 N.Y.2d 553, 557 (1997) (Court of Appeals sets forth the meaning of reckless disregard).
11. *Andreotti*, 2011 N.Y. Slip. Op. 32203(U), *2-3 (*citing Wilson v. State*, 269 A.D.2d 854, 855 (4th Dept. 2000) and *Bello v. Transit Authority*, 12 A.D.3d 58, 61 (2d Dept. 2004)).
12. *Andreotti*, 2011 N.Y. Slip. Op. 32203(U), *2-3 (citing Wilson, 269 A.D.2d at 855 and *Bello*, 12 A.D.3d at 61); Vehicle and Traffic Law §1103(b); CPLR §3011; CPLR §3018(b); CPLR §3020(a).
13. See Vehicle and Traffic Law §1103(b).
14. Vehicle and Traffic Law §118; *Gawron v. Town of Cheektowaga*, 117 A.D.3d 1410, 1411 (4th Dept. 2014) (*citing* Vehicle and Traffic Law §118); Vehicle and Traffic Law §140.
15. See *Gawron*, 117 A.D.3d at 1411 (the appellate division "conclude[d] … the service road constitutes a highway within the meaning of section 1103(b) [of the Vehicle and Traffic Law] as a matter of law.").
16. See *Wilson*, 269 A.D.2d 854.
17. See *id.*; see *also* Vehicle and Traffic Law §1103(b).
18. See *Wilson*, 269 A.D.2d 854.
19. See *id.*; see *also* Vehicle and Traffic Law §1103(b).
20. See *Lynch-Miller v. State of New York*, 209 A.D.3d 1294 (4th Dept. 2022).
21. See *id.* at 1295 (*citing* Vehicle and Traffic Law §1103(b)).
22. See *id.* (*citing* Vehicle and Traffic Law §1103(b)).
23. See *id.* at 1297.
24. *Wilson*, 269 A.D.2d 854; *Lynch-Miller*, 209 A.D.3d 1294; Vehicle and Traffic Law §1103(b).
25. *Board of Managers of Cathedral Tower Condominium*, 2014 N.Y. Slip. Op. 33846(U), *9 (*citing Mountain View Coach Lines, Inc.*, 102 A.D.2d at 664); *Wilson*, 269 A.D.2d 854; *Lynch-Miller*, 209 A.D.3d 1294; Vehicle and Traffic Law §1103(b); *An Overview of the Appellate Division, supra.*
26. *Calderon and Gonzalez v. Thompson*, Index No.: 603752/2020 (Sup. Ct., Nassau County 2023) (J. Prager). The decision and order is electronically filed by means of the New York State Courts Electronic Filing ("NYSCEF") system. The decision and order is available at https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=SFuXnbdGDJUKhd3k7xzWJw==; *Halio*, 32 Misc. 3d at 595-6; *Mountain View Coach Lines, Inc.*, 102 A.D.2d at 665; *In re Connolly*, 51 Misc. 2d at 976.
27. See *Calderon and Gonzalez*, Index No.: 603752/2020.
28. See *generally id.*
29. See *generally id.*
30. See *generally id.*
31. See *generally id.*; see *generally Paisley v. Coin Device Corp.*, 5 A.D.3d 748, 750 (2d Dept. 2004); see *generally Holmes v. New Rochelle*, 190 A.D.2d 713, 714 (2d Dept. 1993).
32. *Calderon and Gonzalez*, Index No.: 603752/2020; CPLR 3212; Vehicle and Traffic Law §1103(b).
33. See *generally* Calderon and Gonzalez, Index No.: 603752/2020.
34. See *generally id.*
35. See *generally id.*
36. See *generally id.*
37. See *generally id.*; see *generally* Vehicle and Traffic Law §1103(b).
38. See *generally* Calderon and Gonzalez, Index No.: 603752/2020; see *generally* CPLR 3212; see *generally* Vehicle and Traffic Law §1103(b).
39. See *Calderon and Gonzalez*, Index No.: 603752/2020; see *generally* CPLR 3212; see *generally* Vehicle and Traffic Law §1103(b).
40. See *Calderon and Gonzalez*, Index No.: 603752/2020.
41. *Id.; Mountain View Coach Lines, Inc.*, 102 A.D.2d at 664; *An Overview of the Appellate Division, supra.*
42. *Calderon and Gonzalez*, Index No.: 603752/2020; *Mountain View Coach Lines, Inc.*, 102 A.D.2d at 664; *An Overview of the Appellate Division, supra.*

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FOCUS: EDUCATION LAW

The Biden Administration's Plan for Holding Colleges Accountable: New HEA Regulations Aim to Protect Students and Streamline Access

Cynthia A. Augello and Brittany Hulbert

On October 24, 2023, the Biden-Harris Administration introduced a significant overhaul of regulations governing Title IV of the Higher Education Act of 1965 (HEA).[1] This landmark legislation, which provides billions of dollars in federal aid to students and institutions, is undergoing its first major revisions in over a decade. The new regulations, set to take effect on July 1, 2024, prioritize student protection, financial transparency, and access for non-traditional learners.

Early Intervention for College Closures

Guarding Against Sudden Closures: One of the most pressing concerns addressed by the amendments is the devastating impact of unexpected college closures. Students left in the lurch, their academic progress abruptly halted with their federal loans in default, have long faced a painful reality. The new rules empower the federal Department of Education (ED) to intervene proactively through various measures.[2]

- *Trigger Events:* Institutions must report specific events indicating financial instability within 21 days, such as two consecutive years of enrollment declines exceeding 15%; sudden leadership changes combined with negative financial audits; and unsecured debt exceeding 50% of annual operating expenses.
- *Financial Safety Nets:* ED can require institutions with triggering events to submit letters of credit or other financial guarantees; develop detailed teach-out plans for student program completion in case of closure; and participate in ED-mandated financial improvement plans.

ED can now demand clearer financial projections and risk assessments from institutions, enabling earlier identification of potential closure threats. Secondly, stricter standards for administrative capabilities are introduced, ensuring colleges possess adequate resources and infrastructure to manage their finances and student services effectively. Additionally, the amendments allow ED to swiftly suspend federal aid to at-risk institutions, preventing further student debt accumulation and safeguarding limited resources.

Several examples of sudden college closures that could have potentially been prevented or mitigated with the HEA amendments include:

1. Antonelli College (2019)[3]

This for-profit chain abruptly closed its 13 campuses across Ohio, Michigan, and Florida, leaving nearly 4,000 students stranded mid-program.

How the amendments could have helped? Trigger events like declining enrollment and leadership changes might have prompted ED intervention earlier. Mandatory financial reserves could have provided a buffer to allow for teach-out plans or orderly closures.

2. Mount Ida College (2018)[4]

This small liberal arts college in Massachusetts announced its closure just weeks before graduation, shocking current students and faculty.

How the amendments could have helped? Mandatory teach-out plans would have ensured students could complete their degrees at nearby institutions or receive transfer credits. Financial transparency measures might have uncovered underlying issues sooner, allowing for corrective action.

3. Globe University[5] and Minnesota School of Business (2016)[6]

These for-profit institutions closed sixty-one campuses across multiple states, affecting over 10,000 students.

How the amendments could have helped? Enhanced oversight of for-profit institutions, known for higher closure rates, could have flagged potential problems earlier. Stronger financial accountability measures might have prevented the unsustainable growth that led to their collapse.

4. ITT Technical Institutes (2016)[7]

This nationwide chain of for-profit technical schools shut down over one-hundred and thirty campuses, leaving over 40,000 students in limbo.

How the amendments could have helped? The requirement to report triggering events could have led to earlier intervention by ED to address financial mismanagement and protect students. Mandatory teach-out plans or transfer agreements could have minimized disruption for students.

5. Corinthian Colleges (2015)[8]

This large for-profit chain collapsed under the weight of investigations into deceptive practices and poor student outcomes.

How the amendments could have helped? Increased scrutiny of student recruitment and financial aid practices might have prevented the enrollment of students who were unlikely to succeed. Clearer financial aid information could have helped students make more informed choices about borrowing and repayment.

While it's impossible to guarantee that these closures would have been entirely prevented, the HEA amendments aim to provide tools for early intervention, financial safeguards, and student protection in similar situations. By addressing the root causes of sudden closures and prioritizing student outcomes, these changes have the potential to make a significant difference in the lives of thousands of students and safeguard colleges from financial instability and abrupt closure.

Protecting Academic Records

Another prominent focus of the revisions is preventing the unfair withholding of transcripts. In instances where students pay for courses with federal aid but encounter sudden closures or institutional misconduct, institutions often hold transcripts hostage, jeopardizing their ability to transfer credits or pursue further education. The new regulations explicitly prohibit this practice, guaranteeing students rightful access

to their academic records, regardless of unforeseen circumstances at their former institution.

- *Transcript Access Guarantee:* Institutions cannot withhold transcripts for unpaid debts related to tuition, fees, or housing.
- *Alternative Payment Plans:* ED encourages institutions to offer flexible payment plans to avoid transcript holds.
- *Transcript Disbursement Standards:* Institutions must provide transcripts within 15 days of receiving a written request.

The practice of withholding transcripts for unpaid debts has been a contentious issue for years, impacting countless students and raising concerns about fairness, access, and the very purpose of education. Let's delve deeper into this complex matter, exploring its various facets:

- *The Scope of the Problem.* Numbers tell a stark story. Studies estimate that millions of students have their transcripts withheld due to unpaid debts, disproportionately affecting low-income students and students of color. The consequences are far-reaching. Withheld transcripts can prevent students from transferring credits, applying for jobs, and pursuing further education, effectively hindering their academic and professional trajectories.
- *Arguments for Withholding.* For institutions, it is a debt-collection tool. Educational institutions see transcript withholding as a way to incentivize students to pay outstanding balances, potentially recouping lost revenue, and deterring future defaults. And there are concerns about fairness. Some argue that everyone should be held accountable for their debts, regardless of their circumstances.
- *Arguments Against Withholding.* It punishes students, not just debtors. Withholding transcripts disproportionately harms students who may lack the resources to pay, trapping them in a cycle of debt and limited opportunities. It also possibly violates the Family Educational Rights and Privacy Act (FERPA). This federal law protects students' educational records, and some argue that withholding transcripts constitutes an unfair invasion of privacy. Finally, it undermines the purpose of education. Education should be a pathway to opportunity, not a hostage held for financial gain.

The recent HEA amendments aim to address this issue head-on by prohibiting institutions from withholding transcripts for debts related to tuition, fees, and housing. This move represents a significant step towards protecting students and ensuring equal access to educational opportunities. However, this change causes issues for educational institutions who provide services to students. Challenges and Considerations include:

- *Implementation:* Ensuring consistent application of the new regulations across institutions will be crucial.
- *Alternative debt-collection methods:* Institutions will need to explore alternative ways to collect outstanding debts without resorting to measures that harm students.
- *The future of financial aid:* The long-term impact on financial aid programs and student debt needs ongoing monitoring and potential adjustments.

The fight against transcript withholding is not over. The Biden Administration believes that continued advocacy, research, and policy development are crucial to ensure that education remains accessible and empowering for all students, regardless of their financial circumstances.

Financial Aid Clarity and Fairness

The revised HEA also tackles the opaque and often confusing communication surrounding financial aid packages.[9] Students frequently struggle to understand the true cost of attendance, the intricacies of loan repayment, and the potential impact of scholarships and grants. The new regulations mandate clear and upfront disclosure of all financial aid options, including estimated net costs, expected loan burdens, and potential repayment scenarios. This enhanced transparency aims to empower students to make informed decisions about their education investments.

- *Net Cost Estimator:* Institutions must provide students with a clear and accurate net cost calculator before enrollment.
- *Simplified Award Notification:* Financial aid award letters must be written in plain language and include breakdowns of grants, loans, and expected net costs.
- *Disbursement Schedules:* Institutions must provide clear timelines for disbursement of financial aid funds.

Alternative Pathways to Higher Education

Recognizing the changing demographics of higher education, the amendments seek to facilitate pathways for students without a high school diploma or its equivalent to access postsecondary opportunities.[10] They establish a more streamlined process for states to approve alternative credentials—such as competency-based assessments or prior learning portfolios—as valid for eligibility for federal aid. This opens doors for a wider range of learners, including adult learners, veterans, and individuals with nontraditional educational backgrounds, paving the way for greater equity and inclusivity in higher education.

- *State Flexibility:* Streamlined process for states to approve alternative pathways, such as competency-based assessments demonstrating skills and knowledge; prior learning assessments recognizing life and work experience; and industry-recognized credentials aligned with postsecondary education.
- *Program Standards:* Clear requirements for states to ensure approved pathways lead to recognized credentials or degrees; maintain academic rigor and quality assurance; and provide student support services and transferability options.

Similarly, colleges will be required to limit career training programs to no more than 100 percent the length mandated by the state for certification or licensure. New degree programs will be required to meet state-required accreditation and/or licensure requirements. Lastly, when colleges are notified that a student intends to move to a new state, the college will be required to prove that the receiving state's requirements are met and inform the student of which programs lead to provisional licensure or licensure through reciprocity agreements.

Navigating Uncertainties

While the new regulations bring some changes being applauded, some uncertainties remain. Critics point to potential bureaucratic hurdles for institutions trying to comply with stricter financial reporting and risk assessment requirements. Institutions will likely bear the costs of these regulations and be subject to additional compliance expenses. Additionally, the effectiveness of the early intervention measures in preventing closures awaits real-world application. It will be crucial for ED to strike a balance between necessary oversight and fostering a healthy and diverse higher education landscape.

Looking Ahead

The revised HEA regulations represent a significant step towards a more student-centric and accountable higher education system. By prioritizing student protection, financial transparency, and access for non-traditional learners, the Biden-Harris Administration aims to address longstanding challenges and pave the way for a more equitable and sustainable educational future, benefitting both students and colleges. As the July 2024 implementation date approaches, close monitoring and ongoing dialogue between all stakeholders will be essential to ensure these changes translate into tangible benefits for students and the higher education ecosystem as a whole.

1. https://www.ed.gov/news/press-releases/biden-harris-administration-releases-final-rules-strengthen-accountability-colleges-and-consumer-protection-students.
2. https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/non-ge-final-rules-fact-sheet.pdf.
3. https://collegehistorygarden.blogspot.com/2018/05/the-antonelli-institute-in-pennsylvania.html.
4. https://www.wcvb.com/article/its-just-depressing-students-angry-over-sudden-closure-of-mt-ida-college/19727273.
5. https://www.twincities.com/2017/01/12/globe-minnesota-school-of-business-students-struggle-as-campuses-close/.
6. https://www.ohe.state.mn.us/mPg.cfm?pageID=2181.
7. https://www.nytimes.com/2016/09/08/business/downfall-of-itt-technical-institutes-was-a-long-time-in-the-making.html.
8. https://www.usnews.com/news/articles/2015/04/27/for-profit-corinthian-colleges-shuts-down-all-remaining-campuses.
9. https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/non-ge-final-rules-fact-sheet.pdf.
10. https://www.federalregister.gov/documents/2023/10/31/2023-22785/financial-responsibility-administrative-capability-certification-procedures-ability-to-benefit-atb.

Cynthia A. Augello is the founding member of the Augello Law Group, PC, where she practices Education Law. She is also the Editor-in-Chief of the Nassau Lawyer and Chair of the NCBA Publication's Committee. Cynthia can be contacted at caugello@augellolaw.com.

Brittany Hulbert is an associate attorney of the Augello Law Group, PC practicing Education Law in the state of New Jersey.

FOCUS: REAL PROPERTY LAW

The End of "Caveat Emptor" in New York House Sales?

Jeff Morgenstern

From time immemorial, buyers of homes in New York have been confronted by the rule of "caveat emptor"— "let the buyer beware." This placed the burden of investigating the condition of the house on the buyer. Unless a buyer could establish that a seller actively concealed or misrepresented some known material fact, once a buyer closed, the post-closing discovery of defects in the house would leave the buyer with an uphill battle in pursuing the seller for damages or other relief.

New York attempted to balance the rights of the buyer and seller by enacting the Property Condition Disclosure Act as of March 2002.[1] That statute called for sellers to complete a forty-eight-question statement ("PCDS") regarding the condition of the house prior to the signing of the contract of sale or give the buyer a $500 credit at closing. This disclosure would theoretically give a buyer some protection to be able to make an informed decision about the purchase and guard against unexpected repairs.

As a practical reality over the years since then, sellers typically made the very easy choice of giving the $500 credit at closing, rather than bother with the nuisance of completing the PCDS and exposing themselves to liability for improperly answering a question(s).

Fast forward to September 2023: the pendulum has now shifted towards the buyers, to put more teeth into the PCDS and do away with the optional $500 credit. The revised statute,[2] which becomes effective on March 20, 2024, begins by stating that:

> "THIS DISCLOSURE STATEMENT IS NOT A WARRANTY OF ANY KIND BY THE SELLER OR BY ANY AGENT REPRESENTING THE SELLER IN THIS TRANSACTION."
>
> "IT IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR TESTS AND THE BUYER IS ENCOURAGED TO OBTAIN HIS OR HER OWN INDEPENDENT PROFESSIONAL INSPECTIONS AND ENVIRONMENTAL TESTS AND IS ALSO ENCOURAGED TO CHECK PUBLIC RECORDS PERTAINING TO THE PROPERTY. A KNOWINGLY FALSE OR INCOMPLETE STATEMENT BY THE SELLER ON THIS FORM MAY SUBJECT THE SELLER TO CLAIMS BY THE BUYER PRIOR TO OR AFTER THE TRANSFER OF TITLE. A COPY OF THE PCDS IS TO BE ATTACHED TO THE CONTRACT OF SALE BUT NOTHING IN THE STATUTE OR IN THE PCDS IS INTENDED TO PREVENT THE PARTIES FROM ENTERING INTO ANY AGREEMENTS REGARDING THE PROPERTY'S PHYSICAL CONDITION, INCLUDING SALES THAT ARE "AS IS.""[3]

The amended statute limits its coverage to "Residential Real Property," defined as a one to four-family dwelling used or intended to be used as the home or residence of one or more persons. The exceptions to coverage are unimproved land, condominiums, co-ops, property on an HOA that is not owned as fee simple by the sellers, and properties sold by fiduciaries.[4]

The PCDS now provides that a seller "MUST"[5] fill out and deliver to a buyer or buyer's agent the Disclosure Statement before the contract is signed. It has various groups of questions divided up into "General Information"; "Environmental" (which has added a series of questions regarding whether the house is in a FEMA or Flood Hazard area, if flood insurance is in place, and if there is a history of indoor mold); Structural; and Mechanical Systems. The amendment does not require a seller to undertake or provide any investigation or inspection of the property or to check any public records.[6]

The possible answers to the various questions are "Yes," "No," "Unknown," or "N/A." Both parties have to sign the statement, and the seller has to certify that the statement is true and complete to its actual knowledge.[7] If the seller subsequently learns that the statement was materially inaccurate, the seller has to deliver a revised one, but in no way is the seller required to do so after transfer of title or buyer's taking possession, whichever is earlier.[8] However, a seller who delivers a PCDS or fails to provide one, is only liable for a willful failure to perform the statute's requirements, and liability is for actual damages suffered by the buyer in addition to any other remedies available.[9]

In addition, the real estate broker of a listing must notify the seller of its obligation to provide the PCDS to potential buyers and the buyer's broker (if they have one) must inform the buyer of their right to receive it. Brokers have no further duties under the statute and are not liable for any violation.[10]

Some of the many unanswered questions from this amendment are:

- What is the attorney's role, if any, in seeing to it that the PCDS is accurately completed?
- Can the protections of the statute be waived? (the statute is silent as to that)
- Will this deter houses from being put up for sale, and potentially limit the inventory available to buyers?
- Will sellers increase their asking prices to compensate for the added nuisance of providing this form and exposing themselves to liability? and
- What adjustments will parties make to their real estate contracts to deal with this statute's requirements, bearing in mind that the statute of limitations for fraud claims is the greater of six years from the commission of the fraud or two years from discovery.[11]

One thing is certain; this revised statute will create a lot of uncertainty in the housing market.

1. NY Real Property Law Article 14, §460, et seq.
2. NY Real Property Law §462(1,2), Ch. 484, L. 2023.
3. *Id.*
4. NY Real Property Law §463.
5. The option of giving a $500 credit at closing has been repealed.
6. NY Real Property Law §462(3).
7. The representations are not made by the seller's agent.
8. NY Real Property Law §464.
9. NY Real Property Law §465.
10. NY Real Property Law §466.
11. CPLR 213(8).

Jeff Morgenstern maintains an office in Carle Place, where he concentrates in bankruptcy, creditors rights, and commercial and real estate transactions and litigation. He is an editor of the *Nassau Lawyer*. He can be contacted at jmorgenstern78@gmail.com.

FOCUS: ARTIFICIAL INTELLIGENCE

ChatGPT Exposes Students to Wrongful Accusations of Plagiarism

Scott Limmer

Artificial Intelligence (AI) and the impact of ChatGPT has been a hot topic in the news recently.[1] The use of ChatGPT to author student papers has preoccupied academia. Educators fear that students can easily turn in assignments that were created by ChatGPT. That fear has motivated universities to impose harsh discipline when professors believe a student engaged in plagiarism by relying on AI to author a paper.

False accusations of plagiarism can lead to severe consequences, including failing grades, academic suspension, or expulsion. Before ChatGPT, educators typically supported plagiarism charges by locating the original source material and comparing it to the student's paper.[2] Significant verbatim copying was strong evidence of plagiarism.

ChatGPT does not copy an existing text. It paraphrases and cites source material, just as a student should do. For that reason, works produced by AI cannot be detected by traditional plagiarism detectors.

Proving Plagiarism by AI

Some companies have attempted to fill the gap in plagiarism detection by offering flawed services that purport to detect the algorithm used by ChatGPT. The algorithm simulates human prose by predicting the next word that a human writer would use in the sentences it composes, based on the average word choice it finds in all the compositions in its database. Detection software determines whether a student's word choices are so average that they are probably the product of the ChatGPT algorithm.

Unfortunately, students who consistently make average word choices can be flagged as submitting a paper written by ChatGPT.

No evidence supports the false accusations beyond the assumptions made by software programmers. Innocent students have been accused of turning in plagiarized work simply because they wrote papers in the style of a paper that ChatGPT might have written.[3]

AI Plagiarism Detection Is Unreliable

While several websites have promoted AI detectors, many of the recent leading detectors have been shown to be unreliable. The research company OpenAI, the creator of ChatGPT, designed an experimental tool called AI Classifier to detect AI-generated text. OpenAI discontinued the product after finding that it had an accuracy rate of 26 percent.[4]

Turnitin is one of the leading tools that is marketed as an AI detector. While Turnitin initially claimed that its product returned false positives in fewer than one percent of the papers it checked, the company now admits that its detection scores are not always reliable.[5]

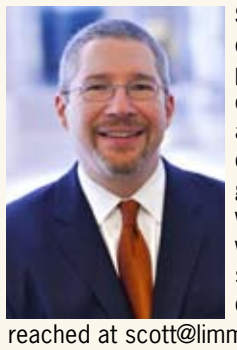
A computer scientist at the University of Maryland who has researched AI detectors concluded that "[c]urrent detectors of AI aren't reliable in practical scenarios."[6] He opines that it is "very unlikely that we'll be able to develop detectors that will reliably identify AI-generated content."[7]

The Future of Plagiarism Accusations

The false positives generated by AI detectors have been widely reported by media sources that focus on higher education.[8] That publicity, combined with challenges to the validity of AI detection that falsely accused students raised at disciplinary hearings, has persuaded some educational institutions that they are basing discipline on unreliable evidence.

It seems that colleges and universities have hit the pause button on accusations of plagiarism that are supported only by AI detectors and there has been a sharp decline in disciplinary charges based solely on claims of ChatGPT plagiarism. Hopefully schools have learned not to base shaky accusations on AI detection software that cannot provide a verifiable assurance of reliable results.

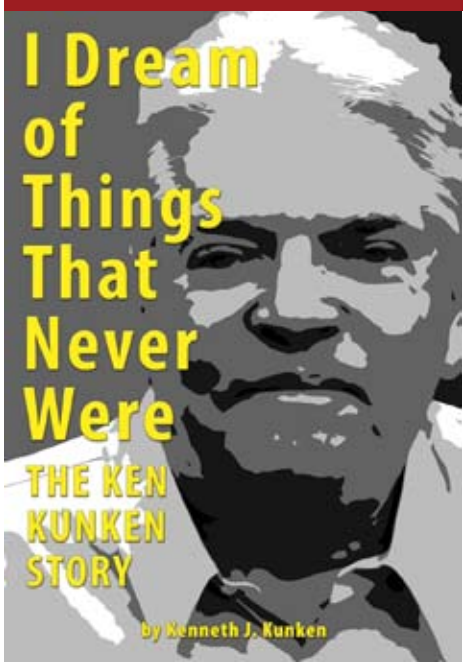
1. See, e.g., Chris Westfall, *Educators Battle Plagiarism As 89% Of Students Admit To Using OpenAI's ChatGPT For Homework*, Forbes (Jan. 28, 2023).
2. While educators might recognize a plagiarized paper based on familiarity with the source material, they typically use a plagiarism detector that has been licensed by the university. The detection software compares a student's paper to large databases of books, academic papers, and other student papers and identifies the percentage of the paper that matches source material.
3. Geoffrey A. Fowler, *We Tested a New ChatGPT-Detector for Teachers. It Flagged an Innocent Student.*, Wash. Post (Apr. 3, 2023).
4. Benj Edwards, *OpenAI Confirms that AI Writing Detectors Don't Work*, Ars Technica (Sept. 8, 2023).
5. Geoffrey Fowler, *Detecting AI May Be Impossible. That's a Big Problem for Teachers.*, Wash. Post (June 2, 2023).
6. *Is AI-Generated Content Actually Detectable?*, Univ. of Maryland (May 30, 2023).
7. *Id.*
8. See, e.g., Susan D'Agostino, *Turnitin's AI Detector: Higher-Than-Expected False Positives*, Inside HigherEd (June 1, 2023).



Scott Limmer concentrates his practice in the areas of criminal defense and representation of college and graduate students when charged with violating their school's code of conduct. He can be reached at scott@limmerlaw.com.

FOCUS: ELIMINATION OF BIAS

Overcoming Bias Can Be a Lifelong Pursuit



Adrienne Flipse Hausch

A unique CLE was presented by the Nassau Academy of Law on January 8, 2024, at Domus with guest speaker Kenneth Kunken. Kunken is an attorney whose career included nearly thirty years as an Assistant District Attorney. To Ken Kunken, there should be no particular notability to that fact, except that on October 31, 1970, Kunken was injured in a college football accident that fractured his spine and left him paralyzed from the neck down.

After almost ten months in rehab and predictions that he would not survive, Kunken defied the odds and returned to Cornell University to complete his degree.

Kunken reported that he was treated as if he were intellectually impaired. Even the doctors would ask his attendants "How is Ken doing?" rather than speaking to Ken directly.

Kunken continued through graduate programs and then attended Hofstra law school. At that time, Hofstra was the only accessible university in the country and Ken's achievements became noteworthy, so much so that then U.S. Senator Edward Kennedy asked him to testify at a congressional hearing held at Hofstra. It was in those days that this nation began to wake up to the notion that a physical disability's impact was more to the detriment of the disabled person than to society, and efforts had to be made to make the world more accessible to those with disabilities.

Kunken's approach was to do and lead by example. After receiving degrees in counseling and rehabilitation, he applied to nearly 200 agencies and employers and learned that even agencies charged with assisting others were reluctant to hire him—even as a volunteer.

Kunken then learned of Abilities, the agency founded by Henry Viscardi in Albertson, that was committed to giving a proper education to all children, irrespective of the physical or mental impairment from which they suffered and became employed there as a counselor. This positive atmosphere encouraged Kunken to continue with his studies and continue to work on meeting the needs of others. As a result, he quit his job and went to law school. Kunken noted that he had to be replaced by three people because of the volume of cases he handled—a trait that followed him to the Nassau District Attorney's Office where he was hired almost on the spot after being interviewed. As he noted, he was hired because of his abilities without regard to his disabilities, as he advocates that this is the attitude and position all people should take.

Kunken gives credit to the Americans with Disabilities Act for making public areas of this country more physically accessible but acknowledged that there is a long way to go. However, Kunken (averred) that attitude is a big part of our current problems and bullying of children with disabilities by children without them is a major issue we face today.

In the Nassau District Attorney's office, Kunken served as a Senior Trial Assistant and had the reputation as "the tough guy in the wheelchair" who really knew his stuff. Even though he was offered a job merely doing desk work, he declined and then exceeded all expectations as a trial attorney—without even considering his physical limitations.

Kunken pointed out that when asked in 2022 "why hire an attorney with a disability?," the ABA responded: because they are resilient by nature; they know how to concentrate; they are alert to their surroundings; and their positive attitude has an impact on how they are perceived. Kunken confirmed that this is his experience as well, and felt that heightened awareness is a real asset for any attorney.

Kunken is married and has three sons. He and his wife, Anna, welcomed triplets almost twenty years ago. Son, James, attends SUNY Morrisville; son, Timothy, attends Syracuse University Newhouse School of Publication Communications; and son, Joseph, attends dad's alma mater, Cornell.

Kunken continues working for the Nassau DA and has recently authored a memoir entitled, *I Dream of Things That Never Were, The Ken Kunken Story*. The title is inspired by the words of George Bernard Shaw that were etched into a paperweight given to Kunken by Senator Kennedy in gratitude for Kunken's testimony. Kunken hopes that his story will help to educate others to the need to eliminate bias created by physical disability alone. We are a diverse society. We should be inclusive. But, we have a long way to go.

Photo by Hector Herrera

Adrienne Flipse Hausch is an attorney in private practice with offices in Mineola. Her areas of practice are primarily matrimonial and family law, criminal defense, and guardianship. She has served as an NCBA Director, mentor, *Nassau Lawyer* editor, and founding Chair of WE CARE Fund. She can be reached at ahausch@optonline.net.

NASSAU ACADEMY OF LAW

February 14 (HYBRID)

Dean's Hour: Was It Love or Treason? A Love Story for Valentine's Day by Rudy Carmenaty

12:30PM – 1:30PM

1.0 CLE credit in Professional Practice

Skills credit available for newly admitted attorneys.

Long before there was Megan Markle, there was Wallis Simpson. On December 11, 1936, Edward VIII, the King of the British Empire, renounced the crown. The abdication was precipitated by his impending marriage to Wallis Warfield Simpson, an American divorcee.

Join us as Rudy Carmenaty tells the story of the scandalous romance of King Edward VII and Wallis Warfield Simpson. Rudy will explain the tangled web of why the sovereign's freedom to marry is contingent on the advice of Parliament and the Cabinet had no intention of approving the marriage because an eminent threat to the stability of the political order and the security of the realm would be at peril.

NCBA Members: Free
Non-Member Attorney: $35

February 15 (HYBRID)

Dean's Hour: Demystifying and Navigating Eligibility for the World Trade Center Health Program and September 11th Victim Compensation Fund Programs

With the NCBA Plaintiff's Personal Injury Committee

12:30PM– 1:30PM

1.0 credits in Professional Practice

Since the devasting terrorist attacks on 9/11 at the World Trade Center more than 22 years ago, there has been a significant amount of information concerning those who were exposed to debris from the sites and whether they may, or may not, be eligible for health and/or compensation benefits. This workshop provides an overview of eligibility requirements to enroll into the World Trade Center Health Program (WTCHP) as well as filing a claim with the 9/11 Victim Compensation Fund (VCF). This program will de-mystify the information and requirements around the VCF and WTCHP and enable you to properly advise clients who could make a claim of the next steps(s) to support their health monitoring and potential claim award.

Guest Speakers:

Regina P. Munster, Esq., Partner, 9/11 Claims & Benefits Practice, Turken, Heath & McCauley, LLP
Matthew J. McCauley, Esq., Managing Partner, 9/11 Claims & Benefits Practice, Turken, Heath & McCauley, LLP
Chelesa Wilson, Esq., Director of 9/11 Claims & Benefits Practice, Turken, Heath & McCauley, LLP

NCBA Members: Free
Non-Member Attorney: $35

(HYBRID)

Creative & Effective Appellate Brief Writing

FEBRUARY 29 AND MARCH 1, 2024
9:00AM—4:30PM
(both days)

ROWAN D. WILSON
NYS Court of Appeals Chief Judge

Presented by the Nassau County Bar Association, in coordination with the NYS office of Indigent Legal Services, Appellate Defender Council

An intensive, two-day program designed specifically for appellate defenders on criminal and family court (parent representation appeals), with an in-person appearance and keynote speech by NYS Court of Appeals Chief Judge Rowan D. Wilson.

In-person attendance is required for workshop participation. In-person attendees will receive 10.0 CLE credits. Virtual attendees will receive 4.0 CLE credits.

GUEST SPEAKERS AND WRITING WORKSHOP INSTRUCTORS

Tehra Coles, Esq., Executive Director, Center for Family Representation

David Feige, Esq., Author of *Indefensible: One Lawyer's Journey into the Inferno of American Justice*, and Co-Creator of the legal drama, *Raising the Bar*; Former Trial Chief, The Bronx Defenders

Andrea Hirsch, Esq., Former Supervisor, The Legal Aid Society of New York City Criminal Appeals Bureau, Director, Appellate Advocates, and the Center for Appellate Litigation

Kent Moston, Esq., Director of Training, Suffolk County Legal Aid Society; Former Attorney in Chief and Appeals Bureau Chief of The Legal Aid Society of Nassau County

Christine Waer, Esq., Managing Director of Litigation, Center for Family Representation

REGISTRATION FEES:
In-Person Attendance—$150
(*includes breakfast and lunch both days*)
Virtual Attendance—$60

PROGRAM CALENDAR

February 27 (IN PERSON ONLY)

An Evening with Justice Arthur M. Diamond—A Mock Guardianship Hearing

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

5:30PM—7:30PM

2.0 CLE credits in Professional Practice

This CLE program will provide newer attorneys, or those interested in learning to practice in the Mental Hygiene Law Article 81 guardianship area, with a model of how an Article 81 hearing is conducted. Retired Justice Arthur Diamond will be the presiding judge in this mock trial hearing and will assist in some discussion regarding common evidentiary issues exhibited during guardianship hearings, while Committee members will role play the key parties in a guardianship hearing. This skills practice-based CLE will provide attendees with needed information and a demonstration of skills in order to begin or improve one's practice of Article 81 guardianship law.

NCBA Members: Free
Non-Member Attorney: $70

April 18 (IN PERSON ONLY)

SAVE THE DATE

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

With the NCBA Matrimonial Law Committee

5:30PM—6:30PM – Cocktail Reception
6:30 PM – 8:30 PM – Program
2.0 CLE credits in Professional Practice

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

NCBA Members: Free
Non-Member Attorney: $70

please join us in person only at Nassau County Bar Association

2024 ANNUAL SCHOOL LAW CONFERENCE

MARCH 22, 2024

8:00 AM	**Breakfast and Registration**
9:00 AM	**Maintaining Order Without Stifling Speech: The First Amendment's Impact on Conflicting Opinions in the School Environment** (1.5 credit Professional Practice)—John Gross, Thomas Volz, Candace Gomez and Christopher Mestecky
10:30 AM	**AM Break**
10:45 AM	**Morning Breakout Sessions**

1. **How Artificial Intelligence and Security Threats are Shaping Technology Updates in School Districts** (1.0 credit Cybersecurity, Privacy & Data Protection—General)—Christopher Shishko and Jed Painter
2. **Don't be Foiled by FOIL: How to Handle Freedom of Information Act Requests** (1.0 credit Professional Practice)—Tyleana Veneable, Christie Jacobson and Anthony Fasano
3. **Bad Behavior: How Districts Can Manage Employee Discipline Matters** (1.0 credit Professional Practice)—Sharon Berlin, Joshua Shteierman and Greg Gillen

11:45 AM	**Lunch**
12:45 PM	**Striking a Balance: Where Mental Health and Restorative Practices Intersect with Student Disciplinary Proceedings** (1.5 credit Professional Practice)—Mara Harvey, Michael McAlvin, Rebecca Sassouni and Dennis O'Brien
2:15 PM	**Break**
2:30 PM	**Afternoon Breakout Sessions** (1.0 credit Diversity, Inclusion & Elimination of Bias)

1. **Balanced Education: How Title IX and the Commissioner's Guidance Attempt to Provide Equal Educational Access**—Scott Limmer, Sophia Terrassi and Helayn Cohen
2. **An Introduction to Impartial Hearings**—Lauren Schnitzer, Jack Feldman and Fahad Qamer
3. **Keeping the Faith: Practical Guidance for Religious Accommodations**—Ellen Vega, David Arntsen and Daniel Levin

NCBA Members—$100
Non-Member Attorneys—$250
School Personnel—$250
Purchase orders accepted from school districts.

FOCUS: LAW AND AMERICAN CULTURE

Keep the Faith, Baby!

Rudy Carmenaty

Adam Clayton Powell, Jr. was the pastor of the Abyssinian Baptist Church in Harlem and a member of Congress. Few figures on the national stage have been more colorful or more compelling. Whether in the pulpit or in the halls of power, the ever-provocative Powell actively courted the limelight.

No Black man before him had acquired so much influence or had such cachet on Capitol Hill. As chairman of the House Education & Labor Committee, he led in the enacting of significant legislation. Then at the apex of his achievement, Powell underwent a swift and merciless fall from grace.

In 1967, Powell's eccentric behavior and countless controversies caught up with him. He was barred from the U.S. House of Representatives. Powell sued, prevailing in the United States Supreme Court. Yet this victory would prove pyrrhic. By then, Powell was spent. Not long after, he would succumb to cancer.

The son of Adam Clayton Powell, Sr., the younger Powell inherited his father's mantle and his ministry, one of the largest Protestant congregations in New York City. Powell, Jr. would use his church to organize the Black community in the 1930s. Harlemites were captivated by his charisma and flair for the dynamic.

During the Depression, Powell organized demonstrations on 125th Street. Powell's efforts secured jobs for African Americans in department stores, public utilities, as well as at the 1939 World's Fair.[1] In 1941, Powell became the first Black member of the New York City Council.

Elected to Congress in 1944, Powell served in the House from 1945 to 1970. On arriving in Washington, he found the segregated capital of a nation segregated by law and custom. Earning the moniker of "Mr. Civil Rights," Powell integrated

facilities on the Hill and opened the press galleries to Black reporters.[2]

He proposed bills outlawing lynching and banning poll taxes, which effectively kept African Americans from voting.[3] Powell garnered considerable enmity for what became known as the Powell Amendment. To all legislation, he would attach a rider prohibiting the use of federal monies to any entity which discriminated on account of race.

To his critics, the *Powell Amendment* smacked of grandstanding and resulted in the defeat of progressive measures at the hands of Southern Democrats.[4] Powell remained unbowed; in fact, he was defiant. The Powell Amendment was a harbinger of Title VI of the Civil Rights Act of 1964.[5]

In 1955, contrary to the State Department's avowed wishes, Powell, ever the maverick, was the sole-American observer at the non-aligned Asian-African Conference in Bandung, Indonesia.[6] While not denying the reality of racism, Powell refused to be used by the communists in the midst of the Cold War.[7]

Powell made a celebrated return to the United States. Exerting his newfound clout, Powell suggested the State Department sponsor concerts abroad featuring jazz musicians so as to promote American interests.[8] Beginning with a tour by Dizzy Gillespie, "Jazz diplomacy" turned-out to be an inspired triumph.[9]

In the 1960s, Powell made common cause with Malcolm X, Stokely Carmichael, and a cadre of younger Black leaders. Powell embraced *Black Nationalism* and *Black Is Beautiful* long before such thinking became fashionable.[10] Powell, who had led demonstrations and rent strikes, always appreciated the utility of protest.

More to the point, he believed in amassing electoral power, generating legislation, and obtaining jobs for his people. Powell's most productive period came during the heyday of Lyndon Johnson's Great Society. Proving himself an astute political player, Powell wheeled and dealed with the best of them.

Powell's chairmanship of the House Committee on Education & Labor would mark him as the most successful African American political actor until the election of Barack Obama in 2008. Several of Powell's initiatives came to fruition as Congress and the nation came to see things his way.

In six years, his committee approved, and Congress adopted, fifty bills which became law. These bills authorized increases in the minimum wage, federal aid for primary and secondary schools, federal aid to colleges and universities, Head Start, and the creation of the National Endowments for the Arts and for the Humanities.[11]

In 1964 poll taxes, which Powell had opposed since his freshman term, were outlawed in primaries and general elections for all federal offices with the ratification of the Twenty-Fourth Amendment.[12] Powell also secured passage of the law making lynching a federal crime.[13]

If that were the entire story, it would be one of unvarnished accomplishment. Such was not the case with Adam Clayton Powell, Jr. For his ambitions and his appetites made for a volatile combination. Powell always lived life on his terms. He savored the fact that he was perceived as being "arrogant, but with style."[14]

Accusations of corruption, absenteeism, and womanizing followed him throughout his career. Powell's private conduct would not withstand present-day scrutiny. A playboy and bon vivant, he was self-indulgent with a penchant for luxury, high-living, and the ladies.

The thrice married Powell was never able to divorce the personal from the political. His wives were Cotton

Club showgirl Isabel Washington, the jazz pianist Hazel Scott, and Yvette Flores Diego, a member of a prominent Puerto Rican family. The list of his female companions was, to say the least, exhaustive.

This flamboyance, nay recklessness, bled into his activities as a member of the House of Representatives. Powell frequently missed key votes on the floor. Powell was also indicted for tax evasion and slammed for taking lavish trips at taxpayer expense.

In 1962, Powell took a junket paid by Congress to Europe with staffer Corinne Huff, a former Miss Ohio. Ostensibly there on business, the entire procession appeared rather seedy. Powell cut the trip short, as he reveled in the attention his actions elicited. At the time, his wife was in Puerto Rico about to give birth.

Powell dominated Harlem politics. So much so, he never ran a conventional campaign or needed to raise any money. He confined his electioneering to Sundays, when he would preach his sermon at Abyssinian.[15] Powell's congregants would then get him the votes he needed on election day the following Tuesday.[16]

With Abyssinian as his base, Powell's support among his constituents was absolute and unstinting. Beyond 125th Street, Powell was a folk hero of sorts, seen by many as the 'Congressman of Black America.' Others were not so enamored. His extravagant demeanor went beyond mere conceit.

Powell refused to curb his indulgences or apologize for his behavior. He was many things, but never a hypocrite. Unlike other members of Congress, he flouted convention. Powell would ultimately pay a heavy price for his defiance of congressional norms. This was his Achilles' heel and the cause of his undoing.

Harlem resident Ester James sued Powell for libel after the Congressman called her a "bag woman" on television.[17] A judgement for $245,000 was entered against Powell in 1963.[18] During a multi-year legal battle, damages ran as high as $575,000 (later cut to $55,787).[19] Powell refused to pay or even to appear in court.

Cited with contempt, Powell was only able to make weekend sojourns to Harlem, since New York law prohibited the serving of a civil summons on Sundays.[20] Powell pressed on, oblivious to the consequences. As time wore on, Powell's standing within the Black community began to erode.

The struggle for racial equality was taking on new dimensions. After the March on Washington in 1963, Martin Luther King, Jr. became the preeminent civil rights spokesman as Powell's peccadilloes ostensibly disqualified him from leadership.[21] A resentful Powell took to referring to Dr. King as "Martin Loser King."[22]

With the convening of the 90th Congress in January 1967, Powell came under sustained attack. House members, fed up with the man and his excesses, prevented Powell from taking his seat, stripped him of his chairmanship, and established a Select Committee to investigate his fitness for office.[23]

House Speaker John McCormack named Emanuel Celler the Committee's chair, with John Conyers as its sole African American member.[24] The Select Committee's function was to investigate and determine Powell's fitness for office under Article I of the Constitution; review the proceedings in New York and Powell's contempt citation; and ascertain if Powell engaged in misconduct as committee chairman for misuse of payroll and travel expenditures.

Powell obviously met the constitutional requirements of age, citizenship, and inhabitancy to serve as a House member. Nevertheless, he was found wanting regarding the legal case brought by Ester James in New York and his use of congressional funds.

Congressman Claude Pepper argued Powell should not be seated, while Conyers contended that Powell be either fined or denied his seniority.[25] As the committee deliberated, Powell brashly proclaimed, "keep the faith, baby!."[26] This phrase became his mantra, but it carried little weight with the committee or the full House.

The Committee concluded that Powell engaged in acts of financial misconduct, including having his estranged third wife on the payroll while she performed no work in either his Washington or district office.[27] The Committee recommended Powell be seated, censured, fined $40,000, and stripped of his seniority.[28]

Powell charged that others, some of whom were now sitting in judgement of him, were guilty of the same or similar infractions. Even if true, this argument provides a weak defense and does not absolve him of his own misdeeds. And Powell, no doubt, had committed the abuses alleged.

Powell owned a vacation hideaway in Bimini. A *Newsweek* cover story showed a grinning Powell dockside begging the question: "Must Adam Leave Eden?"[29] Members cited the article as proof that Powell was not contrite. The *Newsweek* story further provoked his enemies and sealed his fate.

The full House rejected the recommendations of the select committee, voting 307 to 116 to exclude Powell.[30] Having been formally excluded from Congress, his seat was declared vacant. His exclusion resulted in the need for a special election. Note, unlike recently expelled Long Island Congressman George Santos, Powell was excluded, not expelled.

Harlem, for its part, had other ideas and returned Powell to his newly vacant seat with 86 percent of the vote.[31] In November 1968, Powell was elected to the 91st Congress. On January 3, 1969, Powell was seated, fined $25,000 and denied his seniority.[32] Powell sought his vindication in the courts.

He sued, claiming the House had violated the Constitution when it barred him even though he satisfied all requirements contained in Article I §2.[33] In June 1969, the Supreme Court agreed. The Court's ruled 7-1 in *Powell v McCormack* that the House acted unconstitutionally when it excluded Powell.[34]

Chief Justice Earl Warren held "*since Powell had been lawfully elected by his constituents and since he met the constitutional requirements for membership in the House, that the chamber was powerless to exclude him.*"[35] It was also noted the House excluded but did not expel Powell as provided for in Article I §5.[36]

Just one month earlier, Associate Justice Abe Fortas had been forced to resign due to a financial impropriety that had come to light in the press.[37] Powell observed, with a touch of irony: "*From now on, America will know the Supreme Court is the place where you can get justice.*"[38]

Powell's triumph, however, did not restore the status quo. Determinations as to his salary, fines assessed against him, and, most important of all, his seniority, and his chairmanship, are the exclusive province of the House of Representatives. The courts have no say in these matters as Congress, after all, is a separate branch.

Powell would never regain his former stature. In short order, he would likewise lose his seat in Congress. Powell, by then ailing from cancer, ran one final time in 1970. Politically wounded, he lost the Democratic nomination in a primary to Assemblyman Charles Rangel by the meager margin of one-hundred-fifty votes.[39]

Adam Clayton Powell, Jr. died in 1972 at age 62. His legacy, befitting the life he led, is complicated. There is Powell the charismatic clergyman, the stirring civil rights leader, the master legislator. There is also Powell the playboy politician who had long taken his position for granted.

Perhaps Powell was too much of an iconoclast. His ignominy was largely the product of his own making. He seemed to attract adulation and animosity in equal measure. Powell, in the classical sense, is a tragic figure. A man who was brought down by his own flaws. His hubris led to his downfall.

Half a century later, Powell should represent more than the name on a government office building or a Harlem thoroughfare. While certainly no paragon of virtue, Powell's legislative accomplishments, by any measure, improved conditions touching lives in Harlem and beyond.

What cannot be denied is that Powell was a magnetic presence in or out of the pulpit. He should be remembered and respected. For Powell did keep the faith. And he paid the price for his sins. All the while, he remained true to himself and his community, and did so with arrogance, but also with style.

1. *Who was Adam Clayton Powell Jr.? at powell.cps.edu.*
2. POWELL, Adam Clayton, Jr. at history.house.gov.
3. Nadra Kareem Nittle, *Biography of Adam Clayton Powell, Congressman and Activist* at www.thoughts.com.
4. Charles V. Hamilton, *Adam Clayton Powell, Jr.*, 226 (1st Ed. 1991).
5. The 1964 Civil Rights Act codifies the Powell Amendment. Title VI states in specific and unequivocal language that: "*No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.*"
6. Will Haywood, *King of the Cats* 201 (1st Ed. 1993).
7. Hamilton, *supra* 243.
8. *The Jazz Ambassadors: Cold War Diplomacy and Civil Rights in Conflict* at www.npr.org.
9. *Id.*
10. Joshua K. Wright, *King and Prince of Abyssinian: Reflections on Adam Clayton Powell, Sr. and Jr.* at www.abernathymagazine.com.
11. POWELL, *supra.*
12. 24th Amendment-Abolition of Poll Taxes at www.constitutionalcenter.org.
13. Adam Clayton Powell Jr. at www.myblackhistory.net.
14. Thomas A. Johnson, *A Man of Many Roles*, April 5, 1972, at www.nytimes.com.
15. Wright, *supra.*
16. *Id.*
17. Wright, *supra.*
18. Haywood, *supra* 320.
19. Johnson, *supra.*
20. Hamilton, *supra* 15.
21. *Id*, 479.
22. Basil Parsons, *The More Radical MLK Came of Age in New York*, (April 4, 2018) at www.villagevoice.com.
23. Hamilton, *supra* 15.
24. Haywood, *supra* 353.
25. *Id* at 355.
26. Adam Clayton Powell Jr., *supra.*
27. *Id.*
28. POWELL, *supra.*
29. See *Newsweek* edition of January 14, 1967.
30. Johnson, *supra.*
31. Andrew Glass, *New York voters restore Powell to his congressional seat*, April 11, 1967 at www.politico.com.
32. *Id.*
33. *Powell v. McCormack/Oyez* at www.oyez.org.
34. 395 U.S. 486.
35. Oyez, *supra.*
36. *Id.*
37. Allen Pusey, *May 14, 1969: The Spectacular Fall of Abe Fortas*, (April 1, 2020) at www.abajournal.com.
38. POWELL, *supra.*
39. Johnson, *supra.*

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FOCUS: EDUCATION LAW

New Title IX Rules Will Impair Students' Right to Due Process

Scott Limmer

Title IX, the federal civil rights law that Congress enacted to prohibit sex discrimination in colleges and universities that accept federal funding,[1] has spawned conflicting and controversial regulatory approaches to student disciplinary proceedings. While there is general agreement that Title IX requires covered educational institutions to protect students from sexual misconduct, the Office for Civil Rights (OCR) in the Department of Education has not prioritized the rights of accused students who face expulsion or suspension.

History of Title IX Rules

The OCR issued a guidance[2] in 2011 that urged schools to use a preponderance of the evidence standard at disciplinary hearings when determining an accused student's guilt of prohibited conduct covered by Title IX. The guidance encouraged schools to abandon the clear and convincing evidence standard that typically governs severe or stigmatizing sanctions imposed in civil proceedings.[3]

The guidance also condoned disciplinary procedures that prohibit the accused student's lawyer from participating in the proceeding, that limit the student's opportunity to cross-examine the accuser, and that deprive the student of access to evidence.

Protests from law professors and other concerned members of the public,[4] as well as court decisions that mandated respect for due process in proceedings that could result in expulsion or other serious discipline, were driving forces that motivated OCR to revoke the guidance in 2017. After a notice-and-comment period, regulations took effect in 2020 that balanced the school's duty to protect students from sexual misconduct and its duty to protect the due process rights of accused students.[5]

Proposed Revision of Title IX Rules

The change of administration in 2021 has again prompted OCR to propose changes to its rules. A positive change would prohibit discrimination on the basis of gender identity and pregnancy.[6] Protecting LGBTQ and pregnant students furthers Title IX's goal of eliminating sex discrimination in a school's programs and activities.

Unfortunately, the proposed rules upset the balance that the 2020 rules achieved between the need to protect student victims of sexual misconduct and the need to protect students who are wrongly accused. The proposed rules do not mandate disclosure of exculpatory evidence. They allow schools to withhold disclosure of investigation reports and witness statements if they instead provide a summary of evidence that the school's investigators regard as relevant.[7]

The proposed rules prohibit schools from using a clear and convincing burden of proof unless the school uses the same standard for less consequential factfinding proceedings.[8] The rules not only permit schools to dispense with the student's right to cross-examine the accuser, they allow schools to dispense with a hearing entirely and to meet with the parties individually and out of the other's presence.[9] While schools will be permitted to allow a student's lawyer (but not the student)[10] to cross-examine the accuser, the school will have the option of allowing the student's lawyer to "propose" questions that the decisionmaker can reject or rephrase.[11]

Finally, the proposed rules do not entitle the accused student to a neutral decisionmaker. Rather, they allow the investigator or Title IX Coordinator who brings the charges to act as the decisionmaker.[12]

Reaction to New Title IX Rules

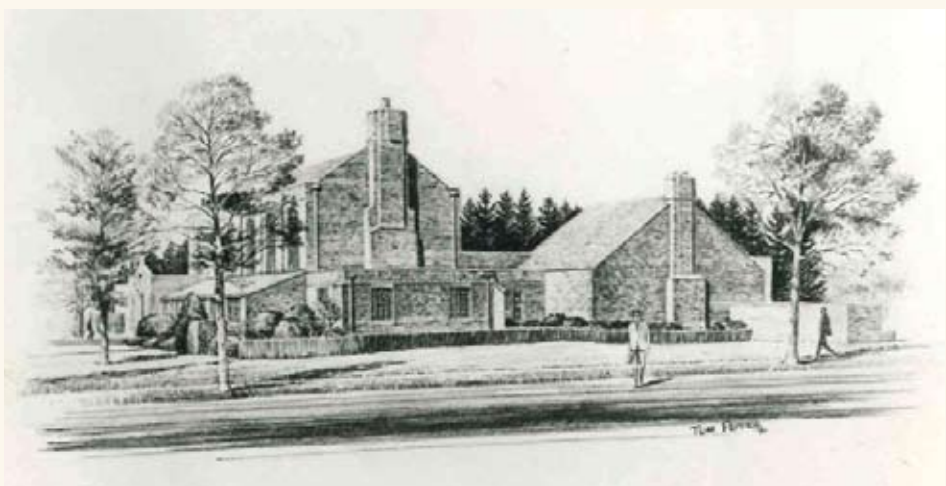
Most opposition to the new rules has come from states and organizations that oppose the expansion of protection against sex discrimination to LGBTQ students.[13] Significantly less attention has been paid to the proposed gutting of the right to due process for students who may be facing expulsion or suspension.

The finalized rules were first scheduled for publication in May 2023. That deadline was moved ahead to October 2023 in response to an outpouring of comments regarding a proposed rule addressing transgender athletes. The October deadline has passed, and the new tentative deadline is April 2024.

1. Title IX of the Education Amendments of 1972, as amended, is codified at 20 U.S.C. §1681 et seq.
2. Dear Colleague Letter: Sexual Violence, U.S. Dept of Educ., Office for Civil Rights (Apr. 4, 2011) (rescinded in 2017).
3. *See, e.g., Doe v. Univ. of Miss.*, 361 F. Supp. 3d 597, 613 (S.D. Miss. 2019) (noting that the correct burden of proof in student disciplinary hearings that involve allegations of sexual misconduct presents a "thorny issue").
4. *See, e.g.*, Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, *Fairness for All Students Under Title IX*, Harv. L. Sch. (Aug. 21, 2017); Open Letter from Members of the Penn Law School Faculty (Feb. 18, 2015).
5. 34 C.F.R. Part 106.
6. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (July 12, 2022) [proposed § 106.10).
7. *Id.* §106.46(f)(4).
8. *Id.* §106.45(h)(1).
9. *Id.* §106.46(f)(1)(i).
10. *Id.*§106.46(f)(1)(ii).
11. *Id.* §106.46(f)(1)(i).
12. *Id.* §106.45(b)(2).
13. Bess Levin, *22 Republican States Sue Biden Admin for the Right to Discriminate Against LGBTQ+ School Kids*, Vanity Fair (July 28, 2022).

A Toast to Domus: The Legacy of the Nassau County Bar Association (Part 1)

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



The Nassau County Bar Association was founded in January 1899, only a few weeks after the birth of the county. Until 1898, the three townships which make up Nassau—Hempstead, North Hempstead, and Oyster Bay—had been part of Queens County. The creation of Greater New York brought Long Island City, Newtown, Jamaica, and Flushing into the city, but the three eastern towns, far more rural and less populated, were left in limbo: part of Queens County but not included in the great metropolis. This was not because the inhabitants rejected the idea; they were not even asked. No plans for the consolidated city included all of Queens, and thus only part of Queens voted in the non-binding referendum held in 1894. In 1892, the eastern towns had a population of only 47,184, compared to the nearly 100,000 living in the western towns and Long Island City. Furthermore, at the time of consolidation, the eastern towns had just over 20 percent of the county's assessed valuation, and only six percent of the county debt. By any measure, the eastern and western towns were developing in different directions and at a different rate.

It was clear to all that having half of the county included in the new metropolis and half outside the city's boundaries was unworkable and would only make local government unmanageable. During the 1898 legislative session, Assemblyman George Wallace of Hempstead introduced a bill to create a new county, and on January 1, 1899, Nassau was born.

Most lawyers who lived in old Queens County had offices in New York or Brooklyn. Local matters brought attorneys to the county

courthouse in Long Island City. Most prominent attorneys belonged to either the Queens County Bar Association, founded in 1876, or the New York Bar Association, founded in 1870 during the judicial corruption scandals of the Tweed era. No such crisis caused the Nassau lawyers to form their association, but the move followed directly from the creation of the new county.

The first meeting to organize a bar association for Nassau County was held in Mineola on January 18, 1899, with J.B. Coles Tappen serving as the temporary chair, and George W. Eastman as the temporary secretary. The group included: Edgar Jackson, Wilmot T. Cox, Edward T. Payne, Albert W. Seaman, Henry M. W. Eastman, James P. Nieman, and Wm. Clarke Roe. The men named a committee to devise by-laws and a constitution for the proposed bar association. A month later, the lawyers met at the office of Mr. Tappen at 16 Exchange Place in Manhattan and discussed the committee's work. They decided that the charter members would include those invited to the first two meetings and others who expressed an interest in participating. The seventeen charter members were:

Edward T. Payne
Edgar Jackson
Paul K. Ames
Wm. Clarke Roe
Albert W. Seaman
J.B. Coles Tappen
Fred Ingraham
Townshend Scudder
Eugene W. Denton
Wilmot T. Cox
Henry M. W. Eastman
George W. Eastman
Augustus Weller
Wm. J. Young
Edward Cromwell
Franklin T. Coles
James P. Nieman

Augustus Weller of Hempstead and Henry Eastman had the distinction of having been among the founders of the Queens County Bar Association.

On March 2, 1899, the men marked the formation of the Bar Association of Nassau County with a dinner held at Allen's Hotel in Mineola, the place where the initial moves to form the new county had been made the previous year. They quickly adopted the constitution and by-laws, and voted that the dues would be $6, "payable in advance, at the Annual Meeting in each year." Augustus N. Weller was voted the first president, George W. Eastman, vice-president, Edward T. Payne, treasurer, and William Clarke Roe secretary. They also added John Ordonaux and James S. Allen to the list of charter members.

The attorneys who formed the Bar Association were, not surprisingly, active in political affairs. J.B. Coles Tappen had been one of the early advocates of the new county, while Townshend Scudder, counsel to the Queens County Board of Supervisors, had opposed the plan. The county's first elections in 1898 saw Republican Henry Eastman was elected county treasurer, and Democrat James P. Nieman became the first District Attorney, defeating his opponent by only seventeen votes (4,749-4,732). And William J. Youngs, Queens County District Attorney and a Republican state committeeman, was soon named Theodore Roosevelt's confidential secretary.

The Bar was instrumental in organizing the courts and government of the new county. Among their first projects were supporting the construction of a county courthouse and assuring sufficient space for lawyers and their clients. They also formed the county law library and allocated funds for its growth.

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FOCUS: CIVIL LITIGATION

Protected—The Avenue to Navigate Notices to Admit

Ian Bergström

Notices to admit are basically written demands intended to compel litigants to admit or deny information within the context of civil lawsuits. The notice to admit is among the various civil disclosure devices pursuant to CPLR article 31. The admission of information limits the scope of uncontested factual disputes to be litigated. Ideally, a litigant's compliance with the notice to admit streamlines motion practice and trial. The party served with the notice to admit may attempt to become creative responding to the demands as an attempt to avoid factual admissions regarding the litigation. Also, the party served with the notice to admit may disregard the statutorily required timeframe to respond. The improper handling of notices to admit potentially cause dire consequences for the party unaware of the standards.

An Overview of Notices to Admit

Litigants are statutorily required to serve their response to the notice to admit within 20-days of service.[1] Generally, the requested information are deemed admitted if the litigant does not timely respond.[2] The statutory bases of notices to admit are CPLR §3102 and CPLR §3123.[3] The notices to admit can pertain to factual information and/or "the genuineness of … papers or documents ...."[4] The statutory notice to admit standards are set forth under CPLR §3123.[5] The appellate division describes the functionality of notices to admit as "designed to elicit a stipulation regarding specific matters concerning which there is general agreement."[6] The litigant admitting information responsive to the notice to admit cannot be prejudiced using such information for unrelated "proceeding[s]."[7]

Disclosure

Notices to admit are one of the various disclosure devices pursuant to CPLR article 31.[8] Litigants can utilize notices to admit and other disclosure devices pursuant to CPLR article 31.[9] Notices to admit serve a specific purpose compared to other discovery devices pursuant to CPLR article 31.[10] The First Department and Second Department declared that notices to admit should not be transmuted into "deposition[s] on written questions" and "written interrogatories" attempting to elicit information.[11] In *Haroche v. Haroche*, appellant-respondent wife commenced "a support proceeding" attempting to compel the respondent-appellant husband to pay for the dental procedure regarding their child.[12] Appellant-respondent wife attempted to compel the husband to admit that the physician performed a "necess[ary] … and reasonable[]" dental procedure(s).[13] The Second Department determined that the Westchester County Family Court improperly required the husband to pay for the procedure(s) because the requested information "were matters of expert opinion" and the parties litigated the legitimacy of the dental procedure(s).[14] Notices to admit setting forth "highly technical, detailed and scientific information" are improper because testimonial evidence is the proper vehicle to explain same.[15]

The notice to admit is not intended to be utilized as a method for litigants to establish prima facie entitlement to their applicable causes of action, rather than other disclosure devices.[16] For instance, Supreme Court of Nassau County did not enable plaintiffs to utilize the notice to admit as a method establishing prima facie entitlement to their "negligence" cause(s) of action.[17] In *Villa v. NYC Housing Authority*, plaintiffs-respondents deviously attempted to demand the defendant-appellant "interpret" the provision under New York City Health Code §131.15 "when window guards are required" by means of the notice to admit.[18] Plaintiffs-respondents also deviously attempted to demand the defendant-appellant admit or deny whether the notice of claim complied with General Municipal Law §50-e.[19] The First Department overturned the trial court.[20] Supreme Court of New York County determined that the notice to admit demanding "admissions of … legal conclusions and ultimate issues going to the core of the dispute" are improper.[21] The First Department sets forth the circumstances, whereby the notice to admit is improper to acquire certain information.[22]

Although litigants can "object" to demands as to other disclosure devices, objections are inapplicable to notices to admit.[23] Supreme Court of Nassau County determined that the notice to admit was "deemed admitted" because the "defendant served a blanket objection to all requests …."[24] If a litigant purportedly "cannot truthfully … admit or deny" the notice to admit demands, then he or she is statutorily required to "sw[ear]" to such circumstances within their written response.[25] Supreme Court of Kings County declared that CPLR §3123 does not reference the ability of an attorney to "verif[y]" or otherwise swear to the notice to admit.[26] If the litigant does not properly respond to the notice to admit, then the opposing party eventually proving the information requested within the notice to admit can verbally "move" or file an application requesting an attorney fee award and/or payment of "reasonable expenses" pursuant to CPLR §3123.[27] CPLR §3123 insinuates that the application for an attorney fee award and/or payment of "reasonable expenses" is permissible, regardless of whether the movant wins the lawsuit.[28]

Protective Orders Key to Challenging Notices to Admit

The sole method contesting the propriety of notices to admit and/or acquiring additional "time to respond" to notices to admit are to move for protective orders pursuant to CPLR §3103.[29] The statutory basis of protective orders is CPLR §3103.[30] The litigant(s) is required to file an application for the requested protective order or the trial court can sua sponte render the protective order.[31] Protective order applications should be filed within the 20-day timeframe responding to the notice to admit, unless the notice to admit is "palpably improper."[32] Nassau County District Court sua sponte rendered the protective order "vacating" the "abusive and improper" notice to admit pursuant to CPLR §3103(a).[33] Simply stated, litigants must file protective order applications as the avenue to navigate notices to admit pursuant to CPLR §3103.[34]

1. See *Central Nassau Diagnostic Imaging, P.C. v. GEICO*, 28 Misc. 3d 34, 36 (Sup. Ct., App. Term 1st Dept. 2010) (*citing* CPLR §3123(a)).
2. *Id.* (*citing* CPLR §3123(a)); *Nacherlilla v. Prospect Park Alliance, Inc.*, 88 A.D.3d 770, 771-2 (2d Dept. 2011); CPLR §3123(a).
3. See CPLR §3102(a); see *also* CPLR §3123(a)-(c).
4. CPLR §3123(a); *Abdourahamane v. Pub. Stor. Inst. Fund III*, 190 A.D.3d 666, 667-8 (2d Dept. 2021) (*citing* CPLR §3123(a)); *Cormier v. Nassau University Medical Center Nassau Health Care Corp.*, 2022 N.Y. Misc. LEXIS 6364, *2, Index No.: 603013/2021 (Sup. Ct., Nassau Co. 2022) (J. Quinn); *Nader v. General Motors Corp.*, 53 Misc. 2d 515, 516 (Sup. Ct., N.Y. Co. Special Term 1967); *Hodes v. New York*, 165 A.D.2d 168, 170 (1st Dept. 1991).
5. CPLR §3123(a)-(c); Abdourahamane, 190 A.D.3d at 667-8 (*citing* CPLR §3123(a)); *Cormier*, 2022 N.Y. Misc. LEXIS 6364, *2, Index No.: 603013/2021; *Nader*, 53 Misc. 2d at 516; *Hodes*, 165 A.D.2d at 170.
6. See *Lewis v. Hertz Corp.*, 193 A.D.2d 470 (1st Dept. 1993).
7. See CPLR §3123(b).
8. See CPLR §3102(a); see *also Nader*, 53 Misc 2d at 516.
9. See *Groeger v. Col-Les Orthopedic Association*, 136 A.D.2d 952 (4th Dept. 1988).
10. See *Tolchin v. Glaser*, 47 A.D.3d 922, 923 (2d Dept. 2008).
11. *Berg v. Flower Fifth Avenue Hospital*, 102 A.D.2d 760 (1st Dept. 1984); *Taylor v. Blair*, 116 A.D.2d 204, 208 (1st Dept. 1986); *Tolchin*, 47 A.D.3d at 923.
12. See *Haroche v. Haroche*, 38 A.D.2d 957 (2d Dept. 1972).
13. See *id.*
14. See *id.*
15. See *Falkowitz v. Kings Highway Hospital*, 43 A.D.2d 696 (2d Dept. 1973); see *also Berg*, 102 A.D.2d 760.
16. See *Midland Funding LLC v. Valentin*, 40 Misc. 3d 266, 270 (Dist. Ct., Nassau Co. 2013) (J. Hirsh).
17. See *Cormier*, 2022 N.Y. Misc. LEXIS 6364, *2, Index No.: 603013/2021 (*citing* CPLR §3103).
18. See *Villa v. NYC Housing Authority*, 107 A.D.2d 619, 620 (1st Dept. 1985).
19. See *id.* at 620-1.
20. See *id.* at 619.
21. *Jane Doe v. Lenox Hill Hospital*, 2023 N.Y. Slip. Op. 30342(U), *5 (Sup. Ct., N.Y. Co. 2023) (J. Kelley).
22. See *Villa*, 107 A.D.2d at 619-20.
23. See *HSBC Bank USA, N.A. v. Carchi*, 2013 N.Y. Slip. Op. 30552(U), *3 (Sup. Ct., Queens Co. 2013) (J. Agate).
24. See *Molina v. Two Bros. Scrap Metal*, 2019 N.Y. Misc. LEXIS 4221, *6-7 (Sup. Ct., Nassau Co. 2019) (J. Brown).
25. See *Rosenfeld v. Vorsanger*, 5 A.D.3d 462, 463 (2d Dept. 2004) (*citing* CPLR §3123(a)); see *also Constantino v. Newman*, 47 A.D.2d 626 (2d Dept. 1975).
26. See *Barnes v. Shul Private Car Service, Inc.*, 59 Misc. 2d 967, 968 (Sup. Ct., Kings Co. 1969) (J. Multer); see *also* CPLR §3123(a).
27. See CPLR §3123(c); see *also Reid v. Unique Van Serv.*, 284 A.D.2d 520, 521 (2d Dept. 2001).
28. See CPLR §3123(c).
29. CPLR §3102(a); CPLR §3103; CPLR §3123; *Jane Doe*, 2023 NY Slip. Op 30342(U), *5; *Erdman v. Eagle Insurance Co.*, 239 A.D.2d 847, 848 (3d Dept. 1997); *Smith v. Brown*, 61 Misc. 3d 681, 684 (Sup. Ct., Bronx Co. 2018) (J. Higgitt); *Smith*, 61 Misc. 3d at 683 (footnote number two); *Allstate Fire & Casualty Insurance Co. v. Singleton*, 2020 N.Y. Misc. LEXIS 14033, Index No.: 608739/2019 (Sup. Ct., Nassau Co. 2020) (J. Brandveen); *Garber v. Stevens*, 2009 N.Y. Slip. Op. 33316(U), *1-2 (Sup. Ct., N.Y. Co. 2009) (J. Bransten); *Carni v. Continental Home Loans, Inc.*, 2014 N.Y. Slip. Op. 33833(U), *9 (Sup. Ct., Nassau Co. 2014) (*citing* CPLR §3103); *Bravate v. Brian Power*, 2021 N.Y. Misc. LEXIS 4363, *1-2, Index No.: 608495/2020 (Sup. Ct., Nassau Co. 2021) (J. Cozzens, Jr.).
30. See CPLR §3103(a)-(c).
31. See CPLR §3103(a).
32. *Franklin v. Beth Israel Medical Center*, 2009 N.Y. Slip. Op. 32501(U), *4-5 (Sup. Ct., N.Y. Co. 2009) (J. Lobis); *Nader*, 53 Misc. 2d at 518; CPLR §3102(a); CPLR §3103; CPLR §3123(a).
33. See *Midland Funding LLC*, 40 Misc. 3d at 270; see *also* CPLR §3103(a).
34. See CPLR §3103.

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Nassau County Courts Induction Ceremonies

L-R: Supreme Court Justice Christopher T. McGrath, Court of Claims Judge and Acting Supreme Court Justice Ellen Tobin, Supreme Court Justice Gary Carlton, 10th Judicial District Administrative Judge Vito M. DeStefano, Nassau County, U.S. Magistrate Judge James M. Wicks, and NCBA President Sanford Strenger.

L-R: Family Court Supervising Judge Ellen R. Greenberg, District Court Judge Madeleine Petrara-Perrin, Family Court Judge Eric P. Milgrim, Family Court Judge Segal Blakeman, 10th Judicial District Administrative Judge Vito M. DeStefano, Nassau County, District Court Supervising Judge Tricia Ferrell, and NCBA President Sanford Strenger.

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LAP WELLNESS CORNER

Take Control of Your Mental Health

Mental health is the bedrock of a solid, productive life. It informs every aspect, from familial relationships to professional productivity. When faced with stressors that compromise their mental health, many people struggle to admit that they might not be able to handle them alone. This is particularly prevalent in legal profession, where the expectation of consistent proficient performance is constant, fear of stigma and confidentiality is high, and identifying as the person others go to for help (not needing help themselves) is real. However, while the fear and anxiety of showing weakness is real, the consequences of not seeking help are often worse.

5 Reasons Why Seeking Help is Worth the Risk:

Just Getting Started Works Wonders: Anxiety, fear, sadness, compulsive/impulsive behaviors and/or anger are unlikely to go away on their own. Taking the first step toward seeking help and addressing a problem in a measurable way can make a huge difference in your outlook and reduce symptoms.

Prevents Self-Medicating with Drugs and Alcohol: While they may feel like solutions in the moment, drugs and alcohol will very likely further complicate your problems. There are better ways of coping with life's challenges. Professional and peer assistance from your Lawyer Assistance Program (LAP) are far healthier, more effective ways of coping with mental challenges.

Saves Time and Face: When left untreated, mental health problems can take a major toll on our personal (conflicts in relationships), professional (unethical behaviors, lateness, neglecting clients) and financial lives. Seeking help early can stop the bleeding and reduce the negative fallout that often accompanies such issues.

You Are Not Alone: Everyone deals with sadness, fear, stress and anxiety. Lawyers, however, struggle with mental health problems in larger numbers than the general population and most other professions. ***LAP provides both professional and peer support and your confidentiality is protected under Section 499 of the Judiciary Law (as amended by Chapter 327 of the Laws of 1993).*** The NCBA Lawyer Assistance Committee is comprised of attorneys, some of whom are in recovery from alcohol or substance abuse, some have experienced mental health issues. They understand the unique stressors of the profession and volunteer their time to provide support and hope to other attorneys in need.

One Call Can Turn Things Around: Countless attorneys have turned to and received help from LAP. Mental health issues have a way of snowballing and things can get out of control quickly. Reaching out to LAP will reduce the likelihood of this happening. ***LAP services are strictly confidential.*** A supportive ear and manageable suggestions for improving your circumstances await, with no commitment to any kind of treatment.

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

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Nassau County Bar Association Lawyer Assistance Program

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

CALENDAR | COMMITTEE MEETINGS

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New Lawyers	Byron Chou and Michael A. Berger
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Supreme Court	Steven Cohn
Surrogate's Court Estates & Trusts	Michael Calcagni and Edward D. Baker
Veterans & Military	Gary Port
Women In the Law	Melissa P. Corrado and Ariel E. Ronneburger
Workers' Compensation	Davin Goldman

TUESDAY, FEBRUARY 6
Women In the Law
12:30 p.m.

WEDNESDAY, FEBRUARY 7
Real Property Law
12:30 p.m.

General, Solo & Small Law Practice Management
12:30 p.m.

THURSDAY, FEBRUARY 8
Asian American Attorney Section
12:30 p.m.

Access to Justice
12:45 p.m.

TUESDAY, FEBRUARY 13
Education Law
12:30 p.m.

Family Court Law, Procedure & Adoption
12:30 p.m.

Labor & Employment Law
12:30 p.m.

WEDNESDAY, FEBRUARY 14
Medical Legal
12:30 p.m.

Commercial Litigation
12:30 p.m.

THURSDAY, FEBRUARY 15
Business Law, Tax & Accounting
12:30 p.m.

Matrimonial Law
5:30 p.m.

FRIDAY, FEBRUARY 16
Sports, Entertainment & Media Law
12:30 p.m.

TUESDAY, FEBRUARY 20
Intellectual Property
12:30 p.m.

Ethics
12:30 p.m.

Diversity & Inclusion
6:00 p.m.

TUESDAY, FEBRUARY 27
Plaintiff's Personal Injury
12:30 p.m.

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

WEDNESDAY, FEBRUARY 28
Association Membership
12:30 p.m.

District Court
12:30 p.m.

WEDNESDAY, MARCH 6
Real Property Law
12:30 p.m.

THURSDAY, MARCH 7
Hospital & Health Law
8:30 a.m.

Publications
12:45 p.m.

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

TUESDAY, MARCH 8
Women In the Law
12:30 p.m.

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.

Moritt Hock & Hamroff has announced that **Ilona Posner** and **Caitlyn Ryan** have been elevated to Partner, and **Karen Davakis** and **Grace Lee** have been elevated to Counsel, effective January 1, 2024.

Jaspan Schlesinger Narendran LLP is pleased to announce that **Christina Jonathan** has joined the Firm as a Partner and **Terry Smolev** has joined as Of Counsel, each in the Firm's Trusts and Estates Department.

Sahn Ward has changed its name to **Sahn Ward Braff Koblenz Coschignano PLLC**. The Firm is pleased to announce that **Elisabetta T. Coschignano** has become a Member of the Firm and that **Michael H. Sahn** will share the role and responsibilities of Co-Managing Member to guide the Firm in its continued service to its clients, and its expanding practice.

Robert S. Barnett and **Yvonne R. Cort**, Partners at Capell Barnett Matalon & Schoenfeld LLP, spoke at the NYS Society of CPA's Nassau/Suffolk Chapter Annual Tax Conference. Barnett presented a session on S Corporation basis issues and Cort discussed recent decisions by the NYS Tax Appeals Tribunal and the U.S. Tax Court on jurisdiction, passport revocation, and sales tax. Barnett also spoke at a Nassau Academy of Law Dean's Hour on the new Corporate Transparency Act and Beneficial Ownership Information reporting, and published an article, "Professional Partnerships: Considerations for Retirement and Reorganization," in the *Journal of Taxation*, January 2024 edition.

Michael Kohan is being installed on February 29, 2024, as the President of the Network of Bar Leaders, a coalition of over 50 bar associations in the metropolitan New York area.

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

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