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Meet President Baiamonte

By: Ann Burkowsky

The Nassau County Bar Association (NCBA) is pleased to welcome Rosalia Baiamonte of the firm Gassman Baiamonte Gruner PC, as its 120th President. Baiamonte will be installed on Tuesday, June 7, 2022, at Domus, the Home of the Association, with close family members, friends, and colleagues in attendance.

Baiamonte has extensive experience dealing with a full range of matrimonial issues and substantial appellate advocacy experience, having prosecuted and defended dozens of notable appeals involving complex matrimonial and family law issues. Her practice also extends to collaborative interdisciplinary divorce.

President Baiamonte's first column can be found on page four of this issue.

Education and Career

A graduate of Brandeis University in 1990 (B.S.) and Syracuse University College of Law in 1993 (J.D.), Baiamonte began her matrimonial and family law career as an associate of the Garden City firm DaSilva & Keidel. During this time, Baiamonte was also an Associate Editor of the legal publication *Domestic Relations Reporter*. In March 1996, Baiamonte became an associate to renowned leader in the matrimonial and family law field, Stephen Gassman. She was named a member of the firm in 2007, and in 2016, the firm was renamed to what is known today as Gassman Baiamonte Gruner, PC.

Affiliations

Baiamonte is an active member of numerous organizations, including the New York State Bar Association, where she is the Immediate Past Chair of the Family Law Section. She is also a Fellow of the American Academy of Matrimonial Lawyers, New York Chapter, and the New York Bar Foundation.

A long-standing and active member of the NCBA, Baiamonte has served as Chair of the Association's Matrimonial Law Committee, Chair and Vice Chair of the Judiciary Committee, member of the Board of Directors, and most currently, an Officer of the NCBA Executive Committee.

In addition, Baiamonte is a frequent lecturer on various matrimonial topics for county and statewide judicial and bar-related groups and has made appearances as a guest lecturer at various universities including LIU Post, St. John's, and Hofstra.

Honors and Accomplishments

In recognition of her professionalism and contributions as a skilled advocate and leader in the practice of matrimonial law, Baiamonte was awarded the Richard J. Keidel Memorial Award in 2014. The following year, she received the NCBA's Directors Award for outstanding service as Chair of the Judiciary Committee. The Maurice A. Deane School of Law at Hofstra University installed her as one of the Outstanding Women in the Law in 2018.

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Gassman Baiamonte Gruner, P.C., has established itself as Greater New York's premiere matrimonial and family law firm, and it is one of the most respected and sought-after matrimonial law firms servicing Long Island and the greater New York Metropolitan area.

The firm's attorneys have devoted themselves exclusively to the highly specialized fields of matrimonial and family law, and have extensive experience dealing with a full range of matrimonial issues, among them: agreements (pre-nuptial, post-nuptial, and separation), custody and visitation, equitable distribution, spousal and child support issues, license and professional practice valuations, enforcement and modification proceedings, awards of counsel fees and experts fees, as well as an extensive family law appellate practice.

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Upon Her Succession
To the Presidency of
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From the President

Rosalia Baiamonte

In 1972, my parents made the courageous decision to leave behind the country of their birth, their family and friends, and sacrifice all that was familiar to them, in the hopes of finding a new and better life for our family in the United States of America. There was precious little opportunity for a young girl in 1970's Palermo, Sicily. However, our translocation to Canarsie Brooklyn didn't seem like much of an opportunity to a five-year-old; for me it was terrifying.

In kindergarten, I spent each day sitting alone in silence. Hampered by a frustrating inability to communicate, I knew enough to know that I was the object of ridicule for being different, for dressing unlike anyone around me, and for having a name that people found difficult to spell and struggled to pronounce. My afternoons were spent watching the children's television workshop. I mimicked the words I heard and practiced in the glare of the screen until their pronunciation became second nature to me. I credit Bob, Gordon, Susan, and Luis from *Sesame Street*, Carole and Paula from the *Magic Garden*, and Morgan and Rita from the *Electric Company*, for teaching me how to read, write, and speak the English language.

By second grade, the quiet girl was quiet no longer. I immersed myself in my studies and joined as many clubs as I could, determined to make my parents' sacrifices worthwhile and to fulfill the aspirations they had for their children.

On June 21, 1983, the same week as my graduation from I.S. 25 Junior High School, our naturalization process became complete as we proudly took the Oath of Allegiance at the United States District Court for the Eastern District in Brooklyn, becoming United States citizens.

Like many of you, I have often been asked to select the moment in time I decided to be an attorney. For me, that decision was made at seven years old when I found my voice and the empowerment that comes from effective communication.

Now, 50 years after an Alitalia flight carrying my family landed at JFK International Airport, a girl from Palermo, Sicily, has the honor and privilege of being installed the 120th President of the Nassau County Bar Association, the largest suburban bar association in the country.

I am mindful that I am only the tenth woman in the 123-year history of this association to be installed as President. In fact, it was not until 1951 that the Association amended its bylaws to permit women to be admitted as members. Another 43 years would pass until Grace Moran became the first woman installed as President in 1994—a mere 28 years ago.

I am quite possibly the first immigrant to serve as President, certainly the first immigrant of the modern era.

It was only 15 years ago, in 2007, that Lance Clarke was the first African American man to be installed as President. And it will be another four years from now, until our newly installed Secretary, the Hon. Maxine Broderick, will become the first African American woman to be installed as President in the year 2026, a glass ceiling that will have taken 127 years to shatter. At what point in our journey will our members gather to bear witness to the installation of its first Asian American President? Or a LatinX President? Or a President who is a proud member of the LGBT community?

The tapestry of our Association becomes richer because of diversity. Diversity encompasses not only gender, race, and sexual orientation, but also ethnic and national origin, religion, geographic location, work experience, economic background, age, and disability. As diversity increases, so does our strength and capability as a bar association. Through increased diversity, our organization can more effectively address societal and member needs through a collection of varied perspectives, experiences, knowledge and understanding.

It is critical that our organization as a whole, and all of its components—including the Nassau Academy of Law, WE CARE Fund, Lawyers Assistance Program, Mortgage Foreclosure Assistance Project, *Nassau Lawyer*, and the dozens of Committees under this grand umbrella that we call Domus—strive to reflect the diversity of our profession and our society within its membership, leadership, program involvement, and community outreach.

As an immigrant, I have always sensed a duality in myself—while one half is deeply rooted in tradition, the other half seeks innovation. Such concepts are not mutually exclusive but, rather, harmonious. In preparation for assuming the mantle of the presidency, I engaged in a "listening tour" over a series of lunches at the bar association with many of our esteemed Past Presidents. I am eternally grateful to Past Presidents John McEntee, Christopher McGrath, Grace Moran, Steven Leventhal, Richard Collins, Dorian Glover, Greg Lisi, Marc Gann, Kathryn Meng, Andrew Simons, Peter Mancuso, Lance Clarke, Elena Karabatos, Stephen Gassman, Marian Rice, Joseph Ryan, William Savino, Emily Franchina, Susan Katz Richman, and Martha Krisel for sharing their wisdom, providing their support, and being a source of inspiration. While each had a unique perspective, there is little doubt that all of them share a deep and abiding love for this Association, as do I.

I am fortunate to serve alongside President Elect Sanford Strenger, Vice President Daniel Russo, Treasurer James Joseph, and Secretary Maxine Broderick, and for the unparalleled passion, dedication, and commitment they bring to our Association.

I am grateful for the staff at NCBA, especially Executive Director Elizabeth Post, Director of CLE and NAL Jennifer Groh, NAL Executive Assistant and Judiciary Committee Liaison Patti Anderson, Assigned Counsel Defender Plan Administrator Robert Nigro, Director of Pro Bono Activities Madeline Mullane, Director of LAP Elizabeth Eckhardt, Communications Manager and *Nassau Lawyer* Production Manager Ann Burkowsky, Special Events and WE CARE Coordinator Bridget Ryan, Membership Coordinator and Committee Liaison Stephanie Pagano, Membership Services Coordinator Donna Gerdik, Lawyer Referral Information Service Coordinator Carolyn Bonino, and of course, our House Management Director and Photographer Hector Herrera.

I am hopeful for the year ahead, and the opportunity to add a bit more texture to the rich fabric of this Association.

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FOCUS: MENTAL HEALTH

We're Not Immune to Vicarious Trauma

Elizabeth Eckhardt, LCSW, PhD

What Types of Trauma Are There?

While the terms vicarious trauma, secondary trauma, and compassion fatigue are often used interchangeably, they are also often defined differently in the literature. While similar, secondary trauma refers to the emotions and behaviors one experiences when confronted intimately with a traumatizing event or series of events experienced by a significant other. It is stress experienced as a result of helping or wanting to help a traumatized or suffering person. This is distinguished from vicarious traumatization because vicarious trauma is a cumulative effect on a professional whose career exposes him or her to multiple traumas over time. Vicarious trauma is perceived not as an isolated event nor as a pathology of some kind, but rather as the human consequence of repeatedly knowing, caring, and facing the reality of trauma.

Who Experiences Vicarious Trauma?

An occupational hazard for most first responders, vicarious trauma is commonly talked about for police officers, emergency medical technicians, nurses, physicians, and firefighters. However, we are learning that other professionals, including lawyers, are at risk of experiencing vicarious trauma, as well. While one might immediately think about crisis counselors, social workers, and school personnel, lawyers in certain practice areas experience trauma at the same or greater levels. Practitioners prone to experiencing vicarious trauma work in specialties such as immigration, representation of children, domestic relations, guardians, family law, criminal defense—both as private attorneys and public defenders.

These types of practitioners are among those considered at higher risk for vicarious trauma.

Characteristics of Professions Experiencing Vicarious Trauma

Lawyers in these practice areas share:

- Deep and direct contact with clients
- A client base with devastating life experiences
- The need to relive traumatic experiences over and again with their clients
- Clients at serious imminent risk of bodily harm, homelessness, and violence.

The effects of trauma—vicarious or direct—are cumulative to both the lawyers, legal staff, and the clients.

Compounding this risk are often larger workloads with limited resources and support systems. The result of these working conditions can be burnout, increased isolation, and emotional exhaustion which are all precursors of vicarious trauma. Just as clients experience trauma in a way that leaves long-term post-traumatic effects, the lawyer working with traumatized clients can also experience post-traumatic effects, albeit at a lower level of intensity.

There is little doubt that lawyers live life under stress. Lawyers experience substance abuse and mental health disorders in greater numbers than the general population and most other professions. In addition to the stress emanating from one client's world, lawyers regularly face the challenge of contentious court appearances, deeply unhappy clients and their families, demanding judges, and legal personnel with whom the lawyer may not see eye-to-eye. In many environments, the lawyer has an extraordinary number of clients, often far too many to be able to represent them with the individual attention that he or she would like to give them. In addition, the environment in which the lawyer works may lack resources and regular opportunities for support and feedback.

Seeing the Signs

Lawyers who experience vicarious trauma find themselves deeply affected by their clients' trauma and thus experience post-traumatic effects themselves. These post-traumatic symptoms can alternate between a sense of numbing and denial about the trauma, on one hand, and intense and almost overpowering feelings, on the other. This numbing and denial can be experienced as a lack of caring.

Simply put, the lawyer's sense that the lawyer has ceased caring for his or her clients is actually false; the intensity of caring and empathy for clients has led the attorney to experience post-traumatic symptoms like numbing and denial that may faintly echo the client's reactions.

What should an attorney look for to avoid a crisis? Becoming aware of the effects your work has on you is essential to helping you take care of yourself. Even if you are not regularly exposed to trauma, you may be struggling with issues of burnout or remnants of your own personal trauma experience. Warning signs include:

- Intrusive, negative thoughts and images related to the client's traumatic experiences
- Having disturbing images from cases intrude into thoughts and dreams
- Difficulty maintaining work-life boundaries
- Avoiding people you love, places, and activities that you used to find enjoyable. Thus, leaving work as the only activity
- Feeling emotionally numb, disconnected, or unable to empathize
- Experiencing feelings of chronic exhaustion and related physical ailments
- Becoming pessimistic, cynical, irritable, and prone to anger
- Feeling inadequate in your work and questioning whether what you do matters
- Feeling numb and detached
- Viewing the world as inherently dangerous and becoming increasingly vigilant about personal and family safety
- Secretive self-medication and/or any addiction (alcohol, drugs, work, sex, food, gambling, etc.)
- Becoming less productive and effective professionally and personally
- Inexplicable aches and pains exceeding what you expect for an ordinary busy day or week.

Reducing the Impact

Writers on stress and vicarious traumatization emphasize that these are occupational hazards both intrinsic to this work and unavoidable. Indeed, there is a perception that the only way to avoid stress in the daily life of a lawyer is to either work or care much less than is necessary. Or on the other hand, to fail to engage compassionately, even empathetically, with one's client. For diligent, humane lawyers, stress and vicarious traumatization are unavoidable. Because the experiences can severely impair the lawyer's ability to provide the best service to clients, the lawyer must carefully understand and address both stress and vicarious traumatization, as they occur, for the lawyer and for the client. And like many occupational hazards, the effects of stress and vicarious traumatization in the life of a lawyer in an emotionally challenging field can be mitigated, even if they cannot be completely eliminated. Consciously taking steps to protect oneself is critical.

Setting healthy boundaries is imperative to managing vicarious trauma. While you can be empathetic to your clients, you must also separate your own identity from the case for your own well-being. This can allow you to hold onto the passion and deep meaning that attracted you to the law in the first place. Strategies include:

- Pursue hobbies or simply pause to assess one's inner state to help slow the momentum of trauma and afford space to regroup/refuel.

• Acknowledge the good in your life to help balance the weight of traumatic pain. Make time for trusted family and/or friends (people who don't drain you but fill you up).

• Seek help if feeling depressed, stressed, or overwhelmed. LAP is confidential by law.

• Be realistic about what you can accomplish and avoid wishful thinking.

• Do not take traumatic case content home with you.

• Increase your self-observation: recognize and chart your signs of stress, vicarious trauma, and burnout.

• Take care of yourself emotionally: engage in relaxing and self-soothing activities, nurture self-care.

• Work toward a healthy work/life balance: have outside interests.

• Don't take on responsibility for your clients' well-being but supply them with tools to look after themselves.

• Balance your caseload: try a mix of more and less traumatized clients.

• Take regular breaks and take time off when you need to.

• Seek social support from colleagues, family members.

• Use a buddy system.

• Use peer support and opportunities to debrief.

• If you need it, take up time-limited group or individual therapy.

• There are also significant organizational factors that can increase the risk of a person being vicariously traumatized, which should be assessed and addressed.

Changing the Culture

Police departments, hospitals, and fire departments train their personnel to recognize the symptoms of vicarious trauma and provide strategies to treat and prevent it. Law schools rarely teach students how to cope with the trauma associated with legal work and vicarious trauma can be an unintended consequence.

Discussing vicarious trauma, along with other mental illnesses, with colleagues and professional groups and seeking help for these issues, are one of the best ways to minimize the long-term impact of trauma on the practitioner. Regularly addressing lawyer well-being and providing resources to attorneys and working to end the stigma of seeking help are all steps to take in improving the health and well-being of our profession.

If you are experiencing any of the symptoms of vicarious trauma, the Lawyer Assistance Program is here for you. Please contact Beth Eckhardt, LAP Director at 516-512-2618 or EEckhardt@nassaubar.org. You can also contact Jackie Cara, Esq., Chair of the Lawyer Assistance Committee at 646-549-2850 or jc32412@gmail.com.

Elizabeth Eckhardt, LCSW, PhD is currently Director of the Nassau County Bar Association's Lawyer Assistance Program. In addition, Dr. Eckhardt has a private psychotherapy practice where she has been providing individual, couple, and family therapy for more than 25 years. Prior to her work with the Lawyer Assistance Program, Dr. Eckhardt spent 22 years as Principal investigator of Research at National Development and Research Institutes, Inc. She can be contacted at eeckhardt@nassaubar.org.

FOCUS: LITIGATION

An End to Forced Arbitration of Sexual Assault and Sexual Harassment Claims?

James G. Ryan and Seema Rambaran

On March 3, 2022, President Biden signed the End in Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("Act") into law.[1]

The Act amends the Federal Arbitration Act ("FAA")[2] to make pre-dispute arbitration agreements or pre-dispute joint-action waivers for sexual assault and sexual harassment claims invalid and unenforceable at the *option* of the person (or class representative in the case of class or collective action) alleging such claims.[3] Effectively, employees may not be forced to agree to arbitrate claims of sexual harassment or sexual assault in advance of these claims arising. However, employees may choose to agree to a pre-dispute arbitration provision of sexual assault or sexual harassment claims or may agree, after claims of sexual harassment or sexual assault have arisen, to arbitrate these claims.

Some may ask, so what has changed? And the answer is…it depends.

The Ghost of Compelled Arbitration Provisions Past

Nearly six years ago, forced arbitration provisions in employment contracts got its, arguably, first fifteen minutes of fame in the infamous lawsuit brought by Gretchen Carlson, the former Fox News anchor, against Roger Ailes, her then boss and Chairman and CEO of Fox News.[4] Carlson alleged, in a New Jersey state court action, that Ailes had "unlawfully retaliated against [her] and sabotaged her career because she refused his sexual advances and complained about severe and pervasive sexual harassment."[5] In response, Ailes petitioned the federal court in New Jersey to compel Carlson to arbitrate her employment, including sexual harassment, related claims pursuant to an arbitration provision in her employment contract with Fox News.[6] In opposition, Carlson's attorneys argued, *inter alia*, that Carlson was not required to arbitrate her claims against Ailes because he was not a signatory to Carlson's employment contract and her claims of sexual harassment and retaliation are not based on her contract with Fox.[7] Ultimately, the court did not have to decide whether to compel arbitration because the parties settled the suit.

The high-profile case of *Carlson v. Ailes* really kickstarted into motion the MeToo movement and resulted in legislators reconsidering the role arbitration provisions may play in addressing sexual harassment claims in the workplace. As many know, in 2018, New York State amended the New York State Human Rights Law ("NYSHRL") by enacting CPLR §7515, which invalidated agreements to arbitrate sexual harassment claims "except where inconsistent with federal law."[8] Thereafter, in 2019, the New York State legislature further amended the NYSHRL, this time seeking to prohibit arbitration provisions related to *all* discrimination or harassment claims, including those based on race, gender, national origin, age, sexual preference, etc.[9]

In 2019, in one of the first decisions to address the viability of the amendments to the NYSHRL, Judge Denise L. Cote, of the Southern District of New York ("SDNY"), ruled in *Latif v. Morgan Stanley, et al.*, that an agreement to arbitrate sexual harassment claims is enforceable despite New York's law prohibiting mandatory arbitration agreements covering sexual harassment claims.[10] Notably, the arbitration provision at issue explicitly provided that it would be "governed by and interpreted in accordance with the [FAA]."[11] In granting the employer's motion to compel arbitration, Judge Cote found that "the FAA's policy favoring the enforcement of arbitration agreements is not easily displaced by state law" and that "when state law prohibits outright the arbitration of a particular type of claim … the conflicting rule is displaced by the FAA."[12]

One year later, in 2020, in *Whyte v. WeWork Cos., Inc.*, in another SDNY decision, Judge Colleen McMahon granted WeWork's motion to compel arbitration, relying on the reasoning in *Latif*.[13] As a result, in *Whyte* the employee-complainant was required to arbitrate her race and gender discrimination and retaliation claims subject to an arbitration provision in her employment contract.[14]

Shortly after the *Whyte* decision, in *Newton v. LMVH Moet Hennessy Louis Vuitton, Inc.* a New York state court examined the same issue presented in *Latif* and *Whyte*, but rejected federal court precedent and instead denied a motion to compel arbitration, holding that an arbitration provision related to sexual harassment claims in an employment contract was unenforceable.[15] The court reasoned that the FAA did not apply to the claims asserted because the FAA applies only to "a transaction involving commerce" and the alleged sexual misconduct occurred exclusively within the company's New York office and did not implicate commercial activity.[16] However, this decision was reversed in a decision by the First Department, holding that the arbitration provision was enforceable because "[t]he provisions of CPLR §7515 relied on by the plaintiff are not retroactively applicable to arbitration agreements, like the one at issue, that were entered into preceding the enactment of the law in 2018, so that plaintiff's argument that this law prohibits arbitration of her claims is unavailing."[17]

In yet another state court decision, in *Fuller v. Uber Tech., Inc.*, without addressing the Newton decision, the court granted a motion to compel arbitration of a sexual harassment claim adopting the reasoning in *Latif*.[18] Since the decision in *Fuller*, several other courts have similarly held that CPLR §7515 was preempted by the FAA.[19]

The Ghost of Compelled Arbitration Provisions Present

Fast forward to the semi-post pandemic workplace, forced arbitration provisions in employment contracts may be getting their second (or maybe third or fourth) fifteen minutes of fame with the passing of the Act. Notably, the federal government seems to have done a 180 on its long-standing position in favor of enforcement of arbitration agreements, deciding now to preclude sexual harassment and sexual assault claims from compelled arbitration. By its terms, the amendment to the FAA seems limited. However, practically, and procedurally, the Act's application merits an independent review.

As practitioners are well aware, and as the *Carlson v. Ailes* lawsuit exemplifies, employment lawsuits asserting sexual harassment may also include claims of retaliation, discrimination, and/or other employment related claims. While under the Act, the sexual harassment claim may have to be litigated in court, a carefully worded arbitration provision could potentially require the parties to arbitrate all other claims. Employers would then need to determine whether to permit all claims to be litigated in court or split the claims between arbitration and litigation.

A "sexual harassment dispute," as defined in the Act, refers to a dispute relating to conduct that is alleged to constitute sexual harassment under applicable federal, tribal, or state law.[20] A "sexual assault dispute" under the Act refers to "a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable tribal or state law, including when the victim lacks capacity to consent."[21]

The Act requires that any dispute related to whether a claim should be arbitrated shall be determined under federal law.[22] Moreover, the Act places courts, not arbitrators, in the position to decide whether the Act applies to a specific agreement to arbitrate and the validity and enforceability of such an agreement.[23] Notably, practitioners should look-out for agreements that purport to delegate such authority to arbitrators, especially where the party challenging the arbitration provision is not doing so in conjunction with a challenge to other provisions of the employment agreement.[24] The Act is explicit in its delegation of authority to courts only, despite the basis for the underlying claim.[25]

The Act also applies to any relevant dispute or claim that arises or accrues on or after the date of the enactment of the Act.[26]

The Ghost of Compelled Arbitration Provisions Future

As cases arising under CPLR §7515 over the last several years evidence, the applicability of the Act may be case specific. Employees may appreciate the rights and protections litigation affords, while employers may seek to review their employment contracts and internal policies to ensure compliance with federal and state laws while creating the broadest permissible arbitration clause.

Moreover, the passing of the Act may be the second chance CPLR §7515 needs to now be deemed to actually limit arbitration clauses. On its face and without any relevant case law on point, for the most part the Act and CPLR §7515 seem to be consistent. For one, both the Act and CPLR §7515 appear to prohibit any agreement to arbitrate claims of sexual harassment or sexual assault. However, unlike CPLR §7515, the Act does not address all claims of discrimination, so it is yet to be seen how courts will handle cases where a party seeks to compel arbitration pursuant to an arbitration provision where there are claims of sexual harassment in conjunction with other employment law related claims (i.e., retaliation and discrimination).

In addition, it remains to be seen whether the Act will serve to invalidate provisions entered into prior to the passing of the federal law compelling the arbitration of sexual harassment or sexual assault claims. As discussed herein, at least one court has opined that CPLR §7515 has no retroactive effect.[27] CPLR §7515, by its plain language, states, "[e]xcept where inconsistent with federal law, no written contract, entered into on or after the effective date of this section shall contain a prohibited clause."[28] However, the Act, by its plain terms, states "no pre-dispute arbitration agreement or pre-dispute joint-action waiver shall be valid or enforceable with respect to a case which… relates to the sexual assault dispute or the sexual harassment dispute."[29] Absent the limiting language similar to that found in CPLR §7515, an argument can be made that the Act prohibits *all* relevant provisions, regardless of when the arbitration agreement was entered into. On the other hand, the Act also states, "[t]his Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act."[30]

The question that remains to be addressed is whether the Act will apply to pre-dispute arbitration agreements entered into pre-March 3, 2022, where a claim of sexual harassment arises after March 3, 2022.

1. 9 U.S.C. §§401 and 402, amending 9 U.S.C. §§2, 208, and 307.
2. 9 U.S.C. §2.
3. 9 U.S.C. §402(a).
4. *Carlson v. Ailes*, No. L00501616, 2016 WL 3610107 (Sup. Ct., N.J. July 6, 2016).
5. *Id.*
6. *Carlson v. Ailes*, No. 2:16-cv-04138, 2016 WL 4120281(D.C.N.J. July 15, 2016). Ailes removed the case to federal court arguing that because Carlson is suing for lost compensation and her salary was "in excess of $1 million annually," and the parties live in different jurisdictions, state court is an improper venue.
7. See *id.*, Doc. No. 10.
8. CPLR §7515 (L. 2018, ch. 57, §1 [Part KK, Subpart B]).
9. CPLR §7515 (L. 2019, ch. 160, §4, eff. Oct. 11, 2019).
10. *Latif v. Morgan Stanley & Co. LLC, et al.*, No. 18-cv-11528, 2019 WL 2610985 at *3 (S.D.N.Y. June 26, 2019).
11. See *id.* at *2.
12. See *id.* at *3.
13. *Whyte v. WeWork Companies, Inc.*, No. 20-cv-1800, 2020 WL 3099969 at *4 (S.D.N.Y. June 11, 2020).
14. See *id.*
15. *Newton v. LVMH Moet Hennessy, et al.*, Index No. 154178/2019, 2020 WL 3961988 at *3 (Sup. Ct., New York Cty. July 13, 2020).
16. *Id.*
17. *Newton v. LVMH Moet Hennessy et al.*, 192 A.D.3d 540, 541 (1st Dept. 2021).
18. *Fuller v. Uber Tech. Inc.*, No. 150289/2020, 2020 NY Slip Op. 33188 (Sup. Ct. New York Cty. Sept. 25, 2020).
19. *Gilbert v. Indeed*, No. 20-3826, 2021 WL 169111 (S.D.N.Y. Jan. 19, 2021); see also *Crawford v. Goldman Sachs Group, Inc.*, No. 159731/2020 (Sup. Ct., New York Cty. Feb. 23, 2021).
20. 9 U.S.C. §401(4).
21. 9 U.S.C. §401 (3); see also 18 U.S.C. §2246.
22. 9 U.S.C. §402(b).
23. *Id.*
24. *Id.*
25. *Id.*
26. 9 U.S.C. §3.
27. *Newton*, 192 A.D.3d at 541.
28. CPLR. §7515(b)(i).
29. 9 U.S.C. §402(a).
30. 9 U.S.C. §3.

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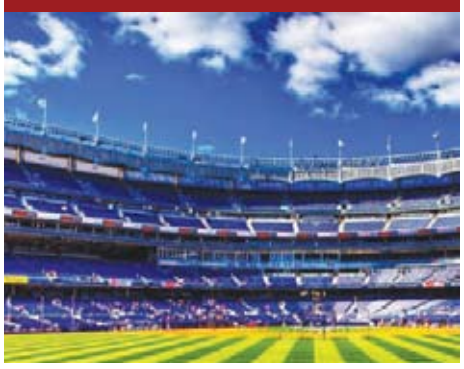
FOCUS: INTELLECTUAL PROPERTY



The New Jersey Giants? Whether Continued Use of "New York" is Deceptive

Sara M. Dorchak and Tyler deJesus

Earlier this year, Abdiell Suero of Greenwich Village filed a $6 billion lawsuit against the New York Giants, the New York Jets, the National Football League, and others, claiming that they have committed false advertising and deceptive practices by continuing to use the geographic designation "New York" when, in fact, their stadium is located in New Jersey.[1] Along a similar line of thinking, can the Giants or the Jets even claim trademarks rights in a name that is potentially misdescriptive or even deceptive to its consumers?

Despite what most people believe, trademark laws exist to protect the consumer from confusion, not to protect the trademark itself, though of course, the trademark owner also benefits from a non-confused public.[2]

The central function of a trademark is to serve as a source identifier and to embody a number of characteristics and qualities, including what the products and services are, the reputation of the source, the quality of the products and services, the general pricing, and so much more.[3]

For example: Amazon® evokes an e-tail merchant with a wide variety of consumer products for purchase; Apple® evokes technology, hardware, and software; and Honda® evokes low-cost and long-lasting automobiles. These trademarks are all considered strong, partly because they are all inherently distinctive—none of them directly describing the products or services of their respective brands. Marks that are not inherently distinctive, however, cannot gain trademark rights unless they have acquired distinctiveness through the establishment of secondary meaning.[4] This added requirement is necessary to elevate the word, phrase, or graphic into a source identifier in the eyes of consumers, rather than the ordinary and descriptive meaning of that word, phrase, or graphic.[5]

Part of the reason why secondary meaning or acquired distinctiveness is required is because a consumer encountering a descriptive word or phrase will not necessarily identify it as the source identifier, but rather will think that the wording merely describes the qualities of the product or service. However, the usage of a descriptive term by one source, through the passage of time, can acquire a "special significance" so that the descriptive word becomes a source identifier of the products and services to consumers.[6] The *primary significance* of the term becomes, in the minds of the consuming public, the producer of the products or provider of services, not the products or services themselves.[7]

Even with secondary meaning, the words do not lose their original meaning or descriptiveness. In fact, trademark owners often still want consumers to attribute the descriptive elements to their products and services as they often convey positive qualities or features. This can be particularly true for geographically descriptive trademarks—marks where the descriptive element is a geographic location. When consumers see a geographically descriptive trademark, even after it has acquired secondary meaning, they will still likely presume that the goods or services come from a particular location.

Geographic origin can be especially important in the food and beverage industry where the products can only truly be called something if they come from a particular location. For example, for something to be called "tequila" it must have certain characteristics, including that the blue agave used to create the liquor must be grown and cultivated in Mexico.[8] Where products or services come from can say a lot, as the geographical location itself embodies characteristics unique to that region.

The food and beverage industries are not the only industries where consumers consider geographic origin important. In the case of professional sports, fans find community and comradery by associating themselves with a particular sports team. There

are, of course, myriad reasons why a person may choose to associate themselves with a particular sports team, though the most common can be separated into three different categories: (1) the fan born into liking a team, often because a parent or close family member also roots for that team; (2) a fan who chooses to go against the family team, often picking a team that perpetually wins or has an athlete liked by the individual; and (3) a fan by circumstance, either because they are jumping on the bandwagon of a popular team or because they grew up or went to school in the area where the team exists.[9]

Whether it is an alcoholic beverage or a sports team, when a trademark includes a geographic description and the product or service does not actually come from that location, then the trademark is geographically misdescriptive. Consumers are deceived into believing that the products or services contain distinct characteristics, when in fact they do not.[10] The test for whether a trademark is misdescriptive was best described in the Trademark Trial and Appeal Board case, *In re Quady Winery Inc.:*

> The test for deceptive misdescriptiveness has two parts. First, we must determine if the matter sought to be registered misdescribes the goods. If so, then we must ask if it is also deceptive, that is, if anyone is likely to believe the misrepresentation. A third question, used to distinguish between marks that are deceptive under Section 2(a) and marks that are deceptively misdescriptive under Section 2(e)(1), is whether the misrepresentation would materially affect the decision to purchase the goods.[11]

The ultimate question becomes, can the New York Giants or New York Jets continue to use their name after having moved home games to a New Jersey location or does their continued usage of "New York" now constitute deceptive misdescriptiveness?

No one disputes that the names New York Giants and New York Jets were, upon their original foundation, descriptive of their general location. The Jets originally shared their playing field with the New York Mets at the former Shea Stadium, while the Giants originally shared the old Yankees Stadium with the New York Yankees—the stadiums converting back and forth between football and baseball, as needed.[12] This changed when the Giants officially called the stadium in East Rutherford, New Jersey, home in 1976.[13] The Jets would not officially call the New Jersey stadium home until 1983, though they had played some home games there as early as 1978.[14]

Despite the new location being across the Hudson River from New York City, does the phrase "New York" misdescribe the Jets or the Giants?[15] Arguably, the term New York does not simply encompass New York State, but also the New York City Metropolitan area, which encompasses not only places in New York City, but the surrounding areas as well, including areas in New Jersey, Connecticut, or even Pennsylvania.[16] People who commute to and from New York City consider themselves a part of New York, even if they do not technically live in the State of New York.

Even if a court were unconvinced by this argument and were to view the phrase "New York" in this instance as misdescriptive, is anyone likely to believe the misrepresentation?[17] In Mr. Suero's litigation against the Giants, the Jets, the NFL, and others, the defendants argued in their memoranda supporting their Motion to Dismiss that the move to East Rutherford, New Jersey was well-publicized and that the defendants have never represented that the Stadium is located anywhere other than in New Jersey.[18] The Jets and the Giants are also not unique as there are many instances where a sports teams will link to a more well-known metropolitan area as larger markets can lead to a larger fan base. For example, the newly named Washington Commanders (previously Redskins) have been playing six miles away in Landover, Maryland since 1994 but, like the Jets and the Giants, cater to the larger metropolitan area surrounding Washington, D.C. The strangest of all, the San Francisco 49ers play in Santa Clara, California, which is 54 miles away from downtown San Francisco (and closer to San Jose). In contrast, the MetLife Stadium where the Giants and the Jets play their home games is only seven miles away from the New York State Border—literally on the other side of the Hudson River.

Finally, and maybe the most important question of all, if there is misrepresentation, does it materially affect the decision to purchase the goods or services?[19] As mentioned above, fans choose their sports teams for different reasons, including geographic proximity to the team. However, most fans understand that it is not easy to build large sports stadiums in the middle of a metropolitan area and are therefore not surprised when such stadiums appear outside the geographic limits of that area.

Perhaps the most telling example is to consider someone like my grandfather. He stopped rooting for the Brooklyn Dodgers, like so many other die-hard fans, when they moved across the country to Los Angeles. But he never stopped rooting for the New York Jets, even though he understood they were playing in East Rutherford, New Jersey. So, at least for him, it did not materially affect his decision to continue supporting the team.

Going back to Mr. Suero's case, on March 21, 2022, the defendants filed a joint motion to dismiss for failure to state a claim, which has not yet been decided. Since that time, Mr. Suero filed an amended complaint, dropping the civil racketeering claim in the original lawsuit and the requirement for the teams to return to New York, though he kept the demand that they change their name to the "New Jersey" Jets and Giants.[20] It will be interesting to see whether the Motion to Dismiss is granted or if this case will proceed on the merits.

1. Steven Taranto, *Fan sues Giants, Jets for $6 billion demanding both teams leave New Jersey and play home games in New York* CBSSports.com (2022), https://bit.ly/3LWclAY.
2. *James Burrough Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266, 276 (7th Cir. 1976); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205 (2nd Cir.1979).
3. 15 U.S.C. §1127; Gen. Bus. L. §360; *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 779 (1992); *The Sports Authority, Inc. v. Prime Hospitality Corp.*, 89 F.3d 955, 960 (2d Cir. 1996).
4. 15 U.S.C. §1052(f); *Trademark Manual of Examining Procedure (TMEP) §1212; Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1580 (Fed. Cir. 1988), quoting *In re Capital Formation Counselors, Inc.*, 219 USPQ 916, 917 n.2 (TTAB 1983).
5. *Ralston Purina Co. v. Thomas J. Lipton, Inc.*, 341 F. Supp. 129, 133 (S.D.N.Y. 1972).
6. Nims, *Unfair Competition and Trademarks* at §37 (1947).
7. Ralston, 341 F. Supp. at 133.
8. Wikipedia, Tequila, https://en.wikipedia.org/wiki/Tequila.
9. Sweets Thomas, The Bleacher Report, Why Football Fans Pick The Teams They Do (2022) https://bleacherreport.com/articles/140405-pick-a-team-any-team.
10. TMEP §1209.04; 15 USC §1052(e)(1).
11. 221 USPQ 1213, 1214 (TTAB 1984).
12. Stadiums of Pro Football, *Yankee Stadium*, https://bit.ly/3vOFVD4 ; Stadiums of Pro Football, *Shea Stadium*.
13. Wikipedia, *History of the New York Giants*, https://bit.ly/3vR7knV.
14. Wikipedia, New York Jets, https://en.wikipedia.org/wiki/New_York_Jets.
15. *In re Quady* at 1214.
16. Wikipedia, *New York Metropolitan Area*, https://bit.ly/3MNEk66.
17. *In re Quady* at 1214.
18. Law 360, *Suero v. NFL et al.* (2022), https://www.law360.com/dockets/documents/6239c3246f469002604a642f.
19. *In re Quady* at 1214.
20. Abraham Jewett, Top Class Actions, *NFL's New York Jets, Giants Class Action Claims Teams Mislead Fans About Location By Playing Home Games in New Jersey* (2022), https://bit.ly/3KPAEzh.

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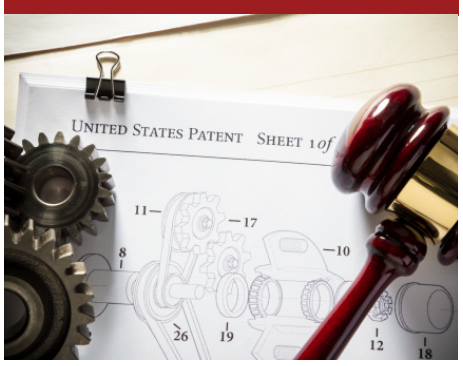
Tyler DeJesus is a third-year law student at St. John's University School of Law, where he is studying intellectual property, among other topics.

FOCUS: INTELLECTUAL PROPERTY

Top Ten Myths About Patent Law



Frederick J. Dorchak

The top ten myths about patent law are as follows:

10. You Can Patent an Idea

An inventor stuck in traffic on the Long Island Expressway on her way to the Hamptons gets an idea: a transporter to take her there without sitting in traffic. If she got that idea first, one might believe she could patent that idea. That belief, however, would be wrong.[1]

Thinking that ideas can be patented is a common misconception—a myth about Patent Law. This article will call this myth one of the top ten myths about Patent Law and discuss nine others, but unlike David Letterman's Top Ten List, this list has no order of importance and is not very funny.

Now back to her transporter idea: she cannot patent it because it is just an idea, an abstract concept. Until she figures out how this transporter will work so that someone can build it from what she tells them, she will be unable to patent the transporter.[2] Also, if she does figure it out, her patent will cover only her way of doing it. Generally, if others figure out a different way, her patent will be unable to stop them.[3]

The inventor does not have to build the transporter, however, before applying for a patent. Although the U.S. Patent and Trademark Office can ask an inventor to submit a working model,[4] it rarely does so. The patent application simply must describe the invention in such detail as to enable any person skilled in the field to make and use the invention.[5] It suffices if one can build the transporter from reading her patent application.[6]

9. You Can Patent Your Invention at Any Time

No patent can be granted on an invention in public use or on sale for more than one year before filing the patent application, even if the inventor himself did the using or selling.[7]

If the inventor has advertised, promoted and sold his product for several years, it is now too late to apply for a patent even if nothing is like it. The patent application must be filed within one year of the first offer for sale.[8]

8. If Someone Else's Patent Expires, then the Inventor Can Obtain a Patent

If the product is described in a patent, expired or not, the product is thereafter considered old. No one can patent it again.[9]

If the inventor, however, comes up with an improvement, she can apply for a patent on the improvement.[10] For example, the inventor sees someone's patent on a chair and improves that chair by putting curved portions on the chair bottom to make a new invention—a rocking chair. The inventor can apply for a patent on her rocking chair if it was not described in the earlier chair patent.

7. Anyone Can Patent in the USA Any Product That They Discover Abroad

Patents can be granted only to the person who invented the product.[11] The person seeing the product in a foreign country did not invent the product; someone else did. The person cannot apply for a patent on the product, even if it is completely unknown in the United States.

6. If It's Patented, Then It Must Be High-Quality

Sometimes, commercials talk about "our patented formula" or "our device is so good, it's patented." These statements sound good, but do not necessarily mean anything. A patent is not an endorsement, guarantee or indicator of the quality, safety, commercial viability or other characteristics of any product covered by the patent. These statements simply mean that the Patent Examiner has been convinced that the invention is new, useful, and not obvious over what he or she has been able to locate in the Patent Office records.

Patent Examiners sometimes make mistakes, however, and grant patents on things done before or obvious. The Patent Office has procedures to challenge the validity of patents.[12] Validity may also be challenged in court by one accused of patent infringement.[13]

5. Mailing Yourself a Description Protects Your Idea

The inventor must apply for a patent to get protection. Such mailing, at most, might evince conception of the invention, which once had importance, but such mailing alone or any proof that an inventor came up with the invention first provides no patent rights.

On March 16, 2013, the United States went to a first-to-file system,[14] in which the one who filed the patent application first generally is the one entitled to the patent, not the one who invented first. Under the first-to-file system, the inventor's self-mailing means even less because filing, not invention, date, has importance.

Public disclosure of the invention also has importance under the first-to-file system. If the inventor publicly discloses his invention within one year before filing his patent application, a patent application by someone else filed after his public disclosure will not prevent the inventor from getting a patent.[15]

Had the inventor not publicly disclosed the invention, the patent application filed by someone else before his patent application would have prevented the inventor from getting the patent.[16] Thus, under the first-to-file system, public disclosure before patent application filing can have advantages.

Publicly disclosing the invention before filing the patent application, however, renders invalid foreign patent rights based on the patent application in many countries. Unlike the United States, many countries require that the patent application be filed before any public disclosure.

4. A "Patent Pending" or "Provisional Patent" Lets the Inventor Sue for Patent Infringement

Generally, neither a provisional nor a pending patent application gives enforceable rights. The inventor can enforce a patent only after grant. The words "patent pending" simply mean that the inventor has applied for a patent. For example, an inventor has the idea to put ham slices between two bread slices and applies for a patent on her ham sandwich invention. Once the patent application is filed, she can put "patent pending" on her ham sandwiches even though she never will get a ham sandwich patent.

"Patent pending" sounds good but means little. A provisional patent application refers to a filing in the Patent Office that can be quite informal. The Patent Office merely records that the inventor filed the provisional patent application without examining it.

The inventor has a year from filing to file a "nonprovisional" patent application.[17] If she does, the inventor may be entitled to the provisional application filing date which can be important. If she does not, it is as if the provisional application was never filed.

3. Whoever Owns All Rights in the Invention Can Get a Patent Without Mentioning the Inventor

A U.S. patent must name only the true inventor: the person who actually conceived of the way to build the invention and built it or described it in a patent application so that others could build it.[18] Naming the inventor, however, does not mean that the inventor owns the patent. Rights in a patent or patent application are property rights that may be sold, licensed, divided or otherwise transferred.[19] Nevertheless, the inventor's name always appears on the patent.

For example, a person has the idea for a transporter but has no clue how to build one, so he hires a creative guy to build a transporter. The person tells the creative guy that he will pay the guy but wants to own all the rights. Agreeing, the creative guy asks how this transporter is to be constructed and is told he must figure it out himself. The guy does figure it out and receives his payment, but the person must still name the creative guy as the inventor in the transporter patent application.

2. An "International Patent" Will Protect the Invention Worldwide

There is no internationally recognized patent. Patents are national in scope. Each country has its own requirements for obtaining a patent.

Most countries (including the United States) are parties to a treaty[20] permitting a patent applicant to file first in one country and then file corresponding applications in other countries. If an inventor files within one year from her U.S. filing date, she gets the same U.S. filing date in each country she filed in.

In addition, a Patent Cooperation Treaty (PCT)[21] provides a streamlined procedure for applying for a patent in nearly every country in the world. With a PCT application, an inventor can defer prosecuting the application in these countries for approximately two and one-half years from the earliest filing date. Although the inventor still must go forward in each country that she wants to obtain a patent in, she gets more time to decide.

1. A Patent Gives the Right to Make, Use, and Sell the Product

A patent gives no right to do anything, except sue for patent infringement. Someone else may have a patent that prevents making, using, and selling the invention.

For example, the guy with the chair patent can prevent the inventor with a rocking chair patent from making rocking chairs that infringe the chair patent. Conversely, if the chair patent guy wants to make rocking chairs, he needs authorization from the rocking chair patentee because otherwise the chair patent guy will infringe the rocking chair patent.

Stated differently, a patent gives the owner a "negative" right: the right to exclude others from using, making, selling, and importing the invention in the United States.[22] A patent is not required to do anything, and a patent does not authorize the owner to do anything, just stop others from doing something.

1. "An idea of itself is not patentable, but a new device by which it may be made practically useful is." *Rubber-Tip Pencil Co. v. Howard,* 87 U.S. (20 Wall.) 498, 507 (1874).
2. "Conception is the touchstone of inventorship, the completion of the mental part. . . . Conception is complete only when the idea is so clearly defined in the inventor's mind that only ordinary skill would be necessary to reduce the invention to practice, without extensive research or experimentation." *Burroughs Wellcome Co. v. Barr Laboratories, Inc.,* 40 F.3d 1223, 1227–28 (Fed. Cir. 1994) (citations omitted).
3. *O'Reilly v. Morse*, 56 U.S. (15 How.) 62, 113–19 (1854).
4. 35 USC §114.
5. 35 USC §112(a).
6. *The Telephone Cases*, 126 U.S. 1, 535–36 (1888).
7. 35 USC §102(a).
8. *Pfaff v. Wells Electronics, Inc.*, 525 U.S. 55, 67 (1998).
9. 35 USC §102(a).
10. 35 USC §101.
11. *Pannu v. Iolab Corp.*, 155 F.3d 1344, 134–51 (1998).
12. 35 USC §§301-307 (ex parte reexamination), 35 USC §§311–19 (inter partes review), 35 USC §§ 321-329 (post-grant review).
13. 28 USC §§2201-2202; *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191 (2014).
14. Pub. L. 112-29, 125 Stat. 285 §3(n) (Sept. 16, 2011) (amendments made by this section effective 18 months after enactment).
15. 35 USC §102(b).
16. 35 USC §102(a)(2).
17. 35 USC §111(b)(5).
18. See Manual of Patent Examining Procedure §2109.
19. 35 USC 261.
20. Paris Convention for the Protection of Industrial Property (Mar. 20, 1883), as revised and amended.
21. Patent Cooperation Treaty, June 19, 1970, as amended and modified.
22. See, e.g., *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 510 (1917).

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FOCUS: APPELLATE COURT

A Rare Glimpse into the Operation of the Appellate Division from the Former Chief Clerk

Amy E. Abbandondelo

For nearly a decade, from December 2011 until she retired on August 4, 2021, Aprilanne Agostino was the Clerk of the Court of the Appellate Division, Second Department, tasked with managing the day-to-day operations of the busiest New York appellate court. On March 31, 2022, the NCBA Appellate Practice Committee had the privilege of hosting Ms. Agostino for a Dean's Hour CLE, titled "Reflections from the Appellate Division Clerk's Office," during which Ms. Agostino provided a rare glimpse into the behind-the-scenes workings of the Appellate Division, Second Department.

At the time of her retirement, Ms. Agostino had dedicated nearly thirty-five of her remarkable thirty-seven-year legal career serving the Appellate Division, Second Department's justices, attorneys, and litigants. Before her appointment to Clerk of the Court of the Appellate Division, Second Department, Ms. Agostino served as a court attorney, law secretary to Associate Justices Richard A. Brown and Charles B. Lawrence, Deputy Chief Court Attorney, Chief Court Attorney, Associate Deputy Clerk, and Deputy Clerk. On the few occasions she worked outside the Appellate Division, Second Department, Ms. Agostino continued her commitment to public service, serving as counsel to the Queens County District Attorney's office in the early nineties and as Acting Chief Clerk of the Appellate Term, Second Department from December 2005 to Spring 2007.

As the Clerk of the Appellate Division, Second Department, Ms. Agostino was the non-judicial manager of the court, overseeing a staff that reached approximately 200. Ms. Agostino noted that despite the growth in personnel—necessitated by the ever-increasing number of appeals—the Appellate Division, Second Department always felt like a community. During her long tenure at the Appellate Division, Second Department, Ms. Agostino was happy to witness more diversity across the growing staff and the judicial bench, as well as more leadership opportunities for women and minorities.

Ms. Agostino discussed her experience managing the Appellate Division, Second Department during the height of the COVID-19 Pandemic. She recounted that during the beginning of the COVID-19 Pandemic, the only two people at the courthouse were herself and a security guard, who sadly later died due to COVID-19. The clerk's office was inundated with an unprecedented number of requests for attorney good standing certificates. Those requests could not be processed until the COVID-19 restrictions were eased and staff could return to the courthouse. The clerk's office also received numerous communications from applicants seeking information and guidance concerning their admission to the bar, which was temporarily halted due to the COVID-19 Pandemic.

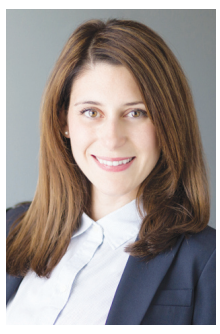
Ms. Agostino credits the commitment of Hon. Alan D. Scheinkman (Ret.) during his tenure as Presiding Justice to advancing the court's technology for its success in quickly transitioning to virtual operations during the COVID-19 Pandemic. Whether the court will offer a virtual argument option going forward is a policy question for the current administration.

Mindful of the need to improve the speed of the appellate review process without sacrificing quality, Ms. Agostino routinely discussed best practices with her counterparts in the other judicial departments. Ms. Agostino walked the participants at the program through the court's multi-level process for readying an appeal for argument and decision that was in place when she retired. Ms. Agostino explained that when an appeal is fully briefed, the Chief Court Attorney would assign the appeal to a court attorney to analyze and draft a written report, which would then be circulated to the assigned panel of justices in advance of the date on which the appeal is calendared to be argued. The clerk's office generally calendars argument in the order in which appeals are perfected, but preference is given to criminal and family court cases. A more complex appeal that takes a court attorney longer to process may be calendared later than other appeals perfected at the same time. Generally, sixteen to twenty appeals appear on each day of the argument calendar.

Typically, one justice on the assigned panel would be responsible for reporting on the appeal to the other assigned justices. The assigned panel might discuss an appeal in advance of argument and the reporting justice might circulate additional written reports to the panel. Ms. Agostino stated that in her experience, the assigned panel would generally decide the appeal the day on which it is argued. If in the majority, the reporting justice would draft the majority opinion, which would then be sent to the Decision Department, where it would be formatted, cite-checked, and cross-checked against recent and pending decisions. If the Decision Department were to discover discrepancies, the proposed decision would be returned to the assigned panel for further consideration. One week in advance of publication, proposed decisions would be circulated to all the justices and their law clerks, as well as all court attorneys, including the members of the Law Department and the Decision Department, the Deputy and Associate Deputy Clerks, and the Clerk of the Court, for review. The Presiding Justice of the court would review all decisions before publication.

Ms. Agostino reiterated to the Appellate Practice Committee that the best method of communicating with the Clerk's office is through email, to which the Clerk's office responds within 24 hours. A party unsure as to which department in the clerk's office to contact may always email the General Clerk's office. To conserve judicial resources, however, Ms. Agostino requested that a party not send the same email to multiple departments.

Since her retirement, Ms. Agostino has taken some time to decompress, process her life's work, and explore what she wishes to do next, which may include legal research and editing or perhaps even teaching. The Appellate Practice Committee wishes Ms. Agostino the best of luck in her future endeavors.



Amy E. Abbandondelo is Vice Chair of the NCBA Appellate Practice Committee. She is associated with Sherwood & Truitt Law Group, LLC, where she focuses her practice on real estate litigation.

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NAL PROGRAM CALENDAR

Pre-registration is REQUIRED for all Academy programs. Go to nassaubar.org and click on CALENDAR OF EVENTS to register. CLE material, forms, and Zoom link will be sent to pre-registered attendees 24 hours before program. All programs will be offered via HYBRID unless otherwise noted. Please RSVP to academy@nassaubar.org 24 hours before program date to attend in person.

JUNE 9

Dean's Hour: Lessons in Law, Love and Loyalty— The Abdication of Edward VIII (Law and American Culture Lecture Series)
With the NCBA Diversity and Inclusion Committee and the NCBA Matrimonial Law Committee
Program Sponsored By NCBA Corporate Partner Champion Office Suites and Encore Luxury Living
12:30 PM – 1:30 PM
1 credit in professional practice

JUNE 9 (IN PERSON ONLY)

Know Your Rights: Finding a Place to Call Home— Fair Housing on a Diverse Long Island
With the NCBA Community Relations and Public Education Committee, the NCBA Diversity and Inclusion Committee and the NCBA Real Property Law Committee
Program Sponsored By NCBA Corporate Partner Tradition Title Agency Inc. and Long Island Board of Realtors®; Touro University Jacob D. Fuchsberg School of Law
5:30 PM – 8:30 PM
2 credits in diversity, inclusion, and elimination of bias; 1 credit in professional practice

JUNE 10

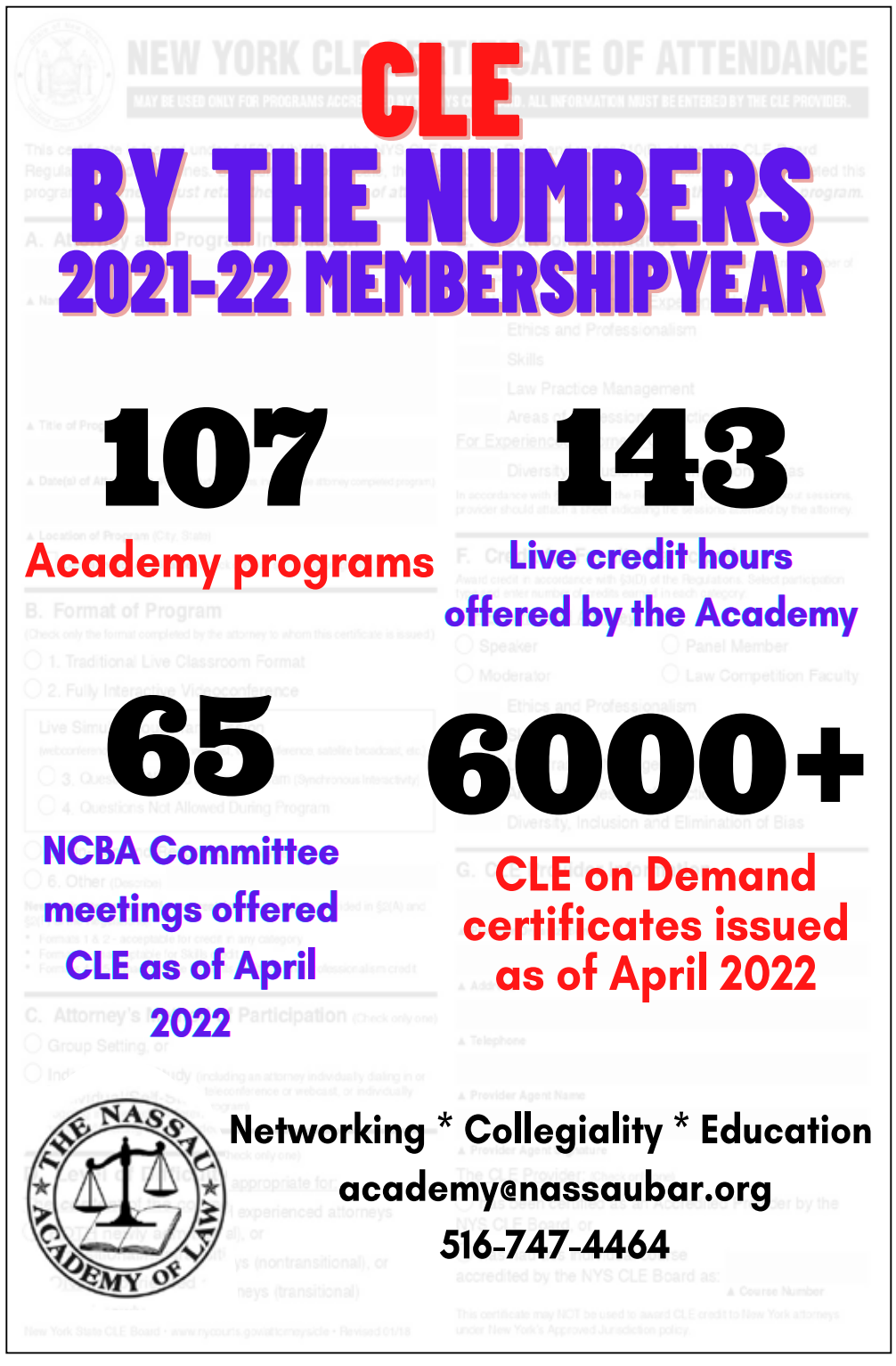
Dean's Hour: Under Color of Law— Government Supported Segregation in Housing and Finance
With the NCBA Diversity and Inclusion Committee
12:30 PM – 1:30 PM
1 credit in diversity, inclusion, and elimination of bias

JUNE 13

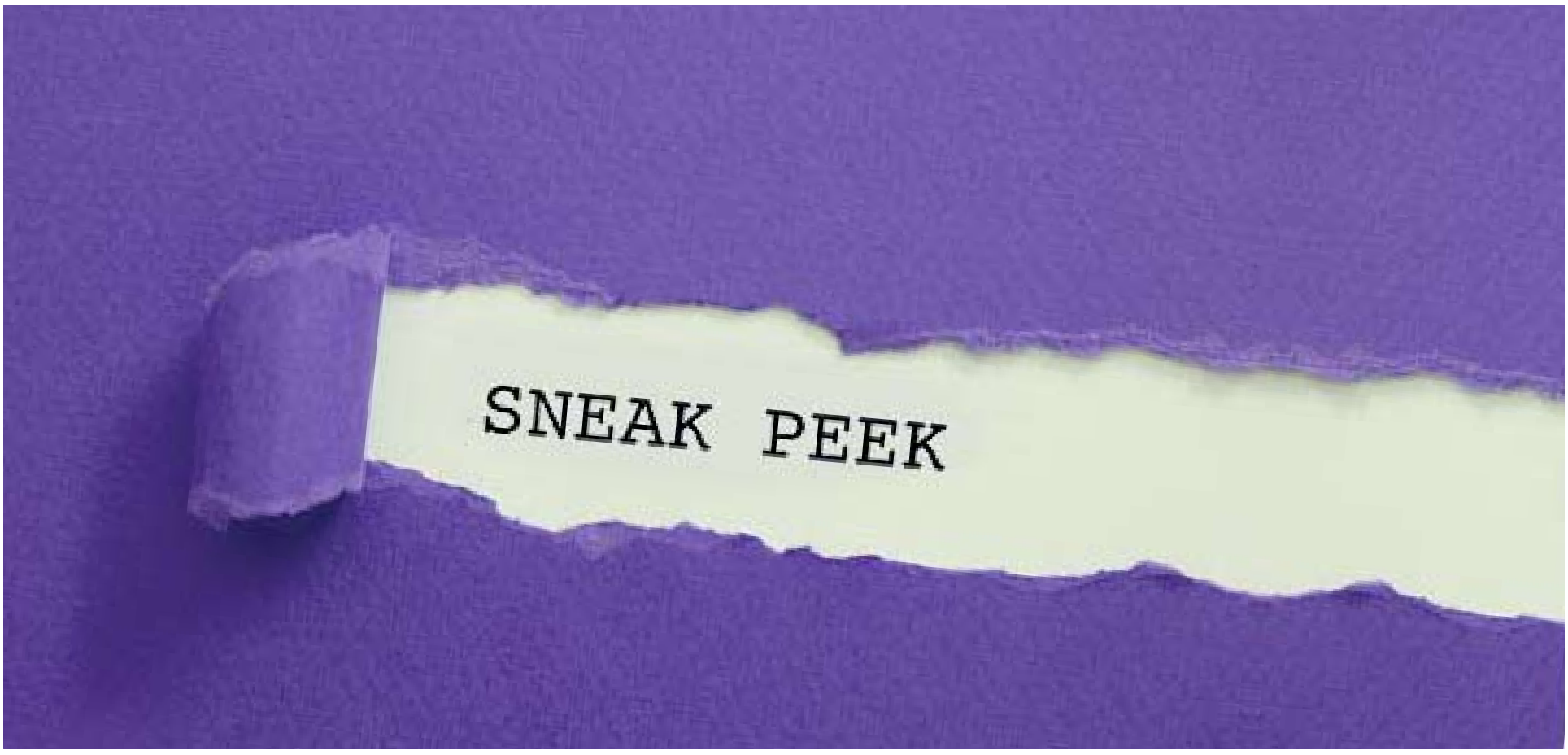
Dean's Hour: *Roe v. Wade*: What's Next?
12:45 PM – 1:45 PM
1 credit in professional practice

JUNE 15

Dean's Hour: Mediating a Personal Injury Case— A Roundtable Discussion
With the NCBA Alternative Dispute Resolution Committee and the NCBA Plaintiff's Personal Injury Committee
Program Sponsored by Nota by M&T Bank
12:30 PM – 1:30 PM
1 credit in professional practice. Skills credits available for newly admitted attorneys



NAL PROGRAM CALENDAR



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FOCUS: ALTERNATIVE DISPUTE RESOLUTION

Remote Mediations—Yay or Nay?

Cynthia A. Augello

After two plus years of pandemic living, while many are eager to get back in person, there may be some benefits to keeping certain proceedings remote. Mediation is one such proceeding that offers many benefits in a remote setting. Just like most things, however, there are benefits and detriments. This article will address the pros as well as the cons regarding remote mediations.

Pre-Pandemic Mediations

Someday history books will likely read as follows: "Prior to the massive changes of court-related proceedings caused by COVID-19, mediations took place in person." It's true. The parties or the court would choose a mediator, a date would be set, and the parties would most likely meet with the mediator in the mediator's office or other neutral setting.

Sometimes, if agreed to, the mediator would travel to a location agreed to by the parties. Oftentimes, the parties would all start in one large conference room where the mediator would provide confidentiality forms for the parties to sign, give the "rules" of the mediation and permit each side to give opening remarks. Thereafter, the parties would each go into a separate conference room and the mediator would shuffle back and forth between the parties attempting to resolve the matter.

Remote Mediations

With necessity being the root of all innovation, COVID-19 normalized remote mediations. Unlike court appearances, depositions, arbitrations, hearings and similar proceedings, the benefits of remote mediations are arguably greater. Mediation, unlike most legal proceedings, is an attempt to resolve issues between the parties and thus not actually being in the presence of one another might be advantageous.

In remote mediations, the parties or the court still choose the mediator and the date. But instead of traveling to a location to sit through the mediation session, the parties, the lawyers, and the mediator log on to their computers. The mediator will often ask before the session if there is any reason for everyone to speak before the session. If not, the parties are immediately placed in different online "rooms" and the mediator switches back and forth between the online rooms.

Pro: Less Stress

No one can argue against the idea that when parties are more comfortable and less stressed, that they are more likely to resolve issues. Many clients feel pressure and stress at the idea of seeing their adversary in person. In many civil litigation matters, the parties do not see each other throughout much of the litigation.

The idea of having to face each other in person at a mediation is stressful and may initially hinder the process. By mediating virtually, the stress is lessened because often the parties do not even see each other on the computer before splitting into rooms. Additionally, the online/remote setting is more casual and comfortable because the parties are not traveling to a location that is unknown to them.

Con: Less Impact

Due to increased distractions, less formality, less hassle to arrive on time, less expense (a/k/a "buy-in") and not being physically located in the same room as the mediator or their lawyer, remote mediations may also have less impact on the parties and their willingness to settle than in-person mediations do. However, if parties really want to resolve the matter and attend in good faith with the goal of resolution, the format should not matter too much.

Pro: Increased Attendance by Real Decision Makers

In many cases, in addition to the parties, it is also imperative to have an insurance company representative involved in the decision-making process. In the case of a corporate party, certain higher ups in a corporation may need to be involved in making decisions but they cannot take the time away from the office to attend a mediation session in person.

Often such individuals will give the attending representative certain authority and be reachable via telephone should the individual need information or additional authority. This often creates issues during a mediation, or it causes delays in resolution. This includes the perception by the other party that the mediation is not important to the non-attending individual(s). Because it is easier to be available virtually, more mediations are attended by the necessary decision makers.

Con: Personal Touch Can Be Impacted

Obviously, in person communications are more personal than communications over a computer screen. There is seemingly a hierarchy of effective communication with in-person being at the top of the list, and texting at the bottom of the list. This potential problem, however, can be mitigated. Among other things, the mediator needs to make sure that he or she is capable of handling the technology.

Additionally, all involved need to make sure that their background and camera angle and microphone are all "professional" in their operation which certainly enhances virtual communications. Importantly, lawyers should refrain from turning themselves into a "cat" during the mediation.[1] It is important for the mediator and the mediation participants, such as counsel and the parties, to be able to see each other's faces and effectively talk to each other almost as if they are in the same room.

Pro: Best Foot Forward

Being on camera positively affects the behavior of mediation participants. People seemingly put their best foot/face forward (as if posing for a photo) which generates more civility, less interrupted conversation, fewer unreasonable positions, and more sharing of information.

Con: Increased Personal Interruptions

We have all been on remote meetings and an animal appears on screen or makes noise or an unclothed toddler runs across the view of the camera. These things happen and for the most part, we have all become accustomed to brushing these things off. It does, however, still make the experience appear less formal and, as a result, could appear less important or serious which could impact the desire or the willingness to resolve the matter.

Pro: Increased Personal Interruptions

The same con, is also a pro. Often, when the dog barks, the cat

runs across the keyboard, the child makes noises in the background, it leads to personal discussions and revelations about the other party/the lawyers/the mediator that make the experience more personable and less sterile. The opportunity to speak about animals and children may not come up in the traditional in-person mediation as often as it likely does in remote settings.

Con: Lawyer Hallway Meetings Cease to Exist

Not to take any credit away from the many skilled mediators who practice, however, nearly all mediations involve "hallway meetings" between counsel who are not presently in a private caucus with the mediator. Often, progress is made toward resolution by such informal conversations; especially if it appears as though the mediator is not making progress toward a settlement.

This too, can be mitigated somewhat by all counsel exchanging cell phone numbers at the commencement of the mediation so as to enable them to speak to each other at least by phone.

Alternatively, the lawyers could ask to be put into a "room" together without the mediator and parties to talk through some issues.

Pro: Less Expensive

Due to the difference in travel time from one's living room to kitchen as opposed to living room to an office somewhere, parties now pay less for mediation than they would have previously. In addition to travel savings, the parties are also saving time and costs associated with their lawyers traveling.

Pro: Access to Information

Most attorneys have been in a situation during a mediation where an important unanticipated document becomes important. In an in-person mediation, when that situation arises, the parties usually decide to forge ahead with the mediation without the benefit of the now important document. When parties and attorneys are in their own homes/offices, any important documents are more likely to be accessible and can be shared with the mediator immediately. In the event that a second day of mediation is necessary due to the missing document, it is much easier to schedule a second session than it would be for in-person settings.

Con: Easier to Leave

One of the great things about a virtual mediation is the ease of getting to it. The same ease also applies to leaving. Parties can just click a button and leave the session during frustrating moments. In an in-person mediation, while it happens, leaving is not as easy because it involves much more than clicking a button. Also, parties are more likely to realize the greater expense of an in-person mediation and are more likely to stay put even during the stressful moments.

Pro: Not Getting Hangry

Traffic happens—especially on Long Island and in New York City. It is a way of life. It is not uncommon in a mediation scheduled to begin at 10:00 am, but, because one or more parties or lawyers were stuck in traffic, nothing really begins until 10:30 am? By 4:00 pm, one or more parties begins to get "hungry" even though the mediation session has only been in full swing for five to six hours.

While it can be done for in-person mediation sessions, counsel and clients are typically far more receptive to agree to a "1:00 pm to 5:00 pm or even 6:00 pm" mediation session when it is done virtually. That has the advantage of leaving the morning free, and, at the same time, if the session does last until 6:00 pm, it is a short commute to the dinner table. Additionally, because of the long breaks in between mediator visits to each room for in-person mediations, parties will often grab lunch without taking a break during the mediation. In virtual mediations, lunch breaks are much easier and comfortable.

Remote mediations are likely here to stay. While they are not perfect, there are many positives associated with remote mediations that we do not see in other remote legal proceedings. Additionally, the negatives listed above, while present, likely would not hinder the success of a mediation where the parties are strongly invested in resolving the dispute.

1. https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html.

Cynthia A. Augello is a certified mediator and the Principal of the Law Offices of Cynthia A. Augello, PC, primarily handling matters involving defense of employment law litigation and general commercial litigation. She is also the Co-Chair of the Nassau County Bar Association Publications Committee.

FOCUS: CORPORATE GOVERNANCE

Expanding ESG Regulations Bring Commercial Risk

David Shargel

Environmental, Social, and Governance ("ESG") issues are top of mind in almost every industry, and especially after the U.S. Securities and Exchange Commission's new proposed rules for climate disclosures were issued on March 21, 2022. But while the proposed rules may not be directly applicable to most privately-held companies, the rules underscore an emerging trend: ESG regulations could impact other entities with whom public companies do business, such as joint-venture partners, suppliers, contractors, and subsidiaries, whose own ESG compliance (and failures) could have both financial and reputational consequences.

ESG Basics

ESG comprises factors by which investors evaluate a company's social and environmental conscientiousness and risk. The "E" focuses on climate risk, such as a company's overall impact on the environment, through greenhouse gas emissions or otherwise, as well as the company's short and long-term environmental strategies, such as a transition to a carbon neutrality. The "S" refers to a company's human capital, including its efforts to establish and maintain diversity and inclusion, as well as workplace conditions and human rights. The "G" embraces risk management and accountability and asks whether the company is ensuring compliance with its business and investment strategies, as well as its risk-avoidance efforts.

There is no doubt that investors care about these issues. A Gallup poll conducted at the end of 2021 shows that nearly half of U.S. investors are interested in sustainable investing, while a significant number go a step further, researching and thinking about a company's environmental record, corporate governance policies, and social values before investing.[1]

Regulatory and Shareholder Litigation Risks

Given investors' involved focus on ESG issues it is not surprising that regulators have taken notice. The SEC's proposed rules came more than a year after the SEC created a Climate and ESG Task Force in its Division of Enforcement, which was focused on identifying material gaps or misstatements in public company disclosures of climate risks under the SEC's decade-old existing disclosure requirements.[2]

The new proposed disclosure rules, which are now in the public comment period, would require disclosure of greenhouse gas (GHG) emissions data covering not only direct emissions from a company's operations, but also indirect emissions from the generation of purchased or acquired energy. The SEC calls these Scope 1 and Scope 2 emissions. Under some circumstances, companies would also need to disclose Scope 3 emissions, or emissions that occur in the upstream and downstream activities of a company's value chain. This is where the activities of private companies might be implicated, as discussed in greater detail below.[3]

Although the new proposed rules focus on climate risk, this is not the SEC's only ESG focus, as it has also set its sights recently on disclosure compliance involving issues such as board diversity, human capital management, and cybersecurity risks. For example, the SEC's Division of Enforcement has investigated companies like Activision, regarding a failure to disclose risks related to sexual harassment and discrimination, as well as First American Financial Corp., for its failure to timely disclose cybersecurity risks.

The Department of Justice is also focused on ESG issues, with recent remarks by the Attorney General and Deputy Attorney General highlighting that the agency is taking aggressive new actions to strengthen its approach to corporate crime,

including in the areas of environmental justice and cybersecurity.[4] Other regulators and government agencies are also involved. For example, the U.S. Treasury Department has called for enhanced disclosures; stock exchanges like Nasdaq have implemented board diversity rules requiring listed companies to have at least one "diverse" board member by 2023, and two by 2025; the Commodities Futures Trading Commission has formed a Climate Risk Unit that will focus on the role of derivatives in understanding, pricing and addressing climate risk; and U.S. Customs and Border Protection is utilizing withhold release orders to prevent materials produced with forced labor from being imported into the United States. State agencies and attorney generals are also involved, suing companies like Exxon for failing to adequately disclose climate change risk and Activision, mentioned above, over its workplace harassment.

Investors' increasing interest in ESG issues and the resulting regulatory focus leaves no question that companies should develop identifiable and measurable ESG initiatives. Companies must not only implement these initiatives but must also take steps to strengthen their compliance programs to ensure the initiatives are being followed. In this regard, firms must be careful to avoid "greenwashing," or deceptively seeking to persuade the market that an organization's products and practices are more environmentally friendly than they are. Missteps in these areas could result not only in regulatory enforcement action, but also securities class action lawsuits by investors alleging they were misled and derivative claims by shareholders seeking to implement ESG reform through litigation. Regardless of the merits of these claims, they often prove costly, both for a company's finances and reputation.

Business Partners' ESG Failures A Potential Landmine

As mentioned above, the SEC's proposed disclosure rules implicate not only a company's own GHG emissions, but also "Scope 3" emissions, which involve a company's indirect emissions from upstream and downstream entities. If the rules become law, this means that public companies are likely to demand that vendors and suppliers measure and disclose information about their own GHG emissions. Additionally, companies that have business relationships with a publicly-traded entity should expect new contractual terms requiring not only GHG disclosures, but also compliance with certain GHG standards and goals. A failure by a supplier or vendor to abide by these requirements could result in significant liability.

Moreover, such risks are not necessarily dependent upon the SEC's proposed rules becoming final. Even without the new disclosure requirements, companies are required to comply with the SEC's existing climate disclosure guidelines, as well the SEC's general disclosure rules requiring the disclosure of material information about the company to prospective investors and shareholders. Given the climate of heightened ESG scrutiny, business owners must consider their company's role in these issues when they are involved in a public company's value chain.

For example, Company A, which is publicly-traded, might state its annual SEC disclosure that it has policies and procedures in place to prevent illegal activity as to human capital, like the use of forced labor, anywhere in its production chain. The market eventually learns, however, that Company A's largest supplier of manufacturing components, Company B, a private company, uses forced labor to assemble parts. Both companies are likely to face regulatory enforcement action and, where applicable, shareholder litigation. Further, the breakdown of ESG compliance between the two companies might be addressed through costly commercial litigation or arbitration.

Conclusion

While there is no way to completely guard against these risks, companies on both sides of the equation can take steps to avoid them by preparing for a business environment in which ESG issues are here to stay. For example, companies can:

- Review existing policies and procedures relevant to ESG matters, including with respect to environmental and social issues.

- Establish organizational responsibility and ensure that systems are in place to ensure compliance with policies and procedures.

- Understand how proposed disclosure rules (and existing rules) will impact its company, even if the rules themselves are geared towards publicly-traded entities with SEC reporting requirements.

- To the extent necessary, review contracts with business partners for ESG issues, including risk allocation.

For example, contracts should contain representations and warranties and commitments, as well as balancing protections, regarding relevant ESG matters. Companies should consider a right to an audit allowing them to review the adequacy of compliance programs within the value chain. Similar principles apply to M&A transactions, where enhanced due diligence may be necessary, and appropriately tailored ESG reps and warranties, as well as other material provisions, should be considered as part of the deal structure.

In sum, ESG matters create risk for both large and small companies, public or private. The market and regulatory focus on ESG is likely only to increase, and companies should take steps now to manage these risks in order to avoid the attendant financial and reputational harm.

1. See https://news.gallup.com/poll/389780/investors-stand-esg-investing.aspx.
2. https://www.sec.gov/news/press-release/2021-42.
3. The SEC's proposed climate disclosure rules are available in their entirety at https://www.sec.gov/rules/proposed/2022/33-11042.pdf.
4. See, e.g., https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks- aba-institute-white-collar-crime.

David Shargel is a litigation partner at Bracewell LLP in Manhattan and Chair of the NCBA Federal Courts Committee. His practice focuses on a wide range of business disputes and arbitrations. In addition, he is a member of Bracewell's environmental, social, and grievance (ESG) practice.

NCBA Committee Meeting Calendar
June 6, 2022 – August 4, 2022

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

MONDAY, JUNE 6
GENERAL SOLO AND SMALL LAW PRACTICE MANAGEMENT
12:30 PM
Scott J. Limmer/Oscar Michelen

WEDNESDAY, JUNE 8
MEDICAL-LEGAL
12:30 PM
Christopher J. DelliCarpini

WEDNESDAY, JUNE 8
MATRIMONIAL LAW
5:30 PM
Jeffrey L. Catterson

WEDNESDAY, JUNE 15
BUSINESS LAW TAX & ACCOUNTING
12:30 PM
Jennifer L. Koo/Scott L. Kestenbaum

THURSDAY, JUNE 23
DIVERSITY & INCLUSION
6:00 PM
Rudolph Carmenaty

THURSDAY, AUGUST 4
COMMUNITY RELATIONS & PUBLIC EDUCATION
12:45 PM
Ira S. Slavit

New Members

We Welcome the Following New Members Attorneys

Sean Charles Acosta
Rubin Paterniti Gonzalez Rizzo Kaufman, LLP

Deep Chopra

Michael Gherardi

Sang Young Han
Dilworth & Barrese, LLP

Madison Hays

Joshua Douglas Kelner
Kelner & Kelner

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Meghan E. Paola

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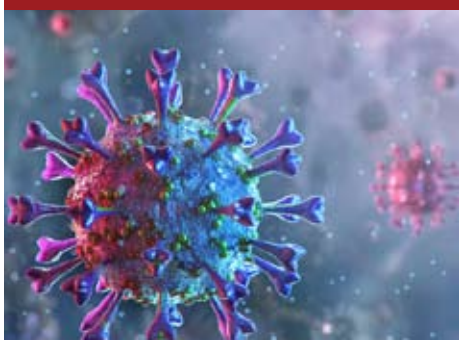
Robert Christopher Shea

Adam Mark Tavares

Yaear Weintroub

FOCUS: COVID-19



How Courts Are Applying NY's COVID-19 Liability Immunity Laws

Ira S. Slavit

When COVID-19 struck, heroes of all stripes put their health and even their lives at risk to treat afflicted patients. With the laudatory goal of protecting those individuals, New York State, first through Executive Order and then by statute, implemented laws that immunized individual and institutional health care providers from claims of ordinary negligence. This article will review the multiple versions of immunity from liability that have been enacted since the COVID-19 onslaught and judicial decisions that have interpreted them.

Immunity from liability was initially provided by Executive Order 202.10, and was codified in Public Health Law Article 30-D (§§3080–82), The Emergency Disaster Treatment Protection Act ("EDTPA"). Immunity applied retroactively to March 7, 2020, the date a Disaster Emergency in New York State was declared.

PHL §3082(1), titled "Limitation of liability," established a three-prong test to secure immunity from any civil or criminal liability:

> (a) the health care facility or health care professional is arranging for or providing health care services pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law
>
> (b) the act or omission occurs in the course of arranging for or providing health care services and the treatment of the individual is impacted by the health care facility's or health care professional's decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the state's directives
>
> (c) the health care facility or health care professional is arranging for or providing health care services in good faith.

Under the original EDTPA, immunity could exist regardless of whether the acts or omissions were related to the treatment of COVID-19. This broad immunity was narrowed on August 3, 2020, when Section 3082 was amended to provide immunity from liability to health-care professionals only in the course of treating or caring for patients who had confirmed or suspected COVID-19. Article 30-D was repealed effective April 6, 2021.

This leaves two distinct time periods of immunity: March 7, 2020, through August 2, 2020, when immunity can exist regardless of whether the patient has COVID-19; and August 3, 2020, through April 6, 2021, when the patient must have had either confirmed or suspected COVID-19.

Decisions Denying EDTPA Immunity

As of this writing, no New York State appellate or federal courts has considered the EDTPA. Several state trial court decisions, however, have confronted the issue.

These decisions bear some similar characteristics. All decide a defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(7) on the ground that they are entitled to qualified immunity under Sections 3080 and 3082. Defendants thus face the high burden of conclusively establishing that the complaint does not state a cause of action. Also, the acts and omissions alleged in the pleadings occurred between March 7, 2020, and August 3, 2020, when EDTPA immunity was its broadest.

The key issue in all the decisions concerns whether the pandemic impacted the health care facility's or professional's decisions or activities to warrant immunity from liability. Most note that the statute does not qualify how treatment must be affected—positively, negatively, or otherwise—but merely requires that treatment be impacted. The decisions also observe that a statute conferring immunity must be strictly construed, and that the party seeking its protections must conform strictly with its conditions.

In *Pena v. Gupta*, the plaintiff alleged that breast cancer was not timely diagnosed and treated.[1] The defendants submitted affidavits stating that routine care rendered to plaintiff was affected in that they were providing telemedicine services instead of in-person outpatient physician services, and were providing in-patient care and treatment only to acutely ill hospitalized patients to cope with the sharp surge in hospitalizations.

Bronx County Supreme Court Justice Doris M. Gonzalez held that the defendants had not met their burden because although their ability to see patients in person was ostensibly impacted, it is not clear that that fact "affected" the treatment of the plaintiff such that her condition could not be properly diagnosed and treated, either by returning phone calls, making a referral to other providers, or arranging telemedicine services. The defendants have filed a Notice of Appeal.

Robertson v. Humboldt House Rehabilitation & Nursing Center involved a resident at the defendant's nursing home from March 23 to April 29, 2020, who became infected with and died from COVID-19 while a resident there.[2] Plaintiff contended that the defendants failed to address whether it was "arranging for or providing Erie County health care services in good faith" as PHL 3082(1)(c) requires. Supreme Court Justice E. Jeannette Ogden denied the defendant's motion to dismiss, holding that no evidence was offered to establish the nature and extent of the care plaintiff's decedent received or how, if at all, it was impacted by the facility's response to COVID-19 or that it was acting in good faith. An issue vigorously argued in the attorney's affirmations, though barely touched on in and not the apparent basis for the court's decision, was whether the repeal of Article 30-D was retroactive. The defendant is appealing the decision.

Other courts evaluating whether a provider's or facility's response to the COVID-19 emergency impacted treatment have focused on whether the complained of acts and omissions were connected to the harm the plaintiff suffered, as contrasted with COVID-19 related changes that did not bring about the alleged injury.

In *Matos v. Chiong*,[3] the plaintiff alleged that the defendants failed to properly treat a patient who was admitted to the defendant hospital on March 11, 2020, two weeks status-post a hysterectomy, with nausea, vomiting and abdominal pain, and an admitting diagnosis of pelvic abscess.

Bronx Supreme Court Justice John R. Higgitt denied the motion, noting that the defendants did not point to a single instance in the 780 pages of records they submitted that revealed that the pandemic or defendants' response thereto had any impact on any aspect of plaintiff's care and treatment. The court further noted that neither of the defendants' two affidavits "directly addressed, let alone established, whether the care rendered *to plaintiff*—not merely any care they rendered [during the declared emergency] … was in any way impacted by the pandemic or the moving defendants' response thereto."[4]

Justice Higgitt applied the same reasoning and reached the same result in *Townsend v. Penus*.[5] It was alleged therein that the defendant failed to institute thrombotic therapy (IV-tPA) to a patient in its emergency department whom the hospital had determined was suffering from an ischemic stroke.

Similarly, dismissal was denied in *Spearance v. Snyder*, wherein plaintiff alleged that basal cell carcinoma was not properly and timely diagnosed, and defendant contended that treatment was affected because telemedicine was being utilized.[6] Onondaga Supreme Court Justice Gerard J. Neri denied the motion, holding that the use of telemedicine could not be looked at in a vacuum and there was no proof that its use altered the physician's treatment of plaintiff.

Decisions Granting EDTPA Immunity

An opposite result was reached by Bronx Supreme Court Justice Mitchell J. Danziger in *Hampton v. City of New York*, wherein a delay in performing an open reduction with internal fixation for a tibial plateau fracture was alleged.[7]

In support of their motion, NYCHHC submitted the affidavit of the Chief of Orthopedic Surgery at Lincoln Medical Center who stated that Lincoln was prohibited from performing elective surgeries under penalties of having its operating certificate revoked, was required to divert all available resources to the pandemic, and that its orthopedic staff had been reassigned to deal with COVID-19. This proof was held sufficient to support granting defendants' motion to dismiss. Parenthetically, the court dismissed plaintiff's claim that the defendants kept inaccurate medical records because the Governor's Executive Order No. 202.10 conferred absolute immunity for the purported failure to maintain accurate records during the pandemic.

Dismissal was also granted in *Crampton v. Garnet Health*, in which plaintiffs' allegations included that Ms. Crampton sustained injuries including pressure ulcers and fungal dermatitis while a resident at the defendant nursing home from May 21 to July 1, 2020, mostly due to staffing insufficiencies including in qualifications, training and supervision.[8]

An affidavit from its Director of Nursing submitted in support of its motion stated that the plaintiff's "medical treatment was impacted because she was required to undergo COVID-19 testing, monitoring and temperature checks; her medical treatment was impacted because staff time with residents was reduced by the staff's need to comply with COVID-19 PPE requirements; and her treatment was impacted because COVID-19 prevention measures resulted inter alia in her communal activities and meals being stopped, her visitation being curtailed, and her being kept in her room with the door closed."[9]

Orange County Supreme Court Justice Catherine M. Bartlett, in finding this proof sufficient to warrant granting the motion, stated:

> The court observes in this regard that Montgomery need not have demonstrated that Ms. Crampton's treatment was impacted in some particular manner different from that of other residents. Nor must Montgomery have demonstrated any particular manner in which her medical treatment was adversely affected. Montgomery's evidence unequivocally demonstrates the basic linkage—between the facility's COVID-19 measures and the treatment of Ms. Crampton—required per PHL §3082(1)(b) for Section 3082 immunity to attach.[10]

Thus, in direct contrast to other cases discussed herein, under *Crampton's* rationale no direct link between a health care provider's COVID-19 response and their acts and omissions that allegedly harmed the plaintiff need be established to secure immunity from liability. Any change to the provider's practice in response to COVID-19, such as using telemedicine visits as in *Pena* and in *Spearance*, alone warrants the action's dismissal.

Conclusion

Bear in mind that these decisions dealt only with CPLR 3211 motions. These issues will be revisited on more fully developed records in summary judgment motions. Nevertheless, future decisions could adopt any of these different approaches.

Whether appellate courts employ the broader standard of *Crampton* or the narrower one of *Pena*, *Matos*, and *Townsend* may be more important than the results reached in individual cases. Perhaps appellate courts will consider health care providers to be overreaching in seeking immunity from their own negligence when the mal- or non-feasance alleged was not related to the pandemic.

Possibly relevant is a report by the New York Attorney General entitled "Nursing Home Response to COVID-19 Pandemic," dated January 30, 2021, found widespread lack of compliance with infection protocols by health care facilities at the height of the pandemic and that for-profit nursing homes had misappropriated public funding to increase their own profit instead of investing in higher levels of staffing and/or PPE.

Or perhaps courts will accept that in March and April of 2020 the legislature intended to confer extraordinarily broad immunity, in the face of an extraordinary and unprecedented in our lifetimes public health emergency, marked by images of refrigerator trucks parked outside of hospitals and daily neighborhood displays of appreciation for the health care workers facing the COVID-19 pandemic. The cases cited herein demonstrate that defendants are more likely to fare better when the alleged acts and omissions were made by institutions than by individual physicians.

1. 802448/2021E, 2021 WL 6777533, (Sup.Ct., Bronx Co. Oct. 29, 2021).
2. 805232/2021 (Erie Co. Mar. 14, 2022), NYSCEF 32.
3. 2020 N.Y. Slip Op. 34586(U),2020 WL 12738871 (Sup.Ct., Bronx Co. Dec. 9, 2020).
4. *Id.* (emphasis in original).
5. 2021 N.Y. Slip Op. 32375(U), 2021 WL 5498045 (Sup.Ct, Bronx Co. June 1, 2021).
6. 73 Misc.3d 769 (Sup.Ct., Onondaga Co. 2021).
7. 2021 N.Y. Slip Op. 32327(U), 2021 WL 6497567 (Sup.Ct., Bronx Co. June 3, 2021).
8. 73 Misc.3d 543 (Sup.Ct., Orange Co. 2021).
9. *Id.* at 559–60.
10. *Id.* at 560.

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

FOCUS: LAW AND AMERICAN CULTURE

Fact, Fiction, and *the French Connection*

Rudy Carmenaty

At the 44th annual Academy Awards, the evening's big winner was *The French Connection* (1971). Based on Robin Moore's 1969 book, this unflinching New York based crime drama received a total of five Oscars, including Best Picture and Best Actor.[1] Not bad for a film with a meager budget of $1.8 million, which wound up grossing over $52 million in its initial release.[2]

Employing a cinematic style described as "*induced documentary,*" the movie took dramatic license with actual events shading the truth by cleverly blending fact with fiction.[3] The French Connection depicts, in vivid and realistic detail, undercover police work and the compelling personalities who inhabit both sides of the law.

The movie was based on an actual 1962 drug bust that resulted in the interdiction of one-hundred pounds of pure heroin with a then-estimated street value of $32 million.[4] Most telling of all, in 1972, the very same heroin seized ten years earlier was taken from the NYPD property clerk's office never to be seen again.

The actual French Connection case was as captivating as anything put on the screen. One lesson that can be drawn from the book, the film, and the events which inspired them, is that the cops, by necessity, must be as ruthless, as vicious, and as uncompromising as the mobsters they are chasing. Another lesson is that any victory in the war against drugs is at best illusory.

The story behind the French Connection begins with NYC Narcotics Detective Eddie Egan. Gene Hackman's character, Jimmy "Popeye" Doyle, was based on Egan whose nickname was "Popeye". Egan was a larger-than-life figure responsible for more than 8,000 arrests during his fifteen-year career.[5] After he retired from the NYPD, Egan became an actor.

The quintessential New Yorker, the Queens-born Egan was orphaned at the age of twelve, played minor league ball for the Yankees, and did two stints in the Marine Corps.[6] Popeye, as depicted by Hackman, and as lived by Egan, is a tough-as-nails cop who will stop at nothing in his pursuit of criminals.

Obsessive and fearless, his crude manner belies his complexity. On the one hand he is single-minded, incorruptible, and loyal. On the other hand, he can be brutal, insensitive, and bigoted. Working out of Harlem, Egan and Salvatore "Sonny" Grosso, his partner, cracked the French Connection case. Grosso was the temperamental opposite of the mercurial Egan.

Quiet and morose, Grosso provided a calming effect on his combative partner. Grosso would also retire from the police force for work in film and television, mostly behind the scenes as a producer. Author Robin Moore realized early on that the key to the story was the relationship between these two men and how each complimented the other.

The French Connection was a four-decade long international criminal conspiracy orchestrated by Corsican mobsters wherein heroin was trafficked from France for sale and distribution in North America. At its height, it supplied eighty percent of all of the heroin consumed in the United States.[7] Egan and Grosso intercepted a shipment of heroin from Marseille to New York.

The French seaport of Marseille provided the nexus for the international opium trade. Poppy was smuggled from Turkey, refined into heroin by labs in Marseille, and shipped to New York.[8] The heroin from Marseille was of the highest quality in terms of its purity. Once pure grade heroin was cut and sold as individual units, its street value grew exponentially.

The mastermind behind this operation was the debonaire Corsican mobster Jean Jehan. His purpose was to facilitate the deal whereby American mobsters would purchase a hundred pounds of heroin for a sale price of $500,000.[9] It was Jehan who came up with the idea of using the car of a French TV-personality, Jacque Angelvin, to smuggle the drugs into the U.S.

Jehan was an elusive figure who was never tried for his crimes on either side of the Atlantic. He had never lost a shipment until 1962 and was able to elude capture by fleeing to Montreal.[10] There he had extensive contacts and ultimately returned safely to Marseille. Despite there being open warrants for his arrest, he operated with considerable impunity within France.

In 1967, he was held and interrogated in Paris but was soon released.[11] William Friedkin, who directed the film, has speculated that Jehan may have been involved with the Free French Forces under Charles De Gaulle. Because of Jehan's service during World War II, French authorities refused to honor any arrest warrants or requests for his extradition.

Jehan never returned to the United States. He purportedly lived a comfortable life befitting his position in the Corsican Mob. He died in bed peacefully of old age. Proving that there is no honor among thieves, when Jehan fled New York he is said to have left with the $500,000.[12]

Jehan's American buyers were Sicilian mobsters. The New York Mafia satisfied the American market for illicit narcotics. Speculation is that the French sold their drugs only to the Italians in the U.S. and in turn the Italians would refrain from dealing drugs in Europe, a possible violation of the anti-trust laws if agreed to in the legitimate world.[13]

Pasquale (Patsy) Fuca was Jehan's American buyer. For Fuca the transaction was a family affair which involved his brother Tony, their father Joe and implicated Patsy's wife Barbara. Patsy and Barbara operated a grimy luncheonette in Brooklyn as a cover. A small-time hood, this score, if it had been successful, would have enabled him to move into the big leagues.

Patsy ultimately pled guilty to three felony counts: possession of narcotics, conspiracy to possess narcotics, and conspiracy to sell narcotics.[14] He was sentenced to seven to fifteen years.[15] His brother Tony got sentenced to five to eleven years.[16] The elder Fuca and wife Barbara were able to plead to misdemeanors and both got suspended sentences.[17]

Both the book and the film could serve as a primer on detective work. The case stemmed from a chance encounter between Egan and Fuca at the famed Copa Cabana nightclub. Unlike the shoot-out at the climax of the movie, the deal was in-fact consummated, the drugs were exchanged, and discovered later in the Bronx home of Patsy's father.[18]

The ultimate twist in the French Connection story concerns the final whereabouts of the heroin. The heroin that was seized in 1962 had been sitting in storage as evidence following its confiscation. On January 4, 1972, someone posing as a police officer gave a bogus shield number, signed in and out of a ledger book, leaving with one hundred pounds of the stuff.[19]

The 'French Connection' heroin was pinched from the Property Clerk's Office at 400 Broome Street in lower Manhattan.[20] By then, with inflation, the value of the narcotics had risen to $70 million.[21] The theft took place at the very same time that the film was playing in movie theaters across the city and only a few months before the Academy Awards ceremony.

To the embarrassment of the NYPD brass, no one was ever indicted for the theft of the 'French Connection' heroin. It is widely believed that police officers were bought-off to secure admittance to the property room.[22] Ultimately the heroin found itself in the arms of its intended victims, only a decade later than was originally intended by Jehan and Fuca.

The French Connection dramatizes an almost forgotten era in American law enforcement. But it was not so much a romantic time as it was an ambivalent one. The good guy, Egan, was something of a slob but he was authentic. The villain, Jehan, was suave, sophisticated, and totally corrupt. The contest between these two men was existential in nature.

Egan and Grosso managed the single largest drug bust of its time. It was an incredible achievement, alerting the entire country to the scourge of the international drug trade. Yet their triumph was short-lived. After all, Jehan escaped. Egan and Grosso left the NYPD for the movies. The heroin wound up on the streets upon being stolen from the property room.

The one thing of lasting value that remains may well be the film itself. That is the true legacy of the French Connection case. *The French Connection* is one of the great New York movies and, for better or for worse, was instrumental in spurring the War on Drugs. Perhaps, that is triumph enough.

1. *The French Connection* received Oscars for Best Picture (Phillip D'Antoni), Best Actor (Gene Hackman), Best Director (William Friedkin), Best Adapted Screenplay (Ernest Tidyman), Best Film Editing (Jerry Greenberg).
2. Oscar Season Chat #4: A Conversation with Producer (and Legendary Cop) Sonny Grosso at https://www.popoptiq.com.
3. Matthew Jackson, *14 Fascinating Facts About The French Connection,* (February 3, 2020) at https://www.mentalfloss.com.
4. Thomas D. Claggett, *William Friedkin Films of Aberration, Obsession and Reality*, 129 (1st Ed. 2003).
5. David M. Herszenhorn, *Eddie Egan, Officer Who Inspired 'French Connection' Dies at 65*, New York Times (November 6, 1995) at https://www.nytimes.com.
6. *Id.*
7. Larry Collins and Dominique Lapierre, *The French Connection—In Real Life*, New York Times (February 6, 1972) at https://www.nytimes.com.
8. Alexandre Marchant, *The French Connection: Between Myth & Reality*, Vingtième Siècle. Revue d'histoire (2012) at https://cairn-int.info.
9. *Story Behind 'French Connection'*, New York Times (December 15, 1972) at https://www.nytimes.com.
10. *Id.*
11. Robin Moore, *The French Connection*, 308 (1st Ed. 1969).
12. Moore, supra, 308.
13. Kyra Allessandrini, *When the Sicilian Mafia Wanted Heroin, They Had to Ask the Corsicans*, The Journalist as Historian (April 27, 2020) at https://www.jounalist-historian.com.
14. Moore, supra, 303.
15. *Story Behind 'French Connection'*, supra.
16. *Id.*
17. Moore, supra 308.
18. Moore, supra 296.
19. David J. Krajicek, *Justice Story: How 'French Connection' heroin went missing from NYPD Property Clerk's Office*, New York Daily News ((January 1, 2012) at http://nydailynews.com.
20. *Id.*
21. *Id.*
22. *Id.*

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

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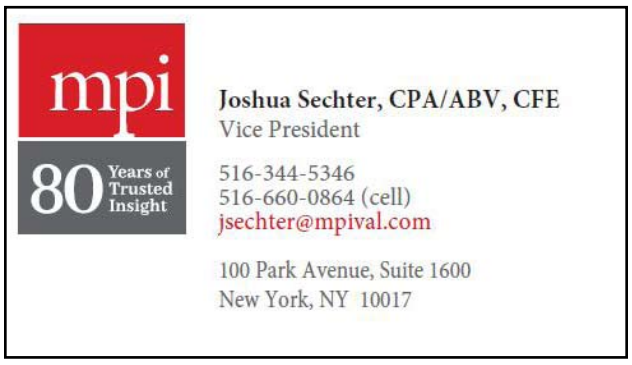

NCBA Corporate Partner Spotlight

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122nd Annual Dinner Gala...

Continued from Page 1

Thank you to all those who supported our 122nd Annual Dinner Gala at the Long Island Marriott. Congratulations to Distinguished Service Medallion Recipient Chief Judge DiFiore and our Fifty, Sixty, and Seventy-Year Honorees for their dedication to the legal profession.

NCBA Annual Meeting 2022

Photos By: Hector Herrera

The Annual Meeting of the Nassau County Bar Association was held on May 10, 2022. We would like to thank and congratulate our outgoing Board of Directors, Committee Chairs and Co-Chairs, Michael H. Masri on his receipt of the 2022 Director's Award, and NCBA Past President Martha Krisel on her receipt of the Past President's Award.

We sincerely thank and acknowledge our outgoing President Gregory S. Lisi for his outstanding leadership and dedication to the NCBA throughout his term.

In Brief

Marci Goldfarb has joined Schwartz Ettenger, PLLC serving as Senior Counsel.

Bond, Schoeneck & King is pleased to announce that effective June 1, 2022, the lawyers of Lazer, Aptheker, Rosella & Yedid, a Long Island-based law firm, will join Bond.

The Equipment Leasing and Finance Association (ELFA) has awarded **Marc L. Hamroff**, Managing Partner of Moritt Hock & Hamroff LLP, the Edward A. Groobert Award for Legal Excellence.

Michael T. Schroder, Partner at Schroder & Strom, LLP, is pleased to announce that **Jeremy May** has joined as an Associate Attorney.

Jaspan Schlesinger LLP co-managing partner **Steve Schlesinger** was recently honored by the Maurice A. Deane School of Law at Hofstra University as a Hall of Fame honoree. Partner **Simone M. Freeman** is the incoming Vice-President of the Women's Bar Association of the State of New York (WBASNY).

Ronald Fatoullah of Ronald Fatoullah & Associates was honored by *Schneps Media* as a Power Lawyer of New York for 2022 as an Elder Law and Estate Planning Attorney at their gala in May. The firm also celebrated National Elder Law Month and National Older Americans Month by hosting a webinar with the Administration for Community Living, the Justice Center for Protection of People with Special Needs, and the NY Area Agency on Aging Association.

Marian C. Rice

Karen Tenenbaum, LL.M. (Tax), CPA, tax attorney, discussed her experience as an entrepreneur during her interview with Assuanta Howard on Uplevyl, an app for professional women. Karen's interview on the "Mitlin Money Mindset" podcast was recently released. She spoke about NYS telecommuting, residency rules, as well as other federal and state tax issues. Her article, "Four New York Sales Tax Traps to Avoid," was recently featured in the *Legal Brief* by the SCBA. Karen moderated "Employee Tax Retention Credit" by Rebecca Shepard at the SCBA Tax Law Committee. She also moderated "Marketing Planning—Reach Your Goals by Reaching the Right Clients" by Christopher Anderson at the SCBA Academy of Law.

Hon. Steven M. Jaeger (Ret.) has joined the Jansen Group as a neutral.

Capell Barnett Matalon & Schoenfeld LLP Partner **Stuart Schoenfeld** has been elected Vice President of the LGBT Network, a non-profit organization that serves as a support system for the LGBT community in Long Island and Queens. Stuart was also a guest speaker on the *Apple* Podcast *the Confident Retirement's* episode "Careful Planning for Special Needs and Medicaid." Partner **Robert Barnett** is speaking at the Chinese American Society of CPAs on Stock Option Reporting. We are also pleased to announce that Partner **Gregory Matalon** published the article "Estate Planning Opportunities in a Volatile Market."

Joseph Milizio, Managing Partner of Vishnick McGovern Milizio LLP (VMM) was appointed to the Suffolk County LGBTQ Advisory Board. Mr. Milizio was also named a Power Lawyer by *Schneps Media* for the second consecutive year on May 19. VMM was proud to sponsor the Nassau County Office for the Aging annual conference & luncheon, held on May 19. Partners **James Burdi** and **Constantina Papageorgiou** of VMM's Wills, Trusts, and Estates and Elder Law practices represented the firm. Also on May 19, Ms. Papageorgiou led a seminar on estate planning at the Women in Surgery Collaborative event at NYU Langone Hospital—Long Island.

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

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

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

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

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REFLECT AND CONNECT

June is Post Traumatic Stress Disorder Awareness Month

PTSD, which stands for post-traumatic stress disorder, occurs in people after they have experienced a particularly traumatic event like war, violent physical/sexual/verbal assault, accidents, etc. Symptoms include depression, anxiety, nightmares, paranoia, insomnia, disturbing thoughts, and much more. PTSD can only develop after you go through or see a life-threatening event. It's normal to have stress reactions to these types of events, and most people start to feel better after a few weeks or months. This mental disorder is highly treatable, but due to the lack of knowledge around it as well as the stigma attached to seeking mental help, many choose to ignore the problem.

There are currently about 8 million people in the United States with PTSD. Lawyers are also at risk for experiencing PTSD and/or some of the symptoms of PTSD, particularly immigration, child welfare, domestic relations, public defense, family law, and criminal defense lawyers.

Even though PTSD treatments work, most people who have PTSD don't get the help they need. It is imperative to get the word out that there are successful treatments available. If you think you or someone you know may have PTSD, scan the QR code on the right to take a five item screening test for PTSD.

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*The NCBA Lawyer Assistance Program is directed by Beth Eckhardt, PhD, and the Lawyer Assistance Committee is chaired by Jacqueline A. Cara, Esq. This program is supported by grants from the NYS Office of Court Administration. *Strict confidentiality protected by § 499 of the Judiciary Law.*

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Chair, Employment & Labor Practice Group

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