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123RD ANNUAL DINNER GALA

SATURDAY, MAY 13

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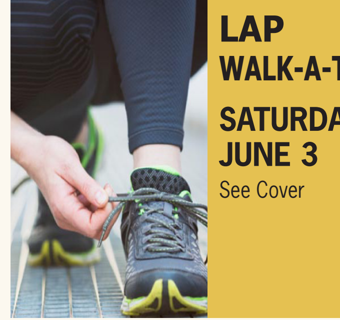

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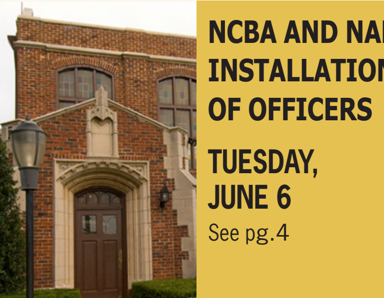

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Vicarious Trauma: What Lawyers Need to Know

By: Beth Eckhardt, LCSW, PhD

Vicarious trauma is often thought of as an occupational hazard for first responders police officers, emergency medical technicians, nurses, and other first responders. However, a growing body of evidence confirms that lawyers, judges, and law students are also at risk of experiencing vicarious trauma. Attorneys who represent immigrants, children, and victims of domestic violence, as well as criminal defense attorneys, law guardians, and family court attorneys are at heightened risk for vicarious trauma. These attorneys often are in deep and direct contact with clients who have had devastating life experiences and must relive these traumatic experiences as part of their case.

The terms vicarious trauma, secondary trauma, burn out and compassion fatigue are often used interchangeably. While definitions of these differ, the symptoms often overlap and can cause significant interference in one's wellbeing and ability to perform their work ethically and effectively. The term vicarious traumatization (VT) was coined in 1995 by researchers seeking to describe the profound, cumulative shift in world view that occurs in helping professionals when they work with individuals who have experienced trauma. These professionals notice that their fundamental beliefs about the world are altered and possibly damaged by repeated exposure to traumatic material.

For example, a domestic violence shelter worker may stop being able to believe that any relationship can be healthy. A child abuse investigator may lose trust in anyone who approaches their child. 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.

Secondary trauma (ST) is characterized by symptoms similar to those experienced by people with Post Traumatic Stress Disorder (PTSD) including fatigue, irritability, and agitation that can occur immediately after exposure to another person's expression or experience of trauma.

Compassion fatigue is defined as deep emotional exhaustion from repeated exposure to trauma that diminishes one's ability to feel empathy.

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2023 Nassau County Bar Association

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"You may not always end up where you thought you were going, but you will always end up where you are meant to be."

(A quote ascribed to Jessica Taylor, British Feminist Author)

From the President

Rosalia Baiamonte

As I sit down to write this, my last President's Column, I reflect upon the past 11 months in service of this great bar association that I hold so dear.

I am immensely proud of the initiatives that have come to fruition. First among them was my desire to raise awareness and funding opportunities for the Nassau County Bar Association's Lawyer Assistance Program. This included an educational series for the Justices of the Nassau County Courts; hosting the first fundraising event at domus titled "*An Evening with Brian Cuban*" which also served to honor the invaluable contributions made to LAP by Henry Kruman and Jackie Cara, Past Chair and current Chair, respectively, of NCBA LAP Committee; securing a first-time grant from the New York Bar Foundation in the sum of $7,500.00 to assist LAP; and, after many months of diligent pursuit, securing a commitment from the Nassau County Executive for a minimum $100,000 grant to enable NCBA to expand LAP's mission of providing confidential assistance to an ever increasing number of attorneys who are struggling with addiction and mental health issues which, in turn, will serve to protect our profession and the community at large. Moreover, on June 3, NCBA LAP will launch its first annual Walkathon in partnership with Hofstra Law School—***"Take the Pledge, Take a LAP,"*** the net proceeds of which will exclusively benefit the Lawyer Assistance Program.

Of equal importance was the implementation of critical diversity initiatives, including the formation of the President's Panel on Affinity Bar Outreach, the creation of the first Asian American Attorneys Section of the NCBA (spearheaded by Jennifer Koo), as well as the founding of the NCBA Karabatos Pre-Law Society, which seeks to promote greater diversity in the legal profession and NCBA membership by assisting local college students from traditionally underrepresented groups to achieve law school admission. The Pre-Law Society includes mentoring, programming, as well as opportunities for internship placements for both college student mentees and their law school student mentors, as well as scholarship opportunities due to the generosity of Past President Elena Karabatos and our corporate partner, Webster Bank. NCBA's diversity initiatives will be well-served and better informed by NCBA's first membership survey which also launched this bar year.

NCBA formed a cutting-edge Cyber Law Committee, to be Co-Chaired by Thomas Foley and Nicholas G. Himonidis, as well as the first ever Law Student Committee, Chaired by NCBA's very own Bridget Ryan, to meet the special needs of our ever-burgeoning law student members. Of equal value was the reconstitution of NCBA's Financial Oversight Committee, whose members (Past Presidents Stephen Gassman and Elena Karabatos, as well Directors Ellen Tobin, Jerome Scharoff, and Michael Antongiovanni, who skillfully served as its Chair) were essential in guiding NCBA's strong fiscal initiatives and successful investment strategies.

NCBA merchandise was launched this year with a line of comfortable and cozy zip-up fleeces for the Fall and Winter; next up, Spring-time windbreakers!

NCBA was host to several VIPs, among them, District Attorney Anne T. Donnelly; former federal prosecutor and retired federal Judge, Hon. John Gleeson; Appellate Division, Second Department Associate Justices, Hon. Mark C. Dillon, Hon. Randall T. Eng, Hon. Angela G. Iannacci, and Hon. Hector D. LaSalle; Hon. Norman St. George, Deputy Chief Administrative Judge for Courts Outside New York City; and Hon. George Silver, former Deputy Chief Administrative Judge for New York City Courts and newly appointed member of the NYSBA's Committee on Diversity and Inclusion.

I greatly enjoyed the numerous opportunities afforded to me to represent this esteemed Bar Association both inside and outside Domus, including BBQ at the Bar; the WE CARE Golf & Tennis Classic; WE CARE Tunnel-to-Towers; Judiciary Night; Wassail; Fair Housing Event; WE CARE's annual grant ceremonies; WE CARE Dressed to a Tea; Pro Bono Recognition Reception; Law Day Dinner; the Annual Installation of Officers for the Magistrates Association, LIHBA, the Columbian Lawyers, and Jewish Lawyers Association; Legislators breakfasts; Internship breakfasts; Law Student Lunches organized by Hofstra University, the Judicial Induction Ceremonies and Portrait Unveilings held in Nassau County Supreme Court; the Hon. Elaine Jackson Stack Moot Court Competition Finals; the NYS High School Mock Trial Tournament Finals; as well as the numerous committee meetings, special events, and Nassau Academy of Law programs held at Domus. I look forward to hosting our upcoming 123rd Annual Dinner Gala on May 13 and the June 6 Installation.

I am grateful for the opportunities afforded to the NCBA for collaborations with other bar organizations, especially, the Suffolk County Bar Association (Hon. Vincent J. Messina, President), Long Island Hispanic Bar Association (Veronica Renta Irwin, President), Nassau County Women's Bar Association (Cherice P. Vanderhall-Wilson, President), and Amistad Long Island Bar Association (Kevin Satterfield, President).

I am also grateful for the support of Hon. Vito M. DeStefano, Administrative Judge of Nassau County, whose partnership and dedication to many initiatives has continued to strengthen the enduring bond between the bench and the bar which is a hallmark of our association.

To the members of my law firm, Stephen Gassman, Josh Gruner, Karen Bodner, Byron Chou, Dari Last and Adina Phillips, thank you for the enduring support you have shown me this year, and every year.

I wish to thank the members of 2022-2023 NCBA Board of Directors, for their support, engagement, and encouragement, as well as the Committee Chairs, Co-Chairs, and Vice Chairs of the various NCBA committees for their efforts which brought creativity and value to their members. Special thanks to the NCBA Past Presidents, whose wisdom and experience was a constant source of information and inspiration. In particular, I wish to extend my sincerest gratitude to Past Presidents Christopher McGrath, Marian Rice, William Savino, Peter Levy,

Martha Krisel, Dorian Glover, Gregory Lisi, Elena Karabatos, and Stephen Gassman, who indulged my every request for assistance.

My admiration to Susan Katz Richman, for her extraordinary and successful leadership as Dean of the Nassau Academy of Law; to Elizabeth Eckhardt, for her compassionate and devoted leadership as Director of NCBA Lawyer Assistance Program; to Robert Nigro, for his unshakeable leadership as Administrator of Nassau County Assigned Counsel Defender Plan; and to Madeline Mullane, for her indefatigable and enthusiastic leadership as Director of Pro Bono Activities and Mortgage Foreclosure Consultation Clinics.

My profound gratitude to Elizabeth Post, whose expert leadership as NCBA Executive Director is integral to the enduring success of this great association. Without her assistance and partnership, the presidential initiatives which have come to fruition this year simply would not have been possible.

My thanks to all the NCBA staff, whose dedication to serving our membership and the public is second to none. In particular, I wish to extend my profound gratitude to Stephanie Pagano and Patti Anderson, for their professionalism and dedication to the proper administration of their many NCBA job titles, and to Ann Burkowsky and Bridget Ryan, whose enthusiasm, talent, commitment and humor are the underpinning of every NCBA and WE CARE special event. And to Hector Herrera who is, quite literally, *Everything, Everywhere, All at Once!*

Special thanks to the family of NCBA staff for all of their hard work and dedication; Cheryl Cardona, Omar Daza, Christina Versailles, Carolyn Bonino, Nicole Garzon, Jody Maze, and Alvarez Faison. Much luck to Stephanie Ball, the newly appointed Director of the Nassau Academy of Law.

My thanks as well to Jeff, Trish, Gary, and the entire staff at Esquire Catering for their efforts in service to our members.

To my fellow Officers on the Executive Committee, Immediate Past President Gregory S. Lisi, President-Elect Sanford Strenger, Vice President Daniel W. Russo, Treasurer James P. Joseph, and Secretary Hon. Maxine Broderick—your enduring support and friendship is a gift I take with me.

And to the incoming administration under the Presidency of Sanford Strenger, I extend my best wishes for a successful bar year!

2023 Installation of NCBA and NAL Officers and Directors

Tuesday, June 6, 2023 6:00 PM at Domus

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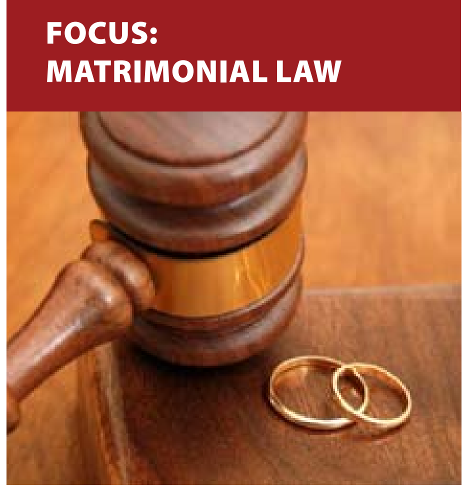

Interim Support Awards: Time for A Practical Approach

Nancy E. Gianakos

Time and again, matrimonial courts are confronted with interim support applications during the pendency of a divorce action that call for a temporary budget solution that may remain in effect for years while custodial and equitable distribution issues are negotiated and debated. The applicable statutes for a determination of temporary maintenance and child support are found in the New York Domestic Relations Law ("DRL"), DRL §236 (5-a), and DRL §240 (1-b), respectively.

Those provisions reflect a social policy of equitable distribution of income born of political compromise as to what is deemed appropriate for a New York family during the pendency of a matrimonial action. Application of these statutes and the guidelines set forth therein, create more questions than answers, underscored by the plethora of interim applications. A decision that results in an overtaxed payor and a complacent payee may inadvertently drive costly litigation for the parties. This is hardly a paradigm for an amicable resolution given the state of the financial affairs of most litigants who are in the throes of a divorce.

Statutory Constraints

Discretionary spending varies from family to family—golf memberships, vacations, sports clubs, extracurricular activities, hobbies, summer camp, etc. The parties whether—seven figure entrepreneurs or modest W-2 wage earners—often fund their marital lifestyle by deficit spending their way to luxury living; monthly expenses exceed net after tax income.

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Automatic Orders that take effect upon an action's commencement limit a party's use of marital assets nor is encumbering martial property permissible without the other party's consent or further orders of the court.[1] Illiquid assets cannot readily remedy substantial credit card debt and staggering mortgage payments. Adding to this scenario that ne household is or may soon be two during the pendency of the action and is funded with the same income stream, underscores the complexity of a determination handed over to a trial court with limited resources besieged with motions.

Income and Suspect Expenses

Early in an action (typically when the pendente lite application is made), all the income to be considered by a court in a support determination may not be readily apparent. Parties may fund their lifestyle from a variety of sources—income earned via employment and/or investments, familial gifts that are recharacterized as "loans," credit lines, trust income, credit cards, survivor settlements, etc., and the not so legitimate.

Relying on prior years' tax returns to determine income often is not necessarily indicative of the parties' present financial situation or of all the income available for determination of interim support. Though income may not be taxable and escapes reporting on a party's return, such income may nevertheless be includable in "gross income" for interim support purposes. The statutory definition of "gross income" is all encompassing.[2] In addition, payment of a party's expenses by a generous parent, may be considered "income" to the recipient resulting in an imputation of income to that party by the court in a determination of a support award for maintenance and/or child support.

Further, complicating the determination of income in a pendente application are the "business expense" deductions of a party, a haven of opportunity to reduce one's income. Though presumably such expenses were accurately reported for all the years the parties filed jointly, the very same expenses are suddenly suspect and "overstated" in a *pendente lite* application. The defense of "innocent spouse" in a U.S. tax court bears a heavy burden of proof by the claimant; arguably, when the same defense is raised in a matrimonial action, no lesser burden should be afforded the claimant who presumably derived benefits from the allegedly understated income as did the "accused spouse."

Similarly the living expenses of the parties are microscopically scrutinized by each litigant when for years, they enjoyed a certain "marital lifestyle" together. The party who customarily handled marital finances is frequently painted with allegations of "mismanagement," "marital waste," and "fiduciary dereliction of duty." However, those making such claims beset with selective retention or a blind eye, soon discover their affliction is no excuse; at some point they stand accountable as well, though perhaps, escaping initial culpability in a pendente lite application.

What should be apparent is that it simply is not arithmetically possible to maintain the historic martial lifestyle given the added cost of litigation and in many instances, the expenses of a second household during the pendency of an action. The adage "two can live cheaper than one" rings true.

The 50/30/20 Rule

Many litigants are unaccustomed to "living within their means." In search of a budgetary guide, a common rule of thumb is the "50/30/20 rule," according to Daniel C. Shaughnessy, Managing Director and Senior Wealth Advisor at Wilmington Trust, of the monthly net income, 50% is allocated to needs, 30% to wants and 20% to debt/savings. Many parties confront the issue head-on for the first time in a matrimonial proceeding under compulsory disclosure as they prepare a Net Worth Statement.[3]

In reviewing credit card and checking account statements, loans and cash payments for their expenses, many are in shock at the state of their financial affairs. Suddenly, they find themselves expected to live in accordance with statutory guidelines enacted to create "uniformity of awards within the state" that in no way accommodate the deficit spending that supported their "marital lifestyle" they seek to continue.

Each party's Net Worth Affidavit includes expenses for necessities (such as food, shelter, clothing, health insurance), discretionary expenses (wants), debt and savings (or the lack thereof). If the parties are living "separate and apart" either by choice or court order, the prior marital lifestyle is no longer indicative of the present cost of living. Clearly, if the apparent income (i.e. 1099, W-2, K-1, a recently filed tax return of the parties) is insufficient to meet the admitted lifestyle expenses, practicality would dictate that the first sector of expenses to be reduced or eliminated from the marital budget is the category of "discretionary" expenses. Not so fast, says the litigants.

Presumptive Support v. Marital Lifestyle

The reality of pendente lite support awards are based in law; a hard sell for matrimonial practitioners to parties living beyond their means with unrealistic

expectations. The statutory guidelines for temporary support provide a formula to calculate a "presumptively correct amount" of temporary maintenance and child support; that presumptive amount may be far less than the parties' actual expenses.

The court is NOT mandated to order the presumptively correct amount of support pursuant to the statutory formula; the court may deviate, that is, increase or decrease that presumptive sum resulting from application of statutory caps currently $203,000 for maintenance and $163,000 for parents' combined income for child support if the result is "unjust or inappropriate." However as the Appellate Division, Second Department, in *Spinner v. Spinner*, reminded the trial court, that in a decision to deviate, the factors for deviation must be disclosed in such decision.[4]

There, the trial court "…improvidently exercised its discretion in capping the combined parental income in excess of $143,000 at $400,000."[5] The court did set forth factors to apply the appropriate percentage of 25% for two children *but failed to offer an explanation for an upward deviation from the cap of $143,000*. The Appellate Division determined that the trial court should have limited the combined parental income *in that instance* to $250,000 under the particular financial considerations for that family.

The legislature, when setting forth the specific statutory factors for a court to consider in fashioning temporary support—both maintenance and child support—gave deference to judicial discretion by permitting the court to deviate based on "any other factor which the court shall expressly find to be just and proper."[6] The "other factor" allows the court a wide berth to fashion awards. Judge Dollinger, in the early days of the statutory changes to the DRL, expressed in the *Harlan* decision that "… the Legislature, in suggesting criteria to be considered when awarding temporary maintenance, share the same practical concern as this court that parties should attempt to reduce expenses during the pendency of divorce proceedings."[7]

A Practical Approach

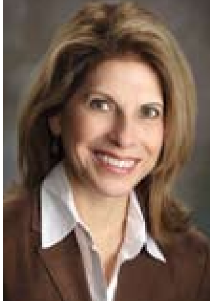
This suggests that counsel for a party would be most effective in advocating a position based upon a realistic financial plan. Such a plan may be obtained through a third party advisor such as a "CFDA," certified financial divorce analyst, for consideration by the parties before filing an Order to Show Cause for pendente lite relief.[8]

The trial court is equipped with an arsenal of presumptions and authority to deviate from statutory caps based upon legislatively approved factors and that the Appellate Division Second Department has ruled that those factors relied upon for a deviation from the legislative presumptive cap must be set forth in its decision.

Mindful of the foregoing, be guided accordingly when negotiating temporary support with "presumptive caps" based upon modified caps applied in other cases; facts and circumstances of each matrimonial matter are rarely, if ever, identical. If judicial intervention is unavoidable, providing the court with a financial road map, annunciating factors relied upon explaining a deviation upward or downward may just result in an interim award that is affordable for both litigants on a temporary basis though neither may be financially satisfied by the result.

Compelling parties to live in a fiscally responsible way is a tall order. Parties just possibly could be spared considerable expense and save the trial courts considerable time were a practical approach employed by counsel prior to resorting to judicial intervention.

1. DRL §236 [B](2).
2. DRL §240 [5-a](b)(4).
3. DRL §236B(4)(a).
4. 188 A.D.3d 748 (2020), 134 N.Y.S.3d 377.
5. *Spinner* was decided in 2020; at that time, the statutory cap for child support was $143,000.
6. DRL §236(B)(5-a)(h-a) and DRL §240(1-b)(f)(deviation factors for temporary maintenance and child support respectively).
7. *Harlan v Harlan*, 998 N.Y.S.2d 769, 2014 N.Y.Slip Op. 24385 (Sup.Ct. Monroe Cty., Oct.2014).
8. The designation indicates a planner with a legal, accounting or financial background who obtained specialized training in financial and tax aspects of divorce.



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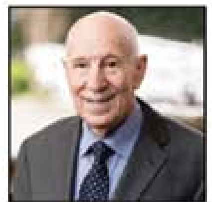
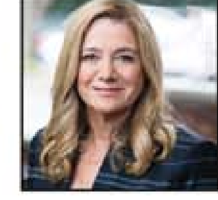

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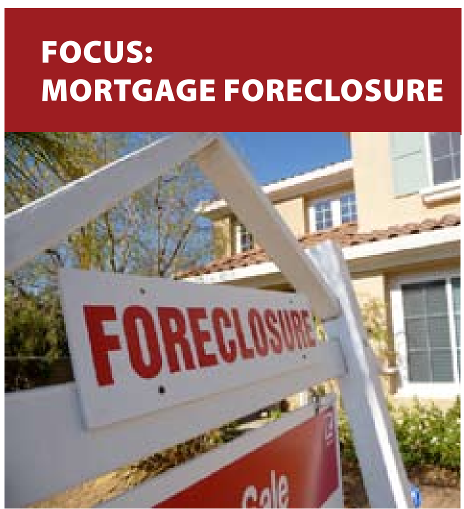


The New Foreclosure Abuse Prevention Statute: How Homeowners Can Beat the Clock

Jeff Morgenstern

The New York State legislature passed last year the "Foreclosure Abuse Prevention Act ("FAPA"), which became law on December 30, 2022,3 much to the joy of homeowners and consumer-oriented organizations and supporters—but not lenders, who now have a much harder time postponing the accrual of foreclosure claims by voluntarily discontinuing an action by stipulation or court order and declaring that the loan was being de-accelerated.[1]

CPLR 213(4) provides a six-year statute of limitations for commencing a mortgage foreclosure action, which accrues upon a default by the borrower and the obligation being accelerated by the lender's election. Lenders could "de-accelerate" the loan and start the limitations clock all over again by [how?]

This allowed a lender to manipulate the length of time that a borrower could have a foreclosure action hanging over its head, by attempting to cure certain defects in its prima facie case with a second bite at the apple. This in turn gave lenders much more time to keep distressed borrowers entangled in attempts to settle their debts through loss mitigation.

The issue reached the Court of Appeals in *Freedom Mortgage v. Engel*, where the lender's voluntary dismissal of this foreclosure action was held to be a revocation of its prior acceleration of the loan.[2] The effect of undoing the acceleration was to reset the statute of limitations as to any future default payments, absent the noteholder's contemporaneous statement to the contrary.

In response to *Engel*, FAPA was enacted specifically to overturn *Engel* so that a lender no longer can unilaterally reset the statute of limitations by discontinuing a foreclosure action and "deaccelerating" the loan. In such a scenario, if a second foreclosure action is brought on the same mortgage debt, more than six years from when the debt was accelerated, the borrower can "beat the clock" by moving to dismiss the second action as time-barred and should prevail under FAPA. FAPA amends various statutes that are intertwined and deal with the rights of the parties in foreclosure actions, as follows.

RPAPL §1301

This section has provided that an action to recover any part of a mortgage debt could not be commenced while another action to recover part of the debt was already pending, or after plaintiff recovered a final payment, without leave of the court where the first action was brought.[3] FAPA goes a bit further by providing that obtaining leave from the court is a condition precedent and a defense to commencing the new action, regardless of whether or how the first action was already disposed.

If a new action is brought without leave of the court, Section 1301 now provides that the first action is deemed discontinued, unless prior to the entry of final judgment in the first action, the defendant either raises lack of compliance with the condition precedent or seeks to dismiss the action based upon CPLR 3211(a)(4).

In addition, Section 1301 now provides that if a court determines that if an action on the mortgage debt is time-barred, any other action to recover any part of the same mortgage debt is likewise time-barred; this would include a subsequent foreclosure action or an action on the underlying promissory note.

CPLR Amendments

A new subsection (e) to CPLR 3217 provides that if a defense of statute of limitations is raised, premised on the fact that the lender accelerated the debt instrument prior to or due to commencing a prior action, the plaintiff cannot stop the accrual of the statute of limitations by claiming that the debt instrument was not validly accelerated, unless, the prior motion was dismissed based on the court's express finding of an invalid acceleration.[4]

Similarly, CPLR 213(4) now provides that if the statute of limitations is raised as a defense premised on the fact that the lender accelerated the debt instrument prior to or due to commencing a prior action, the plaintiff is estopped from asserting that the debt instrument was not validly accelerated prior to or through the commencement of the prior action, unless the prior

action was dismissed based on the court's express finding of an invalid acceleration.[5] The same principle of estoppel now applies in any quiet title action to cancel or discharge a mortgage of record.[6]

There is an addition of CPLR 203(h), which bars a lender from unilaterally extending or resetting the statute of limitations in a foreclosure action once the loan has been accelerated and the statute has run. Examples of this would be a Stipulation of Discontinuance, or its decision to revoke its acceleration and demand for payment in full.[7]

Finally, there is a new CPLR 205-a limiting the effectiveness of the "savings statute" for time-barred claims.[8] Once an action is terminated, the original plaintiff can commence a new action based upon the same transaction(s) if it is brought within six months of termination, and if the termination of the prior action occurred by any manner other than a voluntary discontinuance, lack of jurisdiction over the defendant, dismissal due to neglect, violation of any court or part rules, failure to comply with a court scheduling order, or to appear for a conference or calendar call, failure to submit any order or judgment, or a final judgment on the merits. Plaintiff (or its successor-interest, or assignee) only gets one six-month extension.

These provisions apply to a successor-in-interest or assignee of the original plaintiff if it can plead or prove that it is acting in lieu of or on behalf of, the original plaintiff; in addition, if the defendant served an answer in the prior terminated action, in any new action based on the same transaction(s), any cause of action or defense claimed by the defendant will be timely if it was timely asserted in the prior action.

General Obligations Law

Under §17-105 of the General Obligations Law, a party could have agreed to waive the statute of limitations of a mortgage foreclosure in a signed written agreement.

The amendment to this section provides that it is the exclusive means by which a party can reset or extend the statute of limitations for a mortgage foreclosure, and that the discontinuance of a foreclosure action in any way does not reset or extend the statute of limitations.[9]

Finally, one of the key provisions of FAPA, and probably the most controversial, is that it took effect immediately, and applied not only to prospective actions, but also retroactively to pending actions where the judgment of foreclosure and sale had not yet been enforced. In light of this, FAPA is sure to open the floodgates to much litigation by homeowners seeking to have pending foreclosure actions dismissed if they have a fact pattern falling within the scope and coverage of FAPA.

1. N.Y. Assembly Bill 7737b.
2. 37 N.Y.3d 1 (2021).
3. RPAPL §1301(3)(4), L.2022 Ch. 821 §2.
4. CPLR 3217(e), L.2022 Ch. 821 §8.
5. CPLR 213(4)(a), L.2022 Ch. 821 §7.
6. CPLR 213(4)(b), L.2022 Ch. 821 §7.
7. CPLR 203(h), L. 2022, Ch. 821 §4.
8. CPLR 205-a, L.2022, Ch. 821 §6.
9. GOL§17-105 (4)(b), L. 2022, Ch. 821 §3.

Jeff Morgenstern maintains an office in Carle Place, where he concentrates in bankruptcy, creditors' rights, commercial and real estate transactions, and litigation.

FOCUS: MATRIMONIAL AND FAMILY LAW

The Impact of the Marijuana Regulation and Taxation Act MRTA On Matrimonial and Family Law

Jennifer Rosenkrantz[1]

On March 31, 2021, the New York State Legislature passed legislation decriminalizing the personal use of cannabis with some limited exceptions.[2] One of the main purposes of the Marijuana Regulation and Taxation Act or "MRTA" was to remediate the disproportionate impact of the illegality of cannabis on persons of color in the criminal justice system, housing, the foster care system, and denial of parental custody in child protective proceedings and custody matters.[3]

MRTA repealed Article 221 of the Penal Law ("Offenses Involving Marijuana") and replaced it with Article 222 of the Penal Law ("Cannabis"). The new statute ushered in changes regarding the personal use of marijuana that will undoubtedly have significant effects on various areas of law including child protective proceedings and custody matters.

The impact of the new law on matrimonial and family law, as of now, largely undetermined given that the legislation is only two years old. We, as practitioners, need to not only understand the nuances of the legislation but also need to be prepared to advise our clients accordingly.

There are a number of significant changes in the law. Among the more notable changes:

- MRTA deleted marijuana from the definition of controlled substances in Public Health Law §3332.[4] As a result of this classification, in order for a sale of marijuana to be unlawful, the seller must receive compensation for the sale. On the other hand, proof of compensation is not required with respect to sales of controlled substances as giving a controlled substance away constitutes a sale even where no money was actually paid.

- It is lawful for a household to possess up to six marijuana plants (three mature plants and three immature plants).[5]

- Outside the home, a person who is 21 years old or older can possess up to three ounces of marijuana.[6]

- It is legal to smoke marijuana anywhere that smoking tobacco is permitted with the exception of in a vehicle.[7]

- Probable cause to search can no longer be based solely upon the odor of marijuana.[8]

- It is legal to possess up to five pounds of cannabis in or on the grounds of one's private residence.[9] One must take "reasonable steps" to ensure cannabis is in a secure place not accessible to anyone under the age of 21.[10]

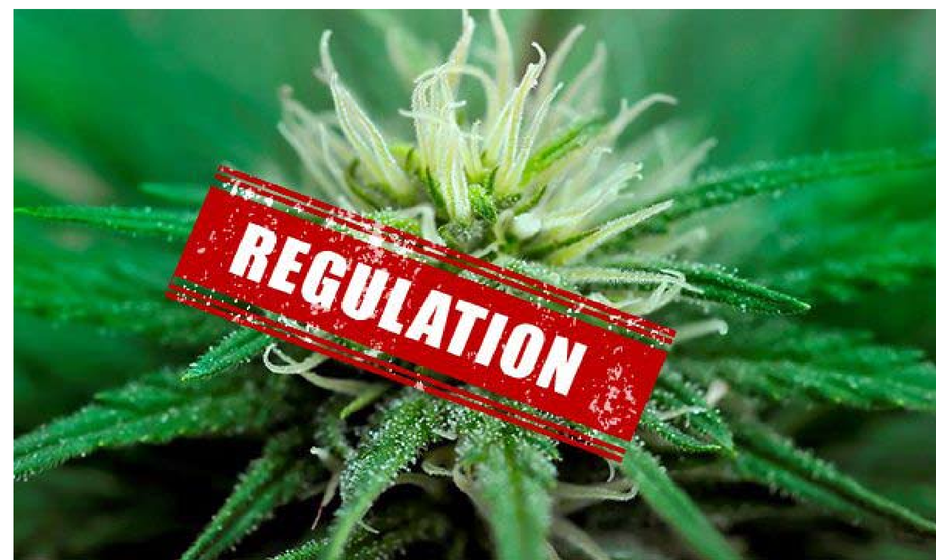
- A prior conviction for possessing up to 16 ounces of marijuana or selling up to 15 grams of marijuana will automatically be expunged.[11]

It remains illegal for a person under the age of 21 to possess marijuana in any amount.[12] It also remains illegal for a person who is 21 years old or older to sell marijuana to a person under the age of 21.[13]

As for the specific application of MRTA to matrimonial and family law:

> No person may be denied custody of or visitation of or parenting time with a minor under the Family Court Act, Domestic Relations Law, or Social Services Law, solely for conduct permitted under this chapter, including but not limited to, section 222.05 or 222.15 of the Penal Law unless it is in the best interest of the child and the child's physical, mental or emotional condition has been impaired, or is in imminent danger of becoming impaired as a result of the person's behavior as established by a fair preponderance of the evidence. For purposes of this section, this determination cannot be based solely on whether, when and how often a person uses cannabis without separate evidence of harm.[14]

The Family Court Act was also amended to add "the sole fact that an individual consumes cannabis, without a separate finding that the child's physical, mental or emotional condition was impaired or is in imminent danger of becoming impaired established by a fair preponderance of the evidence shall not be sufficient to establish prima facie evidence of neglect."[15]



In *Matter of Mahkayla W.*,[16] the Appellate Division, First Department held that, to the extent the Family Court found that the child was neglected based solely on the mother's use of marijuana while pregnant, that finding could not be sustained without evidence that the child's condition was impaired or at imminent risk of impairment.

The First Department went a step further in *Matter of Saaphire A.W.*,[17] wherein the Court held that evidence that the mother smoked marijuana while pregnant with her youngest daughter even when the mother and child both tested positive for marijuana at the time of the birth was insufficient, on its own, to sustain a finding that the child was physically, mentally, or emotionally impaired or was in imminent danger. There was no evidence that the mother's marijuana use affected her judgment or behavior or that the child was placed in danger as a result of the mother's drug use. The finding of neglect based solely on the mother's use of marijuana without more was vacated.[18]

In *Matter of Mia S.*,[19] the Family Court made a finding of neglect against the mother before the amendment to the Family Court Act. In her appeal, which was filed after the amendment, the mother argued that the 2021 amendment to Family Court Act §1046(a)(iii) was intended to apply retroactively.

The Appellate Division, Second Department agreed and, notwithstanding the fact that the Family Court did not make a finding as to whether the child's "physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired," affirmed the finding of neglect, holding that the Family Court's reliance on the first past of Family Court Act §1046(a)(iii), under which "proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child" was sufficient.

The Court further noted that:

> contrary to the mother's contention, the 2021 amendment does not preclude a determination that the petitioner established a prima facie case of neglect in this case. The 2021 amendment should not be interpreted as preventing any reliance on the misuse of marihuana, no matter how extensive or debilitating, to establish a prima facie case of neglect. After all, the statute still encompasses the misuse of other legal substances, such as alcoholic beverages and prescription drugs. Based on the plain language of the statute, the 2021 amendment does not prevent a court from finding that there has been a prima facie showing of neglect where the evidence establishes that the subject parent has, in fact, repeatedly misused marihuana in a manner that "has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality."

Such a finding is not based on "the sole fact" that the parent "consumes cannabis."[20]

In an example of how marijuana is now treated differently than controlled substances (as marijuana is no longer classified as a controlled substance under New York State Law), in *Matter of Adonis H.*,[21] the Appellate Division, First Department held that a prima facie case of neglect was established by evidence that the father admitted to being addicted to Percocet, was taking the drug in excess of what was prescribed and was purchasing Percocet illegally after his doctor became suspicious and stopped prescribing it.

The Court held that ACS did not have to establish either actual impairment of the children's physical, mental or emotional condition, or specific risk of impairment. Had the father's preferred drug been marijuana, ACS likely would have had to meet a higher burden in order to establish abuse or neglect as marijuana use alone without evidence of harm or risk of harm to a child as a result of such use can no longer serve as a basis for a finding of abuse or neglect.

In light of the new legislation decriminalizing the use of marijuana, a parent's use of cannabis can no longer be used to deny that parent custody of or parenting time with his or her child without more.[22] The mere use of marijuana, standing alone, is not a sufficient basis for suspending visitation or even for granting supervised visitation.

Thus, for example, in *Damon B. v. Amanda* C.,[23] unsupervised visitation was granted to the father despite his admission that he smoked marijuana. The mother testified that the child smelled like marijuana, that the child has asthma, and that the child returned home after one visit smelling like perfume. The father admitted to marijuana use but stated that he did not smoke in the presence of the child and that he had passed drug tests at several jobs. The Court allowed the father to enjoy unsupervised parenting time with the child, directing only that he father to refrain from using marijuana during his parenting time.[24]

A notable change in the Penal Law is that the smell of marijuana alone is no longer sufficient to support a finding of probable cause. Thus, in *People v. Javier*,[25] the Court held that the police lacked probable cause to search defendant's car during a traffic stop for evidence of marijuana as there was no evidence that the car contained marijuana for anything other than personal use. The odor of marijuana, the presence of one unburnt marijuana cigarette in plain view, and a plastic bag with a few marijuana edibles did not constitute probable cause.

Given the new legislation and the case law, how are we to advise our clients about their marijuana use? Can we simply advise our clients that it is legal now and have them do as they please? The answer is, of course, no. As in all custody cases, courts will look at all facts and circumstances and we must advise our clients to exercise caution. All marijuana products, including paraphernalia and edibles, must be kept safely secured and out of the reach of children.

A litigant should never drive while under the influence of marijuana. Possession of more than the legally permissible amount should not happen. If your client's use of marijuana, while legal, renders him or her unable to properly care for his or her children, that use should be curtailed, if not completely eliminated, at least during times when the client is charged with the care of the children. Time will tell as to how the court system will apply MRTA to custody cases; for now, we should, as always, use common sense and professional experience to guide our clients.

1.The author wishes to express her appreciation and gratitude to the Honorable Marie McCormack, Nassau County District Court, Second District, for her invaluable assistance in the research for this article.
2. Cannabis Law §127.
3. NYS Assessment of the Potential Impact of Regulated Marijuana in New York State, July 2018.
4. It is noteworthy that marijuana is still a controlled substance under Federal law so there exists a conflict between Federal and State law.
5. Penal Law §222.15.
6. Penal Law §222.05.
7. Penal Law §222.05.
8. Penal Law §222.05.
9. Penal Law §222.15.
10. *Id.*
11. CPL 160.50.
12. Penal Law §222.15.
13 *Id.*
14. Cannabis Law §127.
15. Family Court Act §1046(a)(iii).
16. 206 A.D.3d 599, 170 N.Y.S.3d 551 (1st Dept. 2022).
17. 204 A.D.3d 488, 166 N.Y.S.3d 627 (1st Dept. 2022).
18. One has to wonder how a newborn testing positive for marijuana at birth would not, in and of itself, be sufficient to sustain a finding of some sort of impairment or imminent danger.
19. 212 A.D.3d 17, 179 N.Y.S.3d 732 (2d Dept. 2022).
20. *Id.*
21. 198 A.D.3d 478, 156 N.Y.S.3d 153 (1st Dept. 2021).
22. Cannabis Law §127.
23. 195 A.D.3d 643, 149 N.Y.S.3d 642 (3d Dept. 2021).
24. *Id.*
25. 75 Misc.3d 650, 167 N.Y.S.3d 763 (Supreme Court, Bronx County, 2022).

Jennifer Rosenkrantz is a partner at the Garden City law firm of Schlissel Ostrow Karabatos, PLLC where she practices matrimonial and family law. She is a former chair of the NCBA Matrimonial Law Committee.

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FOCUS: COVID-19

Mask Or No Mask: A Critical Look at Post-Pandemic Issues Surrounding Families, Children, and Those of Us Working in This Field

Teresa Ombres and Robert S. Grossman

This was the title of a conference presented at the Nassau County Bar Association by the New York Chapter of the Association of Family and Conciliation Courts on Friday, March 31, 2023.[1]

This program was conceived as an opportunity to look back on how professionals, individuals, and family members navigated the pandemic. How professionals fared, how clients fared, what was learned, what changed and what changes are here to stay—and to do that in-person and experience it as a community. Busy professionals tend to move on, plow through, and get things done. They don't always take the time to consider what's happening and its impact. At the end of the day, there was a presentation on self-care, how clients' trauma affects the professionals working with them and what can be done about it.

The program featured three panel presentations in the morning moderated by the Hon. Jeffrey Sunshine, Statewide Coordinating Judge for Matrimonial Cases and two breakout sessions in the afternoon. Teresa Ombres, President of the New York Chapter, kicked off the morning with a few remarks and introduced Judge Sunshine who then introduced each panel and shared some of his own experiences and insights.

The first panel, composed of a judge, Hon. Javier Vargas, an attorney, Samuel J. Ferrara, attorney-mediator, Jacqueline M. Caputo, and a psychologist, K. Daniel O'Leary, discussed the professional community experience. All of the speakers, including Judge Sunshine, described the benefits and drawbacks of virtual meetings. The common concerns were privacy, children/other people in the room, not being able to read expressions or body-language, technological challenges and more. Benefits included the ability to proceed with cases, easy access, times certain for court conferences, not having to travel, or for clients, not having to take a day off from work, or hire childcare.

Judge Vargas started the discussion by noting the drastic changes imposed during the early stages of the pandemic and the significant reduction in the volume of cases courts were able to process on a day-to-day basis, which in the case of his Part was reduced to single digits from 20-30 cases per day pre-pandemic. There was a significant rise in incidents of domestic violence including requests for orders of protection where multi-generational families were forced to reside together. Judge Vargas described challenges in assessing the credibility of parties and witnesses during virtual/remote proceedings. Judge Vargas extolled virtual conferences for offering easier access to justice, a triumph over the old adage, "justice delayed is justice denied."

Next, Samuel J. Ferrara observed that pre-pandemic the courts and counsel generally followed long-standing procedures because that was "how it was done." The pandemic changed established operating procedures suddenly and unexpectedly. He posed the question as to whether changes would be transitory or permanent. He perceived the difficulty lawyers had trying to educate clients about the process and what to expect, when entering the unchartered waters of the pandemic which made it impossible to give such advice.

Mr. Ferrara noted how town hall meetings became instrumental during the shutdown as a forum for sharing ideas and experiences and fostering a feeling of regaining control. He stressed the benefits of being in-person to resolve matters with real time feedback, and how the gravity of being in court can inspire the client to settle in a way that being a little square on a screen cannot. The experience of an in-person trial simply cannot be replicated on a screen.

Judge Sunshine also spoke to the importance of in-person appearances and the difficulty lawyers sometimes had locating their clients virtually, as opposed to being in the courthouse, in person, with the clients who would be in the hall or in the courtroom. In one particular virtual case, where the attorneys could not locate their clients, the husband suddenly appeared on screen with his wife sitting on his lap who said her husband no longer wanted a divorce.

Jacqueline Caputo shared her experiences as a mediator and collaborative law practitioner. With the closure of the court system, mediation and collaborative practice offered viable, virtual alternatives for divorce cases to be resolved. Since then, clients, and even the courts, are more willing to explore these alternatives to litigation. Ms. Caputo described one mediation where the parents disagreed about whether or not to vaccinate their child. In litigation, the only choice is for a judge to decide either to vaccinate or not to vaccinate. However, in mediation the parents explained the reasons for their opposing views, were able to understand each other, and ultimately were able to reach a decision together.

In another mediation involving a parent who was an emergency room doctor both parents were able to establish their own safety protocols. Ms. Caputo noted that mediation helped parties regain a sense of control in a time when everyone felt they had none.

Daniel O'Leary, PhD lauded the expanded access of mental health services through virtual means as one benefit that he hopes will continue. So far, insurance companies are continuing to cover telemedicine visits, which has expanded the reach of medicine for both treatment and research. In conducting research, professionals are no longer limited to local samples of patients/subjects which allows for much broader samples for gathering data.

Dr. O'Leary cited a study of the impact of the pandemic on graduate students who, as a result of isolation and other factors, suffered an increase in depression and anxiety during and after the pandemic. Judge Sunshine added that the "digital divide" in people who did not have resources to stay connected, contributed to isolation felt by many. Dr. O'Leary agreed that the "digital divide" could limit people from accessing telehealth.

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Judge Sunshine and Judge Vargas shared instances of a lack of decorum among litigants and, surprisingly, attorneys as well who were bolder and even disrespectful during proceedings. Without a Court Officer there was no one to help maintain order. Instead, judges would end the session, adjourning the matter to another date.

The second panel shared the experiences of the family and children.

Jill C. Stone discussed some of her experiences as an attorney for the child. In one of her earlier pandemic cases a father called her, frantically unable to locate his children. It turned out that the mother had died from COVID-19, and her sister secretly took the children to her home upstate. She told the surrogates court that both parents had died and was granted custody.

Fortunately, Ms. Stone was able to get that reversed and have the children returned to their father. She observed that more teens now are unwilling to participate in activities in person, including school. Some children were happier at home, away from bullies and avoiding the fear of not "fitting in" but the isolation took its toll. She expressed concern over children and parents stuck in the house full time, a recipe for conflict in any situation, and made during a time of increased alcohol and drug use. Judge Sunshine and Ms. Stone expressed concern over conducting in camera interviews with children remotely since, among other things, it was difficult if not impossible to confirm that a child was alone during the interview.

Paul J. Meller, PhD, shared how he handled the decorum issue. In order to maintain the "mindset" of being in Court, he dressed for Court, not only with a jacket and tie, but pants and shined shoes, as well. He sees the future through a "trauma lens." The COVID-19 pandemic was not a single traumatic event, but rather, as he explained, a chronic complex distress. Children are still having trouble, with an alarming number of them experiencing suicidal ideations and more than half experiencing mental health issues. We are still in a mental health crisis, with a rise in depression, anxiety, anger, and an increase in alcohol consumption which continues to this day. He believes it would be a disservice to think that the pandemic is simply "over."

Gloria P. Dingwall, Principal at the Dryden Street School in Westbury, New York shared her experiences as a principal and educator. She observed what she believes will be long term mental health issues. Depriving children of the "power of touch" and limiting socialization has caused children to lose essential building blocks of their education. While the media focused on access to devices, the quality of devices and service was not often mentioned.

Principal Dingwall stressed that a virtual education was a "band aid" and cannot match an in-person education. The pandemic unfortunately taught young children not to share, contrary to the very essential teachings in school. She has observed that children are more aggressive and more violent, especially after "parallel play" when children and parents are all on devices simultaneously. The isolation will have long term implications, which are not fully revealed at this time. Most importantly, we need an action plan for the future as Principal Dingwall expects this may not be the last time children learn remotely.

The third panel began with Dr. Michele Reed who has observed a significant absence of kindness and increasing lack of eye contact. Children do not know how to have a conversation, do not look at each other or engage with each other making it more difficult to detect learning differences. She has also seen increased drug use, increased crime, and increased mental health issues.

Dr. Joseph Cooke added insights as Chief of Medicine at New York-Presbyterian/Queens. He expressed that COVID-19 is still an issue, people are still dying, and it is not over. He discussed vaccination issues, and treatment options, and whether wearing a mask is still important. Dr. Cooke discussed long COVID-19 and explained that it is not fully understood. While a patient may have a mild case of COVID-19, the patient could still have long lasting issues for six months or longer. He expressed concern for the frontline staff and noted many cases of post-traumatic stress disorder.

To end the morning sessions, Stephen Gasman engaged with Milfred "Bud" Dale, Esq/Phd. in a discussion about remote/virtual child custody evaluations. Dr. Dale offered his thoughts as both a family law practitioner and a mental health professional, addressing the issue of credibility and concerns about conducting remote evaluations. He said that it is a "convenient fiction" to think that credibility can be better assessed in person than virtually. Interviews are only one piece of the custody evaluator's product, which also includes the review of documents, testing, and collateral contacts.

While Dr. Dale did express some comfort with remote testing and observations, he expressed less comfort with conducting remote evaluations with younger children. He would like to see more research on the reliability of in-person evaluations compared to evaluations conducted virtually.

The lunch hour provided the perfect opportunity for participants to talk about what they heard and share their own experiences practicing during COVID-19.

The last group to present was on the topic of self-care. In early March 2020, before a pandemic was declared, Diane Hessemann and Nancy Nybergh presented a workshop on secondary Trauma at Family Kind with the help of its founder and Executive Director, Lesley Friedland. Little did they know that incidents of trauma and secondary trauma would explode and become inescapable. Before long, they were conducting monthly workshops which continue to this day.

Lawyers who personalize and internalize their client's stories may suffer from vicarious trauma, such as depression and disruption to work, family life and personal life. This can lead to compassion fatigue, where a lawyer might personalize or internalize their client's stories and end up withdrawing from things that give them pleasure and become immersed in the darkness of their work. Signs of trauma were offered along with ways to heal.

Feedback from participants was overwhelmingly positive. Most came away with a deeper understanding of the traumas suffered during COVID-19 and its long-lasting effects. In addition, many expressed an appreciation for having navigated their practices and their lives during that crazy time. Hopefully we learned to pay better attention to what is happening in any given moment and to respond thoughtfully and with care for our clients, ourselves, and our families—very similar to the advice Judge Sunshine gave us and our clients in his *New Your Law Journal* article on March 27, 2020.

1. The Association of Family and Conciliation Courts ("AFCC") was started in California in 1963 with the mission of making the court process better for children and families. In the early days, families seeking divorces were sent to Conciliation Courts to try to help them reconcile. By the early 1970s those courts shifted from "reconciliation" to "divorce with dignity". AFCC was instrumental in encouraging and promoting an interdisciplinary approach to divorce, which meant including a behavioral scientist (today's mental health professional) along with a judge and lawyers. Today, AFCC members also include mediators, parent coordinators, custody evaluators and other disciplines learning from each other and working together to uphold AFCC's mission. AFCC currently has twenty state Chapters and two in Canada, as well as members from all over the world. This year AFCC's annual conference in May will celebrate its 60th anniversary. The New York Chapter was founded in the spring of 2002.

Teresa Ombres is the current President of the New York Chapter of AFCC. She practices exclusively in family and matrimonial law, a significant volume of which is mediation and collaborative divorce. She teaches the Family Law Practicum at the Maurice A. Deane School of Law at Hofstra University and is a "Sustaining Member" of the Nassau County Bar Association.

Robert S. Grossman is an attorney with Winter & Grossman, PLLC practicing matrimonial and family law. He can be reached at 516-745-1700 or rgrossman@wintergrossman.com.

NAL PROGRAM CALENDAR

May 3 (HYBRID)

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

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

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

May 9 (IN PERSON ONLY)

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

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

May 16 (HYBRID)

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

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

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

May 24 (HYBRID)

Mindfulness: What's the Hype and Why Lawyers Need to Know About It
With the NCBA Lawyer Assistance Program
5:30PM-7:00PM
1.5 credits in ethics

June 1 (IN PERSON ONLY)

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

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

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

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

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NCBA Committee Meeting Calendar May 2, 2023–June 7, 2023

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

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

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

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

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

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

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

TUESDAY, MAY 9
Labor & Employment Law
12:30 p.m.
Michael H. Masri

WEDNESDAY, MAY 10
Association Membership
12:30 p.m.
Jennifer L. Koo

WEDNESDAY, MAY 10
Medical Legal
12:30 p.m.
Christopher J. DelliCarpini

WEDNESDAY, MAY 10
Matrimonial Law
5:30 p.m.
Jeffrey L. Catterson

THURSDAY, MAY 11
Intellectual Property
12:30 p.m.
Frederick J. Dorchak

TUESDAY, MAY 16
General, Solo & Small Law Practice Management
12:30 p.m.
Scott J. Limmer/Oscar Michelen

TUESDAY, MAY 16
Appellate Practice
12:30 p.m.
Amy E. Abbandondelo/ Melissa A. Danowski

TUESDAY, MAY 16
Plaintiff's Personal Injury
12:30 p.m.
David J. Barry

TUESDAY, MAY 16
New Lawyers
5:30 p.m.
Byron Chou/Michael A. Berger

WEDNESDAY, MAY 17
Construction Law
12:30 p.m.
Anthony P. DeCapua

WEDNESDAY, MAY 17
Commercial Litigation
12:30 p.m.
Jeffrey A. Miller

WEDNESDAY, MAY 17
Ethics
5:30 p.m.
Avigael C. Fyman

THURSDAY, MAY 18
Government Relations
12:30 p.m.
Nicole M. Epstein

TUESDAY, MAY 23
District Court
12:30 p.m.
Bradley D. Schnur

TUESDAY, MAY 23
Alternative Dispute Resolution
12:30 p.m.
Suzanne Levy/Ross J. Kartez

WEDNESDAY, MAY 24
Education Law
12:30 p.m.
Syed Fahad Qamer/Joseph Lilly

THURSDAY, MAY 25
Diversity & Inclusion
6:00 p.m.
Rudolph Carmenaty

WEDNESDAY, MAY 31
Environmental Law/Municipal Law and Land Use
12:30 p.m.
Kenneth L. Robinson/Judy L. Simoncic, Elisabetta Coschignano

WEDNESDAY, MAY 31
Business Law Tax & Accounting
12:30 p.m.
Varun Kathait

THURSDAY, JUNE 1
Hospital & Health Law
8:30 a.m.
Douglas K. Stern

THURSDAY, JUNE 1
Community Relations & Public Education
12:45 p.m.
Ira S. Slavit

THURSDAY, JUNE 1
Publications
12:45 p.m.
Rudolph Carmenaty/ Cynthia A. Augello

TUESDAY, JUNE 6
Women in the Law
12:30 p.m.
Melissa P. Corrado/ Ariel E. Ronneburger

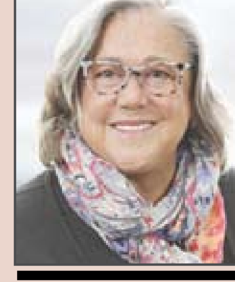
WEDNESDAY, JUNE 7
Surrogates Court Estates & Trusts
5:30 p.m.
Stephanie M. Alberts/ Michael Calcagni

WEDNESDAY, JUNE 7
Matrimonial Law
5:30 p.m.
Jeffrey L. Catterson

In Brief

Vishnick McGovern Milizio LLP (VMM) Partner **Richard Apat**, co-sponsored and volunteered at the NCBA "Suited for Success" benefit drive on March 11. VMM Managing Partner **Joseph Milizio** led a webinar on March 2, "Exit & Succession Planning for Business Owners: Creating a Strategic Plan for Your Next Phase in Life," presented by the Gettry Marcus M&A Transaction Advisory Services Group and including co-speakers from the NYBB Group. Mr. Milizio also participated in a webinar on March 5, "Contingent Liabilities when Buying a Business," hosted by the Rainmakers' Forum. On March 20, *Brooklyn Paper* interviewed VMM Of Counsel **Hon. Edward McCarty** following a hearing before the King's County Supreme Court in a case involving the family of former FDNY captain Hans Meister. On February 18, VMM Partner Constantina Papageorgiou was featured in a longform profile in *The National Herald* about her work as an attorney and as the 1st Vice President of the Hellenic Lawyers Association. VMM partner **Joseph Trotti**, published an article in *Best Lawyers: The Family Law Issue 2023*, "The Quarter-Century Childhood," discussing the recent laws significantly expanding parental obligation for child support.

Jeannine Henry was selected by the New York State Bar Association to receive the President's Pro Bono Service Award for the Tenth Judicial District.


Marian C. Rice

Michael J. Antongiovanni of Meyer, Suozzi, English & Klein, P.C., was appointed to the New York State Bar Association's House of Delegates.

Ronald Fatoullah of Ronald Fatoullah & Associates was awarded Top Business Leader in Nassau County in the category of Elder Law Attorneys by Blank Slate Media. Mr. Fatoullah was also chosen by the community and readers of the *Herald* Newspaper in the category of Elder Law Attorneys, for the Long Island Choice Awards. Ronald Fatoullah also presented "Navigating Nursing Home Medicaid" for the Alzheimer's Association Long Island Chapter, at their annual Legal and Financial Planning Conference for Caregivers on April 22.

A. Thomas Levin participated as a judge in the Yonkers Rotary Club's Second Annual Youth Speech Competition on behalf of the Historical Society of New York.

Thomas J. Garry, Managing Partner of Harris Beach PLLC's Long Island office was included in the City and State Power Law 100 list. Mr. Garry was also named to the *Long Island Business News'* annual Business Influencers in Law list.

Partner **Gregory L. Matalon** and Partner **Robert S. Barnett** presented the webinar "Family Buy-Sell Agreements—Tax and Other Considerations" for the Nassau County Bar Association's Business Law, Tax and Accounting Committee. In addition, Robert also presented the webinar "Calculating S Corp Stock and Debt Basis" for Strafford. In other news, Partner **Stuart H. Schoenfeld** and Associate **Monica P. Ruela** presented the webinar, "11 Medicaid Questions You Need Answered." Gregory will present "Estate Planning Introduction" at the Queens Community House.

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.

FOCUS:
CYBER SECURITY

Cyber Security in 2023 is an All Hands On Deck—Everybody Thing—Not Just an 'Office IT' Thing!

Nicholas Himonidis

It's 2023. Do ***you*** (not your office IT person) know where all your sensitive data is? Do ***you*** know (remember, and keep track of) all the various ways of accessing it? If not, you probably are not doing enough to ensure your data stays secure.

As attorneys, we generate, send, and receive a great deal of sensitive and legally privileged data. We (not our 'office IT people') are legally and ethically responsible for the security of that data. On a more practical level, the 'dataspheres' we operate in today are such that without the direct and meaningful participation of every end user (every attorney/assistant/paralegal in the firm), the most herculean efforts of the most competent IT people will not be sufficient.

Many attorneys do not know where all of their sensitive data lives—and perhaps more importantly—do not keep careful track of the myriad ways they access that data. Most attorneys are too busy with day-to-day case work to give these questions serious thought—and that is a dangerous mistake.

Most would probably say their data is stored on a "secure" email server or a "secure" file server or it's "in a secure cloud environment"—or that they have an IT company that "secures" their data. But the formidable cyber security defenses of the big data platforms we use, and the 'network security' that our IT professionals are primarily focused on, are NOT how most data breaches occur today. Vulnerabilities in end user devices (frequently personal devices), and compromises of account login credentials are among the most common attack vectors exploited by hackers.

Attorneys are prime targets for hackers. According to a 2021 ABA survey, 25% of respondents reported that their firms had experienced a data breach at some time.[1] That number increased to 27% in 2022.[2] One recent action by the New York State Attorney General's Office against a New York medical malpractice firm that fell victim to ransomware resulted in a $200,000 penalty and a requirement to implement data security improvements.[3]

Understand Your Data Ecosystem

Securing your data starts with knowing where your data is, and all of the ways to access it. While this concept may seem overly simplistic, many business owners, including attorneys, do not know where their sensitive data resides, much less consider the platforms and services through which it passes daily. We all have smartphones and computers, likely with multiple email accounts on each.

Our phones have apps for both work and personal use. We subscribe to services like Zoom, Dropbox, OneDrive, etc. Our smartphones and tablets, not just our office computers, are linked to email servers, file shares, cloud storage systems, databases, and other applications. Nearly every device we use has sensitive data stored on it, passing through it, or is a conduit to access that sensitive data.

Knowing where the sensitive data is stored, and what devices and apps can access that data, is the first, and most critical step to securing that data. Why? Because hackers frequently target the weakest attack vector (or point of entry)—and most often that's YOU—the end user. Why should they break through a solid steel door if they can easily steal the key from someone who is careless with it, and perhaps forgot they even had it? You, the 'end user' must develop good cyber security habits on your smart phone, your home computer, your iPad, etc.—or you will continue to be the 'weak link' in the cyber security battle.

Let's discuss some specific actions you can and should take to help protect your sensitive data.

Smartphones

We communicate constantly on our phones, by voice, text, and email. Many of us also use messaging apps—Facebook Messenger, Instagram, WhatsApp, WeChat, Snapchat, Telegram, Signal, Viber, etc.—in addition to enterprise messaging platforms, like Slack, Teams, or Discord. Then, we have email platforms and services, such as Exchange, Gmail, Yahoo, AOL, ProtonMail, Tutanota, and others. Of the many apps on our phones, most of us use only a few regularly; the rest are completely forgotten, and that is a vulnerability in and of itself because unused apps are not regularly updated—and 'security fixes' don't get applied.

So where do we start? First, secure the phone itself. Make sure you have a secure passcode coupled with screen auto-lock set to a very short period (like one minute). Next, consider taking the following steps:

- Review all apps and delete those that are no longer used.
- Configure the operating system and all apps to update automatically.
- Review the privacy settings for all apps, especially those with which you share your location, contacts, photos, camera, or microphone.
- For apps with access to sensitive data, enable an app-specific PIN code (different from your phone passcode) or use biometrics, such as a fingerprint or facial recognition, to access the app, if available.
- Enable the ability to remotely lock, locate or wipe the device if it is lost or stolen.
- Contact your cell carrier to place extra security on your account, such as requiring a passcode for authorized users to make changes, which will protect against increasingly common SIM swapping attacks to bypass SMS based 2FA (more on this later).

Company-issued cell phones are likely being managed by your IT group, using a mobile device management (MDM) platform that enforces policies in line with industry best practices—but the vast majority of attorneys 'BYOD'—bring their own device—and must therefore accept responsibility for the security posture of that device.

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Ira S. Slavit, Esq.

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Fee division in accordance with Rule 1.5(g) of the Rules of
Professional Conduct

iPhone users need to understand how iCloud works and take steps to avoid inadvertent "spillover" of iCloud data to any device not used and accessible exclusively by you. The data in your iCloud can sync to any Apple devices with the same Apple ID. Never enter your Apple ID and password into any Apple device that is not used exclusively by you—as your sensitive information may be synced to those devices. You should routinely review the list of devices connected to your Apple ID—and immediately 'log out' any device you are not 100% is yours and can be accounted for.

Apple has released a new feature called "Lockdown Mode" in iOS (16)—which, when enabled, provides extremely high protection against digital threats. Attorneys who deal with particularly sensitive data, or routinely access client data from their iPhone may wish to consider engaging this extreme threat protection.

Computers

If you have a firm-issued laptop, it is likely managed through enterprise software that enforces security policies. However, if your laptop (or home desktop used for work) is not being managed this way, be sure to follow the guidelines outlined above for smartphones, and take these additional steps:

- **Enable full-disk encryption—*especially on laptops*.** This prevents anyone, including sophisticated thieves, from copying data directly from the computer's hard drive if it is lost or stolen. This is NOT the same as having a 'login password'—which is easily defeated by professionals. Windows and Mac both have built-in, whole-disk encryption, BitLocker on Windows and FileVault on Mac, but they need to be turned on in settings.

- **Activate a premium antivirus subscription** to provide real-time protection against threats from email attachments or web surfing. Many of us with personal computers either received a trial subscription to an antivirus program or downloaded a free version at some point; free and expired trial versions don't carry the same benefits as a premium program, such as real-time scanning, browser scanning, automatic scans, or automatic updates.

While your cell phone temporarily retrieves files stored elsewhere, computers operate differently, and actual copies of files viewed from a remote source often end up cached on the hard drive—another compelling reason to enable full disk encryption, should the computer be lost or stolen.

You need to understand what information is stored on your computer and where else it might exist. Most people are familiar with Desktop, Documents, and Downloads folders, but what about email? Let's say you use Microsoft Outlook. All the emails you read and search through have a local copy saved on that computer (and any other computers where you have Microsoft Outlook installed), including attachments.

That information also lives on the Microsoft Exchange server and the file server where Exchange is backed up. Even if you only access email from Microsoft Outlook using a web browser (formerly Outlook Web Access, or OWA), any attachments you open are stored on your computer as a cached file. Beyond email, other documents and files are saved in various locations on your computer. If you use Microsoft 365, for example, all that information syncs to Microsoft's cloud and is accessible wherever you log into Microsoft 365.

Much of the sensitive information you generate and receive—through email, shared drives, or local apps—exists in many locations, and you must consider how to protect every one of these potential "attack surfaces." Do not ever save login credentials for anything of importance in outlook contacts or notes.

Apps

Apps (on your phone or computer) make accessing all kinds of information easy and convenient, but that convenience comes at the cost of reduced security. Every app has potential vulnerabilities, and lesser-known apps often have far less built-in security, with updates that may be infrequent or non-existent. All apps must be properly configured for security and privacy, and all non-essential or rarely used apps should be deleted. Additional considerations are laid out below.

Accounts for Apps

When signing up for a new app, use your work email for a business-related app and a personal email for a personal app. Be extremely cautious about apps and accounts that offer the option to sign in with another account, such as Google or Facebook. Using this option relies on those other services to secure your login information. If one of those platforms does suffer a breach, and your credentials are compromised, whatever other accounts you signed into this way may also be compromised. Instead, create separate, distinct login credentials for each and every account you utilize (see below regarding the use of a 'password keeper').

Passwords for Apps

To generate and keep track of unique, complex passwords for all of your many accounts, consider a password manager such as RoboForm, LastPass, Dashlane, 1Password and others. These utilities offer the ability to automatically generate different, complex passwords for all of your accounts and store them in an encrypted vault. Even though password manager companies are a prime target for hackers, they are still very secure, and using them to store unique, complex passwords for all of your separate accounts is much safer than most of the alternatives. You just need to make sure that the 'master password' you use for your password manager is long, easily memorable to you but not 'guessable' by anyone else and is one that you have never used before. Commit that one master password to memory, and, if absolutely necessary, write it down and store it in one very secure place (like a safe).

Multi-Factor Authentication (MFA)

Also referred to as two-factor authentication (2FA) or two-step verification, MFA should never be ignored. Along with good password discipline—it is the single best defense against one of your accounts or 'gateways' to your sensitive data being compromised. Nearly all apps and services offer MFA, and if they don't, you should consider an alternative. Many apps and services offer multiple forms of MFA including SMS (text) codes sent to your cell phone, authenticator apps like Google Authenticator, biometrics, and physical hardware. SMS codes being texted to your phone is the weakest method of MFA—as this can be defeated by SIM swap attacks, which are becoming increasingly common, where a hacker tricks your carrier into porting your phone number to a phone in the hacker's possession—at which point they, not you, will receive the MFA code(s) via SMS. Wherever possible, use an authentication app, such as Google Authenticator, Microsoft Authenticator, or Duo. These are not 'SMS' based, and if you do become a victim of a 'SIM' swap—the hacker will not see the necessary MFA codes—but you still will have access to them.

Remote Access Apps

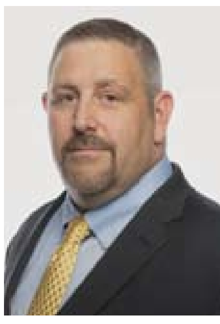
While the ability to access files or a computer remotely increases productivity and efficiency, it also increases risk. If using a remote-access application, such as TeamViewer, AnyDesk, Splashtop, or RDP, ensure that your credentials are not saved for automatic access, and enable authenticator app based MFA.

File Storage Apps

Apps and services such as OneDrive, Dropbox, ShareFile, Box, and others make it very convenient to access files anywhere, anytime, from any device. This same convenience also makes it easier for hackers to steal files. The devices used to access these apps must have proper security settings enabled, and the apps themselves need to be secured using proper password controls and MFA.

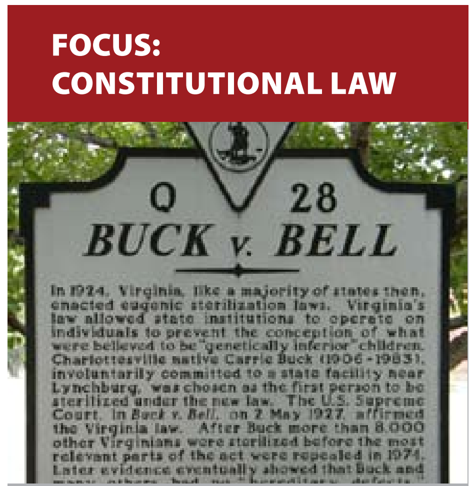
As lawyers, we are responsible for a great deal of sensitive data, and we must do everything we can within reason to help secure that data. With data breaches on the rise, and attorneys being prime targets, effective cybersecurity requires an 'All Hands on Deck/Everybody All In' approach.

1. https://www.americanbar.org/groups/law_practice/publications/techreport/2021/cybersecurity/.
2. https://www.americanbar.org/groups/law_practice/publications/techreport/2022/cybersecurity/.
3. https://ag.ny.gov/press-release/2023/attorney-general-james-secures-200000-law-firm-failing-protect-new-yorkers.



Attorney and cybersecurity/forensic expert **Nicholas Himonidis** is the CEO of The NGH Group, Inc., in Melville. He is also Co-Chair of the newly formed NCBA Cyber Law Committee.

FOCUS: CONSTITUTIONAL LAW



"These Lesser Sacrifices": *Buck v. Bell* and Eugenics in America

Christopher J. DelliCarpini

Imagine a society that paves the way for a super-race by clearing away the "human weeds." Where physicians conspire with courts to sterilize the unfit in the name of "eugenics." That brave new world was the United States in 1927.

In that year, the U.S. Supreme Court in *Buck v. Bell* affirmed Virginia's power to sterilize Carrie Buck for being "feeble-minded."[1] The ruling in *Buck* also legitimized eugenics laws in thirty-four states, who ultimately sterilized over sixty thousand Americans.

On June 1, the NCBA Diversity and Inclusion Committee will present *Buck v. Bell* as its annual dramatic reenactment of a civil rights case. But unlike previous cases, *Buck* does not involve members of a minority fighting for justice. Rather, it involves a threat to human diversity generally. Anyone trapped in a cycle of poverty could be considered "unfit" and targeted for sterilization in the name of improving the race and the government's bottom line.

And we use the present rather than past tense because compulsory sterilization laws have been repealed across the nation, the power to enact such laws remains with each state. The Committee's presentation therefore aims to illustrate the folly of seeing diversity as an enemy to human progress—a lesson that each generation must learn.

"The Science of Improving Stock"

The term "eugenics" was coined by British scientist Francis Galton in 1883 to "express the science of improving stock, which is by no means confined to questions of judicial matings."[2] Predating the research of Gregor Mendel, Galton suggested that we inherit traits in rigorous statistical proportion from each of our ancestors. Galton also advocated government efforts to prevent procreation of "the sick, the feeble, or the unfortunate [as] an equivalent for the charitable assistance they receive."[3]

By the turn of the century, physicians were advocating means for preventing procreation of so-called "defectives." In 1907 Indiana passed the first compulsory sterilization law for convicted criminals. New York passed its own law in 1912, applicable to residents of state asylums.

The precedent for state sterilization laws was established by the United States Supreme Court in 1905, in *Jacobson v. Massachusetts*.[4] A City of Cambridge ordinance required all adults to receive the smallpox vaccine.

Henning Jacobson refused, was fined five dollars, and appealed all the way to the highest court in the land, claiming violation of his Fourteenth Amendment rights.[5] The Supreme Court affirmed the conviction, with Justice John Marshall Harlan writing for the majority that the authority to compel vaccination was within the states' police power.

These early state laws often fell, however, on procedural grounds. The Indiana statute was struck down by that state's high court in 1921, holding that the subjects' inability to cross-examine the experts who recommended sterilization and other deficiencies denied due process. In New York, the Court of Appeals struck down our state's law on equal protection grounds, as it did not apply to "feeble-minded citizens not in custody. By 1921 only ten states had sterilization statutes that were still in active use.

"A Suitable Subject"

As some worked to legitimize sterilization of the feeble-minded, others worked to segregate these undesirables. The Virginia State Colony for Epileptics was established in 1906, and by 1912 was accepting men and women diagnosed with "feeble-mindedness," which encompassed "the simply backward boy or girl ... to the profound idiot ... with every degree of deficiency between these extremes."[6]

As early as 1911 the Colony's first superintendent, Dr. Albert Priddy, advocated for a sterilization law covering all prisons and charitable institutions.[7] In March 1916, the Virginia Assembly passed a law authorizing any citizen to petition for anyone else's commitment as "feeble-minded."[8]

Encouraged by this new legislation, Priddy sterilized at least fifty inmates at the Colony by 1917.[9] Early legal challenges and the threat of personal liability, however, led Priddy to scale back his efforts. In 1922 Harry Laughlin—superintendent of the Eugenics Records Office in Cold Spring Harbor, New York—crafted a "Model Eugenical Sterilization Law" to overcome legal objections. In 1924 Virginia passed a new eugenic sterilization bill that tracked the model law. With a statute built to withstand legal challenge, Priddy was eager for a court to endorse his eugenic scheme. All he needed was a test case.

When Carrie Buck arrived at the Colony in June 1924, Priddy realized he had found his test case. Carrie's mother, Emma Buck, had been sent to the Colony years earlier, and Carrie had grown up as a domestic servant in the Charlottesville home of J.T. and Alice Dobbs.

The previous year Carrie had gotten pregnant; only years later would it come out that she had been assaulted by the Dobbs' nephew. The Dobbs had Carrie committed to the Colony as "a suitable subject for an institution for the feeble-minded."[10] Here Priddy saw proof that feeble-mindedness was hereditary—and therefore preventable through sterilization.

In September 1924 the Colony Board the Board signed the order directing Priddy to sterilize Carrie by surgical removal of the fallopian tubes, a procedure known as salpingectomy. Priddy had testified at the hearing, but Carrie—represented by Irving Whitehead, Priddy's friend and a sterilization advocate—did not testify in her own defense.

Under the Virginia law, the next step was for Carrie to appeal the Board's decision, and for an evidentiary hearing in the Circuit Court of Amherst County. The hearing took place in November 1924.

Virginia attorney and legislator Aubrey Strode struggled to find any witnesses to the supposed feeble-mindedness of Carrie or any of her supposed family members. He had more luck with his expert witnesses, including Priddy and Laughlin, who testified to the inheritability of feeble-mindedness and its costs to the individual and society. On April 13, 1925, the Circuit Court ordered that Carrie be sterilized within ninety days.

"Three Generations of Imbeciles is Enough"

The next step was to appeal to Virginia's high court, the Supreme Court of Appeals. Before then, however, Priddy passed away, and was substituted in the caption with his successor as Superintendent of the Colony, Dr. John H. Bell. The court heard argument in September 1925, and on November 12 affirmed the Circuit Court, finding the sterilization statute as constitutionally valid as any vaccination law. The court also held that as this was not a punitive statute but rather eugenic in purpose, Carrie deserved none of the protections afforded criminal defendants.

Whitehead filed a petition the for a writ of error to the United States Supreme Court. The Supreme Court of Appeals granted the petition, and the United States Supreme Court issued the writ of certiorari.

The Supreme Court issued its decision on December 2, 1927, affirming the decision below by a vote of 8 to 1. Writing for the majority, Justice Oliver Wendell Holmes, a Civil War veteran, found compulsory sterilization within the established police power of the states:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.[11]

He summed up the purpose of such statutes in what has become the most infamous lines from this decision:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.[12]

"A Profound Fallacy"

Public reaction to the decision was largely optimistic, with commentators eagerly anticipating "a race of supermen in America" and "disposing of human weeds."[13] Others, however, were already

arguing that eugenics was bad science in furtherance of bad social policy, premised on the "profound fallacy ... that like produces like."[14]

Carrie Buck left the Colony in the fall of 1927, three weeks after her procedure. In the spring of 1932, Carrie married and settled down in Bland, Virginia, some two-hundred miles west of Charlottesville, where her daughter still lived with the Dobbs.[15] Her daughter Vivian died that summer at the age of eight—leaving behind a perfectly respectable second-grade report card to dispel any notion of feeble-mindedness.

The beginning of the end for eugenics in America was the Supreme Court's 1942 decision *Skinner v. Oklahoma*, a challenge to Oklahoma's sterilization of convicts.[16] For the first time, the Supreme Court struck down a eugenics law, on equal protection grounds—though the decision carefully distinguished *Buck*.

After World War II, sterilization laws remained in force across the United States. Germany eagerly embraced eugenics and forced sterilization in the years before World War II, and at the Doctor's Trial in Nuremberg after the war defendants cited *Buck* in their defense. This not only was an ineffective defense, but cemented in the American public the connection between eugenics and the horrors of Nazism.

Sterilization scandals across America only further exposed the racism and classism that underlies eugenics. *Relf v. Weinberger* uncovered nonconsensual sterilizations at federally funded clinics.[17] *Madrigal v. Quiligan* found that the Los Angeles County U.S.C. Medical Center was systematically sterilizing Spanish-speaking mothers who delivered their babies via cesarean section.[18]

The last effort to overturn *Buck v. Bell* came in 1981, in *Poe v. Lynchburg Training School and Hospital*.[19] Though unsuccessful at that goal, a settlement did bring to light the abuses under Virginia's law.

The Lesson of *Buck v. Bell*

Carrie Buck died in 1983 at 77 years old. Her one-paragraph obituary identified her as "Carrie Detamore," her second husband's surname. It made no mention of the Supreme Court decision that bore her maiden name.[20]

Buck v. Bell may be forgotten, but it is not gone. The last state eugenics law was repealed in 2013.[21] The Supreme Court has cited *Buck* only three times this century—and not favorably.

The precedent on which that decision rests, however—*Jacobson v. Massachusetts*—has been cited in 93 decisions addressing COVID-19 vaccine mandates. And while the power recognized in *Buck* remains undisputed, the prospects for the Supreme Court recognizing a right against compulsory sterilization can only be dim after the court in *Dobbs v. Jackson Women's Health Organization* found no right to abortion in the Due Process Clause.[22]

The lesson, then, is not that the states should not have this power but that they always will have it. What brought down eugenics in America was the public awareness and rejection of the shoddy science and invidious discrimination that animated the movement. The only thing that can prevent such atrocities in the future is a commitment to improving our society by helping the unfortunate rather than condemning them.

1. 274 U.S. 200 (1927).
2. Galton, Francis, *Inquiries into Human Faculty and Its Development*, available at https://bit.ly/3xP5Efe.
3. Galton, Francis, "Eugenics" (June 25, 1906), available at https://bit.ly/3y5O8TS.
4. 197 US. 11 (1905).
5. Wendy K. Mariner, JD, LLM, MPH, George J. Annas, JD, MPH, and Leonard H. Glantz, JD. *Jacobson v Massachusetts: It's Not Your Great-Great-Grandfather's Public Health Law*, National Library of Medicine, available at https://bit.ly/3yAcVzP.
6. Lombardo, Paul A., *Three Generations, No Imbeciles* 15 (Johns Hopkins Univ. Press 2008).
7. *Id.* at 14.
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9. Lombardo, *supra* n.6, at 64.
10. *Buck v. Bell* Transcript of Record at 13–18, available at https://readingroom.law.gsu.edu/buckvbell/.
11. *Buck*, 274 U.S. at 207.
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15. Adam Cohen, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck*, at 290.
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18. Marcela Valdes, "When Doctors Took 'Family Planning' Into Their Own Hands," *The New York Times* (Feb. 1, 2016), available at https://nyti.ms/3YdiZt7.
19. *Poe v. Lynchburg Training School and Hospital*, 518 F.Supp. 789, 791 (W.D. Va. 1981).
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21. "West Virginia sterilization law repealed," *The Eugenics Archives*, available at https://bit.ly/3BT2NDV.
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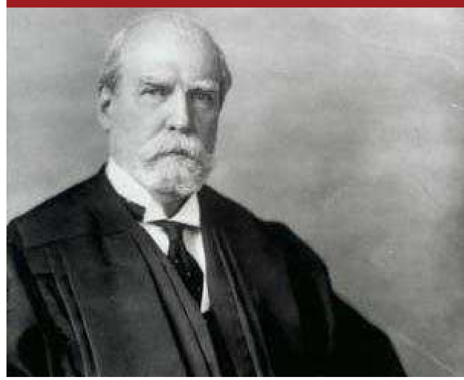

Rudy Carmenaty

We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution.
—Charles Evans Hughes

Regrettably, the legacy of Charles Evans Hughes has been lost to memory. Hughes himself is rarely evoked, if at all. But in his time, he had been the governor of New York, an unsuccessful major party presidential candidate, and the Secretary of State. But it was as a jurist that Hughes truly left his mark.

Hughes was the only person to serve two separate and distinct tenures on the United States Supreme Court. He was an Associate Justice for six years beginning in 1910. He then resigned in 1916 to run for president. Hughes was subsequently named the eleventh Chief Justice, holding office from 1930 to 1941.

Hughes' written opinions were well-reasoned and grounded in his reverence for the Constitution. Yet his august manner made him seem remote. Hughes possessed a brilliant mind, unquestioned integrity, and sincere convictions. Qualities Americans often say they want in a leader, but seldom get or rarely embrace.

Hughes excelled at the state, national, and even at the international level. Just prior to being named to the Supreme Court for the second time, Hughes was a member of the Permanent Court of International Justice at the Hague. When he was the nation's top diplomat, Hughes help preserve world peace during the 1920's.

Unfortunately for him, Hughes never made it to the White House. He came close, falling short by a hairsbreadth. Ironically, the two men who had the greatest impact on Hughes' career were each president of the United States—Theodore Roosevelt and William Howard Taft.

Hughes came to public prominence with his groundbreaking investigations of the insurance and utilities industries in New York. Roosevelt's sponsorship helped him reach the governor's mansion in 1906. A decade later, Hughes became the GOP's presidential standard bearer—again with the support of Roosevelt.

It was Taft who first nominated Hughes to the Court in 1910. However, in a self-serving twist, Taft appointed Associate Justice Edward Douglas White Chief Justice instead of the considerably younger Hughes. In doing so, Taft was willing to cross party lines as White was a Conservative Democrat.

All his life, Taft coveted becoming Chief Justice himself. Historical speculation has it that Taft appointed the older White, in the hope that the next Republican president would nominate him to succeed White. That is exactly what happened when President Harding nominated Taft in 1921.[1]

Had Taft appointed Hughes in White's place, Taft most likely would not have had the opportunity to serve on the Court. Two decades later, a dying Taft insisted that President Hoover pick Hughes as his replacement as Chief Justice so as to bypass the liberal Republican Harlan Fiske Stone.[2]

In 1912, Roosevelt challenged Taft, his hand-picked successor, and the sitting president, for the Republican party's presidential nomination. Taft eventually won the nod, but to his chagrin Roosevelt ran as a third-party candidate on the Bull Moose or Progressive party line.

Taft went down to defeat at the hands of Democrat Woodrow Wilson. Party regulars blamed Roosevelt for Taft's defeat at the polls by splitting the GOP vote. Hughes was the one man in Republican circles acceptable to both the Roosevelt and Taft factions.

Hughes played no role in either Roosevelt's disloyalty or Taft's failure to secure a second term. Having spent the prior six years as a supreme court justice, he was removed from the hurly-burly of political life. Perhaps Hughes should have stayed where he was, but the White House beckoned.

At the outset, Hughes was the odds-on favorite over Wilson. But the intra-party split of 1912 cast a heavy shadow. Hughes further hurt his chances when he unintentionally snubbed California Governor Hiram Johnson. Johnson was Roosevelt's running mate in 1912 and as things turned-out California would be the key state.

On election night, Hughes went to bed believing he had won the presidency. However, in a historic upset, Wilson was reelected by a narrow margin after winning California. Had Hughes won in 1916, there is little doubt he could have been a great president. He remains an intriguing 'What If' of American politics.

One issue that set Hughes apart from Wilson was race. Hughes was among the few national candidates during the Jim Crow era to actively pursue the black vote. Wilson, by contrast, was an outright bigot. Hughes' opposition to lynching and his graciousness when it came to the concerns of African Americans garnered him the support of Booker T. Washington.

Hughes, as the son of a Baptist minister, was opposed to anti-Semitism. He co-founded the National Conference of Christians and Jews. He had good relations with Justices Brandeis and Cardozo. Justice Brandeis, despite their philosophical differences, rated Hughes the finest Chief Justice he had served with on the Court.

With Warren Harding's victory in the election of 1920, Hughes was named Secretary of State. By any measure, Hughes must be rated among the finest individuals to have ever held the post. He provided the vision in foreign affairs which Harding sorely lacked.

Hughes masterfully negotiated the Washington Naval Treaty, preventing an arms race amid the American, British, and Japanese navies. He favored American participation in the League of Nations but was overruled by the President who had opposed the Treaty of Versailles when he was a senator.[3]

Hughes also sacrificed millions of dollars in legal fees while in public office. In private practice, he was one of the most respected and sought-after attorneys in the country. He argued numerous times before the Supreme Court and penned an outstanding volume on the Court's proper role in a Constitutional republic.

In 1930, Herbert Hoover appointed Hughes Chief Justice. It truly was the Hughes Court in every sense. He was an effective leader who exercised a firm yet fair hand. In conference, Hughes was respected by all on what was a bitterly fractured court.[4]

Hughes was frequently the decisive fifth vote during one of the most contentious periods in American legal history. The 1930's marked the apogee, as well as the last gasp, of *Lochner Era* legalism.[5] With the nation ravaged by the Depression, the Court invalidated various New Deal measures initiated by Franklin Roosevelt.

Democrats enjoyed huge majorities in Congress, so FDR could enact virtually any law he desired. Only the Supreme Court stood as a check on Presidential power and Congressional acquiescence. This is the classic tension envisioned by the founders, of the branches acting as a check on one another.

FDR became frustrated by a conservative majority that was overturning his efforts at economic recovery. Matters reached a fever pitch when the justices, in a unanimous decision, invalidated the National Industrial Recovery Act for running afoul of the Commerce Clause.[6]

In all fairness, many New Deal programs were poorly conceived and hastily enacted. Some of the administrative agencies created, like the National Recovery Administration, were overbroad in their authority leaving them vulnerable to Constitutional challenge.[7]

Coming off a landslide reelection victory in 1936, Roosevelt was at the height of his powers. He was spoiling for a fight. The President countered with the Judicial Procedures Reform Bill of 1937. If passed, it would have empowered FDR to expand the size of the Court beyond the nine seats in place since 1869.[8]

FDR would then be able to appoint a new justice for every member of the Court over age seventy. Roosevelt disingenuously argued that the bill was necessary as the justices, whom he dismissed as '*Nine Old Men*,' were too old to meet the demands of their caseloads.

FDR brazenly overplayed his hand. The bill was widely seen for what it was—a naked power grab by a frustrated President who had not been able to name a single justice to the Supreme Court. Hughes worked tirelessly behind the scenes to undercut FDR's efforts.

First the Court upheld, in a 5–4 vote, Washington state's minimum wage law in *West Coast Hotel Co. v Parrish*.[9] Joined by the liberal bloc and Justice Roberts, Hughes wrote a majority opinion declaring the "*Constitution does not speak of freedom of contract*."[10]

Justice Roberts had sided with the conservatives in a similar case during the prior term.[11] It is generally believed that Justice Roberts upheld the constitutionality of the Washington state statute under either presidential pressure or on the advice of Hughes. In either case, it became known as '*the switch in time that saved nine*'.[12]

Not long after, Justice Van Devanter submitted his letter of resignation. One of the Court's conservative members, Van Deventer consistently voted against New Deal legislation. His stepping-down provided FDR with his first opportunity to appoint a justice since he was first elected in 1932.[13]

But Hughes' pivotal move was a letter he sent to Senator Burton K. Wheeler of Montana. In the correspondence, Hughes asserted that the Court was fully capable of handling its caseload. Hughes's letter undermined Roosevelt's underlying premise. FDR's opponents in Congress used the letter to defeat the bill in committee.

Hughes walked a fine line as his skillful maneuverings managed to somehow maintain the independence of the federal judiciary. The Hughes Court function as a break on Roosevelt and Congress' excesses until it could no longer hold back the tide. When change did come, Hughes, ever the statesman, sought equilibrium.

After 1937, new justices, appointed by Roosevelt on a Court led by Hughes, crafted a more deferential approach to economic regulation now sanctioned under a broader interpretation of the Commerce Clause. Hughes would usher in a new era of constitutional adjudication.

The paradigm governing the Court's decision-making process was further transformed by a shift in focus. Jettisoning substantive due process, the justices would going forward apply greater scrutiny to measures impacting personal liberties.[14] The Hughes Court set the stage for the Warren Court that was to follow.

For his part, Hughes gave meaning to the Constitution's restraints on government action protecting civil liberties and permitting free expression. Most notably in *Near v Minnesota*, Hughes ruled, forty years before the Pentagon papers case, that prior restraint on publication violated freedom of the press under the First Amendment.[15]

By the time Hughes retired from the Court, he was universally recognized as one of the great Chief Justices. In the estimation of many scholars, he remains second only to John Marshall. Whether at the bar or on the bench, Hughes affirmed that lawyers and judges were integral to protecting life, liberty, and property.

Justice Jackson once observed that Hughes looked like God and he spoke like God.[16] Perhaps that is why he has been lost to memory. His Jovian appearance, his upright bearing, and his steadfast dedication to the law, make Hughes seem inaccessible to contemporary sensibilities.

Charles Evans Hughes was nevertheless a rare man. More than a lawyer's lawyer or a judge's judge, he was a statesman. It is long since time that Hughes be rediscovered. Any such appraisal would rightfully conclude that Hughes should be remembered as being among the pantheon of American law.

The author would like to thank and dedicate this article to David Schizer, Dean Emeritus of the Columbia Law School, who brought the historical neglect of Hughes to his attention.

1. Taft served as the twenty-seventh President and the tenth Chief Justice of the United States. The only person in American history to hold both offices.
2. Stone was named Chief Justice in 1941 upon Hughes' retirement. Stone was appointed by Franklin Roosevelt.
3. The Treaty of Versailles failed to secure the necessary two-thirds necessary for ratification in the Senate in 1919.
4. The Hughes Court was divided amongst the conservative 'Four Horsemen': Willis Van Devanter (1859-1941), James Clark McReynolds (1862-1946), George Sutherland (1862-1942), and Pierce Butler (1866-1939); and the liberal 'Three Musketeers': Louis Brandeis (1856-1941), Harlan Fiske Stone (1872-1946), and Benjamin Nathan Cardozo (1870-1938); the swing votes were Hughes and Owen Roberts (1875-1955) who were referred to as the 'Roving Justices'.
5. *Lochner v New York* 198 U.S. 45 (1905) held that a New York law setting maximum hours for bakers violated the right to freedom of contract under the Fourteenth Amendment. This landmark ruling set the paradigm for the Court overturning economic regulations and other social legislation enacted by the states and the federal government.
6. *A.L.A. Schechter Poultry Corporation v United States* 295 U.S. 495 (1935).
7. The National Recovery Administration was designed to set prices, hours, and working conditions throughout the American economy. Its symbol, the Blue Eagle, was ubiquitous.
8. Article III of the Constitution vests 'judicial power' in the Supreme Court but is silent as to the composition of the Court (Article I, Section 3, Clause 4 does refer to a 'Chief Justice'). The size of the Court has varied over time. The Judiciary Act of 1869 established a court consisting of a Chief Justice and eight Associate Justices, which has been in place ever since.
9. 300 U.S. 379 (1937).
10. *Id.*
11. *Morehead v New York ex rel. Tipaldo* 298 U.S 587 (1936), Roberts sided in 5-4 decision which nullified New York's minimum wage law as a violation of the Fourteenth Amendment right to liberty of contract.
12. Lesley Kennedy, *This Is How FDR Tried to Pack the Supreme Court*, September 18, 2020, at ttps://www.history.com.
13. FDR appointed Hugo Black to the open seat.
14. See Justice Stone's famous footnote #4 in *United States v Carolene Products Co.* 304 U.S. 144 (1938).
15. 283 U.S. 697 (1931).
16. Matthew C. Waxman, *Constitutional War Powers in World War I: Charles Evans Hughes and the Power to Wage War Successfully*, at https://scholarship.law.columbia.edu/cgi/view.

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Vicarious Trauma: What Lawyers Need to Know

Continued from Cover

Lawyers in general, regardless of the field of law they practice, suffer from substance use and menta health issues in greater numbers than the general population and most other professions. These conditions compound a lawyer's risk for VT as do personal experiences with trauma, larger workloads, limited resources, and support. These working conditions often lead to burnout, increased isolation, and emotional exhaustion, all of which are precursors to vicarious trauma.

Seeing the Signs

Recognize the warning signs. Becoming aware of the effects your work has on you is essential to helping you take care of yourself, your clients, and preserves your ability to practice ethically. 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.

- Racing, intrusive, negative thoughts and images related to the client's traumatic experiences.
- Disturbed sleep, 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, leaving work as the only activity.
- Feeling emotionally numb, disconnected, or unable to empathize.
- Experiencing feelings of chronic exhaustion and related physical ailments.
- Feeling unwarranted guilt, pessimism, hopelessness, irritability, and being prone to anger.
- Feeling inadequate in your work and questioning whether what you do matters.
- Viewing the world as inherently dangerous and becoming increasingly vigilant about personal and family safety.
- Self-medication/addiction (alcohol, drugs, work, sex, food, gambling, etc.)
- Becoming less productive and effective professionally and personally.
- Inexplicable digestive discomfort, aches and pains.
- Difficulty managing and expressing emotions. Misplaced anger or frustration.

A troubling symptom of VT is when an attorney struggling with VT begins to feel numb and detached. This is often experienced as lack of empathy or caring and can make an attorney less able to listen effectively to clients when they tell their stories. This can impact the ability to practice law effectively.

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 may be unavoidable.

Because the experiences can severely impair the lawyer's ability to provide the best service to clients, lawyers 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 public interest lawyer can be mitigated, even if they cannot be completely eliminated. Consciously taking steps to protect oneself is critical.

Personal Strategies to Reduce Risk and Manage Symptoms

- Set healthy boundaries. Setting boundaries is imperative to managing vicarious trauma. While you can be empathetic to your clients you can also separate your own identity from the case for your own well-being. This allows you to hold onto the passion and deep meaning that attracted you to law in the first place.
- Pursue hobbies and interests. Make it a priority not to give up hobbies and life-affirming activities, including Making time for trusted family and/or friends (people who don't drain you but fill you up). Finding work/life balance is essential when working in high stress environments.
- Acknowledge the good in your life. This can help balance the weight of the traumatic pain.
- Seek social support from colleagues, friends, and family.
- Seek help. If you are feeling depressed, stressed, or overwhelmed reach out to the Lawyer Assistance Program (LAP). LAP provides confidential services to lawyers, judges, and law students.
- Set realistic expectations. Be honest about what you can accomplish and avoid wishful thinking.
- 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. Pause to assess your inner state. This will help to slow the momentum of trauma and afford space to regroup/refuel.
- Balance your caseload. Have a mix of more and less traumatized clients.
- Take regular breaks and take time off when you need to.
- Create a buddy system at work. Having someone to talk to in real time who understands can stop symptoms from increasing.

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 and law firms rarely provide training on 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 health and substance use issues, with colleagues and in professional groups is one of the best ways to minimize the long-term impact of trauma on the practitioner. Law firms, law schools, and legal departments that regularly address lawyer well-being help end the stigma lawyers often feel when contemplating seeking help.

Vicarious trauma is not something that individual lawyers and staff should be left on their own to deal with. This is not just a "you problem"—this is an "us problem." This means that it is the responsibility of legal agencies, managing attorneys, and supervising attorneys to include trauma-informed practices into supervision of staff and respond promptly and diligently to signs that staff are struggling with secondary trauma or burnout.

This means having discussions about how to work with trauma survivors in a way that is safe for both the client and the attorney. This means proactively carving out space to debrief and vent. This also means modeling good practices. This is particularly important when supervising newer attorneys. Those who are new to trauma work and/or lack training in evidence-based trauma treatments may be at greater risk of developing work-related stress.

The Lawyer Assistance Program (LAP) regularly conducts workshops on vicarious trauma, mental health issues, substance use disorders, and attorney well-being. LAP also provides peer and professional support. Please call LAP if you are an attorney struggling in these ways or if you are interested in having LAP facilitate a workshop or training at your law firm. Please contact Elizabeth Eckhardt, LAP Director at eeckhardt@nassaubar.org or 516-512-2618. You can also contact Jackie Cara, Esq., Chair of the Lawyer Assistance Committee at jackie@elevatedstrategiesny.com.

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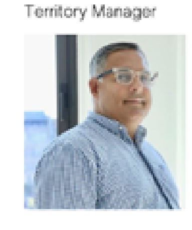

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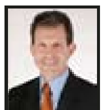

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