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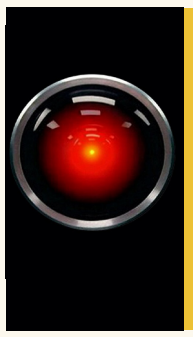

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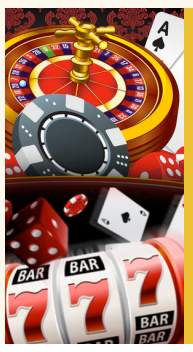

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Join Us for NCBA Judiciary Night

The Nassau County Bar Association Judiciary Night—a celebratory evening to honor the esteemed judiciary of Nassau County—will be held this year on Thursday, October 19, 2023, at 5:30PM at Domus.

The annual event gives local attorneys and judges the opportunity to socialize and network with colleagues while celebrating Nassau County's judiciary. Experienced and new attorneys alike can build connections that will enhance their professional lives.

"My favorite part of Judiciary Night," says Justice Denise Sher of the Nassau County Supreme Court, "is speaking with attorneys on a social basis in a relaxed atmosphere. Due to my 28-year tenure on the Bench, I have and can introduce newer attorneys to my judicial colleagues and other experienced attorneys."

"The NCBA is very fortunate to have a Nassau County judiciary who are not only extremely learned but are also active in our Association and welcoming to our membership," adds NCBA President Sandy Strenger. "Judiciary Night is our opportunity to honor and thank our judiciary. It is a highlight of the Bar year."

Judiciary Night is open to NCBA Members and non-members. Tickets are $100 for Members, $155 for Non-Members and $70 for Magistrates, Law Secretaries and other court staff. Sponsorships are also available for $250, $500 and $1,000, and include tickets.

Judiciary Night's invitation is inserted into this issue of *Nassau Lawyer*. To make a reservation or for additional information, contact Bridget Ryan at bryan@nassaubar.org or (516) 747-1361.

Enhance Your Knowledge and Skills with Comprehensive Online Courses—NCBA Members Receive 12 Hours of Free On-Demand CLEs

Stephanie Ball, Nassau Academy of Law Director

There are many benefits to being a Nassau County Bar Association (NCBA) member—one of which is 12 complimentary on-demand CLE credits!

The Nassau Academy of Law (NAL) produces the highest quality of accredited Continuing Legal Education (CLE) programs. The Academy's on-demand programs are recordings of previously held seminars and committee meetings that are available 24/7 at your convenience, on your time, so you can learn at your own pace. You can access these online programs anytime, and stream, download, or listen to hours of content on the go from anywhere.

Continuing Legal Education courses help lawyers stay current on legal updates and trends. New York State attorneys are required to complete CLE credits every two years to remain in good standing with NYS standards. Academy on-demand programs include the required mandatory credits: Ethics & Professionalism, Diversity, Inclusion & Elimination of Bias, and Cyber Security, Privacy, and Data Protection. And for attorneys who are licensed in New Jersey, through reciprocity, New Jersey will accept credits for courses that are not accredited in New Jersey but are accredited in another mandatory CLE jurisdiction as New York is. For our attorneys who are also licensed in Florida, the Academy has the complete CD set of The Florida Bar Survey of Florida Law 2022 and 2023.

The Academy's catalog of on-demand CLE programs covers over 50 practice areas and features speakers from our legal community and our NCBA committees who are widely recognized as the leading experts in their field. Don't let a busy schedule or location hold you back from getting the CLE credits you need. With a wide range of subjects to choose from and expert instructors leading the way, you can find the perfect CLE course to meet your needs.

The Academy staff is here to answer your CLE questions and to assist you in meeting your CLE goals and requirements. Come visit us at Domus or call (516) 747-4464.

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From the President

Sanford Strenger

This issue of the *Nassau Lawyer* is distributed to over 11,000 attorneys who are registered with OCA as either having an office in, or residing in, Nassau County. The approximately 4,000 attorneys and judges who compose the membership of the Nassau County Bar Association (NCBA) already know the importance to their practice and professional lives, as well as the community that the NCBA has created. To those of you who have not graced the halls of our beautiful home, Domus, on 15th and West Streets in Mineola, or those of you who have discontinued your membership in the NCBA, I ask the simple question, why not join us? It is my hope that you will read on, and that I will persuade you to answer that question with, "I didn't know what I was missing," and then use the QR code on this page to become a member.

Adrienne B. Koch, Esq, the current President of the NY County Lawyers Association, wrote an article in 2019 in the ABA Journal, "The Case for Bar Associations: Why They Matter." She summed up her personal answer to that question, "I love the camaraderie, the opportunity to meet and work with attorneys from all walks of the profession and the feeling that we do sometimes make a difference." I echo Ms. Koch's sentiments, with the caveat that I firmly believe that bar associations, and particularly the NCBA, make a difference each and every day.

Bar leaders often pose the question of how their associations can remain relevant when faced with an increasing number of attorneys preferring virtual communities, law firms in challenging times reducing or eliminating financial support to join bar associations, and the dwindling free time that we all face. In answering this question, bar associations have been chasing the value proposition: How do they create value to maintain and attract membership?

Ms. Koch succinctly answers this question by discussing that bar associations provide something "unique, irreplaceable and vital to every lawyer's practice, the opportunity to meet, know and work collectively with a community of lawyers and judges beyond the walls of one's own office." Ms. Koch's article was written before the COVID-19 pandemic. As we all know, the pandemic had a fundamental effect on each of us—we were stuck in our homes, where we experienced social interaction through little boxes on our computer monitors. As the courts dealt with the problem of rebooting, we appeared in a little box, or on a conference call with the court and our adversaries. Once those interactions ended, we were again left alone. No opportunity to shoot the breeze and share a moment of camaraderie.

Today as we rebuild our social and professional networks, the need to have a place where we can meet other lawyers is not only relevant, but essential to our well-being and the well-being of our practice.

Jay Reeves, Esq., in a blog post written for Lawyers Mutual Liability Company of North Carolina in February 2019, listed nine benefits of getting involved with your bar group: 1. to see old friends and make new ones, 2. to make a difference, 3. to do pro bono work, 4. to receive referrals, 5. to get out of your office, 6. to educate the public and each other on emerging issues, 7. to welcome new blood, 8. to improve your professional reputation, and 9. to have fun.

I could not agree with him more. So, you may ask, "how does the NCBA fit into this equation of providing you with a more fulfilling professional and personal life at the mere cost of $395 a year?" Our membership provides access to all the programs you need to fulfill your CLE requirements through in-person, Zoom, and hybrid programs. Our in-person programs come with the added benefit of networking. Our Academy of Law not only puts on cutting-edge programs, but they are taught by your peers—members of this Association. You can speak with them, learn who they are, and be connected to them. Imagine if the program speaker is the judge you are to appear before tomorrow.

Also included in your membership is the opportunity to participate in over 50 substantive committees, ranging from Animal Law to Workers Compensation, and everything in between. If you have a practice area or want to expand your practice into a new practice area, we have a committee composed of like-minded experts to enhance your practice. Attorneys need this support to grow and flourish within their practice.

At the NCBA, you can make a difference. We host and support a multitude of community involvement programs from high school and law school mock trial and moot court competitions to the Karabatos Pre-Law Society, where we foster mentorships between undergraduate students and law students, some from disadvantaged communities. The WE CARE Fund, the charitable arm of the NCBA, not only provides grants twice annually to local, worthy organizations, but also hosts events year-round, including providing 200 full Thanksgiving dinners with all the trimmings to families less fortunate in our community, and parties at Domus for disadvantaged school children. To see the smiles of those we help is beyond gratifying—it's transformative.

In addition, we help our own legal community through our Lawyer Assistance Program, one of only three in the state with professional staff. We are there if an attorney is struggling with substance abuse, or if a family is faced with the sudden death of an attorney family member and now must close their office. To provide and support these services, we need you.

We also provide a Lawyer Referral Service, where you, as a member of a curated panel, can receive new clients. The NCBA also has an Alternative Dispute Resolution Panel, and our fee conciliation panel will—at no cost to you—arbitrate a fee dispute between you and your client. In addition, our Ethics Committee is available for inquiries.

Additional pro bono opportunities are available through our Mortgage Foreclosure Project, which serves hundreds of homeowners a year, and our Access to Justice programs that offer hundreds of individuals with the opportunity to meet with a lawyer that will provide them direction to solve a legal issue. We can't provide these vital services without you.

Our in-house caterer, Esquire Catering, Inc., provides daily lunches in our magnificent and historic building. Additionally, our dining room is available to Members to cater their private events.

I can go on and on about the many benefits the NCBA offers Members, but for a full list, please visit our website at www.nassaubar.org and click on the "For Attorney" tab.

My personal professional and social journey has been greatly enhanced by being a member of the NCBA. It is a home that has supported me and provided me countless opportunities. We are a dynamic and accessible association. The NCBA needs you, and you it. We are your community and together, through membership, we can make the world a better place for future generations of attorneys and society.

Please scan the QR code to join the NCBA. Thank you.

FOCUS: ARTIFICIAL INTELLIGENCE

The Practical Lawyer's Guide to Harnessing ChatGPT: A Tool, Not a Replacement

Brian Gibbons and Yifan Lin

In an era marked by rapid technological advancements, the legal profession finds itself at the crossroads of tradition and innovation. One of the latest additions to the legal toolbox is ChatGPT, a language model developed by OpenAI. Some lawyers are likely to view ChatGPT as a threat, poised to replace human attorneys.

To that end, we do not recommend watching the first two Terminator films after completing this article, as the Skynet comparisons are self-evident… Other attorneys view ChatGPT as a dangerous device that can harm their practice, especially when used improperly, for example, through overreliance on the technology.[1] Striking a balance between these perspectives, lawyers can leverage ChatGPT to streamline their work and ensure that their expertise remains central to the legal process.

How ChatGPT works

Understanding exactly how ChatGPT works is essential to determine which areas within the legal profession lawyers can utilize this technology, and how we can utilize it. ChatGPT is not a mere advanced search engine. Rather, ChatGPT is an artificial intelligence chatbot that can understand and generate natural language text by learning to operate like the human brain.[2]

Therefore, when people type requests in ChatGPT, it does not search the internet to find the answers, rather it uses its algorithms and training to think about the most likely, but not necessarily, most accurate answers to the request. When typing in requests for ChatGPT, think of it as describing a task to colleagues.

The clearer and more detailed the instructions, the better the work product. To that end, the results ChatGPT generates are a function of the clarity of the requests. And, as with most technology, like virtual depositions on Zoom or Microsoft Teams, regular use will generate comfortability and more refined results.

ChatGPT as a Practical Tool

Rather than considering ChatGPT a threat, lawyers should view it as a practical tool that can supplement their skills. Here are some ways in which ChatGPT can be harnessed effectively:

• Legal Drafting: ChatGPT can assist lawyers in drafting legal documents, such as contracts, pleadings, motion papers and agreements, by generating well-structured initial drafts that attorneys can then review and refine. This is where ChatGPT can cut off the preparation time for the first draft and offer a decent foundation toward an eventual finished product.
It is important to provide specific instructions. For example, when asking ChatGPT to write a draft contract, specify the jurisdiction, purpose of the contract and specific clauses to be included.
• Client Communication: ChatGPT can facilitate smoother communication with clients. Lawyers can use it to draft clear and concise emails, responses to inquiries, or brief explanations of legal concepts. Harnessing the technology not only saves time but can also enhance client satisfaction through prompt and informed responses.
• Automating Routine Tasks: ChatGPT can be employed to automate document review and basic contract analysis, allowing lawyers to focus on more complex and strategic aspects of their cases. However, there are potential risks associating with confidentiality and lawyers' ethical obligation.[3]
• When asking ChatGPT for help, lawyers should take all the necessary steps to prevent disclosing confidential information relating to the representation of a client.[4] There is simply no way to confirm, definitively, whether ChatGPT will use one lawyer's input to generate a response for another user. Further, there are privacy concerns regarding how the data is collected, used or who has access to the data. To ensure confidentiality and attorney-client privilege, lawyers should be highly vigilant when asking ChatGPT for help.

In certain states, acquiring nonlawyer assistance exposes lawyers to specific rules. For example, in Wisconsin, SCR 20:5.3 requires lawyers to make reasonable efforts to make sure the nonlawyer services they utilize, such as artificial intelligence search tools, are provided "in a manner that is compatible with the lawyer's professional obligations."[5] It is imperative to use the consistent level of due diligence to inspect ChatGPT's work product when

checking sources, potential biases and accuracy.

Striking the Balance

The rapid advancement of AI and its integration into various industries, including law, has sparked a debate within the legal community. Despite its potential benefits, ChatGPT comes with challenges, including ethical considerations, data privacy, accuracy, and the risk of inadvertently generating incorrect or biased legal information. Some lawyers fear that AI models like ChatGPT may come to dominate the legal field and replace humans, but given the immediate infiltration of Cha attorneys entirely, erasing the need for legal expertise. Conversely, misuse of ChatGPT has prompted negative press coverage due to its unreliability.

At the start of the COVID-19 pandemic, many attorneys were reluctant to agree to remote depositions, based on the preference for in-person testimony, and the need to "size up" face to face, as opposed to through remote technology. Most if not all of us eventually acquiesced to remote depositions, largely due to necessity. Implementing ChatGPT is likely to become a similarly necessity in the coming weeks, months and years – and attorneys who fail to embrace it may find themselves playing "catch up" in the near future.

Amidst these diverging opinions, a middle ground emerges. Lawyers can harness ChatGPT without fully relinquishing control over their practice. Rather than seeing it as a substitute, it should be treated as a strategic ally. ***Full disclosure, ChatGPT generated the first draft of this article for the Nassau Lawyer, for experiment purposes***. ChatGPT was able to generate a clear structure and covered all the key areas for this article.

Here is the instruction to ChatGPT for this article: "Write an article with 1000 to 1500 words about practical lawyer's uses for ChatGPT. Focus on the aspect where lawyers can use ChatGPT as a tool without being fully dependent on it like any other new technology. Talk a little about how some lawyers think ChatGPT is taking over and will replace lawyers, but some are saying lawyers should not touch ChatGPT at all." Certainly, the first draft needed fine-tuning, additional details and several rounds of edits and revisions—but overall, ChatGPT provided a solid foundation toward a finished product.

ChatGPT can assist in rapidly generating initial drafts or responses, but the final work should always be reviewed, refined, and approved by a qualified attorney. This process ensures that the generated content aligns with legal standards and reflects the specific needs of the case. Do not completely trust the answer ChatGPT generates as it can sometimes produce answers that sound cohesive and persuasive but factually inaccurate.[6] By automating routine tasks, lawyers can allocate more time to critical analysis, strategic planning, and building strong client relationships. This enhances the overall quality of legal services provided. Lawyers must exercise caution when using ChatGPT, ensuring that the AI-generated content adheres to professional ethics, accuracy, and confidentiality standards. Finally, it is helpful for lawyers to remain proactive in learning about AI advancements, staying updated on best practices and potential pitfalls.

Conclusion

ChatGPT is not the end of the legal profession; rather, it is a catalyst for the growth and evolution of the legal profession. Lawyers who embrace this technology as a practical tool can redefine the boundaries of their practice, amplify their efficiency, and ultimately enhance the value they provide to clients. The key lies in using ChatGPT as a resource that empowers legal professionals to concentrate on what truly sets them apart: their human judgment, empathy, and expertise. As the legal landscape continues to transform, a nuanced approach to technology will enable lawyers to adapt and thrive in this dynamic era.

1. Matt Novak – "Lawyer Uses ChatGPT in Federal Court and it Goes Horribly Wrong" – *Forbes.com* (May 2023) *https://bit.ly/3P5E3ht.*
2. David Gewirtz, "How does ChatGPT actually work?", *ZDNET, Artificial Intelligence* (July , 2023). *https://zd.net/3sl2REP.*
3. Mostafa Soliman, "Navigating the Ethical and Technical Challenges of ChatGPT." *New York State Bar Journal, 95-AUG NYSTBJ 26* (July/August, 2023).
4. Cari Sheehan, "The Ethics Of ChatGPT", *Res Gestae, 66-Jun Res Gestae 12* (June, 2023).
5. Aviva Meridian Kaiser, "Ethical Obligations When Using ChatGPT", *Wisconsin Lawyer, 96-FEB WILAW 44* (February. 2023).
6. Judge Herbert B. Dixon Jr.(Ret), "My 'Hallucinating' Experience with ChatGPT", *Judges' Journal, 62 No. 2 JUDGEJ 37* (Spring, 2023) *https://bit.ly/45CcALq.*

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FOCUS: PERSONAL INJURY

Grieving Families Act—Will It Hit New York?

Deanne M. Caputo

New York's Current Wrongful Death Statute

In New York, when an individual dies and a lawsuit is brought in connection with his or her passing, there are two claims that can be made. One is for conscious pain and suffering (which includes fear of impending death) which essentially is a claim that belongs to the decedent, the person who dies, and thus, is considered an estate asset. Second is a claim for wrongful death which is essentially for the financial loss endured by next of kin as a result of the decedent's passing. Although you have three years (2.5 years for medical malpractice cases) to bring a claim for conscious pain and suffering for negligence cases in this State, a wrongful death claim must be bought within two years of the date of death. The law in place does not permit any tolling of this two-year statute of limitations for wrongful death claims, even if no personal representative for the estate exists, unless the sole distributee is an infant, as explained in detail in two seminal Court of Appeals cases, *Hernandez v. New York City Health and Hospitals Corporation*[1] and *Heslin v. County of Greene.*[2]

In New York, unlike many other states, 41 to be exact, the wrongful death statute allows for limited recovery. The statute, enacted in 1847[3] permits the decedent's personal representative, such as an administrator or executor of an estate, to commence an action against any person or entity who would have been liable to the decedent by reason of wrongful conduct had death not occurred.[4] Historically, the damages that can be sought for the persons benefiting from the lawsuit are solely limited to the pecuniary loss, or, in other words, the financial loss, suffered by said individuals, as a result of the loss of their loved one.[5] Although this includes reasonable medical expenses, loss of support and items such as funeral expenses, it has never included the emotional loss that results from the death of the individual.[6] Throughout the years, there has been a big push by the plaintiffs' bar to change this law with much headway being made these past two years with the New York Senate and Assembly passing the New York Grieving Families Act.[7] If this Act is signed into law by Governor Hochul, it would significantly change the law of our State and would broaden not only of the scope of the longstanding statute but also the relief available to those who lost a loved because of another's negligence or wrongdoing.

The Grieving Families Act – To Be or Not To Be

The Act is presently sitting on Governor Hochul's desk as both plaintiffs' and defense bars anxiously await.[8] Early this year, Governor Hochul vetoed a similar version of the proposed law, explaining that it would result in a substantial rise in the cost of health insurance premiums and greatly affect the medical profession.[9] Her suggestion was that the bill be amended so as to carve out medical malpractice from the wrongful death claims.[10]

The law, as proposed, would most notably permit the families in a wrongful death action to now recover compensation for their emotional anguish.[11] This change, found in Section 2, amends Estates, Powers and Trusts Law §5-4.3 to permit recovery for more than just pecuniary (financial) loss.[12] Specifically it states, "grief or anguish caused by decedent's death."[13] Second, Section 1, as amended by chapter 114 of the laws of 2003, amends EPTL §5-4.1 extending the time to bring a wrongful death action from 2 years after the decedent's death to now three years, with an even longer period carved out for those whose death was caused by the September 11th terrorist attacks.[14] Section 3 amends EPTL §5-4.4 to permit recovery by close family members.[15] Presently, the EPTL permits only distributes to recover. The amendment states, "surviving close family members, which shall be limited to decedent's spouse or domestic partner, issue, foster-children, step-children, and step-grandchildren, parents, grand-parents, step-parents, step-grandparents, siblings or any person standing in loco parentis to the decedent."[16] Section 4, which pertains to the approval of settlements of lawsuits and distribution of monies amends EPTL Section 5-4.6 to replace distributees with "persons for whose benefit the actions is brought."[17] Last, Section 5 states that the act shall take effect immediately and apply to "all causes of action that accrue on or after July 1, 2018, regardless when filed."[18]

Should Governor Hochul take a different position than earlier this year and should this law pass, there will be significant impacts on both sides of the Bar. In turning to the defense bar, it has always viewed these changes proposed by the Act as a threat to practicing health care professionals who may fear practicing in this State and a threat to insurance premiums. It is without question that defense attorneys and insurance companies will have to navigate their ways through an influx of motions seeking to include causes of action for the grief and anguish that resulted from the decedent's death. The defense bar is also sure to see an inflow of new lawsuits that come in by those individuals who may been previously barred from bringing same. The evaluation of wrongful death claims will also certainly change as reserves will now have to be set higher to include the value of these new elements of damage. Assuming this does become the law of the State, the defense bar will most likely be filing more appeals in an effort to set precedent as to what should constitute a reasonable amount for one's emotional grief and anguish as a result of losing their loved one. With the passing of this law, the defense bar is sure to see a huge increase in work.

For the plaintiffs' bar, this certainly would be a huge victory as advocates for the position that a life should be worth more than what one earns; a point that Hochul has expressed she knows is unfair.[19]

Despite the fact that the plaintiffs' bar would view the signing of the Grieving Families Act into law as a victory, there certainly are many similarities regarding the effects it will have on both bars. For the plaintiff's bar, just as the defense bar, there will certainly be an increase in work due to the expansive nature of the amendments. There also will be an increase in appellate work regarding these cases because of the fact that there has been no precedent set for what is a reasonable amount for the grief and anguish one can endure following a death. It comes as no

surprise that plaintiffs will seek to maximize what precedent deems as reasonable and the defense will obviously seek to ensure it does not lead to astronomical recoveries.

For plaintiffs' attorneys, there is now an opportunity to help a class of individuals that had no rights for over a century, despite the fact that they unfortunately endured one of the worst tragedies known – the tragic loss of a loved one. Many plaintiffs attorneys also look at the changes that would result from the Act as added layers of protection for humanity because the driver who had one too many drinks may now actually think twice before driving, the person in the a rush to get to their destination may now actually leave more time now for travel, the company looking to take shortcuts to save money may now be sure to ensure their operations and properties are safeguarded properly, etc.

What Will The Future Hold?

If passed, the Grieving Families Act will require both bars and the Courts to work together to create a new body of governing cases and law to define its parameters. It will revolutionize what most refer to as an archaic law that predates the Civil War and a balance will have to found between protecting negligent companies, people, entities and insurance premiums and the need for victims of tragic losses to seek adequate, just and fair compensation for their losses and to have the right to hold the responsible party accountable.

For now, it is important to keep some important practices in mind when handling a negligence case on behalf of an estate, especially if that matter requires a Notice of Claim. If none is required, be sure to always file your action for both wrongful death and conscious pain and suffering within two years of the date of death, which is the shorter of the two statues for these claims. If the matter does involve a Notice of Claim, always keep the following in mind:

1) A Notice of Claim for Conscious pain and suffering must be served within 90 days of the occurrence;
2) The complaint or lawsuit for the conscious pain and suffering claims must be served within one year and ninety days from the date of the occurrence;
3) The Notice of Claim for wrongful death must be served within 90 days of the date of the appointment of the estate representative but still must be within two years from the date of passing; and
4) the complaint for the wrongful death claim must be served within 2 years of the date of death.

In sum, it is always a better practice to file your Notice of Claim within 90 days of the occurrence and if no personal representative has been officially appointed, it is acceptable and permitted to serve same on behalf of the proposed representative, clearly indicating such.

1. 585 N.E.2d 822, 578 N.Y.S.2d 510 (1991).
2. 923 N.E.2d 1111 (2010).
3. N.Y. Const., art. 1, §16.
4. NY EPTL §5-4.1.
5. NY EPTL §§5-4.3 and 5-4.4.
6. NY EPTL §5-4.4.
7. A.6698/S.6636.
8. See *id.*
9. https://www.cbsnews.com/newyork/news/grieving-families-act-vetoed-governor-hochul/.
10. See *id.*
11. https://www.nysenate.gov/legislation/bills/2023/A6698.
12. See *id.*
13. See *id.*
14. See *id.*
15. See *id.*
16. See *id.*
17. See *id.*
18. See *id.*
19. https://www.cbsnews.com/newyork/news/grieving-families-act-vetoed-governor-hochul/.

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FOCUS: JUDICIAL REMEDIES

The Art of Mandamus: Volume Two

Ian Bergström, Esq.

The mandamus doctrine is categorized as mandamus to compel and mandamus to review. The statutory bases of mandamus to compel and mandamus to review are CPLR §7803(1) and CPLR §7803(3). The article sets forth the breakdown of judicial decisions evaluating the mandamus to compel doctrine pursuant to CPLR §7803(1).[1]

Statutory Venue Provisions May Undermine Demands for Mandamus Relief

In *Morales v. Singas*, the Second Department "dismissed" the special proceeding because the court was deprived of "subject matter jurisdiction" to adjudicate the dispute.[2] Self-represented petitioner Adam Morales should have commenced the special proceeding before the supreme court of the requisite county and "judicial district" pursuant to CPLR §506(b) and CPLR §7804(b). The Office of the Nassau County District Attorney criminally prosecuted Adam Morales. Adam Morales demanded mandamus relief attempting to obstruct continuance of the "criminal prosecution," and "compel … dismiss[al] [of] the criminal charges[.]" The demand for mandamus relief was in the nature of mandamus to compel.[3]

Construction of Pleadings May Undermine Demands for Mandamus Relief

In *Morales v. Kellenberg*, the Supreme Court of Nassau County determined that petitioner Alejandro Morales did not properly commence the special proceeding regarding the filing and service of the pleading and moving papers.[4] Consequently, Alejandro Morales did not properly assert the demand for mandamus relief. Despite the defective pleading and motion papers, the Supreme Court of Nassau County entertained the application.

Alejandro Morales did not prove that Kellenberg Memorial High School imposed an arbitrary and capricious punishment devoid of a rational basis pursuant to CPLR §7803(3). Alejandro Morales attended Kellenberg Memorial High School. During gym class, Alejandro Morales perpetrated sexually deviant behavior. The Dean of Students imposed the punishment of "suspen[sion], pending expulsion." Alejandro Morales' "guardians" challenged the punishment by means of the institutional appellate process. The Principal revised the punishment "prohibiting [Alejandro Morales] from attending or participating in the Senior Prom, Baccalaureate Mass or Graduation ceremony." The Kellenberg Memorial High School administration affirmed the punishment. Despite Kellenberg Memorial High School affording him the opportunity to graduate, Alejandro Morales commenced the special proceeding to challenge the institutional discipline. Alejandro Morales demanded mandamus relief compelling Kellenberg Memorial High School to "allow [him] to attend graduation," "the Baccalaureate Mass …," and distribute "guest tickets to attend graduation ceremonies."

The trial court reviewed "the Student Handbook" to determine the nature of institutional "disciplinary regulations[.]" Notably, "parent[s] and "student[s]" expressly acknowledge "receipt of the [Student] Handbook and contractually agre[e] to abide by the rules and regulations … therein." Kellenberg Memorial High School set forth "the overriding principle … is … students are expected to maintain a normal grade of Christian conduct of civility, order and respect," which Mr. Morales contravened. The Roman Catholic high school strove to "educate … students" about the gravity of "sexual[ly] harass[ing]" others. Generally, Alejandro Morales' guardians opposed the institutional punishment by means of discussing the student's background history of conquering hardship regarding his familial situation. Supreme Court of Nassau County reinforced the educational mission to uphold the "standard of conduct of civility, order and respect."

Petitioners Must Prove Entitlement to Clear Legal Rights

In *Perritano v. Town of Mamaroneck*, the Second Department determined that mandamus is improper because the Town of Mamaroneck was not subject to a legal "duty," and the CPLR affords an alternative avenue to resolve disputes involving simplified procedure for court determination

of disputes ("SPCDD") statements.[5] Petitioner Ralph Perritano was a police officer employed with the Town of Mamaroneck. Police Officer Perritano "griev[ed]" the denial of "stand-by pay pursuant to the collective bargaining agreement" amongst the Town of Mamaroneck and police union. The Town of Mamaroneck rejected the grievance, and the Town of Mamaroneck Board upheld same after submission of the appeal. Basically, the collective bargaining agreement set forth the provision(s) requiring the contracting parties to "stipulat[e] for resort to … [SPCDD][.]" The Town of Mamaroneck Board disregarded the "proposed stipulation," so the police officer commenced a special proceeding to compel acceptance of the SPCDD statement as to the board.

In *Town of Hempstead Democratic Committee v. Nassau County Police Department*, the Supreme Court of Nassau County disregarded the demand for mandamus relief because petitioner Town of Hempstead Democratic Committee did not establish "a clear legal right to a parade permit," the Town of Hempstead Democratic Committee did not prove the Nassau County Police Department and Town of Hempstead disregarded the purported requirement of "perform[ing] a ministerial nondiscretionary act," and the Town of Hempstead Democratic Committee did not name the Town of Hempstead Clerk as "a party."[6] The Town of Hempstead Democratic Committee requested the respondents Nassau County Police Department and Town of Hempstead "issue [the] parade permit" at issue regarding the "Presidential debate" between former President Barack Obama and Republican opponent Mitt Romney. Hofstra University hosted the Presidential debate. The Town of Hempstead Democratic Committee initially sent the parade permit application to the Nassau County Police Department. Nassau County Police Department responded that the Town of Hempstead Clerk is responsible for evaluating parade permits. Town of Hempstead Clerk allegedly informed the Town of Hempstead Democratic Committee that the Nassau County Police Department recommended parade permit applications be withheld. Town of Hempstead Democratic Committee sent a Freedom of Information Law ("FOIL") request to the Nassau County Police Department inquiring whether the recommendation was documented. Town of Hempstead Democratic Committee commenced the special proceeding to compel issuance of the parade.

Town of Hempstead Democratic Committee blended the demand for mandamus relief with the "arbitrary and capricious" standard of review. The demand for mandamus relief was in the nature mandamus to compel. Town of Hempstead Democratic Committee described the permit process as a runaround. Nassau County Police Department and Town of Hempstead CPD and the Town of Hempstead contended that the failure to name the Town of Hempstead Clerk as the co-respondent was a fatal misstep warranting dismissal of the

lawsuit. Supreme Court of Nassau County acknowledged the Town of Hempstead Code mandates the permit "application … be filed with the Town [of Hempstead] Clerk[.]"[7]

The Judicial Exercise of Discretion does not warrant Mandamus Relief

In *Schroedel v. LaBuda*, the Third Department determined that the Sullivan County Court "properly exercised its discretion … refusing to accept the plea."[8] The Office of the Sullivan County District Attorney criminally prosecuted petitioner Anthony Schroedel for, inter alia, first degree murder. The criminal prosecution consisted of an "18-count indictment[.]" The Sullivan County Court set forth the deadline for the Office of the Sullivan County District Attorney "to file notice of intention to seek the death penalty." Criminal defendant Anthony Schroedel plead guilty "to the entire indictment" before the deadline. The Office of the Sullivan County District Attorney contested the guilty plea, and the criminal court declined to accept the guilty plea. The criminal court phrased the application as the "preemptive attempt to avoid the death penalty … prior to the expiration of the time for filing the notice of intent" whilst citing *Hynes v. Tomei*, 92 N.Y.2d 613 (1998). New York State Court of Appeals evaluated the constitutionality of certain statutory provisions under the Criminal Procedure Law article 220. Anthony Schroedel commenced the special proceeding to challenge denial of his guilty plea application pursuant to CPLR article 78. Anthony Schroedel demanded mandamus relief "to compel" the criminal court "to accept his plea." The theory of the demand for mandamus is the purported proposition that Anthony Schroedel was afforded the opportunity to plead guilty before the deadline to file the "notice of intent to seek the death penalty[.]" The Third Department "review[ed] … the record establish[ing] beyond doubt" the criminal court considered the "plea." To date, Anthony Schroedel is serving a life sentence at Green Haven Correctional Facility.[9]

In *Deem v. Walsh*, the Second Department "dismissed" the special proceeding because petitioner Michael A. Deem failed to prove entitlement to mandamus relief. Michael A. Deem demanded the Justice of the Supreme Court of Westchester County "recuse herself" regarding the matrimonial proceeding at issue. The demand for mandamus relief was in the nature of mandamus to compel.

In *Maldonado v. Mattei*, the Second Department "dismissed" the special proceeding because petitioner David Maldonado failed to prove entitlement to mandamus relief.[10] David Maldonado demanded the Acting Justice of the Supreme Court of Richmond County "grant … his prior motion to dismiss the indictment." The demand for mandamus relief was in the nature of mandamus to compel.[11]

In *Taffet v. Cozzens*, the Second Department "dismissed" the special proceeding because petitioner Jordan Taffet did not prove entitlement to mandamus relief.[12] Jordan Taffet attempted to forbid Justice R. Bruce Cozzens, Jr. and Justice Sharon Gianelli "enforcing certain orders … in an underlying civil action, … compel" Justice Gianelli "to restore that action to her calendar, and [his] application … for poor person relief." The demand for mandamus relief was in the nature of mandamus to compel.[13] The Second Department "granted" the poor person application by means of ordering the "filing fee" should be set aside pursuant to CPLR §8022(b). However, the Second Department disregarded the application for mandamus relief citing the general propositions governing same.

1. "The Art of Mandamus: Volume One" was published in October 2022. The article evaluates the mandamus doctrine under CPLR §7803(1) and CPLR §7803(3).
2. See *Morales v. Singas*, 184 A.D.3d 566 (2d Dept. 2020).
3. See *id.*; see *also* CPLR §7803(1).
4. See *Morales v. Kellenberg*, 1992 N.Y. Misc. LEXIS 724 (Sup. Ct., Nassau Co. 1992).
5. See *Perritano v. Mamaroneck*, 102 A.D.2d 854 (2d Dept. 1984).
6. See *Town of Hempstead Democratic Committee v. Nassau County Police Department*, 37 Misc. 3d 1208(A) (Sup. Ct., Nassau Co. 2012).
7. See *id.* (citing Town of Hempstead Code Chapter 117).
8. See *Schroedel v. LaBuda*, 264 A.D.2d 136 (3d Dept. 2000).
9. See *Incarcerated Lookup – Schroedel, Anthony*, Department of Corrections and Community Supervision, available at https://nysdoccslookup.doccs.ny.gov/.
10. See *Maldonado v. Mattei*, 180 A.D.3d 914 (2d Dept. 2020).
11. See *id.*; see *also* CPLR §7803(1).
12. See *Taffet v. Cozzens, et al.*, 179 A.D.3d 709 (2d Dept. 2020).
13. See *id.*; see *also* CPLR §7803(1).

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FOCUS: TECHNOLOGY AND THE LAW

Deep Fakes and Shallowfakes: New Technologies Bring New Dangers to the Practice of Law

Matthew Weinick

There can be little debate that technology has changed the practice of law. Long gone are the days when lawyers would spend hours in a law library digging through physical copies of the federal supplement. Instead, with a few clicks on the computer from the comfort of an office chair, Westlaw or Lexis locates the leading authority for a particular legal issue, then with another click, that authority is Shephardized and confirmed as good current law.

New technology, however, brings new pitfalls and traps where lawyers can find themselves facing sanctions, or worse. Some New York lawyers discovered this the hard way recently. Federal district courts imposed more than $160,000 in sanctions in two separate cases based on lawyers' conduct relating to technology. Because the lawyers in these cases did not intentionally misuse technology, the lessons are all the more important.

The Not-So Deep Fake – The Shallowfake

Even the most casual consumer of technology news has likely heard the term "deep fake." A deep fake is artificial intelligence ("AI") generated audio or video that portrays something that did not actually happen in reality.[1] The power of the deep fake was illustrated when filmmaker Jordan Peele created a deep fake video of President Obama appearing to deliver a public service announcement about the dangers of deep fakes.[2]

The idea of the deep fake – using technology to dupe others – is not new. The shallowfake has existed long before the deep fake. Whereas a deep fake is generated by AI, a shallowfake is generated by a person.[3] Alarmingly, shallowfakes do not require advanced software, but rather, can be created with readily accessible and disseminated software such as Photoshop.[4] Individuals can use such basic document editing software to create contracts, invoices, and photographs, i.e., the type of documentary evidence that may find its way into a lawyer's office.[5]

The Evidence is Right Here in a (Shallowfake) Text Message

Increasingly, whether by text message, social media post, or email, plaintiffs are relying on electronic communications as a basis for a cause of action.[6] Indeed, it is doubtful that an attorney practicing in the area of employment discrimination has not encountered a potential client who produces "evidence" of sexual harassment based on texts or emails.

This is what happened in *Rossbach v. Montefiore Med. Ctr.*[7] Andrea Rossbach asserted claims of sexual harassment and retaliatory discharge against her former employer, Montefiore Medical Center, and two individuals employed by the hospital, Norman Morales and Patricia Veintimilla.[8] Rossbach's "principal evidence" of the sexual harassment was text messages allegedly sent by Morales to Rossbach, one of which asked for pictures of Rossbach in a G-string and another which said that Rossbach "looked hot today."[9]

In discovery, Rossbach, via counsel, produced the text messages to the defendants in pdf format.[10] Testifying at her deposition about the message, Rossbach said that the original phone with the message was damaged, which prevented her from taking a screenshot of the text.[11] Instead, she used a new phone to take a photograph of the message.[12]

Rossbach further testified that she gave the original phone to her lawyer, along with the passcode to access the device.[13] Defense counsel said that their discovery vendor could not unlock the phone, and Rossbach repeated the same passcode during the deposition.[14]

After the deposition and pursuant to defendants' request, Rossbach produced a jpeg-formatted picture of the texts, which defendants had analyzed by a forensic expert.[15] Based on its analysis of the file compared to Rossbach's testimony, the expert concluded that the document was forged.[16] Confronted with this evidence and a demand that the case be withdrawn, Rossbach insisted the texts were authentic and refused to withdraw the claims.[17]

Ultimately, the District Court held an evidentiary hearing on the authenticity of the text messages.[18] The court concluded that the text

message was fabricated and that Rossbach had committed a fraud on the court.[19] The conclusion was based on conflicts between the "characteristics" of the document and Rossbach's testimony about the document, missing metadata that should exist with an image taken by Rossbach's phone, and expert testimony that the document did not display a text message as it would appear on an iPhone.[20] These factual conclusions, among others, also supported a finding that Rossbach perjured herself and spoliated evidence.[21]

As a penalty, and finding the conduct to be severe and willful, the District Court imposed a case-terminating sanction.[22] Additionally, the District Court sanctioned both Rossbach and her lawyers in the form of attorneys' fees, costs, and expenses arising from Rossbach's fabrication.[23] As to the lawyers, the District Court determined that such sanctions were appropriate because the lawyer "negligently or recklessly failed to perform his responsibilities as an officer of the court and violated the New York Rules of Professional Conduct."[24]

Several issues were raised on appeal to the Second Circuit, but the heart of the matter was the appropriateness of the sanctions. As to Rossbach, in sum, the Second Circuit determined that the District Court did not abuse its discretion in making its evidentiary rulings or findings of fact.[25] Based on those findings, the decision on spoliation was not clearly erroneous and the court did not abuse its discretion by imposing a case-terminating sanction.[26] The Second Circuit did not seem conflicted in these decisions at all.

On the other hand, the Second Circuit found error in the District Court's award of sanctions against the lawyer and law firm, although the error did not exonerate the lawyers completely of culpability.[27] Rather, the Second Circuit noted that to impose sanctions against an attorney under a court's inherent power or pursuant to 28 U.S.C. §1927, and to award attorneys' fees as a sanction in any case, requires an explicit finding of bad faith.[28] Here, the District Court may have implicitly found bad faith, but without an explicit determination, the Court's decision was error.[29]

Moreover, because the lawyer's conduct related to "representational" conduct, not general conduct as an officer of the court, the appropriate standard also requires bad faith.[30] Instead, the court evaluated the conduct under a negligent or reckless standard.[31] Thus, the case was sent back to the District Court for further findings.

Attorneys Must Be Cautious of Deep Fakes and Shallowfakes

In June 2023, Judge Kastel of the Southern District of New York sanctioned lawyers and a law firm under F.R.C.P. Rule 11 "when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT."[32] The sanctioned attorney testified that he could not believe that ChatGPT could fabricate cases and believed, instead, that the program was able to find real cases that the attorney could not find on his own.[33] In other words, the lawyer unknowingly created a deep fake on himself, which then infiltrated the court proceeding.

To deter future similar conduct, Judge Kastel ordered the lawyers to pay $5,000 to the Registry of the Court.[34] The lawyers represented to the court that they would take it upon themselves to take other remedial measures, including CLE and additional trainings.[35]

Taken together, *Rossbach* and *Mata* are cautionary tales to attorneys. Practitioners must be ever vigilant that their clients are not using technology to commit a fraud on the courts. Practitioners must also ensure that the technology they employ in their practice is not unwittingly creating a fraud or deception.

Some judges are reacting to the emergence of new technologies in the practice of law by explicitly addressing technology in their rules. For example, Judge Subramanian, in the Southern District, allows the use of ChatGPT "or such other tools," but specifically cautions lawyers, including the Lead Trial Counsel designated for the case, that they bear responsibility for the accuracy of research performed by such tools.[36]

Judge Subramanian's admonition should be redundant. In the age of deep fakes and shallowfakes, attorneys must exercise caution in accepting technologically generated documents. It is doubtful that a court would require an attorney to retain an expert to evaluate the authenticity of electronic documents provided by a client. Some level of investigation, however, is warranted to avoid a finding of negligence or recklessness, should it someday be revealed that a client-provided electronic document was indeed fabricated. Similarly, double-checking research performed by online databases or the various AI tools available today seems to be a reasonable standard. In sum, vigilance should always be exercised.

In some ways technology makes the practice of law easier, but technological developments also open the door for new ethical pitfalls. Prudent lawyers will stay abreast of these changes and educate themselves on best practices to employ that would help them avoid the hazards, or at a minimum, avoid liability for the unavoidable traps.

1. Dave Johnson and Alexander Johnson, *What are deepfakes? How fake AI-powered audio and video warps our perception of reality*, Business Insider, June 15, 2023, https://www.businessinsider.com/guides/tech/what-is-deepfake.
2. David Mack, *This PSA About Fake News From Barack Obama Is Not What It Appears*, BuzzFeed News, Apr. 17, 2018, https://www.buzzfeednews.com/article/davidmack/obama-fake-news-jordan-peele-psa-video-buzzfeed.
3. Ashley Stoll, *Shallowfakes and Their Potential for Fake News*, Washington Journal of Law, Technology & Arts, Jan. 13, 2020, https://wjlta.com/2020/01/13/shallowfakes-and-their-potential-for-fake-news.
4. Natalie Randall, *Shallowfakes and fraud*, Alarmrisk.com, Feb. 24, 2022, https://www.alarmrisk.com/resource/shallowfakes-and-fraud.html.
5. *Id.*
6. *E.g. Ganske v. Mensch*, 480 F. Supp. 3d 542 (S.D.N.Y. 2020) (defamation based on Twitter post); *Stolatis v. Hernandez*, No. 63644/2015, 2016 N.Y. Misc. LEXIS 943 (N.Y. Sup. Ct. Mar. 25, 2016) (defamation based on a Facebook post).
7. No. 21-2084, 2023 U.S. App. LEXIS 22601 (2d Cir. Aug. 28, 2023).
8. *Id.* at *3-4.
9. *Id.* at *3, 6.
10. *Id.* at *6.
11. *Id.* at *6-7.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at *7.
16. *Id.*
17. *Id.*
18. *Id.* at *8.
19. *Id.* at *10.
20. *Id.*
21. *Id.* at *11.
22. *Id.* at *10-12.
23. *Id.*
24. *Id.* at *13.
25. *Id.* at *15-28.
26. *Id.*
27. *Id.* at *29-34.
28. *Id.*
29. *Id.*
30. *Id.* at *31-33.
31. *Id.* at *33.
32. *Mata v. Avianca, Inc.*, 22-CV-1461, 2023 U.S. Dist. LEXIS 108263 (S.D.N.Y. June 22, 2023); ChatGPT is an artificial intelligence program that can create "lifelike responses to any question – crafting essays, finishing computer code or writing poems." Pranshu Verma, *Professors Have a Summer Assignment: Prevent ChatGPT Chaos in the Fall*, The Washington Post, Aug. 13, 2023, https://www.washingtonpost.com/technology/2023/08/13/ai-chatgpt-chatbots-college-cheating.
33. *Mata*, 2023 U.S. Dist. LEXIS 108263 at *9.
34. *Id.* at *45.
35. *Id.* at *44.
36. Individual Practice Rules of Honorable Arun Subramanian 8.F.

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FOCUS: LAW AND AMERICAN CULTURE

The Lawyer Who Broke Brooklyn's Heart

Rudy Carmenaty

If you had a gun with only two bullets, and you were in the room with Hitler, Stalin, and Walter O'Malley, who would you shoot? O'Malley. Twice.[1]

Ever since he took the Dodgers from the '*Burrough of Churches*' to the '*City of Angels*', Walter O'Malley has been the devil incarnate in Brooklyn. The 'Bums,' as the team was affectionately known, had forged a unique bond with the 'Flatbush Faithful.' Moving the team to Los Angeles was heart wrenching, a betrayal.

Baseball was then and is now a business. O'Malley's motives have traditionally been attributed to sheer avarice. Weighing on his mind was the success of the Boston Braves once they moved to Milwaukee.[2] The Braves were drawing over two million fans in Wisconsin in a brand-new stadium with ample parking.

O'Malley was no doubt salivating at such a prospect. Yet other factors played their part in his decision. Did New York officials leave him no option? Was it the fault of Robert Moses who vetoed the construction of a new stadium in Kings County? What role did changing demographics in Brooklyn spur the Dodgers' exodus? Could any owner realistically refuse the tempting offer made by Los Angeles?

A lawyer by profession, O'Malley was skilled at corporate infighting. Within less than a decade, he went from the team's attorney to a major stockholder to majority owner. O'Malley's first goal when he took control of the Dodgers was securing a replacement for Ebbets Field.

First opened in 1913, the old ballpark was showing its age. Ebbets Field had a seating capacity of 32,000 and was a liability in terms of maintenance and upkeep. Despite its endearing appeal, it was a financial drain on the organization. The push was for a modern facility with better accommodations and more amenities.

Crammed into one square city block in Flatbush, there was no possibility for expanding Ebbets Field. O'Malley was further consumed with the idea of creating a showcase for his team. He wanted a modern, family-friendly stadium with improved sightlines and increased parking. It bordered on an obsession.

Fans may have expected as much since they were not coming out to games as they used to. As the fifties rolled on, attendance went down from a high of 1.8 million in 1947 (the year Jackie Robinson joined the club) to just over 1 million by mid-decade.[3] The club was still making money, but this was a precipitous drop.

The Bums' middle-class/working class fanbase were leaving Brooklyn in droves. The post-war prosperity led to the suburban boom, and the advent of highways meant Dodger fans were now living on Long Island. With only 700 parking spaces, it wasn't easy for fans to return to the old neighborhood to catch a game.[4]

O'Malley found a site for his new ballpark at the intersection of Flatbush and Atlantic Avenues in Atlantic Yards. Adjacent to the terminus of the Long Island Rail Road, this location would be accessible to Dodger fans who were now living in Nassau and Suffolk counties.

As envisioned by O'Malley, the Brooklyn Sports Center was to be a 52,000-seat multipurpose geodesic dome with a retractable roof.[5] O'Malley wanted to construct a dome facility in Brooklyn where fans could ride to the game on the LIRR or drive in not having to worry about where they parked their cars.

If it had been built, the 'Dodger Dome' may have prevented the team from going to California. O'Malley's plans included not only a new domed facility, but the redevelopment of the surrounding area. A half-a-century later, the Barclays Center stands adjacent to the site O'Malley sought.

Privately financed, the stadium's estimated costs, as touted by O'Malley, would be $6 million.[6]

At the time, the location housed the Fort Greene meat market. O'Malley wanted the land to be taken under eminent domain, as provided for under Title I of the Federal Housing Act of 1949.[7]

O'Malley was willing to spend his own money, but he needed New York City to condemn the property. O'Malley could then buy the parcels he needed to assemble at a substantially reduced price. Without this predicate, there would be no new stadium.

What O'Malley was asking for was the exercise of public authority and expenditure on behalf of a private concern. O'Malley's position was that the Dodger were a cherished part of the community, thus it would be an appropriate public purpose to keep the Bums in Kings County.

This element provided an obstacle that O'Malley could not surmount. New York City (not just the borough of Brooklyn) would have to authorize the use of eminent domain. At that time, that meant the person of Robert Moses. In effect, Moses had the power to permit or thwart O'Malley's ambitions. If only Moses had said yes.

Nonetheless the idea of building a stadium in downtown Brooklyn accessible to the Long Island Rail Road, MTA subways, and public transportation was anathema to Moses' philosophy.[8] Moses felt that any new ballpark should be situated in Flushing Meadows, where ultimately Shea Stadium opened in 1964.

Moses also felt it should be a municipal stadium wherein a team paid rent to the City. O'Malley however insisted on a facility that he would own and from which he could derive all revenues from concessions. In a contest of wills, O'Malley did not have the pull to overcome Moses.

And to be fair, the NYC political establishment balked at O'Malley's proposal. On principle, it was felt that the City should not have to underwrite a profit-making enterprise with a considerable taxpayer-funded subsidy. Today, cities gifting arenas and stadiums to lure sports franchises is taken for granted. Not so in the 1950s.

For the price O'Malley offered was well-below market value. To acquire the Fort Greene site, it would have cost NYC over $9 million.[9] O'Malley was willing to pay $1.5 million for the land after condemnation.[10] The City would also have to bear outlays for area redevelopment, upgrading the LIRR, and related enhancements.

Many thought that O'Malley was bluffing. The Bums leaving Brooklyn was simply unthinkable. But it was O'Malley who overestimated the degree of support he would be able to generate from the public or garner from the politicians. As things turned out, O'Malley would have to go elsewhere to get his new stadium.

O'Malley was a public man who kept his own counsel. He was always deft in his business dealings. From 1952 to 1957, O'Malley was engaged in a game of high stakes poker with NYC officials over the construction of the Brooklyn Sports Center and the fate of the Brooklyn Dodgers.

O'Malley was a seasoned card player who knew when to bluff, knew when to call, and had no intention of

folding his cards (except if it was to leave town). The ace up O'Malley's sleeve, and his most potent threat, was taking the Bums elsewhere.

As things turned-out, his trump card was 3,000 miles away in Los Angeles. During game #1 of the 1956 World Series, LA County Supervisor Kenneth Hahn was at Ebbets Field courting Calvin Griffith of the Washington Senators. O'Malley sent Hahn a note telling Hahn not to make any deal with Griffith until he spoke to him.

A year earlier, as the Dodgers were on the cusp for their 1955 World Series title, O'Malley had been contacted by L.A. City Councilwoman Rosalind Wyman. O'Malley told her then that he was not interested in relocating to Southern California. He said he wanted to work things out in New York.

Wyman was quite persistent and had campaigned for office on the pledge of bringing a major league team to LA. O'Malley at first thought of using LA as a poker chip. Things would change dramatically in less than two years as Los Angeles would offer O'Malley what New York City would not or could not.

A frustrated O'Malley, rebuffed by Moses repeatedly, decided to relocate. After all, Los Angeles officials dangled before O'Malley approximately 350 acres of prime real estate north of downtown LA, and millions of dollars in additional incentives. Even under the best of circumstances, NYC could not match this bid.

O'Malley's first step was securing the territorial rights to the Los Angeles market held by the Chicago Cubs. In February 1957, O'Malley swapped his rights in Fort Worth, Texas for Cubs' owner Phil Wrigley's rights in Los Angeles and bought his Pacific Coast League team, the Angels, and Wrigley Field, the Cubs' LA stadium.[11]

With the territorial rights to Los Angeles in hand and a cooperative municipality willing to give him the land that NYC was not, O'Malley was nearly set to go. Yet he couldn't make the move without the approval of the seven other National League owners.

Without the National League's permission, a shift to Los Angles could not take place. The most serious impediment was one of cost. The nearest outpost to Los Angeles was in St. Louis 1,600 miles away. Without another team on the west coast, road trips to California would become prohibitively expensive.

O'Malley could only move to LA if another ballclub was nearby. Enter Horace Stoneham, owner of the New York, later to be the San Francisco, Giants. The Giants were dead last in attendance and their ballpark, the Polo Grounds, was as dilapidated as Ebbets Field but without any of the charm.

Stoneham had decided on Minneapolis as his team's new home city. O'Malley convinced Stoneham to consider San Francisco. In so doing, O'Malley helped orchestrate another New York team coming to California. Paradoxically, the Dodgers needed their archrivals the Giants to make their move west possible.

On May 28, 1957, the National League voted to permit both the Dodgers and the Giants to move to Los Angeles and San Francisco respectively.[12] The loss of not one, but two venerable teams was a bitter blow for New York baseball fans on both sides of the East River.

During the 1957 season, tell-tale signs where present that the Bums would soon no longer be in Brooklyn. O'Malley sold Ebbets Field to real estate mogul Marvin Katter for $2 million.[13] Also, in both 1956 and in 1957, the Dodgers played seven of their home games at Roosevelt Stadium in Jersey City.

On September 24th, the final game at Ebbets Field was played. The Bums beat the Pirates 2-0 before 6,702 fans as organist Gladys Goodding played *Auld Lang Syne*.[14] Their final game as the 'Brooklyn' Dodgers was at Connie Mack Stadium, a 2-1 loss to the Phillies on September 29th.[15] It was the last time the team wore their Brooklyn road jerseys.

How does one assess Walter O'Malley? Was he a villain or an exceptionally astute businessman? O'Malley always insisted he was forced out of Brooklyn by politics. O'Malley however played his hand knowing that his ultimatum — give me the land for a new stadium or I will bolt town — was sure to be turned down by Robert Moses.[16]

Was the Dodger Dome a public-relations ploy? Did O'Malley intend to go to the West Coast all along? O'Malley was shrewd. For his part, he wanted more — more money, more power, more of everything — and he got everything we wanted and then some in California.

The Los Angeles Dodgers became the first franchise to draw over three million fans. Dodger Stadium, the realization of O'Malley epic quest for a new ballpark, is the finest facility in baseball. Moving the Dodgers was the smart move. It was perfectly legal and it was tremendously profitable.

O'Malley, by any measure, was one of the game's most significant figures. Posthumously elected to the Hall of Fame, O'Malley made baseball geographically the 'National Pastime' by bringing the major leagues to the west coast. He paved the way for Major League Baseball to expand to new markets.

All of which does not absolve O'Malley for taking the beloved Bums away. Old loyalties do matter. Frankly, it was a sin. O'Malley will forever be the lawyer who broke Brooklyn's heart. Pete Hammill and Jack Newfield were right when they noted that the three worst human beings of the 20th century were Hitler, Stalin, and Walter O'Malley.[17]

1. Richard Brownell, *Who's Really to Blame for the Dodgers Leaving Brooklyn?, Gothamist* (May 30, 2018) at https://gothamist.com.
2. The Braves have since moved to Atlanta.
3. Henry D. Fetter, *Revising the Revisionists: Walter O'Malley, Robert Moses, and the End of the Brooklyn Dodgers* at https://historycooperative.org.
4. Biography at https://www.walteromaley.com.
5. O'Malley commissioned a model designed under the direction of R. Buckminster Fuller which he kept in his office.
6. Biography, *supra*.
7. See The American Housing Act of 1949 (Pub. L. 81–171).
8. Robert Moses believed that the automobile was the key to modern living. His philosophy was to build roads, tunnels, and bridges to facilitate the automobile and the rise of the suburbs. See Robert Caro's *The Power Broker* (1974).
9. Fetter, *supra*.
10. *Id.*
11. Dick Young, *Brooklyn Dodgers owner, Walter O'Malley acquires L.A.'s Wrigley Field in 1957, New York Daily News* (February 20, 2015, originally published on February 22, 1957) at https://www.nydailynews.com.
12. Biography, *supra*.
13. A housing project, the Ebbets Field Apartments, now stands on the site.
14. Peter Golenbock, *Bums* (1st Ed. 1984) 577.
15. David J. Halberstam, *The Brooklyn Dodgers played their last game in '57; Vin Sculley called it, Nothing official was said about LA*, Sports Broadcast Journal (August 18, 2020) at www.sportsbroadcastjournal.com.
16. At a Gracie Mansion meeting held on August 19, 1955 by NYC Mayor Robert Wagner between O'Malley and Moses, Moses called O'Malley out in those very terms.
17. Golenbock, *supra*, 582.

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NASSAU ACADEMY OF LAW

October 4, 2023 (HYBRID)

Dean's Hour: Breaking Up is Hard to Do—Law Firm Break-Ups and Retirements
12:30PM–1:30PM
1.0 credit in professional practice

Part 3 of this series will summarize the prior issues and then coordinate with important insurance considerations for all parties. The final day will have time for detailed Q&A and recent cases and rulings will be discussed and analyzed.

Guest Speakers:
Robert S. Barnett, Esq., Partner, Capell Barnett Matalon & Schoenfeld LLP
Omit Zareh, Esq., Partner, Weinberg Zareh Malkin Price LLP

Registration Fees:
NCBA Members complimentary; Non-Members $35

October 5, 2023 (HYBRID)

Dean's Hour: Essential Data Protection for Attorneys and Their Clients
With NCBA Cyber Law and General, Solo & Small Law Practice Management Committees
Sponsored by NCBA Corporate Partner IT Group New York—New York's most trusted tech group
12:30PM–1:30PM
1.0 credit in Cybersecurity, Privacy and Data Protection

Attorneys in New York are required to "keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information." Join our experienced panel for a discussion on the crucial steps that all attorneys must take to protect their firm's data as well as their client's information. Learn the best practice for all attorneys when accessing and transmitting digital data.

Guest Speakers:
Thomas J. Foley, Esq., Partner, Foley Griffin
Nicholas Himonidis, Esq., Owner, The NGH Group
Adam Schultz, Owner, IT Group New York

Registration Fees:
NCBA Members complimentary; Non-Members $35

October 5, 2023 (IN PERSON ONLY)

Fireside Chat: *This Light Between Us with* Andrew Fukuda and Ching-Lee Fukuda
With NCBA Asian American Attorney Section and Diversity & Inclusion Committee
Sponsored by Sidley Austin LLP
5:00PM–6:00PM Cocktail Reception
6:00PM–7:00PM Program
1.0 credit Diversity, Inclusion and Elimination of Bias

Come join us for a networking cocktail hour and Fireside Chat by Andrew and Ching-Lee Fukuda. Ching-Lee will interview Andrew about his journey to becoming a traditionally published author of five novels, with a special focus on his most recent historical fiction work, *This Light Between Us,* which details the varied experiences of Japanese Americans during World War II. Andrew will speak on the unique challenges that face Asian Americans in the publishing industry, and how some of those challenges overlap (or don't) in the legal industry.

Guest Speakers:
Andrew Fukuda—Andrew is an ADA with the Nassau County DA's office. He is the author of five books, including C*rossing,* which was selected as a Booklist Top Ten First Novel and Top Ten Crime Novel, and *The Hunt* series, which has been translated into ten languages. Born in New York and raised in Hong Kong, he graduated from Cornell University with a BA in history, and his law degree from Benjamin N. Cardozo School of Law. He has since lived in Kyoto and New York City, and now calls Long Island home where he lives with his wife Ching-Lee and two sons.

Ching-Lee Fukuda—Ching-Lee is a partner and the head of Sidley's IP Litigation Practice in New York and a member of the firm's Global Life Sciences Leadership Council.

Registration Fees:
NCBA Members complimentary; Non-Members $35

October 12, 2023 (IN PERSON ONLY)

Dean's Hour: The Law Firm Experience through the Lens of Technology—Start to Finish
Complimentary lunch sponsored by NCBA Corporate Partner LexisNexis
12:00PM–12:30PM Lunch
12:30PM–1:30PM Program
1.0 credit in professional practice. Skills credits available for newly admitted attorneys.

The many ways technology can aid attorneys in locating the best and most on point statutes, caselaw, secondary

PROGRAM CALENDAR

materials and all relevant materials can be overwhelming. To comments to the model rules of professional conduct governing attorneys state that "to maintain competency a lawyer should keep abreast...[of] the benefits and risks associated with relevant technology." The goal of this course is to assist attorneys in navigating online legal research so they feel more confident and competent when researching subjects important to their work. This CLE course considers the daily tasks that attendees may be required to perform.

Guest Speaker: Donna Baird
Donna Baird has been with LexisNexis since 1993 as a Solutions Consultant and Team Lead. During her tenure, she has partnered with law firms of all sizes, federal and state agencies, and courts, as well as corporate legal departments. She is a graduate of the College of William & Mary and currently lives in Ashland, Virginia. LexisNexis has arranged for Donna to travel to Domus and present this program in person. You won't want to miss cutting edge research through the lens of technology CLE program!

Registration Fees:
NCBA Members complimentary
Non-Member Attorney $35; Court Support Staff $20

October 16, 2023 (HYBRID)

Dean's Hour: Pro Bono—A History of Pro Bono in Nassau County
With NCBA Access to Justice Committee
12:30PM–1:30PM
1.0credit in professional practice

Come join us for a program on how lawyers have and continue to "do good" in Nassau County. Learn more about the history of pro bono as well as opportunities for pro bono through programs currently being run by Nassau County Bar Association and other pro bono legal service providers.

Guest Speakers:
Judge Vito M. DeStefano, District Administrative Judge, 10th Judicial District—Nassau County
Madeline Mullane, Esq., Director, Pro Bono Attorney Activities and NCBA Mortgage Foreclosure Assistance Project
Cheryl Zalenski, Director, ABA Center of Pro Bono, Counsel to ABA Standing Committee on Pro Bono and Public Service
Professor Emeritus Richard Klein, Touro Law Center
Thomas Maligno, Former Executive Director of Nassau Suffolk Law Services and the Touro Law Center Public Advocacy Center, and Founder of the Pro Bono Projects of the Nassau and Suffolk Bar Associations

Registration Fees:
NCBA Members and Non-Members complimentary courtesy of NCBA Mortgage Foreclosure Project

October 17, 2023 (IN PERSON ONLY)

Civil Evidence Update by Stephen Gassman, Esq.
Sponsored by NCBA Corporate Partner Realtime Reporting
5:00PM–6:00PM Lite Dinner Buffet
6:00PM–8:30PM Program
2.5 credits in professional practice

This course will be a review of the current case law and trends for all civil case litigators—direct examination, cross examination, hearsay, expert testimony, electronic evidence and much more.

Guest Speaker: Stephen Gassman, Esq., Gassman Baiamonte Gruner, P.C.

Registration Fees:
NCBA Members complimentary; Non-Members $85

October 25, 2023 (IN PERSON ONLY)

Killer Robots—What Ethical Obligations Govern Attorneys' Use of AI?
With NCBA Cyber Law Committee
Sponsored by The NGH Group, Inc.
5:00PM–6:00PM Cocktail Reception
6:00PM–7:30PM Program
1.5 credit in Cybersecurity, Privacy and Data Protection—Ethics

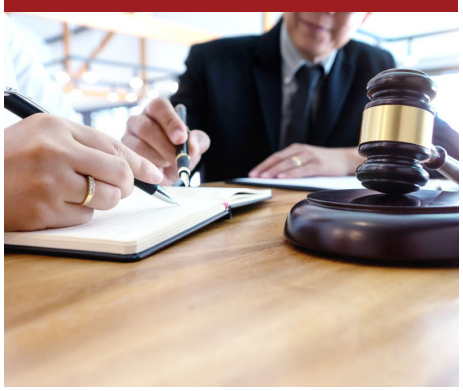
Join us for a fun evening as our panel examines how AI generated technology has the potential to create killer robots. How will a robot know the difference between what is legal and what is right and ethical? Our panel will use clips from blockbuster movies to illustrate their legal discussions on what ethical obligations govern attorney's use of AI.

Guest Speakers:
Thomas J. Foley, Esq., Partner, Foley Griffin
Nicholas Himonidis, Esq., Owner, The NGH Group
Christopher J. DelliCarpini, Esq., *Sullivan Papain Block McGrath Coffinas & Cannavo P.C*

Registration Fees:
NCBA Members complimentary
Non-Member Attorney $50

FOCUS: EMPLOYMENT LAW

Arbitration Considerations in Employment Matters



Paul F. Millus, Esq.

The State of the Law in Federal and NY State Courts

An arbitration clause, whether contained in an employment agreement or in a separate free-standing agreement, is a contract: pure and simple.[1] Under the FAA, arbitration agreements, must be in writing, but need not be signed.[2] State law contract principles are used to determine whether parties have agreed to arbitrate look to general state law contract principles to interpret the scope of an arbitration provision.[3] Indeed, although employment handbooks predominately state that the handbook is not a contract, some courts have enforced arbitration agreements contained in employee handbooks.[4]
As such, the Federal Arbitration Act ("FAA") is controlling in most instances.[5] There are limited exceptions within the statute itself and by congressional mandate which will be addressed *infra*.

A motion to compel arbitration may be filed in federal court or state court. To file in federal court, there must be an independent basis for federal subject matter jurisdiction.[6] If no independent subject matter jurisdiction exists i.e., lack of diversity and amount in issue does not exceed $75,000 or there is no federal question involved, then a litigant cannot seek relief form the federal court's and a matter filed in state court cannot be removed to federal court. Nonetheless, a New York State court will engage in the same analysis that a federal court would. In sum, the party seeking arbitration does not need to demonstrate that the arbitration agreement was enforceable, but merely whether it exists or not and whether it applies to the suit at hand.[7]

To Arbitrate or Not to Arbitrate?

The question is almost entirely rhetorical. If an agreement exists and one party or the other wants to arbitrate, with rare exception, it will be arbitrated. However, it is a worthy question nonetheless. First, although impractical, an employee can refuse to agree to arbitrate any claims it may have in the future against its prospective employee. Most likely, the employee simply will not get the job. But that is not to say that an employee is without any recourse. An arbitration clause is contractual and contracts can be negotiated. The where's and when's in the clause may be up for debate, as might the number of arbitrators, who pays what, how much (and what type of) discovery will be permitted are potential subjects for discussion.

For employers the general consensus has been it is more cost efficient, faster and some think—confidential. Well, maybe yes and maybe no. As for costs, with both JAMS and the AAA, the employer pays, essentially, all substantive costs associated with the arbitration. As any practitioner knows, these can add up—quickly. As for speed—yes—the resolution can come faster (most of the time) but the employer's attorney should keep in mind that the one thing that could short circuit a trial in court—summary judgment—is rarely granted in an arbitration setting. While JAMS specifically permits the filing for summary dismissal—the AAA does not.[8] Therefore, in arbitration the parties are more likely than not to go to "trial" to resolve their dispute.

And what of confidentiality? Arbitrations are private. They are not confidential. For instance, JAMS only "requires the Arbitrator to maintain the confidential nature of the Arbitration, not Plaintiffs." In fact, the AAA makes clear in its statement of Ethical Principles that "[t]he parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement." Further, the CPLR does not provide for issuance of confidentiality orders in aid of arbitration. CPLR 7502(c) specifically provides that the court may entertain an application for provisional remedies, i.e., for an order of attachment or for a preliminary injunction. However, a confidentiality order has been held not to be in the nature of a provisional remedy.[9] As for the FAA, it has been held to have a "strong policy protecting the confidentiality of arbitral proceedings … ."[10] Of course, confidentiality, even if reduced to writing, can for the most part become a moot point if one side or the other seeks to confirm or reject the Award. Finally, a word on waiver. First, both sides can choose not to pursue arbitration. The courts are not required to enforce compulsory arbitration

unless one party asks for it. "There is no provision of the CPLR that requires a court to direct arbitration based upon the existence of what the court believes to be an applicable arbitration provision covering the subject matter of the action, absent a request from one of the parties to arbitrate."[11]

Moreover, the mere fact that a party otherwise entitled to arbitration participates in a judicial action or seeks a remedy accorded to it by a court has been held, in and of itself, a waiver.[12] Rather, the inquiry is to what extent a party used the court's such that, that party's actions are inconsistent with a later claim that the parties were obligated to arbitrate the dispute.[13] Facts will differ, but determining through a review of relevant caselaw how much court intervention will be too much should be factored in from the outset.

Push Back on Arbitrability of Claims

While it is abundantly clear that arbitration agreements will be enforced to the letter, there are some actual existing exceptions to mandatory arbitration together with a potential expansion of those exceptions.

While it has long been the case that the FAA's mandates in support of its "liberal federal policy favoring arbitration agreements," that policy may be "overridden by a contrary congressional command."[14] For example, in 2018, New York enacted the amended Human Right's Law that prohibited the mandatory arbitration of sexual harassment claims. Then in 2019, the New York legislature amended CPLR 7515 to encompass claims of discrimination generally instead of being limited to sexual harassment claims. However, it has long been the law that "the FAA pre-empts state laws [that] 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'"[15] Accordingly, in 2019 District Judge Denise Cote, recognizing that :[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA" ruled that Section 7515 presents no generally applicable contract defense, whether grounded in equity or otherwise, and as such cannot overcome the FAA's command that the parties' Arbitration Agreement be enforced."[16]

As for New York's 2019 legislation, it too has been held to be in conflict with the FAA. However, the passage of The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFAA") somewhat resolved that issue and is one of those instances where the FAA has been lawfully pre-empted by federal legislation. It was signed into law on March 3, 2022 but it applies only to claims that accrued on or after that day and does not have retroactive effect.[17] But what if the plaintiff asserts multiple claims-some arbitrable and some not? The general rule is that when a complaint contains both

arbitrable and non-arbitrable claims, the FAA requires courts to "compel arbitration of pendent arbitrable claims, even where the result would be the maintenance of separate proceedings in different forums."[18] But that rule is in question in light of a recent decision rendered by Federal District Court Judge Englemayer that, where the employer only moved to compel arbitration on the employee's FLSA, and pay, race, gender and ethnicity discrimination, the court held that the EFAA rendered the arbitration clause unenforceable to the entire case.[19] But this June, in another decision from the S.D.N.Y, the court distinguished Judge Engelmayer's ruling holding that "[s]ince Plaintiff's wage and hour claims under the FLSA and the NYLL do not relate in any way to the sexual harassment dispute, they must be arbitrated, as the Arbitration Agreement requires."[20]

Even the U.S. DOL has weighed in with a recent posting on its website entitled "Mandatory Arbitration Won't Stop Us from Enforcing the Law."[21] In its posting, the DOL focuses on misclassification, pay discrimination and wage and hour issues as it pushes back against mandatory arbitration of those claims. And finally, keep in mind that the EEOC is not prohibited from pursuing claims that would otherwise be covered by an arbitration agreement.[22]

In conclusion the forces on each side of this issue are entrenched. The law favoring arbitration may be clear and "well settled", but that does not mean that it will not be weakened at the periphery over time with the exceptions eventually swallowing the hole.

1. The FAA requires all arbitration agreements to be in writing, however, it does not require to be contained in in a separate integrated written contract.
2. See 9 U.S.C. §3; see also Thomson–CSF S.A. v. American Arbitration Ass'n, 64 F.3d 773, 776–77 (2d Cir.1995).
3. "New York law governs the contract and requires courts to "give effect to the parties' intent as expressed by the plain language of the provision." *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 176 (2d Cir. 2003) quoting *John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48, 58 (2d Cir. 2001).
4. *See, e.g., Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (11th Cir.1997); *Bishop v. Smith Barney, Inc.,* No. 97 Civ. 4807, 1998 WL 50210, at *5 (S.D.N.Y.1998).
5. The FAA does not cover "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9.U.S.C. §1. The FAA also does not apply to arbitrations arising out of collective bargaining agreement as CBA's are covered by the Labor management Relations Act of 1947. *Coco Cola Bottling co. of N.Y. v. Soft drink & Brewery Union Local 812 Int'l Bhd. of Teamsters*, 243 F.3d 52 (2d Cir. 2001).
6. The FAA does not create independent federal question jurisdiction, establishing diversity jurisdiction or another basis for federal question jurisdiction is required for removal. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 26 n.32 (1983)).
7. *Zachman v. Hudson Valley Credit Union*, 49 F.4th 95 (2d Cir. 2022).
8. AAA Employment Rule 27 state: "[t]he arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case." This may be overridden by an explicit agreement between the parties in the arbitration agreement.
9. *Ghassabian v. Hematian*, 28 Misc.3d 957, 903 N.Y.S.2d 872 N.Y. Co. 2010).
10. *In re IBM Arbitration Agreement Litigation*, 74 F. 4th 74, 85 (2d Cir. 2023).
11. *P.S. Finance, LLC v. Eureka Woodworks*, 214 A.D.3d 1, 184 N.Y.S.3d 114 (2d Dep't 2023.
12. *Spirs Trading Co. v. Occidental Yarns, Inc.*, 73 A.D.2d 542, 542, 423 N.Y.S.2d 13, 15 (1st Dep't 1979).
13. *Id.*
14. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98, 132 S.Ct. 665, 181 L.Ed.2d 586 (2012) (citation omitted).
15. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478–479, 109 S.Ct. 1248, 103 L.Ed.2d 488 [1989], *quoting Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 [1984]; see *Preston v. Ferrer*, 552 U.S. 346, 349–350, 128 S.Ct. 978, 169 L.Ed.2d 917 [2008.
16. *Latif v. Morgan Stanley et al.* 2019 WL 2610985 * 4 (S.D.N.Y. 2019).
17. *See* 9 U.S.C. §§401, 402, *Johnson v. Everyrealm, Inc.* ---F.Supp ---, 2023 WL 2216173 (S.D.N.Y. 2023). Note: a litigant might want to explore whether an arbitration clause agreed to prior to the date has somehow been "reborn" in some way so that one may argue the date of the clause should be deemed to be effective after March 3, 2022.
18. *Mera v. SA Hospitality Group, LLC*, ---F.Supp. ---, 2023 WL 3791712 (S.D.N.Y. 2023). *KPMG LLP v. Cocchi*, 565 U.S. 18, 22, 132 S.Ct. 23, 181 L.Ed.2d 323 (2011) (*quoting Dean Witter Reynolds, Inc. v.* Byrd, 470 U.S. 213, 217, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985)). In *Mera*, the court held that, since Plaintiff's wage and hour claims under the FLSA and the NYLL did not relate in any way to the sexual harassment dispute, those claims must be arbitrated. Thus, the Court finds that the plaintiff was compelled to arbitrate his FLSA and NYLL claims, but not his NYSHRL and NYCHRL claims, which did not relate to the sexual harassment dispute.
19. *Johnson*, 2023 WL 2216173 * 4 (S.D.N.Y. 2023). *Mera v. SA Hospitality Group, LLC.* ---F.Supp.---, 2013 WL 3791712 (S.D.N.Y. 2023).
20. *Mera v. SA Hospitality Group, LLC.* ---F.Supp.---, 2013 WL 3791712 *4 (S.D.N.Y. 2023).
21. https://blog.dol.gov/2023/03/20/mandatory-arbitration-wont-stop-us-from-enforcing-the-law.
22. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28–29, 11 S.Ct. 1647) (1991) (finding that a victim of discrimination may still file a charge with the EEOC despite being subject to an arbitration agreement, but also noting that "the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration.").

Paul F. Millus, Esq. is a Shareholder at Meyer, Suozzi, English & Klein, P.C. in the Employment and Business Litigation Departments and former chair of the NCBA Labor & Employment Law and Federal Courts Committees.

FOCUS: CONSTRUCTION LAW

The Construction Industry Wage Theft Act Beware!

Michael Ganz

Wage theft, particularly in the construction industry, has become a hot button issue that has put greater onus on general contractors to ensure that construction workers are paid fairly.

In Fiscal Year 2022 alone, the United States Department of Labor's Wage and Hour Division recouped more than $32.9 million in back wages in the construction industry for more than 17,000 employees.[1]

Locally, in January 2022, New York State passed the Construction Industry Wage Theft Act (New York Labor Law 198-E) (the "Act"), joining a host of others states that have passed similar laws, including Illinois and Minnesota.[2]

The purpose of this bill was to amend the existing wage theft law to increase the likelihood that exploited workers in the construction industry will be able to secure payment and collect unpaid wages and benefits for work that has already been performed.

Compliance is critical, considering wage theft continues to fall under the scrutiny of enforcement officials. Among enforcement efforts, last July, NYS launched a hotline to report wage theft and recover stolen wages[3]; this past February, Manhattan District Attorney Alvin L. Bragg, Jr. announced the creation of the Office's first-ever Worker Protection Unit, of which the Office's Construction Fraud Task Force will be part of, to investigate and prosecute wage theft.[4]

Driving Factors Fueling Wage Theft

During the past few years, and especially heightened by the Covid-19 Pandemic, construction contractors have come under increased financial pressure due to enormous increases in material prices, as well as timely availability of those materials. Moreover, recent labor issues, which affect all aspects of the economy are particularly problematic in the construction industry. Unfortunately, contractors often seek to skirt New York's labor laws by underpaying their workers in order to increase their profits, gain an unfair advantage over other contractors bidding on the same work, and even to simply survive. Since contractors generally purchase equipment and materials from similar sources and at similar rates, a contractor's most effective price reduction option is to focus on its labor costs, which are also its largest cost component on most projects.

The Construction Industry Wage Theft Act

New York State's Construction Industry Wage Theft Act, which went into effect January 4, 2022, is intended to curb this wage abuse. It applies to the majority of construction projects within New York State for which contracts were entered into, renewed, revised or amended on or after that date. Specifically excluded from the reach of this law are home improvement contracts for 'occupied homes' or projects for the construction of less than ten (10) 1 or 2 family homes at one location. Obviously, there are nuances to the above, but as the law is still relatively new, the exact implications, restrictions and liabilities have not been tested in the courts.[5]

Specifically, the Act imposes strict liability on a contractor for wage violations, not only for the actions of its direct subcontractors, but also for any-tier of subcontractor performing work under the contractor. This can be particularly challenging, considering many contractors may not even know the identities of all tiers of sub-subcontractors on its projects. Regardless, the law makes this practice even more egregious than before because the contractor is considered jointly and severally liable for its subcontractor's and the subcontractor's subcontractors' unpaid wages, benefits, wage supplements, and any other remedies available pursuant to the requirements of the Act.[6] .Prior to the law change, workers could only lodge a private lawsuit for unpaid wages against their direct employer.

It is also noteworthy that employees or subcontractors cannot waive the liability assigned to the contractor except under a very narrow exception, specifically if it is done through "a collective

bargaining agreement with a bona fide building and construction trade labor organization," and the waiver explicitly references the statute.[7] Presumably, the Act acknowledges the efficacy of the collective bargaining agreement to protect the employees subject to that agreement. In addition, the remedies against the contractor are civil and administrative, not criminal, though of course, there are criminal penalties associated with certain violations of labor law, but not specifically in the new Act.[8]

Claims under the new Act may be brought by the employee directly, or an organization or collective bargaining agent.[9] Moreover, the attorney general may also bring an action against the contractor.[10]

The Act itself provides some protection for a contractor on account of its own subcontractor's violations of the Act. Indeed, the Act explicitly does not prohibit the contractor (or subcontractor for its down steam sub-subcontractors) from establishing contractual remedies and availing itself of certain common law remedies as long as the contractual provisions do not diminish the rights of the employees under the statute.[11]

Therefore, to assist contractors with ensuring their subcontractors pay their employees, General Business Law §756-frequires subcontractors to provide certain certified payroll records at the contractor's request which is discussed below.

The Act provides definitions for a 'construction contract', 'contractor', 'owner', and 'subcontractor'.[12]

A contractor's liability under the Act is applicable for any claims occurring no later than three years prior to the initiation of such claim in a court of competent jurisdiction or the commencement of a civil action brought forth by the attorney general or NYS Dept of Labor. Therefore, the Act provides a three-year statute of limitations for a contractor's liability under the new statute.[13] This cuts the contractor's period of liability exposure in half because employers are generally subject to a six-year statute of limitations for failure to page wages.[14]

The final section of the Act provides that the Act does not diminish any rights afforded by an applicable collective bargaining agreement.[15]

The Wage Theft Prevention and Enforcement Law

Concomitant with the Act is N.Y. Gen. Bus. Law § 756-f. 'Wage Theft Prevention and Enforcement.' (the "Law")

Specifically, there are reporting duties for a subcontractor, requiring, upon a contractor's request, that it provide certified payroll records for all of its employees on the project, as well as the following additional information, whenever applicable[16]:

1. The names of all of a subcontractor's employees, and those of any sub-subcontractors working on the project, including the names of all those designated as independent contractors; [Note, the last four digits of each employee's SS# must be provided][17]

2. The name of each sub-subcontractor;

3. The anticipated contract start date of each sub-subcontractor;

4. The scheduled duration of work of each sub-subcontractor;

5. The name of the local union(s) with whom the subcontractor and each sub-subcontractor is a signatory contractor; and

6. The name, address and phone number of a contact for each sub-subcontractor.

Notably, if a subcontractor fails to timely comply with a request for this information, the Law provides that the contractor may withhold payments owed to the subcontractor.[18] This is crucial to defeat any claim of breach of contract by the subcontractor against the contractor. The Law also applies to subcontractors in their relationship with their sub-subcontractors.

How Construction Industry Clients Can Be Proactive

In light of these new laws, contractors (and subcontractors) might consider adding terms to their subcontracts (and sub-subcontracts) adding indemnification clauses related to suits against them by subcontractor and sub-subcontractors' employees, including attorneys' fees, interest, costs, and any other related damages. Moreover, contractors can also seek to add personal guarantees from principals of the subcontractors for wage violations. Further, contractors (and subcontractors) should consider including penalties in their subcontract (and sub-subcontracts) for non-payment and non-compliance with record production, including work stoppages, withholding of payment, liquidated damages, and default and termination terms.

Equally as important and also as a preventative measure, contractors (and subcontractors to their downstream sub-subcontractors) should also include provisions requiring that, upon signing the contract, and at regular intervals throughout the project (e.g. monthly), the subcontractor and its sub-subcontractors provide the contractor with all payroll records and information required by N.Y. Gen. Bus. Law §756-f. These provisions are critical because as stated above, the law states that they must provide this information to contractors, but only upon request. Accordingly, contractors should ensure that subcontractors provide the required information prior to commencing any work, and also supplement the reporting information if circumstances change. For example, if a labor law issue does arise, perhaps shortening the reporting requirements on a weekly basis. Again, this is not a one-fit all scenario and the contractors and subcontractors must be ready to adapt this law to fit the project's circumstances within the bounds of the law.

Therefore, a subcontractor must be prepared to regularly and timely produce all of its payroll records and information to contractors upon request; otherwise the subcontractors' payments may be legally withheld until the subcontractor complies. This information is required to be provided upon request, even if it is not mentioned in the subcontract agreement, so collecting and producing these records should become a part of the regular payment submission practice. These types of certified payroll submissions are required and standard on public improvement projects for the relevant government agency to issue payment to the contractor, but not required on private projects unless incorporated into the contracts. However, with the Act and Law in place, this distinction is and will continue to be less significant, especially on the larger private construction projects. Importantly, if an employee wage claim arises, the contractor will have significant documentation in hand to address such a claim early in the process including the employee's wage information, benefit requirements and time of performance on the Project.

Other Key Considerations of the New Statute and Reporting Requirements

All of the above referenced reporting requirements and indemnification clauses are logical in the face of these new laws, but contractors also have to consider the impact of these requirements in their subcontracts with entities with whom they have often had a very long relationship. Now, the contractor's subcontractors will see new onerous requirements to produce further information for their own employees and those of their sub-subcontractors' employees on a monthly basis as a condition for payment. Moreover, the subcontractors may also encounter new stricter indemnification clauses in their subcontracts and seek to object to such inclusion.

Recommendations for Helping Clients

Given the Act's nuances, attorneys for contractors and subcontractors must be ready to explain the new laws to their clients, propose additional language to be inserted into subcontracts, and educate applicable parties on the reasons behind the new laws and additional obligations and liabilities contractors and subcontractors may encounter. Taking these relatively straightforward actions now can head off future problems if an employee wage claim issue does arise and ensure that your client has favorable contract language and employee reporting requirements in place.

1. https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries.
2. Illinois (WPCA 820 ILCS 115, et seq – effective 7/1/22); Minnesota (CWWPA – Article 10 – effective 8/1/23).
3. https://www.governor.ny.gov/news/governor-hochul-announces-major-crackdown-combat-wage-theft.
4. https://manhattanda.org/d-a-bragg-announces-creation-of-offices-first-worker-protection-unit-to-combat-wage-theft -protect-new-yorkers-from-unsafe-work-conditions/ – (2/16/23).
5. NY Lab L §198-E (2021).
6. NY Lab L §198-E (2021)(5).
7. NY Lab L §198-E (2021)(2), (10).
8. NY Lab L §198-E (2021)(3).
9. NY Lab L §198-E (2021) (4).
10. NY Lab L §198-E (2021) (6).
11. NY Lab L §198-E (2021) (7).
12. NY Lab L §198-E (2021) (8).
13. N.Y. Lab. Law §198-e(9).
14. N.Y. Lab. Law §198(3).
15 NY Lab L §198-E (2021) (10).
16. N.Y. Gen Bus. Law 756-f (2)].
17 .N.Y. Gen Bus. Law 756-f (1)].
18. N.Y. Gen Bus. Law 756-f (3)].

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FOCUS: MUNICIPAL LAW

Notified—The Late Notice of Claim Doctrine

Ian Bergström, Esq.

The timely service of notices of claim are deemed the condition precedent to suing municipal entities otherwise referred to as public corporations. The trial courts are vested with broad discretion extending the timeframe for potential claimants to serve their notice of claim, unless the statute of limitations is contravened. Recently, the New York State appellate division rendered decisions amplifying the protections afforded to public corporations pursuant to General Municipal Law §50-e(5).

The Notice of Claim Doctrine

Generally, the claimant intending to sue the "public corporation … must serve [the] notice of claim … within ninety [90] days after the claim arises."[1] For instance, the "claim … aris[es] when the accident occurred" regarding torts.[2] Such service is statutorily deemed "a condition precedent to the commencement of an action or special proceeding against a public corporation …."[3] The statutory definitions for public corporation, municipal corporation, and district corporation are set forth under the General Construction Law.[4] The statutory requirements to be included within notices of claim are set forth under General Municipal Law §50-e.[5] The "public purpose" of notices of claim is to facilitate the municipal entities to examine the situs of incident locations, thereby evaluating potential civil "liability."[6] Moreover, "[t]he purpose underlying the notice of claim requirement" is intended to guard municipal entities against fictitious civil claims.[7]

The Late Notice of Claim Doctrine

If the purported claimant serves the notice of claim after "the 90-day statutory period," the notice of claim lacks legitimacy.[8] Therefore, the purported claimant must request judicial permission to serve the late notice of claim after the 90-day timeframe expires.[9] The statutory basis of serving late notices of claim is General Municipal Law §50-e(5).[10] The purported claimant may request the judiciary grant the late notice of claim application nunc pro tunc.[11] "[T]he Latin phrase nunc pro tunc … mean[s] … 'now for then'"[12] or "a thing is done now, which shall have [the] same legal force and effect as if done at time when it ought to have been done."[13] The litigant requesting judicial permission to serve their potential late notice of claim is required to "commenc[e] [a] special proceeding" setting forth the "index number" assigned to the proceeding.[14] The litigant requesting judicial permission is referred to as the petitioner, and the public corporation is referred to as the respondent.[15]

The New York State appellate division describes the trial court determination whether service of the late notice of claim is permissible as "purely a discretionary one."[16] Supreme Courts "have broad discretion" to grant or deny the applications.[17] Despite such discretion, petitioner must proffer the requisite evidentiary showing.[18] The trial court is tasked with evaluating various factors determining whether the exercise of the broad discretion is appropriate.[19] Notably, the judiciary should not afford extra weight to "one factor" compared to other factors.[20] If the public corporation is proven to have "actual knowledge" of the underlying incident, then the "factor … is of great importance."[21] The movant must prove the public corporation received more than generalized awareness the incident transpired.[22] Rather, the public corporation "must have knowledge of the facts … underl[ying] the legal theory or theories on which liability is predicated …."[23] Petitioner's "general[ized] and conclusory allegations" attempting to establish entitlement to service of late notices of claim are insufficient.[24] Petitioner has the "initial" burden proffering "evidence or plausible argument" the public corporation lacks "substantial prejudice."[25] The public corporation is required to proffer "a particularized evidentiary showing" of "substantia[l] prejudic[e]" disproving the initial evidentiary showing.[26] The New York State appellate division overturns the trial courts granting late notice of claim applications if courts "abus[e] [its] discretion …."[27] New York State Court of Appeals applies the abuse of discretion standard of review determining "whether the Appellate Division" improperly upheld or overturned service of late notices of claim applications.[28]

Although trial courts have broad discretion to grant or deny applications to serve late notices of claim, the Second Department recently strengthened the protections afforded to public corporations.[29] The Second Department reinforced the standard that petitioners cannot anemically assert arguments devoid of evidentiary support.[30]

Petitioners are charged with the burden establishing entitlement to such relief.[31] The Second Department disregarded petitioner-respondent's argument the photograph "appended to the late notice of claim" satisfied her burden establishing entitlement to service of the late notice of claim.[32] The Second Department heightened the evidentiary standard by means of requiring "authenticat[ion]" and "identif[action] [of] the actual dates the photographs were taken" regarding the purportedly defective roadway or highway condition at issue.[33] The mere fact municipal administrative arms respond to the purported accident locations is insufficient to prove "actual knowledge."[34] Further, petitioners are mandated to proffer "medical documentation or evidence" proving their purported inability to timely serve the notice of claim because of medical reasons.[35] An attorney's "conclusory assertion … in an affirmation … respondents were not prejudiced" is insufficient.[36] Petitioner's assertion that his "ignorance of the law" frustrated the ability to timely serve the notice of claim lacks merit.[37] Although respondents-appellants did not sufficiently refute the lack of prejudice argument, the Second Department overturned the trial court because they did not satisfy their burden demonstrating the "reasonable excuse" and "actual knowledge" factors.[38]

1. See *generally Newcomb v. Middle Country Central School District*, 28 N.Y.3d 455, 460 (2016); see *generally Orozco v. NYC*, 200 A.D.3d 559, 560 (1st Dept. 2021); see *generally Clarke v. Veolia Transportation Services, Inc.*, 204 A.D.3d 666, 667 (2d Dept. 2022); see *generally Pryor v. Serano*, 305 A.D.2d 717, 718 (3d Dept. 2003); see *generally Schunk v. Town of York*, 200 A.D.3d 1669, 1670 (4th Dept. 2021); see *generally* General Municipal Law §50-e(1)(a).
2. See General Municipal Law §50-e(1)(a); see *also Joseph v. McVeigh*, 285 A.D. 386, 391 (1st Dept. 1955).
3. See General Municipal Law 50-e(1)(a); see *also Salvodon v. NYC*, 55 Misc. 3d 1210(A) (Sup. Ct., Queens Co. 2017).
4. See General Construction Law §66(1)-(3).
5. See General Municipal Law §50-e(2).
6. See *Brown v. NYC*, 95 N.Y.2d 389, 394 (2000).
7. See *Torres v. NYC*, 21 Misc. 3d 1109(A) (Sup. Ct., Bronx Co. 2008); see *also Pedraza v. NYC Transit Authority*, 2019 N.Y. Slip. Op. 32742(U), *8 (Sup. Ct., N.Y. Co. 2019).
8. See *generally A.A. v. NYC Health & Hospitals Corp. (Jacobi Hosp. Ctr.)*, 189 A.D.3d 426, 427 (1st Dept. 2020); see *generally Townsend v. NYC*, 173 A.D.3d 809, 810 (2d Dept. 2019); see *generally Quinn v. Wallkill School District*, 215 A.D.3d 1113, 1115 (3d Dept. 2023); see *generally Bennett v. City of Buffalo Parks & Recreation*, 192 A.D.3d 1684, 1685 (4th Dept. 2021).
9. See *Sumi v. Village of Stewart Manor*, 2023 N.Y. Slip. Op. 04127, *1 (2d Dept. 2023); see *also Clarke*, 204 A.D.3d at 667.
10. See *Sumi*, 2023 N.Y. Slip. Op. 04127, *2; see *also* General Municipal Law §50-e(5).
11. *Sumi*, 2023 N.Y. Slip. Op. 04127, *2.
12. Sumi, 2023 N.Y. Slip. Op. 04127, *2; *People v. Lewis*, 143 Misc. 2d 752, 754 (Sup. Ct., Kings Co. 1989); *Glauber v. Wolff*, 2020 N.Y. Slip. Op. 31925(U), *6 (Sup. Ct., N.Y. Co. 2019).
13. See *In re in re Suffolk Academy of Medicine*, 151 Misc. 2d 976, 970 (Sup. Ct., Suffolk Co. 1991); see *also Sumi*, 2023 N.Y. Slip. Op. 04127, *2.
14. See *Woolward v. NYC*, 2006 N.Y. Misc. LEXIS 3865, *6 (Sup. Ct., Kings Co. 2006).
15. See *generally Salvodon*, 55 Misc. 3d 1210(A).
16. *Newcomb*, 28 N.Y.3d at 465; *Wally G. v. NYC Health & Hospitals Corp. (Metro Hospital)*, 27 N.Y.3d 672, 675 (2016); *Lang v. County of Nassau*, 210 A.D.3d 773, 774 (2d Dept. 2022); *Towson v. NYC Health & Hospitals Corp.*, 158 A.D.3d 401, 402-3 (1st Dept. 2018).
17. See *generally Sherb v. Monticello Central School District*, 163 A.D.3d 1130, 1132 (3d Dept. 2018); see *generally Hewitt v. County of Rensselaer*, 6 A.D.3d 842, 843 (3d Dept. 2004).
18. See *Sherb*, 163 A.D.3d at 1132; see *also Lang*, 210 A.D.3d at 775.
19. General Municipal Law §50-e(5); *Sparrow v. Hewlett-Woodmere Union Free School District* (#14), 110 A.D.3d 905, 906 (2d Dept. 2013); *Lang*, 210 A.D.3d at 774; *R.M. v. Board of Education of the Long Beach City School District*, 212 A.D.3d 812, 813 (2d Dept. 2023); *Babcock v. Walton Central School District*, 119 A.D.3d 1061, 1063 (3d Dept. 2014).
20. General Municipal Law §50-e(5); *Conger v. Ogdensburg City School District*, 87 A.D.3d 1253, 1254 (3d Dept. 2011); *Jensen v. City of Saratoga*, 203 A.D.2d 863 (3d Dept. 1994).
21. See *R.M.*, 212 A.D.3d at 813-4; see *also Babcock*, 119 A.D.3d at 1063.
22. See *Babcock*, 119 A.D.3d at 1063-4.
23. See *Lobos v. NYC*, 2023 N.Y. Slip. Op. 04310, *2 (2d Dept. 2023).
24. See *Sumi*, 2023 N.Y. Slip. Op. 04127, *1.
25. See *Newcomb*, 28 N.Y.3d at 466-7; see *also Lobos*, 2023 N.Y. Slip. Op. 04310, *2.
26. See *Newcomb*, 28 N.Y.3d at 467.
27. See *Welch v. Board of Education*, 287 A.D.2d 761, 762 (3d Dept. 2001); see *also Jensen*, 203 A.D.2d 863.
28. See *Wally G.*, 27 N.Y.3d at 675.
29. *Lang*, 210 A.D.3d 773; *Pil-Yong Yoo v. County of Suffolk*, 215 A.D.3d 852, 854 (2d Dept. 2023); *St. Hilaire v. NYC Housing Authority*, 216 A.D.3d 645 (2d Dept. 2023).
30. *Lang*, 210 A.D.3d 773; *Pil-Yong Yoo*, 215 A.D.3d 852; St. Hilaire, 216 A.D.3d 645.
31. See *generally Newcomb*, 28 N.Y.3d at 466; see *generally Kelley v. NYC Health & Hospitals Corp.*, 76 A.D.3d 824, 826 (1st Dept. 2010); see *generally Lauray v. NYC*, 62 A.D.3d 467 (1st Dept. 2009); see *generally Gibbs v. NYC*, 61 Misc. 3d 1219(A) (Sup. Ct., Kings Co. 2018).
32. See *Lang*, 210 A.D.3d at 776.
33. See *id.*
34. *Id.* at 775; *Clarke*, 204 A.D.3d at 667; *Lobos*, 2023 N.Y. Slip. Op. 04310, *2.
35. See *Lang*, 210 A.D.3d at 775; see *also Clarke*, 204 A.D.3d at 668.
36. See *Pil-Yong*, 215 A.D.3d at 854 (*citing Lang*, 210 A.D.3d at 775-6).
37. See *id.*; see *also Clarke*, 204 A.D.3d at 668.
38. See *R.M.*, 212 A.D.3d at 814-5.

FOCUS: LABOR & EMPLOYMENT LAW

Indemnification for Wage and Hour Related Violations—Developments Under New York and Federal Law

Russell G. Tisman, Esq. and Lisa Casa, Esq.

Corporate practitioners and their clients are accustomed to allocating risks between parties through the use of indemnification clauses in various commercial transactions. The rules differ with respect to indemnification of wage-related exposures. This article addresses the evolution and recent developments about enforcement of wage-related indemnification provisions. It also provides guidance for addressing wage-related risks in connection with the purchase and sale of businesses.

Indemnification Provisions

Courts routinely enforce indemnification provisions in commercial, non-wage, contexts. For example, when businesses are sold, sellers retain certain risks, but buyers assume others, hold sellers harmless, and agree to indemnify sellers if those risks grow into claims.[1] Indemnity provisions are enforced in leases,[2] and licenses.[3] Similarly, purchase orders and contracts related to the sale of goods routinely allocate risks through indemnity provisions.[4] Courts also enforce indemnity provisions allocating risks in contracts for the provision of services.[5]

In contrast, with limited exceptions, Courts are not receptive to the indemnification of wage-related liabilities under the federal Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL").[6] Courts typically reject employer attempts to shift wage liabilities through indemnity provisions for public policy reasons, regardless of the legal theory utilized to allocate such risks.

Enforceability of Wage-Related Indemnification Provisions

The leading Second Circuit case concerning indemnification for wage and hour claims is *Herman v. RSS Security Services Ltd.*[7] In *Herman*, the Second Circuit was asked to decide, as a matter of first impression, whether the Chairman as the 50% shareholder of a company that had failed to properly pay the minimum wage and overtime to its employees could recover his personal liability for the unpaid wage claims under common law contribution and/or indemnification theories from various operating officers of the defendant corporation. The Second Circuit affirmed that the Chairman, as a statutory employer, had no right of contribution or indemnification against the operating officers under the FLSA even though the officers also could be personally liable for the non-payments.

In rejecting the Chairman's contribution and indemnification claims, the Second Circuit, relying on the FLSA's legislative history and remedial purpose, reasoned that because the FLSA's "comprehensive remedial scheme" did not include a right of contribution or indemnification the Court should not engraft an additional remedy that the legislative history reflects was never considered.[8] It also reasoned, as a matter of public policy, that that the remedial purpose of the FLSA to benefit employees by ensuring that they were paid properly, placed employers outside the class for which the statute was enacted to protect. Federal District Courts within the Second Circuit and state court decisions have applied this reasoning to preclude contractual indemnification of wage claims under the FLSA and NYLL.[9] Courts, similarly, have rejected attempts to pass off liability for wage payment violations under various non-indemnification legal theories.[10] Two recent district court decisions, however, have taken different views of the scope of the prohibition articulated in *Herman*, one in the context of alleged FLSA and NYLL wage statement violations, and the other in the context of the sale of a business.

In *Mendez v. 976 Madison Restaurant LLC*,[11] District Judge Andrew Carter rejected an indemnification claim under common law and contractual theories against two payroll service providers who provided the defendant employer with allegedly deficient wage statements.[12] Plaintiffs, tip-paid restaurant workers, brought a class action for statutory damages under the FLSA and NYLL, alleging, *inter alia*, that the employer's wage statements failed to properly reflect the tip credit as required by statute.[13] Defendant, 976 Madison Restaurant,

LLC contended the wage statements were compliant.[14] However, in a third party action against the payroll service providers it claimed the right to recoup liability if the statements were found to be noncompliant.[15] 976 Madison Restaurant opposed the payroll providers' motions to dismiss the amended third-party complaint on the ground that the *Herman* precedent was inapplicable because the alleged damages were the result of improper wage statements, rather than the failure to properly pay employees.[16] As a case of first impression, Judge Carter rejected this distinction noting that 976 Madison Restaurant neither cited precedent nor persuasive reasoning to circumvent public policy considerations articulated in *Herman* and reflected in the legislative history of the FLSA.[17]

In contrast, in *Copper v. Cavalry Staffing, LLC*, District Judge Frederic Block enforced an indemnification agreement for unpaid wages, partially assumed with the purchase of a corporation's assets.[18] Defendant Cavalry Staffing, LLC ("Cavalry") and third-party defendant Fleet Staff ("Fleet") were staffing companies that placed workers as service agents and supervisors at Enterprise Rent-A-Car locations throughout New York State.[19] Pursuant to an asset sale agreement, Fleet acquired Cavalry's assets.[20] This asset sale occurred while a collective and class action for unpaid wages was pending against Cavalry. In recognition of the ongoing litigation, Cavalry and Fleet's asset sale agreement shared 50/50 liability and defense expenses through an indemnity clause. Fleet was entitled to offset actual liability and defense expenses against the asset purchase price.[21]

The wage and hour litigation was settled, with Court approval, for $460,000.[22] Cavalry defaulted paying the full settlement figure, but ultimately deposited $230,000 into a settlement fund, representing its 50% share.[23] At this point, Cavalry was no longer an independent entity, but rather an operating division of Fleet.[24] The $230,000 was distributed to the plaintiff class, with no legal fee payment to its attorneys.[25] To recover their fees, plaintiffs' attorney took an assignment of plaintiffs' claim with judicial approval.[26] They commenced a third-party action against Fleet for breaching the parties' agreement to share liability and defense costs, eventually moving for a default judgment against Fleet.[27] The Magistrate Judge denied the motion under the *Herman* precedent prohibiting indemnification for wage-payment violations. Judge Block rejected the report and recommendation holding that in the context of this sale, the indemnification was enforceable.

While acknowledging precedent that rejected indemnification and contribution claims, the Court upheld this particular indemnification provision reasoning that it did not incentivize Calvary to disregard the FLSA.[28] The court reasoned that the provision was negotiated with full knowledge of the claim and potential exposure after filing the wage and hour action.[29] Indeed, Calvary, the party who failed to pay proper wages, was penalized by a reduced asset sale price as a liability offset.[30] Moreover, the indemnification agreement benefitted employees who otherwise lacked ability to collect the full settlement amount from Cavalry after it sold its assets.[31] Consequently, enforcing the indemnification

provision accomplished the policy of insuring proper payment of employees recognized in *Herman*.[32]

Judge Block questioned the underlying policy consideration that indemnity agreements incentivize employers to flout the FLSA.[33] He noted that "employers regularly seek to manage their risk of liability through bonds and insurance policies."[34] The decision suggests that indemnity agreements against wage and hour claims involving the sale of businesses always should be enforceable, like any other assumed liability.[35]

The authors believe that Judge Block's determination enforcing the particular indemnity provision based on the unique facts was correct because the exposure was known at the time of the transaction, and the provision protected the buyer against half of potential liability it otherwise would not have assumed.[36] Additionally, plaintiffs were afforded funds otherwise unavailable to pay the wage obligation which is consistent with the underlying policy of the FLSA and NYLL.[37] Judge Block's interpretation also is consistent with policies underlying New York Labor Law §198-e, making contractors liable for wages subcontractors fail to pay,[38] and prevailing wage-related statutes impose liability upon government contractors required to certify accuracy of subcontractor payrolls.[39]

We believe that Judge Block's rationale, which supports enforcement of indemnification provisions against wage and hour claims in the purchase and sale of any business, should be followed. The *Cavalry* decision reflects the pragmatic approach facilitating the risk allocations inherent in business sales. Wage liabilities should be treated no differently than other risks involved. It also provides a more precise method by compensating for an actual exposure with a dollar for dollar offset.[40] The alternative, an adjustment to the purchase price accounting for exposures that may not materialize is less precise.[41]

Future litigation will determine whether Judge Block's invitation is followed. We also suggest that indemnity against wage payment violations in other contexts should be allowed where, as in Cavalry, enforcement makes additional funds available to rectify such violations.

1. See e.g., *Sabhlok v. Dana*, 112 A.D.2d 411 (2d Dept. 1985).
2. See, e.g., *Great N. Ins. Co. v. Interior Const. Corp.*, 7 N.Y.3d 412 (2006).
3. See e.g., *Armstrong v. Ogden Allied Facilities Mgmt. Corp.*, 234 A.D.2d 235 (1st Dep't 1996).
4. See, e.g., *Kay-Bee Toys Corp. v. Winston Sports Corp.*, 214 A.D.2d 457 (2d Dept. 1995).
5. See, e.g., *Walters v. George Little Mgmt., LLC*, 2008 WL 11510029 (D.N.J. 2008).
6. See 29 U.S.C.A. §201; see *also*, N.Y. Labor Law §196-d.
7. See *Herman v. RSS Security Services, LTD.*, 172 F. 3d 132 (2d Cir. 1999).
8. The Second Circuit's Herman holding is consistent with appellate decisions in other circuits. See, e,g,, *Martin v. Gingerbread House, Inc.*, 977 F.2d 1405, 1408 (10th Cir. 1992); *Lyle v. Food Lion, Inc.*, 954 F.2d 984, 987 (4th Cir. 1992); *LeCompte v. Chrysler Credit Corp.*, 780 F.2d 1260, 1264 (5th Cir. 1986). In these cases, the courts held that attempts to enforce indemnity obligations under state law were preempted by the federal statutory scheme, and would undermine employers' incentives to comply with the FLSA.
9. See *generally Garcia v. Cloister Apt. Corp.*, 2018 W.L. 125274, *2 (S.D.N.Y. 2018).
10. See *generally Gustafson v. Bell Atlantic Corp.*, 171 F. Supp. 2d 311, 328 (S.D.N.Y. 2001) (the federal court rejected the indemnification claim masquerading as a breach of contract claim); *Mendez v. 976 Madison Rest. LLC*, 2022 W.L. 4619895 (S.D.N.Y. 2022)(the federal court rejected claims seeking indemnification under breach of contract, fraudulent inducement, negligent misrepresentation, and declaratory judgment theories); *Delphi Healthcare PLLC v. Petrella Phillips LLP*, 72 N.Y.S.3d 269 (4th Dept. 2018) (Fourth Department rejected the employer's claim to recoup attorney fees from accountants who were hired to ensure compliance with overtime and wage notice requirements after the class action settlement. The appellate division essentially viewed the tactic as an indemnification claim lacking the potential for recovery).
11. The authors represented one of the third-party defendant payroll-service providers. See *id.*
12. See *Mendez v. 976 Madison Restaurant LLC*, 2022 W.L. 4619895 (S.D.N.Y. 2022).
13. See *id.*; see *also* NYLL §195(3).
14. See *Mendez*, 2022 W.L. 4619895.
15. See *id.*
16. See *id.*; see *also Herman*, 172 F. 3d at 132.
17. See *Mendez*, 2022 W.L. 4619895.
18. See *id.*
19. See *id.*
20. See *id.*
21. See *id.*
22. See *id.*
23. See *id.*
24. See *id.*
25. See *id.*
26. See *id.*
27. See *id.*
28. See *id.*
29. See *id.*
30. See *id.*
31. See *id.*
32. See *id.*
33. See *id.*
34. See *id.*
35. See *id.*
36. See *id.*
37. See *id.*
38. See *id.*
39. See *id.*
40. See *id.*
41. See *id.*

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Marian C. Rice

Robert J. Kurre, Managing Partner of Kurre Schneps LLP, was named 2024 Lawyer of the Year in Elder Law in the 30th edition of *Best Lawyers in America*. This is the tenth consecutive year that Kurre has been included in *Best Lawyers in America*. Kurre also holds an AV Peer Review Rating from Martindale-Hubbell as a Certified Elder Law Attorney.

The following Vishnick McGovern Milizio LLP (VMM) attorneys were named to the 2024 *Best Lawyers in America*: **Bernard Vishnick, Bernard McGovern, Joseph Milizio, Joseph Trotti, Andrew Kimler**, and **Hon. Edward McCarty. Meredith Chesler** and **Phillip Hornberger** were also named to the 2024 *Best Lawyers: Ones to Watch*. **Joseph Trotti, Richard Apat**, and **Avrohom Gefen** were names to the 2023 *New York Metro Super Lawyers* and **Constantina Papageorgiou** was named to *Super Lawyers: Rising Stars*. Joseph Milizio was also named as part of the 2023 *Dan's Out East End Impact Awards Power Couple*, recognizing those who support the LGBTQ+ community of the East End. In addition, Joseph Trotti and Avrohom Gefen published articles in the 2023 *Best Lawyers Business Edition: The Litigation Issue*. Joseph Trotti was interviewed in *Newsweek*, and **James Burdi** and Joseph Trotti gave a lecture to parents of incoming Queens College freshmen regarding life preparedness.

Laurie B. Kazenoff of Kazenoff Tax Law LLC was named to the 2024 *Best Lawyers in America* in Tax law. Kazenoff was also appointed to the Law360 Federal Tax Authority Editorial Board for 2023 and selected as a 2023 *Metro New York Super Lawyer* in Tax.

Justin Frankel and **Jason Newfield** of Frankel & Newfield, P.C. have released an e-book regarding disability claims entitled, *Filing a Disability Insurance Claim—Secrets the Disability Insurance Companies Don't Want You to Know*.

Ronald Fatoullah of Ronald Fatoullah & Associates was selected to the 2023 New York Metro Super Lawyers list as well as the 2024 *Best Lawyers in America* in Elder Law, Trusts and Estates, and Trusts and Estates Litigation. Fatoullah has been selected for these honors since 2007.

Hon. Ruth Bogatyrow Kraft was named Chair of Falcon Rappaport & Berkman's Labor and Employment Practice Group.

Robert S. Barnett of Capell Barnett Matalon & Schoenfeld LLP presented at the Practicing Law Institute 54th Annual Estate Planning Institute on the topic of grantor trusts. **Yvonne R. Cort** has been reappointed as a Member-at-Large of the Executive Committee of the New York State Bar Association, Tax Section.

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

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

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

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

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We Welcome the Following New Members Attorneys

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Robert Kenneth

Malcom X. Carter

Nicole Case

Callie Costanza

Matthew Gerard Culkin

Patrick L. Cullen

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Mark Diamond

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Elizabeth J. Hildebrandt

Morriah I. Johnson

Mark Kokhshteyn

Alexandra Kotowski

Rebecca Leder

Gabriella Lorenzo
Stempel, Catterson, LoFrumento, Carlson, Biondo, LLP

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Marlon McLaurin

Nina McCann
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Rona Cristina Racareanu

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2023-2024

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NCBA Committee Meeting Calendar October 6, 2023– November 9, 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, OCTOBER 3
Law Student
6:00 p.m.
Bridget Ryan

WEDNESDAY, OCTOBER 4
Real Property Law
12:30 p.m.
Suzanne Player

THURSDAY, OCTOBER 5
Hospital & Health Law
8:30 a.m.
Douglas K. Stern

THURSDAY, OCTOBER 5
Publications
12:45 p.m.
Cynthia A. Augello

THURSDAY, OCTOBER 5
Community Relations & Public Education
12:45 p.m.
Ira S. Slavit

TUESDAY, OCTOBER 10
Education Law
12:30 p.m.
Syed Fahad Qamer/Joseph Lilly

TUESDAY, OCTOBER 10
Labor & Employment Law
12:30 p.m.
Marcus Monteiro

WEDNESDAY, OCTOBER 11
Medical Legal
12:30 p.m.
Bruce M. Cohn

WEDNESDAY, OCTOBER 11
Elder Law Social Services Health Advocacy
12:30 p.m.
Lisa R. Valente
Mary Beth Heiskell

WEDNESDAY, OCTOBER 11
Matrimonial Law
5:30 p.m.
Karen L. Bodner

THURSDAY, OCTOBER 12
Access to Justice
12:30 p.m.
Hon. Conrad D. Singer
James P. Joseph

THURSDAY, OCTOBER 12
Asian American Section
12:30 p.m.
Jennifer L. Koo

TUESDAY, OCTOBER 17
Intellectual Property
12:30 p.m.
Sara M. Dorchak

TUESDAY, OCTOBER 17
Senior Attorney and Elder Law, Social Services & Health Advocacy
12:30 p.m.
Stanley P. Amelkin, Senior Attorney
Lisa R. Valente and Mary Beth Heiskell, Elder Law, Social Services, & Health Advocacy

WEDNESDAY, OCTOBER 18
Association Membership
12:30 p.m.
Jennifer L. Koo

WENDESDAY, OCTOBER 18
Ethics
12:30 p.m.
Mitchell T. Borkowsky

WEDNESDAY, OCTOBER 18
Diversity & Inclusion
6:00 p.m.
Sherwin Safir

THURSDAY, OCTOBER 19
Business Law Tax & Accounting
12:30 p.m.
Varun Kathait

THURSDAY, OCTOBER 19
Commercial Litigation/Alternative Dispute Resolution
12:30 p.m.
Christopher J. Clarke and Danielle Gatto, Commercial Litigation
Suzanne Levy and Ross J. Kartez, Alternative Dispute Resolution

TUESDAY, OCTOBER 24
Plaintiff's Personal Injury
12:30 p.m.
Giulia R. Marino

TUESDAY, OCTOBER 24
Government Relations
6:00 p.m.
Michael H. Sahn

WEDNESDAY, OCTOBER 25
District Court
12:30 p.m.
Bradley D. Schnur

WEDNESDAY, OCTOBER 25
Municipal Law & Land Use/ Environmental Law
12:30 p.m.
Elisabetta Coschignano,
Municipal Law & Land Use
Kenneth L. Robinson, Environmental Law

FRIDAY, OCTOBER 27
Appellate Practice
12:30 p.m.
Amy E. Abbandondelo
Melissa A. Danowski

WEDNESDAY, NOVEMBER 1
Real Property Law
12:30 p.m.
Suzanne Player

THURSDAY, NOVEMBER 2
Hospital & Health Law
8:30 a.m.
Douglas K. Stern

THURSDAY, NOVEMBER 2
Publications
12:45 p.m.
Cynthia A. Augello

THURSDAY, NOVEMBER 2
Community Relations & Public Education
12:45 p.m.
Ira S. Slavit

WEDNESDAY, NOVEMBER 8
Association Membership
12:30 p.m.
Jennifer L. Koo

WEDNESDAY, NOVEMBER 8
Medical Legal
12:30 p.m.
Bruce M. Cohn

WEDNESDAY, NOVEMBER 8
Matrimonial Law
5:30 p.m.
Karen L. Bodner

THURSDAY, NOVEMBER 9
Business Law Tax & Accounting
12:30 p.m.
Varun Kathait

THURSDAY, NOVEMBER 9
Asian American Section
12:30 p.m.
Jennifer L. Koo

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- Top 10 Simple Things Every Advisor Can Look For to See if Their Clients' Estate Planning is on Track
- Basis Rescue Planning for Freeze Partnerships
- Elder Abuse: Tackling Fraud in the Family*

Day 2

- Nuts and Bolts of Charitable Remainder Trusts
- Identifying the Vulnerable Estate Plan: Insights into the Current Trends of Elder Law Litigation
- Using Installment Sales to Non-Grantor Trusts
- Taxation of Debt Restructuring, Workouts and Bankruptcy
- Hot Topics in Estate Planning
- Ethics: Tax Opinion Policies and Procedures*

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