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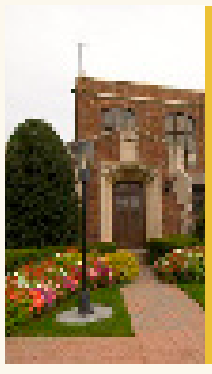
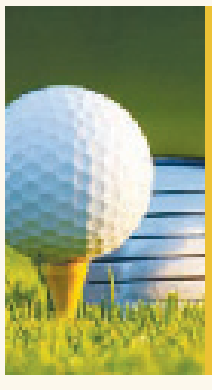


BBQ AT THE BAR

THURSDAY, SEPTEMBER 5



WE CARE GOLF AND TENNIS CLASSIC

MONDAY, SEPTEMBER 16

pg.20

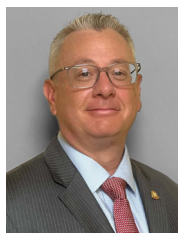
JUDICIARY NIGHT

THURSDAY, OCTOBER 10

See insert

2024-2025 Elected NCBA Board of Directors

Executive Committee



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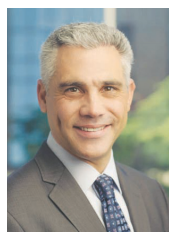

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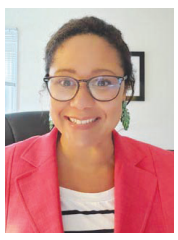

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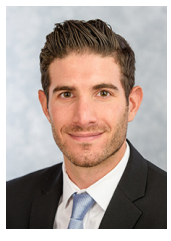

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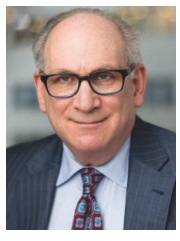

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From the President

Daniel W. Russo

When summer ends …. Domus begins! I'm not sure I can quite put it into words, but the month of August always seems to bring mixed feelings for me. On one hand, I am always a bit sad when the summer vibe ends, when the kids go back to school, the traffic gets heavier, and the days begin to shorten. On the other hand, I find myself excited at the prospect of less New York humidity, an influx of anything pumpkin flavored, the start of hockey season and, of course, the beginning of a great calendar of events at and around Domus.

BBQ at the Bar—September 5

As has been a tradition at Domus, we kick off the NCBA year with BBQ at the Bar on September 5. This free event gives all of us the chance to eat great food, catch up with friends we haven't seen all summer, reconnect with the NCBA Corporate Partners, and meet new NCBA Members who have joined our family at Domus. It is a great event to begin the year, and I look forward to seeing all of you there.

We Care Golf and Tennis Classic—September 16

On September 16, WE CARE will host its Golf and Tennis Classic honoring Kenneth Collins, President of Collins Building Services, Inc. and Joseph Dussich, President of JAD Building Maintenance. The Classic is WE CARE's signature event and has grown into a model charity fundraising event for bar associations across the country. The golf portion is held at two of Long Island's premier country clubs, and, in addition to full rounds of golf, beginners can choose to take lessons instead. For those who would rather use a racquet than a club, tennis and pickleball lessons are available to enjoy. After the athletics are over, attendees are presented with about 100 auction items to bid on while enjoying great food with great company. A special thanks to WE CARE chairs Jeff Catterson and Barbara Gervase as well as the Classic Committee for once again planning what will be an awesome event. If you haven't signed up yet, what are you waiting for?

Lawyer Assistance Program Fall Retreat—September 20-22

The end of September will be the time for two additional traditions of the NCBA. First, the NCBA Lawyer Assistance Program (LAP) will host its 18th Annual Recovery Retreat from September 20 to 22 at the Thomas Berry Retreat House in Jamaica, Queens. The LAP Retreat provides an opportunity for lawyers in recovery to come together in a beautiful setting to celebrate the hope, joy, and challenges of living a substance-free life. LAP encourages attorneys new to recovery (a day, a week, or months) to spend the weekend with other attorneys in recovery, in a safe and relaxing environment. There is a scholarship fund available for those in need. If you are in recovery and would like to attend the retreat, please email Dian O'Reilly at doreilly@nassaubar.org. If you are struggling with problematic drinking, or if you know of another attorney, judge, or law student in need of support, contact LAP Director Elizabeth Eckhardt at eeckhardt@nassaubar.org or (516) 512-2618.

Tunnel to Towers—September 29

The following weekend, on Sunday, September 29, members of the NCBA and WE CARE will take their annual pilgrimage from Chaminade High School in Mineola to Brooklyn to participate in the Warriors for a Cause Tunnel to Towers 5K Run & Walk. This event, honoring our nation's first responders and military heroes, has proven to be one of the most memorable experiences of the year, whether it is your first time participating, or you have had the pleasure of participating in years past. A special thank you to Past President Rick Collins for continuing to make the NCBA a part of this special day. Register online at warriorsforacause.org/product/2024-tunnel-to-tower-event-registration, listing WE CARE in the company box.

Judiciary Night—October 10

The NCBA will honor the esteemed judiciary of Nassau County at Domus on Thursday, October 10. This popular cocktail reception is an opportunity for Members to mingle with the local Bench and Bar. To purchase tickets or a sponsorship, complete this month's insert in *Nassau Lawyer* or contact Han Xu at hxu@nassaubar.org or (516) 747-1361.

We Care Fall Festival—October 14

As the air cools and the leaves change, Domus will host the WE CARE Fall Festival on Columbus Day, October 14. Last year's inaugural event was amazing, with over 250 kids coming to Domus to enjoy all sorts of games, giveaways and carnival-like activities outside of Domus. Festival chairs Faith Getz Rousso, Debra Keller Leimbach and Hon. Marie F. McCormack are expecting this year's event to be even bigger and more fun but need more adult volunteers to make the day as enjoyable as possible for the kids. If you are available to volunteer, please contact Faith Getz Rousso at faith@radopt.com.

NCBA 125TH Anniversary Celebration

This fall, in addition to all the great recurring traditions, the NCBA will celebrate its 125th Anniversary with a party on November 14 at Domus. This special night will include short skits depicting major events in the Association's history, the dedication of a time capsule, special auction items (including several paintings of Domus by local artists), music, and a wide variety of wonderful food from local restaurants. This evening has been in its planning stages for almost a year and thanks to the very dedicated "125" Committee and its various subcommittees, it is shaping up to be a unique commemoration of our beloved bar association's past, present and future. In the spirit of celebrating the NCBA and raising money to secure its future, it will be an evening unlike any other that has been hosted at Domus. If you miss this one, you will have to wait another 25 years to do it again!

Holiday Season at Domus

While I find it hard to believe that I am writing about the holidays already, before we know it Domus will be hosting two of its wonderful traditions. On November 28, WE CARE will host its annual Thanksgiving Luncheon where seniors from our community come and enjoy a traditional Thanksgiving luncheon with friends and the NCBA family. The event epitomizes what WE CARE and the NCBA stands for—community and service for those in need. This event is always in need of volunteers. If you are interested in seeing the smiles on the faces of those who might otherwise spend the holidays alone, please sign up and come to Domus.

And finally, the annual NCBA Holiday Celebration is set for December 5, an evening to kick back, enjoy the company of friends and family surrounded by Domus' holiday décor, and in front of a beautiful fire in the Great Hall. Of course, the night is highlighted by the Tale of Wassail, a holiday tradition at Domus, this year presented by the President Elect James Joseph. As last year's epic Wassail Mystery was one for the ages, President Elect Joseph has his work cut out for him. We can't wait to see what he has in store for the Tale this year.

If everything above isn't enough to entice you to visit Domus, September and the months that follow will be filled with many cutting-edge CLE programs that the Nassau Academy of Law has become famous for. Led by Dean Lauren Bristol and Director Stephanie Ball, this fall semester will not disappoint. From Dean's Hours on various topics to multi-part series, the Academy of Law will continue to educate our members on what is new and what is vital in the legal profession. Remember, as an NCBA member, your CLEs are free, so don't hesitate to sign-up and get your credits.

I look forward to this fall and all that the NCBA has happening in the next four months. I hope each of you will take the opportunity to attend one or all the events happening at Domus. And please, if you do, come say hi. Be kind.

FOCUS: CONSTRUCTION LAW

New York's Revision of the Retainage Requirement for Private Construction Projects—Will This Keep Construction Projects Moving?

Michael D. Ganz and Adam A. Perlin

On November 17, 2023, New York Governor Kathy Hochul signed Senate Bill S3539 ("Retainage Amendment"), which amended Sections 756-a and 756-c of the New York General Business Law, commonly referred to as the Prompt Payment Act.

The Retainage Amendment, also known as the 5% Retainage Law, effectively limits the amount of retainage that can be held from general contractors and subcontractors on private construction contracts of $150,000 or more to no more than five percent.

The amendment took effect immediately and applies to contracts entered into on or after the effective date of November 17, 2023. Therefore, the new law does not apply to contracts that were entered into before the effective date of November 17, 2023, meaning that owners or contractors will not have to revise or amend pre-existing contracts to comply with the new retainage and final billing requirements.

Other State's Retainage Laws

New York joins a growing number of other jurisdictions regulating retainage on private construction projects, including Massachusetts, Connecticut, Minnesota, Montana and Nevada, among others. No doubt, other states have recognized the importance of addressing stilted and vague retainage issues that have hampered construction projects for decades.[1]

The Purpose of Retainage

Before delving into the nitty-gritty of the new law, it is important to understand the purpose of retainage. Retainage is an amount of money (traditionally and most frequently ten percent of the amount payable by an owner to a contractor) to provide that contractor with an "incentive" to complete its construction work.[2] The retainage is thereafter paid to the contractor when it completes its work. The United States Bankruptcy Court presiding over an adversary proceeding in the Chapter 11 bankruptcy of Enron Corp. succinctly summarized the concept as follows:

> "The retention of a percentage of a contractor's monthly progress payments, known as retainage, secures the payment of performance-related damages. The retainage is a means of ensuring the satisfactory completion of a construction project as it functions as an incentive for its timely and acceptable completion. The purpose of retainage is to avoid a situation in which "costs" to the contractor to complete the facility are less than "benefits," *i.e.*, final payment."[3]

To provide a concrete example, a contractor who performs one million dollars of construction work and has 10%, or $100,000, withheld (or retained) until it completes the work, is deemed more likely to complete its work because it must wait for the $100,000 until the end of the project. The problem is that while this protects the owner, a contractor who operates on a narrow profit basis may need that $100,000 to continue to pay its own employees, subcontractors, suppliers, etc. By forcing these contractors to wait until the end of the project to receive 10% of their contract sum, many construction contracts drastically slow down because contractors lack the funds to pay their employees or to purchase materials. In severe cases, construction projects may cease altogether due to the financial difficulties encountered by financially struggling contractors.

By enacting the 5% Retainage Law, Governor Hochul and the New York Legislature aimed to ameliorate some of these problems. The new law amends Sections 756-a and 756-c of the General Business Law (part of Article 35E of the GBL, known as the "Prompt Pay Act"), and applies to private construction contracts "where the aggregate cost of the construction project, including all labor, services, materials and equipment to be furnished, equals or exceeds one hundred fifty thousand dollars."[4]

Through this new 5% Retainage Law, owners, prime contractors, and subcontractors are prohibited from withholding more than 5% from their lower tier contractors. Importantly, in no case may a contractor or subcontractor withhold more than the percentage the owner retains on the prime contract. In essence, if an owner only holds 3% in retainage from the contractor, the contractor can therefore only hold 3% in retainage from its subcontractors. Reducing by half the amount of retainage withheld to 5% ostensibly provides contractors with more money to continue performance. Owners may assert that the reduction swings the pendulum too far in the other direction and provides too little incentive for a contractor to complete its work (and correct defective work) if less money is held until the end. However, as set forth in the legislative history of the bill, the legislature believed they struck a proper balance, and that "mandating that substantial completion on private construction projects be specified in the contract and reforming the contract payment process of retainage would greatly reduce disputes and delays between owners and contractors."[5]

The Law's Final Billing Requirements

Besides the 5% Retainage cap, the statute provides contractors an important tool by allowing them to "submit a final invoice to the owner for payment in full upon reaching substantial completion." The term "Substantial Completion" is "defined in the contract or as is contemplated by the terms of the contract."[6] Thus, the 5% Retainage Law defines Substantial Completion as however the parties define it in their contract. Typically, however, a project reaches substantial completion when an owner may use the project for its intended purpose although some items of work may remain, i.e., punch list items. For example, if a contractor is building a school, substantial completion might be achieved when the school is open and children are attending classes, even though some painting or carpentry issues remain. As a result, substantial completion represents a time period that precedes final completion of the entire contract. However, owners may seek to redefine "substantial completion" as a stage of completion closer to the final completion requirement, to postpone a contractor's ability to submit a final invoice. Whether such attempts to redefine "substantial completion" will ultimately succeed will likely depend on litigation and how the courts interpret the relevant statutory language.

Moreover, the statutory language does not mean that an owner must release all retainage upon Substantial Completion. The law, as it did before this amendment, still requires that the owner release all retainage to the contractor no later than 30 days after final approval of the work under the contract. The change to the law merely accelerates the time in which a contractor may submit its final invoice.

As in the prior version of the law, contractors and subcontractors are required to release a "proportionate amount of retainage," to the "relevant parties" (i.e., their lower tiers), after receiving payment of retainage from the tier above. Again, if an owner reduces retainage from 3% to 1% to the contractor, the contractor must also proportionally reduce its withheld retainage due to the subcontractor.

The penalty for failing to comply with the law remains the payment of interest at 1% per month from the date the retention becomes due.[7]

Can the Law be Contracted Around?

An open question after passage of the 5% Retainage Law is whether owners and contractors can enter into contracts that sidestep the new statutory language with higher retainage amounts. As set forth below, under the terms of the Prompt Pay Act (GBL Article 35-E), of which this law is a part, such a tactic could be possible, but as of yet, there is no case law providing judicial interpretation on the issue.

Specifically, in an earlier part of the Article, (GBL Section 756-a), the law provides that the terms of a construction contract "shall supersede the provisions of this article… [e]xcept as otherwise provided in this article." Section 757

also identifies a limited and specific list of contract terms that are void and unenforceable, including such provisions as: subjecting construction contracts to the laws of other states; requiring disputes to be venued other than in New York; prohibiting rights of suspension for non-payment; prohibiting arbitration of disputes under the Prompt Pay Act; establishing payment provisions that differ from those in 756-a(3); and obviating the penalty provisions of 756-b of the Act. However, the alteration of the retainage provisions contained in Section 756-c, is not included among this list of prohibited/voidable terms.

Based on the above, one plain-meaning reading of the statute appears to permit the parties to enter contract terms that differ from the statute's 5% retainage requirements and the other requirements of Section 756-c. However, it seems doubtful that the New York State legislature would undergo the painstaking process of amending the retainage law only to leave a gaping loophole through which the parties could disregard the amendments entirely by simply agreeing to contrary terms in their contracts. The authors of this article foresee the enforceability of the new 5% Retainage Law and its restrictions as a likely source of future litigation that will require the courts to clarify the law's enforceability and the scope of modification by private actors.

The 5% Retainage Law Applies to the Total Contract Sum and Not Individual Payments

There is a common misconception of the 5% Retainage Law held by many owners and contractors. These parties believe that no more than 5% in retainage can be withheld from each payment requisition/invoice. This is incorrect. In fact, the new law caps retainage at 5% of the total contract sum, and not 5% of each payment requisition/invoice. For example, the statute appears to permit an owner to hold 10% in retainage from a contractor for the first 50% of the contractor's work, as long as the owner thereafter reduces the retainage to 0% for the remaining work. The owner would be compliant with the law because the owner would in effect be withholding 5% in retainage from the contractor on the total cost of the contractor's work. Consequently, the customary practice of holding 10% until 50% completion, remains permissible under the new law.

Conclusion

The 5% Retainage Law has been in effect for less than one year and there is no caselaw law yet to determine its scope, to understand whether parties may modify it in private contracts, or to assess the law's full impact. However, the reduction from the previously typical retainage amount of 10% to the current 5%, along with the impact of releasing retainage upon submission of an invoice for substantial completion, should both contribute to an overall improvement in the ability of both contractors and their subcontractors to remain financially sound for the duration of construction projects, which should in turn also expedite those projects. Another benefit of the new law may be that at a minimum, it compels all parties to give their form contracts a second look and an updated review. Regardless, the authors of this article predict that the 5% Retainage Law will result in new litigation over the requirements of owners and contractors, as well as over the definition of "Substantial Completion", and owners and contractors will require further clarification and guidance from the courts on these issues.

1. M.G.L. c. 149, § 29F; CT Gen Stat § 42-158k. (2023); Minn. Stat. 337.10; Montana Title 28-2-2110; NV Rev Stat § 338.515 (2022).
2. A contractor may also withhold retainage from a subcontractor to provide the same incentive.
3. *In re Enron Corp.*, 370 B.R. 583, 594 (2007).
4. N.Y. Gen. Bus. L. § 756 (Definitions) (defining "Construction contract").
5. N.Y. Spons. Memorandum, 2024 S.B. 3539.
6. N.Y. Gen. Bus. L. § 756-a.
7. N.Y. Gen. Bus L. § 756-b(1)(b).

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FOCUS: CONSTITUTIONAL LAW

Double Jeopardy and *McElrath v. Georgia*

Christopher M. Casa and Zhanna Green

Double jeopardy is a fundamental principle that prohibits the government from prosecuting a person more than once for the same crime. *Nevertheless, in McElrath v. State*,[1] the Supreme Court of Georgia held that a defendant could be retried for murder even though a jury had already found him not guilty of murder by reason of insanity. On appeal in *McElrath v. Georgia*,[2] the U.S. Supreme Court unanimously reversed that decision, holding that the defendant could not be retried for a crime for which he had been acquitted, and reaffirmed the fundamental principle of double jeopardy. Although *McElrath* does not constitute a change in how double jeopardy applies, it is instructive on how judges, prosecutors, and defense attorneys can avoid running afoul of the principle.

What is Double Jeopardy?

The principle of double jeopardy is enshrined in the United States and New York Constitutions, which prohibit the government from prosecuting a person more than once for the same offense or from imposing more than one criminal punishment for the same offense.[3] Jeopardy is the danger of conviction and punishment that a defendant in a criminal action may incur.[4] Jeopardy attaches when an accusatory instrument charging a defendant with a crime is filed, and when the action either ends in a conviction upon a plea of guilty, a trial jury is empaneled and sworn, or a witness is sworn in a bench trial.[5]

If a defendant has been prosecuted for and convicted of crimes, that defendant generally cannot be prosecuted again for the same crimes arising out of the same act or criminal transaction.[6] There are limited exceptions where double jeopardy principles do not prohibit the government from prosecuting a defendant again for the same or similar crimes,[7] including the dual sovereignty doctrine[8]—"a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute"[9]—and the delayed death exception—the state may prosecute a defendant for assault or attempted murder and then if the victim of the same crimes later dies as a result of the same conduct the state may then prosecute the defendant for murder.[10]

Double jeopardy principles generally do not prevent the government from retrying a defendant following a mistrial, as long as the defendant requests or consents to the mistrial, there was "manifest necessity" for the mistrial or "the ends of public justice would otherwise be defeated."[11] For example, if a trial ends after the court discharges a deadlocked jury, the government is not prohibited from retrying the defendant.[12] However, if a prosecutor intentionally causes a mistrial by engaging in prejudicial misconduct deliberately intended to provoke a mistrial, rather than to secure a conviction, double jeopardy would prevent further prosecution of that defendant for those crimes.[13] Notably, for federal constitutional purposes, a reversal of a judgment for being against the weight of the evidence does not bar a retrial,[14] but New York statutes prohibit retrial under those circumstances.[15]

If a person has been prosecuted and acquitted of crimes, that person generally cannot be prosecuted again for the same crimes.[16] Whether a defendant has been acquitted for double jeopardy purposes depends upon whether the court's ruling, "whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[17] For example, a defendant has been acquitted and cannot be prosecuted again for a crime if a jury finds the defendant not guilty and the court accepts the verdict[18] or if the crime is dismissed at trial for lack of sufficient evidence.[19] An acquittal may also be implicit.[20] For example, if a jury is given a full opportunity to render a verdict on a particular charge and finds a defendant guilty on a different crime which necessarily negates guilt of that charge, or if that charge and a lesser crime are submitted to the jury in the alternative and the jury finds defendant guilty of the lesser crime, then the defendant is impliedly acquitted of that charge.[21]

What Happened in McElrath?

Damien McElrath was charged with premediated murder, felony murder and aggravated assault for stabbing and killing his adoptive mother.[22] McElrath suffered from mental illness for much of his life; he was diagnosed with bipolar disorder and attention deficit hyperactivity disorder (ADHD) at a young age.[23] He struggled with psychiatric treatment and often refused his prescribed medication.[24] His mental illness caused him to be suspended from school and receive low grades, contributed to encounters with law enforcement, and resulted in frequent conflicts with his mother.[25] His mental health significantly declined over time and he began to suffer from delusions that his mother was poisoning his food and drink with ammonia and pesticides, and that he was an FBI agent who frequently traveled to Russia and had killed multiple people.[26] He was eventually committed to a mental health facility for two weeks and diagnosed with schizophrenia.[27] One week after his release, McElrath fatally stabbed his mother, purportedly because he believed she was poisoning him.[28]

At trial, a Georgia jury found McElrath "not guilty by reason of insanity" of premeditated murder and "guilty but mentally ill" of felony murder and aggravated assault.[29] The trial court accepted the verdict even though it was repugnant under Georgia law because it was not "legally and logically possible" for those verdicts to exist simultaneously.[30]

On appeal to the Supreme Court of Georgia, McElrath argued that the jury's verdict of "not guilty by reason of insanity" barred his retrial for premeditated murder under the double jeopardy clause of the Fifth Amendment.[31] He contended that the verdict constituted an acquittal for double jeopardy purposes and that the government could not retry him for that charge.[32] The Supreme Court of Georgia rejected that argument, nullified the verdicts as repugnant, and authorized a retrial.[33] On appeal to the U.S. Supreme Court, McElrath argued that despite the nullification of those verdicts, the jury's verdict of "not guilty by reason of insanity" on the premeditated murder charge should be deemed an acquittal and preclude a retrial on double jeopardy grounds.[34]

In a unanimous opinion written by Justice Jackson, the U.S. Supreme Court held that the double jeopardy clause barred further prosecution of McElrath for the crime of premeditated murder.[35] The Court

held that the jury's verdict constituted an acquittal for double jeopardy purposes, notwithstanding the Georgia court's nullification of that verdict and that the jury's verdict on that count was inconsistent with its verdicts on the other counts.[36] The Court emphasized that "perhaps the most fundamental rule in the history of double jeopardy jurisprudence" is that "[o]nce rendered, a jury's verdict of acquittal is inviolate" and cannot be reviewed, on error or otherwise.[37] Thus, "the jury holds an unreviewable power to return a verdict of not guilty even for impermissible reasons" and the double jeopardy clause "prohibits second-guessing the reason for a jury's acquittal."[38] Furthermore, a verdict of "not guilty by reason of insanity" was the functional equivalent of a verdict of not guilty and thus an acquittal, because it amounted to a finding that the evidence was insufficient to establish criminal liability.[39] Accordingly, the Court held that the jury's verdict of "not guilty by reason of insanity" for premeditated murder was an acquittal for double jeopardy purposes and that the government could not retry McElrath for that crime.[40]

What is the Significance of *McElrath*?

McElrath reminds us that a verdict of not guilty is inviolate and cannot be disturbed even if procured by error. Double jeopardy prohibits the retrial of a crime for which a defendant was found not guilty even if that verdict is repugnant. Consequently, it is essential for judges, prosecutors, and defense attorneys to recognize a repugnant verdict before it is accepted and to be familiar with the fundamental principle of double jeopardy.

1. 308 Ga. 104 (2020).
2. 601 U.S. 87 (2024).
3. See U.S. Const. Amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy"); NY Const., Art 1, § 6 ("No person shall be subject to be twice put in jeopardy for the same offense"); CPL § 40.20(1) ("A person may not be twice prosecuted for the same offense").
4. See Black's Law Dictionary (11th ed 2019) (online version).
5. See *Willhauck v. Flanagan*, 448 U.S. 1323, 1325-1326 (1980); C.P.L. § 40.30(1)(a)-(b).
6. See C.P.L. § 40.20(2)(a); see *also United States v. Dixon*, 509 U.S. 688, 696 (1993) (when a person is tried or sentenced for an offense he cannot be tried or sentenced for that offense or any offense containing the same elements); *People v. Wood*, 95 N.Y.2d 509, 513 (2000), citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (The "applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.").
7. See C.P.L. § 40.20(2)(a)-(i).
8. See C.P.L. § 40.20(2)(f); *Polito v. Walsh*, 8 N.Y.3d 683, 686-687 (2007) (double jeopardy principles do not prohibit successive federal and state prosecutions for the same conduct).
9. *Gamble v. United States*, 587 U.S. 678, 681 (2019).
10. See C.P.L. § 40.20(2)(d); *People v. Latham*, 83 N.Y.2d 233, 237-238 (1994).
11. *People v. Ferguson*, 67 N.Y.2d 383, 388 (1986), *citing United States v. Perez*, 22 U.S. 579, 580 (1824).
12. See *Rivera v. Firetog*, 11 N.Y.3d 501, 506-507 (2008).
13. See *Gorghan v. DeAngelis*, 7 N.Y.3d 470, 474 (2006); see *also United States v. DiFrancesco*, 449 U.S. 117, 130 (1980) (defendant who successfully moved for a mistrial may be retried so long as the prosecutor did not deliberately provoke the mistrial request).
14. See *Tibbs v. Florida*, 457 U.S. 31, 39 (1982).
15. See C.P.L. § 470.20(5); see *also* William C. Donnino, Practice Commentary, McKinney's Cons Law of New York; C.P.L. § 40.20.
16. *People v. Biggs*, 1 N.Y.3d 225, 228 (2003), citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).
17. *Biggs*, 1 N.Y.3d at 229, citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).
18. *McElrath*, 601 U.S. at 94.
19. *Biggs*, 1 N.Y.3d at 229 (2003).
20. See *People v. Gause*, 19 N.Y.3d 390, 395 (2012); *Suarez v. Byrne*, 10 N.Y.3d 523, 532 (2008), citing *Green v. United States*, 355 U.S. 184, 190 (1957).
21. See *Gause*, 19 N.Y.3d at 395-396; see *also* C.P.L. § 300.40(3)(b) ("A verdict of guilty upon a lesser count is deemed an acquittal upon every greater count submitted."); *People v. Helliger*, 96 N.Y.2d 462, 466 (2001) (retrial on greater offense barred by double jeopardy following guilty verdict on lesser included offense).
22. *McElrath*, 601 U.S. at 91.
23. *Id.* at 90.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 90-91.
29. *Id.*
30. *Id.*at 87.
31. *Id.* at 93.
32. *Id.*
33. *Id.*
34. *Id.* at 89.
35. *Id.* at 98.
36. *Id.* at 89-90.
37. *Id.* at 94, citing Martin Linen Supply Co., 430 U.S. at 571.
38. *Id.*, citing Smith v. United States, 599 U.S. 236, 253 (2023).
39. *Id.* at 95.
40. *Id.* at 96.

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FOCUS: CONSTITUTIONAL LAW

The U.S. Supreme Court Clarifies When Government Persuasion Becomes Coercion

Christopher J. DelliCarpini

The United States Supreme Court issued two decisions this past term that attempted to clarify how far governments can go to pressure companies to cooperate with a political agenda.

In *National Rifle Association v. Vullo*, the Court held that the New York Department of Financial Services ("DFS") would violate the First Amendment, as alleged, "by coercing DFS-regulated parties to punish or suppress the NRA's gun-promotion advocacy."[1]

In *Murthy v. Missouri*, however, the Court held that states and social-media users did not even have standing to sue federal agencies and officials for allegedly pressuring social media platforms into censoring certain content.[2]

Distinguishing between permissible persuasion and a First Amendment violation is critical for counsel representing government agencies as well as regulated companies. But as the lengthy dissent in *Murthy* shows, where to draw that line is hardly clear.

Bantam Books: No Coercion, Direct or Indirect

The seminal decision on government coercion is the Supreme Court's 1963 decision *Bantam Books, Inc. v. Sullivan*.[3] A state commission would send publishers notices about "objectionable" books and magazines and remind them of the commission's "duty to recommend to the Attorney General prosecution of purveyors of obscenity."[4] The trial court found that the effect of the notices was, understandably, to intimidate publishers into withdrawing the objectionable titles.

Writing for the majority, Justice Brennan took pains to point out that "we do not mean to suggest that private consultation between law enforcement officers and distributors prior to the institution of a judicial proceeding can never be constitutionally permissible."[5] The commission's work, however, "was in fact a scheme of state censorship effectuated by extralegal sanctions; they acted as an agency not to advise but to suppress."[6]

The concurrences raised issues that would resurface in *Vullo* and *Murthy*. Justice Douglas wrote separately to reiterate "the very narrow scope of governmental authority to suppress publications on the grounds of obscenity."[7] Justice Clark concurred in the result but chided the majority for not explaining what the commission could still do, suggesting that it was still free "to publicize its findings [and] solicit the support of the public in preventing obscene publications from reaching juveniles."[8]

In dissent, Justice Harlan found the commission to be "obviously not an effort by the State to obstruct free expression but an attempt to cope with a most baffling social problem" and noted that the commission's notices were not self-executing: "Any affected distributor ... may test the Commission's views by way of a declaratory judgment action."[9]

NRA v. Vullo: Coercion Requires Consequences

Vullo considered a coordinated campaign by the New York State government to punish the NRA by punishing those who did business with the group.[10] The NRA offered its members insurance policies, which were underwritten and administered by third parties. In 2017, DFS began investigating one such policy for possible violations of New York law. The investigation soon spread to NRA's other policies, and after the Parkland school shooting, those third parties severed ties with NRA, allegedly fearing reprisals from DFS superintendent Maria Vullo.

The campaign became even more direct in 2018. Ms. Vullo met with Lloyd's, one of NRA's underwriters, and allegedly on behalf of then Governor Andrew Cuomo, "presented [their] views on gun control and their desire to leverage their powers to combat the availability of firearms, including specifically by weakening the NRA."[11] Unsurprisingly, Lloyd's agreed to cease underwriting such policies in return for DFS shifting focus "solely on those syndicates which served the NRA, and ignor[ing] other syndicates writing similar policies."[12]

DFS also issued guidance letters that "encourage[d]" all regulated entities to "review any relationships they have with the NRA or similar gun promotion organizations" and "take prompt actions to manag[e] these risks and promote public health and safety."[13] Vullo and Cuomo also issued a joint press release urging "all insurance companies and banks doing business in New York" to cut ties to the NRA, and in a tweet the Governor urged New York companies "to revisit any ties they have to the NRA," which he called "an extremist organization."[14]

NRA sued, and Vullo moved to dismiss. The district court denied the motion, but the Second Circuit reversed. The Supreme Court granted certiorari to hear whether the complaint stated a First Amendment claim against Vullo.

The Court held that NRA did state a claim: "A government official can share her views freely and criticize particular beliefs, and she can do so forcefully in the hopes of persuading others to follow her lead.... What she cannot do, however, is use the power of the State to punish or suppress disfavored expression."[15]

Bantam Books, the Court wrote, "stands for the principle that a government official cannot do indirectly what she is barred from doing directly," that is, it "cannot coerce a private party to punish or suppress disfavored speech on her behalf."[16] The test was whether the officials conduct, viewed in context, "could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff's speech."[17]

Given Vullo's authority, the Court held her communications with the third parties and the guidance letters "can be reasonably understood as a threat or an inducement. Either of those can be coercive."[18] Even the illegality of certain insurance programs did not justify pursuing violations "to punish or suppress the NRA's protected expression."[19]

The two concurring opinions refined the analysis. Justice Gorsuch wrote to highlight the Second Circuit's error in "break[ing] up its analysis into discrete parts" rather than taking them all in context.[20] Justice Jackson wrote to clarify that NRA had pleaded a tenuous claim

for censorship but had also pleaded a claim for First Amendment retaliation, and that the lower courts should on remand consider these theories independently.[21]

Murthy v. Missouri: Standing Requires Injury

Less than a month after *Vullo*, the Court decided *Murthy*. The plaintiffs were states and social media users who sued federal agencies and officials, alleging that they pressured social media companies into censoring certain content.

These companies had long-standing policies suppressing false or misleading speech, which in 2019 they applied to information about COVID-19.[22] A variety of government officials, including from the White House and the CDC, met with these companies over years to urge them to do more to combat disinformation.[23] The FBI also communicated with the companies about disinformation campaigns around the 2020 elections, though they expressly disavowed taking any action against the companies for their responses.[24]

The plaintiffs moved for a preliminary injunction, which the district court granted.[25] The Fifth Circuit affirmed with modifications, finding that the states and individual plaintiffs had standing and were likely to succeed on the merits.[26] The Supreme Court granted certiorari and reversed, finding that none of the plaintiffs had standing.[27]

The Court held that the plaintiffs had to show "a substantial risk that, in the near future, at least one platform will restrict the speech of at least one plaintiff in response to the actions of at least one Government defendant."[28] Given the companies' long-standing efforts to cull false information and the actual recommendations that government officials urges, the plaintiffs could not show traceability, that anything done to them was in response to government coercion, which all but precluded them from raising the inference of future censorship.[29]

The Court also noted that content moderation efforts continued as government efforts waned with the pandemic: "without proof of an ongoing pressure campaign, it is entirely speculative that the platforms' future moderation decisions will be attributable, even in part, to the defendants."[30] The Court also rejected the plaintiffs' "right to listen" theory, as it would grant standing to anyone who might have wanted to see anyone else's censored content.[31]

Justice Alito dissented, joined by Justices Thomas and Gorsuch, condemning "what the District Court termed 'a far-reaching and widespread censorship campaign' conducted by high-ranking federal officials against Americans who expressed certain disfavored views about COVID-19 on social media."[32] He found from the record that "[w]hat the officials did in this case was more subtle than the ham-handed censorship in *Vullo*, but it was no less coercive."[33] He also found that at least one individual plaintiff, Facebook user Jill Hines, proved all three elements of standing—injury in fact, traceability, and redressability—as government officials "repeatedly hectored and implicitly threatened Facebook to suppress speech expressing the viewpoint that Hines espoused."[34]

A Question of "Leverage"

Vullo and *Murthy* are clearly on opposite sides of the line between permissible persuasion and unconstitutional coercion, and the critical distinction appears to be, as the majority put it in *Vullo*, "leverage."

What makes persuasion a First Amendment violation is whether, taken as a whole, the agency's actions are a threat or an inducement to curb speech—yours or another's, as seen in *Vullo*. Discrete actions may stand out, like the DFS guidance letters or then-Governor Cuomo's tweets. But as *Murthy* makes clear, those actions cannot be evaluated in isolation; ambiguous comments may be coercive and aggressive rhetoric may be mere persuasion, depending on when such statements are made and to whom.

What government entities should avoid, therefore, is even the appearance of threatening legal or regulatory action against private actors or their partners for engaging in protected First Amendment activities. As in *Vullo*, this includes conditioning enforcement or investigations on a target's compliance with an agency's agenda. Express denials of such conditions, as in the FBI communications in *Murthy*, might insulate an agency from allegations of unconstitutional coercion—though again, a court would view them in context.

But may an agency threaten consequences other than regulatory or other legal action? Could a government body merely refuse to do business with entities that espouse politically unfavorable views? It may be that regulations on government contracting preclude such political considerations. Indeed, expressly barring private actors on political grounds from otherwise generally available opportunities might, in context, look like coercion.

Murthy shows, however, that anything short of a "threat" or "inducement" is permissible persuasion, even by an agency with the potential to regulate the target. Government actors are free to "hector" and "implicitly threaten" private actors to change their content, as long as no legal action is expressly threatened or taken. It would seem that however powerful, public actors have the same First Amendment rights as private actors, and they are as free to urge others to adopt their views.

Counsel crafting a complaint in such a case, and those defending clients against such charges, should verify that a First Amendment violation is pleaded. Whether the claim alleges censorship, retaliation, or both, plaintiffs must plead and prove the elements of standing as articulated in *Murthy*: they must show an injury that can be traced to a government action and that can be redressed in the courts.

1. 602 U.S. 175 (2024).
2. ___ U.S. ___, 144 S.Ct. 1972 (2024).
3. 372 U.S. 58 (1963).
4. *Id.* at 61–62.
5. *Id.* at 71.
6. *Id.*
7. *Id.* at 72 (Douglas, J., concurring).
8. *Id.* at 75 (Clark, J. concurring).
9. *Id.* at 78 (Harlan, J., dissenting).
10. *Vullo*, 602 U.S. at 181–83.
11. *Id.* at 183.
12. *Id.*
13. *Id.* at 184.
14. *Id.*
15. *Id.* at 188.
16. *Id.* at 190.
17. *Id.* at 191.
18. *Id.* at 193.
19. *Id.* at 196.
20. *Id.* at 199 (Gorsuch, J., concurring).
21. *Id.* at 202–04 (Jackson, J., concurring).
22. *Murthy*, 144 S.Ct. at 1982.
23. *Id.* at 1982–83.
24. *Id.* at 1983.
25. *Id.* at 1984.
26. *Id.* at 1984–85.
27. *Id.* at 1985.
28. *Id.* at 1986.
29. *Id.* at 1987–94.
30. *Id.* at 1993.
31. *Id.* at 1996–97.
32. *Id.* at 1997 (Alito, J., dissenting).
33. *Id.* at 1999 (Alito, J., dissenting).
34. *Id.* at 2005–09 (Alito, J., dissenting).

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FOCUS: HOSPITAL AND HEALTH LAW

Physician Discipline in New York State

Bruce M. Cohn

The professional discipline of physicians and physician assistants follows a different path than the other professions regulated by the New York State Education Department. In 1991, the Board for Professional Medical Conduct ("the Board") and its Office of Professional Medical Conduct in the NYS Department of Health assumed responsibility. The process is contained in NY Public Health Law § 230. It should be noted that this is specific to physicians and physician assistants. Other health professionals come under the jurisdiction of the Office for Professional Discipline in the Department of Education. Other licensed professionals are subject to oversight by the Education Department, Secretary of State or the court system.

What is Professional Misconduct?

The Education Law[1] sets out more than forty actions which form the basis for allegations of misconduct. These include a multitude of professional sins which are common to all professions, and some unique to medicine, such as ordering unnecessary tests; fee splitting with non-physicians; HIPAA violations; failure to wear identification in a hospital; failure of an ophthalmologist to provide copies of a prescription for glasses; not disclosing the identification of participants in a procedure while the patient is under anesthesia; and abandoning patients. The statute also defines "practicing negligently on more than one occasion" as professional misconduct while gross negligence on one occasion is misconduct. Failure to comply with the Board is itself professional misconduct.

The 2021 Annual Report of the Board (the most recent available on their website)[2] notes that five allegations were responsible for 74% of the actions taken by the Board: negligent/incompetent practice; sexual misconduct; inappropriate prescription of controlled substance; being impaired due to drugs or alcohol; and fraud. Impairment is a major contributor to Office of Professional Medical Conduct ("OPMC") issues and the Board contracts with the Medical Society to operate Committee for Physician Health ("CPH") which identifies, refers for treatment, and monitors impaired physicians to get them safely back to practice.

The Process

According to the Board's 2021 report, 50% of complaints are received from the public. Investigations also arise from the OPMC's own research, through the National Practitioner Data Bank[3] and reporting of malpractice settlements by professional liability insurance companies or self-insured institutions.[4] Complaints may also be generated through information from the media or referrals to OPMC from other government agencies. Actions taken against a practitioner's privileges by a hospital also generate a report. NYS maintains a reporting system for hospitals. New York State Patient Occurrence & Tracking System ("NYPORTS") hospitals are mandated to report and investigate certain "never events" which should not occur in the absence of negligence.[5] NYPORTS details are generally confidential as part of the quality assurance process but are available to OPMC.[6]

Incoming complaints are investigated and reviewed by supervisory staff and medical professionals. If there is no evidence of an infraction under the misconduct statutes, the case is closed. In 2021, 47% of cases investigated moved forward (Board Report, supra). The subject of the allegations is often offered an informal interview with an investigator. Practitioners are entitled to appear with an attorney and a stenographer at their own expense. Physicians should consult with an experienced health care counsel before attending such an interview. The bane of every lawyer's existence is the client who tells you about what they did after they did it.

Some cases do not move forward for a variety of reasons, such as the complaint is not about a physician, physician assistant or specialist assistant, or the allegations do not set out a case of misconduct under the statute. A committee of the Board, consisting of two physicians and one public member, reviews all possible misconduct allegations and determines whether the matter should move forward toward a hearing.

If the case is deemed to set out a viable allegation, a Department of Health Attorney prepares a Notice of Hearing and a Statement of Charges which set out the allegations against the practitioner. A hearing is held before a Board committee. The practitioner and their attorney are permitted to produce witnesses and evidence at the committee hearing presided over by an Administrative Law Judge who issues Findings of Fact & Conclusions of Law. The committee also has the power to impose a penalty, if warranted. This may include a license suspension, a revocation of license, practice monitor or a fine up to $10,000 per violation.[7] Pursuant to the Board's report, 77% of the cases were deemed "serious," warranting a suspension, revocation or restriction on licenses. According to OPMC statistics, many cases are settled by agreement with the practitioner entering into a consent order.

If either side is dissatisfied with the decision of the Hearing Committee, the side may appeal to an Administrative Review Board ("ARB"), consisting of five members, three physicians and two public members. It is prudent to advise clients to think carefully about an appeal. The ARB may reverse the decision of the Hearing Committee or reduce or increase the penalty. In 2021, ten appeals were heard by the ARB and all determinations were upheld. In two cases, the penalty was decreased and in four of the ten cases, the penalty was increased.

Admissibility—Can I Use It in My Case?

One of the most common questions from attorneys representing malpractice plaintiffs is whether the decision of OPMC can be entered into evidence at trial. The mere existence of a complaint is confidential. If the complaint results in a formal action, the information becomes public. Counsel still must consider whether the action is relevant to their case and the allegations of negligence. Official public records relating to the actions taken by a physician while treating the plaintiff would be fair game in the absence of a contrary ruling by a judge based on the information being highly prejudicial or some other grounds. A more likely scenario is the effort by counsel to use a reported action against a physician from a prior encounter as evidence of the practitioner's lack of care or negligent practice. This becomes a matter for the court to determine.

A case on point is the oft-cited *Matter of Brandon's Estate*[8] which holds that "A general rule of evidence, applicable in both civil and criminal cases is that it is improper to prove that a person did an act on a particular occasion by showing that he did a similar act on a different unrelated occasion" Certain exceptions to this rule…have been recognized when for example, the evidence of other similar acts is offered to help establish motive, intent, absence of mistake or accident, a common scheme or plan, or identity, *Matter of Brandon's Estate, supra*.

The circumstances of the case may have opposing counsel trying to enter "prior acts" as demonstration of the physician's history of careless practice into evidence. In *Mazella v. Beals*,[9] the defendant physician treated the plaintiff's decedent over many years for obsessive compulsive disorder and major depression. The patient's visits to the doctor were few and far between. The doctor continued to renew prescriptions for Paxil (an SSRI medication used to treat depression) over a period of ten years without examining the patient. Ultimately, after a particularly bad episode, the patient took his own life. The case was also unusual in that, at trial, the defendant doctor admitted that his care departed from good and accepted practice but argued that intervening acts severed the causal connection.

Defendant filed a Motion in Limine, seeking to prevent the plaintiff from questioning the doctor about a prior consent order with OPMC. Motion was denied and the jury returned a $1,200,000 verdict. On appeal, the 4th Department affirmed.[10] The Court of Appeals reversed on the basis that the trial court committed reversible error in allowing the defendant to be questioned about the contents of a prior OPMC consent order which only distracted the jury from the central issues in the case.

Citing *Matter of Brandon, supra* "It is improper to prove that a person did an act on a particular occasion by showing that he did a similar act on a different unrelated occasion…The Consent Order was nothing more than evidence of unrelated bad acts,

the type of propensity evidence that lacks probative value concerning any material factual issue…unpersuaded by plaintiff's claim that the evidence was admissible to impeach defendant's credibility."

Good Faith Complaints

In the life cycle of representing physicians and other professionals, there comes a time when counsel is asked if they should sue the plaintiff for filing a frivolous claim. The answer is almost always that this is a very bad idea. In an OPMC case, the identity of the complainant to OPMC is confidential, however, in many cases, the identity may be evident, and the aggrieved doctor may be tempted to retaliate.

Dr. Robert Haar, an orthopedic surgeon, provided treatment to several patients and billed Nationwide Mutual Fire Insurance Co. for services rendered. Nationwide denied one claim and partially denied several others. Subsequently, the company filed a complaint with OPMC who investigated but took no action against Dr. Haar. The physician, feeling aggrieved by the complaint, filed suit against the insurance company for filing a complaint in "bad faith," basing his complaint on the Public Health Law § 230 (11)(b) which provides protection against liability for complaints in "good faith" The case was removed to federal court by the defendant and the district court (Kaplan, J.) dismissed the case upon finding that the Public Health Law created no right of action for bad faith allegations.

Upon appeal, the 2nd Circuit reviewed the allegations de novo and in a detailed analysis of state law, noted that the 2nd Department in *Elkoulily v. NYS Catholic Health Plan* found no private right of action in the section relied upon by the plaintiff.[11] However, the First Department, albeit with minimal analysis, reached the opposite conclusion in *Foong v. Empire Blue Cross*.[12]

Due to the split, the 2nd Circuit certified the following question to the NYS Court of Appeals: "Does NY PHL 230 (11) (b) create a private right of action for reporting in bad faith to the Office of Professional Medical Conduct?"

The Court of Appeals responds in the negative. The court notes that the statute in question requires certain entities to file complaints but allows others to permissively file complaints. The plaintiff concedes that the statute does not expressly create a cause of action but rather the cause of action is implied. Judge Stein notes that in this situation, the court looks at three factors: whether the plaintiff is in a class for whom this right may be implied; whether it is consistent with the legislative scheme; and whether it would promote the legislative purpose. In this case, the plaintiff fails on all three prongs. The statute in question was added to protect the complainant, not the subject of the complaint. The court also notes that the relief requested by plaintiff would not promote any legislative purpose and given the expressed purpose of the statute pursuant to the sponsors memorandum, is not consistent with the legislative intent.

> "In sum, Public Health Law § 230(11)(b) was not enacted for persons similarly situated to plaintiff, and a private right of action is inconsistent with the legislated purpose and broader statutory scheme."[13]

Conclusion

The Board of Professional Medical Conduct and its Office for Professional Medical Conduct operate a statutorily mandated process providing oversight for physicians and physician assistants. A client who receives any communications from OPMC should contact an attorney familiar with the process immediately for advice and representation. There is a tendency among highly educated professionals to believe that they can simply explain what happened and the problem will go away. An OPMC investigation is just as serious as a court proceeding and may result in significant sanctions up to and including loss of license. It should be taken seriously.

1. NYS Educ. Law 6530, et. Seq.
2. https://www.health.ny.gov/professionals/doctors/conduct/annual_report/2021/docs/report.pdf.
3. 42 U.S.C. 11101-11154, 45 C.F.R. § 60.1 (2024).
4. NYS Ins. Law § 315.
5. NYS Public Health Law § 2805-L.
6. NYS Public Health Law § 2805-M.
7. NYS Public Health Law § 230-A.
8. 55 N.Y.2d 206,210,211 (1982).
9. 27 N.Y.3d 694 (2016).
10. 122 A.D.3rd 1358 (4th dept. 2014).
11. 153 A.D.3rd 768, 772 (2d Dept. 2017).
12. 305 A.D.2d 330 (First dept 2003).
13. 115 N.Y.S.3d 197.

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NASSAU ACADEMY OF LAW

September 10 (Hybrid)

Dean's Hour: Through the SCOTUS Looking Glass—An Analysis of the U.S. Supreme Court's Reversal of 40 Years of Deference to Administrative Agency Interpretation and Enforcement of the Laws

With the NCBA Environmental Law, Government Relations, and Municipal Law and Land Use Committees

12:30PM

1.0 CLE Credit in Professional Practice

NCBA Member FREE; Non-Member Attorney $35

The recent SCOTUS decisions in *Loper Bright Enterprises v. Raimondo* and *Securities and Exchange Commission v. Jarkesy* have upended administrative law and the authority of administrative agencies to enforce the laws they were created to oversee. In previous cases of agency interpretation of federal statutes that had ambiguity, the courts gave deference to agency expertise and reasonable interpretations of their authority. Federal agencies also served quasi-judicial functions of imposing penalties and collecting fines for determined violations of the laws. Courts will now take a larger role in interpreting statutes and will shape the future course of administrative agency action.

Guest Speakers:

John L. Parker, Esq., a Partner with Sahn Ward Braff Koblenz Coschignano PLLC, leads the firm's Environmental Energy and Resources Practice Group. He is Chair of the NCBA Environment Law Committee.

Danielé "Danny" D. De Voe, Esq., is a partner with Sahn Ward, where she specializes in commercial litigation and employment law.

Michael H. Sahn, Esq., Co-Managing Member of Sahn Ward, practices zoning and land use planning, real estate law and transactions, corporate, municipal, and environmental law. He is Chair of the NCBA Government Relations Committee.

Moderator Elisabetta T. Coschignano, Esq., Member of Sahn Ward, practices commercial and residential real estate transactions, zoning and land use planning, municipal law, litigation, and estate planning. She is Chair of the NCBA Municipal Law and Land Use Committee.

September 11 (Hybrid)

Dean's Hour: Selena—The Murder of the Mexican American Madonna

12:30PM

1.0 CLE Credit in Professional Practice

NCBA Member FREE; Non-Member Attorney $35

Singer Selena Quintanilla was born in 1971 and shot and killed on March 31, 1995 by an obsessed fan who derived her identity from her association with the pop star. Selena became a seminal figure in Mexican American culture. The trial raised numerous legal and ethical issues. There was no doubt who pulled the trigger, yet the actions of the authorities raised questions about securing the defendant's confession. More telling are the rights of the accused to a fair trial in an inflamed media environment punctuated by threats of violence. The trial—which ended with what was widely perceived as a just verdict—could serve as a model for a trial being conducted under intense media scrutiny.

Guest Speaker:

Rudy Carmenaty, Esq., is Deputy Commissioner of the Nassau County Department of Social Services. He was former Bureau Chief in the Office of the Nassau County Attorney, Director of Legal Services for the Nassau County Department of Social Services, and Director of Nassau County Department of Human Services.

September 12 (Hybrid)

***Yours in Freedom, Bill Baird*—Documentary Film Screening Exploring the Fight for Birth Control Access and the Road Ahead**

Sponsored by the Nassau, Queens and Suffolk Counties Women's Bar Associations

5:00PM Dinner and Cocktail Reception

6:00PM Program

1.0 CLE Credit in Diversity, Inclusion & Elimination of Bias and 1.0 Credit in Professional Practice

Complimentary Dinner Reception and CLE

Watch an exclusive screening of Rebecca Cammisa's powerful documentary, *Yours in Freedom, Bill Baird*, about the man who successfully challenged the U.S. law banning the distribution of contraceptives to unmarried people.

PROGRAM CALENDAR

Baird v. Eisenstadt legalized birth control for all Americans on March 22, 1972. This landmark right-to-privacy case was the foundation for *Roe v. Wade*. The film begins in the early 1960s when Bill Baird became the clinical director of EMKO Pharmaceuticals, a company that manufactured and sold contraceptive foam. After witnessing a woman die following a botched coat-hanger abortion, Baird committed himself to doing everything he could to promote low-cost birth control and access to safe, legal abortion. Following the screening, Bill Baird, now 92, will join the program via Zoom for a Q&A.

September 19 (Hybrid)

Dean's Hour: DNA Evidence in Your Case—Is It Over Before It Starts? Not So Fast!

With the Nassau County Assigned Defender Plan

12:30PM

1.0 CLE Credit in Professional Practice

NCBA Member FREE; Non-Member Attorney $35

This program explores the strengths and weaknesses of DNA evidence in a case. Learn the basics of DNA analysis, how to interpret results and determine the significance of those results as it relates to the strength of the case, and the importance of obtaining an expert for consultation and potential testimony at trial.

Guest Speakers:

Dr. Mechthild Prinz, PhD. is a professor of Forensic Genetics and teaching in the Forensic Science Program at John Jay College of Criminal Justice. She has more than 30 years of experience in forensic DNA testing.

Jeffrey Groder, Esq., practices criminal law in federal and state court. A former ADA at the Nassau County District Attorney's Office, he opened his own law practice in 1998.

September 24 (Hybrid)

Dean's Hour: Negotiating and Litigating Arbitration Clauses

12:30PM

1.5 CLE Credits in Professional Practice

NCBA Member FREE; Non-Member Attorney $50

National Arbitration and Mediation (NAM) hearing officers discuss provisions that should be addressed in any arbitration clause, and how to avoid the possibility of the arbitration clause being challenged in court or before an arbitrator. Topics include choice of law, venue, and the location of the arbitration; administered vs. self-administered arbitrations; single vs. panel arbitrations; selection of the panel; confidentiality; the importance of reciprocal provisions; streamlined discovery; protective orders; default provisions; and the impact of the agreement on the arbitrator. The panel will give tips on crafting an arbitration clause with specific terms on professional responsibility, the importance of streamlining the resolution of any dispute under the agreement, and how best to create a clause specific to the business transaction.

Guest Speakers:

Hon. Peter B. Skelos (Ret.) spent 11 years as an Associate Justice of the Appellate Division of the NYS Supreme Court, Second Judicial Department.

Lisa M. Casa, Esq. is a Partner at Forchelli Law in the Employment and Labor practice group.

Danielle B. Gatto, Esq., is a Partner at Forchelli Law in the Litigation practice group.

Bret L. McCabe, Esq., is a partner at Forchelli Law in the Construction and Litigation practice groups.

September 25 (Hybrid)

Dean's Hour: Traps When Buying or Selling a Business—Part 1

12:30PM

1.0 CLE Credit in Professional Practice

NCBA Member FREE; Non-Member Attorney $35

Business sale and acquisition involve many legal, financial, tax and ethical considerations. The two-part series explores some common traps and missed opportunities. Part 1 includes: proper structure; entity considerations—corporation vs. partnership; contract purchase price allocations; Special S corporation traps; Section 754 election; and goodwill and valuation.

Part 2, scheduled for October 23, is a detailed discussion of ethical considerations encountered in buy/sell representation. Practical examples of ethical considerations will be presented.

Guest Speakers:

Robert S. Barnett, Esq., MS (Taxation), CPA, is a Partner at Capell Barnett Matalon & Schoenfeld, LLP (Parts 1 and 2)

Mitchell T. Borkowsky, Esq., Law Offices of Mitchell T. Borkowsky (Part 2)

September 25 (Hybrid)

The Child Victims Act: Where Things Stand Today

With the NCBA Plaintiff's and Defendant's Personal Injury Committees

5:30PM

1.5 CLE Credits in Professional Practice

NCBA Members FREE; Non-Member Attorney $50

NAL PROGRAM CALENDAR

Justice Leonard Steinman, the Child Victims Act Regional Judge for the 9th and 10th Judicial Districts, and his Principal Law Clerk, Danielle Mederios, Esq., will discuss the history, evolution, and present status of CVA law. Topics to be addressed include recent developments concerning the liability of municipalities and school districts; CVA verdicts; trial issues; and the practices of Justice Steinmann's CVA Part.

Guest Speakers:
Hon. Leonard Steinman has served as a Supreme Court Justice since 2013. Since January 1, 2022, he has presided over CVA Regional Part.
Danielle Medeiros, Esq., has served as the Principal Law Clerk to Justice Steinman in Nassau County since 2019.

September 26 (Hybrid)

Dean's Hour: Cell Site Analysis by Jerry Grant
With the Nassau County Assigned Defender Plan
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

Cell site analysis is the method of mapping out an approximate location of a cell phone based on historical activity. Learn the process of obtaining and understanding the information that is contained in a Call Detail Report and how to interpret those records and produce a map indicating a general geographical location based on the cell tower and cell sector. Grant will show how easy-to-read reports can be created to allow you to visualize the approximate location of a cell phone during activity.

Guest Speaker:
Jerry Grant is an Independent Digital Forensics Investigator/Consultant, and an Investigator for the Western District of NY Federal Public Defender's Office, overseeing the NYW automation program.

September 27 (In Person Only)

Veterans Forum: Demystifying the Rights Available to Veterans—Practical Legal Information and Tips Every Lawyer and Service Provider Needs to Know
9:00AM Continental Breakfast and Registration
9:30AM–12:00PM Program
1.0 CLE Credits in Professional Practice
FREE CLE Program and Continental Breakfast

9:30AM Welcome and Introduction
Viviana DeCohen, New York State Commissioner of Veteran's Services

10:00AM Commonly Repeated Veterans' Myths
Benjamin Pomerance, Esq., Deputy Counsel, NYS Department of Veterans' Services

11:00AM Panel Presentation
Amy Amoroso, Director, VBOC SBA Federal Region II NY/NJ/PR/USVI, Founding Member of USMCA
Alecia R Grady, Director, Private Public Partnership Office, Office of the Chief of Army Reserve

October 1 (Hybrid)

Dean's Hour: How a Trial Consultant Can Help You with Your Case?
With the Nassau County Assigned Defender Plan
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

Learn the elements of collaborating with a trial consultant, including trial preparation, persuasive themes, witness preparation, and approaches to jury selection; when you should start and how long you should work with them; what they need to be most helpful to you; and how defense lawyers in the private bar and on the 18B panel can hire a trial consultant in New York.

Guest Speaker:
Joseph V. Gustaferro, a court-appointed mitigation specialist in capital cases, has spent over 40 years as a trial consultant, mitigation specialist, and jury selection expert in 200+ cases for the defense bar.
Steven Raiser, Esq. is a founding partner at Raiser & Kenniff, PC, practicing litigation for criminal defense and civil matters. He has appeared as a legal analyst for FOX, CNN, and Court TV (TRU TV).

October 1 (In Person Only)

Fireside Chat with Hon. Rolando Acosta (Ret.)
With the Long Island Hispanic Bar Association
5:30PM
1.5 CLE Credits in Diversity, Inclusion and Elimination of Bias
NCBA Member FREE; Non-Member Attorney $50

Retired Justice Rolando T. Acosta was Presiding Justice of the NYS Appellate Division of the Supreme Court, First Judicial Department from 2017 to 2023. He was elected to the NYC Civil Court in New York County in 1997 where he helped create the Harlem Community Justice Center, and to the State Supreme Court in 2002. Justice Acosta was named an Associate Justice for the Appellate Division, First Judicial Department in 2008 by Governor Eliot Spitzer and elevated to Presiding Justice in 2017 by Governor Andrew Cuomo.

Committee Chair Orientation

On July 16, NCBA President Daniel Russo welcomed the 2024-2025 Committee Chairs and Vice-chairs to Domus. The meeting provided an invaluable opportunity for committee leaders to gain a deeper understanding of their roles and the operation of the NCBA, including insights into the Nassau Academy of Law, special events, Corporate Partners, *Nassau Lawyer*, and the NCBA Lawyer Assistance Program.

Photos By Hector Herrera

New Lawyers Roundtable

On July 23, the NCBA New Lawyers Committee, chaired by Byron C. Chou and Michael Berger, hosted about fifty court interns at Domus for a roundtable discussion with new lawyers from diverse areas of practice who provided their personal and professional insights to the aspiring attorneys.


Photos By Hector Herrera

Portrait Dedication Ceremony


Photo By Hector Herrera

On July 23, the Nassau County Courts held the portrait dedication ceremony for retired Justice of the Supreme Court, Hon. John Michael Galasso. NCBA President Daniel Russo, District Administrative Judge Vito M. DeStefano, Nassau County Supreme Court and Matrimonial Part Supervising Judge Jeffrey Goodstein, and Hon. Gregory Peterson were present for the ceremony. The Nassau County Bar Association commissions portraits for Nassau County Supreme Court justices upon their retirements from the Bench. The portraits hang in the Calendar Control Courtroom of the Supreme Court.

FOCUS: ADMINISTRATIVE LAW

Back to the Future: SCOTUS Undoes 40-year Precedent in Administrative Law Jurisprudence

John L. Parker

The *Chevron* decision that brought the deference standard to administrative law is history.[1] The famous case involved the Environmental Protection Agency in a dispute about its interpretation of the Clean Air Act Amendments of 1977. It dates almost to the time of a famous landmark movie, *Back to the Future*, which demonstrates what in part has happened in this area of the law.[2] In the recent *Loper Bright* decision involving another environmental topic—regulation of fisheries, the Supreme Court has done what only it could do—undo its own precedent. The decision returns the Supreme Court to a previous approach of reviewing administrative actions, overturning the deferential standard of the past four decades and returning to the far earlier standard of the 1940s era review of administrative action—placing the Courts into the role of interpreter and decider of the interpretation of statutes.[3] In essence, administrative law has moved "Back to the Future."

Background: The Federal Government's Challenge of Governing Many Complicated Issues Simultaneously

Administrative agencies have never existed without controversy. Nonetheless, they define government, regulating a significant part of our lives. The agencies were born in response to the challenges of the Great Depression by the Roosevelt Administration. Congress created an alphabet soup of agency names, from the Securities and Exchange Commission to the Food and Drug Administration, and eventually the Environmental Protection Agency ("EPA"), among many others. The agencies each address specific issues and legal areas. The difficulty in finding legislative consensus on the many details needed to address the underlying problems can lead to ambiguity and lack of clarity in the language of federal statutes authorizing agencies to act. The complexity of real problems—like addressing a changing climate—demonstrates the challenge of directing what agencies can and should do with emerging problems. Additionally, the science behind an ongoing and developing problem, like climate change, involves many factors and demonstrates that substantial expertise is needed for modern government to implement its mission. For example, climate change action must address multiple actors and areas that will impact the climate goals being addressed, balanced, and directed. These areas overlap and interconnect, including automobiles, factory emissions, and electricity production further complicating efforts.

Lawyers dealing with administrative law know that agencies can be challenging. Many times, litigation is necessary to address agency decisions. These challenges to the bureaucracy have resulted in an evolving judicial landscape that has brought us to where we are today.

The Supreme Court in the 1940s noted that the role of the Court was to determine if agency action would be upheld, reaching the decisions on a case-by-case basis without giving the benefit of the doubt to agency expertise or decision-making.[4] The agency, in essence, had to persuade the Court that they acted properly. Decades later, the Supreme Court then veered in a new direction when it was asked to determine a challenge to an agency's decision implementing the Clean Air Act. The Supreme Court held that the courts should defer to agency expertise in interpreting the law in cases where there was ambiguity in the law, as long as their actions were reasonable. The swing of the pendulum in favor of the agency has had significant implications for the increase in the growth of the role of administrative agencies and their ability to regulate in areas even if the law wasn't as precise as it could be.

The Supreme Court began to swing the pendulum back from the agencies with its "major questions doctrine," reasoning that for these types of questions, Congress could not be deemed to have allowed the agency to make decisions about the scope of the law. The pendulum has now swung back further, with the Supreme Court returning closer to where it all began in the 1940s, removing the requirement for a Court's deference to agency decisions and deciding whether agency decisions should be upheld. Many argue this returns the balance to due process under the law and will make unelected agency officials accountable for their actions. Many are concerned that complex issues will not be addressed without substantial litigation.

Evolution of the Supreme Court's Jurisprudence on Agency Actions

In *Skidmore v Swift and Co.*, the issues focused on the Fair Labor Standards Act and how "work" was defined. Employees challenged the interpretation of the labor law regarding what work periods would be paid regarding their shifts involving monitoring fire alarms—they needed to be available to respond but did not always respond. The workers challenged a determination between whether "waiting time" should be considered the same as "working time" and therefore constitute work hours. The lower court decision went against the workers. The Supreme Court's analysis looked at the Department of Labor's interpretation of its rules. It concluded that the Department of Laber was entitled to consideration and respect, but also concluded that the Department did not control the Court's interpretation. Instead, the Supreme Court concluded that it should take a case-by-case analysis to determine the level of deference it would apply to the agency when reviewing their determinations and actions.[5] The rule was in part respectful, but it was not deferential to the agency.

In *Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc.*, the lawsuit challenged the EPA's regulatory approach that allowed all of the air emissions of a stationary source to be treated as one—a single "stationary source." The lawsuit found fault with the Reagan Administration's approach because they did not agree that the intent of the law was to focus on the overall emission changes from a stationary source, instead of individual emission points within the stationary source. Plaintiff argued that the EPA's interpretation went against the Clean Air Act's purpose, specifically, its goal of reducing air pollution in states not meeting air quality standards. The Supreme Court upheld the EPA's policy. The Court decided that if a federal law is ambiguous, courts must defer to the administrative agency's reasonable interpretation of the law, establishing the modern principle now known as "*Chevron* deference." Ironically, the Court upheld the environmental interpretation deemed by many as less protective of the environment.

In *West Virginia*, in another Clean Air case, several states challenged EPA's Clean Power Plan aimed at shifting electricity generation from high-emission sources like coal and

gas to lower-emission sources such as wind and solar.[6] Under the Obama administration, the EPA issued an order requiring coal-fired power plants to either reduce electricity production or subsidize renewable energy sources, seeking a reduction in coal's national electricity-generation share by 2030. The EPA, under the Trump administration, repealed this rule, creating an Affordable Clean Energy Rule arguing that the shifting of electricity generation could not be an emissions-reduction standard. States filed petitions for review of the repeal order, leading to a legal battle that ultimately reached the Supreme Court that looked at the issues in the case as a "major question," holding that when an administrative agency takes actions of vast economic and political significance, it must have clear authorization from Congress and cannot infer such authority from ambiguous statutory text. The Supreme Court found that the EPA did not have that clear congressional mandate on changing energy generation required in the Clean Power Plan. This landmark case demonstrates a significant shift away from the view of Court deference to agency expertise and reasoning, and is the significant predecessor to the *Loper Bright* case that befell *Chevron*.

In *Loper Bright*, the National Marine Fisheries Service came under scrutiny when a group of commercial fishermen challenged a policy requiring the fishing industry to pay for fishing observers if federal funding became unavailable because onboard observers were mandated to collect data on fishery conservation and management under law. The fishermen argued that the law did not address whether fishermen must pay for observers, and it did not authorize passing these costs of monitors directly to the industry. The lower court upheld the policy by applying *Chevron* deference, affirming the agency's statutory interpretation requiring the fees as reasonable despite the statute's silence on whether fishermen must pay for observers. The Supreme Court, however, did not defer to the agency interpretation or expertise, and overturned the lower court and *Chevron*. The new *Loper Bright* doctrine returns back to the older pre-Chevron doctrine that it is solely the judiciary's responsibility to interpret ambiguous statutes, not an agency, unless Congress explicitly delegates that authority to the agency.

A Test Time for A Nostalgic View of Administrative Law

The reliance of other courts on the new *Loper Bright* approach is ultimately far from certain. The question of whether the courts will revert back to their earlier approach in the review of agency action is also unclear, since a review of recent court cases shows that reliance on the underlying reasoning—back to *Skidmore*—is not being consistently followed.[7]

The impact on the substantive work done at the various agencies is similarly uncertain. The expertise needed to deal with significant government challenges, such as climate change, will not abate. Congress will continue to need to pass legislation that provides clear direction for agencies and even clearly grants them discretion to act, which may prove difficult in an era of divided government and result in areas of concern going unaddressed. At this time, the *Loper Bright* decision does not appear to impact an agency's interpretation of its own rules or regulations requiring them to implement regulations and take administrative action that does not rely upon the deferential approach from the *Chevron* era. Nonetheless, there has been a shift away from giving deference to agency decision-making and expertise decidedly to the Court. The uncertainty about the extent of this shift will result in litigation, commentary, and analysis for the foreseeable future.

As we can all recall from history, there was a *Back to the Future II* movie. Here, much litigation is likely to result and will be responsible for creating a future script for judicial review of administrative action.

1. *Chevron, U.S.A, Inc v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
2. The movie, released on July 3, 1985, sends Marty McFly back 30 years into the past in a time travel machine, returning to a reset future that he set into motion in that past. See Back to the Future (1985 Universal Pictures Amblin Entertainment); see *also Back to the Future*, imdb, https://www.imdb.com/title/tt0088763/ (last visited August 9, 2024).
3. *Loper Bright Enterprises v. Raimondo, Secretary of Commerce*, 143 S.Ct. 2429 (2024).
4. *Skidmore v. Swift and Company*, 65 S.Ct. 161 (1944).
5. *Skidmore v. Swift and Company*, 65 S.Ct. 161 (1944).
6. *West Virginia v. Environmental Protection Agency*, 597 U.S. 697 (2022).
7. See Robert Lafolla, *Courts Show Little Interest in Skidmore as a Chevron Alternative*, Bloomberg (Jul. 29, 2024, 5:05 AM), https://news.bloomberglaw.com/ip-law/courts-show-little-interest-in-skidmore-as-a-chevron-alternative.

John L. Parker is a Partner with Sahn Ward Braff Coschignano PLLC where he leads the Environmental Energy and Resources Practice Group. His regulatory and administrative law experience was an important part of his role as Regional Attorney at the NYS Department of Environmental Conservation for the Lower Hudson Valley–Catskill Region. He served as Counsel to the Chairman of the Assembly Environmental Conservation Committee working on several environmental law initiatives, Chair of the NYSBA Legislation Committee Environmental and Energy Law Section that sponsors the Annual Legislative Forum, and Chair of the Nassau County Bar Association Environment Law Committee. He can be reached at jparker@sahnward.com.

FOCUS: LAW AND AMERICAN CULTURE

A Forgotten Gem Tossed on Hampstead Heath

Rudy Carmenaty

If you google the word "sapphire," a myriad of items come up. They range from precious jewels to a laboratory in Idaho that performs risk assessments on nuclear power plants. But there is only one motion picture entry, a forgotten gem of a film that you will find on YouTube.[1]

Sapphire is the name of a 1959 movie set in London. It runs for a mere eighty-seven minutes. Despite its relatively short running time, the movie manages to be part police procedural, part socio-ethnic study, and a rather poignant meditation on the issue of race.

That *Sapphire* takes place abroad provides an American audience with an experience comparable to seeing one's reflection in a fun house mirror, particularly because the language being spoken is English. Things may appear distorted, yet they are revealingly similar.

In viewing race relations through the prism of Britain in the 1950s, *Sapphire* does more than afford an unfamiliar perspective on a daunting issue. For one can gleam how a different country during a different era dealt with a subject that continues to be contentious on this side of the Atlantic.

To truly appreciate *Sapphire*, some context is required. On June 21,1948, the ship HMT Empire Windrush docked at Tilsbury Harbour.[2] Among its thousand passengers, were 802 individuals from Jamaica, Bermuda, Trinidad, and other British possessions in the West Indies.[3]

Known as the "Windrush Generation," these passengers represented the first wave of nearly half-a-million to arrive in the United Kingdom from the Caribbean.[4] That year, Parliament passed the British Nationality Act extending citizenship to persons from the Commonwealth. Under the Empire, all were British subjects who had sworn allegiance to the Crown. More than half of those aboard the Windrush participated in the British armed forces during the Second World War.[5] A scant few years prior, they were lauded for their military service.

As one Jamaican, who served in the Royal Air Force, was told: "What you come back here for? The War's over."[6] England desperately needed such immigration after the war to compensate for manpower shortages and to meet other pressing economic necessities.

These individuals came to Britain in search of a better life. The Labour Government, led by Clement Atlee, actually debated in cabinet if the Windrush should be turned back.[7] The passengers waited an entire day before being allowed to disembark. Acclimating these new arrivals proved difficult.

The reception West Indians faced was no more inviting than the weather: "They tell you it is the mother country, you're all welcome, you all British… when you come here, you realize you're a foreigner and that's all there is to it?[8] Most settled in Brixton and Peckham in South London, or in Notting Hill, in West London.

Housing, while not segregated per se, was often unavailable and jobs were not forthcoming. Whites on the lower rungs of the economic ladder were often pitted against these new arrivals for scarce resources. Theirs was a clash premised not only on "color" but also on class.

In 1958, race riots broke out in Notting Hill. Young males, known as "Teddy Boys," set upon West Indians during five days of ethnic strife.[9] A carnival now takes place in Notting Hill. It was first established the year following the riots and it continues annually.[10]

True to life, *Sapphire* contains a scene where a West Indian is roughed-up by some Teddy Boys. The Teddy Boys call him the "N" word. The film vividly exposes raw sentiments predicated on the uneasy relations among the English working class and their West Indian neighbors.

Still, the film is not a heavy-handed diatribe. Rather it's an old-fashioned British Whodunnit. A murder mystery with a gentleman detective sifting through clues. I will not divulge the ending in the hope you see the film. Just a tease, the culprit's identity turns out to be a bit of a shock.

The story unfolds with the victim's limp body tossed upon a grassy knoll during the opening credits. The word *Sapphire* emblazons the screen. Actress Yvonne Buckingham, who plays the title role, never utters a single word. All the same, her presence is keenly felt.

The murdered girl was attractive with auburn hair. She was stabbed half-a-dozen times in and around the heart. Her corpse is found in Hampstead Heath, a hilly park, by youngsters at play. The police arrive, and surmise she was killed elsewhere and unceremoniously dumped at this site.

A handkerchief embroidered with the letter "S" offers a sign as to who she may be. The viewer learns about her as Detective Superintendent Hazard, played by Nigel Patrick, and his junior colleague Inspector Learoyd, played by Michael Craig, do. Bit by bit, as Hazard pieces together what happened and why.

Her name is Sapphire Robbins. She was a student at the Royal Academy of Music. She was, according to the autopsy, three months pregnant. Nevertheless, there are several incongruities. Underneath her proper tweed skirt, she is wearing a scarlet taffeta also marked by the letter "S."

The young lady's penchant for risqué undergarments and a locked draw full of flashy clothing will be the initial clues, in a string of clues, that will demonstrate she was not exactly who she appeared to be. Another clue is a torn photograph of Sapphire dancing with an unknown companion.

Promotional materials sold *Sapphire* as "the Sensational Story of a Girl Who Didn't Belong."[11] Directed by Basil Dearden and produced by Michael Relph, with a script by Janet Green, the film went on the win the BAFTA as the year's best film, the UK's equivalent of the Oscar.

Phillip Green's evocative score, performed by Johnny Dankworth and his orchestra, proves integral to the storytelling. The film's depiction of London's underground jazz scene and its use of Black performers, when few opportunities then existed, make *Sapphire* perhaps "the best British film on racism ever made."[12]

The movie launched a new sub-genre of British cinema. The "social thriller," as it became known, posed societal topics in the guise of a crime film, "including every viewpoint that… yield[s] a suspect."[13] As melodrama, *Sapphire* was daring for 1950s and holds up extremely well on its own terms. However, the film's West Indian characters, by current standards, are little more than hackneyed. Critics have noted that "authentic West Indian accents" are missing, and many of the Black characters are less convincing than their White counterparts.[14]

These weaknesses demonstrate that the filmmakers' good intentions had their limitations. They are compensated by the film's strengths and the performance of Earl Cameron, a Black actor. His character is that of Sapphire's brother. A medical doctor by profession, he arrives from Birmingham to claim the body.

The truth is soon revealed. Saphire was biracial, the product of an English father and a Black mother. Dr. Robbins is dark-skinned. His late sister was "lily skin." This means that Sapphire was fair enough to "pass" for white. In life, she straddled two worlds, occupying an ambiguous place on each side of the racial divide.

The ensuing investigation revolves around the implications arising from Sapphire's complexion and how those in her circle took issue with her racial identity. Hazard deduces that hate was what killed Sapphire. Dr. Robbins ruefully notes, "I see all kinds of sickness in my practice. I have never seen the kind you can cure in a day."

Compelling are the reactions from various Blacks regarding Sapphire's situation. When Hazard interrogates an African lawyer who dated Sapphire, he, in no uncertain terms, rejects the idea of wanting to marry her. After all, neither he nor his family would accept that she was "half-caste."

As Hazard and Learoyd question Sapphire's colored friends, certain resentments emerge from her passing as White. One young woman goes as far as admitting she hated that "high-yellow doll." The film demonstrates that Black people are equally likely to hold prejudiced views.

Hazard pursues leads as the facts warrant. His sole motivation is to solve the crime. Hazard assures Dr. Robbins he will do so. The Doctor matter-of-factly retorts: "There is no assurance for me and my kind, Superintendent. I have been Black for thirty-eight years. I know. She may have looked white, but Sapphire was colored."

Sapphire's background provides Hazard with a motive for murder. Hazard acts with equanimity. The same cannot be said for his partner Learoyd. When he learns of Sapphire's actual background, it becomes evident Learoyd harbors a bevy of racist views.

Initially drawn to her plight, Learoyd becomes less sympathetic when he discovers Sapphire is part-Black. His entire attitude changes. In his mind, Sapphire, as indicated by her flashy clothing and her love for dancing, may well have asked for it.

Learoyd goes so far as to say that Blacks "should all be sent back where they belong." Dubious as to the murdered girl's morality, he doubts whether Sapphire's white boyfriend was really her child's father. David Harris, the girl's British fiancée, comes across as anguished and tortured.

Paul Massie, in the role of David, walks a fine line between heartbreak

and suspicion. His grief appears genuine enough. David was planning to marry the girl, but did he feel the fool on account of Sapphire's deception? Marrying Sapphire would also have cost him a prized scholarship in Rome.

At the time of the murder, David claims he was in Cambridge. He informs Hazard he did not return to London until 11:00 pm, after the killing occurred. He seems apprehensive, as if he were not telling the whole truth. His alibi falls apart when Hazard learns he returned from Cambridge hours earlier than he first admitted.

While David cared for Sapphire, the same cannot be said of his family. They had accepted Sapphire when they thought she was White. All that changed when Sapphire informed David's family not only was she pregnant, but that her brother was as "Black as a Pot."

David's father, Ted Harris (Bernard Myles), is an outright bigot. But for her pregnancy, he would never have welcomed Sapphire into his family. Ted is emotionally invested in David's future, there nothing he would not do "for his boy." Could the elder Harris have killed Sapphire to protect his son's prospects?

What role, if any, did David's mother (Olga Lindo) or his sister Millie (Yvonne Mitchell in a stunning performance) play? Millie, like her father, seeks validation for her own shortcomings through her children. Millie's attention is squarely focused on her family's reputation now that the murder has made the newspapers.

The Harris family, whose alibis the night of the killing are all flimsy, embody prevailing attitudes which run the gamut from hypocrisy to hostility. Whether they be Teddy Boys, middle-class shop clerks on Shaftsbury Avenue, or Sapphire's fellows at the Royal Academy, all harbor traces of prejudice to varying degrees.

Most disquieting are the reactions of the landladies who rent rooms to Sapphire. One former landlady in Earl's Court was willing to tolerate the girl because of her skin tone, that is until a dark-skinned suitor came calling. Her current landlady, Mrs. Thompson, would never have rented her a room if she knew the truth.

Played by Edith Sharpe, her reaction when Dr. Robinson comes to collect Sapphire's belongings is revolting. She justifies her beastly behavior by stating her livelihood depends on White students staying at her boarding house. Having a Black lodger would make the parents of her other residents uncomfortable.

Sapphire's friend Patsy (Jocelyn Britton), who knew she was "colored" and brought her to the boarding house, has her own angsts. Patsy is quick to call Mrs. Thompson out on account of her prejudices. Yet when Patsy visited her parents with Sapphire, she neglected to tell them the truth either.

Another suspect that emerges, this one Black, comes in the person of Johnny Fiddle. Played by Harry Baird, Johnny was the man with Sapphire in the torn photo found among her effects. Hazard long suspected that this unidentified dancing partner could be the killer.

Once Sapphire realized she could pass, she quickly dropped Johnny. Was Johnny jealous or resentful to the point of murder? Johnny's cause is damaged further by his association with Tulip's Club, an underground jazz spot. Johnny is no stranger to the law.

Johnny's switchblade and a blood-stained shirt matching Sapphire's blood-type are found in his flat. All the same, there is a noticeable difference in the way he is interrogated, including by Hazard, and how a White suspect like David Harris is questioned by the police.

When Learoyd follows up on Johnny's alibi, he confronts a gang of West Indians. The Black characters are presented as nothing more than cartoonish figures in an unfortunate scene that has not aged particularly well. Racial tropes from the 1950s are on full display.

With all these suspects, Hazard unearths Sapphire's killer by happenstance. It is only when the individual's hatred for Sapphire and her color comes to the surface, in an unanticipated moment, that the murderer at last is revealed. Hazard concludes he didn't solve a thing, rather "We just picked up the pieces."

Sixty-five years after its release, viewers will find *Sapphire* succeeds as a social thriller. Dearden and company set out "to show this prejudice as the stupid and illogical thing that it is."[15] Notwithstanding its limitations, they succeeded in crafting a thoughtful piece of entertainment.

Sapphire examines race prejudice in Britain and does so with considerable insight. It is a little-known movie to be appreciated for what it achieved and, alas, for what it aspired to achieve. Seeing it on YouTube, the viewer is given a glimpse into another time and another place not all that far removed from our own.

1. BAFTA-Winning Mystery Crime Full Movie/ Sapphire (1959)/Retrospective at www.youtube.com. Quotes from the film are taken from this source.
2. Lucy Rodgers and Maryam Ahmed, Windrush: *Who exactly was on board?*, BBC (June 19, 2019) at https://www.bbc.co.uk.
3. *Id.*
4. *Id.*
5. ReviseSociology, *West Indian Immigration to Britain: 1948: The Empire Windrush*, (June 25, 2018) at https://revisesociology.com.
6. *Id.*
7. *Id.*
8. *Id.*
9. Emily Cousins, *The Notting Hill Riots* (1959), Blackpast (June 8, 2010) at https://www.blackpast.org.
10. Harriet Sherwood, *Windrush scandal a 'stain on our history', say Noting Hill carnival chief, The Guardian* (July 20, 2023) at https://www.thegaurdian.com.
11. Timeline *1959 Sapphire (1959)* at https://exhibtions.mixedmedia.org.uk.
12. Nostalgia Central, *Sapphire (1959)*, at https://nostalgiacentral.com.
13. Alexander Walker, *Hollywood U.K.*, (1st Ed. 1974), 156.
14. Timeline, *supa.*
15. The Spinning Image, *Sapphire*, at https://www.thespinningimage.co.uk.

Rudy Carmenaty is the Deputy Commissioner of the Nassau County Department of Social Services. He can be reached at rudolph.carmenaty@hhsnassaucountyny.us.

In Brief

The *Nassau Lawyer* welcomes submissions to the IN BRIEF column announcing news, events, and recent accomplishments of its current members. Due to space limitations, submissions may be edited for length and content. PLEASE NOTE: All submissions to the IN BRIEF column must be made as WORD DOCUMENTS.

Moritt Hock & Hamroff announced that **Michael Cardello III**, the firm's Managing Partner, has been elected to serve as Chair of the New York State Bar Association Commercial & Federal Litigation Section. This Section seeks to improve the quality of client representation and enhance the administration of justice in the areas of commercial and federal litigation. Moritt Hock & Hamroff also announced the launch of its newly redesigned website at www.moritthock.com on August 19.

Sahn Ward Braff Coschignano PLLC is pleased to welcome **Hillary K. Massey** as an Associate with the firm. She will concentrate her practice in labor and employment law and commercial litigation.

On August 8, 2024, Garden City law firm **Meyer, Suozzi, English, & Klein, P.C.** and the New York Bar Foundation presented a $5,000 annual award to Albany law school's student who displays excellence in legal writing and advocacy.

Forchelli Deegan Terrana LLP's Chairman and Co-Managing Partner, **Jeffrey D. Forchelli**, was selected by his peers for inclusion in the 31st Edition of *The Best Lawyers in America*® for Land Use and Zoning Law. The following FDT partners were also recognized in the 2025 Edition of *The Best Lawyers in America*®: **Gregory S. Lisi** in Litigation – Labor and Employment; **Kathleen Deegan Dickson** in Cannabis Law; **Joseph P. Asselta** in Construction Law; **Daniel P. Deegan** in Real Estate Law; and **Keith J. Frank** in Employment Law – Management. The following FDT partners were included for the second time in the B*est Lawyers: Ones to Watch*® in America 2025 Edition: **Lisa M. Casa** in Commercial Litigation and Labor and Employment Law – Management; **Cheryl L. Katz** in Litigation – Trusts and Estates; **Lindsay Mesh Lotito** in Banking and Finance Law; **Robert L. Renda** in Tax Law; and **Danielle E. Tricolla** in Business Organizations (including LLCs and Partnerships), Closely Held Companies and Family Businesses Law, Commercial Litigation, Litigation – Labor and Employment, and Litigation – Real Estate.

According to the Institute for Traffic Safety, 31% of all motor vehicle fatalities were the result of drunk driving. In response to these preventable deaths, the NYS Legislature is planning to reintroduce legislation next year that would lower the blood alcohol concentration levels for drunk driving and aggravated drunk driving. **Ira Slavit**, Partner, Levine & Slavit PLLC, calls on elected officials in Albany to address the issue this year before more drivers are killed on the road.

Vishnick McGovern Milizio (VMM) proudly congratulates **Bernard Vishnick**, **Bernard McGovern**, **Joseph Milizio, Joseph Trotti**, **Andrew Kimler**, **Hon. Edward McCarty**, **Meredith Chesler** and **Phillip Hornberger** for being named to the 2025 Best Lawyers in America in 13 categories. VMM also received the Best Lawyers "Top-Listed Award," given to the firm with the most recognized lawyers in a geographical area. VMM is also proud to announce that managing partner **Joseph Milizio** has been named to the 2024 Dan's Papers Power List of the East End, recognizing "the most influential individuals in the Hamptons and on the North Fork...for their commitment, impact and influence on the Twin Forks region."

Robert S. Barnett, founding Partner of Capell Barnett Matalon and Schoenfeld LLP, recently presented "Tax Treatment of LLC Liquidating Distributions" for Strafford, including a discussion of planning techniques, tax basis, and exceptions to the general nonrecognition rules. In September, Robert is lecturing for the New York County Lawyers Association on "Buy-Sell Agreements Post *Connelly*," and for the Practicing Law Institute on "Grantor Trusts—Currently and in the 2025 Green Book."

The Best Lawyers in America® has recognized the following Rivkin Radler attorneys: **Stuart I. Gordon** (Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law, Litigation-Bankruptcy); **Jean Hegler** (Trusts and Estates); **Jennifer F. Hillman** (Litigation-Trusts and Estates, Trusts and Estates); **Benjamin P. Malerba** (Health Care Law); **Patricia C. Marcin** (Trusts and Estates); **Jeffrey P. Rust** (Health Care Law); **William M. Savino** (Insurance Law, Litigation-Insurance); and **Wendy H. Sheinberg** (Elder Law, Trusts and Estates). The following attorneys were recognized as 2025 *Best Lawyers: Ones to Watch*: **Heather S. Milanese** (Elder Law, Litigation-Trusts and Estates, Trusts and Estates); **Philip Nash** (Insurance Law); **Catherine Savio** (Commercial Litigation, Litigation-Securities); and **Sean N. Simensky** (Banking and Finance Law, Corporate Law).

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Family and Friends Welcome!

Sunday, September 29, 2024
9:30 AM - 2:00 PM

Registration Includes:

- **Entry Fee**
- **T2T Event and Warriors Team Shirt**
- **Breakfast and Lunch**
- **Preferred Starting Time**
- **Round Trip Coach Bus Transportation**
- **Goody Bag**

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VOLUNTEER ATTORNEYS NEEDED FOR CONSULTATIONS!

PRO BONO OPEN HOUSE

Tuesday, October 29, 2024 at the NCBA

2:00-4:00 PM | 4:00-6:00 PM | 6:00-8:00 PM
(Attorneys can volunteer for any shift or all shifts.)

We invite all attorneys to volunteer for an in-person open house event.
Any Nassau County resident can attend and speak with an attorney for free.

Volunteers are needed in the following areas of law:

Bankruptcy | Divorce and Family Law | Employment

Mortgage Foreclosure and Landlord Tenant | Elder Law (Estate and Surrogate)

Immigration | General Legal A to Z (from Adoption to Zoning)

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Condemnation Law & Tax Certiorari	Robert L. Renda
Construction Law	Adam L. Browser
Criminal Court Law & Procedure	Christopher M. Casa and Amanda A. Vitale
Cyber Law	Thomas J. Foley and Nicholas G. Himonidis
Defendant's Personal Injury	Jon E. Newman
District Court	Bradley D. Schnur
Diversity & Inclusion	Sherwin Safir
Education Law	Liza K. Blaszcyk and Douglas E. Libby
Elder Law, Social Services & Health Advocacy	Lisa R. Valente and Christina Lamm
Environmental Law	John L. Parker
Ethics	Mitchell T. Borkowsky
Family Court Law, Procedure and Adoption	Tanya Mir
Federal Courts	Michael Amato
General, Solo & Small Law Practice Management	Jerome A. Scharoff
Grievance	Robert S. Grossman and Omid Zareh
Government Relations	Michael H. Sahn
Hospital & Health Law	Kevin P. Mulry
House (Domus)	Steven V. Dalton
Immigration Law	Pallvi Babbar
In-House Counsel	
Insurance Law	Michael D. Brown
Intellectual Property	Sara M. Dorchak
Judicial Section	Hon. Gary F. Knobel
Judiciary	Dorian R. Glover
Labor & Employment Law	Marcus Monteiro
Law Student	Bridget M. Ryan and Emma P. Henry
Lawyer Referral	Gregory S. Lisi
Lawyer Assistance Program	Daniel Strecker
Legal Administrators	
LGBTQ	Jess A. Bunshaft
Matrimonial Law	Karen L. Bodner
Medical Legal	Bruce M. Cohn
Mental Health Law	Jamie A. Rosen
Municipal Law and Land Use	Elisabetta Coschignano
New Lawyers	Byron Chou and Michael A. Berger
Nominating	Rosalia Baiamonte
Paralegal	
Plaintiff's Personal Injury	Giulia R. Marino
Publications	Cynthia A. Augello
Real Property Law	Suzanne Player
Senior Attorneys	Stanley P. Amelkin
Sports, Entertainment & Media Law	Ross L. Schiller
Supreme Court	Steven Cohn
Surrogate's Court Estates & Trusts	Michael Calcagni and Edward D. Baker
Veterans & Military	Gary Port
Women In the Law	Melissa P. Corrado and Ariel E. Ronneburger
Workers' Compensation	Craig J. Tortora and Justin B. Lieberman

WEDNESDAY, SEPTEMBER 4
Real Property Law
12:30 p.m.

THURSDAY, SEPTEMBER 5
Hospital & Health Law
8:30 a.m.

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

Publications
12:45 p.m.

MONDAY, SEPTEMBER 9
Mental Health Law
12:30 p.m.

Panel discussion with organizations offering resources and services for vulnerable seniors and others struggling with mental health or substance use disorders. The panel includes Moderator Tommy DiMisa, creator of Philanthropy in Phocus. TSINY Executive Director Dr. Larry Grubler, Options for Community Living CEO Yolanda Robano-Gross, and The EAC Network President and CEO Neela Mukherjee Lockel.

Family Court Law, Procedure and Adoption Cocktail Party
5:30 p.m.

TUESDAY, SEPTEMBER 10
Women in the Law
12:30 p.m.

Labor & Employment Law
12:30 p.m.

WEDNESDAY, SEPTEMBER 11
Business Law, Tax & Accounting
12:30 p.m.

Matrimonial Law
5:30 p.m.

THURSDAY, SEPTEMBER 12
Intellectual Property
12:30 p.m.

TUESDAY, SEPTEMBER 17
Surrogate's Court Estates & Trusts
5:30 p.m.

WEDNESDAY, SEPTEMBER 18
Asian American Attorney Section
12:30 p.m.

The Hon. Lillian Wan, Associate Justice, Appellate Division, Second Department will be speaking about her path to the judiciary.

Ethics
5:30 p.m.

THURSDAY, SEPTEMBER 19
Association Membership
12:30 p.m.

Condemnation Law & Tax Certiorari
12:30 p.m.

Diversity & Inclusion
7:00 p.m.

MONDAY, SEPTEMBER 23
Elder Law, Social Services & Health Advocacy
12:30 p.m.

In Part I of "Introduction to Article 81 Guardianship Trial Practice," retired Justice Arthur M. Diamond will take attendees through a sample guardianship case, step-by-step, discussing preparation for the hearing; basics of opening and closing statements; and direct examination of petitioner and court evaluator.

WEDNESDAY, SEPTEMBER 25
General, Solo & Small Law Practice Management
12:30 p.m.

FRIDAY, SEPTEMBER 27
Appellate Practice
12:30 p.m.

MONDAY, SEPTEMBER 30
Elder Law, Social Services & Health Advocacy
12:30 p.m.

Using the same sample guardianship case from Part I, in Part II of "Introduction to Article 81 Guardianship Trial Practice," retired Justice Arthur M. Diamond will discuss cross examination of petitioner and court evaluator; general hearsay issues to watch out for; and handling physical evidence during the hearing and how to admit evidence.

Education Law
12:30 p.m.

TUESDAY, OCTOBER 1
Women in the Law
12:30 p.m.

WEDNESDAY, OCTOBER 2
Real Property Law
12:30 p.m.

THURSDAY, OCTOBER 3
Hospital & Health Law
8:30 a.m.

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

Publications
12:45 p.m.

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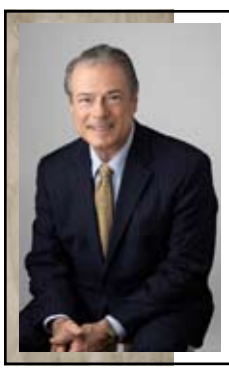

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