Nassau Lawyer

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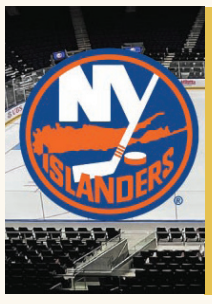

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Remembering Pat Carbonaro, NCBA Lawyer Referral Information Service Coordinator

Last month, the Nassau County Bar Association suffered a tremendous loss with the sudden passing of Lawyer Referral Service Coordinator and friend to us all, Pat Carbonaro. "Pat Carbonaro was the heart and soul of LRIS. Her compassion and dedication was an inspiration to all of us," said Hector Herrera, NCBA Building Manager.

Pat has worked for the NCBA for 33 years, including the past 32 years as Coordinator of the Lawyer Referral Information Service (LRIS) program. "Pat was not only a coworker, but was a friend to many—and a very good friend to me. She was always there when I needed someone to talk to, and she is going to be missed terribly," said NCBA Membership Coordinator Stephanie Pagano.

The Bar Association is planning on purchasing a memorial bench to be placed outside Domus in Pat's memory. The family has asked that donations be made in Pat's honor to: The National Organization for Rare Disorders; Attn: Department 5930, P.O. Box 4110, Woburn, MA 01888.

Patricia A. Carbonaro
October 10, 1946 – March 31, 2022

NCBA Annual High School Mock Trial Tournament

Jennifer C. Groh

One of the highlights of the Bar year is the annual Mock Trial Tournament for high school students. The long-running program has helped further the students' understanding of trial advocacy and the legal system and has perhaps sparked a future career aspiration or two.

In past years, the hallways of the Nassau County Supreme Court echoed with the excited voices and footsteps of 600 students from about 50 schools across Nassau County. Like so many other events these past few years, the COVID-19 crisis forced the re-thinking and re-imagining of this annual competition, and the competition has shifted temporarily to a virtual format.

On February 10, the competition got underway thanks to the dedication of the NCBA members who volunteer their time to serve as attorney advisors for the 44 teams in the competition this year, as judges for the seven rounds that make up the competition, and as Chairs who oversee the running of the tournament each year.

The finals round on April 11 was a match-up between Massapequa High School and North Shore Hebrew Academy High School, with Massapequa ultimately claiming the win for the round. Massapequa will go on to represent Nassau County in the state finals to be held virtually at the end of May. The Mock Trial Tournament Chairs are Hon. Marilyn K. Genoa, Peter H. Levy, and Hon. Lawrence M. Schaffer, and the Administrator is Jennifer C. Groh, Director of the Nassau Academy of Law and Administrator for the Community Relations and Public Education Committee.

2022 Mock Trial Tournament Participants

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Peter H. Levy, Esq.
Hon. Lawrence M. Schaffer

Tournament Coordinator
Jennifer C. Groh

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Gregory S. Lisi

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The Rule of Law

FROM THE PRESIDENT

Gregory S. Lisi

This is my last article as President of the Nassau County Bar Association. Normally, this would be my opportunity to thank all the people who have helped me in this whirlwind of a year. However, in light of recent events, I thought I would use this article to discuss something that is extremely important to the members of this Bar, and should be extremely important to everyone, the attack on the Rule of Law.

As John Adams, second President of the United States famously wrote, "Ours is a government of laws, and not of men," meaning, possibly for the first time in history, a country was to be governed by the Rule of Law and not the whims of its leaders. This now seems axiomatic, but this was unheard of at the time. The United States created a Democracy based on the Rule of Law. We became a model for others to follow. We were not flawless, and our founding fathers knew we were not unflawed (thus the language "In order to form a more perfect union" in the Preamble of the Constitution), but they knew that the only way to make this great experiment in allowing the citizens to govern themselves was to make the Rule of Law paramount.

Throughout many of the revolutions since our own, other countries followed this theory that the Rule of Law is supreme. However, the Rule of Law is only as valid as the confidence the citizenry has in its dominance. The citizenry must believe in their government's understanding and compliance that the Rule of Law is paramount. Such trust comes from our leader's acceptance and promotion of the predominance of the Rule of Law. Our leaders can certainly complain if they lose a case or an election, but without real evidence, they should not attack the underpinnings of the system that allowed them to achieve their leadership position. Otherwise, they erode our citizen's confidence in the greatest democracy in the world.

Many countries do not subscribe to the axiom that a country should be ruled by laws and not by people. For as we can see, even today, when a country does not have respect for the Rule of Law, but instead is an autocracy, or a kleptocracy, it will trample on the rights of its own people, easily violate international boundaries and even the Rules of War for the aims of a few of its leaders. These countries do not have a history of accepting the Rule of Law as preeminent and, as one can witness on the news every night, such lack of acceptance of the Rule of Law can have dire and deadly consequences.

Unfortunately, in the last few years, there has been an unprecedented attack on the Rule of Law in this country and abroad. In the United States, members of the executive and legislative branches, the very people who should be defending and promoting the Rule of Law are—without evidence—attacking our institutions' reliability and causing a significant portion of our citizens to doubt the Rule of Law. I understand that our leaders and judges are human and when you have a government this size, there will be some bad actors. Those should be removed and prosecuted, but the attacks are not so much directed at individuals, as against the system and the Rule of Law.

The integrity of our democracy, both in the voting booth and on the bench, must be accepted as self-evident to keep our democracy sound. Unsupported attacks on the credibility of our judges, our voting systems, and our politicians degrade the confidence of our citizenship in the Rule of Law. Such attacks should not be taken lightly and should be backed up by valid evidence, not innuendo or rumor. For without the Rule of Law, we have chaos or anarchy.

Further, the easiest way for those outside autocracies to undermine our democracy, and our country, is to lessen or end, our citizens' confidence in the Rule of Law. The basis of a strong democracy is the adherence to the Rule of Law. The Rule of Law cannot survive on its own. It must be respected and nurtured by the very people who make and enforce it. We all agree that *stare decisis* is important to a successful judicial system, and that an honest and open legislative and executive branch is paramount to a well-run republic. However, all those things come back to what the founders knew, the most important factor in a well-functioning democracy is the preeminence of the Rule of Law. Our leaders, the ones who truly care about this country, must advocate for the Rule of Law, not attack it, and degrade confidence in it. Understand what John Adams knew, there can be no functioning democracy without confidence in the Rule of Law.

Grateful to All of You

I will take a moment to acknowledge my heartfelt gratitude to all the wonderful staff at the Nassau County Bar Association, including Executive Director Liz Post, for helping me every step of the way during my presidency. Thank you also to my partners and staff at Forchelli Deegan Terrana LLP for putting up with my absences and assisting me when I, or the NCBA, needed help.

A further thank you to my fantastic Executive Committee who has helped me every step of the way in this presidency and the NCBA Board of Directors who never stopped asking me how they could help as we fought to get back to normal. There are too many committee chairs to list here who were exceptional during and after the pandemic, you know who you are, and I hope you know how grateful I am to you.

Thank you to my wonderful family for not complaining, too much, about my late nights. A special thank you to my amazing secretary, Carri Ocasio, for helping me every step of the way.

Lastly, thank you to the members of the NCBA. I truly believe, and the membership numbers bear it out, that we are in better shape than when we started, and it is thanks to so many of you and your generous contributions this year. I truly value and have a new appreciation for the astonishing members of the NCBA, who all stepped up during COVID, never said no to me about any request, and helped this Bar Association thrive. It has been an honor to the be the 119th President of the Nassau County Bar Association.

FOCUS: MATRIMONIAL LAW

Overcoming an Automatic Appellate Stay Intended to Thwart the Payment of Awarded Temporary Counsel Fees

Matthew S. Seidner and Maria Schwartz

In awarding interim *(pendente lite)* counsel fees during a divorce, courts regularly apply DRL §237(a) and grant the presumptively less or non-monied spouse temporary attorney fees subject to future reallocation. As stated in *O'Shea v. O'Shea*, the purpose has "deep statutory roots, [and] is designed to redress the economic disparity between the monied spouse and the non-monied spouse."[1] Since then, both the original statute and case law have evolved to underscore the importance of such awards and, where appropriate, enforce them. Yet, as is all too common after being granted such an award, actually receiving money can prove to be a difficult plight. This is especially so where the payor can further flex their financial power by obtaining an immediate automatic stay which would seem to halt all hope of forthcoming payment. Lurking in the depths of CPLR Article 55, where the laws regarding appeals lay, is a provision that can, at the moment, be used to thwart the obligation and execution of a temporary counsel fee award.[2] This provision is completely irreconcilable with the statutory intent of the DRL, relevant case law, and the orders made in accordance therewith. Fortunately, as discussed below, the automatic stay is not insurmountable as it can, and should, be vacated by the trial courts.

History of CPLR §5519

Before discussing how counsel to the less monied spouse can undo this ill-intended litigation tactic prior to a much-needed amendment to CPLR §5519, a brief history should be set forth. The predecessor statute to CPLR §5519 is Civil Practice Act §594 which, while permitting an automatic stay of an order pending appeal if an undertaking was posted, expressly excluded "temporary alimony orders." The prior statute did not exclude stays of temporary counsel fees or even child support, but it can be logically inferred such was of no less significance than interim spousal maintenance. Indeed, our courts have held that counsel fees are "in the nature of support" when faced with similar attempts to defeat the payment of same through discharge in bankruptcy.[3]

In 1952, CPLR §5519 was enacted (superseding CPA §594) and the language excluding "temporary alimony orders" was mysteriously absent and no basis for that omission is contained in the legislative history. Subsequently, a body of case law developed to protect temporary maintenance and child support obligations from being thwarted by CPLR §5519. However, interim counsel fees were largely unaddressed likely because DRL §237's language that attorney's fees be presumptively awarded was not yet enacted. Likely, the utilization of the CPLR as a sword to thwart the use of the DRL is not what the Legislature intended. Hence, the New York State Bar Association ("NYSBA"), Committee on the CPLR, has proposed a solution and an amendment to the statute to add the words "[e]xcept in actions brought pursuant to the DRL and FCA."[4] No changes have been implemented as of yet, but a representative of the NYSBA stated on a telephone call on March 25, 2022, that it was still pursuing this cause. In the interim, while the current statute remains in effect, Courts nevertheless have expressly rejected the misuse of the CPLR §5519 stay where it eviscerates the very purpose of DRL §237. Thus, when a less or non-monied spouse learns of the monied-spouse's attempt to use CPLR §5519 to avoid paying the counsel fee award, the response should be the immediate filing of a motion to vacate the automatic stay with support from cases set forth herein.

In *Wechsler v. Wechsler*, the Supreme Court, New York County, vacated the automatic stay provided by CPLR §5519(a) concluding that

> [b]y appealing a decision awarding a non-monied spouse interim counsel fees, and then bonding the award to stay enforcement pending appeal, a monied spouse can compromise a nonmonied spouse's ability to litigate the ongoing case proceeding at the trial level. The effect of the stay is to prevent the nonmonied spouse from receiving money to pay professionals as the case continues. Thus, the monied spouse achieves indirectly what it could not do directly, depriving the nonmonied spouse of the ability to pay for representation while the case is ongoing . . . [T]his strategy may be used to obtain an unfair litigation advantage that the underlying interim award was intended to prevent in the first instance.[5]

A decade later, in *Karg v. Kern*,[6] the First Department affirmed the supreme court's vacatur of a CPLR §5519 automatic stay holding that "[t]he court was appropriately concerned that the defendant was taking advantage of the automatic stay to prevent plaintiff from receiving interim counsel fees, thereby preventing an even playing field in the litigation."[7] The court went on to further state that "plaintiff would be severely prejudiced if she were forced to wait months to obtain the interim award."[8] Unfortunately, it does not yet appear that the Second, Third, or Fourth Departments have issued decisions analyzing the interplay between DRL §237 and CPLR §5519 but, absent a specific and different holding between the Appellate Divisions, that holding is still controlling upon all of the trial courts of the state.[9]

Automatic Stay Without a Court Order

CPLR §5519(a)(2) allows for the issuance of an automatic stay without a court order where the judgment or order directs the payment of a sum of money and an undertaking in that sum is given. Unlike an application for a stay by motion, the party seeking this particular stay need not establish a likelihood of success on the merits, that they would suffer irreparable harm in the absence of a stay, or that the equities weigh in favor of a stay. Moreover, an undertaking is very easy to obtain by a party with the financial means to do so. This article explores how this provision is used by the monied spouse as a mechanism to further keep the financially inferior spouse down and how to prevent the improper use and abuse of same.

The Second Department ruled in *Prichep v. Prichep* that an application for interim counsel fees by the non-monied spouse in a divorce action "should not be denied—or deferred until after the trial, which functions as a denial—without good cause, articulated by the court in a written decision."[10] In so holding, the court explained that there are often disparities in each matrimonial parties' financial circumstances and differing abilities to access funds for representation.[11] Moreover, the court emphasized the important public policy underlying DRL §237(a) and explained that it is usually unjust to force a less monied spouse to await trial to receive counsel (and other professional) fees because that spouse may be at a significant disadvantage litigating up to and through that point, if they can retain or maintain counsel at all.[12] Two years after *Prichep*, in 2010, DRL §237(a) was amended to codify these principles and created a "rebuttable presumption" in favor of the less monied spouse. The courts regularly award *pendente lite* fees accordingly.

Avoiding Payment and Contempt Proceedings

While in most cases the awards are paid without issue, there are other cases where the monied spouse does not pay and the less or non-monied spouse is then forced to find the means to bring enforcement and contempt applications causing

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that same spouse to incur even more legal fees. Unfortunately, there is another, perhaps less known, way for the monied spouse to undermine a court's interim counsel fee award by utilizing CPLR §5519 which allows that litigant to legally avoid findings of contempt while simultaneously withholding the counsel fees awarded to the less monied spouse. Notably, many interim appeals may ultimately never be perfected or decided prior to the trial or, as is well-known, most appeals will inevitably be denied due to the typical rulings in the Second Department that modifications of *pendente lite* support awards should rarely be made by an appellate court and that any perceived inequities in a *pendente lite* award are best remedied by a speedy trial.[13] However, these realities can be circumvented by simply filing a Notice of Appeal and posting an appropriate undertaking. Moreover, the monied spouse need not fear any repercussions for failing to pay the *pendente lite* counsel fees because of the unjust benefit derived from the automatic stay. Clearly, regardless of the appellate outcome, if any, as a result of the automatic stay and the fact that many months will likely elapse while the appeal is *sub judice*, the less monied spouse remains without the means to adequately protect his or her interests as the matrimonial matter continues at the trial court level.

In conclusion, it is manifestly unfair and unjust for a less monied spouse, who was already compelled to seek judicial intervention in order to successfully receive a counsel fee award, usually after spending thousands of dollars and waiting many months, to have to engage in even more expensive and time-consuming motion practice in order to obtain a vacatur of the automatic stay provided by CPLR §5519. While there is what can only be logically deemed an accidental statutory omission of a few previously included words, some litigants attempt to take full advantage of the opportunity in order to further impair the less monied spouse. Although trial courts have done their part to avoid the thwarting of the express purpose of DRL §237(a) interim legal fee awards, and the First Department has affirmed such action, the proper solution is legislative. Until an amendment occurs, trial courts should be wary of the use of a general provision of the CPLR to undermine a specific provision of the DRL.

1. *O'Shea v. O'Shea*, 93 N.Y.2d 187, 190 (1999).
2. CPLR §5519(a)(2).
3. *See* AB v. GH, 31 Misc.3d 945, 949–950 (Sup. Ct., N.Y. Co. 2011).
4. Neil E. Kozek & Hon. Mark C. Dillon, *How Divorce Law in New York State Favors the Spouse With the Financial Advantage*, NYSBA (Feb. 3, 2021), https://nysba.org/non-payment-of-interim-counsel-fees-in-matrimonial-actions-addressing-the-loophole-between-drl§-237-and-cplr-5519.
5. *Wechsler v. Wechsler*, 8 Misc.3d 328 (Sup. Ct., N.Y. Co. 2005).
6. *Karg v. Kern*, 125 A.D.3d 527 (1st Dept. 2015).
7. *Id.*
8. *Id.*
9. *See, e.g., Mountain View Coach Lines v. Storm*, 102 A.D.2d 663, 664 (2d Dept. 1984).
10. *Prichep v. Prichep*, 52 A.D.3d 61, 62 (2d Dept. 2008).
11. *See id.* at 64-66.
12. *See id.*
13. *See, e.g., Yerushalmi v. Yerushalmi*, 136 A.D.3d 809, 811 (2d Dept. 2016); *Dowd v. Dowd*, 74 A.D.3d 1013, 1014 (2d Dept. 2010).

Mr. Seidner is the founder of The Law Offices of Seidner & Associates, PC located in Garden City and the practice is focused on matrimonial and family law.

Ms. Schwartz is the founder of Maria Schwartz, PC, a divorce and family law firm, handling matrimonial litigation and appeals.

Thanks is given to **Alexa R. Schwartz**, an Associate with Maria Schwartz, PC, who assisted with all editing and citations.

FOCUS: ETHICS

Protecting Your Online Reputation

Allyson D. Burger

For those of us that do take great care "bout our reputations," Joan Jett offers some sage advice. We can't be living in the past when "it's a new generation."[1] As a society, our collective choices have become substantially informed by online reviews. This is whether we're in search of restaurants, vendors, or medical care.

So, too, has lawyer shopping taken a new, digital shape. In the era of internet trolls, it's never been more important to manage your firm's online presence, while ensuring compliance with prevailing ethical rules and obligations.

The ABA Model Rules of Professional Conduct at §1.6(a) prohibit lawyers from revealing any information relating to the representation of a given client unless said client gives informed consent.[2] Pursuant to Rule 1.6(b),[3] a lawyer may only reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Pursuant to Rule 1.9,[4] this ethical duty continues as related to former clients. The State of New York's Rules of Professional Conduct echo the same obligations at 1.6 and 1.9.[5] What does this mean for our ability to respond when an unhappy former client (or someone posing as such) drags us through the mud in cyberspace? Beware and be careful or face certain consequences.

"On its own, a negative online review, because of its informal nature, does not meet the level of a 'controversy between the lawyer and the client' within the ambit of Rule 1.6 (b)(5) to allow for disclosure of confidential information pertaining to a client's matter."[6] The ABA Standing Committee on Ethics and Professional Responsibility also concludes that, "even if an online posting rose to the level of a controversy between lawyer and client, a public response is not reasonably necessary or contemplated by Rule 1.6(b) in order for the lawyer to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client."[7]

It has been reiterated through informative opinions and various grievance holdings that "lawyers who communicate about legal topics in public commentary must comply with the Model Rules of Professional Conduct, including the Rules regarding confidentiality of information relating to the representation of a client. A lawyer must maintain the confidentiality of information relating to the representation of a client, unless that client has given informed consent to the disclosure, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Rule 1.6 (b)."[8]

Further, a lawyer may not rely on the exception in Rule 1.6 (b) to disclose a former client's confidential information in response to a negative online 'accusation." "Accusation" is defined by Black's Law Dictionary as "[a] formal charge against a person, to the effect that he is guilty of a punishable offense." A lawyer is not authorized to reveal confidential information whenever helpful in a dispute, but rather only when facing some kind of formal proceeding."[9] The New York State Bar Association's Committee on Professional Ethics has even elaborated that "unflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession, and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice."[10]

When attorneys have responded to a former client's critical commentary on a website, they have done so to their peril. Courts have consistently reprimanded lawyers for revealing confidential

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information about their former client in response to the client's negative online review. Nationwide, attorneys have consistently been reprimanded and suspended for revealing client confidences in response to a negative online review.[11] Further, defamation lawsuits brought by attorneys to challenge website reviews or ratings have widely been unsuccessful.[12]

A veteran criminal defense and divorce attorney was recently publicly censured in New York State under the doctrine of reciprocal discipline, after the lawyer had first been censured in the State of Tennessee. In responding to a former client's unfavorable posting, Attorney Johnson revealed the nature of the complaining client's underlying case and provided disparaging commentary about the former client's behavior.[13]

With the modern public relying so heavily upon the internet reviews of strangers, how can we protect ourselves without running afoul of our ethical obligations? The ABA Standing Committee on Ethics and Professional Responsibility recommends the following best practices:

- Don't respond to the negative post or review, because doing so may draw more attention to it and invite further response from an already unhappy critic.

- Request that the host of the website or search engine remove the posting.

- Respond with a request to take the conversation offline and attempt to resolve the issue together (doing so in a tasteful manner and, most importantly, not disclosing any confidential client information in the response).

- Offer a response so as to simply state that the lawyer's professional obligations do not permit the lawyer to respond.

While it may feel disconcerting to be restrained from defending oneself against an internet bully's (often anonymous) attacks, there are safer methods available to keep our online reputations pristine. First and foremost, it is prudent to become in the habit of regularly searching online platforms, e.g. Avvo, Martindale, LinkedIn, to learn if your firm has been the subject of an online posting.

If you are unfortunate to be on the receiving end of a negative online review, evaluate whether the likely poster is a client or non-client. If the reviewer sounds as if they are not actually a client but posing as one, notify the administrator of the forum right away. Many sites will flag the posting for further review and hopeful removal if they are unable to verify that the poster was ever indeed a client.

Should you choose to respond to any posting, be informed by the ethical guidance of late and respond in limited and deliberate fashion. Offer a professional and compassionate tone in a vein of encouraging further off-line discussion, without revealing any potential client confidences. Regularly seek out positive internet testimonials from satisfied clients to counteract any unwelcome press and do so without incentivization.[14]

The fear of negative online feedback also serves as a reminder to continually review and reflect upon how to improve your firm's practices for a better overall client experience. By prioritizing effective communication with clients and tackling any unforeseen discord head-on, a potential posting may be obviated. Undoubtedly, the best protection against a bad reputation is to manage client expectations from the outset of representation.

1. Joan Jett, *Bad Reputation* (Boardwalk Records, 1980)
2. American Bar Association, (2020). Text of the model rules of professional conduct. ABA.
3. *Id.* at Rule 1.6 (b).
4. *Id.* at Rule 1.9.
5. 22 NYCRR §1200 at §§1.6, 1.9.
6. See ABA Standing Comm. on Ethics and Prof'l Responsibility, Op. 496 (2021).
7. See *id.*
8. See ABA Standing Comm. On Ethics and Prof'l Responsibility, Op. 480 (2018).
9. N.Y. Bar Ass'n Comm. On Prof'l Ethics, Op. 1032 (2014).
10. See *id.*
11. See In re *Skinner*, 740 S.E.2d 171 (Georgia, 2013) (reprimand); In re Tsamis, Comm'n File No. 2013PR00095 (Illinois, 2013) (reprimand); *Illinois Disciplinary Board v. Peshek*, No. M.R. 23794 (Illinois, 2010) (60-day suspension); *Office of Lawyer Regulation v. Peshek*, 798 N.W. 2d 879 (Wisconsin, 2011) (reciprocal discipline); In re *Quillinan*, 20 DB Rptr. 288 (Oregon, 2006) (90-day suspension); *People v. Isaac*, No. 15PDJ099, WL 6124510 (Colorado, 2016) (six-month suspension).
12. See *Straw v. Avvo, Inc.*, Case No. C20-0294JLR, (W.D. Wash. 2020); *Browne v. Avvo, Inc.*, 525 F.Supp.2d 1249, 24 Law. Man. Prof. Conduct 4 (W.D. Wash. 2007).
13. *Matter of Jeffrey D. Johnson*, Motion No. 2021-03521 (1st Dept., 2021).
14. See In re *David J. Steele*, No. 49S00-1509-DI-527 (Indiana, 2015) (lawyer disbarred, in part, for actively manipulating his AVVO reviews as to monetarily incentivize positive reviews and punishing clients who negatively reviewed him by disclosing confidential information about their cases online).

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FOCUS: FAMILY LAW

Role and Responsibilities of the Attorney for the Child

Adrienne Flipse Hausch

The position of Attorney for the Child ("AFC") was "created" by the Rules of the Chief Judge in October of 2007. At that time, the advocates for children in the courts were called "Law Guardians." Problems with the nature of advocacy for children in the court system prompted the reconsideration of the name "law guardian" and Section 7.2 of the Rules was promulgated to clarify the position.

Unfortunately, Section 7.2(a) begins: "As used in this part, 'attorney for the child' means a law guardian appointed by family court pursuant to section 249 of the Family Court Act, or by the supreme court or surrogate's court in a proceeding over which the family court might have exercised jurisdiction…."

Children had been entitled to representation in all aspects of the judicial system since *Application of Gault* was decided by the United States Supreme Court in 1967.[1] In that case, a teenage boy from Arizona was accused of acts which, if committed by an adult, would be crimes. The Arizona rules did not require legal representation for the youth, as the placement was designed to treat the child for his anti-social behavior and not punish him. The Supreme Court disagreed, and the standards established for representation of children in all jurisdictions throughout the United States began to be enacted.

In New York, the social services attitude that prevailed throughout the country was tweaked and modified until the position of law guardian was created in 1978. The standards for the representation of children were clarified in 1992. However, the term "law guardian" prompted not simply substitution of judgment but application of the views and evaluation of the law guardian without any consideration of the wishes of the child. As a result, the New York State Bar Committee on Children and the Law fostered the change in nomenclature to assure that there was no misunderstanding of the role of the AFC.

The standards promulgated by the State Bar in 2014 were intended to end the confusion and were adopted by the Chief Judge in 2015 and remain the standard today. Those rules establish the ethical considerations for an AFC in various proceedings. The AFC is subject to the ethical requirements applicable to all lawyers. In juvenile delinquency and person in need of supervision proceedings, they must zealously defend the child. In other proceedings, they must zealously advocate the child's position.

In ascertaining the child's position, the AFC must consult with and advise the child to the extent and in a manner consistent with the child's capacities and have a thorough knowledge of the child's circumstances. Rule 7.2 (d)(2) states:

> If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interest. The attorney should explain fully the options available to the child and may recommend to the child the course of action that in the attorney's view would best promote the child's interests.

Subsection (d)(3) states:

> When the attorney for the child is convinced either that the child lacks the Capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

This substitution of judgment is permitted and has been sustained by the courts. It is essential, however, that the AFC clearly articulate the client's position when advocating a position contrary to the client's wishes.[2]

Nor is the court entitled to consider the AFC its aide.[3] However, the attorney is obliged to make that determination that the child has or does not have the ability to judge for him or herself.[4] Even if the child appears to have the ability to advocate his own position, the attorney can only substitute judgment when the child does not have the capacity by reason of impairment to exercise "knowing, voluntary, and considered judgment" or if the child is at "substantial risk of imminent harm."[5]

If the AFC properly advocates for his or her client and clearly articulates the client's position, the AFC is, thus, free to advocate the attorney's position. However, there is a fine line between advocating a position and testifying. Courts have permitted AFCs to actually testify at hearings and thus become witnesses in the case. That is improper. But again, it is a fine line that is drawn between advocacy and testimony. The lower courts have been admonished for permitting that kind of proffer.[6]

A similar issue has arisen as a result of in camera interviews with children where the children report inconsistencies to the court. As the trier of the fact, it is the court's obligation to determine the truth or falsity of the child's statement. The courts have likened this and relied upon the Attorney Rules of Professional Conduct [Rule 1.4] for an attorney to be justified in revealing client communications. For example, attorneys for children are not mandatory reporters to child protective services,[7] but Rule 1.6 of the Rules of Professional Conduct permit disclosure of client confidences to, inter alia, "advance the best interests of the client" or to "prevent reasonable certain death or substantial bodily harm." This rule has been invoked when sexual abuse was revealed to a child's attorney.[8]

Case law makes it very clear that children are entitled to more than the mere presence of an attorney; they deserve effective representation, and failure to provide effective assistance of counsel is reversible error.[9]

Like any other attorney, the AFC's responsibility is to adhere to the client's directions recognizing the child's authority to make fundamental decisions when the client and attorney disagree. However, representation is also "attorney-directed" in the sense that, particularly when representing a young child, an attorney has the responsibility to bring his/her knowledge and expertise to bear on counseling the client to make sound decisions. This requires the attorney to know the basis for the decisions made by the child and to work diligently to assure that the child understands the attorney's position as well.

However, only in rare circumstances is the AFC authorized to substitute judgment, and then only when the client's position is fully disclosed to the court.

1. 387 U.S. 1 (1967).
2. *Matter of Derick Shea* D., 22 A.D.3d 753 (2d Dept. 2005).
3. *Rogovin v. Rogovin*, 27 A.D.3d 233 (1st Dept. 2006).
4. *Mason v. Mason*, 103 A.D.3d 1207 (4th Dept. 2013).
5. *Swinson v. Dobson*, 101 A.D.3d (4th Dept. 2012).
6. See, e.g., *Matter of Angelina* A.A., 211 A.D.2d 951 (3d Dept. 1995), *Matter of Bentley v. Bentley*, 86 A.D.2d 926 (3d Dept. 1982).
7. Social Services Law §413.
8. *Matter of Carballeira v. Shumway*, 273AD2d 753 (3d Dept. 2000).
9. *Matter of Elizabeth*, 155 A.D.2d 666 (3d Dept. 1989); *Matter of James TT*, 191 A.D.2d 132 (3d Dept. 1998).

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FOCUS: MEDICAL MALPRACTICE

Audit Trails in Medical Malpractice Litigation

Mary Anne Walling and Christopher J. DelliCarpini

In medical malpractice litigation, you might not even receive in discovery the most important part of a patient's electronic medical record (EMR)—unless you know how to ask for it.

Required by Federal and New York law, the audit trail records the creation, editing, and viewing of information in the EMR, and is valuable evidence of the EMR's authenticity and reliability. Since the enactment of the HITECH Act in 2009, essentially all hospital records and most office-based records have transitioned so that they are created, formatted, and stored in an electronic format.[1] Audit trails record the creation, verification, access, editing, viewing, printing, and other actions in the lifetime of that EMR. They can also show the location of whoever was acting upon the record at the time, which can be particularly valuable when providers can access EMRs remotely. Thus, audit trails can be valuable for either side, and counsel should know when and how to demand and use such evidence

What—and Where—is the Audit Trail?

Metadata is the "data about data." It is secondary information, not apparent on the fact of the document, that describes a document's characteristics, origins, and usage. There are essentially three types of metadata:

(1) substantive or application data, which is embed in the document remaining with the document when moved or copied;

(2) system data, which is automatically generated evidencing the document's creation and/or revision; and

(3) embedded data, which is data imputed into the file by its creators or users and cannot be seen in the document's display.[2]

Audit trails is the system meta data, which contains metadata in a variety of devices and computer systems,[3] including medical records. One of the first forms of a medical audit trail was the Pictorial Archive Communicating System (PACS), which documents each step of a radiological study from the entry of patient data, including the request for the study, to the issuance of the radiology report. It also evidences any time anyone views the images or report. Other specific audit trails include anesthesia recordings, vital signs, cardiac monitor data, and electronic fetal monitoring tracings.

Case Law on Discovery of Audit Trails

In *Gilbert v. Highland Hospital*, one of the earliest New York decisions on point, the court defined and described audit trails:

> The audit trail is a document that shows the sequence of events related to the use of and access to an individual patient's EHR [electronic health records]. For instance, the audit trail will reveal who accessed a particular patient's records, when, and where the health care provider accessed the record. It also shows what the provider did with the records—e.g., simply reviewed them, prepared a note, or edited a note. The audit trail may also show how long the records were opened by a particular provider.[4]

The court also described the potential value of audit trails in litigation:

> Each time a patient's EHR is opened, regardless of the reason, the audit trail documents this detail. The audit trail cannot be erased, and all events related to the access of a patient's EHR are permanently documented in the audit trail. Providers cannot hide anything they do with the medical record. No one can escape the audit trail.[5]

In *Heinrich v. State*, the trial court explained the materiality of the audit trail for the decedent's chart:

> The decedent, a patient with a complicated preexisting medical history, was in the hospital for approximately 36 hours before his death and was treated by at least 17 providers on several different units, with numerous treatments, tests, and scans administered. There is certainly the potential that the EMR and audit trail would uncover information useful to claimant and the request is narrow enough to limit the burden on defendant.[6]

Audit trails can help defendants as well as plaintiffs. In *Falls v. (Police Officer) Detective Michael Pitt*, the plaintiff alleged a warrantless body cavity search at the local hospital.[7]

The audit trail, however, confirmed that the plaintiff visited the hospital a second time that night—after the police had obtained a warrant—and the records of the first visit made no mention of the search.[8] The plaintiff could only speculate that the record had been erased, but without evidence the audit trail undermined his claim.[9]

Courts have not presumed that metadata and audit trails fall within demands for medical records. In *Gilbert*, the court held that metadata is relevant "if the authenticity of a document is questioned or if establishing who received what information and when is important to the claims and defense of a party."[10]

In *Vargas v. Lee*, the Second Department directed disclosure of the plaintiff's audit trails, and in doing so explained how to analyze demands for such evidence.[11] The plaintiffs sued for medical malpractice and moved to compel production of the audit trail from the day of the subject surgery through to discharge. The trial court denied disclosure, but the plaintiffs renewed their motion with "evidentiary submissions [that] demonstrated that [the hospital] did not provide the complete patient file to the injured plaintiff."[12] The trial court denied renewal,[13] but the Second Department reversed, finding that the plaintiff had "sustained their threshold burden of demonstrating that the audit trail, for the limited time period sought by the plaintiffs, "would provide, or was reasonably likely to lead to, information bearing directly on the post-operative care that was provided to the injured plaintiff."[14] The court also found this portion of the audit trail necessary for counsel to "ascertain whether the patient records that were eventually provided to them were complete and unaltered."[15] The court also found that Wyckoff's averments failed to show that production would be unduly burdensome.[16]

Gilbert and *Vargas* outline two ways that audit trails could be material, but parties seeking audit trails will have to prove one or the other. In *Heinrich v. State*, the Court of Claims followed *Vargas* and *Punter* to hold that the plaintiff was entitled to the audit trail not because of allegedly incomplete records, but to explain his treatment. In P*unter v. New York City Health and Hospitals Corp.*, however, the First Department affirmed a trial court finding that the plaintiff had not shown that the audit trail of her medical record was discoverable.[17] After *Vargas*, the plaintiff renewed her previously unsuccessful motion to compel. The trial court distinguished *Vargas*, however, because the plaintiff in *Punter* made "no showing that defendants have withheld records from plaintiff."[18]

With few New York decisions on-point, case law from other jurisdictions may offer some guidance on other issues related to discovery of audit trails. In *Hall v.*

Flannery, the court held that audit trails, being automatically generated, were not protected by Illinois' peer review or work-product privilege.[19] In *Zenith Insurance Company*, the court also held that audit trails are not protected by Texas' peer review privilege, and permitted discovery on evidence that the post-surgical report had been altered.[20] In *Borum v. Smith*, the court permitted discovery of the audit trail, but would not allow plaintiff's counsel to access the EHR during the defendant physician's deposition.[21]

How to Obtain and Use Audit Trails

Med-mal plaintiffs' counsel should serve notice to preserve audit trails and all such metadata. This should be sent even before litigation is begun, whenever there is essential electronic data that may be lost, particularly from devices that generate stand-alone metadata that could be "recorded over" in subsequent tests.

Arguably, patients are entitled to their audit trails and all medical metadata. Public Health Law §§17 and 18 codify patients' right to their records with limited exceptions.[22] And of course, CPLR 3101(a) entitles parties to documents that are material and necessary to the prosecution or defense of an action.[23] We contend that the importance of the audit trail is self-evident from its contents, without making a specific showing regarding the discoverability of the record. Until the audit trail is obtained, we may not know just what essential and admissible evidence lies within. Courts have applied to discovery demands a test of usefulness and reason, however, as well as whether the discovery sought is reasonably anticipated to lead to admissible evidence.[24] It is rational to argue that an audit trail meets this threshold. Further applying a rule of fairness, plaintiffs should have the same access to such information as the defendants and their counsel.[25]

Defendants have objected to disclosure of audit trails as privileged, or that such demands are unduly burdensome, overbroad, and not likely to lead to admissible evidence. Plaintiffs should not concede that they must earn such discovery by showing evidence that the record has been altered, nor should they compromise on disclosure of audit trails that is limited in time and scope. Rather, they should insist on their statutory rights to such evidence, and to access as broad as that enjoyed by defendants.

Just like the EMR, the audit trail can be produced in a format and containing information that is determined by the defendants and their IT providers. Plaintiffs' counsel must therefore scrutinize produced audit trails for completeness and follow up on any anomalies. Long admissions can generate voluminous audit trails, but they can and should be produced in a text-searchable format. Providers access EMRs by logging in, so plaintiffs' counsel should ask in deposition whether each provider has logged in with another user's credentials. Counsel should also question about the use of scribes, who may enter information in the chart on behalf of older or less technologically savvy providers.

If cases are to be decided on the facts and the law, then prompt production of material evidence is in the interests of justice. Production of audit trails can be more important than counsel ever suspected, and today can be easier to produce than counsel anticipated.

1. 42 USC §300jj-11 *et seq.*
2. *Matter of Irwin v. Onondaga County Resource Recovery Agency*, 82 AD3d 315 (4th Dept. 2010)(citing Spiro and Mogul, "*The New Black": Meditations on Metadata*, NYLJ (Feb. 5, 2009)); *see also Aquilar v. Immigration & Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 F.R.D. 350, 354–55 (S.D.N.Y. 2008); *Lopez v. Port Authority of New York and New Jersey,* 171 A.D.3d 500 (1st Dept. 2019).
3. *People v. Larkin*, 72 Misc.3d 663 (Sup. Ct., Kings Co. 2021)(body-worn camera video); *ACE Securities Corp. v. DB Structured Products, Inc.*, 55 Misc.3d 544 (Sup. Ct., N.Y. Co. 2016)(financial records); *Johnson v. Martins*, 79 A.D.3d 913 (2d Dept. 2010)(voting machines).
4. 52 Misc.3d 555, 557 (quoting 2011 Health L. Handbook §10:9).
5. *Id.*
6. 73 Misc.3d 650, 657 (Ct. Claims 2021).
7. 16-CV-8863 (KMK), 2021 WL 1164185 (S.D.N.Y. Mar. 26, 2021).
8. *Id.* at *40.
9. *Id.*
10. 52 Misc.3d at 558 (quoting *Aguilar v. Immigrations & Customs Enf't Div. of U.S. Dept. of Homeland Sec.*, 255 F.R.D. 350, 354 (S.D.N.Y. 2008)).
11. *Id.* at 1073.
12. *Id.* at 1074.
13. *Id.*
14. *Id.* at 1077.
15. *Id.*
16. *Id.*
17. 191 A.D.3d 563 (1st Dept. 2021).
18. *Punter v. NYCHHC*, 2019 N.Y. Slip Op. 34239(U), 2019 WL 5882250 (Sup. Ct., N.Y. Co. 2019).
19. Case No. 3:13-cv-914-SMY-DGW, 2021 WL 2008345 (S.D. Ill. May 1, 2015).
20. 328 F.R.D. 153 (N.D. Texas 2018).
21. Civil Action No. 4:17-CV-00017-JHM, 2017 WL 3014487 (W.D. Ky. July 14, 2017).
22. *Lopez v. Port Authority of New York and New Jersey*, 171 AD3d 500 (1st Dept. 2019); *Matter of Mantica v. New York State Dept of Health*, 94 N.Y.2d 58, 62 (1999).
23. Thomas A. Moore and Matthew Gaier, *Patients' Right to Their Own EMR Metadata*, New York Law Journal (Oct. 4, 2021), available at https://bit.ly/3qHglr9.
24. *Id.*
25. *Id.*

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FOCUS: LITIGATION

Christopher J. DelliCarpini

Update: Amendments to New Insurance Disclosure Law

In the March issue of *Nassau Lawyer*, we surveyed the new CPLR 3101(f) enacted in December 2021, which required defendants to disclose insurance policies. As that article was going to print, however, Albany amended the statute to narrow those obligations.

S7882 was enacted February 24, 2022. The bill began working its way through the Legislature in mid-January, and barely a month later was on the Governor's desk for her signature.

The amendments took effect immediately, but amended the disclosure requirement generally to apply not to pending actions, but only "to all actions commenced on or after" the effective date. The amendments are:

• The time for disclosure has gone from 60 days after service of an answer to 90 days.

• If the plaintiff consents in writing, defendants may disclose a declaration page instead of the policy itself.

• The scope of disclosure no longer reaches "all primary, excess an umbrella policies," but only those that "relate to the claim being litigated."

• No longer must defendants provide phone numbers for adjusters, but may merely provide names and e-mail addresses.

• Disclosure need not provide the "amounts available under any policy" but just "the total limits available," that is, "the actual funds, after taking into account erosion and any other offsets, that can be used to satisfy a judgment."

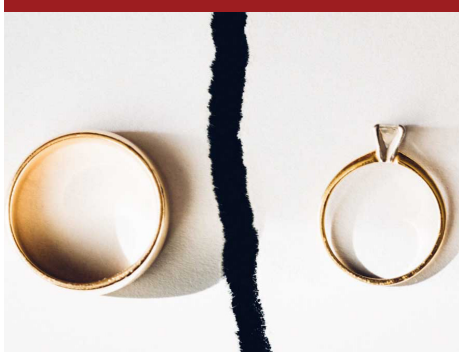
• Defendants need not disclose lawsuits that have or may reduce or erode such policies, or payments of attorney's fees that have reduced or eroded the face value of the policy.

• Instead of "an ongoing obligation" to keep such disclosure current, defendants need only update their disclosure "at the filing of the note of issue, when entering into any formal settlement negotiations conducted or supervised by the court, at a voluntary mediation, and when the case is called for trial."

• Lastly, CPLR 3101(f) shall not apply at all to actions for no-fault automotive insurance benefits.

FOCUS: MATRIMONIAL LAW

Time Value of Money in Divorce



Mark I. Plaine

The Domestic Relations Law ("DRL") defines a distributive award in the following manner:

> "In any action in which the court shall determine that an equitable distribution is appropriate but would be impractical or burdensome or where distribution on an interest in a business, corporation or profession would be contrary to law, the court in lieu of such equitable distribution shall make a distributive award in order to achieve equity between the parties…" DRL §236(B)(5)(e).

In this era of procedural delays and fluctuating interest rates, the timing of the payment of a distributive award can be a major consideration in divorce actions. Questions typically arise concerning whether a non-titled spouse is entitled to interest on an award, at what rate to calculate interest, and from what date does the interest accrue.

The starting point when assessing interest due a claimant would be CPLR §5001, §5002 and §5003. CPLR §5001 concerns interest on a claim from the date of accrual to the date of the court's decision. CPLR §5002 refences interest from the date of the court's decision to the date of the entry of judgment. CPLR §5003 is the relevant statute when calculating interest from judgment to payment.

There is often a gap of years between the commencement of the divorce action and the date when property awards are made. Moreover, when a court makes a distributive award, the payor spouse often lacks sufficient liquidity to pay it in a lump sum. Where payment is made over time, the court must construct an equitable payment plan with regard to the recipient's delayed receipt of the sums awarded.[1] An analysis of some of the more pertinent appellate decisions appears below.

Pre-judgment Interest

The Appellate Division-Second Department has noted that the imposition of interest on an award is not meant to constitute a penalty. Instead, it represents the cost of having the use of another person's money for a specified period of time.[2] In deciding interest-related issues, the courts attach importance to the nature of the asset, the valuation date used, and the conduct of the parties.

Marital assets may be valued on any date from the commencement of the action to the date of trial.[3] Because interests in businesses and professional practices constitute "active assets", there is a judicial preference for valuing same as of the date of commencement of the matrimonial action.[4]

In *Baron v. Baron*,[5] the wife was awarded 20% of the value of the husband's business. On appeal, the court held that interest on the award should run from the date of commencement. Here, the asset was valued as of the date of commencement as the litigation had been prolonged by the husband's stealthy conduct.

In *Lipsky v. Lipsky*,[6] the husband owned a medical practice. The wife received a distributive award of $300,000, which represented her interest in the husband's professional practice and the enhanced earnings which derived from his professional attainments. Pre-judgment interest at the statutory rate of nine percent, was found to have been properly assessed from the date of commencement of the divorce action. In affirming the award, the Appellate Division noted that the husband had failed to provide certain financial documents causing his practice to be substantially undervalued.

Courts need not apply the statutory rate when awarding pre-judgment interest. In *Litman v. Litman*,[7] the wife was awarded percentage interests in the husband's law practice and his investment account. Pre-judgment interest on the wife's share of the practice was set at an initial rate of six percent, to be adjusted upward to seven and a half percent thereafter. Pre-judgment interest on the investment account was computed at seven and a half percent.

In *Margolis v. Cohen*,[8] the court awarded pre-judgment interest at the rate of four percent where there was nearly a two-year gap between the date when the parties stipulated to a distribution of certain assets and the date of the court's decision.

An award of pre-judgment interest is discretionary, not mandatory.[9] In *Jayaram v. Jayaram*,[10] the Appellate Division reversed a trial court decision to award pre-judgment interest on a distributive award. There, the asset in question was the husband's enhanced earning capacity which derived from his professional degree and licenses. The appellate court ruled that the assets in question were not tangible assets,

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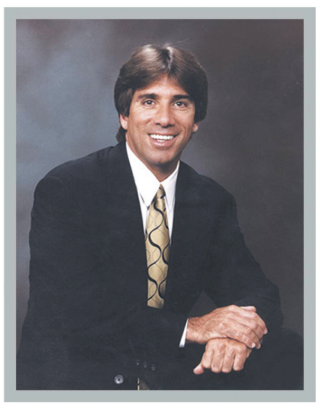

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such that the wife was not deprived of the use of her share during the pendency of the action.

Post-judgment Interest

Where the distributive award is payable as a lump sum, interest accrues at nine percent from the date of entry of judgment.[11] However, where the award is to be paid over a period of time, it is permissible to vary from the statutory rate and impose a lower rate of interest. This would include a rate as low as three percent.[12] In addition to property payouts, the courts are also authorized to impose interest at various rates on unpaid support arrears up to the statutory rate.[13] One must also realize that interest on a monetary award continues to accrue while a matter is on appeal, and even where the appellant has posted an undertaking.[14]

As the accrual of interest on a large property award can be significant, it is important to address the issue of interest in the negotiation and trial of the divorce action.

1. *Iarocci v. Iarocci*, 98 A.D. 3d 999, 951 N.Y.S. 2d176 (2nd Dept. 2012).
2. *Selinger v. Selinger*, 232 A.D. 2d 471, 648 (2nd Dept. 1996); *Prilik v. Petro Home Services*, 2022 WL 791318 (2nd Dept. 2022). *See also*, *Seale v. Seale*, 60 Misc. 3d 1205 (A), 109 (Warren County Supreme Court 2018).
3. DRL §236 (B) (4) (b); *Sinnott v. Sinnott*, 194 A.D. 3d 868, 149 (2nd Dept. 2021).
4. *Carter v. Fairchild-Carter*, 199 A.D. 3d 1291, 159 (3rd Dept. 2021); *Belilos v. Rivera*, 164 A.D. 3d 1411, 84 (2nd Dept. 2018).
5. 71 A.D. 3d 807, 897 (2nd Dept. 2010).
6. 276 A.D. 2d 753, 715 (2nd Dept. 2000).
7. 280 A.D. 2d 520, 721 (2nd Dept. 2001).
8. 153 A.D. 3d 1390, 61 (2nd Dept. 2017).
9. *Pappas v. Pappas*, 140 A.D. 3d 838, 36 (2nd Dept. 2016).
10. 62 A.D. 3d 951, 880 (2nd Dept. 2009).
11. *Cohen v. Cohen*, 132 A.D. 3d 627, 18 (2nd Dept. 2015); *Vedrager v. Verdrager*, 230 A.D. 2d 786, 646 (2nd Dept. 1996).
12. See, e.g., *Malis v. Malis*, 146 A.D. 3d 831, 46 (2nd Dept. 2017); *Hamroff v. Hamroff*, 35 A.D. 365, 826 (2nd Dept. 2006).
13. *Spathis v. Spathis*, 137 A.D. 3d 654, 26 (1st Dept. 2016); *Miklos v. Miklos*, 39 A.D. 3d 826, 835 (2nd Dept. 2007).
14. See *Greenberg v. Greenberg*, 269 A.D. 2d 354, 702 (2nd Dept. 2000), *see also*, *Wiederhorn v. Merkin*, 106 A.D. 3d 416, 965 (1st Dept. 2013).

Mark I. Plaine is an attorney in Forest Hills specializing in matrimonial law. He is a member of the Nassau County Bar Association, Queens County Bar Association, and a fellow of the American Academy of Matrimonial Lawyers.

FOCUS: FROM THE BENCH

So, You Want to Try a Medical Malpractice Case?

Hon. Arthur M. Diamond

I have been very fortunate during my time on the bench to preside over many medical malpractice trials. I so enjoyed them for several reasons. First and foremost, the evidence in these cases was the most sophisticated one could come across on the civil side of courtroom practice and as readers of this column are probably aware I am passionate about learning and discussing evidence. But additionally, I found the lawyering, by and large, to be phenomenal. The amount of preparation that is required to adequately try these cases is immense and the attorneys on both sides consistently impressed me with their knowledge and skill. That being said, this column is aimed at young plaintiff trial attorneys who aspire to try these cases and to share some personal observations about the trials I have had the opportunity to preside over.

Motions *in limine*—I cannot over-emphasize the importance of presenting to the trial court at the earliest opportunity a written motion *in limine* if you have an evidence issue that you have not been able to resolve with your adversary pre-trial. Failure to do so, in my opinion, sends a clear message to the court that you are not experienced and not prepared. Remember that the judge gets the case from CCP usually with no notice. The jury typically arrives around the same time and is placed in their room. If, when you are first brought into chambers, you advise the court that you have an evidence issue that needs to be ruled on prior to the opening statements, or an objection to some evidence that has been previously exchanged, you are putting the judge in a very difficult position of keeping the jury waiting while the application is heard. Furthermore, the court may need time to decide the application and adjourn the case for a day or two to properly research the issue. When you arrive with papers, having been served on your adversary, the judge now has the issue clearly in front of him, probably with opposition and can more speedily make a ruling.

The Opening Statement—Keep it simple, or at least simpler. What I mean by this is that too many attorneys use their opening statements to try and impress the jury with *their* medical knowledge. The statements are often too long—especially on the plaintiff side—and filled with medical jargon that the jury cannot possibly follow this early in the proceeding. Remember, the purpose of the opening is not to show the jury how smart you are. The purpose is to TELL YOUR CLIENT'S STORY in plain English and prepare them for the trip you are about to take them on. I believe the better practice is to pare your opening down to the essentials of your client's story—and inform the jury that they will hear the medical explanation of all of this from the doctors who testify later in the case. Focus on the language of the departures so that the jury will have been exposed to those concepts throughout the trial. Later, in your summation, you then remind the jury about what you told them when you first met them and reiterate how the proof has supported that theory.

Calling the Defendant—As in almost all civil trials the plaintiff in these cases begins by calling the defendant doctor to the stand. The defendant is then 'pinned down' as to what he did in his treatment of the plaintiff and much of the questioning is centered around the plaintiff's medical records which

2022 Installation of NCBA and NAL Officers and Directors

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at 6:00 PM at Domus

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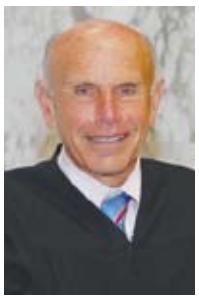
have been admitted into evidence and are shown to the jury as the doctor explains his interactions with the patient/plaintiff. All well and good. But you must remember that after you have called the doctor as a witness he will then, probably several days later, return to the stand on direct examination where the doctor will again give an explanation of his treatment. Plaintiff's counsel should now be limited on cross examination solely to those areas which plaintiff did not cover on his direct or where the doctor gave a different answer on his direct that he gave to plaintiff on plaintiff's direct. I have, on several occasions, been forced to limit plaintiff's cross examination of the defendant because I have found that the material was covered on his own 'direct.' While I understand why this is the sequence of testimony that has been adapted as the norm, I caution young attorneys to sit down and think about how they may be limited on cross examination and to think through about how this may impact the presentation of their case.

Handling the Evidence—there is no space here to review basics but remember that anything—literally anything—may be marked for identification, and anything you want to put in front of the witness MUST be marked for identification. The most significant piece of evidence in these trials is, almost always, the patient's hospital record and/or office records. Some cases have more than one of each, and each may be dozens, if not hundreds, of pages. Therefore, the most practical thing that a young lawyer may learn from this column is to make sure to 'Bates stamp' every record that is over a few dozen pages. It is hard to estimate how much time it saves when every page in every record is numbered sequentially.

A second area of concern in these cases is the use of radiographic imaging in testimony. In particular, the use of MRI images during the testimony of a physician can be problematic. The most common cause of confusion typically arises when the jury is shown a monitor with MRI several images on the screen. There are typically a dozen images displayed while the expert explains how the image is produced and what it means. The problem is that those individual 'boxes' are not numbered, and if the jury requests a readback of the expert's testimony there is no way for them to connect the testimony with the MRI that has been introduced into evidence as i.e., Plaintiff's 23 in evidence. I have advocated in a prior column in the New York Law Journal for allowing courts to videotape such testimony so that the jury could better follow it during deliberations. As it is now, I believe MRI read back testimony is virtually useless. An alternative would be to blow up those images that are truly significant, separating them from the dozens of small images from the scan, and mark each individually into evidence.

Your Expert/Their Testimony/the Verdict Sheet—Finally, we get to the verdict sheet. If it can be afforded, I strongly suggest that at the very least you have with you, with a copy for the court, your expert's trial testimony at the charge conference. Many attorneys do not realize that the court will be basing the requested departures almost exclusively on the testimony of your expert. If your expert has not said the magic words "to a reasonable degree of medical certainty the failure to do 'xyz' was, in my opinion, a departure from the standard of care at the time" you will have a hard time getting that departure in the verdict sheet. Preparation here is the key. Your expert cannot waver or obfuscate. If the expert does so it may prove fatal to your case.

One final word—in your free time (I know that may be an oxymoron)— you should do your best to find med mal trials in your county and go watch them. You learn a great amount by observing experienced attorneys. And of course, if you know the judge who will be presiding over your case, by all means, go and see how he/she runs their part. It will help you in the end.



Hon. Arthur M. Diamond JSC (Ret.) is a retired Supreme Court Justice in Mineola and can be reached at artie.diamond@yahoo.com.

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MAY 3

Dean's Hour: A Supreme Study in Scandal—The Rise and Fall of Abe Fortas
(Law and American Culture Lecture Series)
With the NCBA Diversity and Inclusion Committee
Program Sponsored By NCBA Corporate Partner Champion Office Suites
12:30 PM – 1:30 PM
1 credit in professional practice

MAY 4

Dean's Hour: Defense Counsel's Guide to Padilla Compliance (In Bite Size Chunks!)
Part 5: Review of the Criminal Grounds of Deportability (Including Immigration Definition of a Conviction and Interplay with Treatment Court Pleas, Conditional Pleas, and Interim Probation)
With the NCBA Immigration Law Committee and the Nassau County Assigned Counsel Defender Plan
12:30 PM – 1:30 PM
1 credit in professional practice. Skills credits available for newly admitted attorneys

MAY 4 (IN PERSON ONLY)

Killing of Vincent Chin: A Re-Enactment
With the NCBA Diversity and Inclusion Committee
Reception Sponsored By NCBA Corporate Partner Tradition Title Agency, Inc.
Reception 5:30 PM – 6:30 PM
Program 6:45 PM – 8:00 PM
1.5 credits in diversity, inclusion, and elimination of bias

MAY 12

Dean's Hour: Risk Management and the Rules of Professional Conduct
With the NCBA Ethics Committee
12:30 PM – 1:30 PM
1 credit in ethics

MAY 12

Know Your Rights: Social Security Disability—Navigating the Process: SSD Applications, Workers Compensation and Personal Injury
With the NCBA Community Relations and Public Education Committee and the NCBA Workers' Compensation Committee
5:30 PM – 7:00 PM
1.5 credits in professional practice. Skills credits available for newly admitted attorneys

MAY 16 (ZOOM ONLY)

Popcorn CLE Series: Representing Anna: Ethical Considerations for Attorneys in the Legal Representation of Anna Delvy
5:30 PM – 6:30 PM
1 credit in ethics

MAY 17

Dean's Hour: Defense Counsel's Guide to Padilla Compliance (In Bite Size Chunks!)
Part 6: Strategies for Handling Specific Offense and Recent Criminal-Immigration Law Decisions
With the NCBA Immigration Law Committee and the Nassau County Assigned Counsel Defender Plan
12:30 PM – 1:30 PM
1 credit in professional practice. Skills credits available for newly admitted attorneys

MAY 18

Dean's Hour: Banks and Attorneys—A Collaboration on New York's New Power of Attorney Statute
With the NCBA Elder Law Committee
Program Sponsored By NCBA Corporate Partner Investors Bank
Networking 12:30 PM – 1:00 PM:
Program 1:00 PM – 2:00 PM
1 credit in professional practice. Skills credits available for newly admitted attorneys

NAL PROGRAM CALENDAR

MAY 18 (ZOOM ONLY)

In Limine Motions: Purpose, Procedure and Pitfalls

Guest speaker:

Hon. Vito M. DeStefano, Administrative Judge, Nassau County Courts

6:00 PM – 7:00 PM

1 credit in professional practice. Skills credits available for newly admitted attorneys

MAY 19

Dean's Hour: Defense of the Legal Malpractice Claim

With the NCBA Ethics Committee

12:30 PM – 1:30 PM

1 credit in ethics

MAY 24

Dean's Hour: Understanding the Military Pay and Retirement System in Matrimonial Actions

With the NCBA Veterans and Military Law Committee and the NCBA Matrimonial Law Committee

Program Sponsored By Encore Luxury Living

12:30 PM – 1:30 PM

1 credit in professional practice. Skills credits available for newly admitted attorneys

JUNE 1

Dean's Hour: Defense Counsel's Guide to Padilla Compliance (In Bite Size Chunks!)

Part 7: Post-Conviction Relief for Non-Citizens

With the NCBA Immigration Law Committee and the Nassau County Assigned Counsel Defender Plan

12:30 PM – 1:30 PM

1 credit in professional practice. Skills credits available for newly admitted attorneys

JUNE 2

2022 Evidence Update with Guest Speaker Hon. Arthur M. Diamond (Ret.)

With the NCBA Appellate Practice Committee

5:30 PM – 7:30 PM

2 credits in professional practice

JUNE 9

Dean's Hour: Lessons in Law, Love and Loyalty—The Abdication of Edward VIII (Law and American Culture Lecture Series)

With the NCBA Diversity and Inclusion Committee and the NCBA Matrimonial Law Committee

Program Sponsored By NCBA Corporate Partner Champion Office Suites and Encore Luxury Living

12:30 PM – 1:30 PM

1 credit in professional practice

JUNE 9 (IN PERSON ONLY)

Know Your Rights: Finding a Place to Call Home—Fair Housing on a Diverse Long Island

With the NCBA Community Relations and Public Education Committee, the NCBA Diversity and Inclusion Committee and the NCBA Real Property Law Committee

Program Sponsored By NCBA Corporate Partner Tradition Title Agency Inc.

5:30 PM – 8:30 PM

2 credits in diversity, inclusion, and elimination of bias; 1 credit in professional practice

JUNE 10

Dean's Hour: Under Color of Law—Government Supported Segregation in Housing and Finance

With the NCBA Diversity and Inclusion Committee

12:30 PM – 1:30 PM

1 credit in diversity, inclusion, and elimination of bias

JUNE 15

Dean's Hour: Mediating a Personal Injury Case—A Roundtable Discussion

With the NCBA Alternative Dispute Resolution Committee and the NCBA Plaintiff's Personal Injury Committee

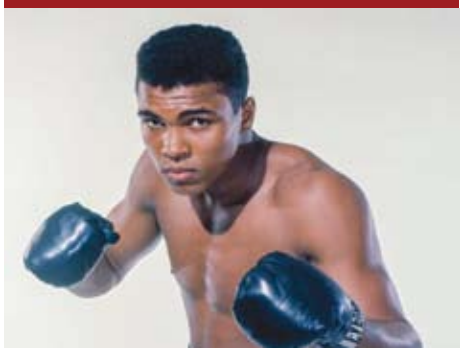
Program Sponsored By Nota by M&T Bank

12:30 PM – 1:30 PM

1 credit in professional practice. Skills credits available for newly admitted attorney

FOCUS: DIVERSITY AND INCLUSION

Muhammad Ali Scores a Knockout at Domus



Ira S. Slavit

On March 24, 2022, a ring-side crowd of 60 lawyers and judges came to Domus for the NCBA's Diversity and Inclusion Committee's lecture on the life of Muhammad Ali. "*Float Like a Butterfly While Stung by the Bees: The Trials & Tribulations of Muhammad Ali*" was presented by NCBA Director and D&I Committee Chair Rudy Carmenaty.

Prior to the main event, the evening began with a cocktail hour accompanied by live music provided by the band Caribbean Swing. Another highlight was an inspiring rendition of the Star-Spangled Banner by actress Kristen Murphy. Karen Keating of NCBA Corporate Sponsor Traditional Title Agency sponsored the program.

The evening offered a wonderful opportunity for representatives from local affinity bars and their guests to mingle and network at Domus. Kevin Satterfield, President of the Amistad Long Island Black Bar Association, addressed the attendees which included members of Amistad and the Long Island Hispanic Bar Association. Also in attendance were students from Hofstra's Maurice A. Deane School of Law.

Hon. Maxine Broderick, Hon. Darlene Harris, and Hon. Phil Solages participated in the festivities. In keeping with the spirit of the occasion, Judge Broderick encouraged those present to become involved in the association's activities and aspire to leadership positions at the NCBA. Judge Broderick was recently nominated to become the NCBA's incoming Secretary.

The program not only chronicled Muhammed Ali's boxing career, but it discussed his impact on American law and culture. As Mr. Carmenaty noted in his PowerPoint presentation, Ali's story "*touches upon issues of civil rights, religious liberty, war and peace, and individual conscience.*"

By any measure, Ali was the finest heavyweight of his era, perhaps the best in the entire history of boxing. Many of his fights have obtained legendary status: his 1964 title bout with Sonny Listen, his epic battles with Joe Frazier—*the Fight of the Century* (1971) and the *Thrilla in Manilla* (1975)—and the *Rumble in the Jungle* (1974) where he regained the heavyweight crown against George Foreman.

But Ali was more than a celebrated athlete. Born Cassius Marcellus Clay in Louisville, Kentucky in 1942, he changed his name to Muhammad Ali after joining the Nation of Islam in 1964. Mr. Carmenaty's presentation focused on Muhammed Ali's legal battle which would result in the noted US Supreme Court decision *Clay v United States*, 403 U.S. 698 (1971).

Muhammad Ali appealed his 1967 conviction for evading military service in the armed forces during the height of the Vietnam War. The draft board in Louisville, Kentucky rejected his application for conscientious objector status. He based his application on his Muslim faith and his being a minister in the Nation of Islam.

Ali was convicted in the Southern District of Texas for failure to submit to induction when called to step forward in Houston. He was sentenced to five years in prison and a $10,000 fine (the maximum penalty allowed by law). This conviction was upheld by the Fifth Circuit Court of Appeals.

In his initial appeal to the Supreme Court, Ali was denied certiorari. But before the denial of cert was issued, the Solicitor General Irwin Griswold informed the Court that defendants in several cases had their phone conversations subjected to FBI wiretaps. Under *Alderman v U.S.*, 394 US 165 (1968), prosecutions with tainted eavesdropping evidence might be rendered unconstitutional.

Ali himself was not under surveillance, but his phone conversations with Dr. Martin Luther King, Jr. and the Honorable Elijah Muhammed were illegally overheard. The Court remanded Ali's case back to the trial court. The District Court ruled, and the Fifth Circuit affirmed, that the government's surveillance had no impact on Ali's 1967 conviction.

In his subsequent application to the Supreme Court, cert was granted. Ali was given a second bite at the apple. Oral argument did not go auspiciously for Ali. The one bright spot was when Griswold conceded as to Ali's sincerity and that his objection was grounded in his religious beliefs. Ali's case hinged on whether his objection was predicated on his participation in war "*in any form.*"

In conference, the Court voted 5-3 to affirm Ali's conviction. Justice John Marshall Harlan, who had been assigned the opinion, then changed his position, concluding that Ali's claim as a conscientious objector was sincere. With the court deadlocked 4-4, Ali's conviction would have been sustained. Justice Potter Stewart then put forward the proposition that Ali's conviction could be reversed on technical grounds.

On June 28, 1971, three months after losing to Joe Frazier at Madison Square Garden, the Supreme Court overturned Ali's conviction unanimously 8-0. Justice Thurgood Marshall had recused himself from the deliberations. The Court issued a per curium opinion which ruled that the government had failed to properly specify why Ali's application for a conscientious objector exemption was denied, citing a technical error on the government's part.

The unsung heroes in Ali's Supreme Court case were Justice Harlan and his law clerk Thomas Krattenmaker. A conservative patrician, Harlan was an exceptionally fair, highly respected, and steadfast jurist. At the outset, he was the most unlikely member of the Court to champion Ali's cause. Harlan had first sided with the majority based on his reading of the law.

Krattenmaker was tasked with preparing a draft opinion. He was able to make the connection between Ali's professed religious beliefs and conscientious objectors protected under prior case law. In 1955, the Supreme Court issued a decision protecting the rights of Jehovah's Witnesses to refuse military service in *Sicurella v U.S.*, 348 U.S. 385.

Krattenmaker convinced Harlan to reexamine the matter and provided him with his research into the religious tenants of the Nation of Islam. This ultimately led the Justice to change his position. Krattenmaker was sympathetic to Ali and convinced that his religious objection was sincere. He was also, as many young people then, opposed to the Vietnam War.

Mr. Carmenaty offered fascinating insights into the behind-the-scenes deliberations of the Supreme Court Justices. Another litigation he perceptively reviewed was Ali's petition against the New

York State Athletic Commission. The Commission suspended Ali's boxing license, without the benefit of a hearing, the very same day that he had refused induction. This arbitrary decision caused Ali three years of his career during his athletic prime.

Ali was ultimately suspended in all 50 states. Ali successfully argued that the suspension violated the Equal Protection Clause of the Fourteenth Amendment. His counsel pointed to at least 244 instances where the Commission granted, renewed, or reinstated boxing licenses to applicants convicted of felonies, misdemeanors or military offenses involving moral turpitude. Even Sonny Liston received a license to box after an armed robbery conviction.

Perhaps the program's finest achievement was communicating to the audience how Ali's persona and his principled stance against the draft transcended boxing, making him a global icon. For the once-reviled draft resister, with the passage of time, would be embraced by the American people and accepted by the very government that had prosecuted him.

After the *Thrilla in Manilla*, Ali was invited to the White House by President Ford. In 1980, he was recruited by President Carter for a diplomatic mission to Africa. In 2001, Ali was given the Presidential Citizens Medal by President Clinton, who would deliver a eulogy at Ali's memorial service. In 2005, he was awarded the Presidential Medal of Freedom, the nation's highest civilian honor, from George W. Bush.

As football great Jim Brown observed: "*He was above sports; he was part of history. The man used his athletic ability as a platform to project himself right up there with world leaders, taking chances that absolutely no one else took, going after things that few people have the courage to go after.*"

Another enjoyable aspect of the presentation was highlighting Ali's way with words. For Muhammed Ali had an instinctual gift for the English language. His verbal dexterity was all the more remarkable considering that Ali suffered from dyslexia and other learning disabilities. In or out of the ring, Ali was like poetry in motion.

Clever quotes from Ali, some humorous and some inspiring, were interspersed throughout the PowerPoint, including:

> "You know I'm bad. just last week, I murdered a rock, Injured a stone, Hospitalized a brick. I'm so mean, I make medicine sick."

> "I should be a postage stamp. That's the only way I'll ever get licked."

> "When will they ever have another fighter who writes poems, predicts rounds, beats everybody, makes people laugh, makes people cry, and is as tall and extra-pretty as me?"

> "Impossible is just a big word thrown around by small men who find it easier to live in the world they've been given than to explore the power they have to change it."

Speaking of sports and telling it like it is, no overview of Muhammad Ali would be complete without discussing his relationship with Howard Cosell. As Mr. Carmenaty put it, Ali and Cosell were a match made in media heaven. No one who ever saw an interview of Ali by Cosell could forget their repartee or Ali's incessant threats to pull-off Cosell's toupee.

But there was a serious side to their relationship, and arguably Ali had no more vocal defender than Cosell, a graduate of the NYU Law School. Cosell was the first sportscaster to call him Muhammed after he changed his name from Cassius Clay. Commenting on the stripping of Ali's heavyweight boxing championship and the suspension of his boxing license Cosell stated:

> *It was an outrage; an absolute disgrace. You know the truth about boxing commissions. They're nothing but a bunch of politically appointed hacks. … And what they did to Ali! Why? How could they? There'd been no grand jury empanelment, no arraignment. Due process of law hadn't even begun, yet they took away his livelihood because he failed the test of political and social conformity, and it took seven years to get his title back. It's disgusting.*

By the end of the presentation, the thought that was on everyone's mind was one of "awe." Awe for the life Muhammad Ali lived, all he had gone through, his immense talents, and the impact he had on the world. To have shared the experience amongst the camaraderie of a room of diverse and accomplished people at Domus made the evening that much more special.

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

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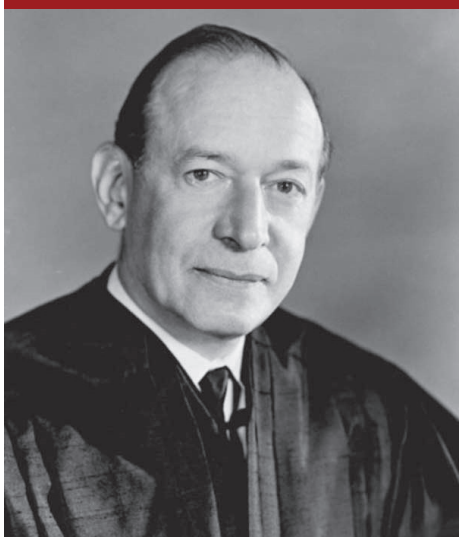
FOCUS: LAW AND AMERICAN CULTURE

A Supreme Study in Scandal: The Rise and Fall of Abe Fortas



Rudy Carmenaty

Abe Fortas was a brilliant attorney and a Justice on the Supreme Court. Regrettably, he was also an unsuccessful nominee for the position of Chief Justice and the first member of the Court to resign under the threat of probable impeachment. Fortas' life could have been written by Clifford Odets. His fall from grace, the product of his own hubris, was a tragedy worthy of Shakespeare.

Born in Memphis, his parents were Orthodox Jews from Russia.[1] Fortas attended Yale Law School on scholarship. A poor boy made good; at Yale he caught the eye of future Supreme Court Justice William O. Douglas. When Douglas left for Washington, Fortas soon followed, serving in government during the heyday of the New Deal.[2]

Fortas became a fixture in the nation's capital. He built a lucrative law practice founding the high-powered law firm of Arnold, Fortas & Porter.[3] He cultivated the mighty and his own influence stemmed from his proximity to those in power.

The principal relationship in Fortas' life was with Lyndon Johnson. As LBJ ascended the political ladder, he increasingly came to rely on Fortas' counsel.[4] Fortas repeatedly declined various cabinet posts when offered. Still, he became an integral part of the Johnson White House.

Fortas never asked anything from the President in exchange for his services. It bothered Johnson that there was nothing he could offer Fortas in return. Then UN Ambassador Adlai Stevenson died in June 1965. LBJ, who had yet to make an appointment to the Supreme Court, saw his opportunity to reward Fortas and enhance his own power.

LBJ applied his considerable persuasive skills to convince Arthur Goldberg to give up his seat on the Court (a life-time appointment) and accept the post of UN Ambassador (which serves at the pleasure of the President). LBJ, using the famed 'Johnson treatment' no doubt, induced Goldberg to resign, thus opening up a supreme court slot for Fortas.

LBJ made his old friend an offer he could not refuse. Nevertheless, Fortas ascended the bench reluctantly. While most lawyers covet such an opportunity, Fortas would have preferred to stay where he was. But the job was too big, and he could not say no to the President this time. The problem was that Fortas and Johnson were simply too close for either comfort or propriety.

Fortas was easily confirmed. Though he lacked any judicial experience, there is no doubt that he had the intellect and ability to serve. There was also no reason to question his ethics in 1965. As a private citizen, Fortas was at liberty to work for Johnson in any capacity. But what was once acceptable, would be no longer once Fortas joined the Court.

LBJ saw Fortas as his man. Neither Johnson nor Fortas appreciated that Fortas could not or should not remain working for the White House while serving as a Justice. Yet Fortas continued advising the President on everything from judicial appointments to labor strikes to the war in Vietnam.[5]

Three years later in 1968, Chief Justice Earl Warren offered his resignation so LBJ could appoint his replacement. Warren's resignation was conditioned on the confirmation of his successor.[6] Johnson chose Abe Fortas to be the next Chief Justice. It was assumed, as in 1965, that he would be easily confirmed without any serious opposition.

LBJ knew he could count on Senate liberals to vote for confirmation. But he also needed Southern Democrats and Republicans. Johnson reached out to old friends Richard Russell of Georgia, the leader of the Southern bloc, and Everett Dirksen of Illinois, the leader of the Senate Republicans, and both men agreed to support Fortas.[7]

By 1968, the Supreme Court had become a political football. Richard Nixon cleverly exploited the issue during that year's presidential campaign. Grass roots appeals to impeach Earl Warren were commonplace. Conservatives in the Senate chose the Fortas nomination to voice their opposition to the Warren Court's liberal direction.

Fortas had testified previously before Congress and was well-versed in the ways of Washington. Yet he had no indication of the hostility that he would now be facing before the Senate Judiciary Committee. In the past, such hearings, if held at all, were for the most part perfunctory. Now the hearings were being used to put the entire Warren era on trial to undermine Fortas.[8]

Fortas faced hostile questioning at his confirmation hearing, a first for a prospective Chief Justice. Much of the committee's inquiry centered around his association with the White House. Neither Fortas nor Johnson believed the rules applied to them. Although Fortas obfuscated, the truth was that he had maintained an intimate working relationship with the President.

But what was particularly damaging to Fortas was the revelation he had accepted a $15,000 payment for teaching a summer course at American University.[9] This arrangement was set up by a former law partner and his salary was being paid by people he had represented while in private practice.[10] Fortas failed to realize that as a Supreme Court Justice he must be above reproach.

Fortas denied any wrongdoing, but it proved to be the nail in his coffin. The votes were probably still there to confirm Fortas on an up or down vote, but the Rules of the Senate allow for the filibuster. Opponents mounted a filibuster to run out the clock on the Johnson presidency. The argument was made that a lame duck should not be permitted to appoint the new Chief Justice.[11]

In 1968, Senate Rules required the approval of two-thirds of the

senators present to cut off debate. After a strenuous White House effort, a 45–43 majority voted to end the filibuster.[12] The 45 votes were far short of the two-thirds (59) needed for cloture.[13] Later that same day, Fortas asked the President to withdraw his nomination.

This was the first time that the filibuster was employed to derail a judicial appointment. It set an ill-fated precedent. Unable to get Fortas confirmed, Johnson left the selection of the next Chief Justice to the next president. A damaged Fortas kept his seat as an Associate Justice. He would do so for only one more term.

Richard Nixon was elected that November. Warren did not want to be succeeded by a Nixon appointee, but he refused to withdraw his resignation on principle. An understanding was arrived at between Warren and Nixon, Warren would step down in June 1969. Nixon appointed Warren Burger as the fifteenth Chief Justice. Burger was easily confirmed, serving until 1986.

Back in 1966, Fortas accepted an undisclosed retainer from a foundation run by financier Louis Wolfson, a former client.[14] The retainer agreement provided that in return for unspecified services, Fortas was to receive $20,000 a year for life.[15] It also provided that the same $20,000 a year payment, upon his death, would be paid to his widow for the rest of her life.[16]

Fortas later repaid the money, but only after Wolfson was indicted.[17] By then it was too late. This arrangement of $20,000 a year for life was captured in writing and signed by Fortas. In May 1969, Life magazine reported the story.[18] Fortas once again insisted he had done nothing wrong, nor was he ever charged with a crime.

The exposé of the arrangement with Wolfson ruined Fortas' reputation and eliminated any chance of his staying on the Court. The allegations led to calls in Congress for Fortas' impeachment. Wolfson was eventually convicted for violations of the securities laws. This outrage dwarfed the previous year's allegations concerning the payment from American University.

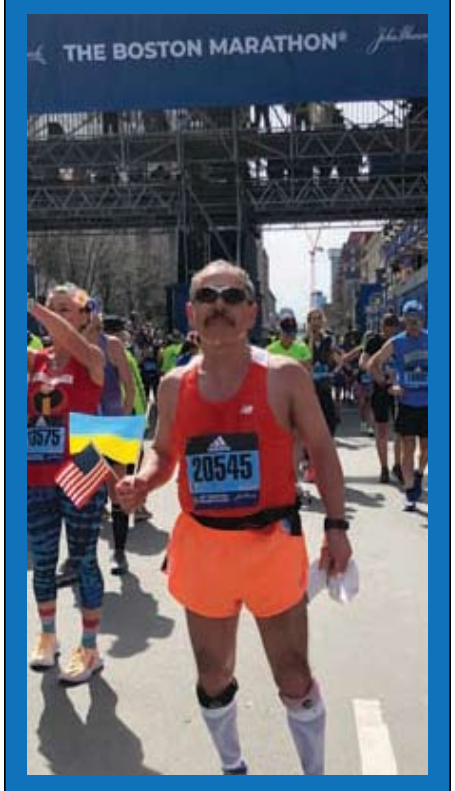
The Fortas' situation cast a dark shadow over the Court. Warren urged Fortas to step down. Fortas elected to resign on May 14, 1969, becoming the first Justice forced off the Court due to scandal.[19] Having served just under four years, he was leaving alongside the man he thought he would succeed as Chief Justice only a year earlier.

Fortas' downfall was as stunning as it was puzzling. How could a man who was so intelligent, so capable and so politically astute put himself in such a spot? Was it greed or was it arrogance that led to Fortas' disgrace? Fortas, who lived until 1982, offered no explanation and refused to discuss the matter.

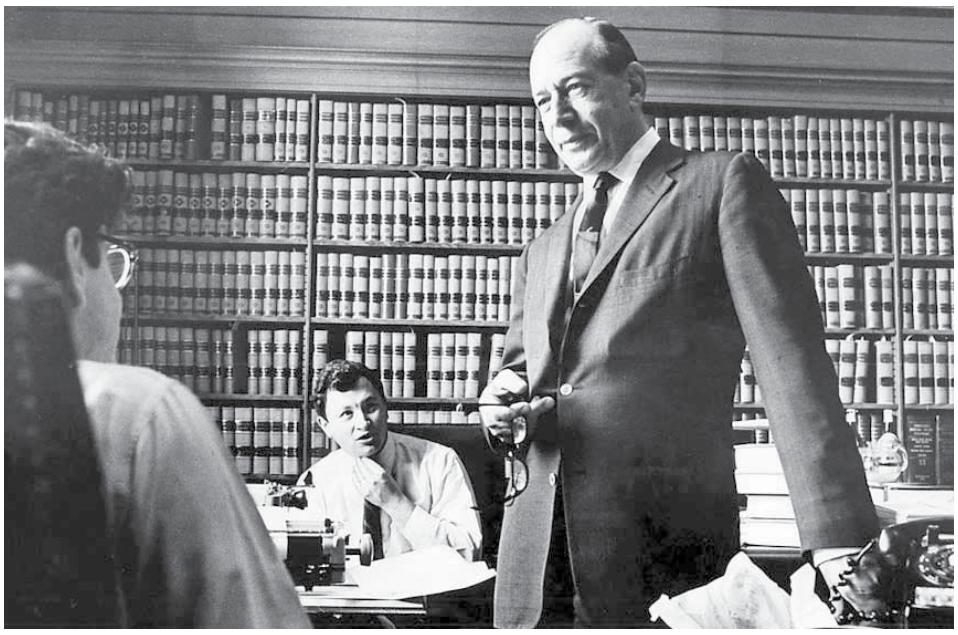
The only thing he would say was that he stepped down to spare his mentor, William O. Douglas.[20] Douglas had his own questionable financial arrangements. By taking the hit, Fortas said he was sacrificing himself for Douglas' sake. Douglas did face an impeachment inquiry in 1970, the effort went nowhere, and he retired from the Court in 1975.

Fortas accepted his predicament with equanimity. He returned to private practice, although his services were no longer wanted at Arnold & Porter. He regained his

Hector Herrera, NCBA Building Manager, Runs 2022 Boston Marathon



The NCBA congratulates its very own Hector Herrera for completing the 2022 Boston Marathon on Monday, April 18!



professional footing by establishing Fortas & Koven, a small five-lawyer boutique firm.[21] Just two weeks before his death in 1982, Fortas returned to the Supreme Court.[22] This time as an advocate.

The Fortas confirmation battle of 1968 and his forced resignation in 1969 changed the standards for Supreme Court Justices. A Justice's conduct and dealings must be free of any appearance of impropriety. Financial disclosures became more rigorous, and limits were imposed on the ability of a Justice to earn outside income.

One further consequence is that no Justice since Fortas has engaged in any extrajudicial governmental activities. Going back to John Jay, Supreme Court Justices had represented the United States abroad. Robert Jackson served as the Chief Prosecutor at the Nuremberg Trials. Even Earl Warren chaired the Warren Commission investigating the assassination of President Kennedy.

The idea of a Supreme Court Justice engaging in these sorts of activities, much less the confidences that were exchanged between Fortas and LBJ, would be unthinkable today. It was this failure to grasp that his situation had fundamentally altered, along with his personal failings, that led to Fortas' undoing.

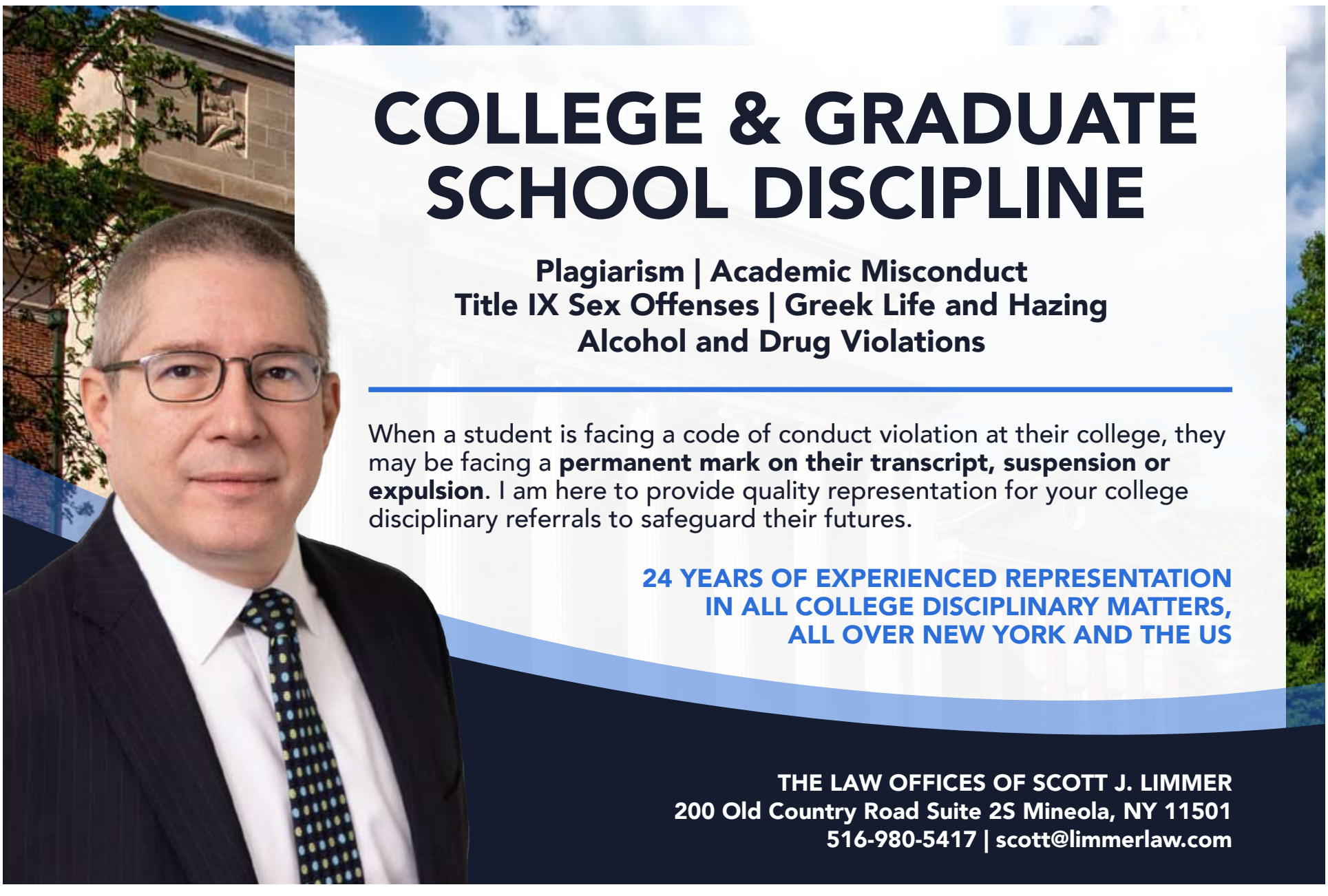
Abe Fortas was the consummate lawyer. His advice was well-reasoned, highly sought after, and well-compensated. Granted that he had all the requisites to be a fine jurist, he lacked the essential temperament to be a judge. He was unable to remove himself from the political arena, and accept the semi-monastic life required on the Supreme Court.

Fortas would have been better off heeding his own counsel. When offered the job, he should have declined. Or at the very least, he should have refrained from advising LBJ once confirmed. But if he had done either, he would not have been Abe Fortas.

Therein lies the tragic note in this story. Fortas could have avoided the shame brought about by his forced resignation and the damage he inflicted on the institution of the Court. He simply couldn't help himself.

1. Oyez, Abe Fortas at https://www.oyez.org.
2. Allen Pusey, *May 14, 1969: The Spectacular Fall of Abe Fortas,* ABA Journal (April1, 2020) at https://www.abajournal.com.
3. *Id.*
4. Fortas represented LBJ in a disputed Democratic Senate primary in Texas in 1948. When President Kennedy was assassinated, Fortas was waiting on the tarmac when LBJ arrived in Washington.
5. Linda Greenhous, Ex-Justice Abe Fortas Dies at 71; Shaped Historic Rulings on Rights, New York Times (April 7, 1982) at http://www.nytimes.com.
6. Andrew Hamm, Legal history highlight: The failed election-year nomination of Abe Fortas, (March 16, 2016) at https://www.scotusblog.com.
7. Andrew Glass, Senate Spikes Abe Fortas' Supreme Court nomination, Oct. 1, 1968, Politico (October 1, 2015) at https://www.politic.com.
8. Hamm, *supra.*
9. Clara Torres-Spelliscy, The Cautionary Tale of Abe Fortas,(February 6, 2018) at https://www.brenanacenter.org.
10. *Id.*
11. Michael Bobelian, *Op-Ed: Bitter Supreme Court battles began 50 years ago over Abe Fortas, Los Angeles Times* (May 12, 2019) at https://www.latimes.com.
12. Hamm, *supra.*
13. Andrew Glass, *Abe Fortas resigns from the Supreme Court, May 15, 1969* Politico (May 14, 2017) at https://www.politic.com.
14. Greenhouse, *supra.*
15. *Id.*
16. *Id.*
17. Pusey, *supra.*
18. *Id.*
19. Bobelian, *supra.*
20. Glass, *Abe Fortas resigns from the Supreme Court, May 15, supra.*
21. Greenhouse, *supra.*
22. *Id.*

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



In Brief

John V. Terrana, Co-Managing Partner and Chair of Forchelli Deegan Terrana LLP's Tax Certiorari practice group, has been selected for inclusion in *Long Island Business News*' Power 25 Law list.

Steven Wimpfheimer of Whitestone has joined the tax certiorari law firm of Schroder & Strom, LLP in an Of Counsel capacity.

Craig Olivo, Managing Member of the firm Bond, Schoneck & King, is pleased to announce that in a survey conducted by BTI Consulting Group, Bond, Schoeneck & King was recognized as "an unparalleled leader in client service" in their *Client Service A-Team: Survey of Law Firm Client Service Performance 2022*.

Gayle S. Gerson joined Jaspan Schlesinger LLP as partner in litigation practice group.

Ronald Fatoullah of Ronald Fatoullah & Associates was honored by *Herald Newspaper* at the Long Island Choice Awards for 2022 at their gala in April. Ronald Fatoullah & Associates was named Best Law Firm and Mr. Fatoullah was named Best Estate Planning Attorney. In addition, Ronald Fatoullah was honored by *Schneps Media* as a New York City Power Lawyer for 2022.

Marc L. Hamroff, Managing Partner of Moritt Hock & Hamroff LLP (MH&H), was celebrated as an inaugural member of Hofstra University's Maurice A. Deane School of Law's Hall of Fame on April 5, 2022, at a gala event held at the Whitney Museum of American Art in New York City.

Jeffrey D. Forchelli, Chairman and Co-Managing Partner of Forchelli Deegan Terrana LLP (FDT) welcomes **Keith J. Frank** to the firm's Employment & Labor practice group as a Partner.

Marian C. Rice

Stuart Schoenfeld, Partner of Capell Barnett Matalon & Schoenfeld LLP presented a webinar, "Learning from Celebrity Estates: Estate Planning Basics." Additionally, Stuart Schoenfeld presented "Elder Care Planning with IRAs" with Associate **Monica Ruela**. Partner **Gregory Matalon** and Associate **Erik Olson's** article "Taxable Gift Reporting on Form 709" has been published in the *New York Law Journal*. In other current news, Partner **Robert Barnett** is speaking at the 2022 New York Society of CPAs (NYSSCPA) Annual Estate Planning Conference on the topics of estate planning and income tax. Robert Barnett is also presenting for Strafford on "Calculating S Corp Stock and Debt Basis" and speaking on the topic of stock options for the NYSSCPA Personal Financial Planning Committee. Partner **Yvonne Cort** will be presenting for Women Owned Law, a group supporting and advocating for women legal entrepreneurs, on the topic of tax strategies for law firms.

Karen Tenenbaum, LL.M. (Tax), CPA, tax attorney, discussed various tax issues that may arise when buying or selling a business on Anthony Cirtolo's new podcast, "Firm Grasp on an Empty Bag?" Karen discussed common tax problems seniors may experience as they retire and possibly move out of state during her interview with Peter Janowsky on his show "Financial Strategies for Seniors. Karen discussed a variety of tax topics and stories that hospitality professionals should keep in mind during a live interview on the United States Bartenders' Guild's Instagram. Karen was also recently interviewed by **Kenneth Landau** on his radio show, "Law You Should Know." Karen moderated "Representing the Intervenor in Innocent Spouse Cases" by Frank Agostino, at a joint meeting with the Suffolk County Bar Association's Taxation Law Committee and the Nassau County Bar Association's Business Law, Tax, and Accounting Committee.

Joseph Milizio, Managing Partner of Vishnick McGovern Milizio LLP (VMM) is recognized in the *New York Metro Super Lawyers 2022* for the third consecutive year in Business & Corporate Law. Partner **Joseph Trotti** is recognized for the third consecutive year in Family Law. Partner **Richard Apat** is recognized for the fourth consecutive year in Personal Injury. Partner **Constantina Papageorgiou** is recognized for the third consecutive year in *Super Lawyers: Rising Stars* in Estate Planning & Probate. Managing Partner Joseph Milizio was also named the "2021 Long Island Choice Awards—Best Real Estate Attorney." VMM was proud to sponsor the St. John's University School of Law "2022 Alumni Association Luncheon/Claire C. McKeever Retirement Celebration," held on April 8. VMM partners **Bernard McGovern, James Burdi, Constantina Papageorgiou**, and associates **Phillip Hornberger** and **Lauren Block** attended. VMM partner **Avrohom Gefen**, head of the firm's Employment Law and Commercial Litigation practices and key member of the Alternative Dispute Resolution practice, was a panelist on the *Long Island Business News* LIBN NOW Experts Forum webinar, "Labor and Employment Law Post-Covid: What Business Owners, Employers and Workers Need to Know," on April 28.

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

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

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

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

NCBA Committee Meeting Calendar
May 2, 2022 – June 9, 2022

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

MONDAY, MAY 2
GENERAL SOLO AND SMALL LAW PRACTICE MANAGEMENT
12:30 PM
Scott J. Limmer/Oscar Michelen

WEDNESDAY, MAY 4
REAL PROPERTY LAW
12:30 PM
Alan J. Schwartz

THURSDAY, MAY 5
PUBLICATIONS
12:45 PM
Andrea M. DiGregorio/ Rudolph Carmenaty

THURSDAY, MAY 5
COMMUNITY RELATIONS & PUBLIC EDUCATION
12:45 PM
Ira S. Slavit

MONDAY, MAY 9
SURROGATES COURT ESTATES & TRUSTS
5:30 PM
Brian P. Corrigan/ Stephanie M. Alberts

TUESDAY, MAY 10
CIVIL RIGHTS
12:30 PM
Bernadette K. Ford

TUESDAY, MAY 10
LABOR & EMPLOYMENT
12:30 PM
Matthew B. Weinick

TUESDAY, MAY 10
COMMERCIAL LITIGATION
12:30 PM
Jeffrey A. Miller

WEDNESDAY, MAY 11
EDUCATION LAW
12:30 PM
John P. Sheahan/Rebecca Sassouni

WEDNESDAY, MAY 11
MEDICAL-LEGAL
12:30 PM
Christopher J. DelliCarpini

WEDNESDAY, MAY 11
MATRIMONIAL LAW
5:30 PM
Jeffrey L. Catterson

THURSDAY, MAY 12
MUNICIPAL LAW & LAND USE
12:30 PM
Judy Simoncic

FRIDAY, MAY 13
DISTRICT COURT
12:30 PM
Roberta D. Scoll

TUESDAY, MAY 17
PLAINTIFF'S PERSONAL INJURY
12:30 PM
David J. Barry

TUESDAY, MAY 17
ALTERNATIVE DISPUTE RESOLUTION
5:30 PM
Michael A. Markowitz/ Suzanne Levy

WEDNESDAY, MAY 18
ETHICS
4:30 PM
Avigael C. Fyman

THURSDAY, MAY 19
INTELLECTUAL PROPERTY
12:30 PM
Frederick J. Dorchak

THURSDAY, MAY 19
DIVERSITY & INCLUSION
6:00 PM
Rudolph Carmenaty

TUESDAY, MAY 24
SURROGATES COURT ESTATES & TRUSTS
5:30 PM
Brian P. Corrigan/Stephanie M. Alberts

TUESDAY, MAY 24
ANIMAL LAW
6:00 PM
Florence M. Fass

WEDNESDAY, MAY 25
BUSINESS LAW, TAX & ACCOUNTING/WOMEN IN THE LAW
12:30 PM
Scott L. Kestenbaum/Jennifer L. Koo/Edith Reinhardt

WEDNESDAY, JUNE 1
ELDER LAW SOCIAL SERVICES HEALTH ADVOCACY
12:30 PM
Ariella T. Gasner/Suzanne Levy

WEDNESDAY, JUNE 1
REAL PROPERTY LAW
12:30 PM
Alan J. Schwartz

THURSDAY, JUNE 2
COMMUNITY RELATIONS & PUBLIC EDUCATION
12:45 PM
Ira S. Slavit

THURSDAY, JUNE 2
PUBLICATIONS
12:45 PM
Cynthia A. Augello/Rudolph Carmenaty

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

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

WEDNESDAY, JUNE 8
EDUCATION LAW
12:30 PM
John P. Sheahan/Rebecca Sassouni

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

THURSDAY, JUNE 9
MUNICIPAL LAW & LAND USE
12:30 PM
Judy Simoncic

New Members

We Welcome the Following New Members Attorneys

Alessandra Elizabeth Albano

Michael R. Allain

Claudia Jane Bleicher

Alexandra Bryer

Richard Celestin

Erin Elizabeth Cullen

Michael J. Del Piano
Lewis Johs Avallone Aviles, LLP-LI

Sarah Joanne Everhart

Mikayla Lynn Fanto

Giuseppe Fioretto

Celina Flores

Paul Anthony Franco

Brittany Rae Frank

Caroline Frisoni

Felicia Gaon

Beth Gazes
Taylor, Eldridge & Endres PC

Steven Wayne Goldfeder

Maria Harghel

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Michael Henke

Edward Raymond Johannes
Law Offices of Perry & Frankson

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Marissa Ann Muscarella
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Frazer & Feldman, LLP

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Marc R. Rosen

Beaudin Rosenberg

Luisa T. Rueda
The Safe Center LI

Jared Sanders

Brian P. Schechter
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Kali Schlegel

Timothy D Sini
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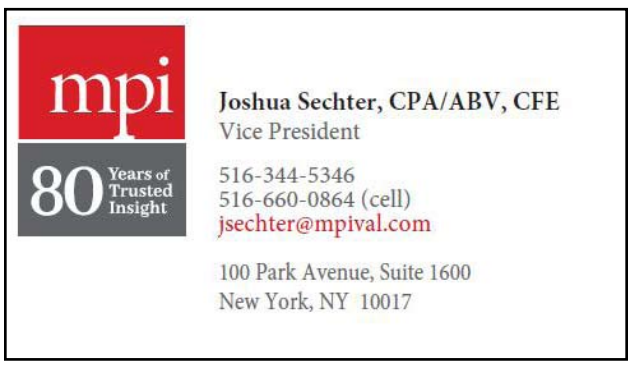

St. John's Team Wins 37th Annual Hon. Elaine Jackson Stack Moot Court Competition

Jennifer C. Groh

The law student team from St. John's University defeated three other teams to win the Hon. Elaine Jackson Stack Moot Court Competition, the annual law school challenge sponsored by the Nassau Academy of Law (NAL). This competition has been a perennial favorite for both the teams and volunteers involved in the two-day competition.

2022 was also the first year without Hon. Elaine Jackson Stack, for whom the competition was renamed to show the Academy's appreciation for her steadfast commitment to both the competition and the practice of law. Dede Unger, daughter of Judge Stack and an NCBA Member herself, summed it up best when addressing the audience immediately following the Finals round, "For Judge Stack, speaking was everything. It was the most powerful way to inform people of what you thought, what your plans were, and how thorough your knowledge was. This obviously held tremendous weight in her courtroom. The way lawyers and litigators spoke, and what they had to say, could mean the difference in whether people paid attention, were persuaded, or simply snoozed. I can tell you without hesitation that when Judge Stack spoke, people listened." Judge Stack might not have been physically present those two competition nights, but her presence and impact certainly was, and always will be, in years to come.

On March 22, in the Association's Great Hall, the St. John's team of Stephanie Algarin-Santiago and David Aminov won their arguments over CUNY School of Law's Erica G. Glenn and Doria Montfort, taking top honors in this year's competition.

Two traditional awards were also presented to recognize the best efforts in oral and written arguments and briefs. CUNY won the Eugene S.R. Pagano Best Brief Award. David Aminov, from the winning St. John's team, won the Justice Edward J. Hart Memorial Award for Best Oralist.

The Honorable Norman St. George, Deputy Chief Administrative Judge (Outside NYC), presided as Chief Judge on the Moot Court Finals Bench. The distinguished panel of Associate Judges were Nassau Academy of Law Dean Terrence Tarver, Tarver Law Firm, Garden City; NAL Past Dean Honorable Andrew M. Engel, Nassau County District Court; NCBA Past President Marc C. Gann, Collins, Gann, McCloskey & Barry, Mineola; and NCBA Past President and NAL Past Dean Peter J. Mancuso, Nassau County District Attorney's Office (Ret.).

Moot Court Chair Christine T. Quigley authored this year's problem and wrote the bench brief. The fact pattern challenged the law students to (1) argue whether an electronic harassment statute regulating speech intended to "annoy, harass, or offend another" is constitutionally overbroad in contravention of the Free Speech Clause of the First Amendment, and (2) whether circumstantial evidence of extrajudicial social-media contact with a juror is sufficient evidence to entitle a criminal defendant to a Remmer hearing under the Sixth Amendment's right to a trial by an impartial jury.

A total of four law student teams competed this year, representing St. John's University School of Law, CUNY, and Touro.

Special Thank You to the Volunteers

The Hon. Elaine Jackson Stack Moot Court Competition, coordinated by Nassau Academy of Law Director Jennifer Groh and NAL Executive Assistant Patti Anderson, involves dozens of volunteer judges, brief scorers, and timekeepers during the two-day event. We thank them for their participation. The Academy would like to give a special thank you to Gary Petropoulos of Catalano, Gallardo & Petropoulos for his extraordinary efforts behind the scenes.

JUDGES
N. Scott Banks
Lauren Bristol
Ralph Catalano
Hon. Andrew M. Engel
Domingo R. Gallardo
Marc C. Gann
Joseb Gim
Hon. David Goodsell
Hon. Susan T. Kluewer
Hon. Steven G. Leventhal
Peter J. Mancuso
Hon. James McCormack
Kent Moston
Gary Petropoulos
Geoffrey Prime
Bruce Robins
Elisa Rosenthal
Hon. Norman St. George
William Schleifer
Michael A. Scotto
Hon. Scott H. Siller
Terrence Tarver

PROBLEM AUTHOR
Christine T. Quigley

BRIEF SCORERS
Christine T. Quigley
Elisa Rosenthal
Bruce Robins
Michelle Russo
William Schleifer

TIMEKEEPERS
Ian Glick
Alexandra Nieto
Renton Persaud
Lauren Bristol

MOOT COURT CHAIR
Christine T. Quigley

New Grand Jury Room Unveiling

(L-R): Hon. Vito M. DeStefano, Nassau County Administrative Judge; Hon. Norman St. George, Deputy Chief Administrative Judge (Outside NYC); Anne Donnelly, Nassau County District Attorney; N. Scott Banks, Legal Aid Society; Gregory S. Lisi, NCBA President; Gregory Grizopoulos, Criminal Courts Bar Foundation in-coming President.
Photo by: Hector Herrera

The opening of the new Grand Jury Room in the Nassau County Court House was held on April 14, 2022. This newly constructed room within the County Court House demonstrates the Court's appreciation of our citizens who take on their civic duty responsibility.

We Care

We Acknowledge, with Thanks, Contributions to the WE CARE Fund

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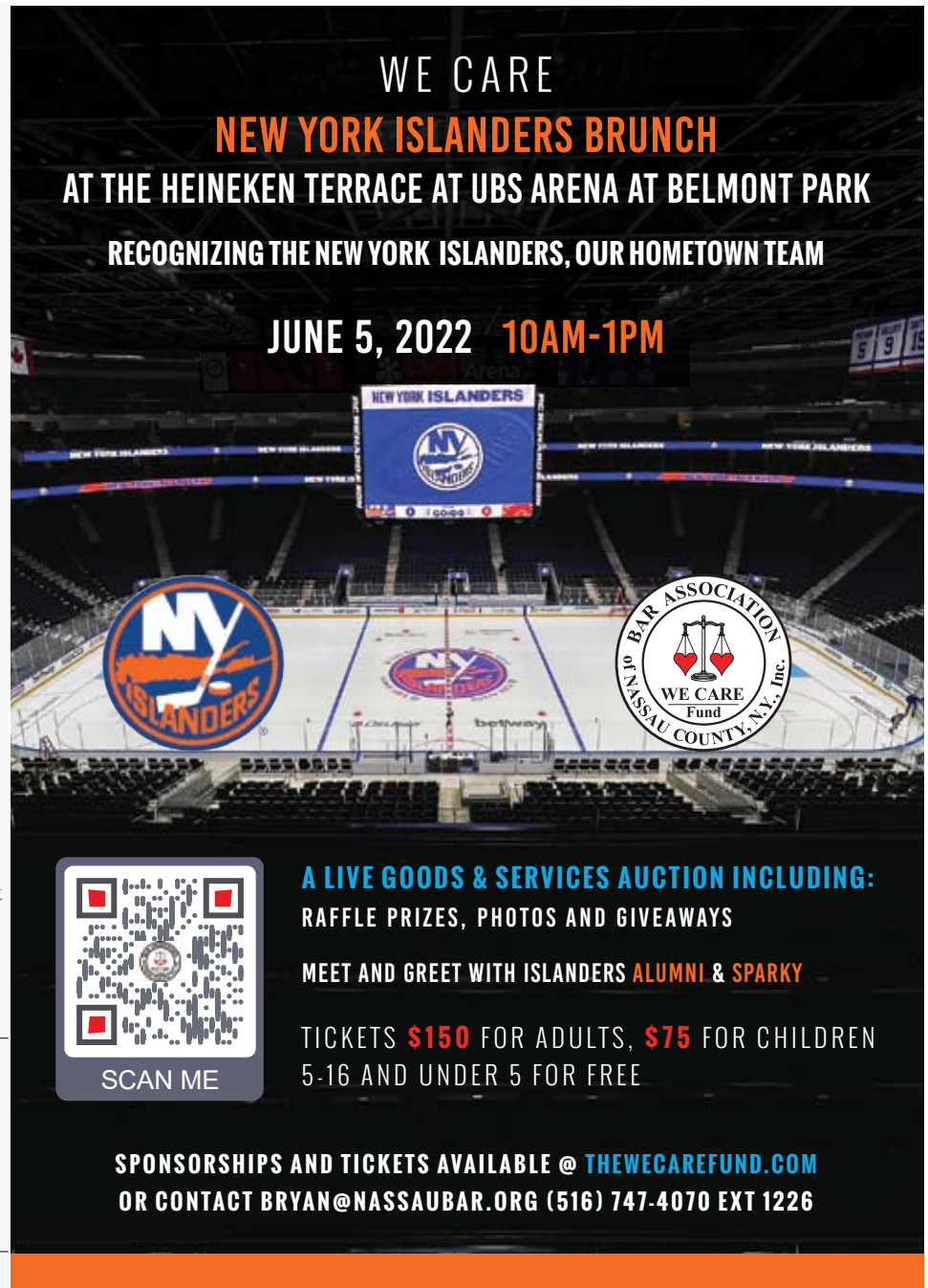

The WE CARE Fund is proud to announce the first ever WE CARE Goods and Services Auction to be held this Summer with the New York Islanders! Join the WE CARE Fund on Sunday, June 5, as they recognize the New York Islanders—Long Island's hometown team. Held at the brand-new Heineken Terrace at UBS Arena at Belmont Park, this event will be a live goods and services auction that will include brunch, raffle prizes, photos, and giveaways. Attendees will also get the chance to meet and greet with New York Islanders Alumni and Sparky! All funds raised from the Goods and Services Auction will be disbursed through charitable grants to help children, the elderly, and those in need throughout Nassau County.

Tickets are $150 for adults and $75 for children ages five to sixteen. Children under five are free! This event is sure to be fun for the whole family! For more information about tickets and sponsorship opportunities, visit www.thewecarefund.com.

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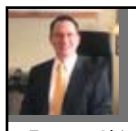

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BY THE NCBA LAWYER ASSISTANCE PROGRAM

REFLECT AND CONNECT

Alcohol Awareness

Alcohol is the #1 public health problem in the United States.

Lawyers and Alcohol:

- Lawyers have significantly higher rates of problematic drinking (36.4%) than the general population (5.3)
- During the pandemic, female lawyers reported higher levels of problematic drinking than male lawyers
- Lawyers in private firms had the highest rates of hazardous drinking (23.4%)
- Junior associates have the highest reported problem drinking (31.1%), followed by senior associates (26.1%) and junior partners (23.6%)
- 28.1% of participating lawyers in their first ten years of practice demonstrated signs of a drinking problem, compared to 19.2% of lawyers in their second decade of practice

Indications that an Attorney is Struggling:

- Frequent lateness and last-minute cancellations
- Not returning client calls
- Frequent requests for extensions
- Client complaints about unresponsiveness
- Colleagues reports of inappropriate behavior, often cast as humor
- Defensiveness
- Frequently disappears during business hours
- Suspicious billing, timekeeping and expenses

There is an ethical obligation to intervene when impaired attorney's competence to practice law is compromised. LAP consults with law firms and legal departments on the use of the Model Policy for Law Firms/Legal Departments Addressing Impairment. This includes information on: defining the problem, professional responsibility, confidentiality, available resources, prohibitions, and consequences, return to work agreements, voluntary monitoring, and more!

If you are concerned that you or a colleague has a problem with alcohol, the Lawyer Assistance Program can help! LAP services include confidential peer and professional support, consultation and education to law firms, interventions and referrals to inpatient and outpatient treatment.

Prevention and early intervention are the best ways to protect yourself, your career, and your personal and professional relationships. To take an AUDIT (Alcohol Use Disorders Identification Test) scan the QR code to the right.

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YOU ARE NOT ALONE

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If you would like to make a donation to LAP or learn about upcoming programs, visit nassaubar.org and click on the "Lawyer Assistance Program" page on the home screen.

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