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SAVE THE DATE

WE CARE's 26th Annual Golf & Tennis Classic

Bridget Ryan

On September 19, 2022, the WE CARE Fund hosted its 26th Annual Golf & Tennis Classic. The Classic is WE CARE's largest and most successful fundraising event, raising hundreds of thousands of dollars each year, and this year was no exception, grossing over $300,000. Held at two courses—The Muttontown Club and Brookville Country Club—the 2022 Classic marked another successful event for WE CARE.

The Classic has something for everyone in attendance, and includes a day of sports and other activities, an expansive cocktail hour, delicious buffet dinner, and over 40 raffle prizes! This year, WE CARE offered a new activity with Golf 201. While Golf 101 is a favorite for many, giving participants the opportunity to learn how to play golf, Golf 201 offers a more advanced instruction. With this new addition, 10 participants were able to improve on skills they may have learned from Golf 101 in previous years, while also getting out on the course.

The Classic began this year with beautiful weather and sunny skies, but Mother Nature had other plans—a microburst storm sent heavy rain and strong gusts of wind through the outdoor cocktail hour. With the help and teamwork of committee members, NCBA staff, Brookville Country Club staff, and event attendees, the event was quickly moved indoors, and resumed effortlessly. After successfully shifting the programming inside, attendees heard from WE CARE Co-Chairs Deanne M. Caputo and Joseph A. Lo Piccolo and were able to see how WE CARE impacts grant recipients.

See GOLF & TENNIS CLASSIC, Page 23

Celebrating 40 Years of Mock Trial

Jennifer C. Groh

In 1982, the Commodore 64 computer made its debut in American homes. EPCOT opened in Florida, and the first issue of *USA Today* was published. Hank Aaron and Frank Robinson were inducted into the Baseball Hall of Fame. Cats opened on Broadway while E.T. the Extra Terrestrial ruled at the box office, and Michael Jackson's groundbreaking album, Thriller was released. It was also the first year that high school students from across the state competed in the New York State Bar Association's Mock Trial Tournament.

In 2022, Mock Trial is celebrating 40 years of giving high school students firsthand knowledge of law and courtroom procedures. The long-running program has helped further students' understanding of trial advocacy and the legal system and has perhaps sparked a future career aspiration or two. Nearly 100 teams and thousands of students participate each year in eight regions across the state. Here in Nassau County, we average between 45-50

schools in the competition, making us the second largest county in the competition after New York City.

In past years, the hallways of the Nassau County Supreme Court echoed with the excited voices and footsteps of 600 students

See MOCK TRIAL, Page 21

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Giving Thanks to Our Non-Lawyer Professionals

FROM THE PRESIDENT

Rosalia Baiamonte

November ushers in the time of year for sharing what we are thankful for. At this time of Thanksgiving, the Nassau County Bar Association would like to express its genuine appreciation and gratitude for our non-lawyer professionals who help shape and strengthen our legal community and our community at large in a myriad of ways.

We are grateful for the generous and enduring support of our 2022-2023 Corporate Partners and their representatives, each of whom is committed to providing our members with professional products and services to enable them to succeed, specifically:

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The Nassau County Bar Association is also grateful for the Community Liaisons who serve on the WE CARE Advisory Board, assist in fundraising and event coordination efforts, solicit in-kind donations, and volunteer for WE CARE events. In particular, we note with special gratitude the genuine efforts of the following:

• **Ellen Birch** (Realtime Reporting), who has historically served as Chair of the WE CARE Golf Outing Raffle Room and is a regular sponsor for many charitable events.

• **Harold L. Deiters, III**, (Empire Valuation Consultants), who previously served as Chair of the Golf & Tennis Classic, and recently launched a unique and successful fundraising event in July 2022 known as *Nashville Night*. Deiters also was instrumental in the creation of the WE CARE Endowment, whose purpose is to raise capital for the health and longevity of WE CARE's future giving, and he currently serves as Chair of the Endowment Committee.

• **John Farrell** and **John McGorty** (PrintingHouse Press), together with the entire staff at PHP PrintingHouse Press, are an essential and integral component of WE CARE. Long-time supporters and sponsors of various WE CARE events, PHP annually provides no-cost signage and event journals to WE CARE free of charge, enabling WE CARE to fulfill its mission of donating 100% of the funds raised at their charitable events to be donated to improve the quality of life of children, the elderly and those in need in Nassau County. In addition to such services, PHP has made substantial financial contributions to many WE CARE events, specifically the annual Golf & Tennis Classic.

• **Jeffrey Mercado** (Webster Bank), is a frequent sponsor of WE CARE events and, even prior to joining the WE CARE Advisory Board as a community liaison, he contributed to the annual Golf & Tennis Classic.

• **Timothy McCue** (Valley National Bank), who has been a committed supporter and active participant in the WE CARE Thanksgiving Committee.

• **Regina Vetere** (AssuredPartners Northeast) is another integral and stalwart supporter and sponsor of virtually every single charitable event hosted by WE CARE. Vetere famously organizes and participates in the Golf 101 and Golf 201 lessons for beginners—a favorite attraction of the annual Golf & Tennis Classic, and is always there to lend support, provide a helpful golf tip, and even offer her trademark pink ladies' golf clubs should the need arise.

Special thanks to **Karen Keating**, formerly of Tradition Title, a former Corporate Partner, who graciously sponsored many Bar events and programs for the Diversity & Inclusion Committee, and who recently joined the WE CARE Advisory Board as a community liaison.

Lastly, we are grateful for the non-lawyer professionals who serve as the 2022-2023 sponsors of the Matrimonial Law Committee, one of the largest and most active committees of our Bar Association. We wish to specifically thank the following non-lawyer professionals, who continue to provide invaluable professional assistance and litigation support to our community of matrimonial and family law attorneys: **AssuredPartners Northeast** (Regina Vetere), **Brisbane Consulting Group, LLC** (Paul Herlan), **Empire Valuation Consultants** (Harold L. Deiters, III), **HFM Valuation & Consulting Services** (Heidi Muckler), **KLG Business Valuators & Forensic Accountants** (Glenn Liebman and David Gresen), **Legal Hero Marketing** (Bryan Osima), **MPI Business Valuation & Advisory** (Joshua S. Sechter and Joseph Ammirati), **The NGH Group, Inc.** (Nicholas Himonidis), and **Tova QDRO & Pension Consultants, LLC** (Denisa Tova-Liebman).

The contributions and involvement of our non-lawyer professionals not only serves to promote the mutual interest of lawyers and businesses providing service to the legal profession, but also provides opportunities to help shape the community and maintain high standards for the legal profession. NCBA is grateful for this extraordinary and unique partnership.

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FOCUS: VETERANS AND MILITARY LAW

The Military Service Retired Pay System and Equitable Distribution

Gary Port

When service members retire, they may receive either regular retirement or disability retirement pay.[1] They may also receive a disability payment from the Veterans' Administration which may or may not affect the retired pay.[2] They could, until 2018, voluntarily participate in the Military Thrift Savings Plan;[3] however this Plan became mandatory for those who joined after 2018.[4]

These streams of income have an impact on Equitable Distribution,[5] spousal support[6] and child support.[7] Therefore, a matrimonial lawyer must understand their differences. There is nothing particularly mysterious about them as all derive from both statute and regulation, the information is readily available to practitioners.

Retired Pay

The most common retired income stream is the regular retired pay. The enabling statute is in 10 USC Chapters 61 and 63. The regulations are found in the Department of Defense Financial Management Regulation Volume 7B. Until 2018, there was just this one retirement system, and the vast majority of current and accruing retirees fall into that system.

The military retired pay system is a defined benefit system, not a defined contribution plan.[8] The calculation to determine it is based upon time in service and rank on retirement.[9] The calculation starts with determining the HIGH 36[10] (this article we will not be considering REDUX[11] or Final Pay[12]). The last 36 months of pay are averaged. Then the number of years of service is multiplied by 0.025%.[13] For example, 20 years multiplied by 0.025% yields 50%. This number is then multiplied by the monthly average to yield the monthly retired pay.[14] For example, a service member's whose monthly average is $5,000 and served for 20 years would receive $2,500 per month in retired pay. While a service member who served 25 years (25 *0.025=.625) would receive $3,125 on that $5,000.

A reserve service member's or guardsperson's retired pay is similarly worked out, except for one additional calculation.[15] For each day of service on active duty or for every four hours of a weekend drill, these service members receive a "point."[16] The total number of points of service is divided by 360.[17] That number is then multiplied by 0.025%. The remaining calculation is the same. For example, assume a reserve or guardsman received 5,000 points, when that is divided by 360 it yields the equivalent of 13 years. When that is multiplied by 0.025% it yields 0.325%. When that is multiplied by the monthly average of the above example of $5,000, it yields the amount of $1,625.

The one other caveat is that the service member must serve at least 20 good years and receive an Honorable Discharge or a General Discharge under Honorable Conditions.[18]

Military Disability Retire Pay

The disability retired pay is not VA disability pay. The retired pay is when someone is medically unfit to continue service.[19] Disability retirement is calculated in one of two ways. The first method, is to calculate the retired pay based on the percentage of disability. In the second method, pay is calculated according to the years of service.[20]

If the percentage of disability is chosen, then it is not part of disposable retired pay.[21] Any portion not part of the definition of disposable retired pay is exempt from equitable distribution.[22]

However, if time in service is used to calculate the military disability pay then the medical retired pay is marital property.[23]

Specifically, the DoD Financial Management Regulation echoing the statute states:

> A. The retired pay multiplier for a disability retirement is determined as follows:
>
> • A member permanently retired for disability receives retired pay that is equal to the retired pay base under Table 3-1, Rule 1, multiplied by the member's election of either:
>
> • The applicable percentage described in subparagraph 030201.B times the years of service credited for percentage purposes, except as provided in subparagraph c;
>
> • Percentage of disability, not to exceed 75 percent, on date retired;[24]

The statute makes it clear that the service member can elect to either have their pay calculated based upon time, or as a function of the disability. When choosing the later, the debits will apply.[25]

To simplify this, if a service member is found to be disabled, then a disability rating will be issued. The service member will then be able to choose whether to have their military disability pay calculated by time in grade or by the disability rating. For example, a private who is injured in the first months of service will get more money if choosing to have her military disability retirement pay calculated based upon disability over time in grade. However, a four-star general with 35 years of service would earn more if the military disability pay were calculated by time rather than injury.

If the disability pay is calculated based upon injury, then it may be exempt from the marital estate and cannot be divided in equitable distribution.[26]

The Former Spouse's Protection Act

The Former Spouse's Protection Act[27] allows state courts to divide military retired pay. This statute was specifically passed to overrule the Supreme Court's Decision in *McCarty v. McCarty*,[28] which held that retired pay was not subject to division in a divorce. In direct response to *McCarty*, Congress enacted the Former Spouse's Protection Act, which authorizes state courts to treat "disposable retired or retainer pay" as community property.[29] 'Disposable retired or retainer pay' is defined as 'the total monthly retired or retainer pay to which a military member is entitled,' minus certain deductions. Among the amounts required to be deducted from total pay are any amounts waived in order to receive disability benefits."[30]

The Supreme Court in *Mansell* held that when a service member chooses to opt for Veteran's Administration disability pay over the regular military retirement, that VA benefit is not considered community property. The court reiterated that position in *Howell v. Howell*[31] where the court stated that Veterans disability pay is not community property. While the Supreme Court has not passed upon military disability pay, which falls under a different statute, there is an argument that if based upon time it is subject to equitable distribution.[32]

Courts around the country have struggled with dividing disability pay for equitable distribution. There is some case law which suggests that even if the disability pay cannot be divided, it can be considered when dividing up the other assets. This is based upon the fundamental concept that equitable distribution is not equal distribution.[33]

North Carolina has addressed this issue. "In North Carolina, military disability payments are treated as a distributional factor."[34] Similar to North Carolina, the Supreme Court of Alaska has held the federal law did not preclude the consideration of the economic consequences of a decision to waive military retirement pay in order to receive disability pay in determining the equitable distribution of marital assets.[35]

The practice point here is that if the service member elects disability pay based upon the disability, and not time served, there still may be an avenue to get an offset on the other martial assets.

VA Disability Pay

The final type of pay which can be received is the Veterans Administration disability pay. This is a monthly payment based solely upon a disability rating[36] and is not dependent on whether a service member retired or

did not. A service member who merely completes her service obligation, without retirement, can receive VA disability payments if she can show a disability and may be able achieve a rating. The amount of money received monthly depends on the rating scale which goes from zero to one hundred percent. The maximum received for an individual is $3,332.06, for an individual with a spouse and child $3,653.89, or for an individual with a child $3,456.30.[37]

Under the Former Spouse's Protection Act, this VA payment is exempt from the marital estate.[38]

Prior to 2003, if a service member received retired pay or disability retired pay, that money was offset by the amount of VA disability received.[39] For example, if a service member was receiving $2,500 per month in retirement, and $2,000 a month in VA benefits, then she would have received the $2,000 from the VA, but only $500 from the Department of Defense.

This changed in 2004 with the enactment of Concurrent Retirement and Disability Payment (CRDP) law.[40] Congress enacted new legislation in 2004 establishing the CRDP program,[41] Members who were eligible for retired pay and who are also eligible for veterans' disability compensation for disabilities rated 50 percent or higher or if injured in combat or combat training would receive both payments. Congress specifically legislated receipt of the full concurrent receipt of retired pay and VA disability compensation for qualified retired members.

DoD defines CRDP as a program that restores retired pay of certain retired members who are also entitled to disability compensation from the VA. Under the CRDP program, regular or reserve members who are entitled to retired pay based on either length of service or disability, and who are also entitled to VA disability compensation based on a combined VA disability rating of 50% or greater may receive both retired pay and disability pay concurrently.[42] Members retired under military disability provisions must have at least 20 years of creditable service.[43] [44] Concurrent Retirement and Disability Payment (CRDP),[45] states that the CRDP entitlement represents the ability to draw both retired pay and VA disability compensation without regard to the waiver and offset requirement, and CRDP payments are payments of retired pay.

This new statute still left open whether the CRDP payments were still considered exempt from the marital asset under the Former Spouse's Protection Act. The basic question was framed as whether the CRDP was a "restoration" of the retired pay, or to be considered disability pay.

That issue has finally been resolved by the Defense Office of Hearings and Appeals (DOHA).[46] DOHA found that the new statutory framework constituted a "restoration" of retired pay. Therefore, payments under CRDP are:

> considered disposable retired pay under 10 U.S.C. §1408, the USFSPA, and subject to the laws and regulations governing military retired pay. The express language contained in the CRDP statute specifically includes members who are retired under Chapter 61 with 20 years or more of service and defines the amount of CRDP they are entitled to receive as the amount of retired pay to which they would be entitled if they had not retired for disability. Therefore, a member retired under Chapter 61, with more than 20 years of service, is no longer receiving Chapter 61 retired pay as calculated under 10 U.S.C. §1201(b)(3); but is being paid CRDP based on the principles and calculations under 10 U.S.C. §1414. Thus, the exception to disposable retired pay contained in 10 U.S.C. §1408(a)(4)(A)(iii) does not apply.

DOHA concluded by finding: "CRDP is a restoration of retired pay based on longevity, which is 20 years of service. It is divisible under the USFSPA. The USFSPA is consistent with the CRDP statute, and the implementing regulations contained in Chapter 64 of Volume 7B of the DoDFMR. Any contrary interpretation would provide the member with an entitlement or benefit that was not explicitly authorized by Congress."[47]

When representing a service member or a spouse in a divorce, it is important for the practitioner to be aware of these three streams of income, and further, to be aware that how a service member leaves the service can have an impact on the equitable distribution. When drafting a settlement agreement, the practitioner must also be able to peer into her/his crystal ball to avoid a future pitfall.

This problem is highlighted by a New Jersey Appellate Court in the *Fattore* decision[48] where the military spouse opted to receive military disability pay years after the divorce and distribution of property. The non-military spouse was seeking reimbursement and indemnification for what was lost from the original judgment of divorce. In such instances, the court cannot go back in time and provide dollar for dollar indemnification. The Supreme Court in *Howell v. Howell*[49] noted that military pay is a contingent right, and not a vested one. As such, if an award in military pay is granted in a divorce, and conditions later change, the non-military spouse has no recourse.

1. 10 U.S.C Chapter 61, Retirement for Physical Disability;10 U.S.C Chapter 63, Retirement for Age.
2. 38 U.S.C. §§5304 and 5305.
3. 5 U.S.C. §8440e.
4. 5 U.S.C. §8440e.
5. 10 U.S.C §1408.
6. DRL §236(B)(5), (5-a), (6).
7. DRL §240 (1-b).
8. 10 U.S.C §1401.
9. 10 U.S.C §1401;DoDFMR Vol 7B Chapter 1, §2.0.
10. DoDFMR Vol 7B sec Chapter 12.2.1.2.
11. DoDFMR Vol 7B sec Chapter 1 2.3.3.
12. DoDFMR Vol 7B sec Chapter 12.2.1.1.
13. 10 USC §§1401,1409.
14. DoDFMR Vol 7B, Chapter 3, §2.0.
15. DoDFMR Vol 7B, Chapter 3, 2.5.
16. 37 U.S.C §206 and DoDFMR Vol 7A, Chapter 58.
17. 10 U.S.C 12733, DoDFMR Vol 7B, Chapter 3, §2.5.2.
18. 10 U.S.C §12731.
19. Chapter 61 of Title 10 of the U.S. Code.
20. 10 U.S.C §1401. See also Claims Case No. 2016-CL-091608.3.
21. 10 U.S.C 1408.
22. 10 U.S.C 1408.
23. See DoD Financial Management Regulation Vol 7B §290701(C)(5).
24. DoD Financial Management Regulation Vol 7B §030202 (B).
25. 10 U.S.C §1408(a)(4)(A)(iii).
26. *Id.*
27. *Id.*
28. *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981).
29. 10 U. S. C. §1408(c)(1).
30. *Mansell v. Mansell*, 490 U.S. 581, 584-85, 109 S. Ct. 2023, 2026 (1989).
31. *Howell v. Howell*, 137 S. Ct. 1400 (2017).
32. *Mylett v. Mylett*, 163 A.D.2d 463, 558 N.Y.S.2d 160 2d Dept. 1990).
33. *Rodgers v. Rodgers*, 98 A.D.2d 386, 390-91, 470 N.Y.S.2d 401, 405 (App. Div. 2nd Dept. 1983); *Greenwald v. Greenwald*, 164 A.D.2d 706, 713, 565 N.Y.S.2d 494, 499 (App. Div. 1st Dept. 1991).
34. *Bishop v. Bishop*, 113 N.C 113 N.C. App. 725, 734, 440 S.E.2d 591, 597 (1994).
35. *Halstead v. Halstead*, 164 N.C. App. 543, 546-47, 596 S.E.2d 353, 356 (2004).
36. 38 U.S.C 1155.
37. https://www.va.gov/disability/compensation-rates/veteran-rates/.
38. 10 U.S.C §1408.
39. 38 U.S.C. §§5304, 5305.
40. Chapter 64 of title 10 of the United States Code.
41. 10 U.S.C. §1414.
42. The implementing regulations for CRDP are found in Chapter 64 of Volume 7B of the DoD 7000.14-R, Financial Management Regulation (DoDFMR).
43. Chapter 61 to Title 10 U.S.C.
44. 10 U.S.C Chapter 64.
45. DoDFMR Vol 7B §640503.
46. Claim No. 2016-CL-091608.3.
47. Claims Case No. 2016-CL-091608.3.
48. *Fattore v. Fattore*, 458 N.J. Super. 75, 203 A.3d 151 (Super. Ct. App. Div. 2019).
49. *Howell v. Howell*, 137 S. Ct. 1400 (2017).

Gary Port is a matrimonial lawyer, a retired Army Lieutenant Colonel, Army Reserve Ambassador to New York, President of the Greater New York Statue Liberty Chapter of the Association of the United States Army, and Commander of American Legion Post 81.

FOCUS: CRYPTOCURRENCY

On Crypto, Death, and Taxes

J. Scott Colesanti and Veronica Ruiz

"Cryptocurrency," the omnipresent oxymoron, can be said to suffer from the persisting yet unproven theory that its demise is imminent. However, nearly a generation after its inception, alt-currencies show no signs of halting. Accordingly, the crypto controversy inspired by Congressional and regulatory inaction rages on.

On a macro level, the battle sparks debate over whether governmental intervention would stymie innovation; on a practical level, the discussion can be as simple as how to catch Ponzi schemers who have mastered the creation of worthless digital tokens. However, a much more fundamental query looms large, namely, what tax treatment should be accorded holdings of Bitcoin? This article both sums up the Internal Revenue Services' (IRS) pronouncements to date and presents a tax scenario for businesses both large and small.

The Birth of Cryptocurrencies

In 2009, a "White Paper"—authored anonymously—appeared on the internet. At a time when the markets and nation doubted government and middlemen, "Bitcoin" promised to facilitate peer-to-peer commerce sans third-party intervention.[1]

That initial manifestation of what is now termed "digital asset" originated as a reward for "mining" or solving complicated algorithms; in short, only technocrats would possess Bitcoins. However, once mined by enough parties, Bitcoin quickly became a coin available for purchase on an unlimited secondary market, and countless parties took to investing in it rather than using it for payment. About eight years ago, Bitcoin "the investment" momentarily hit a price of $1,000, and other digital currencies appeared en masse.[2] About a year and a half ago, some of the biggest institutions on Wall Street changed their view on digital assets resulting in a rise in crypto prices.[3] Today, as many as 30-50 million Americans are dabbling in alt-currency.[4]

Thirteen years and over 19,000 cryptocurrencies later,[5] the middlemen are omnipresent. A brief score card of entrepreneurs reads as follows: Countless originators can create digital tokens, coins, or currencies immediately available for purchase and trading on a 24/7 worldwide market. Brokers—both of the registered and unregistered variety[6]—sell currencies seemingly as soon as they are hatched; meanwhile, organizations wearing several hats offer custodial services that reward "staking," or the lending of housed alt-currencies for consideration.[7] Hundreds of trading platforms serve as an intermediary for buyers and sellers. These cyber markets range in business model from trust company registered with a State to public company registered with the U.S. Securities and Exchange Commission (SEC), to entities completely off the regulatory grid.

In turn, government response has been best characterized as scattered. To begin, there is no statute nor federal regulation defining cryptocurrency, its issuers, its brokers, its intermediaries, its banks, its pricing, its custodians, its lenders, or its exchanges. The most meaningful guidance comes from regulatory fraud cases against people who, in filling the void, seemingly went too far.

The Treasury Department refuses to recognize Bitcoin or any other crypto as legal tender. The Department's focus is on the money transmitter regulations that target money laundering, which is still perhaps the greatest threat.[8]

The SEC and Commodities Future Trading Commission ("CFTC") have spoken often on the problem of unfettered growth but have not promulgated Rules. Using broad interpretations of "security," the SEC has brought close to 100 disciplinary actions against would be crypto issuers, dealers, and exchanges, while the CFTC has joined the crusade by asserting jurisdiction over entities issuing assets that can be called commodities. The crypto winter has led these agencies to declare more digital assets and platforms under their control.

Separately, the Department of Justice (DOJ) may occasionally bring criminal action based upon the securities and commodities laws, but those cases are limited by the lack of formal rulemaking by the SEC and CFTC. The DOJ made news in late July by bringing its first criminal action for insider trading in crypto under a variety of statutes, some, or all of which may ultimately apply.[9]

Finally, the banking regulations limit investment banks to investing 3% in crypto or anything else[10] (the suggested international standard is lower, at 1%). The problem is, those limits arguably apply to registered banks or their holding companies, not to the ad hoc trading platforms lending undefined digital coins.

IRS's Stance

Amidst this blizzard of entrepreneurial opportunity and regulatory inertia, the IRS response has been steadfast and clear: As property, cryptocurrency needs to be taxed for gains and losses. The agency has stated for years that cryptocurrency is property, meaning that when it is sold, its profits or losses must be recognized.[11] This position has become outdated because, although cryptocurrency is used as an investment most of the time, it still can be used as a payment system by some businesses.

The IRS's current FAQs related to virtual currency provide some clarity, such as a definition— "used as a unit of account, a store of value or a medium for exchange that have an equivalent value in real currency or act as a substitute for real currency." The FAQs also address how virtual currency is treated for taxation and reporting purposes, that is—as property. The IRS equates income recognition similarly to that of traditional income: (1) Payment in cryptocurrency for services is recognized as a wage at fair market value and (2) exchange of property for cryptocurrency is also recognized at fair market value. Consistent with real currency, income from cryptocurrency must then be reported, depending on the character of the income (ordinary or capital) on a Form 1040 either on the ordinary income line or on Schedule D for Capital gains and losses.[12]

The FAQs do address aspects of taxation that are more unique to cryptocurrency than to its traditional currency counterpart. This includes the reporting of the currency as either short or long term, and how to calculate a gain or loss given the fluctuations in value that are inherent to the virtual currency market. The guidance also discusses implications of hard forks, which are a non-taxable change of currency on a distributed ledger if no new cryptocurrency is distributed.

If, however, an "airdrop" (i.e., new crypto) occurs which results in a distribution, taxable income will result.

A Practical Question

A competitive disadvantage may arise where a small business income taxpayer uses cryptocurrency in its daily operations (i.e., to pay its debts to debtors preferring crypto). Assume a business owner maintains $10k in a liquid account to pay operating costs of $8k a month. The regular use of the asset will not qualify it for long term capital treatment but may instead afford the asset short-term ordinary treatment.

The benefit, or detriment, depends on whether the business owner reports a gain or loss. If a gain, the business owner is disadvantaged because his income will be taxed at ordinary rates, and not the preferential long term capital rates. If a loss, however, the business owner will benefit more from ordinary losses as they are deductible in full and can offset ordinary income on a one-to one basis. Conversely, under the present state of the tax code, capital losses are limited to offsetting a capital gain and only up to $3k in ordinary income.[13]

Because the business owner's income will always be "ordinary" if used in the course of business and not held for longer than one year, the ordinary losses would be preferential. This could be seen as counterintuitive on the part of the IRS as it almost suggests a business is better off at a loss. An update in laws, to equalize the rights of a small business owner who deals in cash versus cryptocurrency may incentivize others to join the world of cryptocurrency, potentially normalizing the use of cryptocurrency as a global medium of exchange. Even imperfect exceptions and limits would represent a step forward in this very real problem besetting bookkeepers far and wide.

Hope on the Horizon?

A host of Bills pending in Congress speak to some aspect of cryptocurrency. These proposed measures concern topics as varied as dealing with ransomware, Russian crypto, and ethical disclosures by members of Congress. H.R. 5082, introduced in August 2021 as the quixotic "Cryptocurrency Tax Clarity Act," nonetheless only defines "broker" for tax reporting purposes and "digital assets" as specified securities. In sum, the quagmire described herein is not addressed. The omnibus "Responsible Financial Innovation Act" introduced in the spring, while enjoying bipartisan introduction, briefly discusses a broad variety of legal topics including bankruptcy, cybersecurity, money transmission, asset custody, and consumer protection. Yet the measure is decidedly less creative in proposing guidance for tax issues,

which—while excluding from gross a maximum of $200 in crypto losses/gains—makes no distinction between cryptocurrency obtained for payment and cryptocurrency obtained for investment.[14]

Separately, the Senate's "Digital Commodities Consumer Protection Act of 2022" would change the narrative in favor of labeling "digital assets" as "digital commodity," with exceptions. The varied provisions address digital commodity brokers, dealers, platforms.[15] However, tax treatment is neither a priority nor clearly delineated.

The States have varied, individualized responses. Some have opted for tax breaks to lure crypto startups to their region. New York stands alone in requiring all crypto sellers to purchase a "BitLicense."[16] That license proceeds on the difficult premise that the Empire State has jurisdiction over anyone who sells crypto to New Yorkers. The accompanying registration has attracted less than 40 takers but does subject the registrant to net capital and custody requirements. Florida recently defined "cryptocurrency" while using case law to clarify money transmitter obligations.[17] Notably, the measure does reference "stored value" as an exception to the definition of "virtual currency." Yet that progressive nomenclature still wants for tax details. Namely, the effect of market fluctuations and crypto volatility upon the profitability of crypto holdings remains uncertain.

Conclusion

There is yet another aspect of the cryptocurrency rise and swoon. Specifically, businesses using crypto as currency (as it was originally intended) face the harsh reality of tax treatment designed for those who use alt-currency for investment. While the death of the investment fad continues to be exaggerated, the certainty of taxes attends the everyday operations of countless businesses seeking to pay the bills in the digital asset age. Stated otherwise, the merchant in the new digital asset world has little time to contemplate the demise of Bitcoin, but is surely fixated once a month on unpredictable taxes levied upon holdings purposed for the account payable. When Congress and/or the regulators finally decide upon a firm response to the generational problem of digital asset regulation, the simple question of how to exclude "Bitcoin held for payment" from the ledger holding "Bitcoin for investment" needs to be addressed.

1. Satoshi Nakomoto, "Bitcoin, A Peer-to-Peer Electronic Cash System" (2009), https://bitcoin.org/bitcoin.pdf. The identity of the White Paper's author(s) remains a mystery.
2. Bitcoin Price History, yahoo! finance, https://finance.yahoo.com/quote/BTC-USD/history/ (last visited October 14, 2022).
3. See "Crypto Market Sizing Report 2021 and 2022 Forecast," crypto.com (January 19, 2022), https://crypto.com/research/2021-crypto-market-sizing-report-2022-forecast (detailing exponential growth in adoption of cryptocurrency by Wall Street firms and large banks in the first half of 2021).
4. *Compare* "34 Million US Adults Own Cryptocurrency", Insider Intelligence (April 20, 2022), https://www.insiderintelligence.com/insights/us-adults-cryptocurrency-ownership-stats/ (last visited October 14, 2022), *with* Brian Quarmbry, "Do 46 Million Americans Really Own Crypto?", Coin Telegraph (May 12, 2021), https://cointelegraph.com/news/do-46-million-americans-really-own-crypto (last visited October 14, 2022).
5. Arjun Kharpal, "Crypto firms say thousands of digital currencies will collapse, compare market to early dotcom days," (June 3, 2022), available at https://www.cnbc.com/2022/06/03/crypto-firms-say-thousands-of-digital-currencies-will-collapse.html#:~:text=the%20coming%20years.-,There%20are%20more%20than%2019%2C000%20cryptocurrencies%20in%20existence%20and%20dozens,different%20cryptocurrencies%20are%20built%20upon (last visited October 14, 2022).
6. For example, RobinHood, the registered securities broker-dealer, openly and loudly offers cryptocurrencies for sale. See https://robinhood.com/us/en/about/crypto/. Countless other parties offer the same.
7. See, e.g., "Crypto.com", "products", https://crypto.com/us/ (offering "14.5% on your coins").
8. U.S. Department of the Treasury, "Questions on Digital Currency", https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1626
9. "Three Charged In First Ever Cryptocurrency Insider Trading Tipping Scheme," The United States Attorney's Office for the Southern District of New York, https://www.justice.gov/usao-sdny/pr/three-charged-first-ever-cryptocurrency-insider-trading-tipping-scheme (last visited October 14, 2022).
10. Prohibitions on proprietary trading and certain relationships with hedge funds and private equity funds, 12 U.S.C. Sec. 1851 (2018). The "Volker Rule" was implemented by Section 619 of the Dodd Frank Act of 2010.
11. See, e.g., IRS Notice 2014-21, https://www.irs.gov/irb/2014-16_IRB#NOT-2014-21.
12. See https://www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions.
13. See *generally* "Capital Losses VS. Ordinary Losses," AmeriLawyer.com, https://www.amerilawyer.com/blog/business/capital-losses-vs-ordinary-losses/ (last visited October 14, 2022).
14. S. 4356, https://www.congress.gov/117/bills/s4356/BILLS-117s4356is.pdf.
15. H.R. 8730, 117th Congress, 2d sess., https://www.congress.gov/117/bills/hr8730/BILLS-117hr8730ih.pdf.
16. 23 NYCRR Part 200 (2022), https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=I7444ce80169611e594630000845b8d3e&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)&bhcp=1 .The license applies to all cryptocurrencies, and not just Bitcoin.
17. Fla. Stat. §560.204(1). The provision becomes effective in January 2023.

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FOCUS: EDUCATION LAW

Are Proposed Title IX Rules Unfair to Students Accused of Sexual Misconduct?

Scott Limmer

Title IX of the Education Amendments of 1972[1] prohibits educational institutions that receive federal funding from discriminating on the basis of sex. Since Title IX covers schools that participate in federal student loan programs, most public and private colleges and universities must comply with Title IX.

Discrimination on the basis of sex has long been interpreted to include sexual harassment.[2] Sexual violence is a form of sexual harassment.[3] Title IX imposes a duty on schools to take appropriate action to protect students from sexual misconduct. Schools take proactive steps to help achieve that goal, such as creating student rules that prohibit sexual harassment. They also try to prevent students who break the rules from reoffending by imposing discipline. Expulsion and suspension are potential outcomes of disciplinary proceedings.

Reasonable people agree that schools should take their obligation to protect students from sexual harm seriously. At the same time, reasonable people should agree that students who are accused of sexual misconduct should not be presumed guilty before due process. Some people could argue that the Department of Education, under the current administration, is taking steps to disturb that balance. The Department has proposed regulations that may have the impact of weakening an accused student's assurance of a fair disciplinary hearing.

History of Title IX Rules Governing Disciplinary Procedures

During the last several years, Title IX rules have placed the rights of accused students on a seesaw. The Department of Education issued a guidance in 2011 that advised schools to enforce Title IX with little regard for the rights of accused students.[4] The guidance urged schools to allow an accused student's guilt to be established by a preponderance of the evidence, rather than the stricter "clear and convincing" evidence standard that usually applies to punishments (such as expulsions) that affect a person's substantial rights. The guidance also condoned disciplinary procedures that prohibit the accused's lawyer from participating in the proceeding, that limit the accused student's opportunity to cross-examine the accuser, and that deprive the student of access to the evidence (including evidence that suggests the accused student's innocence).

While some schools resisted the Department's suggestion that students accused of sexual misconduct are not entitled to certain protections, many schools chose not to risk federal funding by violating Title IX as interpreted by the Department's Guidance.[5]

As schools began to implement the Department's 2011 Guidance, legal scholars raised serious objections to the Department's stance concerning due process rights of accused students.[6] Courts began to rule in favor of students who were subjected to unfair disciplinary hearings that ended with expulsions or lengthy suspensions.[7]

The Department revoked its Guidance in 2017. New regulations took effect in 2020 that struck a more appropriate balance between the school's duty to protect students from sexual misconduct and its equally important duty to protect the due process right of accused students.[8]

Proposed Change in Title IX Rules

Some of the proposed rules make positive changes. The proposed rules expand the universe of students who are protected from sex discrimination by prohibiting discrimination on the basis of gender identity and pregnancy.[9] Protecting LGBTQ students furthers Title IX's goal of eliminating sex discrimination in a school's programs and activities.

Unfortunately, the new rules can be seen to take several steps back in assuring that students who are accused of sexual misconduct receive a fair hearing.

Reporting and investigating. Current regulations require a college or university to respond when it has "actual knowledge" of sexual misconduct.[10] In most cases, "actual knowledge" comes from an alleged victim's complaint to a school employee who has been designated to receive those complaints. That person usually has the title of Title IX Coordinator.

Under the proposed rule, the school must respond to suspected sexual misconduct, even when the alleged victim has not complained.[11] Administrators, teachers, and advisors (other than those who have a confidential relationship with the student) would be required to notify the Title IX Coordinator of any information that might constitute sexual misconduct. Staff members who are not administrators, teachers, or advisors would be required to notify the Title IX Coordinator or to give the affected student the name of the Title IX Coordinator.[12]

The current regulations do not require the investigation of rumors or other seemingly untrustworthy information when no complaint of sexual misconduct has been made. The proposed regulations encourage investigations based on "information" regardless of its source. Students may find themselves subjected to an investigation based on hearsay stories that are not substantiated by the alleged victim of the misconduct.

The proposed rules permit a Title IX Coordinator to initiate a complaint that triggers a disciplinary process against the wishes of the alleged victim.[13] In some cases, alleged victims would prefer that an alleged incident not be investigated. The proposed rules allow a Title IX Coordinator to begin an investigation and initiate disciplinary proceedings even if the alleged victim regards an investigation of the alleged incident as an invasion of their privacy.

Finally, the proposed rules require investigators to be trained in a new definition of "relevant" evidence. That definition deems evidence to be relevant if it "would aid a decisionmaker in determining whether the alleged sex discrimination occurred."[14] Although currently unknown, there is a concern amongst attorneys representing accused individuals that investigators may be trained to disregard evidence that the accuser has a history of making false accusations because those allegations did not involve the specific instance of sexual misconduct that the accuser is currently alleging. If such training takes place arguments can be made that the investigations are unlikely to be thorough.

Disclosure of evidence. As is the case for all defendants, accused students cannot prepare a proper defense unless they understand exactly what they have been accused of doing. Disclosing the evidence against the accused is fundamental to a fair hearing. The proposed rules, however, give schools the option of disclosing a written report describing the evidence that the investigator regards as relevant.[15]

A written report prepared by the school, acting as prosecutor, could potentially summarize the evidence in a way that favors the accuser. It is possible that inconsistent details or changes in the accuser's story may be omitted because the school does not regard them as significant. Relevance may be interpreted in a way that favors evidence tending to prove the accuser's story. Investigators may feel free to withhold exculpatory evidence on the ground that they don't view it as relevant. Giving the school exclusive access to the evidence, can put the accused student at an extreme disadvantage.

Burden of proof. Schools would typically be prohibited from requiring proof of sexual misconduct by clear and convincing evidence. Unless that school uses a "clear and convincing" standard for all other comparable proceedings, including proceedings relating to other discrimination complaints, the school would be required to use a preponderance of the evidence standard.[16]

In reality, no other proceeding is comparable to a disciplinary proceeding that might result in expulsion, but schools will likely feel (as they felt in 2011) that they have no choice but not use a burden of proof that fails to protect students from the risk of a decisionmaker's error.

Confrontation and cross-examination. Criminal trials attempt to assure fair outcomes by guaranteeing that the accuser will face the accused while testifying at a trial. The accuser's attorney then questions the accuser to expose inconsistencies and inaccuracies in the accuser's testimony.

It can be argued that neither due process right is secured under the proposed rules. Hearings do not need to be held live.[17] The new rules dispense with face-to-face confrontation, allowing the accuser to testify from a remote location. Alternatively, decision-makers are authorized to dispense with a hearing and to meet with the parties individually and out of the other's

presence.[18] The accuser never has to look at the student they are accusing.

While schools will be permitted to allow a student's lawyer (but not the student)[19] to cross-examine the accuser, the school will have the option of allowing the student's lawyer to "propose" questions that the decisionmaker will not be required to ask.[20] If the decisionmaker decides to ask the question, the decisionmaker will be free to rephrase it as they see fit. This has the potential to be extremely harmful and unfair to an accused.

The proposed rules also require a decisionmaker to exclude questions that are not "relevant," as relevance is narrowly defined. A question that would call attention to the accuser's lack of credibility might not be regarded as "relevant" under that standard if the question does not directly address the alleged sexual misconduct. Moreover, the decisionmaker may not allow questions to be asked that are "harassing."[21] That broad term gives the decisionmaker the power to ban any question that might make the accuser feel uncomfortable—including uncomfortable questions that might expose false testimony.

Remarkably, the accuser need not answer questions that go to their credibility, and that refusal cannot be a sole basis for finding that a sexual misconduct accusation is probably false.[22] Again, in the interest of "protecting" accusers, the proposed rules make it more difficult to present evidence that raises serious doubts about the truthfulness of the accusation.

Impartial decisionmaker. Before new rules were adopted in 2020, schools often allowed the investigator or Title IX Coordinator to make the final decision. Acting as prosecutor, judge, and jury, an investigator would gather the evidence, decide that the evidence supported guilt, and then preside over a hearing at which guilt was a foregone conclusion. Accused students had no hope of a favorable outcome in cases where it appeared the investigator's mind was made up before the hearing began.

The proposed rules do not require the decisionmaker to be a neutral third party. Rather, the rules allow the investigator or Title IX Coordinator to act as the decisionmaker.[23] That person will likely have met with the accuser countless times. Accused students may enter hearings with two strikes against them because the hearing occurs only because the investigator or Title IX Coordinator has already decided that the accusation is true. The new rules completely disregard the due process protection of an impartial decisionmaker.

Stacking the Deck

It is difficult to see the Department of Education's proposed rules as anything other than an attempt to favor accusers over students who are accused of sexual misconduct. Reasonable people do not object to the #MeToo movement's insistence that women who are the victims of sexual violence or sexual harassment should be heard. Allowing a school the ability to pick and choose what evidence they provide to the accused student, limiting the accused's right to cross-examine the accuser, and allowing disciplinary decisions to be made by the same person who decided to pursue discipline weakens the possibility of a fair proceeding for innocent students who are falsely accused.

1. 20 U.S.C. §1681 et seq.
2. *Meritor Saving Bank v. Vinson*, 477 U.S. 57, 64 (1986).
3. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41410 (July 12, 2022) [hereinafter Proposed Rule].
4. U.S. Dept of Educ., Office for Civil Rights, Dear Colleague Letter: Sexual Violence (Apr. 4, 2011) (rescinded in 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.
5. See Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, *Fairness for All Students Under Title IX*, Harv. L. Sch. (Aug. 21, 2017).
6. See, e.g., *id.*; Open Letter from Members of the Penn Law School Faculty (Feb. 18, 2015), http://media.philly.com/documents/OpenLetter.pdf.
7. See, e.g., *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018).
8. 34 C.F.R. Part 106.
9. See Proposed Rule, supra n. 3 (proposed §106.10).
10. 34 C.F.R. §106.44(a).
11. See Proposed Rule, supra n. 3 (proposed §106.44(a)).
12. *Id.* (proposed §106.44(c)).
13. *Id.* (proposed §106.44(f)(5)).
14. *Id.* (proposed §106.2).
15. *Id.* (proposed §106.46(f)(4).
16. *Id.* (proposed §106.45(h)(1).
17. *Id.* (proposed §106.46(g)).
18. *Id.* (proposed §106.46(f)(1)(i)).
19. *Id.* (proposed §106.46(f)(1)(ii)).
20. *Id.* (proposed §106.46(f)(1)(i)).
21. *Id.* (proposed §106.46(f)(3)).
22. *Id.* (proposed §106.46(f)(4)).
23. *Id.* (proposed §106.45(b)(2)).

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NCBA Lawyer Assistance Program to Host "*Less is More: Improve Productivity and Increase Your Bottom Line While Doing Less and Enjoying More*" Seminar with CLE Credit Available

The NCBA Lawyer Assistance Program (LAP) has been hard at work to develop relevant and engaging wellness seminars for legal professionals. LAP's upcoming seminar, *Less is More—Improve Productivity and Increase Your Bottom Line While Doing Less and Enjoying More*, is set to be held on Friday, November 18 from 11:00 AM to 1:00 PM at the NCBA and will be led by attorney, endurance coach, marathon runner, professional development coach, and performance leadership specialist Brendan Cournane.

The program will explore science-based proven techniques to improve personal productivity; set, achieve, and exceed goals; and thrive in one's practice and life.

The cost for members to attend is $40, and $75 for non-members. The cost includes two CLE credits in ethics, a buffet lunch, and the chance to win a free one-on-one session with Cournane.

Those who are interested in registering for the seminar can contact LAP Director Beth Eckhardt at eeckhardt@nassaubar.org or (516) 294-6022.

FOCUS: LAW AND AMERICAN CULTURE

The Spy Who Sued Me

Rudy Carmenaty

From Sean Connery to Daniel Craig, the cinematic incarnation of Ian Fleming's James Bond has thrilled audiences for sixty years and twenty-five motion pictures.[1] A global phenomenon, Eon Productions' Bond movies have earned billions at the box-office and paved the way for *Star Wars* and other lucrative film franchises.

The character prefers his martini shaken, not stirred. Fittingly, it has not always been a smooth ride for moviedom's definitive gentleman spy. Eon Productions has been embroiled in numerous lawsuits over intellectual property rights. Competing claims have resulted in protracted litigation.

Bond's producers have nonetheless managed to navigate these legal onslaughts, which beyond being both costly and exhaustive, threatened the character's viability on screen. Indeed, Bond has survived courtroom adversaries far more cunning and potentially as lethal as SPECTRE, SMERSH, or a bevy of femme fatales.

All this legal wrangling took decades to resolve. It involved courts on two continents, millions of dollars, another iconic character, and took place only after the deaths of the original participants. The end result has been that all rights associated with Bond were fully secured by the producers of the official series.

Bond's literary creator is indisputably Ian Fleming (1908-1964). Fleming had served in Naval Intelligence during World War II and in civilian life was a denizen of Fleet Street. After the war, he procured a plum assignment with a London newspaper chain which each year provided him with a winter sojourn in Jamaica.

He named his Caribbean retreat Goldeneye. Rather appropriate considering Fleming possessed a keen eye for adventure, and the good life—all the qualities that would make Bond so appealing. On a lark, to stave-off jitters from his forthcoming nuptials, he embarked on a second career as a novelist.

Inspired by Sir William Stephenson (aka 'Intrepid') and taking the name 'James Bond' from the author of *The Birds of the West Indies*, Fleming crafted a hero for the burgeoning Cold War.[2] James Bond, Agent 007, is an operative for Section Six of British Military Intelligence (MI6) and possesses a license to kill.

Casino Royale, published in 1953, was the first of an oeuvre consisting of thirteen novels and two short story collections. Adult escapism at its finest, Fleming saw the movie potential in Bond from the outset. He set-up Glidrose Productions Ltd. to field offers from prospective producers. It was far from an auspicious start.

Bond, the colorful British movie hero, made his debut on a black and white American TV anthology called *Climax*. In 1954, CBS broadcast a one-hour adaption of *Casino Royale* starring Barry Nelson. To make matters worse, the character was not English but instead an American spy named 'Jimmy' Bond.

Fleming received a paltry $1,000 for the tv-version of *Casino Royale*.[3] To make matters worse, Fleming sold the film rights to actor Gregory Ratoff for $6,000.[4] Best known for playing impresario Max Fabian in the classic *All About Eve*, in real-life Ratoff was not up to the task of bringing Bond to the movies.

The man who made Bond a film icon was Albert R. Broccoli (1909-1996). A native of Queens, 'Cubby' Broccoli, with partner Harry Saltzman for the first nine pictures, produced the Bond movies until his death. Michael G. Wilson and Barbara Broccoli, Cubby's stepson, and daughter, now helm the franchise.

Broccoli had wanted to obtain the film rights for himself. Saltzman beat him to the punch. Combining forces, they together acquired the rights to all of Fleming's novels, except for *Casino Royale*. Their partnership would continue until Saltzman was bought out by United Artists in 1975.[5]

In 1962, Broccoli and Saltzman formed a Swiss holding company—Danjaq, S.A. Danjaq takes its name from Dana Broccoli and Jacqueline Saltzman, the founding partners' wives. Copyrights in the first twenty films were held by Danjaq and MGM, the successor-in-interest to United Artists which released the initial films.

The rights to the four motion pictures distributed by Columbia between 2006 and 2015 belong to Danjaq, MGM and Columbia. Danjaq licenses the rights to EON which mounts the films.[6] In 2021, Amazon bought MGM for $8.5 billion.[7] So now Bond, James Bond answers, in part at least, not to M, but to Bezos, Jeff Bezos.

The first film *Dr. No* had a modest budget, an unknown leading man—Sean Connery—and became a huge hit. *From Russia With Love*, the second and perhaps the best film in the cannon, gave Bond further cachet when President Kennedy endorsed the novel as one of his favorites.

The seeds for future success were sown with Goldfinger, the paradigm film. It contains the facets—the iconic theme, the opening credits, a hit pop song, breathtaking stunts, beautiful girls, exotic locales, expensive production values—for all that followed. Bond's license to kill became a license to print money.

Apart from the elaborate 1967 spy spoof *Casino Royale* and *Never Say Never Again*, the Bond movies are all from EON Productions. *Thunderball*, released in 1965, is distinguished from its companion films in that it lists Kevin McClory (1924-2006) as producer, with Broccoli and Saltzman serving as executive producers.

This anomaly came about after an arrangement was arrived at between Eon and McClory. The legal niceties arising from *Thunderball* would be the source of contentious court cases for more than half-a-century. And it was all Fleming's fault. The author left himself and Eon vulnerable.

In 1959, Fleming, McClory and Jack Whittingham collaborated on an unrealized film. Fleming reconfigured the themes, plots, and characters for the novel *Thunderball*. Published in 1961, Fleming made no acknowledgment of the contributions of his co-writers, nor did he obtain their permission beforehand.

It remains unclear which writer made which contribution to the various drafts. McClory claimed several copyrights, including those for arch villain Ernst Stavro Blofeld and the criminal organization SPECTRE.[8] In future years, he would claim that he was the creator of the Bond character that movie audiences came to love.

In 1963, McClory's claims came before a court in London (Whittingham was unable to continue the action), resulting in a negotiated settlement. At the time, Fleming was beset by a serious heart condition with less than a year to live. This agreement would haunt Broccoli for years to come.

Recognized as Bond's creator, Fleming got literary rights to the novel. However, future printings would contain the following attribution: "*The story is based on a screen treatment by Kevin McClory, Jack Whittingham, and the Author.*"[9] Fleming also wound up paying £35,000 in damages and McClory's court costs.[10]

More importantly, the settlement gave McClory movie rights to the material. McClory, an established filmmaker, approached Broccoli and Saltzman, who wanted to capitalize on *Thunderball*. The parties struck a deal giving Eon exclusive rights for a decade. The rights would then revert to McClory.

Thunderball was a smash, the most successful Bond ever when adjusted for inflation.[11] McClory became fabulously wealthy. It also whetted his appetite for another crack at Bond. In 1975, McClory announced a rival film sheepishly named *James Bond of the Secret Service*.[12]

To bolster his efforts, McClory got Sean Connery involved in the project. Connery had left the series in a huff over money after *Diamonds Are Forever*. A flinty Scot, Connery was not only bored with the role of Bond but felt he had been cheated by Eon.

McClory's proposed film came at a precarious time. It posed a threat to Eon's *The Spy Who Loved Me*, Broccoli's first film without Saltzman. Also, Roger Moore had assumed the Bond mantle two films prior. Fearing unfair completion and audience confusion, Broccoli and McClory sued each other to foil the other's project.

The Spy Who Loved Me was a slickly produced trove of the best bits from the Bond catalog. Missing, however, were Blofeld and SPECTRE thanks to McClory, forcing Eon to eliminate all such references in the script.[13] But for a brief cameo in 1981's *For Your Eyes Only*, Blofeld would not be seen again until *Spectre* in 2015.[14]

McClory gained a significant legal victory when Britain's High Court affirmed, ten years having passed, he could once again exploit the *Thunderball* material.[15] The year 1983 would see not one but two James Bonds in theaters. It was the most serious threat faced by Eon for the attention of Bond fans.

Connery, no doubt to stick it to Broccoli, starred in *Never Say Never Again*. McClory licensed the story, along with Blofeld, SPECTRE and the premise of nuclear blackmail, to producer Jack Schwartzman. Connery got sterling reviews, but Eon's *Octopussy* did better box-office.

Sony, who owns Columbia, joined the fray in the 1990's. Siding with McClory, who never stopped trying to make another Bond film, Sony also had the rights to *Casino Royale*. Columbia had released the spoof three decades earlier. MGM and Danjaq sued Sony for $25 million.[16] Sony counter sued.

The thrust of Sony's contentions went well-beyond the right to remake *Thunderball* once again. Sony argued that all James Bond movies were essentially derived from the scripts McClory worked on with Fleming and Whittingham, hence McClory was entitled to royalties for the entire series.[17]

As such, McClory should rightfully be considered the creator of the 'cinematic Bond' as opposed to the character which appears in Fleming's novels.[18] There are distinct differences in terms of the character's appearance and affectations which reoccur in the movies, but which do not appear in the books.

Then Spiderman came to the rescue. In 1999, MGM and Sony agreed to swap rights. MGM traded its interests in Spiderman in exchange for Sony's interests in *Casino Royale* and $5 million.[19] Broccoli had spent years pursuing these rights unable to lock them up.

The MGM/Sony swap did not, however, affect McClory's claims against Danjaq. In 2001, the Ninth Circuit Court of Appeals affirmed a decision from the District Court dismissing his case with prejudice due to laches.[20] Five years later, McClory died days after Eon's *Casino Royale* premiered.[21]

McClory's passing, along with that of Broccoli, cleared the way for their heirs to arrive at a new settlement. In November 2013, Danjaq agreed to purchase all rights and interests from McClory's estate for an undisclosed sum.[22] James Bond finally emerged unencumbered from any potential intellectual property dispute.

That is until Fleming's novels enter the public domain. Under the Berne Convention, protection is granted for an author's life, plus fifty years (augmented in the U.S. and the European Union to life plus seventy). Fleming died in 1964. It's plausible that several Fleming copyrights could expire within the next dozen years.

So, stay tuned for the legal ordeals of James Bond may return.

1. *Dr. No* (1962), *From Russia with Love* (1963), *Goldfinger* (1964), *Thunderball* (1965), *You Only Live Twice* (1967), *On Her Majesty's Secret Service* (1969), *Diamonds Are Forever* (1971), *Live and Let Die* (1973), *The Man with the Golden Gun* (1974), *The Spy Who Loved Me* (1977), *Moonraker* (1979), *For Your Eyes Only* (1981), *Octopussy* (1983), *A View to a Kill* (1985), *The Living Daylights* (1987), *License to Kill* (1989), *GoldenEye* (1995), *Tomorrow Never Dies* (1997), *The World Is Not Enough* (1999), *Die Another Day* (2002), *Casino Royale* (2006), *Quantum of Solace* (2008), *Skyfall* (2012), *Spectre* (2015), and *No Time to Die* (2021).
2. Fleming is quoted as saying: "*James Bond is a highly romanticized version of a true spy. The real thing is William Stephenson.*"
3. Oliver Carey, *The James Bond movie franchise and its 60 years of legal and rights battles*, (August 13, 2021) at https://www.filmstories.co.uk.
4. *Id.*
5. Saltzman's stake was bought by Broccoli in 1986.
6. The letters E-O-N represent the maxim '*Everything or Nothing*'. Danjaq is now a limited liability corporation, Danjaq, LLC, headquartered in Delaware.
7. Dan Clarendon, Amazon to Own Half of James Bond Franchise With MGM Deal (September 6, 2021) at https://marketrealist.com.
8. Carey, *supra.*
9. Raymond Benson, *The James Bond Bedside Companion*, (1st Ed. 1984) 26.
10. Neely Simpson, *Ian Fleming and the Thunderball Court Case*, (May 28, 2015) at https://blog.bookstellyouwhy.com.
11. Brandon Gailee, *Highest Grossing James Bond Movies Adjusted to Inflation*, (December 8, 2013) at https://brandongaille.com.
12. Steven Jay Rubin, *The James Bond Films*, (2nd Ed. 1983) 172.
13. *Id.*, 146.
14. Carey, *supra.*
15. UnivEx, *Kevin McClory, Sony, and Bond: A 007 History Lesson* at https://www.universalexports.net.
16. Carey, *supra.*
17. UnivEx, *supra.*
18. Carey, *supra.*
19. *Id.*
20. See *Danjaq, LLC v Sony Corp.* 263 F.3rd 942 (9th Cir. 2001).
21. Carey, *supra.*
22. Ryan Faughnder, *MGM and Danjaq settle James Bond rights dispute with McClory estate*, Los Angeles Times (November 15, 2013) at https://www.latimes.com.

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.

NAL PROGRAM CALENDAR

NOVEMBER 2, 2022 (HYBRID)

Dean's Hour: Aging and Wealth—Strategies for Protecting Wealth

Program presented by NCBA Corporate Partner Opal Wealth Advisors

12:30 PM – 1:30 PM

1 credit in professional practice.

NOVEMBER 2, 2022 (ZOOM ONLY)

Auto Insurance Update

With the NCBA Insurance Law Committee

6:00 PM – 8:00 PM

1.5 credits in professional practice; .5 in ethics Skills credits available for newly admitted attorneys.

NOVEMBER 9, 2022 (HYBRID)

Dean's Hour: Banks and Attorneys—A Collaboration on New York's New Power of Attorney Statute

Sponsored by NCBA Corporate Partner LexisNexis and by Contour Mortgage

With the NCBA Elder Law, Social Services and Health Advocacy Committee

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.

NOVEMBER 10, 2022 (HYBRID)

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

Sponsored by NCBA Corporate Partner MPI Business Valuation and Advisory and by Encore Luxury Living

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

12:30 PM – 1:30 PM

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

NOVEMBER 16, 2022 (HYBRID)

Dean's Hour: People v Hemphill—How Did the Court of Appeals Get it So Wrong?

Sponsored by NCBA Corporate Partner PHP

With the NCBA Appellate Practice Committee and the Nassau County Assigned Counsel Defender Plan

12:30 PM – 1:30 PM

1 credit in professional practice.

Guest Speaker: Hon. Arthur M. Diamond (Ret.)

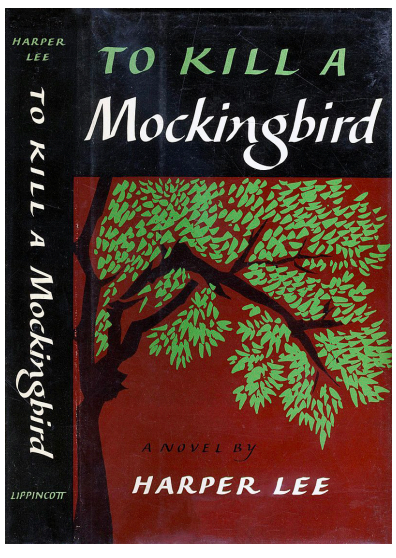
NOVEMBER 16, 2022 (LIVE ONLY)

Popcorn CLE Series: *To Kill a Mockingbird*

Sponsored by NCBA Corporate Partner LexisNexis

5:30 PM – 7:00 PM

1 credit in ethics; .5 in diversity, inclusion, and elimination of bias



Harper Lee's famous novel *To Kill a Mockingbird* tells the story of the pursuit of justice in the midst of racial inequality and has inspired countless attorneys to pursue a calling in law. This seminar will discuss not only the professional conduct lessons taught to us by *To Kill a Mockingbird*, but also the issues of diversity, inclusion and elimination of bias that exist both inside and outside of the courtroom.

NOVEMBER 17, 2022 (HYBRID)

Dean's Hour: Charles Evans Hughes—Guardian of the Constitution and Statesman of the Law (Law and American Culture Lecture Series)

12:30 PM – 1:30 PM

1 credit in professional practice.

NAL PROGRAM CALENDAR

NOVEMBER 30, 2022 (ZOOM ONLY)

Stress, Wellness, and the Legal Community: The Ethics of Healthy Lawyering

With the NCBA Lawyer Assistance Program and the Nassau County Assigned Counsel Defender Plan

5:30 PM – 6:30 PM

1 credit in ethics

DECEMBER 7, 2022 (HYBRID)

Dean's Hour: Legality of 3-D Printed and Homemade Guns

With the NCBA Civil Rights Committee, the NCBA Criminal Courts Law and Procedure 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.

DECEMBER 8, 2022 (HYBRID)

Dean's Hour: The Curious Case of Dr. Sam Sheppard—The Perils of Prosecution by the Law (Law and American Culture Lecture Series)

12:30 PM – 1:30 PM

1 credit in professional practice.

JANUARY 5, 2023 (HYBRID)

Dean's Hour: How to Write a Paragraph

12:30 PM – 1:30 PM

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

JANUARY 11, 2023 (HYBRID)

Dean's Hour: No One is Immune to Eminent Domain

Sponsored by NCBA Corporate Partner LexisNexis

With the NCBA Real Property Law Committee and the NCBA Municipal Law and Land Use Committee

12:30 PM – 1:30 PM

1 credit in professional practice.

Hon. Joseph Goldstein
Bridge-the-Gap Weekend

February 4-5, 2023

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"IT IS OUR HOPE THAT GENERATIONS OF ATTORNEYS WILL BENEFIT FROM THE COURSES OFFERED AT THIS PERENNIAL FAVORITE."

-- THE GOLDSTEIN FAMILY

FOCUS: COURT OF APPEALS

Christopher J. DelliCarpini

Smith v. City: The Prior Written Notice Defense Gets More Defensive

In *Smith v. City of New York*, the Second Department held that a municipal defendant in a premises-liability case meets its initial burden on summary judgment by proving *prima facie* lack of prior written notice; the burden then shifts to the plaintiff to prove an exception to that defense.[1]

This may seem contrary to the general rule that a party seeking summary judgment must first prove *prima facie* that they are not liable, particularly where the plaintiff has pleaded facts that would defeat a particular defense. However much *Smith* may be a change in the law, it is the law for now, and personal injury attorneys on both sides should bear in mind the decision's lessons for purposes of pleading and motion practice.

The Prior Written Notice Defense, And Its Exceptions

New York Administrative Code §7-201(c) is one of the "prior written notice" laws that seemingly every municipality in New York State has enacted. It provides that no civil action shall be maintained against the City for injury due to a defective "street, highway, bridge, wharf, culvert," etc., unless the appropriate City agency had previously received written notice of that defect.

The Court of Appeals recognizes only two exceptions to the prior written notice defense. The most commonly invoked one is "where the locality created the defect or hazard through an affirmative act of negligence."[2] The other exception is "where a 'special use' confers a special benefit upon the locality."[3]

Neither exception is easy to prove. The first requires that the alleged negligence "immediately results in the existence of a dangerous condition."[4] The special use exception is almost impossible to prove, such as in a case involving construction unrelated to the purpose of the roadway like a manhole or water valve—and municipalities can legislate this exception away by extending their prior written notice law, as does Section 7-201(c), to "any encumbrances thereon or attachments thereto."[5]

A Suit for Negligent Snow Removal

Smith arose from a slip-and-fall on an icy roadway. Jeri Smith was working as a site safety inspector on a construction project at a municipal wastewater treatment facility in College Point, Queens. Walking back to her car after a routine inspection, Ms. Smith slipped on black ice on the access road.[6] She brought claims for negligence and violation of Labor Law §241(6) against the City and two corporate defendants. All three defendants cross-claimed against each other, and the corporate defendants commenced third-party actions as well.[7]

The defendants moved for summary judgment, which the trial court granted in part. The corporate defendants argued that they had no duty to Ms. Smith, as they neither owned the property nor had any duty to maintain it. The City argued that it had proven that it had no prior written notice as required by Section 7-201(c), and that therefore Ms. Smith bore the burden to prove an exception to that defense. The trial court threw out the Labor Law claims and dismissed as to the corporate defendants, but held that the City failed to meet its *prima facie* burden to prove that no exception to the prior written notice defense applied here.[8]

The City and Ms. Smith appealed the trial court's decision. The City argued that there was no evidence that it had created the allegedly dangerous condition, and the corporate defendants were not entitled to summary judgment.[9] Ms. Smith argued that the black ice developed from either the piling of snow or the failure to adequately spread sand and salt, either of which was tantamount to creating the dangerous condition.[10] Interestingly, the City did not argue on appeal that the burden shifted once it proved lack of prior written notice, though it had argued that below.[11]

The Second Department Shifts the Burden

In holding that the burden shifted once the City proved lack of written notice, the Second Department relied on a line of Court of Appeals precedent. In *Yarborough v. City of New York*, the Court first held that "Where the City establishes that it lacked prior written notice under [Administrative Code §7–201(c)(2)], the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule."[12]

The Court followed *Yarborough* in *San Marco v. Village of Mount Kisco*, holding factual issues as to creation made summary judgment improper.[13] And in *Groninger v. Village of Mamaroneck* the Court affirmed summary judgment where the plaintiff's expert evidence of creation of the defect was speculative.[14]

Why, then, did the trial court in *Smith* think that the City bore the burden to disprove the exceptions to the prior written notice law? Because of a line of cases in the Second Department that appeared to hold just so.

In *Foster v. Herbert Slepoy Corp.*, the Second Department held that the defendant, a third-party contractor, proved *prima facie* its entitlement to summary judgment by showing that it had no contract with the plaintiff.[15] It did not have to prove that any of the three exceptions to third-party contractor immunity in *Espinal v. Melville Snow Contractors* applied because the plaintiff had alleged no facts that would support any of those exceptions.[16] In *Braver v. Village of Cedarhurst*, the Second Department followed *Foster* to hold that because the plaintiff had alleged that the Village affirmatively created the dangerous condition, the defendant did have to prove *prima facie* that it did not affirmatively create the condition.[17]

The court in *Smith* conceded that its "past decisions have lacked a precise consistency" with the Court of Appeals in this regard, and broke with its own precedent. Henceforth, where the City establishes that it lacked prior written notice under Section 7-201(c)(2), the burden shifts to the plaintiff to show either that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality.

Yet the court added that this burden-shifting applies even where the complaint actually alleged that the defendants created the allegedly dangerous condition.[18] Finding Ms. Smith's expert's opinion speculative and conclusory, the court held that she failed to meet her burden and that the City's motion should have been granted.

The court also affirmed the ruling of summary judgment for the corporate defendants, expending its holding in *Foster*. A third-party contractor sued for negligence meets its initial burden on summary judgment merely by proving *prima facie* that it had no contract with the plaintiff, who then bears the burden in opposition of proving one of the *Espinal* exceptions—even if the plaintiff had pleaded one of those exceptions.[19] Finding that Ms. Smith failed to raise an issue of fact in this regard, the court affirmed summary judgment.

Premises Liability Cases After *Smith*

If *Smith* is not a change in the law of summary judgment, it certainly clarifies the challenge plaintiffs face when suing municipalities and third-party contractors. Once these defendants prove the predicate to immunity, either lack of prior written notice or the absence of a contractual duty, plaintiffs will bear the burden to prove *prima facie* an exception to that duty, regardless of whether they pleaded any such exception.

Nevertheless, the decision should prompt plaintiffs to make some changes in their pleadings. Wherever they name a municipality or third-party contractor as a defendant, they should plead facts that support each of the exceptions to the applicable defense. This will not shift the burden back to the defendant anymore, but it will ensure that evidence of the facts underlying those exceptions is manifestly discoverable. Plaintiffs should also pay attention to affirmative defenses in this regard, and serve demands for particulars and evidence of the facts supporting each.

Plaintiffs obviously want to pursue these exceptions in discovery where they cannot prove prior written notice, but defendants also have an interest in uncovering the evidence of these exceptions. In principle, both sides have an interest in uncovering the evidence of all material facts, whomever that evidence favors on balance. Also, much of the evidence on these exceptions will be in defendants' possession—which will confer an obligation to preserve such evidence or risk a spoliation charge at trial.

On motion for summary judgment, defendants will certainly exploit Smith to minimize their burden and shift as much to plaintiffs as possible. The best that plaintiffs can do is prepare to meet their burden, assembling evidence on the applicable exceptions. Plaintiffs offering expert opinion on affirmative creation of a dangerous condition, or on launching a force or instrumentality of harm, must make sure that those opinions establish causation in sufficient detail, going step by step from the alleged negligence to the plaintiff's injury.

Establishing liability against municipalities has never been easy, and *Smith* does not make it easier—except in removing any ambiguity about just how big a challenge plaintiffs face. Hopefully, clarity on the burdens will lead to more efficient discovery of evidence on those issues. Whether it does, however, will depend on how well counsel for both sides tailor their discovery demands and deposition questions to ascertain the applicability of any of these exceptions.

1. 2022 N.Y. Slip Op. 05226, 2022 WL 4361183 (2d Dep't Sept. 21, 2022).
2. *Smith, supra* n.1, at *6 (quoting *Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474 (1999).
3. *Id.*
4. *Smith, supra* n.1, at **6 (quoting *Yarborough v. City of New York*, 10 N.Y.3d 726, 728 (2008)).
5. *See Drake v. City of Buffalo*, 95 Misc.2d 29 (City Ct., Buffalo 1978).
6. *Smith, supra* n.1, at *2.
7. *Smith, supra* n.1, at *2.
8. *Smith, supra* n.1, at *3.
9. *Smith*, No. 2018-14531, NYSCEF 12 (Appellant-Respondent's Brief).
10. *Smith, supra* n.1, at *4.
11. *Smith, supra* n.1, at *3.
12. *Smith, supra* n. 1, at *6 (quoting Yarborough, 10 N.Y. 2d 3d at 728).
13. 16 N.Y.3d 111, 117 (2010).
14. 17 N.Y.3d 125 (2011).
15. 76 A.D.3d 210 (2d Dep't 2010).
16. *Id.* at 214 (citing *Espinal*, 98 N.Y.2d 136, 140 (2002)
17. 94 A.D.3d 933 (2d Dep't 2012).
18. *Smith, supra* n.1, at *10.
19. *Smith, supra* n.1, at *11 (citing Espinal, 98 N.Y.2d at 140).

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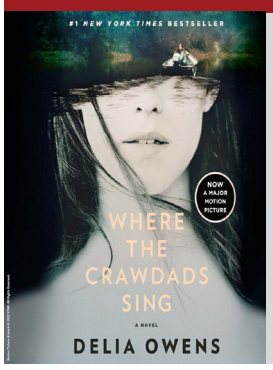
FOCUS: BOOK REVIEW



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Where the Crawdads Sing
A Novel, By Delia Owens

Ann Burkowsky and Bridget Ryan

The language of the court was, of course, not as poetic as the language of the marsh. Yet Kya saw similarities in their natures.

Now a major motion picture, the *New York Times* bestseller *Where the Crawdads Sing*, the 2018 debut novel written by Delia Owens, has sold millions of copies worldwide. The novel alternates between the present and the past, while telling the poignant story of Catherine Danielle Clarke. She is also known as Kya, or "Marsh Girl." A story of survival at the very heart, *Where the Crawdads Sing* takes the reader on an intriguing and emotional journey by its protagonist.

The way in which the author succinctly weaves together the nature of the marsh with themes of abandonment, survival, and trust make this novel a page turner and extraordinary read.

The "Marsh Girl"

Abandoned by her mother and siblings, young Kya is left alone with an abusive and neglectful father. Her father abandons their family home—a shack in the marsh of North Carolina—in later years. It is no question that Kya is no ordinary little girl. Intelligent and resourceful, she is forced to teach herself how to survive without a formal education, resources, or parental guidance, all the while living in isolation.

In the nearby town of Barkley Cove, riddled with social prejudice based on both race and class, Kya is known as "the Marsh Girl." Seen by locals as a wild animal unfit for society rather than a human being, she is deemed an outcast, particularly by the upper-class. The repercussions of this exclusion not only affect Kya mentally, but extend into other aspects of her life, preventing her from obtaining a proper education or going to the grocery store without facing harassment.

The Murder of Chase Andrews

While time has successfully allowed her to acquire the skills necessary for survival through observing the living creatures of the marsh, like the herons and seagulls, Kya begins to long for human connection. Her only friend, Tate, a boy she met in childhood, and later her first love, leaves town to pursue his bachelor's degree and does not return as promised, leaving Kya alone once more.

In her search to fill this void, Kya meets Chase Andrews, the town football star born to an upper-class family. Kya often sees Chase boating with his friends near the marsh. Though wary of Chase upon their first encounter, Kya quickly becomes entranced with him, waiting for his return to her shack when he comes to visit, and meeting him out on the marsh late at night.

The two become romantically involved. Chase decides, however, to keep their relationship a secret to avoid embarrassment from his friends and family—and the real possibility of his own exile from society. All the while Chase promises Kya that she will one day meet his family and friends, and that he will marry her.

When Chase Andrews is found dead at the foot of an abandoned fire tower by two young boys on the morning of October 30, 1969, police and townspeople believe it to be a homicide. Kya is assumed to be the offender, solely based on her reputation as the town's pariah. While the local police take the time throughout the course of the novel to rule out other suspects, Kya is ultimately taken into police custody where she spends two months in jail. A murder trial looms over her head in a lonely jail cell, where her first love Tate acts as one of her only comforts when he comes to visit her frequently to offer his support.

The Trial

It is time, at last, for us to be fair to the Marsh Girl.

Tensions run high as Chase's murder trial plays out in real time for the entire town to see. Some were in favor of Kya's conviction, the punishment for which would be the death penalty, while others were there merely for entertainment. In a small town such as Barkley Cove, the spectacle of the "Marsh Girl" on trial was entertainment in and of itself.

The prosecution had a difficult task in front of them, as there was no murder weapon, fingerprints, or footprints. They would have to rely solely on witness testimony, most of which was not substantial. Not a single witness for the prosecution could definitively say that they had seen Kya anywhere near the area on the night of the alleged murder.

Without any evidence to prove that Chase had been pushed off the tower, they brought forth what they believed to be a secret weapon to prove their case. They come forward with a red cap with wool fibers containing strands of Kya's hair that were found on Chase's denim jacket.

However, the defense argued that this could also not be definitive evidence of Kya's guilt, as the fibers could have appeared on the jacket as long as four years prior (the extent of their relationship), to the night of his death. Additionally, there was no other sign of her proximity to Chase that night; there were no skin fragments under his fingernails, no fingerprints on his jacket buttons or the grate of the tower, and no footprints.

Witnesses for the defense stated that they had all seen Kya leave town on the night in question. As such, there could have been no reasonable way for someone to return from out of town, commit the crime, and then leave town again within the proposed timeline.

The prosecution emphasized Chase Andrews' "shining" reputation within the town and his accomplishments as a football player. The prosecution strongly emphasized the belief that Kya's lifestyle made her capable of committing such a crime, although not one witness was able to produce a viable account of the events that occurred the evening of Chase's death that would place Kya at the scene.

The jury ultimately found Kya not guilty of murder in the first degree, concluding that Chase's death resulted from an accidental fall from the tower where his body was found. Upon her release, Kya's relationship with Tate is rekindled, and the two ultimately marry to live out the rest of their days in Kya's marsh.

It is later revealed (shortly after her funeral) that Kya was in fact the murderer. When Tate finds a box of poems and Chase's shell necklace hidden under the floorboards of their shack that prove that she did in fact murder Chase Andrews—a shocking and unexpected twist that readers do not see coming. Deciding it better to put an end to this story, Tate decides to burn the poems proving her guilt.

For a second, he stared at Chase's shell in his open palm and then dropped it on the sand. Looking the same as all the others, it vanished. The tide was coming in, and a wave flowed over his feet, taking with it hundreds of seashells into the sea. Kya had been of this land and of this water; now they would take her back. Keep her secrets deep.

Final Thoughts

Although the reader is made aware of a violent sexual altercation between Chase and Kya in a remote area of the marsh, there is nothing to indicate that Kya would have retaliated, and the identity of the murderer is not disclosed until the final pages of the novel.

Had Kya not been abandoned repeatedly, forced to live in isolation, and rejected by society and her own family, and had law enforcement and social workers not let a young child fall through the cracks, it is likely that this story could have had a very different ending. With proper, formal education and socialization skills, Kya may have lived a less guarded life, one without the fear of abandonment and threats to her life. Could this story have ended differently had society welcomed her rather than ostracized her?

Can blame be placed on a protagonist that, after enduring a violent altercation, feared her attacker, and acted in retaliation and apprehension of what he may do next? Kya truly feared what Chase was capable of and believed that the only way to rid herself of this anxiety was to eliminate the threat altogether.

This topic has been widely debated amongst readers and critics alike and translates into discussions of real-world events that occur quite frequently, specifically between abusers and their partners.

Although the author makes it easy for the reader to become enamored with Kya, should she have faced punishment for the crime she committed? This question may never have a definite answer.

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New Cybersecurity, Privacy and Data Protection Category of CLE Credit Effective in 2023

Jennifer C. Groh

On June 10, 2022, New York became the first state to require attorneys to complete at least one credit of cybersecurity, privacy, and data protection training as part of their continuing legal education (CLE) requirements. The new requirement will take effect July 1, 2023. The credit is broken down into two categories: *Cybersecurity-Ethics and Cybersecurity-General*.

Cybersecurity, Privacy and Data Protection-Ethics must relate to lawyers' ethical obligations and professional responsibilities regarding the protection of electronic data and communication and may include, among other things: sources of lawyers' ethical obligations and professional responsibilities and their application to electronic data and communication; protection of confidential, privileged and proprietary client and law office data and communication; client counseling and consent regarding electronic data, communication and storage protection policies, protocols, risks and privacy implications; security issues related to the protection of escrow funds; inadvertent or unauthorized electronic disclosure of confidential information, including through social media, data breaches and cyber-attacks; and supervision of employees, vendors and third parties as it relates to electronic data and communication.

Cybersecurity, Privacy and Data Protection-General must relate to the practice of law and may include, among other things, technological aspects of protecting client and law office electronic data and communication (including sending, receiving and storing electronic information; cybersecurity features of technology used; network, hardware, software and mobile device security; preventing, mitigating, and responding to cybersecurity threats, cyber-attacks and data breaches); vetting and assessing vendors and other third parties relating to policies, protocols and practices on protecting electronic data and communication; applicable laws relating to cybersecurity (including data breach laws) and data privacy; and law office cybersecurity, privacy and data protection policies and protocols.

All attorneys, regardless if newly admitted or experienced, will be required to complete one credit in this new category, but it does not change how many credits are required for the biennial registration period, which is 32 hours for newly admitted attorneys and 24 for experienced attorneys. Beginning on **July 1, 2023**, both experienced and newly admitted attorneys will need to comply with this one-credit requirement.

Newly admitted attorney requirements are below:

Newly Admitted Attorney Required CLE Categories (for attorneys admitted on or after July 1, 2023)	Year 1 CLE Credit Hours	Year 2 CLE Credit Hours
Law Practice Management, Areas of Professional Practice, and/or Cybersecurity, Privacy, and Data Protection-**General**	7 see below	7 see below
Skills	6	6
Ethics and Professionalism	3	3
Cybersecurity, Privacy, and Data Protection-**Ethics**	see below	see below
Total Number of CLE credit hours	**16**	**16**

Cybersecurity, Privacy, and Data Protection ("Cybersecurity") Category

- You must complete at least 1 credit in Cybersecurity as part of the 32-credit requirement.
- You may choose to complete the Cybersecurity credit:
  - in Year 1 or Year 2 (as part of the 16 credit-requirement for that year)
  - in Cybersecurity **General** or Cybersecurity **Ethics** (or a combination of the two)
- You may apply a maximum of 3 credit hours of Cybersecurity **Ethics** -- but not Cybersecurity **General** -- toward your 6-credit Ethics and Professionalism requirement
  - *Example*: if you complete 1 credit in Cybersecurity **Ethics** in Year 1, you satisfy your Cybersecurity requirement, and then need to complete only 2 credits in Ethics and Professionalism for that year.
  - *Example*: if you complete 1 credit in Cybersecurity **General** in Year 1, you satisfy your Cybersecurity requirement and must complete an additional 6 credits in Law Practice Management, Areas of Professional Practice, and/or Cybersecurity, Privacy, and Data Protection-**General** for that year.

For Cybersecurity, Privacy and Data Protection-General courses, newly admitted attorneys may earn CLE credit in any approved format, including on-demand offerings and through CLE programs offered live or via Zoom/Teams, etc.

For Cybersecurity, Privacy and Data Protection-Ethics courses, newly admitted attorneys may earn CLE credit only in traditional live classroom, fully interactive videoconference, or in other live formats (e.g., Zoom programs) where questions are permitted during the course.

Experienced attorney requirements are below:

Experienced Attorney Required CLE Categories (for attorneys due to re-register on or after July 1, 2023)	Required CLE Credit Hours
Ethics and Professionalism	4
Diversity, Inclusion and Elimination of Bias	1
Cybersecurity, Privacy and Data Protection (General or Ethics)	1*
Any CLE category of credit	18
Total Number of CLE credit hours	**24**

*You may choose to complete the Cybersecurity credit in Cybersecurity **General** or Cybersecurity **Ethics** (or a combination of the two: ½ credit in Cybersecurity **General** and ½ credit in Cybersecurity **Ethics**).

You may count a maximum of 3 credit hours of Cybersecurity **Ethics** -- but not Cybersecurity **General** -- toward your 4-credit Ethics and Professionalism requirement.

- *Example*: if you earn 3 credits in Cybersecurity Ethics, then you still need to earn 1 credit in Ethics and Professionalism, 1 credit in Diversity, Inclusion and Elimination of Bias and 19 credits in any category of credit -- total of 24 credits

Providers, such as the Nassau Academy of Law, may begin issuing New York CLE credit in Cybersecurity, Privacy and Data Protection to attorneys who complete courses in this new category on or after January 1, 2023. To that end, the Nassau Academy of Law is in the process of planning a **Dean's Hour on January 18, 2023**, that will offer the new category of credit. More details to follow in the coming weeks.

Regardless of the type of CLE credit that you need to fulfill, the Nassau Academy of Law and the Nassau County Bar Association can help. NCBA membership provides for unlimited attendance at Nassau Academy of Law programs or NCBA Committee meetings offering CLE. In addition, a free 12 credits of CLE on Demand are included with membership with any credits over 12 available for purchase at $22/credit. Please note that Part 36 programs are *excluded* from the free CLE offer. Attendance is also free at our yearly Hon. Joseph Goldstein Bridge-the-Gap Weekend, currently scheduled for February 4 and 5, 2023 in person here at the Bar Association. Our Bridge-the-Gap program is designed for both newly admitted and experienced attorneys, and it's a great way to catch up on credits or to learn a new practice area. Sign-up is available for the full weekend, one day, or an individual class.

For all CLE related assistance, please contact the Academy at (516) 747-4464 or email at academy@nassaubar.org. We look forward to seeing you, whether virtually or in person.

Jennifer C. Groh is the Director of Continuing Legal Education for the Nassau Academy of Law at the Nassau County Bar Association. The Nassau Academy of Law hosts CLE programs throughout the year. For additional information, contact Jennifer at jgroh@nassaubar.org or (516) 747-4077.

FOCUS: LAW AND AMERICAN CULTURE

Frontier Justice in the City by the Bay

Rudy Carmenaty

San Francisco itself is art, above all literary art. Every block is a short story, every hill a novel. Every home a poem, every dweller within immortal.

—William Saroyan

Clint Eastwood's 'Dirty Harry' Callahan is an all-American maverick who harkens back to an earlier time. The character evokes the Old West transposed to an urban setting. Beginning with Don Seigel's original film, Eastwood crafted a mythic figure for moviegoers the world over.

An inspector for the San Francisco Police Department, Callahan is a no-nonsense cop in the most liberal and most liberated community in America. The golden metropolis of the west, San Francisco occupies a unique place in the nation's collective imagination. But this picturesque locale has its seamy side.

Into this gritty milieu, Callahan confronts the competing impulses of the age. He has an ingrained sense of right and wrong, even if it means ruffling the feathers of polite society. He shoulders every distasteful duty imaginable. Critics have branded him a rogue hero.

In all actuality, Callahan is a rebel. He defies authority, paradoxically, to impose some semblance of order in a situation which has gone out-of-kilter. In doing so, he satisfies the audience's longing for an ideal of frontier justice. An ideal that probably never existed outside the realm of fiction.

East is East, and West is San Francisco.

—O. Henry

Callahan's lineage can be traced to the 'Man with No Name,' the nihilistic gunfighter Eastwood depicted in Sergio Leone's 'Spaghetti Westerns.'[1] He is also a kindred spirit to Ethan Edwards, John Wayne's character from John Ford's *The Searchers* (1956).

The appeal of the westerner resides in his predisposition to action, regardless of the consequences. In today's highly regimented society, the cowboy is the ultimate symbol of unbridled freedom. By the time of the film's release, the western was passé, a genre in eclipse.

Callahan reimagines this motif, the policeman as a latter-day cowboy. Like his folkloric antecedent, Harry is a loner without attachments to home or family. He is strictly a functional creature with a job to do. A job that others are unable or unwilling to perform.

Harry is confronted with the fundamental conflict between the procedural requisites of the law and the primal urge to obtain justice. At the heart of *Dirty Harry* are underlying themes of guilt and salvation. Callahan, with his powerful mixture of alienation and violence, prods at the psyche.

In *Coogan's Bluff* (1968), Siegel brought Eastwood's western persona to the wilds of Manhattan. Coogan plays an Arizona sheriff, out of his element in New York. This film serves as a thematic bridge in the arc of Clint's career. With Cogan under his belt, Callahan was the next, logical step in the actor's progression.

Whereas Coogan is unaccustomed to city life, Callahan is on intimate terms with the criminal element and the ever-burgeoning legal bureaucracy. He aggressively confronts the former, while consistently being thwarted by the latter.

San Francisco is a golden handcuff with the key thrown away.

—John Steinbeck

Callahan's frustrations with the system are all too clear. Only a short time prior, his actions were deemed to be acceptable. The Warren Court transformed the law, reflecting a shift in elite opinion. As the film unfolds, Harry is resistant to what the law has become.

During the previous decade, the U.S. Supreme Court ushered in a legal revolution. Under Chief Justice Earl Warren, a series of landmark decisions were rendered in the field of criminal procedure. *Mapp v Ohio* (1961), *Escobedo v Illinois* (1964), and *Miranda v Arizona* (1966) redefined the rights of the accused.

Mapp v Ohio extends the exclusionary rule to the states, necessitating evidence illegally obtained be excluded in a criminal prosecution.[2] *Escobedo v Illinois* requires that during a criminal investigation a suspect be provided counsel.[3] Miranda mandates that those in police custody be told they have the right to remain silent and the right to an attorney.[4]

With an upswing in violent crime, these rulings were held, rightly or wrongly, responsible for tying the hands of the police. Many felt this emphasis on the rights of criminal suspects came at the expense of public safety. Richard Nixon won the presidency in 1968 campaigning for 'law and order.'

It is a good thing the early settlers landed on the East Coast; if they'd landed in San Francisco first, the rest of the country would still be uninhabited.

—Herbert Mye

Callahan's antagonist is the sadistic psychopath 'Scorpio' (Andy Robinson). Scorpio was inspired by 'Zodiac,' a serial killer who menaced San Francisco in the 1960's.[5] Like his real-life counterpart, Scorpio kills without compulsion. The perfect foil, his malevolence validates Harry's actions with the ends justifying the means.

Scorpio relishes the willful infliction of pain. His victims include: a woman killed with a sniper's rifle, shades of the Kennedy assassination; an African American child who is shot in the face simply for being black; and a teenage girl who Scorpio rapes and leaves to die buried in an earthen grave.

One further observation, Scorpio's belt buckle takes the form of a mutilated peace sign. The peace sign was ubiquitous then, a talisman of the counterculture and the anti-war movement. The film is rife with such subtle touches. What is not understated is the threat Scorpio represents. He needs to be brought down.

But the Mayor, the District Attorney and the judges are either helpless or hapless. Scorpio's rights, apparently, take precedence over the lives of his victims. Callahan, by contrast, is willing to break the rules to get his man. It is implicit, only by matching Scorpio's darkness can he be stopped.

Harry tortures Scorpio, to the audience's satisfaction, to obtain the whereabouts of a kidnapped girl. After Harry apprehends him, the authorities release Scorpio because Supreme Court rulings offered no choice. In Callahan's eyes, the law and justice are estranged, bordering on the mutually exclusive.

It is hardly fair to blame America for the state of San Francisco, for its population is cosmopolitan and its seaport attracts the floating vice of the Pacific; but be the cause what it may, there is much room for spiritual betterment.

—Sir Arthur Conan Doyle

The audience's empathy is with Callahan. Steadfast and incorruptible, he defies the establishment to protect the community. This comes across vividly when the DA reproaches Harry for his tactics:

> *Where have you been? Does Escobedo ring a bell? Miranda? I mean, you must have heard of the Fourth Amendment. What I'm saying is, that man had rights.*[6]

Befitting the stoic cowboy, Callahan's response is terse and laconic:

> *Well, I'm all "broken up" about that man's rights.*[7]

The film's pivotal insight follows when Callahan comes face-to-face with the Constitution as interpreted by Earl Warren:

> District Attorney: *It's the law.*
> Callahan: *Well then, the law is crazy!*
> District Attorney: *This is Judge Bannerman of the appellate court. He also holds classes in Constitutional Law in Berkeley. I've asked him for an opinion—your Honor?*
> Judge Bannerman: *Well, in my opinion, the search of the suspect's quarters was illegal. Evidence obtained thereby, such as that hunting rifle, for instance, is inadmissible in court. You should have gotten a search warrant. I'm sorry, but it's that simple.*[8]

Deeply embedded in the American character is an affinity for seeing the guilty punished and the innocent protected. A sentiment at odds with Judge Bannerman's proper constitutional determination. This is why the movie strikes such a responsive chord. Not surprisingly, Bannerman teaches Con Law at Berkeley.[9]

San Francisco is forty-nine square miles surrounded by reality.

—Paul Kantner of the Jefferson Airplane

In Dirty Harry, Callahan's most memorable lines convey a brashness born of the frontier. The second time he recites these words is just before his final showdown with Scorpio:

> *I know what you're thinking: "Did he fire six shots or only five?"*

Well, to tell you the truth, in all this excitement, I've kind of lost track myself. But being this is a .44 Magnum, the most powerful handgun in the world, and would blow your head clean off, you've got to ask yourself one question: 'Do I feel lucky?' Well, do you, punk?[10]

After dispatching the villain, Harry chucks his badge—#2211. A scene reminiscent of Gary Cooper in *High Noon* (1952), he and the law continue unreconciled.[11] That should have been the end of the saga. Hollywood however demanded a sequel, which resulted in four films of gradually diminishing quality.[12]

The critic Pauline Kael called the film "*fascist medievalism*."[13] For the conundrum intrinsic to frontier law is that of the vigilante. Does Callahan go too far in his pursuit of justice? Is he the flip side of Scorpio? The movie's own publicity campaign alluded as much:

Dirty Harry and the homicidal maniac. Harry's the one with the badge.[14]

In the follow-up *Magnum Force* (1973), Callahan, in an ironic turn, defends the criminal justice system. He takes on a death squad of motorcycles cops, all appropriately dressed in black, that execute criminals who are beyond the law's reach. Eastwood was evidently responding to his detractors.

As for Ms. Kael's critique, *Dirty Harry* can readily be dismissed as reactionary. Properly understood, it is in fact a cinematic manifestation of the public's reaction to Warren era rulings. Rulings which begrudgingly gained a broader acceptance with the passage of time. Even William Rehnquist, an opponent of *Miranda* while on the Burger Court, sustained the decision as Chief Justice.[15]

A city is where sirens make white streaks of sound in the sky and foghorns speak in dark grays. San Francisco is such a city.

—Herb Caen

The western is an evocation of the untamed frontier and the lost Eden it once suggested. As homegrown legend, it is an American morality play. It affirms the unequivocal triumph of good over evil. It stands apart from present-day attitudes and values, textured as they are with varying shades of gray.

Until popular tastes changed, the western provided a source of entertainment. Yet the need for an omnipotent hero to do battle on the audience's behalf persists. *Dirty Harry* fills that void. The film provides viewers a catharsis by serving up a folk hero to combat our vexing urban reality, with all its provocations and stresses.

Enhanced by Eastwood's iconic performance, the audience has a visceral response to Callahan because he is able to do what they can't do. Off-screen, the murky realities of the law, with all its injunctions, ultimately must hold sway. Still the character had an influence beyond the movie house.

In *Sudden Impact* (1983), Harry utters the memorable quip: "*Go ahead, make my day!*"[16] Ronald Reagan, in a case of life imitating art, would borrow the line when confronting Congress. By then Eastwood had been elected mayor of Carmel-by-the-Sea, just north of San Francisco.

While Reagan and Eastwood played the cowboy on the silver screen, both men governed pragmatically once in office. As Callahan acknowledges in *Magnum Force*, "*a man's got to know his limitations*."[17] Such are also the limitations inherent in art.

Dirty Harry is well-crafted entertainment offering a snapshot of America after the euphoria of the 1960's faded. Having reached the half-century mark, Callahan, the personification of the cowboy ethos, transcends its original context. He endures as a symbol of frontier justice in the city by the bay.

1. *A Fistful of Dollars* (1964), *For a Few Dollars More* (1965), and *The Good, the Bad & the Ugly* (1966).
2. 367 US 643.
3. 378 US 478.
4. 384 US 436.
5. Zodiac Killer Biography at www.biography.com.
6. Dirty Harry-Wikiquote at en.wikiquote.org.
7. *Id.*
8. *Id.*
9. Chief Justice Warren graduated from UC Berkeley Law School, Class of 1914.
10. Dirty Harry-Wikiquote *supra*.
11. Daniel O'Brien, *Clint Eastwood Film-Maker* 112 (1st Ed. 1996).
12. There have been five films: *Dirty Harry* (Don Siegel, 1971), *Magnum Force* (Ted Post, 1973), *The Enforcer* (James Fargo, 1976), *Sudden Impact* (Clint Eastwood, 1983), and *The Dead Pool* (Buddy Van Horn, 1988).
13. O'Brien, *supra*.
14. Dirty Harry-Wikiquote *supra*.
15. *Dickerson v United States* 530 US 428 (2000).
16. Sudden Impact-Wikiquote at en.wikiquote.org.
17. Magnum Force-Wikiquote at en.wikiquote.org.

Celebrating 40 Years of Mock Trial...

Continued from Cover

from nearly 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 shifted to a virtual format. While the format has yet to be determined for the 2023 competition, the dedication of the NCBA members who volunteer their time to serve as attorney advisors for the teams in the competition, as judges for the seven rounds that make up the competition, and as Chairs who oversee the running of the tournament each year, will make certain that this Mock Trial year will be a rewarding and worthwhile experience for all involved.

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.

NCBA Announces First-Ever Law Student Committee

Bridget Ryan

The NCBA is excited to announce the creation of its newest committee open to all NCBA student members: the Law Student Committee!

This is the first-ever committee targeted specifically to law students at the NCBA. The goal of the Committee is to provide local law students the opportunity to network with practicing attorneys, gain insight into the legal field, and foster professional relationships with peers and future colleagues. The Committee will be chaired by NCBA Special Events Assistant/WE CARE Coordinator Bridget Ryan, who is a part-time law student.

Each meeting of the Committee will focus on the distinct needs of law students, such as tips on studying for the Bar, improving interview skills, finding a niche in law, and more!

If you are interested in joining the Law Student Committee, contact NCBA Committees Liaison Stephanie Pagano at spagano@nassaubar.org or (516) 747-4070.

Book Signing with Judge John Gleeson

On Thursday, September 15, Judge John Gleeson, retired U.S. District Court Judge and former Assistant U.S. Attorney for the Eastern District of New York from 1985 to 1994—noted for his prosecution of Mafia cases, most notably that of Gambino crime boss, John Gotti—spent an evening at the NCBA to share his novel, *The Gotti Wars: Taking Down America's Most Notorious Mobster*, with members and their colleagues.

WE CARE's 26th Annual Golf & Tennis Classic...

Continued from Cover

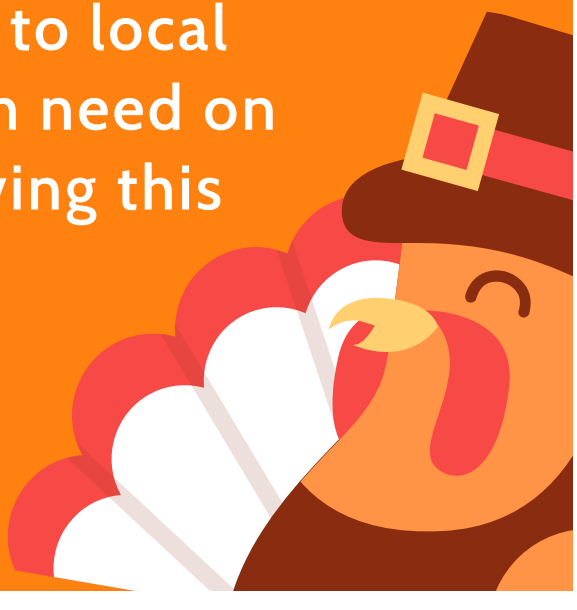
The WE CARE Fund presented awards to two honorees: **Geoffry R. Handler, Esq**., Managing Partner of McLaughlin & Stern, LLP, and **Ronald J. Bredow, PT**, CEO and Co-Founder of NY Physical Therapy & Wellness.

Money raised from all WE CARE fundraisers—the Classic included—is disbursed through charitable grants to organizations throughout Nassau County that help those most in need. Many of these organizations provide necessities, including shelter, food, and clothing—all essentials that many take for granted, but families less fortunate are desperately in need of. In total, WE CARE has raised over $5 million to help those in need and continues to do so.

To learn more about The WE CARE Fund, make a donation, or learn about volunteer opportunities, please visit www.thewecarefund.com or find WE CARE on Instagram (@thewecarefund) or Facebook by searching Nassau Bar Foundation, Inc.

WE CARE THANKSGIVING BASKET DONATIONS

Please consider donating $125 to help WE CARE provide a boxed dinner with all the trimmings to be delivered to local families in need on Thanksgiving this year.



Photos by: Hector Herrera

WE CARE

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

DONOR	IN HONOR OF
Jody Pugach	The marriage of Jill Stone's son
Mark Goidell	NCBA President Rosalia Baiamonte and the NCBA for their support of LAP
Caryle Katz	Congratulations to Tom Levin on being named one of Long Island's top lawyers
Kathleen Wright	Hon. Jeffrey A. Goodstein being honored by the Jewish Lawyers Association of Nassau County

DONOR	IN MEMORY OF
Hon. Marie F. McCormack	Julius Woll, father of Kenneth Woll, Associate Court Attorney, Nassau County District Court
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Hon. Marilyn K. Genoa
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Kathleen Wright
Hon. Denise L. Sher

Tunnel to Towers 2022

On Sunday, September 25, the WE CARE Fund partnered with Warriors for a Cause to send a team to the Annual Stephen Siller Foundation Tunnel to Towers 5K Run/Walk. The event symbolizes Stephen Siller's final footsteps from the foot of the Battery Tunnel to the Twin Towers, and pays homage to the FDNY firefighters, law enforcement officers, and thousands of civilians who lost their lives on September 11, 2001.

WE CARE Treats Local Foster Children to Islanders Game

On Sunday, October 2, the WE CARE Fund treated local foster children and their families to a New York Islanders Game! The group was able to meet Sparky, enjoy concessions, and get out on the ice for a group photo.

In Brief

Jaspan Schlesinger LLP Partner **Shannon E. Boettjer** received an eDiscovery Executive Certification (eDEx) from the Association of Certified E-Discovery Specialists (ACEDS). The following Jaspan Schlesinger attorneys were selected to the 2022 New York Metro Super Lawyers list: **Stanley A. Camhi; Sally M. Donahue; Scott B. Fisher; David E. Paseltiner and Steven R. Schlesinger** (Business Litigation). The following attorneys were selected to the 2022 New York Metro Rising Stars list: **Hanna E. Kirkpatrick; Sophia A. Perna Plank and Matthew L. Zafrin** (Banking). Touro Law Center announced the appointment of **Jothy Narendran** as Chair of the Board of Governors. Partner **Simone M. Freeman** was recognized by the *Long Island Business News* as a Top 50 Women in Business on L.I. Co-Managing Partner **Jothy Narendran** was featured in the *Long Island Business News*' PowerList as one of the 60 Most Powerful Influencers.

Two attorneys of Schwartz Ettenger, PLLC have been named to the 2022 Super Lawyers, New York Metro Edition in the following categories: **Lee A. Schwartz**, Founding Member (Corporate Law, Real Estate Law) and **Marci S. Goldfarb**, Senior Counsel (Trusts and Estates).

Jeffrey D. Forchelli and **John V. Terrana**, Co-Managing Partners of Forchelli Deegan Terrana LLP (FDT), are proud to announce that the attorneys and staff of Koeppel Martone & Leistman, L.L.C. (KML), a regional power in real estate tax law, have joined the firm. **Daniel P. Deegan**, a partner and chair of the firm's Industrial Development Agency (IDA) Benefits and Government Incentives practice group was selected to be featured in the inaugural edition of *Long Island Business News*' Most Powerful Influencers of 2022. The following attorneys were selected to the 2022 New York Metro Super List: **Joseph P. Asselta** (Construction Litigation); **Douglas W. Atkins** (Tax); **Richard A. Blumberg** (Real Estate); **William F. Bonesso** (Land Use & Zoning); **Lorraine S. Boss** (Estate & Probate); **Frank W. Brennan** (Employment & Labor); **Andrea Tsoukalas Curto** (Land Use & Zoning); **Andrew E. Curto** (Business Litigation); **Daniel P. Deegan** (Real Estate); **Kathleen Deegan Dickson** (Land Use & Zoning); **Jeffrey D. Forchelli** (Land Use & Zoning); **Nicole S. Forchelli** (Tax); **Keith J. Frank** (Employment & Labor); **Alexander Leong** (Employment & Labor); **Gregory S. Lisi** (Employment & Labor); **Gerard R. Luckman** (Bankruptcy: Business); **Mary E. Mongioi** (Business & Corporate); **Elbert F. Nasis** (Civil Litigation: Defense); **James C. Ricca** (Banking); **Brian R. Sahn** (Real Estate); **Judy L. Simoncic** (Land Use & Zoning); **Peter B. Skelos** (Appellate); **John V. Terrana** (Real Estate); **Russell G. Tisman** (Business Litigation) and **Danielle E. Tricolla** (Business Litigation). The following attorneys were selected to the 2022 New York Metro Rising Stars list: **Michael A. Berger** (Employment & Labor); **Gabriella E. Botticelli** (General Litigation); **Lisa M. Casa** (Employment & Labor); **Raymond A. Castronovo** (Construction Litigation); **Danielle B. Gatto** (Business Litigation); **Lindsay Mesh Lotito** (Banking); **Jeremy M. Musella** (Mergers & Acquisitions); **Robert L. Renda** (Real Estate) and **Erik W. Snipas** (Land Use & Zoning).

Marian C. Rice

The following Certilman Balin Adler & Hyman, LLP attorneys were named to the 2022 New York Metro Super Lawyers list: **Lisa S. Hunter, Donna-Marie Korth, Paul Linzer, Jaspreet S. Mayall, Thomas J. McNamara, Douglas E. Rowe, Howard M. Stein** and **Paul B. Sweeney**, **Carrie Adduci, Desiree M. Gargano,** and **Rebecca R. Sklar** were named to the 2022 New York Metro Super Lawyers Rising Stars list.

Douglas M. Lieberman, a partner at Markotsis & Lieberman, P.C., has been named a 2022 Metro New York Super Lawyer in Business Litigation.

The following attorneys from the Bond, Schoeneck & King Garden City office have been recognized as 2022 New York Metro Super Lawyers: **Andrea Hyde** (Estate and Probate) and **Terry O'Neil** (Employment and Labor). **Russell Penzer** of the firm's Melville office has also been recognized as a 2022 New York Metro Super Lawyer.

Partners **Justin C. Frankel** and **Jason A. Newfield** of the law firm Frankel & Newfield have been named to the New York Metro Super Lawyers list as two of the top New York metro area lawyers for 2022.

Stephen J. Silverberg has been named to the New York Metro Super Lawyers list as one of the top New York metro area lawyers for 2022. **Scott B. Silverberg** was named to the 2022 New York Metro Rising Stars list.

The following Sahn Ward Braff Koblenz PLLC attorneys were named to the 2022 New York Metro Super Lawyers list: **Michael H. Sahn** (Land Use/Zoning); **Adam H. Koblenz** (General Litigation); **John L. Parker** (Environmental); **Robert N. Cohen** (Business Litigation); **Wayne G. Edwards** (Land Use/Zoning); **Robert A. Abiuso** (Personal Injury General: Plaintiff); **Ralph Branciforte** (Business Litigation) and **Miriam E. Villani** (Environmental). **Joshua D. Brookstein** (Land Use/Zoning) and **Joseph D. Brees** (Real Estate) were recognized as 2022 "New York Metro Rising Stars." Partner **Danny De Voe** earned the title as one of the Top 50 Women in Business Honors by *Long Island Business News*. **Elisabetta Coschignano** and **Thomas McKevitt** earned the *Long Island Business News* Leadership in Law Award.

Karen Tenenbaum was named a Top 50 Women Lawyer by Super Lawyers and a Top-Rated Women Leader in Law by Martindale-Hubbell. Tenenbaum Law, P.C. was listed by *Long Island Business News* as a Top Tax Law Firm and nominated by the *LI Press* as a Best Law Firm on Long Island 2023. Karen spoke on both the Federal panel and the NYS panel for the NCCPAP Accounting and Tax Symposium 2022.

Four Vishnick McGovern Milizio LLP attorneys were named to the Super Lawyers New York Metro 2022 list including managing partner **Joseph Milizio** (Business & Corporate law); partner **Joseph Trotti** (Family Law) and partner **Richard Apat** (Personal Injury). Partner **Constantina Papageorgiou** was recognized in Super Lawyers: Rising Stars for Estate Planning & Probate. Joseph Milizio is pleased to announce that the firm was honored to be a sponsor of the Brandeis Association Annual Installation Ceremony and Gala. Partner **Joseph Trotti** led a panel on matrimonial and family law at the Twelfth Annual St. John's Student-Alumni Career Conference. Mr. Trotti also led a virtual panel for members of the Family Law and Child Advocacy Society (FLCAS) at St. John's University School of Law.

Capell Barnett Matalon and Schoenfeld LLP Partners **Robert Barnett, Gregory Matalon, Stuart Schoenfeld**, and **Yvonne Cort** will be presenting at the 20th Annual Accounting and Tax Symposium for the National Conference of CPA Practitioners (NCCPAP) on the topics of Estate Planning for Business Owners, Tax Planning for Real Estate, S Corporations, Offers in Compromise, and Tax Planning and Asset Protections for Trusts, Elder Care and Special Needs. Partner Gregory Matalon's article, "How to Reduce Tax Exposure when Passing Down a Second Home" has been published in *The Southampton Press*, *The East Hampton Press*, and the **Sag Harbor Express**. **Robert Barnett, Yvonne Cort**, and **Gregory Matalon** have been selected as 2022 New York Metro Super Lawyers, designated as among the top five percent of attorneys in the State, and Associates **Monica Ruela** and **Erik Olson** were selected as Rising Stars.

Michael Moskowitz, founding partner of **Weltman & Moskowitz, LLP**, was named a 2022 Metro Area Super Lawyer in the category Creditor/Debtor Rights. Mr. Moskowitz is pleased to announce its attorneys and staff will be joining the firm of Falcon Rappaport & Berkman PLLC (FRB), effective as of January 1, 2023.

Robert Fallarino of Pegalis Law Group has been named the only 2023 Lawyer of the Year by *The Best Lawyers in America*© for Plaintiffs Medical Malpractice Law in Long Island.

Julia Gavrilov, a partner at Moritt Hock & Hamroff LLP, has been recently appointed to serve as a member of the Equipment Leasing & Finance Association's (ELFA) Equity Committee and as a member of its Legal Resources Subcommittee.

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 November 1, 2022–December 8, 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.

TUESDAY, NOVEMBER 1
WOMEN IN THE LAW
12:30 PM
Melissa P. Corrado/Ariel E. Ronneburger

WEDNESDAY, NOVEMBER 2
REAL PROPERTY LAW
12:30 PM
Alan J. Schwartz

WEDNESDAY, NOVEMBER 2
APPELLATE PRACTICE
12:30 PM
Amy E. Abbandondelo/ Melissa Danowski

WEDNESDAY, NOVEMBER 2
SENIOR ATTORNEY'S
4:00 PM
Stanley P. Amelkin

WEDNESDAY, NOVEMBER 2
SURROGATES COURT ESTATES & TRUSTS
5:30 PM
Stephanie M. Alberts/ Michael Calcagni

THURSDAY, NOVEMBER 3
PUBLICATIONS
12:45 PM
Rudolph Carmenaty/ Cynthia A. Augello

THURSDAY, NOVEMBER 3
COMMUNITY RELATIONS & PUBLIC EDUCATION
12:45 PM
Ira S. Slavit

THURSDAY, NOVEMBER 3
INSURANCE LAW
12:30 PM
Jason B. Gurdus

WEDNESDAY, NOVEMBER 9
MEDICAL LEGAL
12:30 PM
Christopher J. DelliCarpini

WEDNESDAY, NOVEMBER 9
LABOR & EMPLOYMENT LAW
12:30 PM
Michael H. Masri

WEDNESDAY, NOVEMBER 9
MATRIMONIAL LAW
5:30 PM
Jeffrey L. Catterson

THURSDAY, NOVEMBER 10
ASSOCIATION MEMBERSHIP
12:30 PM
Jennifer L. Koo

THURSDAY, NOVEMBER 10
INTELLECTUAL PROPERTY
12:30 PM
Frederick J. Dorchak

MONDAY, NOVEMBER 14
ENVIRONMENTAL LAW
12:30 PM
Kenneth L. Robinson

TUESDAY, NOVEMBER 15
PLAINTIFF'S PERSONAL INJURY
12:30 PM
David J. Barry

TUESDAY, NOVEMBER 15
NEW LAWYERS
12:30 PM
Byron Chou/Michael A. Berger

WEDNESDAY, NOVEMBER 16
CONSTRUCTION LAW
12:30 PM
Anthony DeCapua

WEDNESDAY, NOVEMBER 16
GENERAL SOLO SMALL LAW FIRM PRACTICE MANAGEMENT
12:30 PM
Scott J. Limmer/Oscar Michelen

WEDNESDAY, NOVEMBER 16
ETHICS
5:30 PM
Avigael C. Fyman

THURSDAY, NOVEMBER 17
ALTERNATIVE DISPUTE RESOLUTION
12:30 PM
Suzanne Levy/Ross J. Kartez

THURSDAY, NOVEMBER 17
LAW STUDENT
5:30 PM
Bridget Ryan

TUESDAY, NOVEMBER 22
DISTRICT COURT
12:30 PM
Bradley N. Schnur

WEDNESDAY, NOVEMBER 23
EDUCATION LAW
12:30 PM
Syed Fahad Qamer/ Joseph Lilly

TUESDAY, NOVEMBER 29
DIVERSITY & INCLUSION
5:30 PM
Rudolph Carmenaty

WEDNESDAY, NOVEMBER 30
BUSINESS LAW TAX & ACCOUNTING
12:30 PM
Varun Kathait

WEDNESDAY, NOVEMBER 30
CRIMINAL COURT LAW & PROCEDURE
12:30 PM
Christopher M. Casa

THURSDAY, DECEMBER 1
PUBLICATIONS
12:45 PM
Rudolph Carmenaty/ Cynthia A. Augello

THURSDAY, DECEMBER 1
COMMUNITY RELATIONS & PUBLIC EDUCATION
12:45 PM
Ira S. Slavit

TUESDAY, DECEMBER 6
WOMEN IN THE LAW
12:30 PM
Melissa P. Corrado/ Ariel E. Ronneburger

WEDNESDAY, DECEMBER 7
REAL PROPERTY LAW
12:30 PM
Alan J. Schwartz

THURSDAY, DECEMBER 8
INTELLECTUAL PROPERTY
12:30 PM
Frederick J. Dorchak

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