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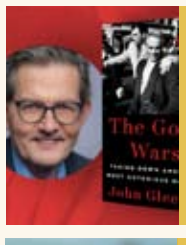

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Spotlighting the NCBA Lawyer Assistance Program

FROM THE PRESIDENT

Rosalia Baiamonte

The mental health crisis gripping our state has drawn heightened scrutiny amid the COVID-19 pandemic. The collective mental health of the legal profession is under severe strain. The results of the recent ALM Intelligence 2022 Mental Health and Substance Abuse Survey confirm what is already known: the situation remains grave. "The proportion of respondents who agree that mental health problems and substance abuse are at a "crisis level" in the legal industry has grown each year since 2019, reaching 44% in the most recent survey."

There are only three lawyer assistance programs within the State of New York that are staffed with licensed mental health practitioners who provide direct LAP services, those being: the New York State Bar Association's Lawyer Assistance Program, the New York City Bar Association's Lawyer Assistance Program, and the Nassau County Bar Association's Lawyer Assistance Program (LAP). NCBA LAP services the 10th Judicial District, comprised of the Long Island Counties of Nassau and Suffolk.

Under the guidance of Elizabeth Eckhardt, PhD, LCSW, Director, NCBA LAP provides a range of services to lawyers, judges, law students, and their immediate family members who are struggling with alcohol or drug abuse, depression, anxiety, stress, as well as other addictions and mental health issues. LAP services are free and strictly confidential via Section 499 of the Judiciary Law and the Rule of Professional Conduct. LAP is completely independent of the Grievance Committees of the Appellate Division and NCBA.

According to the *ABA Profile of the Legal Profession* published in July 2020, there are more than 1.3 million lawyers in the United States; New York State has more lawyers than any state in the country, approximately 184,000. According to the data published in July 2019 in the *NYLJ 100: Attorney Concentration by County*, there are 14,866 attorneys in Nassau County, which has the second-most concentration of attorneys only after New York County (95,005 attorneys). Additionally, there are 8,265 attorneys in Suffolk County (representing the 5th highest concentration of attorneys). Combined, the 10th Judicial District represents 23,131 attorneys in the State of New York. Thus, a substantial section of the legal profession—12.6%—is concentrated in the 10th Judicial District. These metrics do not capture the 911 law students enrolled at Maurice A. Deane School of Law at Hofstra University in Nassau County, or the 486 law students enrolled at Touro Law Center in Suffolk County. Nor do these metrics capture Long Island attorneys who have been disbarred/suspended who participate in monitoring programs.

In the most recent Bar year alone, from June 2021 through July 2022, NCBA LAP has served 156 new and ongoing clients (lawyers, judges, law students, immediate family members). These services include individual professional counseling sessions, peer counseling, intermittent support, law office closings, assessments for monitoring, and referrals for outside treatment (inpatient treatment, intensive outpatient treatment, outpatient mental health treatment, psychological or substance abuse evaluations). Sixty percent (60%) have involved mental health related issues, including anxiety, stress, depression, bipolar/borderline personality, PTSD, suicidal ideation, vicarious trauma, burnout, and anger management; 30% have involved substance use and other compulsive behaviors including gambling and sex addiction; and 10% have involved Character and Fitness, work-life balance, bar exam support, psych-education, and referrals. In addition, LAP has several ongoing monitoring cases involving attorneys seeking reinstatement, bar applicants, and/or law students. During this bar year, LAP has held more than 1,600 individual, group and assessment sessions (this includes individual professional counseling sessions, peer support sessions, the Thomas More AA meetings, Mindfulness Monday sessions, Career Transition Group, and character and fitness Assessment). In this past Bar year alone, more than 1,060 attendees have benefitted from LAP events and programs, including on-site and off-site continuing legal education programs, seminars, and stress-management/wellness workshops at NCBA, law schools and law firms, as well as the Annual 12-Step Retreat for Lawyers.

Despite the fact that NCBA LAP is a resource for approximately 13% of our state's legal industry, it was recently denied any funding from the New York Bar Foundation in the last grant cycle. While one can reasonably surmise that the pandemic has contributed to the anemic response to fundraising efforts and endowments in general, LAP's ability to expand its crucial services in the wake of increased demand remains hampered by a lack of resources.

Currently, Dr. Eckhardt—the Director and sole employee of NCBA LAP—is part-time. Additional funding would provide the opportunity to expand professional and peer support, outreach, programming, and enable NCBA LAP to effectuate several priorities. Foremost among NCBA LAP's goals is to hire a part-time or per diem licensed mental health professional to conduct additional professional counseling, run professional support groups for attorneys with attention deficit disorder, women's support groups, mental health support groups, solo and small practice support, and hold well-being events and meetings. Additionally, NCBA LAP aspires to hire an Administrative/Outreach Coordinator to recruit, schedule and coordinate programs at law firms, law schools, and legal departments, and to coordinate fundraising efforts.

The NCBA LAP is one of only three lawyer assistance programs in the state that is staffed with a licensed mental health practitioner—a fact which is both worthy of acclaim and in strong need of preservation. NCBA is grateful for the efforts of Dr. Eckhardt, as well as the unsung heroes who comprise the Lawyer Assistance Program Committee of the NCBA whose Chair is Jacqueline A. Cara, Esq. and Vice Chair is Annabell Bazante, Esq.

As President, I have mobilized various efforts to fortify and expand our fundraising campaigns for LAP. These efforts include a personal appeal to the Grant Review Committee of the New York Bar Foundation in anticipation of the upcoming grant cycle and outreach to the Nassau County Executive. Additionally, plans are underway for LAP to host its first ever fundraiser in November as well as a Walk-a-thon in May to coincide with National Mental Health Awareness month. I hope to be able to provide a favorable update on these efforts soon.

In the interim, I urge all of our members to be mindful of the crucial services provided by NCBA LAP, and that in addition to your charitable giving to WE CARE, that you consider a separate donation to NCBA LAP. Donations can be made at https://www.nassaubar.org/donate/.

If you or someone you know is in need of assistance, the 24-hour confidential helpline for lawyers in need is (516) 512-2618 or (888) 408-6222. Please contact eeckhardt@nassaubar.org or nassaubar-lap.org.

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FOCUS:
REAL ESTATE LAW

After Surfside, Could Fannie Mae and Freddie Mac Collapse the New York Secondary Mortgage Market For Condo Mortgages and Co-op Loans?

Mark S. Borten

On June 24, 2021, at approximately 1:22 A.M. EDT, Champlain Towers South, a 12-story beachfront condominium in the Miami suburb of Surfside, partially collapsed. Ninety-eight people died. Four people were rescued from the rubble, one died of injuries soon after arriving at the hospital, and eleven others were injured. Approximately thirty-five people were rescued the same day from the uncollapsed portion of the building, which was demolished ten days later.[1]

The main contributing factor under investigation is long-term degradation of reinforced concrete structural support in the basement-level parking garage under the units, due to water penetration and corrosion of the reinforcing steel. The problems were reported in 2018 and noted as "much worse" in April 2021. A $15 million program of remedial works was approved before the collapse, but the main structural work had not started. Other possible factors include land subsidence, insufficient reinforcing steel, and corruption during construction.

New (supposedly temporary) guidelines promulgated in late 2021 by the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) effectively require condo and co-op boards or their property managers to respond to a 12-question form (Fannie Form 1076A/Freddie Form 476A) seeking information about a building's structural integrity and the building's financial health. The guidelines apply to all condominium and cooperative projects with five or more attached units, even if the project is otherwise exempt from review. Fannie's new guidelines are effective for all mortgages closing as of January 1, 2022; Freddie's guidelines are effective for all mortgages closing on and after February 28, 2022.

Both documents were issued to address the risks of residential buildings with aging infrastructure and in need of critical repairs, as well as the risks related to the project's marketability and condition, the marketability of the project's units, and the project's financial stability and viability.

Under the new guidelines, mortgages secured by units in condominium or cooperative projects in need of critical repairs are not eligible for sale to Fannie or Freddie. Projects needing critical repairs remain ineligible until the required repairs and/or an engineer's inspection report has been completed and documented. The guidelines also require lenders to review any current or planned special assessments imposed on units in a condominium or co-operative project (even if paid in full for the subject unit) to determine: (1) the reason for the special assessment; (2) the total amount assessed; (3) for current special assessments, that the total amount is an appropriate allocation or, for planned special assessments, that there is adequate cash flow to fund the reason for the special assessment; and (4) for current special assessments, the amount budgeted to be collected year-to-date has been collected.

Further, in connection with the eligibility review, the homeowner's association or management company will need to complete various lending questionnaires inquiring into building conditions and special assessments involving, among other things, (1) interpreting governing documents; (2) disclosing all litigation affecting the project; (3) evaluating unit uses, multi-unit owners and project insurance; and (4) gathering information related to repairs, budgeting and special assessments.

This article explores the chronology of the Fannie/Freddie questionnaire and the practical and legal difficulties which it presents or may present.

Brief History of Fannie and Freddie

Fannie Mae and Freddie Mac are government-sponsored enterprises (GSEs). A 1938 amendment to the 1934 National Housing Act established Fannie Mae, to help ensure a reliable and affordable supply of mortgage funds throughout the country.[2] In 1954, Congress passed the Federal National Mortgage Association Charter Act, which converted FNMA into

a public-private, mixed ownership corporation. In 1968, FNMA became entirely privately owned. In 1970, FNMA was authorized to buy conventional mortgages as well as FHA and VA loans. In 1970, the secondary mortgage market was expanded when Congress passed the Emergency Home Finance Act, establishing Freddie Mac to help thrifts manage the challenges associated with interest rate risk.[3]

Fannie and Freddie are privately run under the oversight of the Federal Housing Finance Agency (FHFA). Although they do not issue residential real estate loans, the GSEs guarantee to buy a specific type and number of residential real estate loans and then resell them as "mortgage-backed securities" to investors in the secondary market. This approach is intended to make home ownership more accessible nationally and provide reliance and greater liquidity to lenders.

So much for GSEs' intended utility in theory. In order for GSEs to buy and resell loans, however, lenders and their secured loans must meet certain criteria. Due to the new project requirements issued by Fannie and Freddie in response to Surfside, mortgages on units in condominiums and co-ops with 5 or more units are ineligible for purchase by Fannie and Freddie if there is significant "deferred maintenance" or where the association has "received a directive from a regulatory authority or inspection agency to make repairs due to unsafe conditions." The projects remain ineligible until the required repairs have been made and documented. The GSEs define "significant deferred maintenance" as the "postponement of normal maintenance," but it does not mean isolated damage like a water leak or small in-unit fire.

Those with short memories may forget that in September 2008 Fannie and Freddie suffered mounting losses due to the subprime mortgage crisis. Concerned that the U.S. housing market would have a meltdown, the Federal government took direct control of Fannie and Freddie and placed them into conservatorship under the protective umbrella of the Federal Housing Finance Agency, which remains in effect.

Who Has Complained About the Questionnaire?

The Community Associations Institute (CAI), with more than 43,000 members, has been the leading provider of resources and information for homeowners, volunteer board leaders, professional managers and business professionals in more than 355,000 homeowners associations, condominiums and housing cooperatives in the United States and millions of communities worldwide. In its February 17, 2022, letter to the Acting Director of the Federal Housing Finance Agency, the CAI asked for implementation of the Fannie/Freddie guidelines to be suspended and delayed for at least one year, which appears to have fallen on deaf ears.

To demonstrate the impact of these requirements on community associations, in March 2022 CAI conducted an impact survey asking homeowner leaders, community managers and management company executives how these requirements have affected real estate transactions in their communities.[4] CAI received more than 500 responses from CAI

members across 36 states. Here are some of the highlights:

• 90% of the respondents represent condominiums and 11% represent housing cooperatives.

• 72% of respondents said that they have been impacted by the updated Fannie Mae and Freddie Mac lending guidelines.

• Between 22–28% of respondents indicated they experienced a lender denial due to issues related to the questionnaire, not concerns pertaining to building safety.

• Around 30–42% of respondents indicated that they have experienced significant delays in lender approval due to challenges pertaining to the new lender questionnaires.[5]

It may not be unreasonable to speculate that subsequent to CAI's impact survey responses being made public, these percentages have increased, perhaps markedly. Some criticism has also asserted that the questionnaire seeks to impose what amounts to a "one size fits all" approach; such an approach is arguably overbroad when equally applied to a high rise built on Manhattan bedrock and a high rise built on Florida reclaimed wetlands. Habitat Magazine says that the questionnaire "may have a chilling effect on apartment sales in co-ops and condos with extensive deferred maintenance."[6]

Issues Presented by the Questionnaire and Possible Responses

Despite the seeming simplicity of the questionnaire, it has already caused significant confusion and consternation for condo and co-op boards and their managing agents. It has been observed that the form essentially asks condo and co-op board members or managers to certify that the property is structurally sound. More specifically, certain questions inquire about the property's structural integrity. For example, question 3 asks if a condo or co-op is aware of deficiencies in the property's safety, soundness, structural integrity. Also, questions 6 and 7 ask whether funding exists for deferred maintenance, which suggests that the property in fact has deferred maintenance. The questionnaire also asks if there will be future code violations.

How should a managing agent react to the questionnaire? Consistent advice appears based on the general premise that board members are not experts about their building's structural issues and thus should not make definitive statements or representations in answering the questionnaire. One area of expressed concern is that failure or refusal to answer may raise fair housing issues, the argument being that not answering essentially guarantees that the prospective borrower's loan will be denied.

Further, it is plausible to conceive of a claim that the failure or refusal to answer the questionnaire may be intended to prevent certain people from buying into a property, as a significant number of Fannie and Freddie borrowers are minorities.[7] There may also be concerns about incorrect or inadequate responses possibly impacting personal injury, wrongful death or negligence actions or purchaser/seller lawsuits, even extending to potential civil or criminal liability such as an assertion of mortgage fraud.

Here are various suggested approaches to responding to the questionnaire:

• **Provide what you can and add disclaimers—**If new to the building, the property manager can essentially tell the board "We don't know what inspections have occurred and we're new to representing this property. The board should answer to the board's best ability, and then discuss the answers with the manager and make any necessary adjustments."

The manager may also suggest that the board answer many of these questions by attempting to partially deflect, essentially saying that the board hasn't received any information about unsafe or unsound conditions but advising the prospective lender to do the lender's own due diligence. The manager may also suggest that the board review any inspections which the board has, as well as reviewing any reserve study, and include those documents in a response, but with disclaimers about such disclosures.

• **Tell the truth: We can't meaningfully respond—** Buildings have no legal duty to respond. The association is unable to provide a substantive response, and lenders are able to do their own inspections for underwriting.

• **We don't know what we don't know—** "We're answering all these other questions for you. On the other questions, lay people are unaware of anything today, but we can't and won't attest to something we don't know." Consider engaging and consulting with an architect or engineer.

• **Don't guess—**If you don't have the information, don't guess. Err on the side of not filling out the questionnaire. If an underwriter wants that information and there have been recent inspections or a reserve study, provide such information through a records request and let them draw their own conclusions.

• **Redirect the inquiry—** Provide recent board meeting minutes which may discuss outstanding maintenance or construction projects which may significantly affect safety, soundness, structural integrity or habitability, possibly augmented by providing the building's financials.

Conclusions

An old proverb cautions that "[t]he road to hell is paved with good intentions." The recent Fannie/Freddie guidelines, while assuredly well-intentioned, may lead to unintended adverse consequences in the real estate marketplace, especially in a time of arguable recession.

This article shall not be deemed legal or tax advice, and no attorney-client relationship shall be deemed to have been created.

1. https://en.wikipedia.org/wiki/Surfside_condominium_collapse.
2. National Housing Act Amendments of 1938 (Pub. L. 75-424) Enacted: February 3, 1938 The 1938 amendments to the National Housing Act of 1934 expanded the struggling FHA mortgage insurance programs to cover certain low principal loans with maturities of up to 25 years and LTVs of up to 90 percent. At the president's request, the National Mortgage Association of Washington was chartered by the Reconstruction Finance Corporation on February 10, 1938 as a wholly owned RFC subsidiary. The Association was re-designated the Federal National Mortgage Association in April 1938.
3. Emergency Home Finance Act of 1970, Pub. L. No. 91-351, title III (1970).
4. https://www.caionline.org/Documents/Fannie Freddie Impact Survey Results March 2022 Final.pdf.
5. https://www.caionline.org/PressReleases/Pages/UPDATED-FANNIE-MAE-AND-FREDDIE-MAC-LENDING-QUESTIONNAIRES-IMPACT-HOMEBUYERS,-CAUSING-POTENTIAL-DISRUPTION-TO-U.S.-AFFORDABL.aspx.
6. https://www.habitatmag.com/Publication-Content/Bricks-Bucks/2021/November-2021/Fannie-Mae-Tightens-Rules-for-Lenders-in-Wake-of-Condo-Collapse.
7. https://www.housingwire.com/articles/fhfa-mission-report-on-gse-fair-lending-reveals-racial-divide/.

Mark Borten concentrates his practice in real estate transactions with an office in Merrick.

FOCUS:
REAL PROPERTY LAW

Court of Appeals Sets the Record Straight For Commercial Tenants in *DCH Auto V. Town of Mamaroneck*

Michael P. Guerriero

On June 16, 2022, the Court of Appeals issued its decision in *Matter of DCH Auto v. Town of Mamaroneck et al.*,[1] ruling that a net lessee has the right to challenge real estate tax assessments even though it leases, not owns, the property. The unanimous ruling held that the petitioner, a net-lease tenant, had the right to grieve the tax assessments levied by the Town and Village of Mamaroneck, overruling and finding the Appellate Division, Second Department, erroneously dismissed DCH Auto's assessment challenges based on its lessee status.[2]

DCH Auto settled a matter of statewide importance in reaffirming the rights of commercial tenants to file complaints pursuant to Real Property Tax Law ("RPTL") §524 where, pursuant to a net lease, they are contractually obligated to pay real estate taxes on the leased parcel of real property. Historically, a generally accepted tax certiorari principle is that net-lease tenants possess standing to maintain RPTL review proceedings as a party aggrieved by the assessment.[3] However, in *DCH Auto*, the Second Department restricted the right to file RPTL §524(3) complaints to the property owner or an agent authorized in writing by the owner.[4] As such, *DCH Auto* deprived a non-owner aggrieved party of standing to file the predicate administrative complaints necessary to obtain judicial review of the assessment.

The net lease agreement is common for many types of commercial properties and thousands of tax certiorari proceedings are annually filed by net lessees throughout New York State. The lower court decision, and the Second Department decision affirming it, threatened dismissal of the thousands of pending proceedings already commenced by net lessees in the years preceding the decision, and cast doubt upon filings made in the years since.

Real Property Tax Law Assessment Review Proceedings

The Real Property Tax Law provides a scheme for fixing and reviewing tax assessments that involves both administrative and judicial review. The assessor bears the initial responsibility to investigate and establish the tax roll and, once completed, the tax roll is presumed to be accurate and free of error.[5] If dissatisfied with an assessment, the RPTL provides a two-step process for administrative review under Article 5, followed by judicial review under Article 7. After the tentative assessment roll is published by the assessor, a complainant may file an RPTL §524(3) complaint for administrative review with the assessor or board of assessment review. Second, after all complaints have been heard and determined, the final assessment roll is established by the assessor and "any person claiming to be aggrieved by an assessment" may seek judicial review of the assessment pursuant to RPTL §704(1), provided that the complainant has exhausted the remedies available at the administrative level under Article 5 by filing a complaint for review.

At the judicial level, an RPTL Article 7 assessment review proceeding by certiorari is a "special proceeding."[6] RPTL §706(1) states a petition may challenge the assessment on the grounds that it is illegal, excessive, unequal and/or misclassified, so long as the basis for review was initially raised in the predicate RPTL §524(3) complaint. The proper filing of an Article 5 complaint is a crucial prerequisite for maintaining standing in an Article 7 proceeding.

DCH Auto concerned the statutory language that governs the first step: whether the initial complaints filed by a tenant failed to meet the requirements of RPTL §524(3) because DCH was not the owner of the property at issue and therefore, as a tenant, was not "the person whose property is assessed" pursuant to RPTL §524(3).[7]

RPTL §524(3), provides, in pertinent part, that the complaint "must be made by *the person whose property is assessed*, or by some person authorized in writing by the complainant or his office or agent to make such statement who has knowledge of the facts stated" in the complaint. In contrast, RPTL §704(1), which governs step two, filing a petition for judicial review, provides that, "*[a]ny person claiming to be aggrieved* by any assessment of real property upon any assessment roll may commence a proceeding under this article by filing a petition…".

Pursuant to RPTL §706(2), to maintain an Article 7 petition, the aggrieved party "must show that a complaint was made in due time to the proper officers to correct such assessment." The Court of Appeals has recognized that a "protest is a condition precedent to a proceeding under [RPTL] article 7" and that a complainant must timely file a §524(3) complaint that identifies the property, the grounds for review of the assessment, and the extent of the relief sought.[8]

The Appellate Division, Second Department, held in *DCH Auto* that the required condition precedent was not met because the property owner did not file the predicate §524(3) complaints and *DCH Auto* was not identified in the grievances as an agent of the owner.[9] Thus, the owner's failure to file the complaint precluded judicial review of the assessment. The Second Department reached this conclusion notwithstanding that the owner authorized DCH Auto to challenge the assessments in the lease, which also obligated DCH Auto to make property tax payments. In effect, the Second Department declared the complaints a nullity because they were filed by the tenant, not the owner, and in doing so, found the term "person whose property is assessed" under §524(3) to be mutually exclusive of the term "aggrieved party" under §704(1).

In support of its restrictive interpretation that "person whose property is assessed" in §524(3) is limited to "owner," the Second Department relied solely on two of its recent cases in *Matter of Circulo Hous. Dev. Fund Corp. v. Assessor of City of Long Beach, Nassau County*[10] and *Matter of Larchmont Pancake House v. Board of Assessors and/or the Assessor of the Town of Mamaroneck.*[11]

Second Department Precedent in *Circulo Housing* and *Larchmont Pancake House*

In *Circulo*, petitioner sought a non-profit exemption pursuant to RPTL §420-a, whereby only an owner of real property is statutorily entitled to, and may apply for, such exemption.[12] The Assessor for the City of Long Beach denied the exemption application since it was made by an entity that was not the property owner.[13] The non-owner entity filed an Article 5 complaint for review of the exemption denial on the grounds that it was unlawful,[14] and upon the denial of that complaint, filed an Article 7 petition on the same grounds.[15] The Court granted the City's motion to dismiss the Article 7 petition on the basis that the underlying Article 5 complaint was not filed by the owner, thus, "the petition did not 'show that a complaint was made in due time to the proper officers to correct such assessment,' as required by RPTL §706(2)."[16]

While not expressly stated by the Court, the Article 5 complaint was, in fact, defective because it was not filed by the owner, the only party statutorily entitled to apply for and receive the RPTL §420-a exemption. In effect, *Circulo* misinterpreted RPTL §524(3) by conflating it with RPTL §420-a, stated that §524(3) contained an ownership requirement that did not previously exist and erroneously declared that the potential pool of Article 5 complainants is restricted to property owners.

In *Larchmont*, the Second Department extended *Circulo* beyond exemptions to matters involving other general grounds for assessment review including excessiveness and inequality. *Larchmont* involved a related, family-owned business that operated the property and filed the Article 5 complaints.[17] The business was not the record owner and no lease agreement existed contractually obligating it to pay the property taxes.[18] Rather, pursuant to an informal agreement with the owner, the business paid the property taxes and occupied the property rent-free.[19] The Second Department dismissed the proceedings, adopting *Circulo* for its finding that the RPTL §706(2) condition precedent was not met because the §524(3) complaints were not filed by the owner, thereby depriving the lower court of subject matter jurisdiction.[20]

The Court of Appeals affirmed *Larchmont* but on alternative grounds, finding the business was not an "aggrieved party" under RPTL §706(2) since it had no legally defined obligation to pay real property taxes and therefore lacked standing to maintain Article 7 proceedings.[21] The Court did not find that subject matter jurisdiction was lacking, nor did it adopt the *Circulo* reasoning that only a property owner may file the predicate complaints, declining to reach the issue of the proper interpretation of RPTL §524(3).

Meanwhile, the Second Department again adopted *Circulo* in *DCH Auto*, declaring that a net-lease tenant authorized to challenge the tax assessment did not satisfy Article 5 standing.[22] DCH Auto leased the subject property from the owner pursuant to a "net lease" obligating DCH to pay, in addition to rent, all the real estate taxes associated with the property.[23] The lease also granted DCH the right to contest tax assessments in place of the owner.[24] Based on the lease terms, the Court of Appeals disagreed, rejected the Second Department's interpretation that RPTL §524(3) does not confer standing upon non-owners, and reinstated the lower court proceedings commenced by net-lease tenant DCH Auto.[25]

Court of Appeals Reaffirms Established Precedent in *DCH Auto*

In *DCH Auto*, the Court of Appeals reaffirmed that a net lessee contractually obligated to pay the real estate taxes on the leased real property is included within the meaning of "the person whose property is assessed" under RPTL §524(3) and, as such, may properly commence an Article 7 proceeding.[26] The Court rejected the *Circulo* interpretation of RPTL §524(3) once and for all, declaring that "to the extent that *Circulo* is inconsistent with our holding today, it should not be followed."[27]

DCH Auto restored the generally accepted principle that a net lessee possesses standing to file the predicate Article 5 complaint and may obtain Article 7 judicial review of the assessment as a party aggrieved thereby. In so holding, the Court explained:

> "That interpretation is not only in keeping with the legislative history, but it construes the RPTL "as a whole," with "its various sections … considered together and with reference to each other" (*Matter of Anonymous v Molik*, 32 NY3d 30, 37 [2018], quoting *People v Mobil Oil Corp.*, 48 NY2d 192, 199 [1979]). Interpreting the RPTL such that a net lessee may both file the RPTL 524(3) complaint and (as is undisputed) the RPTL 704(1) petition, given that the complaint is a prerequisite to filing a petition, harmonizes the two statutory steps of our tax assessment scheme. Such a result ensures that the party with the economic interest and legal right to challenge an assessment will not be unable to raise a challenge because an out-of-possession landlord that lacks economic incentive fails to file an administrative complaint. It also avoids an inequitable result by which a net lessee may be precluded from obtaining full review of its assessment if the complaint was brought by an owner with different interests, because a petitioner in an RPTL article 7 proceeding may not add grounds for review beyond those specified in the original RPTL 524(3) complaint (*see Matter of Sterling Estates, Inc. v Board of Assessors of Nassau County*, 66NY2d 122, 127 [1985])."[28]

By abrogating *Circulo*, the Court cast aside the Second Department's disruption of settled precedent that non-owners who are contractually obligated to pay real property taxes can maintain assessment review proceedings because they are the persons aggrieved or injured by the excessive, unequal, or unlawful assessment. Commercial tenants challenging real property tax assessments may continue to pursue assessment review unimpeded, without the risk of dismissal on the basis of their lessee status.

1. 2022 NY Slip Op. 03929 (2022).
2. 178 A.D.3d 823 (2nd Dept. 2019).
3. See, *Matter of Burke*, 62 N.Y. 224, 227-228 (1875).
4. 178 A.D.3d at 825.
5. See, *Matter of Sterling Estates, Inc. v. Board of Assessors*, 66 N.Y.2d 122, 124-125 (1985).
6. See, RPTL §704(1); *and* see Civil Practice Law & Rules Article 4.
7. 2022 NY Slip Op. 03929 at 5.
8. 66 N.Y.2d at 125 (1985).
9. 178 A.D.3d at 825.
10. 96 A.D.3d 1053 (2d Dept. 2012).
11. 153 A.D.3d 521 (2d Dept. 2017), *aff'd on other grounds* 33 N.Y.3d 228 (2019).
12. 96 A.D.3d at 105; *and* see, RPTL §420-a(1)(a) & §420-a(11).
13. 96 A.D.3d at 1056-1057.
14. 96 A.D.3d at 1055; *and* see, RPTL §522(1)(a).
15. 96 A.D.3d at 1055; *and* see, RPTL §701(9)(a).
16. 96 A.D.3d at 1057.
17. 153 A.D.3d at 521.
18. *Id.*
19. *Id.*
20. *Id.* at 522.
21. 33 N.Y.3d at 236.
22. 178 A.D.3d at 825.
23. *Id.* at 824.
24. *Id.*
25. 2022 NY Slip Op. 03929 at 13.
26. *Id.* at 14.
27. *Id.* at 13.
28. *Id.* at 12.

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FOCUS: MORTGAGE FORECLOSURE

Residential Mortgage Foreclosure Updates Post-COVID-19

Madeline Mullane

Residential foreclosures are on the rise in the wake of post-COVID19 protections having lapsed. Changes are on the horizon for those who practice in residential foreclosure, with case law and legislation pending that have the potential to significantly shift the practice in the coming months. Coupled with looming economic perils, inflation, and widespread unaffordable housing, the current climate has many thinking back to the foreclosure crisis of the early 2000s and anticipating a deluge of new filings into the next year and beyond.

Foreclosures Resumed

With the new year came the first of many adjustments to protocol and procedure regarding residential foreclosures in New York State. First, on January 15, 2022, the hardship stays available to homeowners and tenants under the New York COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (EEFPA) ended, and the response from the Courts was swift. The very next day, an Administrative Order of the Chief Administrative Judge of the Courts, Lawrence K. Marks, was signed and put forth stating that among other provisions, residential foreclosures were permitted to "resume in the normal course." This order, AO 35/22, further provided that tax lien foreclosure matters may similarly proceed, now also subject to conferencing requirements as delineated in prior Administrative Order 262/21. That order, AO 262/21, signed on September 9, 2021, also provided for resumption of foreclosure actions, but as with the tax liens, deferred protocols were to be determined by each individual county including the terms of holding sales and conferencing tax lien foreclosures.

Relief Provided to Homeowners

One relief for homeowners in default and/or foreclosure came in the form of the New York State Homeowner Assistance Fund, "HAF," which opened its portal for applications in early January 2022. Homeowners were encouraged to apply and could receive awards up to $50,000 in financial assistance. HAF's intent is to assist homeowners who are behind or in forbearance on their mortgage, including seniors with reverses in default mortgages, as well as payment available for defaults on coops, taxes, and utilities. The application portal closed in mid-February after accepting tens of thousands of applicants for review. The portal has since been converted to a waiting list, should additional funds become available.

In anticipation of the burgeoning new foreclosure filings, the Mortgage Foreclosure Assistance Project, funded by the New York State Attorney General's Homeowner Protection Program (HOPP) and housed in the Bar Association, has increased outreach efforts to target homeowners who may not be aware of the services provided by the HOPP network so they can avail themselves of the free assistance. The Project, which operates through the Nassau Bar Foundation and provides free, direct, for the day representation, daily for homeowners in Nassau County Supreme Court at mandatory foreclosure settlement conferences, also hosts monthly in-person clinics where volunteer attorneys provide one-on-one confidential, general legal consultations with homeowners regarding mortgage foreclosure and related matters.

NCBA Sponsored Assistance

The Project currently employs two full time-attorneys, one full-time paralegal and one part-time paralegal, in addition to dozens of attorney volunteers, and law student interns who assist with the Project's efforts. The Project serves hundreds of residents yearly and acts as a both a legal resource and referral guide to the HOPP network.

HOPP, formed in 2012, consists of nearly 90 legal service and housing counseling agencies that provide homeowners with free mortgage foreclosure-related assistance. The overarching intent of the program is to "ensure that no family in New York ever loses their home because they do not have access to a lawyer or qualified housing counselor." With every penny counting more than ever, residents can receive assistance, for free, that may prevent foreclosure in the best outcomes, but at minimum, clients are able to be informed of considerable information regarding the process, their rights, and their options, regardless of the stage of default or foreclosure proceeding.

As new cases move forward, foreclosure sales have also begun to move forward with increased volume, with most counties statewide now having resumed socially distant, in-person foreclosure auctions. Many homeowners now facing a sale had been at the precipice of this stage of their action pre-pandemic, but have had limited options in seeking alternate housing, and have remained in the property while also being unable to save any extra money nor make a housing payment. With accruals continuing while Court cases were paused, many homeowners in new foreclosure filings will likely have unprecedentedly large reinstatement figures, making loan modification less of a viable option than ever. A recent recurring trend has many homeowners stating they have remained in their homes because they have "nowhere to go" given the state of the housing and rental market in the state, and particularly on the Island.

In Manhattan, Bronx, Brooklyn, Queens, and Staten Island, data from PropertyShark.com shows foreclosures continuing to rise toward pre-pandemic trends of new filings, with 286 new foreclosures filed in 2022. Some of these counties still have significant motion backlogs, also attributable to pandemic protections putting stays on aged caseloads. In Nassau County, data collected by the Mortgage Foreclosure

Assistance Project similarly shows an even sharper increase in cases than in the NYC area. From January through mid-July 2022, there have been 175 new tax lien foreclosures filed in Nassau County Supreme Court, compared to the 212 new residential mortgage foreclosures and 95 reverse mortgage foreclosures filed in the same time period in Nassau. The overall trend shows significant issues with homeowners' ability to afford the taxes for their property, even if they do not have a monthly mortgage obligation, which is also the case in many reverse mortgage defaults and with tax lien foreclosures. The fact that these types of cases reflect so largely in the total amount of filings for the County further bolsters the struggles many Nassau residents are having paying their taxes, both for COVID-19 related and other reasons.

Proposed Legislation Pending

Pending state legislation may also impact residential foreclosure practice in the coming months. The Foreclosure Abuse Prevention Act, Assembly Bill A7737B/Senate Bill S5473D, was passed by both the Assembly and Senate during the 2021-2022 Legislative Session. Currently, it awaits Governor Kathy Hochul's signature, and advocacy groups on both sides of the equation continue to address and assert the ramifications the Act would have on their clients and practice. The Act sets to upend 2021 landmark Court of Appeals decision, Freedom Mtge. Corp. v Engel (2021 NY Slip Op 01090), which reversed a decision of the Appellate Division as to the requirements to revoke a prior acceleration of a mortgage loan. The Engel decision favorably impacted lenders in residential mortgage foreclosures much more so than homeowners, providing for new opportunities to restart foreclosure actions that may have otherwise been time barred. The Act seeks to enforce the six-year statute of limitations in mortgage foreclosure cases more definitively and rectify the situation for the hundreds of cases which would not have been properly brought had the Engel decision not been made. Hochul's office has not commented as to whether or when she will sign.

What's Ahead

Though the landscape of residential foreclosures has fluctuated this year and certainly will through at least the next, the volume continues to increase, and the overall number of residents affected does as well. The Mortgage Foreclosure Assistance Project is continuously seeking volunteer attorneys and law students to assist with our efforts and will be hosting trainings and outreach events in coming months that all members interested in volunteering are more than welcome to attend.

For more information, please contact Madeline Mullane, Esq., Director of the Mortgage Foreclosure Assistance Project, and Director of Pro Bono Attorney Activities for the Nassau County Bar Association, at mmullane@nassaubar.org. Training is planned tentatively for October 14, 2022, with the Court, Nassau County Bar Association, Empire Justice, and HOPP.

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FOCUS: RISK MANAGEMENT

Enterprise Risk Management in Higher Education

James G. Ryan, Seema Rambaran, and Kelly McNamee

In an interview, Melanie Lucht, Associate Vice President and Chief Risk Officer at Carnegie Mellon University "CMU," said CMU began to address the emerging risks associated with the COVID-19 virus as early as January 2020[1]—weeks before the first confirmed COVID-19 case in New York devolved into a national emergency.[2] Lucht credits the institution's enterprise risk management plan for its head start to addressing the pandemic.[3]

What is Enterprise Risk Management?

Enterprise Risk Management "ERM" is a structured business process "led by senior leadership, that extends the concepts of traditional risk management and includes: [i]dentifying risks across the entire enterprise; [a]ssessing the impact of risks to the operations and mission; [d]eveloping and practicing response of mitigation plans; [and] monitoring the identified risks, holding the risk owner accountable, and consistently scanning for emerging risks."[4] Unlike traditional risk management, or silo method, which places responsibility on department or business unit leaders to identify risks in their own business unit or department—ERM focuses on identifying risks to the entire business.[5] Through this holistic approach, businesses utilizing ERM identify and analyze significant risks that might have an impact on the strategic goals of the organization and manage those risks to an appropriate level.[6]

Generally, an ERM framework consists of multiple interconnected components[7] starting with identification of the organization's values to foster alignment between culture and strategy within the organization.[8] Management defines the organization's philosophy regarding risk and determines the organization's risk appetite.[9] Zooming in from this 10,000 foot perspective, a business then identifies its unique risks that could prevent the organization from achieving its strategic goals.[10] "The purpose is to generate a comprehensive list of risks based on those events that might create, enhance, prevent, degrade, accelerate, or delay the achievement of objectives."[11] Key risk categories include compliance, legal, financial, reputational, operational and strategic.[12] Next, management conducts a risk analysis considering (1) the causes and sources of risk, including the risk's negative consequences, (2) the likelihood that these consequences will occur, (3) other attributes of the risk, (4) interdependence of different risks, and (5) the immediacy of the risk as a gauge for prioritizing the risk.[13]

Informed by the results of the risk analysis, a business then conceptualizes and documents its risk response with a focus on determining which of the identified risks require a response and what that response should be.[14] The organization then develops an action plan that includes (1) identifying and designating the appropriate personnel to own and manage the particular risk (which may not necessarily be a business's risk or compliance personnel), (2) implementing and maintaining internal controls, (3) evaluating internal controls, and (4) execution of risk and control procedures on a daily basis.[15] Underscoring the holistic approach that is at the core of ERM is an effective system of communication within the organization and across business units.[16]

Risks in Higher Education

Across industries, organizations face some of the same risks, including business model risks, reputational risks, and operational model risks.[17] In addition, colleges and universities face unique risks, including enrollment supply and compliance risks.[18] An overview of some of the major risks facing higher education today highlights the distinct nature of each risk while showcasing the relationship between each risk.

Business Model Risks

"Business model risks challenge an institution's ability to generate adequate revenue and, in some cases, to even exist."[19] This category has several sub-risks crucial for an institution's continued operations, such

as tuition dependency stemming from an institution's reliance on income from student tuition to stay in operation.[20] Unfortunately, a struggling market means rising tuition costs, which may lead to a decrease in enrollment further impacting the institution.[21] Another business model risk is recruitment and targeting of prospective students which requires a strategy that factors in diversity, costs, and pandemic-related decline in student enrollment.[22] Another relevant risk is education delivery mix (in-person classes, purely online classes, or a hybrid model). "The trend of rising tuition and declining enrollment in traditional track, in-person programs have led to an increase in alternative delivery models."[23] This creates an additional risk related to articulating the effectiveness of alternative education models.[24]

Enrollment Supply Risks

Fluctuations in student enrollment can greatly hinder an institution's ability to "forecast faculty turnover, resource use, and infrastructure needs to support the student population."[25] Enrollment may be affected by immigration and federal policies, growing economic trends, market demand, and rising student debt.[26] These factors play a critical role in students' determinations on whether to pursue higher education or enter the workforce sooner.[27] Similarly, rising student debt may curtail some students' ability to pursue higher education.[28] In turn, colleges and universities are faced with myriad risks associated with these realities.

Reputational Risks

Historically, bad press related to scandals, termination of tenured faculty, and other occurrences at colleges and universities have contributed to reputational damage underscoring the importance of managing reputational risks.[29] Negative headlines can result in fractured alumni and business relationships leading to decreased institutional support with long term effects.[30] In addition, brand management is a significant concern when considering reputational risks. Colleges and universities depend on their brand image to attract top students and faculty, and to develop relationships with outside businesses.[31]

Operational Model Risks

"Operational model risks stem from inadequate processes, people, and systems that affect an institution's ability to function efficiently and effectively."[32] ERM ensures that the institution has an adequate framework to support its operations. "Operational agility is critical to staying competitive, flexible, and relevant as strategies and business models shift."[33] Key factors include operational efficiency, facilities and asset management, business continuity and crisis management, and cybersecurity.[34] Failure to continuously assess their portfolio of business processes, identify duplicative activities or inefficiencies, or ensure each business function supports the institution's broader strategy could result in an organization's inability to deliver on academic mission.[35]

Compliance Risks

Institutions of higher education are subject to significant state and federal regulation including Title IX, Title IV, the Clery Act, and research expenditure regulations.[36] "Failure to meet compliance standards can lead to consequences ranging from loss of funding, loss of accreditation, or, in extreme cases, to lawsuits and/or criminal charges against leadership."[37]

ERM in Higher Education

"The benefits of ERM to higher education institutions resemble those found in the private sector."[38] The pandemic highlighted the flaws in relying on each operating unit to assess its own risks.[39] "A proactive ERM program may help academic leaders to keep pace with the rapidly evolving risk landscape in the higher education sector."[40] Rejection of the opportunities inherent in ERM could make the difference between one institution's success and another's loss.

ERM plans may help institutions accomplish many risk objectives, including (1) sustained competitive advantage, (2) solidified integrity and reputation, (3) effective response to significant events, (4) avoidance of financial surprises, and (5) effective management of institution-wide resources.[41] Additionally, ERM provides an opportunity to engage a cross-section of the institution's administration to effectively manage identified risks.[42]

Numerous colleges and universities have already implemented ERM plans, including CMU, the State University of New York, Rhode Island Institute of Technology, Northwestern University, Virginia State University, and Stanford University. A snapshot of CMU's ERM plan evidences its proactive approach to managing risks and identifying opportunities that "university leadership collectively agree are the most important to the achievement of the institution's strategic objectives."[43] CMU also employs a "Risk Management Working Group" made up of "cross-functional representation of both administrative and academic campus leaders" which provides strategic direction and insight into the institution's risk priorities.[44] Lucht admits that during the weeks leading up to the eventual declaration of the pandemic, CMU relied on continual collaboration, information sharing, and risk analysis across the various departments of the institution resulting in a synchronized institution-wide response.[45]

Conclusion

The pivot higher education was forced to undergo as a result of the pandemic emphasized the risks associated with an abrupt change in the educational environment. A modern approach to managing institutional risk that challenge the very existence of institutions of higher education may be found in ERM. A reactive approach to ERM could result in initial damage to an institution before its recovery. A proactive approach to ERM, like that of CMU, is an opportunity to prepare for, manage, and mitigate risks.[46] ERM is not an optional way forward for institutions of higher education but rather a mandatory plan for successfully navigating the changing environment of education.

1. *Enterprise Risk Management with Melanie Lucht*, BUSINESS INTERRUPTED (October 14, 2021) (downloaded using Spotify).
2. James Keivom, *Two Years of the Pandemic in New York, Step by Awful Step*, NEW YORK TIMES (March 15, 2022), https://www.nytimes.com/interactive/2022/nyregion/nyc-covid-timeline.html.
3. *Enterprise Risk Management with Melanie Lucht*, BUSINESS INTERRUPTED (October 14, 2021) (downloaded using Spotify).
4. *Definition of ERM*, STANFORD UNIVERSITY, https://ocro.stanford.edu/erm/key-definitions/definition-erm (last visited Jul. 31, 2022).
5. Mark Beasely, Ph. D., *What is Enterprise Risk Management (ERM)?*, NC STATE POOLE COLL. OF MGMT., https://erm.ncsu.edu/library/article/what-is-enterprise-risk-management (last visited Jul. 17, 2022); see *COSO's Enterprise Risk Management – Integrated Framework*, NC STATE POOLE COLL. OF MGMT. (Sept. 1, 2004), https://bit.ly/3SOHWIW (last visited July 31, 2022).
6. See *id.;* see *also* Meghan St. George, Manger, Baker Tilly, ACUA Webinar: Enterprise Risk Management and Business Continuity Planning: Lessons Learned from COVID-19 (February 25, 2021), https://bit.ly/3JPfYss (last visited July 31, 2022).
7. COSO's Enterprise Risk Management – Integrated Framework. NC STATE POOLE COLL. OF MGMT. (Sept. 1, 2004), https://bit.ly/3bDOkC5 (last visited July 31, 2022).
8. *Id.;* see *also* Kris Pederson, *The Board Imperative: Four ways boards can govern culture to reduce risk*, EY AMERICAS CTR. FOR BD. MATTERS LEADER (Jul. 14, 2021), https://www.ey.com/en_gl/risk/four-ways-boards-can-govern-culture-to-reduce-risk (last visited July 31, 2022).
9. See COSO's Enterprise Risk Management– Integrated Framework. NC STATE POOLE COLL. OF MGMT. (Sept. 1, 2004), https://bit.ly/3AaOU3J (last visited July 31, 2022).
10. *Enterprise Risk Management (ERM) Guide to Risk & Opportunity Assessment & Response*, OLD DOMINION UNIV., (February 2017).
11. *RIT: Guide to Risk Assessment and Response*, ROCHESTER INST. OF TECH., https://www.rit.edu/fa/compliance/enterprise-risk-management#resources (last accessed July 31, 2022); see *also Enterprise Risk Management (ERM) Guide to Risk & Opportunity Assessment & Response*, OLD DOMINION UNIV., (February 2017).
12. *Id.*
13. *RIT: Guide to Risk Assessment and Response*, ROCHESTER INST. OF TECH., https://www.rit.edu/fa/compliance/enterprise-risk-management#resources (last accessed July 31, 2022).
14. *Id.*
15. *Enterprise Risk Management, Risk Operations, Defining Enterprise Risk Management*, CARNEGIE MELLON UNIVERSITY, https://www.cmu.edu/risk-operations/erm-framework/index.html (last accessed July 31, 2022).
16. See Meghan St. George, Manger, Baker Tilly, ACUA Webinar: Enterprise Risk Management and Business Continuity Planning: Lessons Learned from COVID-19 (February 25, 2021), https://bit.ly/3QByzud (last visited July 31, 2022).
17. *Significant Risks Facing Higher Education: Taking an Enterprise Approach to Risk Management*, DELOITTE (2018), us-top-risks-higher-education.pdf (deloitte.com) (last visited Aug. 1, 2022).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Significant Risks Facing Higher Education: Taking an Enterprise Approach to Risk Management*, DELOITTE (2018), us-top-risks-higher-education.pdf (deloitte.com) (last visited Aug. 1, 2022).
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Significant Risks Facing Higher Education: Taking an Enterprise Approach to Risk Management*, DELOITTE (2018), us-top-risks-higher-education.pdf (deloitte.com) (last visited Aug. 1, 2022).
30. *Id.*
31. *Id.*
32. See id.
33. See id.
34. *Id.*
35. See *Significant Risks Facing Higher Education: Taking an Enterprise Approach to Risk Management*, DELOITTE (2018), us-top-risks-higher-education.pdf (deloitte.com) (last visited Aug. 1, 2022).
36. *Id.*
37. *Id.*
38. Cynthia Vitters, ERM Informs Post-Pandemic Path in Higher Education, WSJ (Mar. 15, 2022), ERM Informs Post-Pandemic Path in Higher Education - WSJ, (last visited Aug. 1, 2022).
39. *Id.*
40. *Id.*
41. Vincent Morris, *ERM in Higher Education* (Sept. 2007) UNIV. RISK MGMT. AND INS. ASSOC., https://bit.ly/3P6fvD6 (last visited Aug. 1, 2022)
42. *Id.*
43. *Enterprise Risk Management, Risk Operations, Defining Enterprise Risk Management*, CARNEGIE MELLON UNIVERSITY, https://www.cmu.edu/risk-operations/erm-framework/index.html (last accessed July 31, 2022).
44. *Id.*
45. *Enterprise Risk Management with Melanie Lucht*, BUSINESS INTERRUPTED (October 14, 2021) (downloaded using Spotify).
46. *Significant Risks Facing Higher Education: Taking an Enterprise Approach to Risk Management*, DELOITTE (2018), us-top-risks-higher-education.pdf (deloitte.com) (last visited Aug. 1, 2022).

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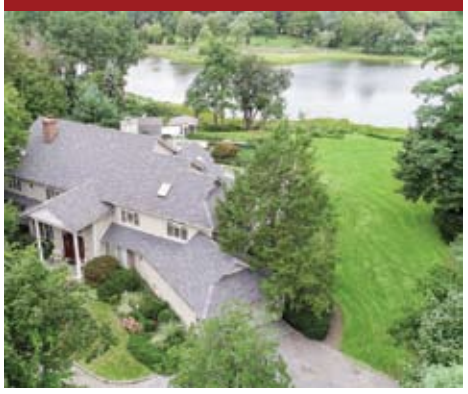
FOCUS: MUNICIPAL LAW

An Overview of Riparian Rights and Access Disputes



John C. Armentano

The surface waters of New York State are held in the public trust, allowing the right of navigation and incidental rights of fishing, boating, swimming, and other recreational purposes; however, a riparian land owner has the right of access to navigable water, and the right to make this access a "practical reality by building a pier or wharfing out."[1] On Long Island, the rights of the waterfront property owner to gain access to the water typically begin at the high water mark of a tidal water body.[2]

What Are Riparian Rights?

Riparian rights refer to a system of allocating water rights among waterfront landowners primarily providing access to the navigable portions of a waterway.[3] In New York, owners of land abutting navigable bodies of waters such as rivers, streams, oceans, seas or lakes, are commonly referred to as riparian landowners and have certain privileges know as riparian rights.[4] Technically, the term "riparian rights" refers to the interests of land owners whose property abuts a river or stream, and when the issue involves lands adjacent to tidal navigable waters, the proper term is "littoral rights." This distinction, however, is vestigial and so often blurred by the courts this it is now more commonly referred to as "riparian rights."[5]

Under New York common law, riparian rights of access traditionally attach to waterfront property by virtue of that property touching the shoreline. This right of access "follows the whole frontage of the property" and comprehends the "reasonable, safe, and convenient use" of the water for navigation, fishing, and such other purposes as commonly belong to the riparian owner exercised in a reasonable manner.[6]

One of the most important rights of the riparian owner is that of access to and from the navigable water.[7] The riparian owner's use of the surface area over the land under the water, or the land under water itself, has been characterized as an easement or servitude that extends beyond the property line with the underlying purpose to assure the upland owner's rights of practical access to navigable waters.[8] These improvements may include piers, docks or other devices to permit the safe harbor of a vessel with access to the navigable waters. This is commonly referred to as "wharfing out."[9]

The physical dimensions of such wharfage to create the riparian right of access is determined by the long standing principle of the right of direct access from a landowner's entire frontage to line of navigability; however, the riparian right ends at the navigable part of the waterway.[10]

Riparian Rights—The Reasonableness Factor

Riparian owners are subject to the reasonable use doctrine such that a riparian owner's use must be reasonable. However, this private right of access, must not to interfere with neighboring riparian landowners or the public's right of navigation.[11] Additionally, the riparian owner's right of access must also yield to the municipal exercise of police power.[12]

The term "reasonable" is a relative term, taking on significance from the circumstances and physical constraints of the riparian landowner frontage and surrounding waterfront area. As with many things, reasonableness of a dock is often in the eye of the beholder. Simply saying that the rule restricts one to a "reasonable" use is hard to quantify, therefore, the scope of what is reasonable use of a riparian rights by a waterfront landowner is defined on a case by case basis.

Riparian Rights Dispute Resolution—State Methods—Court Approved

Waterfront owners seeking to gain access to navigable water from their property often obtain permits from the various governmental agencies that regulate the location of waterfront structures, such as docks and piers. Typically, when these agencies issue their respective permit for a dock or pier, they make no determination as to the riparian rights of the waterfront owner, and often issue these permits subject to the riparian rights of others. The issuance of a permit from a regulatory authority can create an illusion or a false sense of security from these governmental agencies such as the New York State of Department of Environmental Conservation (DEC), the US Army Corps. of Engineers (ACOE) or other municipal authority have properly allocated riparian rights. The DEC permit states that it does not convey any right to "interfere with the riparian right of other" and that the permittee is responsible for obtaining "any other permits, approvals, lands, easements and rights-of-way that may be required to carry out the activities that are authorized by this permit." Similarly, the ACOE permit states that this permit does not "obviate the need to obtain other Federal, state, or local authorizations required by law." Because these agencies granted permission subject to the riparian rights of others, the courts have to decide riparian zones and how and where these boundaries are drawn.[13]

In the case of a riparian owner encroaching on the riparian rights of another, the enforcement mechanism is usually a trespass, or a nuisance suit sometimes coupled with a Real Property Actions and Proceeding Law ("RPAPL") proceeding. For example, a typical fact pattern on the waterfront may include plaintiffs suing defendants for denying or unreasonably interfering with their riparian rights. Usually, the parties own adjoining parcels of waterfront with one owner who built or is building a dock. The plaintiffs may claim that the defendant's dock is on their property, or that its existence violates their riparian right of access to navigable waters, and the ability to launch their boats. The defendants may allege that the plaintiffs, or their predecessor-in-interest acquiesced or consented to the dock's location.

It is for the court to allocate riparian zones and boundaries.[14] Depending on the body of water that is under consideration, the state has enumerated several acceptable survey methods utilized by the courts to assist balancing the reasonable right of access to navigable waters between conflicting riparian owners.[15] These recognized surveying methods arising out of Navigation Law §32 are

codified in regulations promulgated by the New York's Office of General Services in 9 NYCRR §§274.1, *et seq.* ["Interference with Riparian Rights"). Such surveying principles are summarized as follows:

- Perpendicular Method—Establishing the outshore lateral lines between the riparian littoral zones by turning 90 degrees from a base line.

- Long Lake Method—Establishment of the riparian littoral zone for the elongated body of water

- Round Lake (Pie) Method—Establishment of the riparian littoral zone for a circular body of water

- Colonial Method—This method is used to apportion riparian littoral zones by drawing base line from one corner of each lot to the other, at the margin of the upland, and running a line from each of the corners, at right angles to the base line near to the thread of the water body.

- Proportionate Thread of the Stream Method—Apportionment is made among several riparian owners in such a manner that each owner has the same percentage of footage in the thread of the stream as they have along the shoreline.[16]

In applying these accepted State methods, the question for the court to determine is: (1) which method or methods should be applied; (2) how the method should be applied; (3) whether the method(s) should be modified. Typically, court resolution of riparian rights turns to these methods and may be adapted or combined as necessitated by the shape of the shoreline or other factors.[17] Ultimately, the court must provide "clear riparian lines so that the construction of piers and wharfs and the movement of boats is accomplished in an orderly fashion, treating all parties equally," and applying the State's methods.[18] When determining which method to apply or whether and in what manner to modify either such rule, the court's paramount concern is to protect a landowner's right of direct access from their entire shoreline frontage to their equitable share of the line of navigability.[19]

Conclusion

Cases involving riparian rights are fact-specific. Because the court will typically decide a riparian rights dispute by using a factor of reasonableness, it is vital to present your side of the dispute as the reasonable side.

1. *Town of Oyster Bay v. Commander Oil Corp.*, 96 N.Y.2d 566, (2001).
2. *Town of Brookhaven v. Smith*, 188 N.Y. 74 (1907).
3. *Tiffany v Town of Oyster Bay*, 234 NY 15 (1922).
4. *Town of Hempstead v. Oceanside Yacht Harbor,* 38 A.D.2d 263 (2d Dept 1972), aff'd 32 N.Y.2d 859 (1973).
5. *Commander Oil, supra note 1.*
6. *Oceanside Yacht Harbor, supra note 4.*
7. *White Gratwick & Mitchell v. Empire Engineering Co.*, 240 N.Y. 648 (1925).
8. *Trustees of Town of Brookhaven v. Smith*, 188 N.Y. 74 (1907).
9. *Commander Oil, supra note 1.*
10. *Freeport Bay Marina v. Grover*, 149 A.D.2d 660 (2d Dept. 1989).
11. *Oceanside Yacht Harbor, supra note 1.*
12. *Haher's Sodus Point Bait v. Wigle*, 139 A.D.2d 950 (4th Dept 1988) (see also, Nav. § 46-a where the Legislature has delegated certain police powers over navigation to enumerated municipalities).
13. *Sodus Point, supra note 12.*
14. *Errico v. Weinstein*, 25 Misc.3d 1224(A) (Sup. Ct. Nassau Co. 2009).
15. *Freeport Bay Marina, supra* note 10.
16. 9 NYCRR §274.5.
17. *See, Muraca v Meyerwitz*, 13 Misc.3d 348 (Sup. Ct. Nassau Co. 2006).
18. *Errico, supra note 14.*
19. *Freeport Bay Marina, supra* note 10.

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FOCUS: ENVIRONMENTAL LAW

Uncertainty of the Administrative State After *West Virginia v. EPA*

Michael H. Sahn, John L. Parker, and Christopher R. DeNicola

The United States Supreme Court held this summer, in *West Virginia v. EPA*, that a series of Environmental Protection Agency "EPA" regulations promulgated pursuant to the Clean Power Plan "CPP" extended beyond the authority that Congress delegated to the EPA.[1]

The West Virginia decision may change the landscape for administrative regulations on the federal and state levels. In its decision, the Court invoked the previously little-used "major questions" doctrine, which restricts administrative agencies from exceeding their statutory authority by requiring a clear statement of congressional authorization in "extraordinary cases of economic and political significance."[2]

The *West Virginia* decision brings into the spotlight the scope of authority for rule-making by administrative agencies. People have questioned the bounds of administrative agency authority since the beginning of their existence. Administrative agencies are an arm of the Executive branch of the U.S. Government, charged with implementing and enforcing laws set forth by Congress.

For the most part, challenges to regulations promulgated by administrative agencies are heard initially by appointed judges in administrative courts. This structure allows administrative officials to have significant autonomy in carrying out their roles. Therefore, when the agencies find congressional authority in vague and ambiguous statutes, it raises the question of whether Congress actually intended to authorize the agency in the manner it alleges.

The "Bouncing Ball" of Agency Authority

Starting with the decision in *Chevron v. National Resources Defense Council*, broad delegations of authority by Congress to administrative agencies were permitted.[3] Ever since, courts have applied the "*Chevron* deference" doctrine when reviewing challenges to the authority of administrative agencies.[4] Accordingly, courts defer to an administrative agency's interpretation of a congressional statute delegating authority to the agency when the statute is vague or ambiguous, as long as the agency's interpretation is permissible.[5] Now, after the *West Virginia* decision, it appears that the *Chevron* deference doctrine may be replaced by the "major questions" doctrine.

As background to the *West Virginia* case, in 2015, under the Obama Administration, the EPA promulgated the CPP, setting forth strict regulations intended to reduce carbon emissions with an ultimate goal to reduce coal usage in America by 11% by 2030.[6] The EPA cited Section 111(d) of the Clean Air Act of 1970 ("CAA") as the legal authority for the plan.[7] Prior to the CPP, this section was rarely cited.[8] Under Section 111(d), the states set rules governing existing coal plants to comply with emission limits set by the EPA.[9]

However, pursuant to the CPP, the EPA created emission limits for existing power plants by determining the "best system of emission reduction" (BSER), and required the states to enforce compliance with these limits.[10] The BSER for coal plants involved several steps for existing coal plants to achieve the CPP emission limits. One step included "generation shifting" rules that were aimed at shifting existing coal plants from coal generated energy to natural gas and renewable energy.[11] For compliance with the "generation shifting" rules, the CPP required a plant to either reduce its current production of electricity, invest in new energy, or purchase emission allowances or credits.[12]

On the day the CPP went into effect, 27 states along with several private parties petitioned the D.C. Circuit to review the regulation. Most of these states had Republican majorities in their governance. In 2016, the Supreme Court stayed the CPP from taking effect after the D.C. Circuit denied such relief.

Eventually, in 2019, under the Trump Administration, the EPA repealed the CPP on its own, concluding that the promulgation of this "generation shifting" rule exceeded the agency's authority under Section 111(d).[13] The EPA cited the major questions doctrine in coming to this conclusion. Similar to when the CPP was promulgated, many states with Democratic governance along with several private parties petitioned the D.C. Circuit to review the CPP's repeal. Other states such as West Virginia intervened with other private parties to defend the EPA's decision.

The D.C. Circuit ultimately vacated the repeal and reinstated the CPP, holding that its "generation shifting" rule was an authorized "system of emission reduction" under Section 111.[14] The Court further held that the major questions doctrine did not apply.[15] In response, the EPA made a motion to stay the vacatur. This was unopposed and granted. Finally, West Virginia and its co-parties petitioned the Supreme Court for certiorari to review the reinstatement, which the Court granted.

Supreme Court Takes a Narrow View

In other words, the CPP had a "bouncing ball" history by the time it finally got to the Supreme Court on the merits. After review, the Supreme Court reversed the D.C. Circuit in a 6-3 decision written by Chief Justice John Roberts.[16] The Court held that when administrative agencies promulgate rules with significant economic and political consequences (specifically, in this case, the "generation shifting" rules), Congress must have specifically authorized the action.[17] Chief Justice Roberts wrote "[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body," and that administrative authority to regulate cannot be found in "the vague language of a long-extant, but rarely used, statute."[18]

The "generation shifting" rules were significantly more restrictive than previous EPA emission regulations, the Court noted, stemming from an Obama Administration-led "aggressive transformation in the domestic energy industry."[19] The Court determined that the emission limits were so aggressive that "no existing coal plant would have been able to achieve them without engaging in one of the three means of shifting generation."[20] Accordingly, the Supreme Court applied the major questions doctrine, holding that no clear statement of authorization from Congress existed to allow the EPA to implement the "generation shifting" rules.[21]

The Supreme Court stated that although it may not have applied the major questions doctrine in previous decisions, the Court consistently referenced its existence and the principles behind it.[22] In extraordinary circumstances when agencies make unheralded use of their authority, the major questions doctrine acts as a form of checks and balances.[23] In these situations, the agency may not act unless a clear statement from Congress expressly authorizes them to do so.

The *West Virginia* decision creates long term ramifications for administrative agencies. One result of this decision is that it creates an ambiguity in determining which doctrine to apply when reviewing administrative authority challenges. Instead of deferring to the administrative agency in these situations pursuant to *Chevron*, courts may first determine whether a proposed regulation constitutes a "major question" and if so, whether the delegating statute in question expresses a clear statement authorizing the agency to promulgate the regulation. If the regulation invokes a "major question" with potentially significant, economic, or political consequences, the alleged authority must be expressly delegated by Congress to the administrative agency. This is a drastic deviation from the *Chevron* framework.

Another potential ramification of the *West Virginia* decision is the effect it may have on the environment. The *West Virginia* decision presents a step backwards for the EPA's ability to regulate carbon emissions from existing power plants. However, the decision does not strip the EPA of its authority to write future rules in this sector. Even though the generation shifting rules were struck down, the CAA still authorizes and requires the EPA to regulate greenhouse gas pollution from the power sector. Further, the EPA can be sued for not doing so.

The issue for the EPA moving forward will be the scrutiny that the *West Virginia* ruling places on how it crafts under existing federal law, and how it will determine if additional authority is required for specific regulatory programs and programmatic goals. The EPA will

be required to craft its rules and regulations carefully because any challenge to their authority may be subject to judicial scrutiny under the scope of the major questions doctrine. If the EPA's rules and regulations on climate continue to be struck down by the court as too extensive, this could create a significant halt to climate change reform.

In her dissent, Justice Elena Kagan cited the Supreme Court's decision in *Massachusetts v. EPA* several times for the proposition that the majority opinion curtails the authority to set emission standards granted therein.[24] In *Massachusetts*, the Court held that the EPA can issue emission standards for greenhouse gases under the Clean Air Act's broad definition of "air pollutants."[25] Justice Kagan wrote that Congress knew "without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. So [Section 111] enables EPA to base emission limits for existing sources on the 'best system'."[26]

Implications of the Decision

Although the *West Virginia* decision does not overrule *Massachusetts*, it does prohibit the EPA from requiring states to regulate coal plants within their borders based on the emission standards in the CPP. It does not strike down the EPA's authority to set emission standards, but it will affect how rules promulgated pursuant to the emission standards are construed moving forward.

If the courts continue to follow in the framework set out by the *West Virginia* decision and apply the major questions doctrine in their reasoning, the decision is likely to restrict the executive branch's ability to use other departments and regulators such as the Treasury Department, the Securities and Exchange Commission and the Federal Energy Regulatory Commission to not only address climate change, but other administrative initiatives as well. President Biden expressed concerns about the decision by referring to it as "a devastating decision that aims to take our country backwards."[27]

The *West Virginia* decision may also have ramifications on the state level. The decision creates a framework that state high courts could potentially follow. If the state high courts read the major questions doctrine into their own case law, then the state administrative agencies could be subject to significant authority restrictions as well. A likely result will be a fundamental difference in state to state policies. Historically conservative states will likely follow suit and begin to apply the major questions doctrine, while historically liberal states will continue to implement deference to the agencies similar to *Chevron*.

Whether administrative agencies should have far-reaching authority to regulate or whether they should be guided by express delegation from Congress, the ultimate answer still remains unclear after the *West Virginia* decision.

1. *West Virginia v. EPA*, 142 S.Ct. 2587 (2022).
2. *Id.* at 2608-10.
3. *Chevron v. NRDC*, 467 U.S. 837 (1984).
4. "How the Supreme Court created agency deference," Interactive Constitution (June 25, 2021), available at https://bit.ly/3BJMryd.
5. *Chevron*, 467 U.S. at 843.
6. *West Virginia*, 142 S.Ct. at 2602–04.
7. *Id.* at 2602.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 2603.
12. *Id.*
13. *Id.* at 2604.
14. *Id.* at 2605.
15. *Id.*
16. *Id.* at 2587.
17. *Id.* at 2608-09.
18. *Id.* at 2610, 2616
19. *Id.* at 2604.
20. *Id.*
21. Id. at 2615–16.
22. Editorial Board, *The Supreme Court Restores a Constitutional Climate*, The Wall Street Journal (June 30, 2022), available at https://on.wsj.com/3QocoHH.
23. *Id.*
24. *West Virginia*, 142 S.Ct. at 2626.
25. *Massachusetts v. EPA*, 549 U.S. 497 (2007).
26. *West Virginia*, 142 S.Ct. at 2632.
27. "Statement by President Joe Biden on Supreme Court Ruling on *West Virginia v. EPA*," The White House (June 30, 2022), available at https://bit.ly/3w6im8D.

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NAL PROGRAM CALENDAR

SEPTEMBER 14, 2022
Dean's Hour: 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
12:30 PM – 1:30 PM
1 credit in ethics

SEPTEMBER 15, 2022
Dean's Hour: The Agony in Munich—International Terrorism and the 1972 Olympic Games (Law and American Culture Lecture Series)
12:30 PM – 1:30 PM
1 credit in professional practice

SEPTEMBER 21, 2022
Dean's Hour: Hi-Tech Cheating—The Houston Astros' Crime Against America's Pastime
Program sponsored by NCBA Corporate Partner Legal Hero Marketing
12:30 PM – 1:30 PM
1 credit in professional practice

SEPTEMBER 21, 2022
This Year's Most Significant Bankruptcy Decisions
With the NCBA Bankruptcy Law Committee
6:00 PM – 8:00 PM
2 credits in professional practice

SEPTEMBER 22, 2022
Dean's Hour: Law in the Metaverse
With the NCBA Intellectual Property Law Committee
12:30 PM – 1:30 PM
1 credit in professional practice

SEPTEMBER 29, 2022
Dean's Hour: Getting the Edge Over Your Competition—How to Create a Strategic Plan that Wins for Your Law Practice: Part 1—Clarifying and Communicating Your Vision
Program presented by NCBA Corporate Partner Opal Wealth Advisors, LLC
12:30 PM – 1:30 PM
1 credit in professional practice

SEPTEMBER 30, 2022
Seres Humanos Aqui: *Hernandez v. Texas* and the Quest for Legal Recognition
With the Long Island Hispanic Bar Association
Reception 5:30 PM – 6:15 PM;
Program 6:20 PM – 7:30 PM
1 credit in professional practice

OCTOBER 12, 2022
Dean's Hour: Getting the Edge Over Your Competition—How to Create a Strategic Plan that Wins for Your Law Practice
Part 2—Building and Developing the Strategic Plan
Program presented by NCBA Corporate Partner Opal Wealth Advisors, LLC
12:30 PM – 1:30 PM
1 credit in professional practice

OCTOBER 13, 2022
Dean's Hour: Wild Bill Donovan and the Origins of American Intelligence (Law and American Culture Lecture Series)
12:30 PM – 1:30 PM
1 credit in professional practice

OCTOBER 13, 2022 (ZOOM ONLY)
Small Claims Arbitrator Training
With the NCBA Alternative Dispute Resolution Committee
5:30 PM – 7:30PM
2 credits in professional practice

If you are an attorney admitted to the Bar for at least 5 years (2 years for court attorneys) and would like to serve as a pro bono arbitrator in the Small Claims Part of Nassau County District Court, please join us for our first Small Claims Arbitrator training. In order to serve as a Small Claims Arbitrator attendees will be required to be screened by the NCBA's Judicial Screening Panel. The Small Claims Part of District Court hears civil and commercial matters with a monetary threshold of less than $5,000. Litigants need not be represented by counsel and the cases shall be heard "in such manner as to do substantial justice between the parties according to the rules of substantive law." Serving as a Small Claims Arbitrator provides attorneys with a unique opportunity to serve their community by providing expeditious and just resolutions to a variety of conflicts. Attorneys of diverse backgrounds are strongly encouraged to apply.

Program is free to attend for current NCBA Members; $40 for NCBA Non-Members. Program size is limited to 40 attendees.

NAL PROGRAM CALENDAR

OCTOBER 18, 2022

Dean's Hour: Addressing Implicit Bias in Jury Selection
Program sponsored by NCBA Corporate Partner PHP
With the Nassau County Bar Association Assigned Counsel Defender Plan
12:30 PM – 1:45 PM
1.5 credits in diversity, inclusion, and elimination of bias

OCTOBER 18, 2022 (LIVE ONLY)

An Evening with the Family Court Judges and Referees
Program sponsored by NCBA Corporate Partner Legal Hero Marketing
With the NCBA Family Court Law and Procedure Committee
Sign-in and Networking 5:00 PM – 6:00 PM; Program 6:00 PM – 7:30 PM
1.5 credits in professional practice

OCTOBER 19, 2022

Dean's Hour: When Hackers Attack Your Practice, Will You Be Prepared?
Program presented by NCBA Corporate Partner AssuredPartners
With the Nassau County Bar Association Assigned Counsel Defender Plan
12:30 PM – 1:30 PM
1 credit in professional practice

OCTOBER 19, 2022 (ZOOM ONLY)

Myths, Facts and Resources on Domestic Violence
With the NCBA Community Relations and Public Education Committee, the Safe Center LI, and the Central American Refugee Center (CARECEN-NY)
5:30 PM – 7:30 PM
2 credits in professional practice. Skills credits available for newly admitted attorneys
Program is free to attend for informational purposes.

OCTOBER 25, 2022

Criminal Law and Procedure Update 2022
Program will be held at the Nassau County Bar Association
Program sponsored by NCBA Corporate Partner PHP
With the Nassau County Bar Association Assigned Counsel Defender Plan and the NCBA Criminal Courts Law and Procedure Committee
12:30 PM – 3:30 PM
2.5 credits in professional practice; .5 in ethics

OCTOBER 25, 2022 (LIVE ONLY)

Matrimonial Law Update: Cases, Cases, Cases
Presented by Stephen Gassman, Esq.
With the NCBA Matrimonial Law Committee
Program sponsored by NCBA Corporate Partner MPI Business Valuation and Advisory
****Light supper for attendees generously provided by program sponsor****
5:30 PM – 7:00 PM
1.5 credits in professional practice

OCTOBER 26, 2022

Dean's Hour: Remote Residency Here to Stay? The Fight Continues to Pay Tax Where a Taxpayer Actually Resides
Program sponsored by NCBA Corporate Partner Legal Hero Marketing, Inc.
12:30 PM – 1:30 PM
1 credit in professional practice

FOCUS: COMMERCIAL LITIGATION

Practical Considerations When Settling with Unrepresented Parties

Christopher M. Palmieri, J.D. and Robert Plosky

Most lawsuits settle, and for good reason.[1] An effective settlement "converts the risks, delays and expenses of lawsuits into solutions that the parties choose for themselves."[2] When settling with a *pro se* litigant, however, an attorney should tread carefully. Various ethical, procedural, and equitable concerns can derail the settlement or undermine its enforceability.[3]

Ethical Concerns

The New York Rules of Professional Conduct, which govern the ethical behavior of all practicing attorneys admitted to the New York State Bar, do not prohibit an attorney from negotiating a settlement with an unrepresented party.[4] However, during such negotiations, an attorney is prohibited from misleading the unrepresented party as to the nature of the attorney's role.[5] The attorney should ensure that the unrepresented party understands the attorney is not neutral or disinterested in the outcome of the matter and the attorney represents the interests of an adverse party.[6] The attorney should also refrain from providing any legal advice to the unrepresented party, other than the advice to secure their own counsel.[7]

Comment [2] to Rule 4.3 states that the attorney may "explain" to the unrepresented party the attorney's "own view of the meaning" of a settlement document or its "underlying legal obligations."[8] The Comment recognizes, however, that doing so may not always be appropriate and may conflict with the Rule's prohibition on providing legal advice, especially where the unrepresented party is inexperienced or unsophisticated in legal matters.[9]

An attorney should likely refrain from providing in-depth answers to an unrepresented party's inquiries as to the legal import of a settlement agreement's terms. The safest response may be to remind the unrepresented party to retain their own counsel.[10] In fact, Comment [2] to Rule 4.3 also provides that "the possibility that the lawyer will compromise the unrepresented person's interest is so great that the rule prohibits *the giving of any advice*, apart from the advice to obtain counsel."[11]

An attorney should also memorialize the substance of oral communications with an unrepresented party in writing. This reduces the possibility for later disagreements or misunderstandings as to the agreed-upon terms of settlement. All confirmatory emails or other written communications should include a statement noting that the attorney has informed the unrepresented party that they represent a party with adverse interests, and the unrepresented party should retain their own counsel.[12] This helps protect the attorney in the unlikely event the unrepresented party falsely accuses the attorney of engaging in ethically improper communications.

Procedural Concerns

CPLR §321(b)

Although it may seem trivial, before negotiating a settlement with an unrepresented party, an attorney should confirm that the party truly is unrepresented. This is of particular concern where the unrepresented party was previously represented in a civil action by counsel of record but now claims such representation has ended.

Section 321(b) of the Civil Practice Law and Rules "CPLR" governs the method by which counsel of record may withdraw, be changed, or discharged. It requires such counsel either "file[] with the clerk a consent to change [form]" duly signed, acknowledged and served, or obtain an "order of the court in which the action is pending, upon motion."[13] Once counsel of record for a party is removed, CPLR §321(a) prohibits such party from representing themselves in the action "except by consent of the court" where the party is not a corporate entity (which can never represent itself).[14]

In *Moustakas v. Bouloukos*,[15] the plaintiffs were represented by counsel in three lawsuits against the defendants. The plaintiffs attempted to discharge their counsel by a simple handwritten note, without adhering to the requirements of CPLR §321(b). The plaintiffs then negotiated with opposing counsel settlement agreements resolving the three lawsuits, without adhering to the requirements of CPLR §321(a). The court granted the plaintiffs' subsequent motion to rescind the settlement agreements, finding them void because they had been negotiated without the presence of the plaintiffs' counsel. The Second Department affirmed, and also noted that the defendants' counsel may have violated the ethical rule generally prohibiting an attorney from communicating with an adverse party the attorney knows is represented by counsel.[16]

An attorney should ensure any change in opposing counsel has been properly effectuated before engaging in direct communications with the newly unrepresented party.

CPLR §2104

CPLR §2104 states that a settlement agreement resolving pending litigation "is not binding upon a party unless it is in writing subscribed by him or his attorney or reduced to the form of an order and entered."[17] The statute recognizes an exception to the "in writing" requirement for settlement agreements "made between counsel in open court."[18] Although some courts have enforced "open court" oral settlement agreements with pro se litigants, other courts have found such agreements unenforceable as a matter of law, as the plain language of CPLR §2104 requires such agreements to be "between counsel."[19]

Given the risk that an "open court" oral agreement with an unrepresented party may be invalidated, an attorney should reduce it to writing.

Equitable Concerns

Fairness to the Unrepresented Party

A court will not hesitate to invalidate a one-sided settlement agreement, especially where there exists an inherent power imbalance among the settling parties, as is often the case where one party is unrepresented.[20] For example, in *144*

Woodruff Corp. v. Lacrete, the court explained: "While a stipulation [of settlement]...should not be lightly set aside, relief from a stipulation may be granted in order to prevent injustice... While lack of representation is not sufficient to invalidate a stipulation, good cause for vacatur exists where the lack of representation has resulted in a stipulation whose terms are unduly one-sided or unfair."[21] An attorney settling with an unrepresented party should heed these words carefully.

Fairness to the Represented Party

Of course, it would also be unjust if an unrepresented party to a settlement agreement could escape its contractual obligations simply by asserting (falsely) that it did not understand the agreement's terms or was provided no opportunity to consult with counsel. For this reason, where one party to a settlement agreement is unrepresented, the agreement should include a waiver-of-representation clause memorializing the fact that the unrepresented party was encouraged to consult with counsel before signing. Indeed, courts have found "a release's encouragement to consult with an attorney weighs in favor of the agreement's enforceability [as a whole]."[22]

Settling with unrepresented parties can be tricky and fraught with ethical, procedural, and equitable concerns. However, by understanding the nature of these concerns and addressing them directly, attorneys can protect themselves and their clients, while ensuring the enforceability of such settlements.

1. Mary C. Daly, Duty to Disclose All Settlement Offers, N.Y. LEG. ETHICS REP. (June 2004), http://www.newyorklegalethics.com/duty-to-disclose-all-settlement-offers/#:~:text=Between%2095%20and%2098%20percent,a%20matter%20of%20grave%20concern ("Between 95 and 98 percent of all civil cases are settled.").
2. Brendon Ishikawa, Preparing for a Successful Settlement Agreement, AM. BAR ASS'N (Mar. 13, 2018), https://www.americanbar.org/groups/business_law/publications/blt/2018/03/settlement.
3. This discussion concerns attorneys acting on behalf of their clients in settling with unrepresented adverse parties, and not attorneys acting on behalf of themselves.
4. See Cmt. [2] to R. 4.3 of the N.Y.S. R. of Prof. Conduct. The Comments are published by the New York State Bar Association "to provide guidance for attorneys in complying with the [NYS] Rules," but they have not been officially adopted or enacted. See NYSBA NY Rules of Professional Conduct, https://www.nycourts.gov/ad3/AGC/Forms/Rules/Rules%20of%20Professional%20Conduct%2022NYCRR%20Part%201200.pdf; see *also* https://www.nycourts.gov/legacypdfs/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf ("where a conflict exists between a Rule and. . . a Comment, the Rule controls.").
5. See R. 4.3 of the N.Y.S. R. of Prof. Conduct; see *also* R. 4.1 of the N.Y.S. R. of Prof. Conduct.
6. See Cmts. [1] & [2] to R. 4.3 of the N.Y.S. R. of Prof. Conduct.
7. See R. 4.3 N.Y.S. R. of Prof. Conduct.
8. See Cmt. [2] to R. 4.3 of the N.Y.S. R. of Prof. Conduct.
9. See id.
10. "In some cases, in order to be sure that the unrepresented party understands the need for counsel, lawyers have been directed 'to give non-controvertible information about the law to enable the other party to understand the need for independent counsel.'" N.Y. State Eth. Op. 956 (2013), citing N.Y. State Eth. Op. 728 (2000). See *also* N.Y. State Eth. Op. 477 (1977), N.Y. City Bar Op. 2009-02 (2009).
11. See Cmt. [2] to R. 4.3 of the N.Y.S. R. of Prof. Conduct (emphasis added); see *also* Model Code of Pro. Resp. EC 4-3 cmt. 2 (AM. BAR ASS'N 2013); N.Y. State Eth. Op. 74-358 ("It is improper for an attorney to communicate, directly or indirectly, with the adverse party who is not represented by an attorney, in a personal injury suit where the communication undertakes to render legal advice to him other than the advice to him to secure counsel.").
12. See *generally* David Northrip et al., *When and How to Communicate with Pro Se Litigants*, LAW360 (Jan. 18, 2018 at 4:13 P.M.) (noting that telephone communication can be more effective, because pro se litigants may ignore letters, but that oral communications should be confirmed in writing).
13. See N.Y. C.P.L.R. § 321(b)(1), (2) (McKinney 2022).
14. See N.Y. C.P.L.R. § 321(a).
15. 112 A.D.2d 981, 983 (2nd Dep't 1985).
16. The court found it "[s]ignificant[]" that, when the defendants' counsel first informed the plaintiffs' discharged counsel about the settlement agreement in correspondence seeking to arrange for the filing of stipulations of discontinuance, defendants' counsel continued to refer to the plaintiffs as the "client[s]" of the supposedly discharged counsel; see also Rule 4.2(a) of the N.Y.S. R. of Prof. Conduct.
17. See N.Y. C.P.L.R. §2104 (McKinney 2022).
18. See id.
19. See *generally* Thomas F. Gleason, McKinney Practice Commentary, Stipulations N.Y.C.P.L.R. 2104 (McKinney 2015). *Compare Massie v. Metropolitan Museum of Art*, 651 F. Supp. 2d 88 (S.D.N.Y. 2009) (finding, as a matter of law, pro se litigants "cannot be bound by way of an 'open court' oral agreement") with *Fulginiti v. Fulginiti*, 127 A.D.3d 1382, 1383-84 (3d Dep't 2015) (finding "open court" oral agreement with pro se litigant not defective "as a whole" because said litigant "knowingly elected to proceed pro se").
20. For this reason, in 2017, New York City's Housing Court enacted a civil right-to-counsel (RTC) law. See Oksana Mironova, *Right to Counsel Works: Why New York State's Tenants Need Universal Access to Lawyers During Evictions*, COMMUNITY SERVICE SOCIETY (Mar. 7, 2022), https://tinyurl.com/mpk6hnd7.
21. *144 Woodruff Corp. v. Lacrete*, 154 Misc.2d 301, 303 (N.Y.C. Civil Ct., Kings Co. 1992). This decision was issued twenty-five years before the RTC law was implemented.
22. *Kramer v. Vendome Grp. LLC*, 2012 WL 4841310, at *4 (S.D.N.Y. Oct. 4, 2012).

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FOCUS: CONSTRUCTION LAW

A Presumption of Guilt for Bad Record Keeping Under the Lien Law

Neil Diskin

"New York's Lien Law provides special protections, through the automatic establishment of statutorily protected trust funds, to ensure payment of contractors and laborers on construction projects."[1] The failure to comply with these statutory protections can result in personal liability and even criminal convictions.[2]

When an owner of real property, general contractor, or subcontractor receives funds in connection with the improvement of real property, those funds become trust funds ("3-A Trust Funds") and the owner, general contractor, or subcontractor, as the case may be, becomes the trustee.[3] The trust commences at the moment when 3-A Trust Funds come into existence, regard-less of whether there are any beneficiaries of the trust at that time, and continues until every trust claim is paid or until all 3-A Trust Funds have been applied for trust purposes.[4]

If the trust is terminated because all trust claims have been paid, the remaining 3-A Trust Funds then vest in the owner, contractor, or subcontractor, as the case may be.[5] However, while the trust is in existence, the trustee is on the hook to ensure that the 3-A Trust Funds are properly accounted for and used solely for trust purposes.[6] A disbursement of 3-A Trust Funds for a non-trust purpose is a diversion of trust funds, which can lead to civil liability, including punitive dam-ages, and criminal charges for larceny.[7]

Section 71 of the Lien Law itemizes the expenditures for which 3-A Trust Funds can be disbursed. The authorized disbursements are slightly different depending on whether the trustee is an owner or a contractor. If an owner is the trustee, the 3-A Trust Funds can be "applied for the payment of the cost of improvement" as defined in Section 2.[8] Section 71(2) set forth the author-ized expenditures of 3-A Trust Funds if a general contractor or subcontractor is the trustee.[9] Any disbursement other than those authorized by Section 71(1) and (2) constitutes a diversion of trust assets.[10]

Regardless of whether the trustee is an owner or general contractor, the trustee has specific requirements related to maintaining accurate books and records for all 3-A Trust Funds.[11] The failure to comply with the specific books and records requirements is presumptive evidence of a diversion of trust funds—in both civil and criminal cases.[12]

In maintaining its books and records, the trustee is required to use a bank account "in his name" if 3-A Trust Funds are to be deposited.[13] However, the trustee is not required to establish a separate account for the 3-A Trust Funds and is allowed to commingle 3-A Trust Funds with other funds.[14] If 3-A Trust Funds are commingled with non-trust funds, or other 3-A Trust Funds, how-ever, the trustee must keep records showing the allocation of the 3-A Trust Funds in the commin-gled account.[15]

Section 75 of the Lien Law sets forth "[i]n exquisite detail… [the] bookkeeping require-ments relative to trust funds which are receivable, payable, received, paid, transferred, or as-signed."[16] The requirements include, inter alia, the name and address of each person from whom 3-A Trust Funds were received, as well as the amount of funds and the date they were received.[17] Likewise, the trustee must record the name and address of each person to whom the trustee dis-bursed 3-A Trust Funds and the date and amount of such payment.[18] Additionally, the trustee must record, with each payment of 3-A Trust Funds, "a statement of the nature of the trust claim… sufficient in any case to identify the payment as a payment for a trust purpose and to show whether it is for labor, materials, taxes, insurance, performance under contract or subcontract, interest charges on mortgages or other particular trust claim or item of cost

improvement."[19] The trustee must also record information related to payments pursuant to contracts and payments made with funds received under an assignment of funds.[20] The trustee must comply with all of these require-ments; partial compliance will not suffice.[21]

As stated above, the failure to comply with these bookkeeping requirements results in a presumption that 3-A Trust Funds were diverted for non-trust purposes. In *People v. Romano*[22] the trial court applied the presumption and the defendants were convicted of, inter alia, 15 counts of larceny in violation of Section 79-a of the Lien Law.[23] The defendants were Village Mall Town-houses, Inc., the corporate builder, as well as its principals and officers.[24] During the trial, the "defendants themselves impugned the accuracy and integrity of the bookkeeping procedures and made no claim of compliance with section 75."[25] Thereafter, on appeal, the defendants argued, inter alia, that the presumption in Section 79-a was unconstitutional.[26]

The Second Department, explaining that "no published case ha[d] dealt with the constitutionality of the presumption in subdivision 3 of section 79-a," looked to "a similar provision in the pre-1959 law," the constitutionality of which had been upheld when challenged in court.[27]

Specifically, the court in Romano looked to *People v. Farina*, a case in which the defendant was convicted under the predecessor statute.[28] In *Farina*, the Court of Appeals, in upholding the conviction of the defendant, explained the constitutionality of the presumption:

> The statutory requirement that a contractor keep proper books of ac-count and shall furnish a statement in manner provided by the statute furnishes reasonable protection to those entitled to payment for im-provement of property for which the contract has been paid, and it places no unreasonable burden upon the contractor. A statutory pre-sumption of guilt arising from unexplained and willful failure to comply with the provisions of the statute rest upon a sound founda-tion and does not violate any provision of the Constitution of the State of New York or of the United States.[29]

The court in *Romano* then explained that "the controlling test for determining the validity of a statutory presumption is that there be a rational connection between the fact proved and the fact presumed; it must be shown that the presumed fact is more likely than not to flow from the proved facts on which it is made to depend."[30] Ultimately, the Second Department held that "[s]ince the statute so clearly requires record keeping, it

would appear that there is at least a rational connection between a failure to comply and the presumed fact of diversion."[31]

The Court of Appeals affirmed the opinion of the Second Department, but appeared to walk it back a bit.[32] The Court of Appeals found that "both courts below… quite correctly[ ] treated this statutory presumption as only a permissible inference that defendants, by failing to keep statutorily prescribed records, used trust funds for other than authorized trust purposes," and that "the presumption does not relate to criminal intent. Thus, the prosecution was not relieved of its duty to prove defendants' guilt beyond a reasonable doubt and subdivision (3) of section 79-a of the Lien Law did not work to shift the burden of proof to defendants."[33]

Notably, in contrast to the Court of Appeal's description that the lower courts "treated the presumption as only a permissive inference," while holding that "the prosecution was not relieved of its duty to prove defendants' guilt beyond a reasonable doubt," the Second Department had repeatedly referred to the presumption in Section 79-a of the Lien Law as a "presumption of guilt."[34] Nevertheless, the presumption has remained permissive since the Court of Appeals deci-sion. Indeed, it has since been explicitly held that a mandatory presumption would be unconstitu-tional.[35]

Accordingly, even with a presumption that the defendant diverted 3-A Trust Funds, "in order to obtain a conviction of larceny under the Lien Law, the People must prove that the defend-ant had 'the intent to deprive another of property or to appropriate the same to himself or to a third person.'"[36] In *People v. Hollowell*, the court held that the jury could infer intent from circumstan-tial evidence such as spending the 3-A Trust funds, having no money left to purchase supplies, being $18,000 in debt and filing for bankruptcy.[37]

Accordingly, owners, general contractors, and subcontractors, having received funds in connection with the improvement of real property should take great care to ensure that any and all 3-A Trust Funds they receive as a trustee are properly accounted for pursuant to the detailed re-quirements of Section 75 of the Lien Law to avoid the possibility of being convicted of larceny under Section 79-a of the Lien Law based on a presumption of a diversion of 3-A Trust Funds and circumstantial evidence of intent.

1. *Volt Elec. NYC Corp. v. A.M.E., Inc.*, 2022 U.S. Dist. LEXIS 120197, *53 (S.D.N.Y. 2022).

2. See, e.g., *Holt Constr. Corp. v. Grand Palais*, LLC, 108 A.D.3d 593, 597 (2d Dept. 2013) (imposing personal lia-bility on the president of the defendant entities for his role in diverting 3-A trust funds); see *also* N.Y. Lien Law §79-a (a trustee who diverts Article 3-A trust funds is guilty of larceny).
3. Lien Law §70(1) and (2).
4. Lien Law §70(3).
5. *Id.*
6. Lien Law §§1 and 75.
7. Lien Law §§77 and 79-a; see *also Sabol & Rice, Inc. v. Poughkeepsie Galleria Co.*, 175 A.D.2d 555, 556 (3d Dept. 1991)(holding that punitive damages are authorized under Section 77 of the Lien Law).
8. Lien Law §71(1); see *also* Lien Law §2(5) (defining "cost of improvement").
9. Lien Law §71(2)(a) – (f).
10. Lien Law §72(1); see *also Aquilino v. United States*, 10 N.Y.2d 271, 280 (1961) ("[T]he only purpose for which the contractor may use the funds are trust purposes.").
11. Lien Law §75.
12. Lien Law §75(4); see *also* §79-a(3) (failure to maintain books and records is creates a presumption of diversion of 3-A Trust Funds in criminal proceedings); see *also People v. Rosano*, 69 A.D.2d 643 (2d Dept. 1979).
13. Lien Law §75(1).
14. See, e.g., *Fentron Architectural Metals Corp. v. Solow*, 101 Misc. 2d 393 (Sup. Ct., N.Y. Co. 1979).
15. Lien Law §75(2).
16. *People v. Romano*, 69 A.D.2d 643, 655 (2d Dept. 1979).
17. Lien Law §73(3)(C).
18. Lien Law §73(3)(D).
19. *Id.*
20. *Id.*
21. See, e.g., *Onekey, LLC v. Knight Harte Constr., Inc.*, 2017 N.Y. Slip Op. 31529(U), at *7 (Sup. Ct., N.Y. Co. 2017) ("This Court's review of the document that Onekey sent to Knight Harte reveals that it does not comply with all of the requirements of Lien Law §75(3).").
22. 69 A.D.2d 643, 655 (2d Dept. 1979).
23. *People v. Romano,* 69 A.D.2d at 647.
24. *Id.*
25. *Id.* at 655.
26. *Id.*
27. *Id.* at 656 (citing former Lien Law §36-d; *People v. Farina,* 290 N.Y. 272 (1943)).
28. *Id.*
29. *People v. Farina*, 290 N.Y. 272, 275 – 276 (1943).
30. *Romano*, 69 A.D.2d at 656 (citing Tot v. United States, 319 U.S. 463 (1943)).
31. *Id.* at 657.
32. *People v. Romano*, 50 N.Y.2d 1013 (1980).
33. *Id.* at 1016 – 1017.
34. *Romano*, 69 A.D.2d at 655 and 656 (quoting Farina, 290 N.Y. at 275 – 276); id at 663 - 664 (Suozzi, J.P., dis-senting).
35. See, e.g., *People v. Cioffi*, 105 A.D.3d 971, 972 - 973 (2d Dept. 2013) (holding that failure to instruct the jurty that the statutory presumption is permissive violates that defendants' constitutional rights).
36. *People v. Hollowell*, 168 A.D.2d 970, 970 (4th Dept. 1990) (citing Penal Law §155.05(1); *People v. Chester,* 50 N.Y.2d 203 (1980)).
37. *Id.* at 971.

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FOCUS: ELDER LAW

Guardianship: Fact vs. Fiction

Laura M. Brancato

In recent months, television viewers have been captivated by docuseries and fictional portrayals of conservatorship, known in New York as Guardianship. As with most on-screen productions, there may be more dramatic fiction at work than factual portrayal. A reasonable viewer would be worried about the prospect of guardianship, and maybe with good reason. A guardianship proceeding is an involved and often expensive process whereby a court declares a party to be incapacitated. This often means that the party no longer makes decisions about finances or medical treatment or even where they reside. It is essential to understand the New York State statutory framework and what our clients can do to avoid a guardianship altogether.

Fiction vs. Fact

Fiction: Guardianship proceedings happen without the participation of the person alleged to be incapacitated.

Fact: Guardianship proceedings in New York are initiated through the New York State Supreme Court and constitutional protections exist in each proceeding which afford the person alleged to be incapacitated with a right to be heard at any hearing which relates to their case and to be represented by counsel. In fact, if the alleged incapacitated person ("AIP") is not present at the hearing, and no adequate reason is provided for their absence, any decision subsequently made by a judge can be overturned by a higher court. In New York, guardianships are initiated pursuant to the Mental Hygiene Law which is a statute with a multitude of protections for the AIP. Moreover, if the presiding judge does not appoint an attorney for the AIP, the AIP always maintains the right to request an attorney be appointed at any time during the guardianship proceeding.

Fiction: Family members are not notified of a pending guardianship proceeding and therefore a stranger can be appointed as guardian of the alleged incapacitated person without the input of close family or friends.

Fact: Article 81 gives very specific written direction as to who must be noticed of a pending guardianship hearing. Failure to notify all appropriate parties could invalidate any later guardianship findings. Among a variety of parties, the statute requires that the spouse, adult children, siblings, and parties who are active participants in the life of the AIP receive notice of any pending proceeding. Upon the initiation of the case, the Court will direct service of relevant documents upon all named relatives and will make further inquiry throughout the process to assure that all relevant parties are apprised of the status of the guardianship proceeding. Moreover, interested family members can themselves petition for guardianship if they oppose the application being brought before the Court. Once a finding is made, the "Alleged Incapacitated Person" is now denominated as an "Incapacitated Person."

Fiction: Bank accounts or financial resources of the now incapacitated person can be accessed at whim by a court appointed guardian.

Fact: Guardianship matters are given great attention by the court and continuous oversight even after the initial proceeding has concluded. Pursuant to the Metal Hygiene Law, any guardian appointed over financial assets of an incapacitated person ("IP") must provide several different reports to the court for review. First, 90 days after appointment, a court appointed guardian must submit an Initial Report for review. This report will detail what assets the IP owns and where such assets are held. Thereafter, at the end of each calendar year the guardian must provide the court with a comprehensive document known as an annual accounting. This accounting is a very detailed report of each expenditure made on behalf of the IP (with accompanying receipts for each transaction) as well as a detailed report of all investment gains and losses. These reports must be provided each year until the death of the IP. These reports are reviewed in detail by a court appointed examiner who has the authority to report back to the court if their investigation reveals any financial irregularities or concerns.

Furthermore, guardians in New York must seek permission of the court to sell real property belonging to the IP, which assures an additional layer of protection for the IP. The guardian must present a compelling reason to sell real estate, especially if the IP is residing in the home at the time the sale is proposed.

Fiction: A guardian can send an Incapacitated Person to live in a nursing home against their will or without just reason.

Fact: A further proceeding under MHL Article 81 will be held to determine whether an incapacitated party should be moved into a nursing facility or other congregate care setting. If a court determines that a person is incapacitated within the meaning of the Metal Hygiene Law, the court may appoint a personal needs guardian. This type of guardian, often the same person as the property guardian, is commonly tasked with managing the care needs of the IP to assure that they are accessing and receiving the best quality of care available. Care can be delivered in a variety of settings, including at the home of the IP, in an assisted living or at a nursing home. Decisions regarding the day-to-day care of the IP are within the authority held by the guardian. If a guardian seeks to transfer the IP to a new care setting, he or she must first make an application to the court for permission to do so. This application must contain information pertaining to the proposed move, including the identify of the proposed care setting, the services available therein and the just cause for changing the residence of the IP. The IP would be noticed of such proceeding and permitted to participate and be present during any discussion around a change in care. If the IP objects to the proposal, he or she can request counsel for the purposes of filing written objections to the proposed plan. In any case, decisions pertaining to change in home environment are not taken lightly and will be subjected to great scrutiny by the guardianship judge.

Fiction: Clients are at risk of having this proceeding initiated at any time and there is nothing they can do to protect themselves from a guardianship proceeding.

Fact: Clients who are proactive in their estate planning can avoid lengthy guardianship proceedings and can protect themselves from unwanted intervention. Anticipating their future needs, providing for assistance for personal and financial care, and maintaining a relationship with an attorney beyond what is commonly believed to be "estate planning" is critically important.

Conclusion

Clearly, it is critically important that each person, especially the elderly, to consult with an attorney to consider his or her future needs and to put what is needed in place. Even so, there may come a time when a formal guardianship is needed. However, the court pays close attention to the wishes of those in need.

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FOCUS: EDUCATION LAW

OCR And OSERS Issue Guidance on IDEA and Section 504 Requirements for Addressing Disability-Based Student Behavior

Cynthia A. Augello

On July 19, 2022, the Department of Education's Office for Civil Rights "OCR" and the Office of Special Education and Rehabilitative Services "OSERS" released several guidance documents concerning the civil rights of students with disabilities when facing student discipline. The target of the resources is minimizing exclusionary discipline and supporting pandemic-related mental health needs of students, particularly students with disabilities.

Children with disabilities have historically faced systemic barriers to accessing their education. In light of the COVID-19 pandemic, they have faced greater challenges to their social, emotional, and academic development and success.[1] Guidance documents reiterate requirements under federal law for disciplining students with disabilities and offer best practices and considerations for ensuring school disciplinary policies and practices are implemented in a non-discriminatory manner. This article will discuss the primary guidance documents issued as well as the relevant statutes and authorities charged with enforcement.

Introducing the new guidance documents, U.S. Secretary of Education Migues Cardona stated: "[a]ll students deserve to have their rights protected, and schools deserve greater clarity on how they can avoid the discriminatory use of discipline…" He went on to say:

> "[t]oo often, students with disabilities face harsh and exclusionary disciplinary action at school. The guidance we're releasing today will help ensure that students with disabilities are treated fairly and have access to supports and services to meet their needs—including their disability-based behavior. We also expect that districts utilize the federal American Rescue Plan dollars to build capacity, provide professional learning opportunities for educators and school leaders, and hire additional staff. These resources will also help schools live up to their legal obligations, support an equitable recovery for all our students, and make sure that students with disabilities get the behavioral supports and special education services they need to thrive."[2]

The IDEA

The Individuals with Disabilities Education Act "IDEA" is a civil rights statute ensuring services to children with disabilities throughout the country. IDEA governs how states and public agencies provide early intervention, special education, and related services to children with disabilities.

The IDEA provides Substantive Protections. The IDEA requires:[3]

- All children with disabilities are to be given a free appropriate public education ("FAPE").
- Education and Related Services must be provided to children up to the age of 21.
- Education includes academic as well as self-help and vocational skills.
- Education must be provided in the "Least Restrictive Environment" (LRE).
- Education must be individualized and appropriate to the child's needs.

The IDEA also provides Procedural Protections. Procedural Protections of the IDEA include:

- A child's right to be given notice of a proposed decision about his educational program.
- Notice must be given to parents regarding their procedural protections and substantive protections under the IDEA.
- Right to an IEP.
- Right to an administrative or court hearing and the right to have a record of the hearing.
- Right for child to remain in his educational setting until any dispute is resolved (Stay-Put Provision).
- Right to attorneys' fees if the family is the prevailing party at an administrative hearing.

Section 504 of the Rehabilitation Act of 1973 ("Section 504")

Section 504 is a civil rights statute which prohibits discrimination against individuals with disabilities. While Section 504 does not provide funding to educational institution, it does place certain requirements on those receiving federal funding. Section 504 requires funding recipients to provide appropriate educational services designed to meet the individual needs of students with disabilities to the same extent as the needs of students without disabilities are met. An appropriate education for a student with a disability under the Section 504 regulations could consist of education in regular classrooms, education in regular classes with supplementary services, and/or special education and related services.[4]

Americans with Disabilities Act of 1990

The ADA stands for The Americans with Disabilities Act of 1990. The ADA is a federal civil rights law designed to provide equal opportunity for qualified individuals with disabilities, including students. The ADA prohibits discrimination on the basis of a qualified disability and ensures that qualified disabled students can have equal access and opportunity for participation in the programs, services and activities offered by a recipient of federal financial assistance. The ADA was amended in 2008 by, among other things, expanding the definition of disability and what it means to be regarded as disabled under the statute.[5]

Interplay between OCR, OSERS, and State Departments of Education Regarding Educational Services to Students with Disabilities

OCR, a component of the U.S. Department of Education, enforces Section 504 as well as Title II of the

Americans with Disabilities Act of 1990 (Title II), which extends this prohibition against discrimination to the full range of state and local government services, programs, and activities (including public schools) regardless of whether they receive any Federal financial assistance. The Americans with Disabilities Act Amendments Act of 2008 (Amendments Act), effective January 1, 2009, amended the Americans with Disabilities Act of 1990 (ADA) and included a conforming amendment to the Rehabilitation Act of 1973 (Rehabilitation Act) that affects the meaning of disability in Section 504.

The standards adopted by the ADA were designed not to restrict the rights or remedies available under Section 504. The Title II regulations applicable to free appropriate public education issues do not provide greater protection than applicable Section 504 regulations.[6] The OSERS, also a component of the U.S. Department of Education, administers the Individuals with Disabilities Education Act (IDEA), a statute which funds special education programs.[7]

Each state educational agency is responsible for administering IDEA within the state and distributing the funds for special education programs. IDEA is a grant statute and attaches many specific conditions to the receipt of Federal IDEA funds. Section 504 and the ADA are antidiscrimination laws and do not provide any type of funding.[8]

What's the Message Being Sent in the Recent Guidance?

The message from OCR and OSERS is an expectation that due to the increased mental health related concerns for our nation's students, caused, in part by the COVID-19 pandemic, school districts must find ways to support behavior related needs without first resorting to suspension and/or expulsion. Both agencies are especially concerned that students with disabilities, compared to non-disabled peers, have a higher rate of suspension and expulsion. Shockingly, the agencies found that "[s]chool-age students with disabilities served under IDEA represented 13.2 percent of the total student enrollment but received 20.5 percent of one or more in-school suspensions and 24.5 percent of one or more out-of-school suspensions."[9]

The disproportionate nature of such suspensions has been an on-going problem long before the COVID-19 pandemic. OSERS Dear Colleague Letter on Ensuring Equity and Providing Behavioral Supports to Students with Disabilities (August 1, 2016) highlighted data demonstrating that many children with disabilities, particularly Black children with disabilities, were subjected to disproportionately high rates of disciplinary removals.[10]

How will the Issue be Addressed?

The guidance reminds public elementary and secondary schools of their obligations under the various federal laws concerning students with disabilities. Specifically, schools are reminded to provide the services, supports, interventions, strategies, and modifications to policies addressing disability-based behavior. OCR and OSERS both strongly encourage use of positive, proactive practices, focused on the whole child, and inclusive of not just academic support, but also behavioral, social, and emotional support.[11]

Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973

The guidance and its accompanying fact sheet[12] address student discipline under Section 504 of the *Rehabilitation Act of 1973*. Specifically, the guidance outlines the overlapping requirements under Section 504 and IDEA for schools to address disability-based discipline in a non-discriminatory manner.

The guidance first outlines what constitutes a Free and Appropriate Public Education ("FAPE") under Section 504 specific to students with behavioral needs. The guidance highlights "when schools must identify and evaluate students with behavioral needs to determine if they are a student with a disability, the requirements for evaluation and placement determinations, how schools identify needed behavioral supports, the schools' responsibility to meet the needs of students with disabilities, and the relevant procedural safeguards."[13]

The guidance notes that FAPE can be impacted by disciplinary practices that do not appropriately take into consideration a student's disability nor consider that their behavior may be a manifestation of their disability. This is particularly true if such disciplinary practices contemplate a removal of the student from the school setting or a change in placement.

The guidance further provides examples of practical modifications schools can make to their disciplinary practices in addressing disability-based behavior. This includes a recommendation that schools provide training to all staff on how to engage with students with disabilities.[14]

OCR's guidance additionally provides insight on distinguishing behavioral interventions that are non-discriminatory from behavioral interventions that are implemented in a manner more punitive to students with disabilities as compared to their peers without a disability. The guidance then details the process by which OCR will investigate a complaint of disparate impact of student discipline.[15]

OCR may investigate any complaint of discrimination under any law in its jurisdiction, including allegations of "intersectional discrimination" in which a student may experience discriminatory treatment on an additional basis other than their disability, such as due to their race, color, national origin, sex, or age.[16]

Positive, Proactive Approaches to Supporting the Needs of Children with Disabilities: A Guide for Stakeholders

In the nineteen page guidance OSERS focused on ensuring students "have the opportunity for safe, in person learning"[17] including guidance on reviewing "disciplinary practices and policies" and updating them where "disparities in their use persists."[18] This guidance encourages evidence-based behavioral supports and interventions to address students' disability-related behaviors, as well as advises against the use of exclusionary disciplinary practices. In this guidance, State Educational Agencies ("SEAs"), Local Educational Agencies ("LEAs"), schools, and early childhood programs are advised to earmark resources toward training educators to utilize various strategies to support students with disabilities.[19]

Questions and Answers Addressing the Needs of Children with Disabilities and the IDEA's Discipline Provisions

This guidance addresses the IDEA provisions related to the discipline of students with disabilities. Updating the 2009 OSERS guidance entitled *Questions and Answers on Discipline Procedures*,[20] this document focuses on permitted and prohibited strategies to address disability-based behavioral challenges of students with disabilities. The guidance highlights the process for disciplining an IDEA-eligible student, including the process for placing a student in an Interim Alternative Educational Setting and strategies schools may employ to minimize the need for exclusionary discipline.[21]

1. Orsander, M., Mendoza, P., Burgess, M., & Arlini, S.M. (2020). *The hidden impact of COVID-19 on children and families with disabilities*. London, Save the Children International.
2. https://content.govdelivery.com/accounts/USED/bulletins/3220db2.
3. https://sites.ed.gov/idea/statute-chapter-33/subchapter-i/1400.
4. https://www2.ed.gov/about/offices/list/ocr/504faq.html.
5. https://www.ada.gov/pubs/adastatute08.pdf.
6. https://www2.ed.gov/about/offices/list/ocr/504faq.html.
7. *Id.*
8. *Id.*
9. https://www2.ed.gov/about/offices/list/ocr/docs/osers-dcl.pdf.
10. https://sites.ed.gov/idea/files/dcl-on-pbis-in-ieps-08-01-2016.pdf.
11. https://sites.ed.gov/idea/files/guide-positive-proactive-approaches-to-supporting-children-with-disabilities.pdf.
12. https://www2.ed.gov/about/offices/list/ocr/docs/504-discipline-factsheet.pdf.
13. https://www2.ed.gov/about/offices/list/ocr/docs/504-discipline-guidance.pdf at pg. 11.
14. *Id.* at pg. 10.
15. *Id.* at pg. 20, *fn.* 89.
16. *Id.*
17. https://sites.ed.gov/idea/files/guide-positive-proactive-approaches-to-supporting-children-with-disabilities.pdf at pg. 4.
18. *Id.*
19. *Id.* at pg. 9.
20. https://sites.ed.gov/idea/files/08-0101_Discipline_FINAL_June_2009-1.pdf.
21. https://sites.ed.gov/idea/files/qa-addressing-the-needs-of-children-with-disabilities-and-idea-discipline-provisions.pdf.

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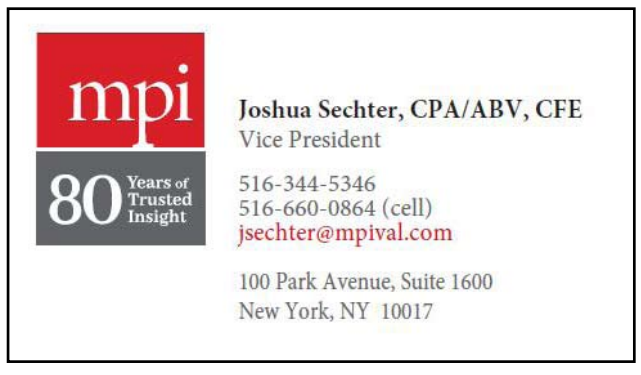

NCBA Corporate Partner Spotlight

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FOCUS: LAW AND AMERICAN CULTURE

The Agony of Munich

Rudy Carmenaty

The XX Olympiad was held in Munich in the summer of 1972. The motto of the Games was "*Die Heiteren Spiele*" or "*the Cheerful Games.*"[1] Ironically, it would be the German's blind adherence to this motif that would compound the tragedy that was to unfold that September.

German officialdom went to considerable lengths to dispel memories of the Berlin Games of 1936. Hitler had used the XI Olympiad as a showcase to advance his vile notions of racial supremacy and antisemitism. The Germans wanted to demonstrate they were a nation rehabilitated since the dark shadows of the Third Reich.

A new West German state, the Federal Republic of Germany, had come into existence since the end of World War II. The 1972 Olympics were designed to present a Germany that was benign, affluent, and, most of all, no longer a menace to world peace.

The first ten days of competition were an affirmation of the Olympic spirit. Perhaps the most poignant moment from the Opening Ceremonies came with the entrance of the Israeli delegation. The presence of Israelis on German soil was a testament to the survival of the Jewish people after the horrors of the Holocaust.

Then before dawn on September 5, 1972, a brutal act would change everything. Palestinian terrorists forced their way at gunpoint into the quarters of the Israeli team at Connollystraße 31.[2] In the ensuing struggle, the Palestinians killed two Israelis—wrestling coach Moshe Weinberg and weightlifter Yossef Romano.

Nine others—weightlifter David Berger, weightlifter Ze'ev Friedman, wrestling referee Yossef Gutfreund, wrestler Eliezer Halfin, track coach Amitzur Shapira, shooting coach Kehat Shorr, wrestler Mark Slavin, fencing master Andre Spitzer, and weightlifting judge Yakov Springer– were taken prisoner.

Berger was the lone American among the hostages. Holding dual citizenship, he was educated at Columbia Law School and achieved his life-long ambition when chosen for the Olympic team. At 180 lbs., his father, Dr. Benjamin Berger, recalled that David might not have been the best weightlifter, but he was the smartest.[3]

The men were tied-up on two beds and bound at the wrists and ankles. Escape was impossible. The mutilated and castrated corpse of Yossef Romano was laid before them as a warning.[4] The hostages were repeatedly beaten, suffering severe physical abuse indicating active resistance.

The terrorists were members of Black September.[5] They came from Jordan and Lebanon. Their leader was Luttif Afif, nom de guerre Issa.[6] He was distinguished by his wearing of a white hat. Armed with automatic weapons and grenades, they all had para-military training.

Black September was emphatic in their demands—the release of two hundred thirty-four comrades held in Israel. This condition had to be met by noon that day or a hostage would be killed each hour afterwards.[7] To make their point, they took Moshe Weinberg's bullet-ridden corpse and threw the body into the street.

The resulting hostage drama would take place over twenty-one-hours from 4:30 am on September 5 until it was finally over 1:30 am September 6. Negotiations were conducted by Munich's police commissioner Dr. Manfred Schreiber, in strategic command of the German response.[8]

The Germans offered the Palestinians money as well as the substitution of high-ranking officials for the release of the Israelis. But there was nothing they could have offered Issa and his confederates, other than actually meeting their demands. Most tragic of all, the mind-set of the Germans left them virtually impotent.

The Germans were completely wedded to their vision for the games. So as not to appear too 'authoritarian,' security was deliberately lax and personnel at the events went unarmed. The Olympic Village was surrounded by a chain-link fence two meters high, the only impediment the terrorists faced.

This myopia not only prevented them from providing adequate security at the outset, but as well it compromised any counter measures that could have been implemented. The forces subsequently summoned by Munich officials would prove wholly inadequate.

This incompetence was evident throughout the ordeal. That afternoon, while negotiations were proceeding, Munich police officers undertook a rescue mission—Operation Sunshine.[9] Dressed in sweatsuits and armed with sub-machine guns, the men selected had no hostage rescue training whatsoever.

As the police took their positions, television crews filmed them broadcasting images live around the world including in the Olympic Village. The Munich police didn't even have the sense to cut off electricity to Connollystraße 31 or restrict the coverage.

Seeing the impending assault not only on tv but also by looking out from their balcony, the terrorists forced the Germans to call off the rescue. Issa ran out and threatened to kill the hostages if the police did not withdraw immediately. They did so. It would be the first of many blunders.

The captured athletes seemed resigned to their fate, behaving with great stoicism. The Israeli government, for its part, was unequivocal. Israel's policy was never to negotiate with terrorists. To do so would mean that no Israeli would ever be safe anywhere in the world.[10]

Discarding their original demand, the Palestinians issued a new one. They wanted transport for them and their captives to Cairo. The Germans were determined not to let them escape and the Egyptian government refused to become involved.[11] Within a year, Israel and Egypt would be embroiled in the Yom Kippur War.

German authorities played along with the ruse of a flight to Cairo to effectuate a rescue. The Germans predicated their plans on the false premise that there were four or five terrorists at most. In fact, there were eight. This would prove another fatal miscalculation.

At about 10:00 pm, having reached an understanding, the terrorists led their bound hostages onto buses. The buses would provide transport to two waiting helicopters which were to fly to nearby Fürstenfeldbruck, a NATO airbase.[12] The entire rescue operation was doomed from the start.

It was ill conceived, and atrociously executed. The plan was to confront the terrorists at Fürstenfeldbruck. At the airport, Issa and his lieutenant would board a jet that was to take them to Egypt.[13] Both men would be subdued by Munich policemen disguised as the flight crew.

This would enable positioned snipers the opportunity to kill the remaining terrorists at the helicopters. Five Munich policemen were deployed.[14] However, none had sniper training, nor infra-red or telescopic sights.[15] As such, there were only five barely capable men for eight heavily armed terrorists.

The helicopters arrived at Fürstenfeldbruck at 10:30 pm. As agreed, Issa and his lieutenant left the helicopters to check the jet that was made available. The remaining six terrorists remained with the Israelis on the tarmac. The Israelis, who were bound to their seats on the choppers, were trapped and could not flee.

But the officers on board the airplane voted to abort their mission, concluding it was too dangerous.[16] They simply left the plane, never informing their superiors of their decision.[17] Upon entering the aircraft, Issa found it empty. The Germans' plan was quickly unraveling.

Realizing it was a trap, Issa ran back warning his compatriots. That set-off a free-for-all of indiscriminate gunfire which killed or injured some of the terrorists and killed a West German sniper. The police were outnumbered and outgunned. The terrorists shot out the flood lights leaving the tarmac in total darkness.

The Germans had arranged for armored personnel carriers to be available for tactical use at Fürstenfeldbruck.[18] But they failed to clear the roads ahead of time, so the troops were stuck in traffic. When they finally reached Fürstenfeldbruck, it was past midnight more than ninety minutes after the helicopters arrived.

Shortly thereafter, Issa emptied his Kalashnikov into one of the helicopters and threw a grenade into the cockpit igniting the vehicle's fuel. Hostages Springer, Halfin and Friedman died immediately. David Berger is believed to have died from smoke inhalation from the resulting fire.[19]

Issa was subsequently shot and killed. The five Israelis in the second helicopter were then murdered, but it is a matter of conjecture as to how. The most likely scenario was that one of the surviving terrorists shot Gutfreund, Shapira, Shorr, Slavin, and Spitzer at point-blank range.

By 1:30 am the ordeal that had begun twenty-one hours prior had ended with the death of all the hostages. Eleven Israelis lost their

lives—two were killed in their rooms and another nine were slain in the bungled rescue attempt. West German authorities refused to accept any responsibility for their actions or deficiencies.

Four of the terrorists, including Issa, were killed at the airport. Another was killed in the Bavarian countryside trying to escape.[20] Three were captured alive and arrested at Fürstenfeldbruck. They were jailed pending trial for their crimes.

In less than two months however, they would be released from West German custody. On October 29, 1972, Lufthansa Flight 615 from Damascus to Frankfurt was hijacked.[21] The hijackers threatened to blow-up the plane if the three imprisoned terrorists were not freed. The men were released, flown to Libya, and received a hero's welcome.[22]

It was suspected, and later confirmed, the hijacking of Lufthansa Flight 615 was part of a clandestine arrangement between the Germans and Black September.[23] The three men were let go in return for Black September refraining from any further operations in West Germany.[24]

The actions of Black September were an act of barbarism that defiled the Olympic ideal. Yet it begs the question, does terrorism pay? Black September's objective was to draw attention to the Palestinian cause. Munich accomplished that and by 1974 PLO Chairman Yasar Arafat was addressing the UN General Assembly.

What happened at the 1972 Olympics was all the more unforgivable because the Germans had commissioned a report that predicted the attack by Black September with haunting specificity. A Munich police psychologist Georg Sieber had developed twenty-six different terrorist scenarios and presented them to his superiors.[25]

Sieber's Situation 21 was frighteningly prescient. Sieber correctly foretold that a dozen Palestinian gunmen could scale the fence of the Olympic Village at 5:00 am, seize Israeli hostages, kill one or two, and issue a demand for the release of prisoners from Israeli jails, and an aircraft to fly them to the Middle East.[26]

Nonetheless, the Olympic organizing committee determined that preparing for threats such as those projected by Sieber would create a security environment that was not in keeping with their concept for the Games. The Germans effectively abdicated their responsibility to provide even minimal preventive measures.

Their failure is accentuated by the fact that the entire tragedy could have been avoided since it had been anticipated. West German authorities took the further misstep of later colluding with Black September when they agreed to free the three prisoners they apprehended.

The Germans deluded themselves with their own hype that the Munich Olympiad would be the "*Cheerful Games.*" In their attempt to bury the past, they failed to embrace the present. And once again, Jews would be killed on German soil. Half-a-century later, the agony of Munich reverberates still. Sic transit Olympiad.

1. Tim Donner, "*The Ugly History of Olympic Politics*", February 9, 2018, at https://www.liberty.nation.com.
2. Munich Massacre at https://www.britanicca.com.
3. Scholar and Athlete – David Berger National Memorial at https://www.nps.gov.
4. *Munich Massacre, supra.*
5. Black September was a militant Palestinian organization, a faction of Fatah, founded following the forcible expulsion of Palestinian fighters from Jordan.
6. Albert Whitwood, *The tragic Real-Life Story of the Munich Olympics*, March 26, 2021 at https://discovernet.io.
7. Jennifer Rosenberg, *Learn about the Munich Massacre*, September 10, 2018, at https://www.thoughtco.com.
8. Whitwood, *supra.*
9. Rosenberg, *supra.*
10. 1972 Munich Olympics massacre – an avoidable catastrophe? At https://www.dw.com.
11. Whitwood, *supra.*
12. *Id.*
13. *Munich Massacre, supra.*
14. Munch 1972: A preventable massacre? at https://learngerman.dw.com.
15. *Id.*
16. *Munich Massacre, supra.*
17. *Id.*
18. *Id.*
19. Tragedy in Munch – David Berger National Memorial at https://www.nps.gov.
20. *Munich Massacre, supra.*
21. Austin Carroll and Stephen Glagola, *Lufthansa Flight 615 Hijacking*, at https://1972olympics.weebly.com.
22. *Munich Massacre, supra.*
23. *Id.*
24. *Id.*
25. *1972 Munich Olympics massacre – an avoidable catastrophe?, supra.*
26. *Id.*

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

In Brief

Effective September 1, 2022, **Rebecca Sassouni** will join the firm Wisselman Harounian Family Law as Of Counsel.

Victoria Spagnolo has joined NHG Law Group as an Associate.

Melissa Negrin-Wiener, Senior Parter at Cona Elder Law is pleased to announce the opening of its new office in Port Jefferson at 41 North Country Road.

Forchelli Deegan Terrana (FDT) partner **Gregory S. Lisi** was recognized for a third consecutive year for his work in Litigation—Labor & Employment Law. FDT partner **Kathleen Deegan Dickson** was listed for the first time for her work in Cannabis Law. The following FDT attorneys were included in *The Best Lawyers in America: Ones to Watch*™ 2023 Edition: **Lindsay Mesh Lotito** (Banking & Finance Law), **Robert L. Renda** (Tax Law), and **Danielle E. Tricolla** (Business Organizations (including LLCs and Partnerships); Closely Held Companies and Family Businesses Law; Commercial Litigation; Litigation—Labor and Employment and Litigation— Real Estate.

Certilman Balin Adler & Hyman, LLP's Condo/Coop and Litigation Partner **Donna-Marie Korth** has been appointed to the Advisory Board of the Mattone Family Institute at her alma mater, St. John's University School of Law.

Thomas G. Sherwood of Sherwood & Truitt Law Group, LLC is pleased to announce that **Amy E. Abbandondelo**, who joined the firm as an associate attorney in 2011 and is the current co-chair of the NCBA Appellate Practice Committee, has been promoted to Member of the firm.

Marian C. Rice

Emily F. Franchina of Franchina Law Group is pleased to announce the firm's move to a new Nassau County location at 1225 Franklin Avenue, Suite 325, Garden City effective September 1, 2022.

Karen Tenenbaum LL.M. (Tax), CPA, tax attorney, is proud to announce that Tenenbaum Law, P.C., was awarded "Best Tax Law Firm" by *Long Island Business News*. Karen was recently interviewed by a financial advisor for her book about successful female entrepreneurs and creating wealth. Karen and other lawyers from her firm presented "Changing State Residency for Tax Purposes" for Strafford Webinars. Karen moderated the Suffolk County Bar Association Academy of Law Billing Series presentations "Top Tips and Best Practices" with Christopher Anderson and "How to Get Paid: The 10 Commandments" by Marco Brown. In addition, she hosted "How to Become a Powerful Communicator" by Jane Hanson for the SCBA Academy of Law. Karen also moderated the SCBA Tax Law Committee webinars "The IRS's ETAAC: What Does the IRS Need to Better Serve Taxpayers" by Argi O'Leary and "Qualified Small Business Stock" by George Rubino and Michelle Connolly.

Kristin J. Kircheim has become a Partner at The Altarac Law Firm, PLLC.

Five Vishnick McGovern Milizio LLP (VMM) attorneys have been named to *Best Lawyers in America 2023*. Partner **Joseph Trotti** was named in Family Law Mediation; partner **Constantina Papageorgiou** was named to *Best Lawyers: Ones to Watch* in two categories, Elder Law and Trusts and Estates; associate **Meredith Chesler** was named to *Best Lawyers: Ones to Watch* in Trusts and Estates; and associate **Phillip Hornberger** was named to *Best Lawyers: Ones to Watch* in Business Organizations (Including LLCs and Partnerships). **Joseph Milizio**, managing partner and head of the LGBTQ Representation practice, was named named one of Dan's Out East End Impact Awards honorees.

Best Lawyers in America has recognized the following Moritt Hock & Hamroff (MHH) attorneys in its 2023 edition: **David H. Cohen**—Real Estate Law; and **Benjamin Geizhals**—Health Care Law. In addition, the following MHH attorneys have been named to B*est Lawyers: Ones to Watch in America*: **Lauren Bernstein**—Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law and Commercial Litigation; **Michael Calcagni**—Litigation-Trusts & Estates and Trusts & Estates; and **Matthew S. De La Torre**—Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law and Commercial Litigation.

Capell Barnett Matalon & Schoenfeld LLP Partner **Gregory Matalon** will be presenting "Estate Planning Before 2026 (and Beyond) for Married Couples" with associate **Erik Olson** for Lorman Education Services. Partner **Stuart Schoenfeld** was featured in the *InvestmentNews* article "How Advisers Can Stop Family Members from Fleecing Elderly Relatives." In other news, Partner **Robert Barnett** presented a well-reviewed lecture entitled "Purchase and Sale of Business Interests—a Federal and State Tax Overview," for the New York State Society of CPA's Closely Held and S Corporations Committee. Partner **Yvonne Cort**'s article, "Innocent Spouse Update: A Change in the Law, and What Constitutes Actual Knowledge" was published in the National Conference of CPA Practitioners' newsletter.

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

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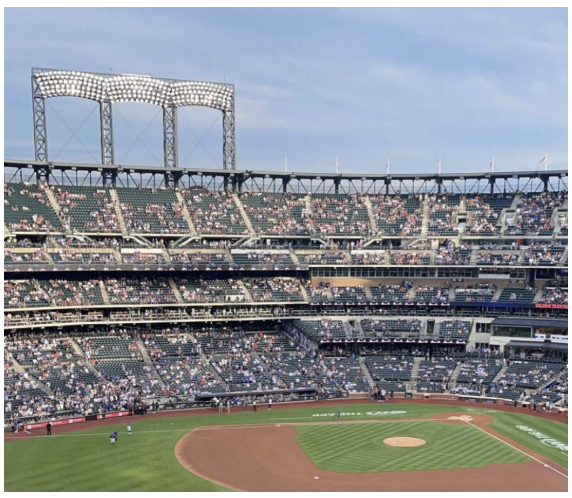
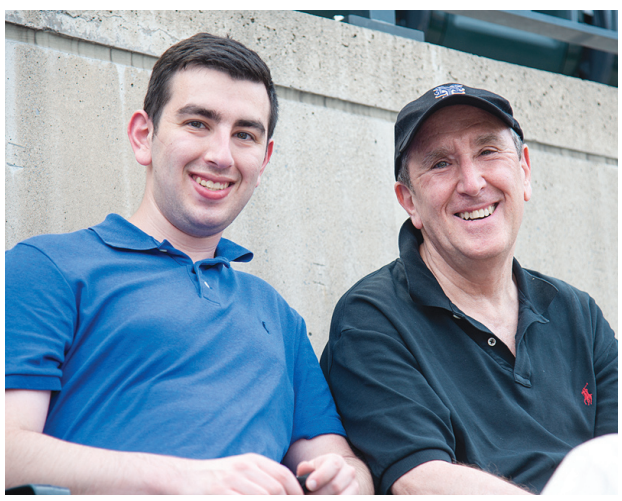
Join the WE CARE Fund and Warriors for a Cause at the Tunnel to Towers 5K Run and Walk in New York City on Sunday, September 25, 2022 .

Registration cost is $125 for adults and $65 for children 14 and under and includes (event t-shirt, warriors team shirt, breakfast, bus transportation to and from the event, and lunch.)

To register, visit warriorsforacause.org and mention WE CARE in the comment box.

WE CARE Mets vs. Yankees Game
July 26, 2022





Photos By: Hector Herrera

WE CARE Nashville Night
July 22, 2022

Photo By: Hector Herrera

NCBA Committee Meeting Calendar September 6, 2022 – October 6, 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, SEPTEMBER 6
APPELLATE PRACTICE
12:30 PM
Amy E. Abbandondelo/Melissa Danowski

WEDNESDAY, SEPTEMBER 7
SURROGATES COURT ESTATES & TRUSTS
5:30 PM
Stephanie Alberts/
Michael Calcagni

THURSDAY, SEPTEMBER 8
LGBTQ
9:00 AM
Jessika Pineda

THURSDAY, SEPTEMBER 8
COMMUNITY RELATIONS & PUBLIC EDUCATION
12:45 PM
Ira S. Slavit

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

TUESDAY, SEPTEMBER 13
GENERAL, SOLO & SMALL LAW PRACTICE MANAGEMENT
12:30 PM
Scott J. Limmer/Oscar Michelen

TUESDAY, SEPTEMBER 13
LABOR & EMPLOYMENT LAW
12:30 PM
Michael H. Masri

WEDNESDAY, SEPTEMBER 14
ASSOCIATION MEMBERSHIP
12:30 PM
Jennifer L. Koo

WEDNESDAY, SEPTEMBER 14
MEDICAL-LEGAL
12:30 PM
Christopher J. DelliCarpini

WEDNESDAY, SEPTEMBER 14
MATRIMONIAL LAW
5:30 PM
Jeffrey L. Catterson

THURSDAY, SEPTEMBER 15
ALTERNATIVE DISPUTE RESOLUTION
12:30 PM
Suzanne Levy/Ross J. Kartez

TUESDAY, SEPTEMBER 20
PLAINTIFF'S PERSONAL INJURY
12:30 PM
David J. Barry

TUESDAY, SEPTEMBER 20
NEW LAWYERS
5:30 PM
Byron Chou/
Michael A. Berger

THURSDAY, SEPTEMBER 20
INSURANCE LAW
6:00 PM
Jason B. Garbus

TUESDAY, SEPTEMBER 20
DIVERSITY & INCLUSION
6:00 PM
Rudolph Carmenaty

WEDNESDAY, SEPTEMBER 21
SENIOR ATTORNEYS
12:30 PM
Stanley P. Amelkin

WEDNESDAY, SEPTEMBER 21
REAL PROPERTY LAW
12:30 PM
Alan J. Schwartz

WEDNESDAY, SEPTEMBER 21
ACCESS TO JUSTICE
12:30 PM
Daniel W. Russo/
Hon. Conrad D. Singer

TUESDAY, SEPTEMBER 27
DISTRICT COURT
12:30 PM
Bradley D. Schnur

WEDNESDAY, SEPTEMBER 28
BUSINESS LAW TAX & ACCOUNTING
12:30 PM
Varun Kathait

WEDNESDAY, SEPTEMBER 28
WOMEN IN THE LAW
12:30 PM
Melissa P. Corrado/
Ariel E. Ronneburger

THURSDAY, SEPTEMBER 29
CIVIL RIGHTS
12:30 PM
Liora M. Ben-Sorek/
David A. Bythewood

MONDAY, OCTOBER 3
SURROGATES COURT ESTATES & TRUSTS
5:30 PM
Stephanie Alberts/
Michael Calcagni

TUESDAY, OCTOBER 4
APPELLATE PRACTICE
12:30 PM
Amy E. Abbandondelo/
Melissa Danowski

THURSDAY, OCTOBER 6
PUBLICATIONS
12:45 PM
Rudolph Carmenaty/
Cynthia A. Augello

THURSDAY, OCTOBER 6
COMMUNITY RELATIONS & PUBLIC EDUCATION
12:45 PM
Ira S. Slavit

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We Welcome the Following New Members Attorneys

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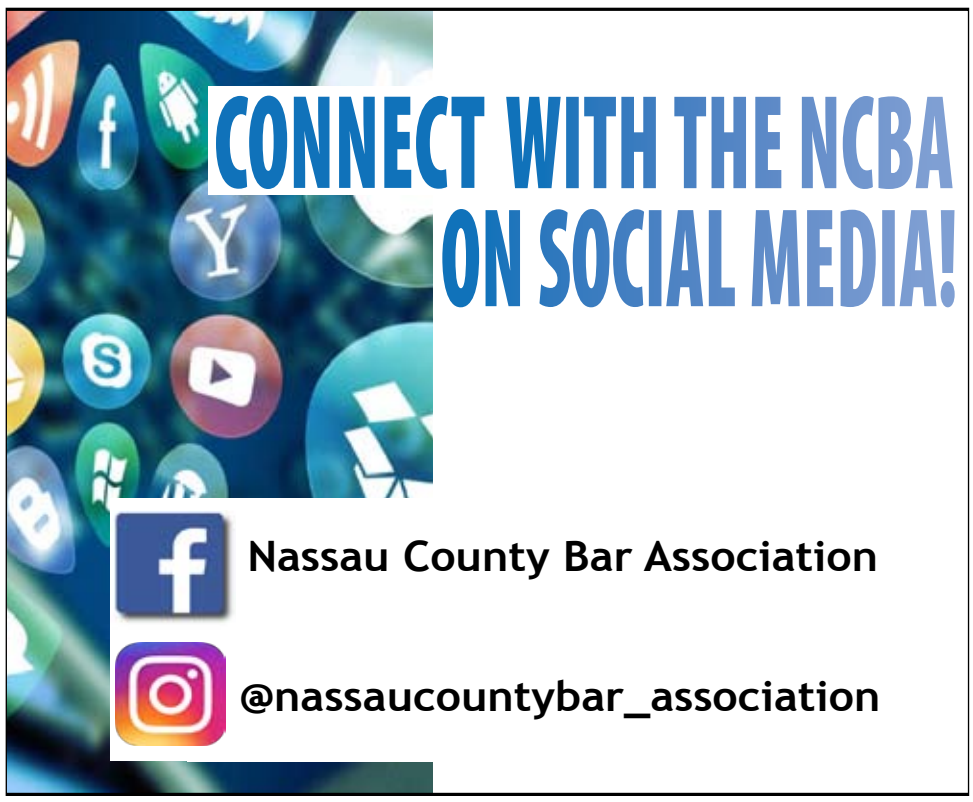

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