Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

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SAVE THE DATE

BBQ AT THE BAR DRIVE-BY

Thursday, September 10, 2020
5:00 to 6:00 PM or 6:15 to 7:15 PM
See pg. 2

VIRTUAL OPEN HOUSE

Monday, October 26 to 30, 2020
See pg. 6

WHAT'S INSIDE

OF NOTE

NCBA Member Benefit - I.D. Card Photo

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UPCOMING PUBLICATIONS COMMITTEE MEETINGS

Thursday, September 3, 2020 at 12:45 PM
Thursday, October 1, 2020 at 12:45 PM

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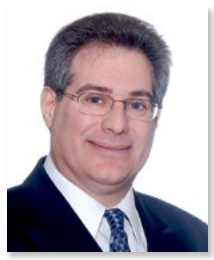

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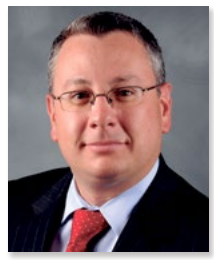

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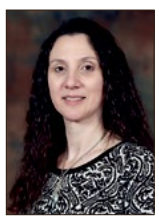

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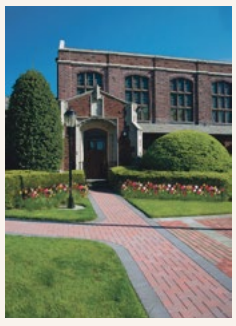

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Don't miss out on the chance to renew your NCBA membership for the 2020-2021 Bar year! Renew online today at nassaubar.org or call the NCBA Membership office at (516) 666-4850 or (516) 747-4876. Payment plan options are available. We look forward to welcoming you back home to Domus.

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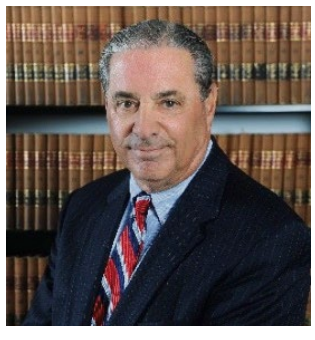

David H. Besso, past Chairman of the Grievance Committee for the 10th Judicial District and past President of the Suffolk County Bar Association, has been representing attorneys for more than twenty years.

Michelle Aulivola has defended attorneys involved in attorney disciplinary matters and grievance investigations for the past fifteen years.

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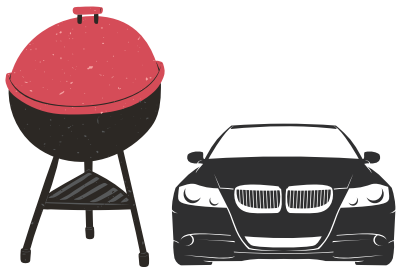
FIRST EVER NCBA MEMBER APPRECIATION

DRIVE-BY BBQ AT THE BAR



THURSDAY, SEPTEMBER 10, 2020
at the Nassau County Bar Association
15th & West Streets, Mineola
5:00 to 6:00 or 6:15 to 7:15 PM
RAIN DATE: Wednesday, September 16, 2020

Please bring a non-perishable food item to be donated to our food drive!

THERE IS NO CHARGE FOR THIS EVENT. YOU MUST PRE-REGISTER.

To register, contact Special Events at events@nassaubar.org or (516) 747-4070 ext. 1226.
Specify your desired time slot and if you will be picking up or staying to network for an hour.

Drive by the NCBA to receive a to-go BBQ dinner, beverage, dessert, and swag bag! Or stay an hour and meet and network with our Directors, Officers, Staff, Corporate Partners, and fellow members in a standing-only networking area for up to 50 people per time slot.

FACE MASKS ARE REQUIRED! SOCIAL DISTANCING WILL BE ENFORCED!

Real Estate/Municipal Law

SELLER BEWARE: Do You Still Owe a Broker's Commission When COVID Wrecks the Sale?

Many real estate deals have collapsed as a result of the COVID-19 pandemic, and much has been written about impossibility or frustration of purpose in the context of disputes between sellers and purchasers. But nearly every real estate deal includes a third party—the real estate broker. When a deal fails because of COVID-19, should the broker still receive its commission?

The general rule in New York is that a real estate broker earns a commission when he or she "procures a buyer who meets the requirements established by the seller."[1] This type of buyer is characterized as "ready, willing, and able."[2] When a broker produces a ready, willing, and able buyer, his or her right to commission becomes enforceable. Barring any exceptions, the broker's right to a commission does not depend upon the performance of the realty contract or the receipt by the seller of the selling price.[3] What this means in practice is often that once a contract of sale is signed, the seller must still pay the broker's commission even if the deal aborts.

Fortunately for sellers, there are exceptions to this general rule. Possible defenses or claims that a seller may have include: (1) a contractually bargained-for exception; (2) the inability of the buyer to complete the sale; (3) a contract of adhesion that violates public policy; and (4) equitable reformation of the contract based on the history of contract negotiations.

As commercial real estate attorneys are well aware, seller's counsel can demand a clause in the brokerage agreement providing that the broker's commission will be paid only upon closing or the passing of title.[4] In that circumstance, the language of the contract itself will be the seller's best defense. Unfortunately, residential sellers often sign a broker's agreement first and hire an attorney later for the sole purpose of negotiating the contract of sale with the purchaser.

Failing the existence of a contractually bargained-for exception, a seller can argue that the general rule should not apply because the buyer proffered by the broker is in actuality not "ready, willing, and able." The weakest link is often the buyer's ability to consummate the deal. As held by the Court of Appeals, "a real estate broker will be deemed to have earned his [or her] commission when he [or she] produces a purchaser who is not only ready and willing to purchase at the terms set by the seller, but able to do so as well."[5]

Case law on a buyer's inability usually centers on its financial inability. The broker has the burden to demonstrate that the buyer is financially able to complete the purchase.[6] For example, a broker will not be entitled to a commission if a buyer fails to obtain a mortgage and thus cannot satisfy the mortgage contingency common in almost all real estate contracts.[7] A buyer whose down payment check bounces after contract signing is likewise not financially "able."[8] A broker may also not be able to prove entitlement to a commission if buyer agrees to pay the second half of a down payment after contract signing and then does not satisfy that condition.[9]

The unique factual background of the COVID-19 pandemic may point the way toward an expansive notion of inability—legal inability based on governmental action such as executive orders or physical inability due to frail health or advanced age. In the height of the health crisis, for example, Governor Andrew Cuomo announced Matilda's Law, named for the Governor's mother, requiring individuals age 70 and older, those with compromised immune systems, and those with underlying illnesses to stay home and limit home visitation to immediate family members or close friends in need of emergency assistance. Under these circumstances, a broker may not be able to meet the burden of proving buyer's ability to consummate the sale.

Katherine Santos

Another argument a seller can bring to bear is the accusation that the broker's agreement constitutes a contract of adhesion, which should be considered void as against public policy. A contract of adhesion "contains terms that are unfair and nonnegotiable and arises from a disparity of bargaining power or oppressive tactics."[10] A court is more likely to find that a contract of adhesion exists where the party seeking to enforce the contract has used high pressure tactics.[11] In case of doubt, the court must hold an evidentiary hearing.[12]

An unrepresented seller negotiating with a large real estate agency unquestionably has far less bargaining power than the broker. It is the brokerage agency that has prepared the form contract with pages of fine print difficult for a layman to comprehend. The seller may feel, and the agent may even say, that the seller is in a position of "sign or else." The seller may thus have a strong argument that the broker in that circumstance should not receive a commission especially where COVID-19 has wrecked the deal. Important public policy concerns have emerged during the COVID-19 crisis, such as ensuring that people stay safe from infection and protecting livelihoods from being destroyed by financial fallout. These public policy concerns weigh in favor of not requiring a seller to pay a commission on a sale that never happened because COVID-19 prevented it.

Lastly, certain sellers may possess evidence supporting a claim for equitable reformation of the terms of the brokerage agreement. "A party seeking reformation of a contract by reason of mistake must establish, with clear and convincing evidence, that the contract was executed under mutual mistake or a unilateral mistake induced by the other party's fraudulent misrepresentation."[13]

In cases of mutual mistake, "[t]he remedy of reformation of a contract is available when…the parties reached an oral agreement and, unknown to either, the signed writing does not express that agreement."[14] A party may therefore introduce parol evidence, i.e., evidence outside the four corners of the document, to support its claim for reformation of contract.[15] This is true even where an agreement contains the standard merger clause providing that the signed contract supersedes any prior terms, representations, or agreements whether made orally or in writing.[16] Courts have shown a high degree of sympathy to unsophisticated homeowners alleging claims of mutual mistake, even when they were represented by counsel at the time.[17]

Many sellers, represented or unrepresented, have been asking questions about how COVID-19 will impact the sale of their home. A telephone conversation or email chain between a broker and seller discussing what will happen if COVID-19 wrecks the sale may show that the agreement between the individual seller and real estate agent was very different from the one reflected in the form from the real estate company—a form that neither of them may have examined closely. In this case, the seller may have a valid claim for equitable reformation of the brokerage agreement.

It is impossible to predict how many sellers will be sued by brokers attempting to collect commissions when the parties never made it to closing. Some brokers may choose not to file suit because of public relations concerns, especially if they do business in tight-knit residential communities where competition between agents is fierce and news travels fast. On the other hand, times have been tight for brokers lately as well. The good news for sellers is if they do have to face suit, they have numerous potential defenses.

Katharine Santos has represented landlords and other real property owners in settings as varied as a three-day jury trial over a breach of contract of sale and a multimillion-dollar securitized mortgage deal. She is a senior associate at Lynn Gartner Dunne, LLP.

1. *Hecht v. Meller*, 23 N.Y.2d 301 (1968).
2. *Lane —The Real Estate Dep't Store, Inc. v. Lawlet Corp.*, 28 N.Y.2d 36, 42 (1971).
3. *Hecht*, 23 N.Y.2d at 305; *Lane*, 28 N.Y.2d at 42.
4. *Dawn's Gold Realty v. Dagnese*, 304 A.D.2d 519 (2d Dept. 2003) (enforcing brokerage contract providing that commission shall be payable only when title passes); *see also Liggett Realtors, Inc. v. Gresham*, 38 A.D.3d 214 (1st Dept. 2007) (agreement did not entitle broker to commission unless deal closed); *Donald Yoo (New York) Corp. v. Laszlo N. Tauber, M.D. & Assocs.*, 281 A.D.2d 171 (1st Dept. 2001) (seller's statement that broker would be paid out of the closing proceeds required that sale actually close).
5. *Rusciano Realty Servs. v. Griffler*, 62 N.Y.2d 696, 697 (1984); *F. Richard Wolff & Son, Inc. v. Tutora*, 50 A.D.3d 950, 951 (2d Dept. 2008) (citing Rusciano).
6. *AA Frontier Inc. v. Silverman*, 1 Misc. 3d 1, 2 (App. Term 2003).
7. *Wolff*, 50 A.D.3d at 951.
8. *Trenga Realty v. Wedgewood Homes, Inc.*, 138 A.D.2d 875, 876 (3d Dept. 1988).
9. *DuBois v. McDade*, 173 A.D.2d 1092, 1093 (3d Dept. 1991).
10. *Love'M Sheltering, Inc. v. Cty. of Suffolk*, 33 A.D.3d 923 (2d Dept. 2006).
11. *Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133, 139 (1989).
12. *David v. #£1 Mktg. Serv., Inc.*, 113 A.D.3d 810, 812 (2d Dept. 2014).
13. *Gunther v. Vilceus*, 142 A.D.3d 639, 640 (2d Dept. 2016) (citing cases).
14. *O'Neill v. Town of Fishkill*, 134 A.D.2d 487, 489 (2d Dept. 1987); *see also Chimart Assoc. v. Paul*, 66 N.Y.2d 570, 573 (1986).
15. *W. Vernon Petroleum Corp. v. Singer Holding Corp.*, 103 A.D.3d 627, 629 (2d Dept. 2013).
16. *K.I.D.E. Assocs., Ltd. v. Garage Estates Co.*, 280 A.D.2d 251, 253 (1st Dept. 2001).
17. *Biscone v. Carnevale*, 186 A.D.2d 942, 945 (3d Dept. 1992).

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President's Letter

FROM THE PRESIDENT

Dorian R. Glover

As I pen this column, I am preparing to attend the March on Washington on Friday, August 28. As one who marched on Selma, Alabama on its 20th Anniversary in 1985 and worked on the campaign of the late civil rights leader John Lewis' campaign for Georgia's 5th Congressional District in 1987, I personally feel incumbent to answer the call for action. This call was inspired by the programs I participated at our Bar Association this summer following the death of George Floyd in Minneapolis.

Programs this summer included: "Dreams Deferred Amongst Racial Covenants, The U.S. Supreme Court Case which Inspired Lorraine Hansberry's *A Raisin in the Sun* led by Rudy Carmenaty; our Diversity & Inclusion Committee Chair Maxine Broderick's Social Justice Book Club's reading of The New York Times' bestseller *Between the World and Me*, by Ta-Nahesi Coates; our Civil Rights Committee Chair Bernadette Ford's invitation to Frederick K. Brewington to speaking on "Race, A Factor in the Law, and Why We Need to Discuss It!" The discussions that I participated in were awakening.

I addressed the same formula with my fall students at Touro Law School in my course, Current Issues of Racism in American Law. Notwithstanding the majority opinion written by Chief Justice Roger B. Taney's in *Dred Scott v. John F. A. Sandford*, change was around the corner. As you may recall, the Supreme Court in 1857, 60 U.S. 393, held "A free negro of the African race, whose ancestors were brought to this country and sold as slave, is not a 'citizen' within the meaning of the Constitution of the United States."

Briefly, the facts were Mr. Scott, his wife and children, slaves belonging to Dr. Emerson, were taken from the State of Missouri to Rock Island in the State of Illinois, a territory governed by the Missouri Compromise of 1820, which prohibited slavery. Mr. Dred argued that because he and his family were entitled to freedom by being taken to Rock Island, in the State of Illinois. The Court disagreed. It is recorded that even Northerners, who were not abolitionist, or even necessarily anti-slavery, protested the pro-Southern bias of the decision. Six years later, Abraham Lincoln, for numerous reasons, including the actual rebellion against the authority and government of the United States, signed the Emancipation Proclamation granted freedom to the slaves within any state. To make systemic change will involve all branches, executive, judicial and legislative branches of government.

Our Bar Association has publicly stated we will work with our justice partners—community leaders, government officials, law enforcement and the judiciary—to bring change, correct inequities, and ensure equal justice and fairness for all members of our community who expect ethical, moral, and upright behavior from those constitutionally bound to uphold the law. To that end, we have formed the Equal Justice Task for progressively participating in the process of proposed legislation and move towards reconciliation.

Our Response to Coronavirus, COVID-19 Pandemic

NCBA pro bono services are at a peak! We have received acclaimed press coverage in connection with our volunteer law students and attorneys who help residents and businesses who reach out to covidhelp@nassaubar.org. Our NCBA staff review each email and assigns it to one of the NCBA volunteers; the Member volunteers provide consultations in their areas of expertise and are assigned residents or businesses who have sought assistance, along with referrals for those facing family violence (The Safe Center of Long Island) or certain legal issues (Nassau Suffolk Law Services).

Taking the next step, on August 27, dozens of homeowners and renters came to the Bar for a free open house under a tent in our parking lot and met with housing counselors. Wearing masks and socially distanced, housing counselors and attorneys offered information about programs such as COVID-19 mortgage forbearance, hardship programs, loan modifications and payment options. Services were available in English and Spanish.

Special thanks to Past President Martha Krisel, our staff and member volunteers for their dedication.

The Next Phase of COVID-19 and What It Means to Your Practice

Chief Administrative Judge Lawrence K. Marks stated when the Hon. Norman St. George was appointed Administrative Judge of Nassau County, in December of 2019, "We are fortunate to have… such [a] highly regarded candidate, possessing the judicial expertise, administrative skills and leadership qualities to fulfill the multiple demands of [this] critically important assignment." Unbeknownst to all, a pandemic followed, and Chief Administrative Judge Mark's words have been personified by the leadership of Administrative Judge St. George.

As Administrative Judge, St. George oversees the operations of all the Nassau County courts, with direct supervision of nearly 90 judges. The publication, Inc. defines essential Leadership qualities:

1. **Clarity**—They are clear and concise at all times. There is no question of their vision and what needs to be accomplished
2. **Decisiveness**—Once they have made up their mind, they don't hesitate to commit—it's all hands-on deck
3. **Courage**—Boldness is both something you can develop and something that is blessed as a virtue
4. **Passion**—There's nothing more inspirational than seeing someone who cares about what they do. The best leaders exhibit boundless energy and passion for what they do
5. **Humility**—While confidence is a very attractive trait in leaders, there's nothing like a humble character

All would agree that during this time, the Hon. Norman St. George has demonstrated all essential leadership qualities and beyond. He would be the first to tell you that it has been a team effort to effectuate the necessary changes of advancing our court system during this time and we say thank you to all involved!

On August 17, 2020, Hon. Norman St. George issued Administrative Order: Return to In-Person Operations for Nassau County–Phase 4.1, instructing jury trials to recommence. Petit civil jury trials will be conducted in October and, in light of the success and positive feedback regarding the impaneling of grand juries of Nassau County during phase three of the return to in-person operations, petit criminal jury trials in the County Court will commence in November. For the complete protocols of the Administrative Order, please visit our website at www.nassaubar.org/announcements/update-regarding-covid-19.

WE CARE

We are pleased to announce that WE CARE, our charitable arm, will offer its traditional Thanksgiving dinners to families in need. We are not serving dinners at the Bar, for health and safety purposes, but will be delivering prepared meals to needy families. Members may participate by contacting our WE CARE Advisory Board, as well as submitting a donation online at the link provided on our website.

Upcoming Events

The Opening of Domus

The NCBA is here for you and is taking on the new Bar year with optimism and a refreshed outlook on the way we usually do things. We share Members' desire to attend lunch CLEs and meet with colleagues. While the Bar continues to stagger the in-office staff schedule, and limit foot traffic at Domus, our goal is to welcome back Members and visitors to the building with the proper safety procedures in place. We'll keep you posted.

Membership Appreciation BBQ at the Bar Drive-By

Our first ever BBQ at the Bar Drive-By will be held on Thursday, September 10, on the lawn of Domus, the first event at the Bar's home since our closure in March. We want to provide our members with the same benefits and networking opportunities, just in a re-imagined way. Utilizing COVID-19 guidelines consisting of, (in part) limited attendees, face masks and social distancing, we are offering two in-person sessions as well as a drive-thru lane for members to receive their dinners and many giveaways.

Nassau Lawyer welcomes articles written by members of the Nassau County Bar Association that are of substantive and procedural legal interest to our membership. Views expressed in published articles or letters are those of the authors alone and are not to be attributed to *Nassau Lawyer*, its editors, or NCBA, unless expressly so stated. Article/letter authors are responsible for the correctness of all information, citations, and quotations.

Nassau Lawyer

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Real Estate/Municipal Law

In the COVID-19 Era, A Municipal Fee Is Unmasked as an Illegal Tax

On March 11, 2020, in an action seeking class certification under CPLR § 901, disgorgement and other relief, Nassau County Supreme Court Justice Jeffrey Brown struck down Nassau County's $355 tax map verification fee, granting the plaintiff's motion for summary judgment and concluding that the fee is actually an unlawful and unconstitutional tax.[1] The economic implications of the decision for the County are profound. It has been projected that a $45 million budget hole could result if the decision, which Nassau County is appealing, is upheld.[2] Nassau County took in $40.56 million in 2019 from the fee, and $39.6 million in 2018.[3]

Factual Background

Nassau County Administrative Code § 6-33.0, added in 2012, is entitled "Verification of Section, Block, and Lot Information." That section provides that the County Assessor shall be entitled to a fee for "the verification of the section, block and lot information contained in any deeds, mortgages or satisfactions, or any modifications or consolidations of the foregoing, presented for recording…." The fee also applies to mortgage assignments. Such information is contained in tax map certification letters ("TMCLs") issued by the Nassau County Department of Assessments (a co-defendant in the action), which must be filed with real property documents when submitted to the Nassau County Clerk for recording. The only document that does not require a TMCL is a power of attorney, frequently used when a party cannot attend a closing; Nassau's recording fee for a typical 9-page statutory power of attorney is $385.

As described in Justice Brown's decision, the fee first assessed in 2012 was $50 for each TMCL. The fee was raised to $75 effective January 12, 2015, tripled to $225 on January 1, 2016, and raised again to $355 on January 1, 2017. Each increase was authorized by a series of local laws amending Section 6-33.0.[4] By letter dated October 8, 2015 to the County Legislators, the Nassau County Clerk "vehemently" objected to the proposed increases in TCML fees and other fees impacting her office, and called them "unconscionable," "egregious and quite possibly in violation of the New York State law."[5] In her letter, the County Clerk also explained that the proposed fee increases would mean that the County's recording fees would have risen by 5,250% since 2010 and that a recording transaction which cost $30 in 2010 would cost $1,575 in 2016.

Jeffrey Falk and his wife bought a home on November 18, 2016 in the Town of Oyster Bay. They were required to pay the title company $1,255 to record the deed and mortgage with the Nassau County Clerk, of which, among the various governmentally imposed recording charges, $450 was assessed to obtain two TMCLs. In his action, Mr. Falk alleged that the fee is (i) unconstitutional because it is excessive, an unlawful tax rather than a true fee, and not reasonably necessary to maintain the County's real property registry, which is the defendants' responsibility; (ii) not intended to defray the costs of providing the TMCLs and far in excess of such costs; and (iii) a tax whose purpose really is for general revenue. Mr. Falk also alleged that the Department of Assessments has not changed its structure, the manner in which it carries out its responsibilities or issues TMCLs, or the time or cost associated with generating a TMCL. Based on available public documents, Mr. Falk also asserted that the County's budget projected a 2016 increase in collections of $27 million resulting from the $225 tripling.

Mark S. Borten

In opposition papers, the County argued that the fee "is not simply the cost of issuing, but also includes inspecting the regulated activity" and that the "ongoing cost of providing assessment services for more than 400,000 individual taxpayer parcels [was]… an inextricable part of the overall costs of the assessment system and the costs of the county's recent real property tax reform efforts, all of which are part of regulating and maintaining the tax map and system of assessments."

Legal Analysis

Justice Brown began his analysis by acknowledging that legislative acts "enjoy a strong presumption of constitutionality [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt," and "[a] local law is cloaked with the same strong presumption of constitutionality as a statute (citations omitted)." He then noted that "[o]nce a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists…[with facts] presented by evidentiary proof in admissible form (citations omitted)."

Significantly, Justice Brown cited Real Property Tax Law § 503(2), which provides that "the expense of maintaining tax maps in current condition shall be a county charge and shall be levied ad valorem upon all taxable property in the county." "The clear reading of…§ 503(2)," he continued, "precludes the use of a fee to 'protect the integrity of the tax map and county records.'" An ad valorem tax is a tax computed on the assessed value of an item, such as real estate or personal property, expressed as a percentage of the assessed value or sales price. Justice Brown also quickly dismissed the County's assertion that by requiring a TMCL, the County is providing essential information required for title insurance, stating that "[t]itle to the property is not determined by the tax map (citation omitted)." Thus, the defendants failed to make an adequate prima facie showing to demonstrate their entitlement to summary judgment as a matter of law.

Next, Justice Brown cited the County Assessor's affidavit demonstrating "that the revenue generated by the TMCL fee is used by the defendants for general purposes… ," is a "revenue item for the department" and that "[t]he only 'revenue' derived from the operations of the department is the funds received from the collection of the [TMCL]."[6] Moreover, he continued, the defendants "recognize and concede that the TMCL fee is a source of general revenue as a whole and is unrelated to the specific costs associated with generating a TMCL," and that there was no analysis "as to the actual cost associated with generating a TMCL or a comparison of the cost related to the TMCL fee and the revenue generated by that fee." In addition, the defendants acknowledged that "no scientific study or survey was conducted regarding the reasonableness of the fee imposed for a TMCL or the dramatic increases in the fee over the past seven years." While the Assessor complained that the County is uniquely burdened financially by the "County Guaranty," i.e., the County's obligation to pay claims upheld for the overpayment of real property taxes paid to school districts, towns, and special districts, as well as to the County itself, Justice Brown stated that "…the County must look to [sic] New York State Legislature to remove or remediate the 'County Guaranty.'"[7]

Concluding, Justice Brown held that Mr. Falk had shown that the defendants' imposition of the TMCL fee for general revenue purposes is "indisputably disproportionate to the cost associated with its issuance." He then stated that Mr. Falk had established as a matter of law that "the revenue derived from the TMCL is used for general administration purposes and unrelated and disproportionate to the cost and effort associated with the TMCL (citations omitted). In sum, the fee associated with providing a TMCL is excessive and not tied to the County's responsibility to maintain its property registry; not assessed or estimated on the basis of reliable factual studies or statistics; and far in excess of the costs necessary to provide the service of generating the TMCLs. Since the fees associated with TMCLs are used to generate revenue, they are an unlawful and unconstitutional tax."

Consequences in the COVID-19 Era

The COVID-19 worldwide pandemic struck with a ferocity and velocity previously unseen by almost every living soul. It has shaken to their financial cores governmental budgets at the national, state, and local levels. The recent decision in *Falk v. Nassau County* ripped away the cloak of an impermissible tax masquerading as a fee. If the decision in *Falk* is affirmed on appeal, and if a decision based on similar reasoning flows from the Suffolk County case described below, politicians across Long Island will face severe and unpalatable options.

An action seeking comparable relief was brought against Suffolk County in 2017 by the Government Justice Center, an Albany nonprofit, on behalf of several Suffolk homeowners.[8] That case seeks to strike down as unlawful, invalid and unenforceable Suffolk's $200 tax map verification fee (increased from $60 in 2015) and Suffolk's $300 mortgage recording fee created in 2016. The complaint in that case alleges in part that for 2017 Suffolk County budgeted the Real Property Tax Service Agency's operating expenses to be $1.2 million, while budgeting fees generated by that agency to exceed $66 million. Three Suffolk County judges previously recused or disqualified themselves from that case. Oral argument on that plaintiff's motion for a declaratory judgment occurred in March 2020. Post-argument letter briefs were filed by June 30, and the court set an early August control date.

Counsel for Suffolk County contend that after the parties' respective motions and cross-motions were fully submitted in 2018, the New York State Legislature passed amendments to CPLR Sections 8019 and 8021 in April 2019 which specifically authorized the challenged fees pursuant to Suffolk County Code A18-3(G). Thus, Suffolk contends that the *Falk* decision is inapplicable, since the *Falk* court was not presented with a challenge to fees which were expressly authorized by the State Legislature. Suffolk's counsel also argued that, unlike *Falk*, no discovery had occurred in the Suffolk case.

Mark S. Borten is principal of the Law Offices of Mark S. Borten in Merrick, representing clients in residential and commercial real estate matters.

1. *Falk v. Nassau County*, Index No. 600868-17 (Mar. 11, 2020)(, Brown, J.) Previously, by decision dated September 27, 2017, Justice Brown dismissed three of the plaintiff's four causes of action and granted the defendants' motion to dismiss the cause of action for injunctive relief in the form of disgorgement, while denying the portion of that motion seeking to dismiss the claim for declaratory relief. *Falk*, NYSCEF No. 15 (Oct. 3, 2017).
2. Eidler, Scott, "Nassau County: $355 tax map fee ruled 'unconstitutional,'" *Newsday* (May 14, 2020).
3. *Id.*
4. Local Law 7-2014, eff. June 19, 2014; Local Law No. 9-2015, eff. Nov. 30, 2015, suspended until Jan. 4, 2016 by Local Law No. 11-2015, eff. Dec. 22, 2015; as amended by Local Law No. 13-2016, eff. Dec. 14, 2016.
5. *Falk, supra* n.1, Complaint Exh. A.
6. *Falk, supra* n.1, Moog Aff. at ¶¶ 28, 34.
7. Citing *Matter of Baldwin UFSD v. County of Nassau*, 22 N.Y.3d 606, 628 (2014). In 1939, via Chapter 272 of the Laws of 1939, the New York State Legislature enacted the Nassau County Administrative Code as a supplement to the Nassau County Charter. Subsequently, pursuant to chapter 851 of the Laws of 1948, the Legislature amended the Nassau County Administrative Code, adding Section 6-26.0(b)(3)(c), which includes what has come to be known as the "County Guaranty."
8. *Cella v. County of Suffolk*, Index No. 620580/17.

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Real Estate/Municipal Law

The Role of the Executive: Unilateral Emergency Powers of the Governor, Town Supervisors, and Village Mayors in Times of Public Crisis

Charles J. Casolaro

The Coronavirus (COVID-19) created a pandemic unprecedented in modern times. Life in New York changed dramatically, and albeit, consequentially on March 7, 2020, when Governor Andrew Cuomo issued Executive Order 202.1, reducing business, professional, leisure and just about all commercial activity in New York to stop the spread of (COVID-19). This executive action was arguably unprecedented in our State's history,[1] altering the ability of nineteen million citizens to engage in some of life's most cherished events such as weddings, graduations, births, and sadly, deaths.[2] However, the pandemic gave the public, for the first time, a true sense of the scope, depth and breathe of the power of an elected executive.

Our form of government, whether at the federal, state or local level, derived from the founding fathers' understanding of the great separation of powers theorists—Polybius, Montesquieu and Locke, who had conceived executive power as a separate and distinct species of power.[3] They understood the executive to handle certain "sovereign functions."[4] However, they also understood that unfettered power, exercised without the consent of the governed—or in local cases, the sanction of the legislature, would lead to abuse.

The courts have generally affirmed the deprivation of individual liberties by executives so long as necessary to meet the needs of the collective societal whole, that "over the long run preserves the proper balance of freedom and order necessary for the healthy development of natural civil society and individual human flourishing."[5]

State Level Executive Authority

The New York State Constitution vests the Governor with the executive power and places upon him the responsibility to 'take care that the laws are faithfully executed.'[6]

This vests authority within the Governor to take measures to faithfully enforce the law, not to expend on existing parameters or create law. "The power to make laws is a legislative function."[7] The limiting principle, therefore, of the executive order is its encroachment into the legislative prerogative. Executives cannot make law, or ignore law, or re-write law; they simply can only execute or enforce the existing law. But, under emergency circumstances, like the current pandemic, those power lines become blurred.

Since March 7, 2020, New York State Governor Andrew Cuomo has issued 48 Executive Orders.[8] The Governor has essentially become a unitary executive, not just of the executive branch, but of the entire state government apparatus. Is this a permissible execution of authority? [W]hether executive action crosses the line and constitutes an inappropriate assumption of legislative power, the Court of Appeals has looked to whether the executive action 'creates a different policy, not embraced in the legislation' or whether the executive action is in fact inconsistent with existing State law."[9]

On May 27, 2020, in the case of *Dao Yin v. Cuomo*,[10] petitioners claimed that Governor Cuomo lacked the statutory authority to cancel the special election. The Governor opposed the petition and argued, *inter alia*, that in response to the concerns presented by COVID-19, the canceling of the special election was a valid exercise of his authority under Executive Law § 29-a. NYS Executive Law § 29-a provides that "the governor may by executive order temporarily suspend any statute, local law, ordinance, or orders, rules or regulations, or part thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster or if necessary to assist or aid in coping with such disaster."[11]

This rule endows the Governor with the authority to exceed his executive authority in times of disaster, such as during the COVID-19 pandemic, which has been classified as a "disease outbreak." Under the rule, the Governor is granted powers to promulgate temporary rules by executive order. However, this executive authority is not absolute. With the delicate balance between handling crises and the intrusion in the traditionally legislative prerogative, the limitations imposed upon the Governor attempt to regulate this separation of powers as best as possible, while allowing the branch of the government best suited to handle crises quickly and efficiently to do so.

Municipal-Village Mayor Executive Authority

The executive authority of a Village Mayor has long been a topic of debate among municipal attorneys. The idea of a Village Mayor exercising unilateral, consequential power escapes the local village resident. But no mistake should be made, Mayors are chief executives, and in the case of extreme emergency, are more powerful than a Town Supervisor. In fact, the power of a Mayor rivals that of the County Executive.

The New York Executive Law devotes an entire article to state and local natural and man-made disaster preparedness, particularly with regard to emergency powers granted to the lower chief executives within the state, including Village Mayors. Section 24 governs local states of emergency and local emergency orders by chief executives. Chief executives are defined as "(1) a county executive or manager of a county; (2) in a county not having a county executive or manager, the chairman or other presiding officer of the county legislative body; (3) a mayor of a city or village, except where a city or village has a manager, it shall mean such manager; and (4) a supervisor of a town, except where a town has a manager, it shall mean such manager."[12]

See EXECUTIVE, Page 17

Real Estate/Municipal Law

Law Students in Government Offices: Responsibilities and Rights

After my first year of law school, I spent the summer of 1978 at the Buffalo Regional Office of the New York State Attorney General. Summer jobs were hard to come by for rising 2Ls, but a relative who worked closely with Attorney General Louis Lefkowitz, recommended me.[1] I worked with three other law students; the pay was five dollars per day. That compensation—paid in one check at the end of the eight-week assignment—was allotted to cover daily expenses. In fact, in 1978, five dollars in Buffalo covered round-trip bus fare and lunch. I still remember the jacket that I bought with part of that $200 check; it was tan with a fuzzy lining and a hood.

Although I cannot recall the last name of my supervisor Mike, I do remember my first assignment. The Attorney General had subpoenaed a car dealership's records; using my 1L research and writing course skills, I worked with the supervising attorney and opposed the dealership's motion to quash. It was very exciting when that motion was denied.

Properly mentored and supervised law students are the lifeline for attorneys with heavy caseloads, and are essential for encouraging public sector career paths. The best internships provide opportunities to contribute while protecting interns' rights and promoting their professional development.

Internships Under the Law

Civil service titles also do include law interns, who do not test competitively because of the limited duration of their assignments. Nassau County's Villages, for example, have a non-competitive title for law interns currently enrolled in law school.[2] Designed in 1972, the duties are basically still relevant to a government law office internship experience. Supervision is mandatory, and the duties are specifically focused on legal research, drafting opinions on legal matters, assisting in preparing local ordinances and drafting memoranda for a legislative body. To qualify for appointment under the law intern title, a law student is required to know how to perform legal research to prepare basic legal documents; the law student must be familiar with legal terminology and legal reference materials.

Law students working for private law firms may be protected by the Fair Labor Standards Act[3] (FLSA), which generally requires the employer to compensate law students unless a particular test is met.[4] Government is not required to compensate interns. For example, the FLSA exempts certain people who volunteer to perform services for a state or local government agency or who volunteer for humanitarian purposes for non-profit food banks. Unpaid internships for public sector and non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. Nevertheless, the educational-focused FLSA goals, as well as FLSA internship court decisions, are well worth reviewing prior to committing to the responsibility of working with and designing assignments for law students in a government office.

Martha Krisel

Under the FLSA and its interpretive decisions, law students should be primary beneficiaries of the experience, even though the interns' work products also provide a direct benefit to the employer.[5] Even the most senior attorneys in government offices end up scanning documents during crunch times, and it is acceptable for law students to do the same. The emphasis, however, should be on applying legal education into practice, coupled with appropriate exposure to real life lawyering through (now generally virtual) client interviews and court appearances.

Since a government office generally has unionized support staff, with clerical and paralegal/attorney assistant competitive titles, law students should never displace paid employees; rather, law students should "complement" the government attorney's accomplishments.[6] Because of this, the *Glatt*[7] displacement factor is a useful barometer even in a government setting, because it emphasizes that an intern's work should complement but not supplant the work of paid employees.

An intern's work is complementary only if it requires some level of oversight or involvement by an attorney, who still bears primary responsibility. While a bit of overlap may be inevitable to meet an all-hands-on-deck court deadline, the intern should always be acquiring skills directly related to proficiency in the practice of law. In *Glatt*, a private sector decision, the court analyzed the primary beneficiary test and held:

> … the proper question is whether the intern or the employer is the primary beneficiary of the relationship. The primary beneficiary test has three salient features. First, it focuses on what the intern receives in exchange for his work. Second, it also accords courts the flexibility to examine the economic reality as it exists between the intern and the employer. Third, it acknowledges that the intern-employer relationship should not be analyzed in the same manner as the standard employer-employee relationship because the intern enters into the relationship with the expectation of receiving educational or vocational benefits that are not necessarily expected with all forms of employment (though such benefits may be a product of experience on the job).[8]

This factor alone is not dispositive. An intern may perform complementary tasks and in doing so confer tangible benefits on supervisors. The *Glatt* factors intentionally omitted a criteria that had been advanced by the Department of Labor that the alleged employer derive no immediate advantage from the activities of the intern.[9]

Maximizing Benefits for Interns and Employers

Appropriately designed assignments in advance of the law students' arrival are crucial; each student must always have a "big project" to research when there is a lull in the ability of the supervising attorney to provide daily interaction and feedback. Law students should never feel that they are in the way or that they are a burden. Proper preparation of appropriate assignments allows the supervising attorney as well as the law student latitude in adjusting to an emergency to which the supervising attorney must attend.

A good guideline for unpaid internships is ensuring hands-on training that a student might experience in a clinical law school format. In addition to legal research, law students, under the supervision of a government attorney, can review police/incident reports, interview witnesses, digest depositions and draft pleadings. The government attorney should ensure that law students attend court hearings and trials, even when the courts are operating virtually.

Although the duration of an internship is predictable, it is not realistic to promise or to spend time designing a start-to-finish semester or summer-long project. Since litigation and transactional work rarely break down neatly into semesters or summers, a pivotal component of the internship experience is instruction on a transition memo where law students concisely document the status of their files. This simultaneously serves as preparation for the next intern, who should already have been selected and who can piggyback on to the work in progress. This is also excellent preparation for an often-overlooked attorney responsibility: maintaining each file with specificity to allow an attorney to take over in the event of the departure or unavailability of an attorney for any reason.

In short, a government law student intern should enter the workplace with legal research and writing skills that are appropriately utilized under attorney supervision to expand that interns' interest in and knowledge of the law. Useful to the design of the government internship experience are the FLSA and court decisions that protect law students from busy work and protect the integrity of the municipal workplace from a subterfuge of addressing staffing deficits.

Martha Krisel is the Executive Director of the Nassau County Civil Service Commission. She also has served as NCBA President, and currently serves as Co-Chair of the NCBA Adoption Law Committee.

1. Nick Ravo, *Louis J. Lefkowitz, 22-Year Attorney General, Dies at 91*, The New York Times (June 21, 1996), available at https://nyti.ms/2DBNjti.
2. Class Specification for LAW INTERN (SEASONAL), available at https://bit.ly/3kH2BO6.
3. 3 U.S.C. § 413.
4. USDOL Wage and Hour Division, Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act, available at https://bit.ly/2F9y6zM.
5. *See, e.g., Mark, v. Gawker Media LLC*, 2016 WL 1271064 (S.D.N.Y. Mar. 29, 2016).
6. *Glatt v. Fox Searchlight Pictures*, 811 F.3d 528 (2d Cir. 2016).
7. *Id.* at 537.
8. *Id.* at 535 (citations omitted). *See also Wang*, 877 F.3d 69 (2d Cir. 2017).
9. *Glatt*, 811 F.3d at 534.

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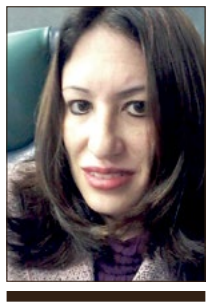
Real Estate/Municipal Law

Limited Homeowner Accountability for Defective Sidewalks in Long Island Towns and Villages

Some Long Island Town and Village ordinances that direct homeowners to keep sidewalks in good repair leave residents with little legal incentive to comply resulting in limited recourse for Plaintiffs who sustain injuries. The governing case law absolves homeowners from liability for trips and falls occurring on a defective sidewalk absent a clause that specifically states that the homeowner or occupant will be liable for any personal injury that results from failure to make repairs. Courts do not consider basic negligence principles such as the requirement of actual or constructive notice of a defect and a failure to correct it despite ample time passage. They do not assign strict liability for a homeowner's willful disobedience of the ordinance in not making requisite repairs in their rulings either. Furthermore, undertaking to make repairs could subject homeowners in such municipalities to liability thereby discouraging compliance with local ordinances.

Homeowner liability varies from one town or village to another. Several Long Island town and village ordinances impose a duty on landowners to maintain the sidewalks. However, owners of land abutting sidewalks are not liable for personal injury sustained on a defective sidewalk absent an additional clause that expressly deems them such.[1] Generally, in the absence of express imposition of liability on the landowner, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks falls on the municipality.[2] The only exceptions to this rule are if the landowner created the defective condition on the sidewalk, such as by negligently repairing it, or if the landowner derives a special use from the sidewalk, such as a utility box on the sidewalk that serviced their property.[3]



Frances Catapano

The Town of Oyster Bay Code, Article II, Section 205(a) states that owners are to keep the sidewalk in "good and safe repair." Section 205(b) then states specifically that "Such owner or occupant and each of them shall be liable for any injury or damage by reason of omission, failure or negligence to make, maintain or repair such sidewalk or for a violation or nonobservance of the ordinances relating to making, maintaining and repairing sidewalks, curbstones and gutters." Plaintiffs who sustain injuries on sidewalks in Oyster Bay fare well.

Conversely, the ordinances governing sidewalk liability within the Towns of Hempstead and North Hempstead require homeowners therein to keep abutting sidewalks in good and safe repair but are silent on liability for personal injury sustained thereon. The Villages of Garden City and Valley Stream do not impose liability on a homeowner for their failure to repair sidewalks either. The Village of Garden City Code Section 178-17 states that it is the responsibility of homeowners in the village to keep sidewalks abutting their property in "good and safe repair" for pedestrians. When a sidewalk is in disrepair, Garden City may send the abutting landowner a notice to make the repair as with suits against homeowners pursuant to 178-20. If they fail to comply within 30 days, the Village may pursuant to Section 178-21 repair the sidewalk and assess the cost against the non-compliant homeowner's property. There is no personal injury clause against the homeowner. Likewise, Article 11, Section 80-44 of the Code of the Village of Valley Stream directs owners, occupants, and lessees to keep abutting sidewalks in "good and safe repair." The consequence for failure to comply is a written notice followed by a $1,000 fine or a few days in jail. This is not a large expense.

Suits against homeowners in Nassau County villages such as Valley Stream have been dismissed on summary judgment because the local ordinance was silent about liability for sidewalk defects.[4] Plaintiff Shashawn Obee alleged that on April 13, 2012, she tripped on a concrete slab on the sidewalk in front of the Valley Stream home of defendant Lucianna Ricotta. The evidence showed that Ms. Ricotta had recently replaced three slabs on the sidewalk, but not a fourth slab on which Ms. Obee sustained an injury. Apparently, the slabs of sidewalk had become displaced by damage from tree roots. The Supreme Court, Nassau County ruled in *Obee* against the defendant relying on basic principles of negligence that govern premises cases, charging Ricotta with having actual notice of the defective fourth slab of sidewalk on which Obee tripped. The lower court simultaneously cited the Administrative Code of the Village of Valley Stream Section 90-7 which imposes a duty on owners and occupants of the premises to repair sidewalks that are damaged by tree roots in front of their property, attributing strict liability to Ricotta for Obee's injuries. The Second Department reversed the lower court's decision and dismissed the case against Ricotta.[5]

The Second Department wrote that a landowner like Ricotta "will only be liable to a pedestrian injured by a dangerous condition on a public sidewalk when the owner "either created the condition or caused the condition to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner or the lessee and expressly makes the owner…liable for injuries caused by a breach of that duty'"[6] Obee would have had recourse had the unevenness of the fourth slab been caused by a shift made during the repair of the other three slabs under the cause and create exception, but this was not the case as the fourth slab had been untouched the whole time.

Unless the aforementioned Villages enforce these clauses to perform repair universally,

See HOMEOWNER, Page 19

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Real Estate/Municipal Law

Expansion of New York's Prevailing Wage Requirements Are Coming

Amid an unprecedented public health crisis, in the middle of the night on April 3, 2020, the New York State Legislature passed the 2021 fiscal year budget which was signed by Governor Andrew M. Cuomo later that same day. In addition to fiscal spending, the $170 billion plus budget includes a panoply of education, public health, environmental, and economic development legislation.

One very important piece of legislation is an amendment to New York Labor Law which expands prevailing wage requirements under the New York State Constitution to apply, for the first time ever, to private projects that receive a certain threshold of public funds relative to total project costs.

Organized labor, which had been lobbying Albany for the expansion of prevailing wage requirements for years, hailed the legislation as a hard-fought victory for workers' rights. Business leaders and developers however, say that the legislation will make many projects cost prohibitive to undertake, hindering new development at a time where economic stimulus and new projects are vital to energizing an economy paralyzed by the ongoing public health crisis. One thing is certain though, this legislation will impact new real estate development and the way private capital is invested in new projects that receive benefits from public agencies.

New Definition for "Public Work"

By way of background, Article I, Section 17 of the New York State Constitution was adopted in 1938 and requires that workers engaged in the performance of any "public work" shall be paid in accordance with the prevailing wage in the same trade or occupation in the locality within the state where such public work is situated.[1] The definition of "public work" is not specifically defined in the constitution and was traditionally interpreted to apply to any project undertaken by state and local municipal agencies, school districts, public authorities, or any other political subdivision of the State.

Nicholas J. Cappadora

The new legislation, embedded deep within the recently adopted budget,[2] expands the definition of public work and thereby the application of prevailing wage requirements to any privately funded project "where the amount of all such public funds, when aggregated, is at least thirty percent of the total construction project costs and where such project costs are over five million dollars."[3] The legislative changes are codified in newly created Sections 224-a, 224-b and 224-c of the New York Labor Law, which are slated to go into effect January 1, 2022.

The general framework for this new legislation is that "covered projects," that is projects that are over five million dollars in total "project costs" that receive at least thirty percent of "public funding" relative to total "construction project costs," must comply with prevailing wage requirements for all work performed on the project. The legislation defines two of the highlighted terms in the previous sentence. "Covered project" and "public funding" are each defined in Section 224-a. However, there are no definitions provided for "project costs" or "construction project costs." Instead, this task and many others have been delegated to the "Public Subsidy Board," a newly established state agency with broadly defined powers and discretion which include establishing definitions for terms left undefined in the legislation, making determinations on the minimum thresholds for covered projects and issuing binding determinations affecting covered projects.[4]

"Public Funds" Defined

One term that has a clear definition in the legislation is "public funds," which is specified in Section 224-a.2 and includes any of the following: (a) payments made by public entities directly to a developer or owner that are not subject to repayment; (b) savings achieved from fees, rents, interest rates, loan costs or insurance costs that are lower than the market rate costs; savings from payments in lieu of taxes; and any other savings from reduced, waived, or forgiven costs that would have otherwise been higher but for the involvement of the public entity; (c) money loaned by a public entity that is to be repaid on a contingent basis; or (d) credits applied by the public entity against repayment of obligations to the public entity. Specifically excluded from the definition of "public funds" are RPL Section 421a benefits, funds used to incentivize or ensure development of comprehensive sewage systems, tax benefits related to brownfield remediation redevelopment, or any other public monies determined by the Public Subsidy Board to be exempt from the definition.

"Covered Projects" Formula

The legislation also specifically exempts certain types of projects from the definition of "covered projects," including among other things work on owner occupied one and two family dwellings, work performed under a contract with a not-for-profit corporation, work performed on certain multiple residence projects where at least 25% of the units are affordable or at least 35% of units are designated for supportive housing services for vulnerable populations or any newly created programs for affordable or subsidized housing determined by the Public Subsidy Board.[5]

The legislature's failure to clearly define other key terms in this legislation essentially leaves a gaping hole in the formula it attempts to create for determining which projects are

See EXPANSION, Page 16

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PROGRAM CALENDAR

September 10, 2020
Dean's Hour: Sonny...Just Like in Money and the Making of "Broadway Joe"
12:30—1:30PM via ZOOM
1 credit in professional practice

Program presented by **Rudy Carmenaty, Esq.**, *Vice-Chair, NCBA Publications Committee*

A contract signed in 1965 between Sonny Werblin of the New York Jets and University of Alabama Quarterback Joe Namath launched the 'sports as entertainment' industry, ultimately making the NFL a multi-billion-dollar industry. A mixture of sports law, entertainment law, and negotiation strategy, this CLE will explore how television transformed football establishing the show business inspired paradigm that governs the legal and business landscape of professional sports today.

September 15, 2020
Auto Insurance Update 2020
5:30—7:30PM via ZOOM
1.5 credits in professional practice; .5 in ethics
Skills credits are also available for newly admitted attorneys

NO-FAULT AND SERIOUS INJURY
A review of recent case law on the "serious injury " threshold, practical tips on motion practice...and more

UPDATE AND REVIEW OF SIGNIFICANT RECENT CASES AND DEVELOPMENTS
Uninsured Motorist (UM), Underinsured Motorist (UIM) Supplementary Uninsured Motorist (SUM) Practice and Procedures

Program presented by **Professor Michael J. Hutter,** Albany Law School, Powers & Santola, LLP, Albany; **Jonathan A. Dachs, Esq.,** Shayne, Dachs, Sauer & Dachs, LLP, New York

September 22, 2020
Dean's Hour: Ethics in Zoning and Land Use Cases
With the NCBA Municipal Law Committee
1:00—2:00PM via ZOOM
1 credit in ethics

Program presented by **Thomas McKevitt, Esq.,** Sahn Ward Coschignano, Uniondale

September 23, 2020
This Year's Most Significant Bankruptcy Decisions
With the NCBA Bankruptcy Law Committee, the Suffolk Academy of Law, and the Eastern District of New York Chapter of the Federal Bar Association
5:00—7:00PM via ZOOM
2 credits in professional practice

There are many recent and significant cases that have been decided throughout the country that may impact your practice and strategies for both business and personal bankruptcy cases.

We are pleased to welcome **Bill Rochelle**, Editor-at-Large for the American Bankruptcy Institute (ABI) and author of the ABI Daily Wire as our guest speaker. Bill has an extraordinary knowledge of bankruptcy law and recent developments. He will be joined by **Bankruptcy Judges Alan S. Trust, Robert E. Grossman**, and **Louis A. Scarcella**. Rounding out the panel are **Shari Barak, Esq.** and **Mickee Hennessy, Esq.**

September 17, 2020

CPLR Update 2020 with Professor Patrick Connors

5:00—8:00PM via ZOOM

3 credits in professional practice

A comprehensive overview of amendments and updates to the CPLR and decisions affecting civil practice over the past year.

Professor Patrick M. Connors

Albert and Angela Farone Distinguished Professor at Albany Law School; Author: Siegel & Connors, New York Civil Practice

Program sponsored by

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone LLP

September 24, 2020

Dean's Hour:

Fighting Back: Using the Law to Fight Anti-Semitism

With the NCBA Civil Rights Committee and the Jewish Lawyers Association of Nassau County

12:45—1:45PM via ZOOM

1 credit in professional practice

Skills credits are also available for newly admitted attorneys

Program presented by **Ilann M. Maazel, Esq.**, Emery Celli et al LLP, New York; **Hon. Gary Knobel**, *President*, Jewish Lawyers' Association of Nassau County, Inc.

This program is presented by a prominent civil rights attorney who successfully litigated a case against a school district that did not take steps to combat anti-semitic actions taken against a Jewish student. The presentation will generally discuss strategies for litigating against a government or company that directly engages in or ignores anti-semitic actions.

September 30, 2020

Business of Law Lecture Series Presents: Dean's Hour: Law Firm Management Lessons Learned During the COVID Crisis

Program sponsored by NCBA Corporate Partner Sterling Bank

12:30—1:30PM via ZOOM

1 credit in professional practice

Skills credits are available for newly admitted attorneys

Program presented by **Thomas J. Foley, Esq.**, *Past Dean, Nassau Academy of Law,* Foley Griffin LLP, Garden City; **Frederick J. Esposito**, **MBA, CLM**, Chief Operating Officer, Rivkin Radler LLP, Uniondale

By popular demand, we are resurrecting our Business of Law Lecture Series that was created by Past Dean of the Nassau Academy of Law, Thomas J. Foley.

The goal of this lecture series is focused on teaching attorneys how to think and act like business people, as well as attorneys. We also hope to incorporate a half-hour of virtual networking preceding the program. Networking should be a fully integrated component in the life of every attorney, regardless of years of experience. It will lead to stronger contacts and friendships that can help in every aspect of your practice

Tax, Trusts & Estates

Now Is the Time for Estate Planning: How to Leverage Low Interest Rates and a Temporarily Favorable Tax Landscape

The COVID-19 pandemic has brought interest rates to historic lows which, when combined with the historically high federal gift tax exemption, provides an unprecedented window of opportunity for estate planning.

Key rates in estate planning include the applicable federal rate (AFR) and the Internal Revenue Code Section 7520 rate. The AFR is the lowest interest rate that can be charged on a loan between related parties without gift tax consequences or imputed income. The 7520 rate is the rate for determining the present value of an annuity, life interest for a term of years, or remainder or reversionary interest.

In response to fears of a pandemic-driven recession, the Federal Reserve reduced interest rates to historic lows. For August 2020, the AFRs are just 0.17% for short-term loans (≤ 3 years), 0.41% for mid-term loans (>3-9 years), and 1.12% for long-term loans (>9 years), and the 7520 rate is only 0.4%.[1] To put this in perspective, in August 2007 (before the recession), the AFRs were 5.0% short-term, 5.09% mid-term, and 5.31% long-term and the 7520 rate was 6.2%.[2]

At the same time, the highest-ever federal gift tax exemption is in effect. The Tax Cuts and Jobs Act of 2017 doubled the gift, estate and generation-skipping transfer tax exemption to $10 million per individual, indexed for inflation, and is now $11,580,000 (a combined $23,160,000 for married couples).[3] This is scheduled to sunset on December 31, 2025, when the exemption is scheduled to revert to the previous exemption of $5,000,000, indexed for inflation.

Taking advantage of this high exemption now is crucial, given the unpredictability of the November elections and the mounting federal deficit, each of which could lead to an earlier reduction in the exemption and to further tax law changes that may limit the estate planning techniques discussed in this article.

Gifting

Clients who have available exemption amounts should consider making current gifts, particularly of depressed assets that are likely to appreciate. Gifts can be further leveraged with assets that can be discounted for lack of control and for lack of marketability, as with gifts of minority interests in closely held family businesses, further reducing the value of the gift and, accordingly, the use of the exemption.

The current New York estate tax exemption is $5,850,000 and is indexed for inflation. Unlike federal tax law, however, New York has no gift tax (but adds back to the gross estate of a resident decedent gifts made within three years of death). The benefits that New York residents derive from making gifts now include the insulation of the gifted property from New York estate tax, and the possibility of lowering the taxable estate below the $5,850,000 exemption amount (provided the donor survives three years).

Non-Gifting Strategies

Two strategies for high-net-worth clients and those who have already exhausted their federal gift tax exemption are (i) the creation of a grantor retained annuity trust (GRAT), and (ii) the sale of assets to an intentionally defective grantor trust (IDGT). For high-net-worth clients, the lifetime gift tax exemption will cover only a fraction of the assets that will eventually be transferred, and these strategies can be structured to reduce a taxable estate with minimal or no use of the exemption.

IDGTs and GRATs are essentially estate freeze techniques that exploit the difference between the AFR rates used in estate planning calculations and the actual rate of performance of the transferred assets. Although both GRATs and sales to IDGTs have many factors in common, there are differences, and often one strategy is superior to the other. Ultimately, which technique to use must be evaluated on a case-by-case basis, with a view to the mathematics in each situation.

Lorraine S. Boss

Grantor Trusts

Both GRATs and IDGTS utilize grantor trusts. The tax laws governing grantor trusts treat the grantor (i.e., the creator of the trust) as the owner of the trust assets for income tax purposes.[4] This has several important estate-planning implications.

First, because the grantor must pay the income taxes on the trust income, as he is considered to be the owner of the trust property, the trust assets will grow free of income tax. The grantor is, in effect, making a "gift" of the income tax that would otherwise be borne by the trust (or its beneficiaries), but without utilizing any gift tax exemption.

Second, as discussed below, assets can be sold by the grantor to the trust, often at a discounted value, without the imposition of income tax or use of the exemption, even if the assets sold have appreciated.

Finally, if the trust includes a power allowing the grantor to reacquire trust corpus by substituting other property of equivalent value,[5] i.e., a "swap power," the grantor can exchange low-basis assets held in the trust for cash or high-basis assets held by the grantor without the imposition of income tax. This allows a step-up in basis on the assets transferred back to the grantor when later inherited by the grantor's heirs as part of the grantor's estate.

Sales to Intentionally Defective Grantor Trusts

One planning technique that works well with low interest rates is an installment sale by a grantor of assets to an IDGT in exchange for the IDGT's promissory note with interest payable at the AFR. Depending on the expected cash flow of the assets sold, the note may be structured with a balloon payment. Since the IDGT is a grantor trust, there is no capital gains tax when the assets are sold by the grantor to the IDGT because the grantor is effectively viewed as selling the assets to herself.

Funding the IDGT with income-producing assets is ideal since such income will allow the IDGT to service the promissory note without needing to make note payments to the grantor in-kind, i.e., with a portion of the assets originally sold to the IDGT. Making note payments in-kind would require obtaining an appraisal each time in-kind assets are used for payment.

In a sale to an IDGT, the assets sold are removed from the grantor's estate and frozen at the value of the promissory note. To the extent that the income earned on the IDGT assets plus all post sale appreciation (including the amount of the discount) exceeds the AFR, all such excess income and appreciation will remain in the IDGT and pass to the beneficiaries free of estate tax. This strategy is particularly effective with closely held family business interests and real estate.

Typically, a grantor creates an IDGT and funds it with a gift of cash or other assets equivalent to approximately 10% of the value of the assets to be sold to the IDGT. This "seed" funding is often recommended to substantiate that the sale is an arm's length sale. The seed money gifted will utilize a portion of the gift exemption. For clients with no exemption remaining, the grantor can obtain personal guarantees in lieu of seed funding.

The grantor can allocate a portion of his generation-skipping transfer tax ("GSTT") exemption to the seed money gifted to the trust, thereby shielding any future appreciation from generation-skipping transfers. For this reason, IDGTs are often structured as multi-generational dynasty trusts. Dynasty trusts take advantage of the federal GSTT exemption by removing family wealth from the transfer tax system for as long as the trust is in existence.

Grantor Retained Annuity Trusts

A GRAT is an irrevocable trust to which a grantor transfers assets while retaining the right to receive fixed annuity payments for a specified term. GRATs are most effective when interest rates are low. The gift is computed by subtracting the actuarial value of the retained annuity from the fair market value of the assets transferred to the trust. In order to determine the value of the retained annuity, the IRS assumes that the rate of return will equal the 7520 rate. Thus, if the combined growth and income on the assets transferred to the GRAT outperforms the 7520 rate (currently just 0.4%), the increase above the 7520 rate passes to the beneficiaries (or trusts for their benefit) free of gift and estate tax.

GRATs can be structured to provide for increasing annuity payments of up to 20% per year, allowing the grantor to receive smaller annuity payments in the early years of the GRAT term, leaving more assets in the GRAT to appreciate.[6]

If the grantor dies during the GRAT trust term, the lesser of the value of the trust corpus or the value of that portion of the corpus necessary to satisfy the retained annuity must be included in the grantor's gross estate. Practically, this means that the entire trust property will be likely be included in the grantor's estate.

Rolling GRATS and Zeroed-Out GRATS

A common type of GRAT is a "zeroed-out" GRAT, for which the annuity is structured to produce no gift or a nominal gift. In order to "zero out" a GRAT, the annuity payment is calculated so that the present value of the annuity payments is nearly equal to the fair market value of the contributed assets. If the assets transferred to the GRAT outperform the 7520 rate, this excess growth and income is transferred estate tax free to the remainder beneficiaries, but if the assets do not outperform the 7520 rate, there is little downside.

Clients can also use rolling GRATs which are a series of short-term GRATs intended to increase efficiency and reduce the risk of the assets being included in a grantor's estate if the grantor does not survive the term. For example, rather than funding a six-year GRAT, the rolling GRAT strategy would replace this with a series of three two-year GRATs. This technique is best at capturing the upside in a volatile market.

Short-term rolling GRATs work especially well with marketable securities. Because marketable securities are publicly traded, the fair market value is readily determined. Accordingly, the annual annuity payments can be paid to the grantor in-kind, i.e., with marketable securities, without the need for an appraisal and without the reliance on income to meet the annuity payments.

Now is the Time to Plan

In addition to the very real possibility that the federal gift tax exemption may be decreased before 2025, other changes may be on the horizon, especially in light of the $2 trillion stimulus package. Numerous proposals have been set forth to limit the estate planning techniques discussed in this article. Among others, there have been proposals to limit the benefits GRATs can provide by prohibiting short-term and zeroed-out GRATS; to eliminate discounts for closely-held business and real estate interests; and to limit the benefits of IDGTs and dynasty trusts.

With historically low interest rates, depressed asset values, and a record high federal gift tax exemption with no certainty as to how long the exemption will remain in place, now is the optimal time for estate planning.

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1. Rev. Rul. 2020-15, I.R.B. 2020-32.
2. Rev. Rul. 2000-38, 2000-2 C.B. 157.
3. Pub. L. No. 115-97, enacted December 22, 2017.
4. The grantor trust rules are set forth in Sections 671–78 of the Internal Revenue Code and were originally enacted in order to prevent abuses by taxpayers who were shifting income to taxpayers in lower income tax brackets.
5. I.R.C. § 675(4)(C).
6. Treas. Reg. §25.2702-3(b)(1)(ii) (as amended in 2005).

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Real Estate/Municipal Law

The Basics for Virtual Public Hearings—How to Be Successful and Efficient

The current pandemic is changing every aspect of life and in response, the legal community is adapting accordingly. One tenet of municipal governance is the requirement to hold public hearings and meetings. Traditionally, such meetings are held in person.

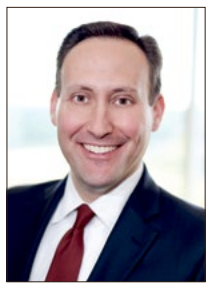
Although, New York State law has allowed video meetings for a long time, agencies rarely utilized this option.[1] Under the Public Officers Law, board members can attend a public meeting via videoconference as long as the public notice of the meeting states that video conferencing will be utilized. The notice must identify the location of the meeting and that the public has the right to attend the meeting at any of the meeting locations.

However since the COVID-19 pandemic, virtual meetings have become the norm, and may well become the method of choice for hearings in the months ahead. In response to the health crisis, Governor Cuomo has issued Executive Orders which temporarily dispenses with the requirement for the public to physically be present at a meeting or public hearing.[2] The Governor's Executive Orders have also allowed for teleconference hearings that aren't otherwise allowed under the applicable statute.

Proper notice has always been, and will remain, a strict requirement under the law.[3] Municipalities conducting a virtual public hearing would be well advised to continue strict adherence to this requirement. Further, notice of virtual hearings require additional information not ordinarily included in a notice for in-person hearings. Notice for a virtual hearing should contain:

- The name of the public body holding the hearing;
- The date and time of the hearing;
- The method that the public body will be utilizing to conduct the hearing, i.e., videoconference or teleconference;
- Means by which the public can view or listen to the hearing (i.e., conference call number, Zoom Meeting ID and Password); and
- The manner in which an individual may submit comment, for example via e-mail, the deadline to receive such comments, or whether the hearing will be held open for a specific number of days to receive such comment, and that the written comments will be made part of the record.

Meeting minutes are still required,[4] and it



Joshua D. Brookstein

Neera I. Roopsingh

is best practice to have a stenographer present during the hearing as meetings must be recorded and transcribed.

Regardless of which platform (Zoom, Microsoft Teams, conference call, etc.,) the public body utilizes to conduct the hearing, it may be a worthwhile investment to hold a "test meeting", especially if that meeting will be the first virtual meeting. A "test meeting" will allow municipal staff and public body members to practice and gain familiarity with the platform being used. It can also serve to formulate a plan of contingencies based on technological problems which arise during the test.

From a practical standpoint, it can help board members practice identifying themselves before speaking so that the record is clear. Holding a test meeting will help ensure that every board member can connect to the platform and use the microphone and camera to guard against any potential quorum issues that can arise due to not being able to log on. Furthermore, a test can ensure that the host of the meeting can control the microphones of participants, so as to help keep the lines of communication open and the record clear.

In addition, it will allow the board members and staff to practice sharing the screen when displaying exhibits, documents, or plans should the need arise during the actual meeting. Even more importantly, it will allow for practice in addressing public comments during the hearing, such as having members of the public sign up to speak so that individuals are not speaking over each other.

This will also ensure that the public has the opportunity to voice any opposition, support, or concern for any proposed project or issue contemplated by the hearing, thus ensuring a "meaningful opportunity" to be heard. In turn, the Board will be fully aware of the public sentiment around the issue they are tasked with considering.

The importance of getting the necessary documents, such as exhibits and plans, prepared and submitted to the public body, i.e., the Village Clerk or Secretary to the Zoning Board, well in advance of the hearing date is vitally important. A practice hearing will allow the Clerk or Secretary of the Board to ensure that these documents are readily available for display and review by the public during the hearing.

Finally, applicants should have their presentations prepared in advance. Virtual meetings tend to take longer than in-person meetings, technical issues inevitably arise, participants talk over each other, and it is easy for a record to get muddled. Prepared presentations will allow an applicant to stay on track and not inadvertently miss any of the presentation's key points or standards of law.

It will allow an applicant to make sure the record is complete so that the Board has all the information needed to render a decision. A clear and complete record will also prove helpful to the applicant should an appeal be necessary.

The Statute of Limitations for an Article 78 petition challenging a Board's decision, regardless of how the meeting was conducted, is thirty days and failure to comply will be fatal to any challenge regardless of the merits.[5] Governor Cuomo's Executive Order 202.8 and subsequent orders have tolled this Statute.[6] So, although a municipal board may conduct virtual hearings and render decisions, currently an aggrieved applicant has a longer window to appeal.

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1. *See* Pub. Officers L. § 104.
2. Governor Cuomo's Executive Order No. 202.1 suspends this requirement of the Open Meetings Law, to allow a public body to hold meetings and hearings without allowing the public to be physically present at the meeting. The order also authorizes public bodies to meet remotely by conference call or similar service. Once the Executive Order expires, public notice of a virtual hearing will have to include the locations from which the board members will be participating and state that the public has the right to attend the meeting at any of the meeting locations.
3. *See* Pub. Officers L. § 104; *In re Thorne v. Vill. of Millbrook Planning Bd.*, 83 A.D.3d 723, 726 (2d Dept. 2011); *In re Benson Point Realty Corp. v. Town of E. Hampton*, 62 A.D.3d 989, 991 (2d Dept. 2009).
4. Exec. Order No. 202.1 (Mar. 12, 2020).
5. Zoning Board decisions on variance applications, determinations, and appeals are subject to a 30-day statute of limitations. Town Law § 267-c; Gen. City Law § 81-c; Village Law § 7-712-c. The grant or denial of a site plan application is also subject to a 30-day statute of limitations. Town Law § 274-a(11); Gen. City Law § 27-a(11); Village Law § 7-725-a(11). Similarly, the statute of limitation on the grant or denial of a subdivision application is 30 days. Town Law § 282; Gen. City Law § 38; Village Law § 7-740.
6. Exec. Order 202.8 (Mar. 20, 2020); Exec. Order 202.48 (July 6, 2020).

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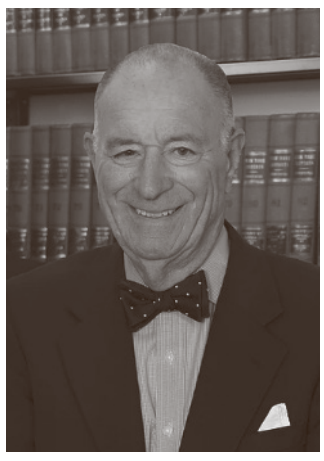

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General Law

An Old Bailey Hack and His Golden Thread

> My creed included a simple faith in trial by jury and the presumption of innocence. The eleventh commandment was, "Thou Shalt Not Plead Guilty."
>
> –*Horace Rumpole*

At the crossroads where the bar and the creative community meet, there are certain fictional attorneys that live on in the imagination. For most Americans, Atticus Finch, Perry Mason, or Ally McBeal are far more recognizable and far more vibrant than many real-life courtroom advocates.

In Britain, the most celebrated literary lawyer, or rather barrister, is Horace Rumpole of *Rumpole of the Bailey* fame. The inspired concoction of author and barrister John Mortimer, QC, Rumpole has entertained audiences on television and subsequently in print since 1975. At the same time, "He embodied the independence of the Bar, infuriating governments, judges, policemen and all persons in authority. Rumpole was television's first and perhaps only truly Dickensian character."[1]

Rumpole was brought to life on television by Leo McKern, who vividly portrayed the role with a "disdain for pomposity, self-regard and the soulless application of the law without regard for human values."[2] A perfect meld of character and actor, in the public's mind McKern became synonymous with Rumpole. As Geoffrey Robertson, QC noted at the time of McKern's passing: "His great achievement was creating a lawyer the world could love."[3]

> Judge Graves: Mr. Rumpole, may I ask where these questions are leading?
> Rumpole: I hope, my lord, to the truth.

Rumpole proudly refers to himself as an "Old Bailey Hack."[4] His stage is the Old Bailey, the central criminal court in London. By profession he is a 'barrister' as opposed to a 'solicitor.' In the UK, only a barrister may argue before the bench. A solicitor handles the front office work, engaging the barrister when litigation is required. The barrister is dependent on the solicitor for the securing of clients.

Despite his years of experience, Rumpole is "a junior member of the bar" by virtue of not being a QC (Queen's Counsel), the "select few who may sometimes be called upon to advise the monarch."[5] Of the 2,000 odd barristers in Britain, the vast majority are juniors rather than seniors.[6] As Mortimer himself, who 'took silk' when he was appointed a QC, once observed: "Knowing the law is not much help for an advocate. In fact, it is a bit of a disadvantage. Cramps your style."[7]

Rumpole is the antithesis of the Hollywood image of the high-powered criminal defense attorney. His clothes are not stylish, nor his offices impressive. His clients are seldom fashionable, his cases often pedestrian. His practice could never even remotely be described as "sexy." But the poetry as well as the prose of the character lies in this very absence of glamour.

Mortimer, who wrote every script, took his stories from actual cases he had litigated or whose details he was intimately aware of. As such, Rumpole has more than a whiff of realism. He exemplifies everything a criminal defense counsel can and should be. He is an advocate who plays his role with unwavering dedication to his client, independence of mind and a bit of subversive naughtiness which shows itself readily before any court.

Rudy Carmenaty

> Rumpole: I happen to have a good deal of faith.
> Samuel Ballard, QC: Yes, in what precisely?
> Rumpole: The health-giving qualities of claret, of course, the presumption of innocence, and not having to clock into chambers in the morning."

But what makes Rumpole a genuine delight lies in the many distinctive touches that Mortimer and McKern have layered on the canvas of the character that makes him seem three-dimensional and quite human. He recites poetry, particularly Woodsworth, at the drop of his bowler hat. He drinks inexpensive wine and smokes cheap cigars at the local pub. His wife Hilda, who was modelled after Margaret Thatcher, is mischievously referred to as "she who must be obeyed."[8]

What also stands out, at least for most Americans, is the character's (and through him, the author's) use of the language. On this side of the Atlantic, the English tongue is often taken for granted. Irony, puns, verbal wordplay, all have a much smaller role in our storytelling. Americans prefer action in their narratives; reaching for the gun is much easier than reaching for a quip.

In every facet of the presentation, Rumpole is the epitome of the British barrister as Sherlock Holmes is the epitome of the British detective or James Bond of the British gentleman spy. Mortimer has crafted a figure much like himself: an Oxford-educated eccentric with a sly wit, a sharp intellect, and above all a passion for justice. But justice not in some cosmic sense, but rather justice for each individual client arrived at literally one case at a time.

> We don't know much about the human conscience, except that it is soluble in alcohol.
>
> –*John Mortimer*

The Old Bailey is not a place that lends itself to pleasant sentiments. Bigotry, hatred, envy, the recurring issue of class in Britain; but most of all crime, both great but mostly petty, are all ever-present. It is a world where "Crime doesn't pay, but it's a living."[9] In fact, Rumpole's livelihood depends upon the criminal element and he is a sort of taxicab "committed to giving a ride to anyone who hails" him.[10]

Mortimer puts it most succinctly, "No brilliance is needed in the law. Nothing but common sense, and relatively clean fingernails."[11] By extension, his most recognizable creation is a lower middle-class renaissance man who comes to the practice of criminal defense work with a skill belied by his less than magisterial appearance.

He brings to every matter before him a wry, not quite cynical but certainly jaundiced, view of human nature. After all, he is over fifty, overweight, and ever put-upon. Yet he retains a certain joie de vivre which makes him a very engaging personality. Rumpole, like Mortimer, "adores good food, enjoys a bottle of claret before dinner, loves Dickens, and fights for liberal causes."[12]

> I had inherited what my father called the art of the advocate, or the irritating habit of looking for the flaw in any argument.
>
> –*John Mortimer*

John Mortimer cut a noticeable figure in British literary and legal circles. He played an instrumental role in the passage of the 1968 Theatres Act, which abolished the office of the Lord Chamberlain, official censor of the English stage.[13] And befitting a devoted criminal defense counsel, he campaigned vigorously for the abolition of capital punishment.

In addition to Rumpole, he wrote plays, novels, and film scripts of appreciable quality. He was a recognized celebrity who lived life to its fullest and was applauded for his great charm. As he got on in years, he ruefully remarked, "I refuse to spend my life worrying about what I eat. There is no pleasure worth forgoing just for an extra three years in the geriatric ward."[14]

A self-professed "Champagne Socialist,"[15] Mortimer came of age politically with the Labour Party's victory in the 1945 general election. But he was far too idiosyncratic in his views to be easily pigeonholed. He couldn't possibly be described as 'woke' in today's parlance. In many ways, Rumpole served as a useful persona for Mortimer: "If I say it, it sounds left-wing, but if Rumpole says it, it sounds cuddly."[16]

Mortimer further embellished his reputation as a civil libertarian in a litany of censorship cases, which broadened the range of permissible expression in Britain. These matters ranged from upholding the publication of Hubert Selby, Jr.'s *Last Exit to Brooklyn* to defending a record store for displaying an album cover featuring the punk rock band The Sex Pistols.[17]

His most significant trials were in defense of two underground publications, one was called Oz and the other Gay News. The former was prosecuted on a charge of conspiring to corrupt minors and the latter was charged with blasphemous libel.[18] This professional advocacy resulted in Mortimer being labeled the "mid-wife of the permissive society."[19]

Rumpole's impact has also been felt in the courts of this country. The O.J. Simpson murder trial witnessed a defense attorney channeling Rumpole: "I think your honour," he argued before Judge Ito, "that we are, as Mr. Rumpole would say, in danger of getting a case of premature adjudication."[20] More than an instance of life imitating art, it speaks to the character's impact as a cultural touchstone for the legal profession on both sides of the Atlantic.

> They won't be guilty until twelve honest citizens come back from the jury room and pronounce them so. In this country we're still hanging on to the presumption of innocence, if only by the skin of our teeth.
>
> –*Horace Rumpole*

For Rumpole and his creator, the bedrock upon which the entire paradigm of English Law rests is the presumption of innocence—the "Golden Thread," as he lovingly refers to it in more than one of his many summations. It is a motif that most telling of all, is maintained by the labors of a less than prosperous barrister and the alleged crimes perpetrated by the downtrodden who are paraded in and out of the Old Bailey.

The true merit of *Rumpole of the Bailey* is in the celebration of this maxim. If *Rumpole of the Bailey* has any justification at all beyond its considerable entertainment value, it is for "the public – and the bar – to understand that the need to protect the liberty of the subject is the main justification for the profession, and certainly for its independence."[21]

Decades ago, a frustrated judge made the point that: "Members of the jury. It may surprise you to know that the sole purpose of the criminal law of England is not to entertain Mr. Mortimer."[22] This may or may not have been so. But if decades from now the character of Horace Rumpole is remembered, it will be on account of the Golden Thread still being recognized as essential to Anglo-American law. An enduring idea which takes its cue from a fictional character presented with a wink and a smile.

Rudy Carmenaty serves as a Bureau Chief in the Office of the Nassau County Attorney, is the Director of Legal Services for the Nassau County Department of Social Services, and the Language Access Coordinator for the Nassau County Executive. He is also Vice-Chair of the NCBA Publications Committee.

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Real Estate/Municipal Law

Pro Bono Attorney of the Month

By Gail Broder Katz

Amarilda Brahimi Fligstein

Welcome to September 2020. Our world has been changed, turned upside down by COVID-19, we are doing things in ways thought unimaginable less than a year ago. However, what has not changed, and has in fact increased, is the need for representation for the underserved populations of our community. What also has not changed is the commitment of our Bar to serving this population. To that end, it is with great pleasure that The Safe Center LI (TSCLI) recognizes Amarilda Brahimi Fligstein as the *Nassau Lawyer's* Pro Bono Attorney of the Month for September 2020.

The proud mother of two young children, in 2017 she was ready to return to practicing law, but was new in town, not knowing any attorneys or possible mentors. It was recommended that Fligstein start meeting members of the legal community by doing pro bono work. She took that advice and was looking for meaningful volunteer work when her husband, an executive with the United Way of Long Island and a source of strength, suggested she contact TSCLI. As a recipient of United Way grants, he correctly thought it would be a good fit. In her own words, "I reached out to Lois (Schwaeber) and after a few minutes it became apparent that there was a need and I was happy to help."

While she had experience in different areas of law, Fligstein was relatively new to the practice of Matrimonial Law. Like other Pro Bono Project (PBP) volunteers, she attended a TSCLI training and took advantage of the PBP mentoring program, expressing her gratitude for her TSCLI mentor's help. She has since represented a variety of clients and accepted her newest assignment shortly before the COVID quarantine began. Her enthusiasm and dedication to her clients is such that in 2018 she logged over 125 hours of pro bono representation making her the number one TSCLI PBP volunteer for 2018. Fligstein was to be honored for this achievement at the Pro Bono Recognition Reception (originally scheduled for July 22) and will be honored when it is held in 2021.

When asked if any particular case or client stood out, she replied, "[My] most memorable was the most recent case I had involving a mom and daughter trying to adjust to a new life. I had to navigate a delicate balance between motivating the client to pursue her goals while also letting her make her own choices. I learned that all I had to do was give her the tools she needed (the law) to have her voice heard. We worked well as a team, we got everything she asked for. And she deserved it all."

In addition to her work with TSCLI, Fligstein has also volunteered with the NCBA, NY CARES, NOW and the Gift of Life program. While performing volunteer work has helped her establish her own practice, she continues to serve, "Doing pro bono work humbles me. It reminds me that our income driven profession is more noble than we think if we only make a little time (easier said than done). I like making a difference in someone's life, the kind of difference they may need, because a lot of people have made a lot of difference in mine, including the members of the Northport Tennis Club."

Fligstein received a B.A. in Science from St. John's University and her Juris Doctor from Pace University School of Law, where she also earned an international law certificate. She has experience in a variety of areas of law including immigration, compliance, real estate, wills, trusts and estates, criminal and matrimonial law. Now a solo practitioner, her primary focus is on family law and elder law, assisting her clients with multiple issues ranging from a struggling new family to a struggling aging family.

Fligstein's family was one of the first Albanian families to come to the United States, where she attended college and became a lawyer. She believes that great achievement comes with the great responsibility to educate her community of the rights they have and to inspire younger generations to educate themselves and use that knowledge to help others. Leading by example is a powerful way of doing that.

Fligstein is a credit to the Albanian community, the legal community, and the diverse communities she so ably serves. Her fluency in Albanian and Greek helps to level the playing field for those who do not have a command of the English language. Her hard work paired with her kindness has helped countless individuals and families. We are grateful for her unwavering dedication and ask that you join us in congratulating her being honored as the Nassau Lawyer Pro Bono Attorney of the Month.

Gail Broder Katz is the Pro Bono Project Coordinator for The Safe Center LI (formerly Nassau County Coalition Against Domestic Violence). She can be contacted at GBroderKatz@tscli.org or (516) 465-4700 for information about the Project and how you can help.

In Brief

Marian C. Rice

Managing Partner **Joseph G. Milizio** of Vishnick McGovern Milizio LLP (VMM) is pleased to announce the establishment of four new practices: COVID-19 Legal Assistance (launched in March); Surrogacy, Adoption, and Assisted Reproduction; Real Estate Litigation; and Personal Injury. VMM is also pleased to welcome two new attorneys, counsel **Richard H. Apat** as head of the Real Estate Litigation and Personal Injury practices and associate **Andrew S. Koenig** in the Personal Injury practice. Joseph G. Milizio has also announced that the firm has been ranked in the 2020 *New York Law Journal* "New York's Top-Rated Lawyers" list in three practice areas: Trusts and Estates, Real Estate Law, and LGBTQ Representation. The firm has also been named in the *Global Law Experts Awards 2020* as "Trust & Estate Litigation Law Firm of the Year in New York." In addition, the firm proudly congratulates three of its attorneys for being named to the *Best Lawyers: Ones to Watch 2021* list: partner **Constantina S. Papageorgiou** in two practice areas, Elder Law and Trusts and Estates; counsel **John P. Gordon** in the practice area of Business Organizations (including LLCs and Partnerships); and associate **Meredith Chesler** in the practice area of Trusts and Estates. **Joseph Trotti** of Vishnick McGovern Milizio LLP was a featured guest on *News 12's* "The New Normal" on July 14, discussing COVID-19 and matrimonial and family law matters. **Avrohom Gefen** was also a featured guest on "The New Normal" on June 29, discussing COVID-19 and business and employment law matters. The prime-time morning show is broadcast across New York and New Jersey. Counsel Richard H. Apat was interviewed on *CBS New York* 5 o'clock news on August 6 about the legal responsibility for property damage and personal injuries caused by tropical storm Isaias. **Andrew A. Kimler** was a featured presenter at the New York Society of Association Executives (NYSAE) webinar on July 24, discussing current challenges facing the workplace. Richard H. Apat will be conducting a webinar about neighbor issues during COVID-19 and Isaias from the legal and insurance perspectives on August 26.

Ronald Fatoullah of Ronald Fatoullah & Associates presented several educational webinars throughout the month utilizing the virtual platform. He provided current updates regarding the changes in community Medicaid and collaborated with expert patient advocates in the medical and insurance arenas to provide guidance during this uncertain time. Mr. Fatoullah also served as a guest instructor at the monthly "Teach-in" for the New York Statewide Senior Action Council and presented "COVID 19—Why You Need A Knowledgeable Elder Law Attorney More Than Ever!"

Karen Tenenbaum, LL.M. (Tax), CPA, tax attorney, and **Marisa Friederich** spoke for AAA-CPA discussing NYS residency tax issues. Throughout the pandemic, Karen and her firm were a resource to the community. Karen was interviewed by *News 12* discussing the COVID Tax Relief updates. The Melville-based firm represents taxpayers in IRS and NYS tax matters.

Stephen J. Silverberg, CELA, has been named as a member of the Executive Committee of the Estate Planning Council of Nassau County, an organization that promotes the exchange of ideas and information among estate planning professionals.

Founding Partners **Daniel J. Hansen** and **Troy G. Rosasco** of Hansen & Rosasco, LLP recently opened their new office at 1377 Motor Parkway, Suite 301, Islandia, NY 11749. They also have offices in midtown Manhattan. The firm is devoted exclusively to representing first responders and downtown Manhattan survivors before the 9/11 Victim Compensation Fund. The Firm Administrator, located at the Islandia office, is **Dede S. Unger**.

Forchelli Deegan Terrana LLP's ("FDT") Managing Partner, **Jeffrey D. Forchelli,** was selected by his peers for inclusion in the 27th Edition of The *Best Lawyers in America*© for Land Use & Zoning Law. He has been recognized annually since 2018. FDT Partner **Gregory S. Lisi** was recognized for the first time in Litigation—Labor & Employment Law. In addition, the following FDT attorneys were included in the inaugural edition of the *Best Lawyers: Ones to Watch:* **Lindsay Mesh Lotito** for her work in Banking & Finance Law and **Robert L. Renda** for his work in Tax Law.

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 35 years, Ms. Rice is a Past President of NCBA.

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

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

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

WE CARE

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

Dear Colleagues:

The hunger of the poor did not stop because of the pandemic. It only got worse.

The needs of the disadvantaged for other basic life needs did not stop because of the pandemic. It only got worse.

The necessity of charities to help the less fortunate in all areas of their lives did not stop because of the pandemic. It only got worse.

The WE CARE Foundation, a charitable arm of the Nassau County Bar Association (NCBA), understands things have gotten worse and needs your help.

Since its inception, We Care has provided over five million dollars in grants to help Nassau County's residents in need. Now, when many of those needs are magnified due to COVID-19, the WE CARE fund is struggling to help. BUT it cannot do so through its traditional fundraisers like Dressed to a Tea, its Golf and Tennis Classic, Casino Night and other events due to both the limitations imposed on public events and other health concerns.

WE CARE has made grants to food kitchens, food banks, agencies which supply shelter and clothing, and agencies that provide after-school and summer day-care which working parents cannot afford. Spousal and child abuse have increased during this crisis, and the abused need our help. All the agencies that supply these services need our help.

In light of the above, we are reaching out to our prior supporters and all NCBA members. WE CARE knows and appreciates the depth of your own charity for others. Please help WE CARE do its best to fulfill its mission. WE CARE needs YOUR help to be able continue to make its grants. We know your ability to give may be restricted somewhat now, but please give what you can. Whatever you give, if others give also, it will add up to an important amount.

Many of us have been blessed with a good life. An unknown author once wrote that: While it is good to be blessed, it is equally good, if not better, to be a blessing.

You can help WE CARE continue to fulfill its mission by going to the NCBA website, clicking on WE CARE and making a donation. And remember, since the NCBA picks up all the administrative expenses of WE CARE, WE CARE will be able to grant 100% of what you donate.

THANK YOU.

Michael H. Masri, Esq.
Co-Chair, WE CARE Advisory Board

Checks made payable to Nassau Bar Foundation — WE CARE

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CONGRATULATIONS TO MICHAEL MASRI ON HIS MARRIAGE

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Expansion ...

Continued From Page 9

"covered." If a project's eligibility it determined by a ratio of the public subsidies it receives verses total cost of the project, then the numerator for this formula is the public subsidies and the denominator is the total project costs. If dividing the total public subsidies by the total project costs equals 30% or more, then that project will be "covered" by this new prevailing wage legislation.

A developer cannot make this calculation without knowing exactly what goes into the denominator, i.e., what constitutes total "construction project costs"? Do they include all material and labor costs? How should those labor costs be calculated? Should they be based on bids received in the open market as a private project, or based on a public bidding process that utilizes prevailing wage standards? Are soft costs such as architectural, engineering, environmental, legal fees and other due diligence costs included? What about land acquisition costs? How does the definition of "construction project costs" (of which public subsidies must be at least 30% to trigger prevailing wage requirements) differ from the definition of "project costs" (which must exceed five million dollars as a baseline threshold for the new legislation)?

These are just a few of the questions that the Public Subsidy Board will need to opine on when its thirteen board members are appointed by the Governor.[6]

Going Forward

The legislation, which is set to go into effect on January 1, 2022, is ambiguous as to whether projects going through the entitlement process will be deemed exempt from the prevailing wage requirements on the date it becomes effective, which is a significant concern for projects on Long Island where the entitlement process can take years to complete. Another important power reserved to the Public Subsidy Board is the ability to temporarily delay the implementation of the legislation past January 1, 2022 "in the event that the board finds that there is or likely would be a significant negative economic impact."[7] The board may delay implementation on a statewide basis, or a region by region basis.[8]

It is common knowledge that nearly all large-scale developments on Long Island would not be feasible but for the financial assistance afforded by local municipalities vis-a-vis Industrial Development Agencies. This assistance typically includes payment in lieu of tax agreements, sales and use tax exemptions and partial mortgage recording tax exemptions, among others. Going forward, a thorough financial assessment must be performed for all future projects seeking public subsidies in the wake of this legislation to determine whether the aggregate value of savings received for the project will trigger the prevailing wage thresholds established in the law.

Nicholas J. Cappadora is an associate at Sahn Ward Coschignano, PLLC, specializing in land use and zoning law and industrial development agency transactions.

1. NY Const Art I, § 17.
2. 2020-21 Art. VII Language Bills, Transportation, Economic Development and Environmental Conservation, S7508-B / A9508-B, at 95, pt. FFF.
3. Labor Law § 224-a, effective Jan. 1, 2022.
4. Labor Law § 224-c.
5. Labor Law § 224-a(4)(a)–(k).
6. *Id.* The 13 members of the Public Subsidy Board shall be appointed by the Governor as follows: one member upon the recommendation of the temporary President of the State Senate, one member upon the recommendation of the Speaker of the Assembly, the Commissioner of the Department of Labor, the President of the Empire State Development Corporation, the Director of the Division of the Budget, two members representing employees in the construction industry, of whom one shall be a representative of the largest statewide trade labor association representing building and construction workers, and one shall be a representative of the largest trade labor association representing building and construction workers with membership in New York City, and two members representing employers in the construction industry, of whom one shall be a representative of the largest statewide organization representing building owners and developers, either for-profit or not-for-profit, and one shall be a representative of a statewide organization representing building owners and developers, either for-profit or not-for-profit, representing a region different than the region primarily represented by the initial employer representative. The Commissioner shall act as the chair.
7. Labor Law § 224-c(7).
8. *Id.* The Board may delay implementation after consultation with the New York State Department of Labor, the U.S. Department of Labor and the Federal Reserve Bank of New York.

We Welcome the following New Members

Attorneys
Nelson Edward Timken

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Yacine Ayana Williams

In Memoriam
Hon. Samuel M. Levine

Executive ...

Continued From Page 6

"[I]n the event of a disaster…and upon a finding by the chief executive thereof that the public safety is imperiled thereby, such chief executive may proclaim a local state of emergency within any part or all of the territorial limits of such local government…. Following such proclamation and during the continuance of such local state of emergency, the chief executive may promulgate local emergency orders to protect life and property or to bring the emergency situation under control."[13] The rule further provides for some examples of the reach and breadth of these emergency orders, such as imposing curfews or closing places of assembly.

Executive Law § 24 has a total of seven other subsections which create additional requirements that the chief executive may be subjected to. Subsection 2 requires the chief executive to publish the local emergency order so that it is transmitted to the public, such as in newspapers or television broadcasts. Subsection 3 dictates the manner in which the local state of emergency must be filed and with whom it must be filed. Subsection 4 declares that nothing in § 24 limits the ability of other responsibilities or duties to be bestowed upon the chief executive. Subsection 5 states that anyone who violates a local emergency order shall face criminal penalty. Subsection 6 states that the chief executive may request that the governor remove inmates from institutions within the emergency jurisdiction. Subsection 7 states that the chief executive may request assistance from the governor, "provided that such chief executive determines that the disaster is beyond the capacity of local government to meet adequately and state assistance is necessary to supplement local efforts to save lives and to protect property, public health and safety, or to avert or lessen the threat of a disaster."[14] Subsection 8 states that any emergency order may be terminated by the legislature at any time, which serves as a check on this extended executive power. As shown, the rule does not expressly limit this emergency power any further than the stated purpose of this power, which is "to protect life and property or to bring the emergency situation under control."[15]

Case law is scant of the role of a Mayor as chief executive during national or state declared emergencies, such as COVID-19. However, the one matter that is instructive is *W.D. on behalf of A. v. County of Rockland*, where a local emergency order was issued in response to a measles outbreak in Rockland County, which was classified as an "epidemic." In that case, the local emergency order at issue declared a prohibition of minors or infants from any place of public assembly if that minor or infant was not vaccinated against measles, with extremely limited exceptions, for a period of time totaling 29 days. The case was brought by parents of children who were not vaccinated pursuant to a religious exemption who were now barred from attending places of public assembly, such as schools, and the case called into question whether Edwin J. Day, the County Executive of Rockland County, "had the authority pursuant to Executive Law § 24 to issue the Emergency Declaration."16 The Respondent argued that the measles outbreak was an "epidemic," and as such would "rise to the level of an 'epidemic' as included in the definition of 'disaster'" under Executive Law § 24. The Court, however, held that the issued executive order exceeded the Respondent's [County Executive's] authority as the level of the crisis did not "rise to the level of a pandemic."[17] Local Emergency declarations are permissible, but need to be limited in scope and duration.

Conclusion

COVID-19 created circumstances not seen before in our lifetimes. Confronted with unprecedented realties, the Governor and other elected chief executives were forced, through the use of the executive orders, to contour the lives of the citizens to fight this pandemic. However, the courts and legislatures have instructed that actions that are taken to surmount such challenges must be limited in scope and substance. Preservation of the collective whole is necessary, for certain, but the founding principles of this country must still be preserved.

Charles J. Casolaro is the principle of the Law Offices of Charles Casolaro of Garden City, and a village attorney for two Long Island villages, as well as special counsel to others. Mr. Casolaro wishes to thank Hofstra Law graduate Julia Evans for her research and assistance in the preparation of this Article. Mr. Casolaro can be reached at cjc@casolarolaw.com

1. Population and Housing Unit Estimates – United States Census Bureau (Jan. 29, 2020).
2. *See* Harvard Journal of Law & Public Policy; *Preface*, Volume 43, Number 3 (Summer 2020).
3. *See* Eric Nelson, *The Royalist Revolution: Monarchy and the American Founding 15, 17, 184-228 (2014)*, as quoted from a lecture delivered by William Barr, the current Attorney General of the United States, at the nineteenth annual Barbara K. Olsen Memorial Lecture on November 15, 2019, at the Federalist Society's 2019 National Lawyers Convention.
4. *See id.*
5. *See id.*; *see also* Lee Edwards, *What is Conservatism?*, Heritage Foundation (Oct. 25, 2018).
6. *See generally* N.Y. Const., art. IV, s 3; *Rapp v. Carey*, 88 Misc.2d 428 (1977).
7. *See* N.Y. Const., art. III, s 1; *id.*
8. *See generally* Office of the Governor, www.ny.gov/agencies/office-governor.
9. *See Dorst v. Pataki*, 167 Misc.2d 329 (1995).
10. *See Dao Yin v. Cuomo*, 2020 WL 2739952 (2d Dept. May 27, 2020).
11. *See* State Executive Law § 29-a(1).
12. *See* State Executive Law at § 20(2)(f)).
13. *See* State Executive Law at §24 (1).
14. *See id.*
15. *See id.*
16. *See W.D. on behalf of A. v. County of Rockland*, 63 Misc.3d 932 (Sup. Ct., Rockland Co. Apr. 5, 2019).
17. *See id.*

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LONG ISLAND BUSINESSNEWS

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Develops innovative programs to provide free or reduced fee access to legal counsel, advice and information.
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Explores issues related to the protection of the rights of minorities and the various civil rights legislation.
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Provides a forum for attorneys practicing commercial litigation, including interaction with justices and support staff of Nassau County's Commercial Part. Works with other related committees and NCBA Officers and Directors on issues of corporate law affecting both litigated and non-litigated matters.
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Focuses on issues related to real property valuation and litigation.
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Discusses new developments and changes in the law that affect defendants' lawyers and their clients.
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Discusses issues arising from practice in District Court, and promotes dialogue between the bench and the bar with respect to issues of common concern.
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Encourages more diverse membership participation at the Bar and promotes discussion of issues related to diversity in the practice of law.
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Vice Chair: Rudy Carmenaty

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Oversees repairs and refurbishing of the NCBA headquarters.
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Discusses topics related to the legal aspects of school systems.
Co-Chairs: John P. Sheahan and Rebecca Sassouni
Vice Chair: Abigail Hoglund-Shen

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Addresses legal issues related to health, mental hygiene and social services for the public and special population groups, including the poor, the aged and the disabled.
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Establishes a forum for the exchange of information regarding substantive and procedural law in the burgeoning field of environmental matters.
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Considers legal issues impacting health care, hospitals, nursing homes, physicians, other providers and consumers.
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Vice Chair: Colleen C. McMahon

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Discusses problem areas in immigration law.
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Shares information and support to assist in-house counsel and new subject matter skills.
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Reviews insurance claim procedures, insurance policies, substantive insurance law and related issues.

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Provides a source of information to practicing attorneys whose interests relate to patents, trademarks, copyright and other intellectual property matters.
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Analyzes proposed federal and state legislation, administrative regulations, and current judicial decisions relating to employer-employee relations, pension, health and other employee benefit plans, Social Security and other matters in the field of labor and employment law.
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Provides confidential assistance to attorneys struggling with alcohol, drug, gambling and other addictions & mental health issues that affect one's professional conduct.
** Application & Presidential approval required*
Chair: Jacqueline A. Cara

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Advises the NCBA Lawyer Referral Service; addresses policy questions regarding fees, law categories and membership. **Presidential approval required*

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Provides a forum for legal administrators to share information, learn about updates to HR and labor law, gain knowledge about topics relevant to their position, and network with other administrators, while at the same time increasing visibility and understanding related to the administrator's role within law firms.
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Addresses equality in the law and the legal concerns of the LGBTQ community.
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Vice Chair: Barrie E. Bazarsky

MATRIMONIAL LAW
Promotes the standards and improves the practice of matrimonial law.
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Vice Chairs: Jeffrey L. Catterson and Karen L. Bodner

MEDICAL LEGAL
Reviews issues relating to medical malpractice litigation for plaintiffs and defendants.
Co-Chairs: Mary Anne Walling and Susan W. Darlington
Vice Chair: Christopher J. DelliCarpini

MENTAL HEALTH LAW
Provides programs on legal issues concerning mental illness and developmental disabilities, including but not limited to, capacity, civil rights, access to treatment and dual diagnosis, as well as discusses relevant statutes, case law and legislation.
Co-Chairs: Saundra M. Gumerove and Suanne Linder Chiacchiaro

MUNICIPAL LAW
Reviews trends and developments concerning zoning and planning, elections, employee relations, open meetings law, and preparation and enforcement of ordinances and local laws.
Co-Chairs: John C. Farrell and Chris J. Coschignano

NEW LAWYERS
Structured events and activities of benefit and interest to newer attorneys (within ten years of admission) and law students, including social and professional activities. Establishes support network for new lawyers.
Co-Chairs: Steven V. Dalton and Glenn R. Jersey, III

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Promotes the exchange of information between paralegals and attorneys and provides and establishes a networking opportunity between paralegals and attorneys.
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Discusses new developments and changes in the law that affect plaintiff's lawyers and their clients.
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Vice Chair: Rudy Carmenaty

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Considers current developments relating to the practice of real estate law.
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Members approximately 65 and older meet to discuss pertinent issues in their personal and professional lives.
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SPORTS, ENTERTAINMENT & MEDIA LAW
Considers topics and factors specifically related to practice in the field of sports, entertainment and media law.
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Provides a forum for dialogue among bar members and the judiciary on topics related to Supreme Court practice.
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Deals with estate planning, administration and litigation; reviews pending relevant New York State legislation; and maintains an interchange of ideas with the Nassau County Surrogate and staff on matters of mutual interest.
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Reviews legislation and regulations associated with military law and veterans' affairs, in particular, the needs of reservists and National Guard called to active duty.
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Examines current trends regarding women in the court system, and seeks to protect their rights to equal treatment.
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Vice Chair: Sherwin Figueroa Safir

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Discusses current legislation related to Workers' Compensation regulations and benefits.
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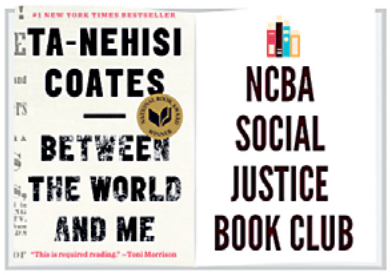
New NCBA Social Justice Book Club Tackles Race, Discrimination and Inequality



In response to the reprehensible acts of hatred and civil unrest that has devastated our nation, NCBA President Dorian R. Glover held the first virtual meeting of the newly formed NCBA Equal Justice Task Force on Friday, June 5, 2020 to discuss how the NCBA would respond to the inequalities and injustices facing our local communities, country and world.

"The Social Justice Book Club's discussion of the Coates' book was unparalleled in terms of the preparation by the organizers, the deft leadership by the moderator, and the thoughtful contributions by participants. The book is a moving and challenging read; I left the meeting feeling that I had a deeper understanding of the profound issues it raises. I am looking forward to the next meeting." said Gail Jacobs, former Dean of the Academy of Law at NCBA.

Among numerous suggestions and innovative ideas shared during the initial meeting of the Task Force, Judge Maxine S. Broderick, Chair of the NCBA Diversity and Inclusion Committee, proposed that NCBA establish a Social Justice Book Club. The Book Club, which would meet bi-monthly, would discuss and explore book selections with the objective of informing members on issues of diversity, injustices, and disparities present in our nation.

On July 29, 2020, the Book Club held its first meeting virtually and welcomed 30 NCBA members to discuss the 2015 National Book Award winner *Between the World and Me* by Ta-Nehisi Coates, an American author and journalist. The book is a work of non-fiction that delves into the realities associated with being a person of color in the United States. Participants earned two Diversity, Inclusion and Elimination of Bias CLE credits.

Prior to the discussion, the Diversity & Inclusion Committee circulated guidelines for discussing sensitive issues of race and inequality:

- Approach the conversation with respect
- Examine your motivation
- Set aside the need to be right and the need to win
- Embrace the discomfort of not knowing
- Consider committing to change
- Be authentic
- Maintain privacy
- Allow the moderators to moderate

In following these guidelines, Book Club members were able to approach these difficult topics with empathy and respect, while learning from one another. Discussion moderator, Hofstra Law Professor Jennifer Gundlach, insured that no opinion was dismissed or disregarded, and Book Club members were encouraged to confront unsettling material without limitation. Questions specific to the book selection were disseminated prior to the meeting and were utilized as a starting point for dialogue.

"The Nassau Bar's Diversity & Inclusion Committee is a vibrant and productive committee that is enhancing members' relationships with the Bar Association and strengthening the Bar's ties to the community. Our first ever D & I Book Club discussing *Between the World And Me*" was so engaging and challenging for all of us participating. More than just a roundtable talk about the book, the meeting helped develop ideas and strategies to promote awareness about the racial inequality that exists in Nassau County and about what the Bar can do to address and remedy it." said NCBA Member Oscar Michelen.

The first Book Club meeting can be considered a success in terms of participation and depth of conversation.

New members are welcome to join the Book Club and suggest works of fiction or non-fiction for future discussion. The selection of texts, which is carried out by committee, are not endorsements of the views and perspectives expounded by the authors nor does the Book Club seek to advance any political or social agenda. One of the primary goals of the Book Club is to be intentionally inclusive. Book Club organizers are mindful that our members do not all share the same experiences and opinions and therefore welcome all perspectives to create a robust, though respectful, dialogue.

If you would like to join the Book Club or suggest a book, contact NCBA Diversity & Inclusion Committee Chair, Hon. Maxine S. Broderick at broderick.maxine@gmail.com or Vice Chair Rudy Carmenaty at Rudolph.Carmenaty@hhsnassaucountyny.us for more information.

NCBA Committee Meeting Calendar
Sept. 2—Oct. 7, 2020

Please Note: Committee Meetings are for NCBA Members. Dates and times are subject to change. Check www.nassaubar.org for updated information.

REAL PROPERTY LAW
Alan J. Schwartz
Wednesday, September 2
12:30 p.m.

PUBLICATIONS
Christopher J. DelliCarpini/Andrea M. DiGregorio
Thursday, September 3
12:45 p.m.

COMMUNITY RELATIONS & PUBLIC EDUCATION
Joshua D. Brookstein
Thursday, September 3
12:45 p.m.

MATRIMONIAL LAW
Samuel J. Ferrara
Wednesday, September 9
5:30 p.m.

CIVIL RIGHTS
Berndatte K. Ford
Thursday, September 10
12:30 p.m.

LGBTQ
Charlie Arrowood/Bryon Chou
Tuesday, September 15
9:00 a.m.

PLAINTIFF'S PERSONAL INJURY
Ira S. Slavit
Tuesday, September 15
12:30 p.m.

LABOR & EMPLOYMENT
Matthew B. Weinick
Tuesday, September 15
12:30 p.m.

ALTERNATIVE DISPUTE RESOLUTION
Marilyn K. Genoa/Jess Bunshaft
Tuesday, September 15
6:00 p.m.

DIVERSITY AND INCLUSION
Hon. Maxine S. Broderick
Tuesday, September 15
6:00 p.m.

BUSINESS LAW, TAX AND ACCOUNTING
Jennifer L. Koo/Scott L. Kestenbaum
Wednesday, September 16
12:30 p.m

ASSOCIATION MEMBERSHIP
Michael DiFalco
Wednesday, September 16
12:45 p.m.

EDUCATION LAW
John P. Sheahan/Rebecca Sassouni
Thursday, September 17
12:30 p.m.

WOMEN IN THE LAW
Edith Reinhardt
Tuesday, September 22
12:30 p.m.

ACCESS TO JUSTICE
Kevin P. McDonough/Rosalia Baiamonte
Wednesday, September 23
12:30 p.m.

INTELLECTUAL PROPERTY
Frederick J. Dorchak/Sara M. Dorchak
Thursday, September 24
12:30 p.m.

DISTRICT COURT
Roberta D. Scoll/S. Robert Kroll
Friday, September 25
12:30 p.m

MEDICAL-LEGAL
Mary Anne Walling/Susan W. Darlington
Tuesday, September 29
12:30 p.m.

ELDER LAW, SOCIAL SERVICES, HEALTH ADVOCACY
Katie A. Barbieri/Patricia A. Craig
Tuesday, September 29
6:00 p.m.

APPELLATE PRACTICE
Jackie L. Gross
Wednesday, September 30
12:30 p.m.

PUBLICATIONS
Christopher J. DelliCarpini/Andrea M. DiGregorio
Thursday, October 1
12:45 p.m.

COMMUNITY RELATIONS & PUBLIC EDUCATION
Joshua D. Brookstein
Thursday, October 1
12:45 p.m.

REAL PROPERTY LAW
Alan J. Schwartz
Wednesday, October 7
12:30 p.m.

Homeowner ...

Continued From Page 8

homeowners living there would be less inclined to take on the added expense of repairing the sidewalk. While they are supposed to keep sidewalks in safe repair, the average person will not see the urgency without a ticket from the municipality. Furthermore, homeowner's insurance does not cover sidewalk maintenance, just the defense of lawsuits arising from an injury sustained from a defect. In addition, given the cause-and-create exception, a homeowner might not want to expose themselves to a potential lawsuit in the event that the contractor they hire to perform sidewalk repairs performs negligently and causes a pedestrian to trip.

Plaintiffs consequently have no recourse after sustaining an injury on a defective sidewalk in these towns and villages unless they file suit against the municipality. However, suits against towns and villages are subject to dismissal without prior written notice to the municipality of the defect unless one or both of the same two exceptions exist: the municipality created the sidewalk condition or derived a special use from the sidewalk.[7]

Late last year *Newsday* reported that the insurance carrier for the Village of Bayville advised the municipality to revise its ordinance to explicitly shift liability for personal injury from sidewalk trip and falls from the Village to the owners of the land abutting the sidewalk. Their rationale was that most homeowners carry insurance to defend against such claims.[8] And indeed, escrow charges that homeowners pay with their monthly mortgage payments include homeowner's insurance in addition to taxes.

Bayville's counsel did not publicize their likely intent to protect their clients from acting against their best interest in unwittingly fulfilling the prior written notice requirement for potential plaintiffs in personal injury suits. If municipalities on Long Island fully enforce currently enacted local codes that impose a duty without liability on homeowners, they open the town or village up to lawsuits should plaintiffs trip and fall on the defective sidewalks in the time window between notice and compliance. They create a written record when they send a notice to the homeowner to correct sidewalk defects. This paper trail may serve as prior written notice in these cases.[9]

In New York City, the Department of Transportation maintains multiple databases of street work permits, notices of violation pertaining to sidewalk and street defects and corrective action requests. This system allows Plaintiff's attorneys to easily pinpoint responsible parties, some of whom may be contractors as opposed to property owners or the City and to determine prior written notice to the City about defects. Sections 19-152 and 16-123 of the New York City Administrative Code require property owners to keep the sidewalk in good repair to release the City of any liability for injuries sustained on the sidewalk. However, the City is responsible for injuries sustained on sidewalks abutting one to three family residences according to Local Law 54 of 2003. For this reason, they require such landowners to carry homeowners' insurance to allow them to indemnify the city for personal injury suits. City sidewalk suits are consequently more viable than prospective ones where the venue is on Long Island.

More municipalities should shift liability away from local government and require Long Island homeowners to carry insurance. This would afford plaintiffs a greater chance at compensation for personal injury judgments and encourage homeowners to make sidewalk repairs. In the meantime, Long Island plaintiff's personal injury attorneys should keep a list of towns and villages that expressly impose liability on abutting landowners for personal injury on defective sidewalks for when deciding what cases to take.

Frances Catapano is an attorney whose practice focuses on personal injury, civil rights and complex litigation. In her spare time, she is a parent and an autism rights advocate.

1. *See Solarte v. DiPalermo*, 262 A.D.2d 477 (2d Dept. 1999).
2. *See Hausser v. Giunta*, 88 N.Y.2d 449, 452-53 (1996); *Bachvarov v. Lawrence Union Free Sch. Dist.*, 131 A.D.3d 1182, 1184 (2d Dept. 2015); *Maya v. Town of Hempstead*, 127 A.D.3d 1146, 1147 (2d Dept. 2015).
3. *See Karr v. City of New York*, 161 A.D.2d 449 (2d Dept. 1990); *Muhlon v. Surf Operations Co.*, 255 A.D.2d 370 (2d Dept. 1998); *Strauss v. Tam Tam, Inc.*, 231 A.D.2d 564 (2d Dept. 1996); *Roe v. City of Poughkeepsie*, 229 A.D.2d 568 (2d Dept. 1996).
4. *See Obee v. Ricotta*, 140 A.D.3d 1134, 1135 (2d Dept. 2016).
5. *See id.*
6. *See id.* (quoting *Maya v. Town of Hempstead*, 127 A.D.3d 1146, 1147 (2d Dept. 2015)(quoting *Hevia v. Smithtown Auto Body of Long Is., Ltd.*, 91 A.D.3d 822, 822–23 (2d Dept. 2012)). *See also Tepeu v. Nabrizny*, 129 A.D.3d 935, 936 (2d Dept. 2015); *Ahdout v. Great Neck Park Dist.*, 124 A.D.3d 810, 810 (2d Dept. 2015).
7. *See Weissman v. City of New York*, 29 Misc.3d 1064 (Sup. Ct., Queens Co. 2010)(*quoting Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474, (1999)(citations omitted)).
8. "Bayville May Shift Liability for Sidewalks, Repairs to Property Owners," *Newsday* (Dec. 15, 2019).
9. *See Weissman, supra* n.5; *Stone v. City of New York*, 16 Misc.3d 1134(A) (Sup.Ct., Kings Co. 2007).

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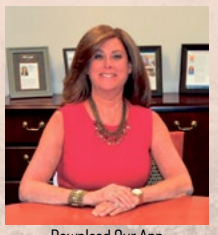

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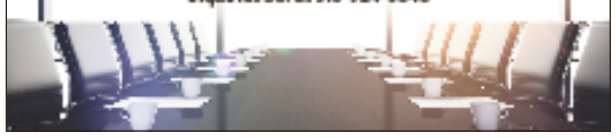

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