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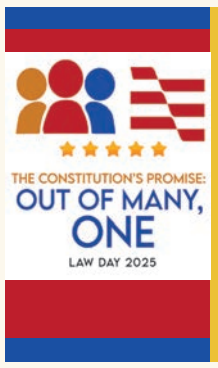

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Nassau Academy of Law and Appellate Practice Committee Host U.S. Court of Appeals Judge Eunice Lee

Nathan V. Bishop

On January 23, 2025, the Nassau County Academy of Law and the Appellate Practice Committee hosted a lively and well-attended Q&A session with Judge Eunice Lee of the Second Circuit Court of Appeals. Sponsored by Printing House Press, the session largely focused on the nuts and bolts of appellate advocacy and jurisprudence as an audience full of practitioners asked Judge Lee for insights on oral argument strategy and the appellate decision-making process. With decades of experience as an appellate advocate to go along with her time at the Second Circuit, Judge Lee imparted valuable professional tips and an insider's knowledge of the appellate process to the Domus crowd.

Despite having spent her entire career working as an appellate practitioner in New York—first at the New York City Office of the Appellate Defender and then with the Federal Defenders of New York—Judge Lee is the first former federal defender to ever don the robe on the Second Circuit. Indeed, even though countless former federal prosecutors fill the ranks of the federal judiciary, Judge Lee said that much of the questioning at her Senate confirmation hearing focused on whether her professional experience was too concentrated on criminal law. At the NCBA event, however, Judge Lee emphasized that her lack of familiarity with some substantive areas of law has not been a disadvantage while serving on the Second Circuit. To that end, she explained that most appellate judges lack expertise in many of the substantive areas of law that arise in their cases, and therefore an attorney's ability to clearly lay out the background of the case and frame the issues on appeal is essential to effective appellate advocacy.

Judge Lee dispensed many such concrete practice tips, as the audience used much of the hour-long Q&A session to mine the wisdom that she has accumulated over more than a quarter century of work as an appellate lawyer and judge. Regarding oral argument, Judge Lee urged attorneys not to focus too much on completing their prepared arguments at the expense of thoughtfully answering questions from the judges on the panel.

She reminded the audience that the main purpose of oral argument is to address the issues and questions that the judges have identified after reviewing the briefs and record, and therefore, it is critical for attorneys to directly and honestly answer each question from the bench before providing any caveats that might frame the issue more favorably for their clients. In that vein, Judge Lee admonished appellate attorneys never to interrupt or talk over a judge because it not only wastes time and undermines an attorney's argument but also irritates the judge. She cited instances from both her time as a practitioner and a judge where judges became

See U.S. COURT OF APPEALS JUDGE EUNICE LEE, Page 16

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NCBA's WE CARE Fund—A Charity Unlike Any Other

FROM THE PRESIDENT

Daniel W. Russo

What is there to say about the NCBA's charitable arm, the WE CARE fund, that hasn't already been said? In over 35 years of existence, WE CARE has raised and distributed over $5,000,000 in charitable grants to over one hundred organizations in need across Nassau County. Founded in 1988 by NCBA Past President Stephen Gassman, the WE CARE fund has become a nationally recognized model for bar associations endeavoring to improve the lives of children, the elderly and those who need assistance throughout the community. Proudly, WE CARE is one of the few charitable organizations that can say every dollar raised is returned to the community by way of a charitable donation.

If ever a question as to the joy that WE CARE spreads to the communities of Nassau County, all one needed to do was come to Domus for the Children's Festival held on Wednesday, February 19. Like the Children's Fall Festival held in October, the Children's Winter Festival saw Domus transformed into a children's wonderland, filled with toys, candy, music, games and even a celebrity appearance by Mr. Met. Almost 200 children from a dozen community organizations— Bethany House, Edna Moran Shelter, Gateway Youth Outreach, Girl Scouts of Nassau County, Glen Clove Boys & Girls Club, Hagedorn Little Village School, Hicksville Boys and Girls Club, Hispanic Brotherhood, La Fuerza Unida, Martin Luther King Center Rockville Center, P.E.A.C.E. Afterschool Program and Uniondale Community Center—came to Domus to enjoy the food, fun, dancing and toy giveaways. Feeling the energy inside Domus and seeing the smiles on the faces of not only the kids, but the parents and adult volunteers alike is something I will not soon forget.

Events like the Children's Festival, unrivaled in its ability to make a child happy, do not come together easily, however. It takes time, it takes effort and, most importantly, it takes people who care about the happiness of others. I would like to take this opportunity, on behalf of the NCBA, to thank WE CARE co-chairs Jeff Catterson and Barbara Gervase and the members of the Children's Festival sub-committee—Hon. Marie F. McCormack, Faith Getz Rousso, Debra Keller Leimbach, Peter Levy and Alan Hodish—WE CARE Coordinator and NCBA Special Events Associate Emma Grieco, the volunteers from Jericho High School and the Girl Scouts of America and all the other volunteers who helped collect, decorate and coordinate for this wonderful day.

A special thank you also goes out to County Executive Bruce Blakeman and County Attorney Thomas Adams for stopping in and saying hello to the kids in attendance. Finally, I would like to thank this year's sponsors—who are too many to list here but are aptly recognized on page 17—without their generosity this event would not have been possible.

Next up on WE CARE's charity fundraising calendar is the re-designed, re-tooled and re-located WE CARE annual fashion show—Dressed to a Tea—with this year's theme being *Escape to Margarita Isle*. This event will be held on March 20 at the Sand Castle in Franklin Square, a new location necessary to accommodate the number of people that come to this great event. Sponsorships and tickets are still available on the NCBA and WE CARE websites.

The charitable endeavors of the NCBA WE CARE Fund are a testament to the values of our membership in serving the citizens of Nassau County. Through fundraising events like Dressed to a Tea and the Golf and Tennis Classic set for September 15, the NCBA continues to make a meaningful impact on the lives of citizens of Nassau County in need. These efforts not only benefit organizations and individuals but also strengthen the fabric of our community as a whole.

Through the efforts of the women and men who dedicate their time and money to WE CARE, the NCBA remains committed to its charitable endeavors and positive change. Thank you to all who continue in the mission of the NCBA WE CARE fund: to serve the community, and the values we hold dear.

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FOCUS: COMMERCIAL LITIGATION

The Impact of Social Media on Commercial Litigation—A Double-Edged Sword

Cynthia A. Augello

Social media has irrevocably transformed the way businesses operate and communicate, and its influence on the legal landscape, particularly in commercial litigation, is both profound and complex. While offering unprecedented opportunities for marketing, networking, and customer engagement, social media also presents a minefield of potential legal pitfalls. This article delves deeper into the multifaceted impact of social media on commercial litigation, exploring its role as evidence, its influence on brand reputation, and the crucial steps businesses must take to navigate this evolving terrain.

Social Media as a Source of Evidence: Unveiling the Digital Footprint

One of the most significant impacts of social media on commercial litigation is its emergence as a rich and readily accessible source of evidence. Platforms like Facebook, X (formerly Twitter), Instagram, LinkedIn, TikTok, and even niche industry forums can provide invaluable insights into the actions, intentions, communications, and relationships of parties involved in a dispute. This digital footprint can take many forms:

- **Direct Admissions.** Statements made on social media, whether in public posts or private messages, can be used as direct admissions against a party's interest, potentially damaging their case. For example, a company executive's admission of a contractual breach in a private LinkedIn group could be used against them in court.
- **Impeachment of Witnesses.** Social media posts that contradict a witness's testimony can be used to impeach their credibility during cross-examination. If a witness testifies they were not at a certain location, but their Instagram post shows them there, this can be powerful evidence.
- **Character Evidence (Limited Admissibility).** While character evidence is generally inadmissible, social media content can sometimes be used to demonstrate a party's character or propensity for certain behavior, particularly in cases involving fraud, defamation, or other claims where character is directly relevant. However, courts scrutinize such evidence carefully.
- **Business Practices and Intent.** Social media activity can reveal a company's marketing strategies, internal communications, pricing policies, and even its knowledge of wrongdoing. For example, deleted but recoverable social media posts could demonstrate a company's intent to deceive consumers.
- **Intellectual Property Infringement.** Social media can be used to demonstrate instances of copyright infringement, trademark dilution, or trade secret misappropriation. Unauthorized use of copyrighted images or logos on a company's social media page can be direct evidence of infringement.
- **Employee Misconduct.** Social media posts by employees can be used to establish grounds for disciplinary action, including termination, especially if the posts violate company policy or damage the company's reputation.

Social Media as Evidence: Beyond the Basics

For a deeper understanding into social media as evidence, the following must be considered and understood:

- **Geolocation Data.** Social media posts often contain geolocation data, which can be crucial in establishing a party's presence at a specific time and place. This can be particularly relevant in cases involving disputes over contracts, matrimonial and family law issues, non-compete agreements, or even personal injury claims related to business activities.
- **Network Analysis.** Social media platforms provide data on connections and relationships between individuals. This network analysis can be valuable in uncovering hidden relationships, identifying potential witnesses, or demonstrating collusion in cases of fraud or antitrust violations.

- **Sentiment Analysis.** Specialized tools can analyze the sentiment expressed in social media posts, providing insights into public perception of a brand, product, or individual. This can be relevant in cases involving defamation, brand damage, or consumer class actions.
- **Deleted Content.** Even deleted social media content can often be recovered through subpoenas or forensic investigations. Attempting to delete damaging posts can be seen as an admission of guilt, intentional spoliation, or an attempt to obstruct justice. Businesses must have clear policies on data retention and deletion.
- **Authentication Challenges.** Beyond screenshots, other forms of authentication are needed. Metadata, IP addresses, and even testimony from platform representatives can be used to verify the authenticity of social media evidence. Courts are increasingly grappling with how to handle evolving authentication challenges.

Social Media and the NLRA: Protecting Employee Rights in the Digital Age

The NLRA protects employees' rights to engage in concerted activities for mutual aid or protection, including discussions about wages, hours, and working conditions. Social media has become a key platform for these activities, creating new challenges and opportunities for employers.

- **Protected Concerted Activity.** Employees have the right to discuss workplace issues on social media, even if those discussions are critical of their employer. This protection extends to posts made on personal accounts, as long as the content relates to terms and conditions of employment and is not malicious or defamatory. For example, employees discussing concerns about safety protocols on a private Facebook group are likely engaged in protected concerted activity.
- **Limitations on Employer Restrictions.** Employers cannot implement social media policies that broadly prohibit employees from discussing workplace issues online. Policies that are vague, overly broad, or chill employees' exercise of their Section 7 rights under the NLRA are unlawful. For example, a policy prohibiting employees from "making negative comments about the company online" is likely too broad and could be interpreted as restricting protected activity.
- **Consequences of Violating the NLRA.** Employers who violate the NLRA by disciplining or terminating employees for engaging in protected concerted activity on social media can face serious legal consequences, including back pay awards, reinstatement orders, and cease-and-desist orders.[1]
- **Balancing Employer Interests and Employee Rights.** The NLRA does not give employees a free pass to say whatever they want online. Employers can still restrict social media activity that is truly disruptive, threatening, or violates other laws, such as those related to defamation or harassment. The key is to strike a balance between protecting employees' rights to engage in concerted activity and protecting legitimate business interests.

Examples of NLRA violations include disciplining an employee for

posting on Facebook about low wages at the company; firing an employee for sharing a news article on Twitter about workplace safety violations; and implementing a social media policy that prohibits employees from discussing "confidential company information," which could be interpreted to include discussions about wages or working conditions.

Examples of permissible employer actions are disciplining an employee for making defamatory or harassing statements about a supervisor on social media; restricting employees from posting trade secrets or confidential customer data on social media; and implementing a social media policy that clearly states that employees are free to discuss workplace issues but prohibits them from making false or misleading statements.

Social Media and Labor Disputes

Social media plays a significant role in labor disputes, providing a platform for unions and employees to communicate their message and organize support.

- **Union Organizing.** Social media can be a powerful tool for union organizing campaigns, allowing organizers to connect with employees, share information, and build support for unionization.
- **Strikes and Picketing.** Social media can be used to publicize strikes and picketing activities, mobilize supporters, and put pressure on employers.
- **Collective Bargaining.** Social media can facilitate communication between union members and bargaining teams during collective bargaining negotiations.

Challenges and Ethical Considerations: Navigating the Legal Maze

While social media offers a treasure trove of potential evidence, its use in litigation also raises several challenges and ethical considerations:

- **Authentication and Chain of Custody.** Ensuring the authenticity of social media evidence is paramount. Screenshots can be manipulated, and accounts can be hacked. Establishing a clear chain of custody for social media evidence is crucial for admissibility.
- **Relevance and Proportionality.** Not all social media content is relevant to a case. Courts must carefully assess the probative value of such evidence and balance it against the principles of proportionality, ensuring the discovery request is not overly broad or burdensome.
- **Privacy and Data Protection.** Accessing private social media content raises significant privacy concerns. Courts must balance the need for evidence with individuals' privacy rights, considering factors like the settings of the account and the nature of the information sought. GDPR and other data privacy regulations add further complexity.
- **Ethical Duties of Lawyers.** Lawyers have strict ethical obligations regarding the use of social media. They must avoid "friending" judges or jurors, refrain from making improper comments about pending cases, and ensure they are not inadvertently accessing or divulging privileged information. They also have a duty to advise their clients on the potential implications of their social media activity.

Social Media and Brand Reputation: A Double-Edged Sword

Social media plays a dominant role in shaping brand reputation, which can be a central issue in commercial litigation, particularly in cases involving defamation, unfair competition, or product disparagement. Negative reviews, defamatory comments, or viral social media campaigns can severely damage a company's image, customer loyalty, and ultimately, its bottom line. Conversely, positive social media engagement can be a powerful tool for building brand trust and enhancing reputation.

Social Media Policies and Best Practices: Proactive Risk Management

To effectively navigate the complex legal landscape of social media, businesses must implement comprehensive and up-to-date social media policies that address:

- **Employee Use.** Clear guidelines for employee use of social media, including restrictions on posting confidential information, making disparaging remarks about the company or competitors, and engaging in conduct that could damage the company's reputation.
- **Content Creation and Marketing.** Protocols for creating and sharing social media content to ensure compliance with advertising regulations, intellectual property laws, and industry-specific guidelines.
- **Monitoring and Response.** Procedures for actively monitoring social media for mentions of the company, its products, and its employees. This includes establishing protocols for responding to negative feedback, online attacks, and potential crises.
- **Litigation Hold and Preservation of Evidence.** Clear policies for preserving social media evidence in anticipation of litigation, including procedures for capturing and storing relevant data from various platforms.
- **Training and Education.** Regular training and education for employees on the company's social media policies and the legal implications of their online activity.

The Future of Social Media and Commercial Litigation

Social media is constantly evolving, with new platforms emerging and existing platforms changing their features and policies. This dynamic landscape presents ongoing challenges for businesses and legal professionals. The increasing use of ephemeral content, the rise of decentralized social media platforms, and the growing sophistication of social media analytics tools are just some of the trends that will continue to shape the intersection of social media and commercial litigation.

Conclusion

Social media has become an undeniable force in commercial litigation, presenting both opportunities and risks for businesses and individuals. By understanding the legal implications of social media, implementing robust policies and procedures, and staying abreast of emerging trends, companies can harness the power of social media while mitigating its inherent risks. Proactive risk management, coupled with sound legal advice, is essential for navigating this complex and ever-changing digital landscape.

1. www.nlrb.gov.

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FOCUS:
LABOR AND EMPLOYMENT LAW

Becoming a Parent in New York: The Current State of Parental Leave

Marc Aspis and Olivia Crooks

For employees of a certain generation, the concept of parental leave, let alone paid parental leave, simply did not exist. Sweden became the first country in the world to enact gender-neutral parental leave (in 1974), and now Swedes are entitled to a generous 480 days of parental leave for a birth or adoption of a child.[1] The Unites States was a little slower—California became the first state to enact paid family and medical leave in 2002.[2] So where does New York stand in the mix?

In New York State, parental leave is governed by a veritable alphabet soup of laws, each with its own unique attributes: the federal Family and Medical Leave Act ("FMLA"),[3] New York Paid Family Leave ("PFL"),[4] New York Paid Sick Leave ("PSL"),[5] and, effective as of January 1, 2025, New York Paid Prenatal Leave ("PPL")[6] (each as may be in effect and amended from time to time).

Parental leave is an increasingly important portion of an overall benefits package (especially for people who expect to become parents), but New York's fractured, piecemeal approach seems to be a work in progress.

FMLA

The FMLA applies to "covered employees."[7] A covered employee must: work for a covered employer; have worked 1,250 hours during the 12 months prior to the start of leave; work at a location where the employer has 50 or more employees within 75 miles; and have worked for the employer for 12 months (which need not be consecutive).

A "covered employer" for these purposes is any public agency employer or any private sector employer employing 50 or more employees for at least 20 workweeks in the current or preceding calendar year.

The FMLA provides 12 weeks of unpaid leave per year; requires group health benefits to be maintained during the leave as if the employee continued to work instead of taking leave; and entitles employees to return to the same or an equivalent job at the end of the leave period. For parental leave specifically, the FMLA allows a mother or father to use the FMLA leave for the birth, adoption or placement (of a foster) child at any time concluding within 12 months after the birth or adoption/placement. A mother can use FMLA leave for prenatal care as well. As the FMLA is unpaid, neither the employer nor the employee is subject to U.S. federal income tax.

PFL

The PFL generally covers most private sector employees in New York as well as public sector employees if the public sector employer has opted in to the program. To be eligible, employees must work at least 20 hours per week after 26 consecutive weeks of employment (full-time employees) or employees must work less than 20 hours per week after working 175 non-consecutive days (part-time employees).[8]

Like the FMLA, the PFL provides 12 weeks of leave per year; requires group health benefits to be maintained during the leave as if the employee continued to work instead of taking leave; and entitles employees to return to the same or an equivalent job at the end of the leave period. For parental leave specifically, the PFL allows a mother or father to use the PFL leave for the birth, adoption or placement (of a foster) child at any time concluding within 12 months after the birth or adoption/placement.[9] PFL is expressly not available for prenatal care.[10]

Unlike the FMLA, the PFL provides paid leave. The amount of paid leave is equal to 67% of the employee's average weekly wage, capped at $1,177.32 (in 2025) for earners above a certain threshold. The program is generally funded by employee payroll deductions of .388% of gross wages per pay period.[11]

Employees must submit a claim to the insurance company, as the benefit is paid out by the insurance company, not by the employer.

Any PFL benefits received by an employee are taxable and shall be included in the employee's federal gross income as non-wages.[12] Since benefits are paid by the insurance carrier rather than the employer, the insurance company will issue a Form 1099-G to the employee to report the income. Taxes will not automatically be withheld from benefits, but employees may request voluntary tax withholding.[13] There is no tax consequence to employers apart from appropriately reporting employee contributions on their respective W-2 forms.

PSL

The PSL covers all private sector employees (including employees of charter schools, private schools and not-for-profit corporations) in New York State and expressly excludes public sector employees.[14] Employers are required to provide leave according to the following chart:

Number of Employees	PSL Requirements
0-4	Up to 40 hours of unpaid leave per calendar year (if the previous tax year net income is less than or equal to $1,000,000)
0-4	Up to 40 hours of paid leave per calendar year (if the previous tax year net income is greater than $1,000,000)
5-99	Up to 40 hours of paid leave per calendar year
100 or more	Up to 56 hours of paid leave per calendar year

PSL can be used (1) "for a mental or physical illness, injury, or health condition of such employee or such employee's family member" and (2) "for the diagnosis, care, or treatment of a mental or physical illness, injury or health condition of, or need for medical diagnosis of, or preventive care for, such employee or such employee's family member."[15] Although not expressly drafted for parental leave, a mother or father can ostensibly rely on either prong to take parental leave, including prenatal leave.

As in the FMLA and the PFL, the PSL entitles employees to return to the same or an equivalent job at the end of the leave period. Under the PSL, the employer pays the employee at the employee's regular pay (or minimum wage, if higher).[16] Accordingly, income and payroll taxes are required.

PSL payments received by an employee are treated as regular wages for both federal and state tax purposes. As such, they are subject to regular income tax withholding, Social Security, and Medicare taxes. Employers must include these payments in regular payroll reporting and W-2 forms. Like wages, PSL payments are deductible by employers as a business expense.

PPL

The PPL is an amendment to the PSL rules and is the first of its kind in the nation. The PPL covers all private sector employees, regardless of employer size.[17] Employees are entitled to 20 hours of paid prenatal leave per year (in addition to any other available leave options). Employees can use PPL for "health care services received by an employee during their pregnancy or related to such pregnancy, including physical examinations, medical procedures, monitoring and testing, and discussions with a health care provider related to the pregnancy;" employees can also use it for fertility treatment and end-of-pregnancy appointments, but cannot use it for postnatal or postpartum care.[18]

Under the PSL, the employer pays the employee at the employee's regular pay (or minimum wage, if higher).[19] Accordingly, income and payroll taxes are required. The tax treatment of PPL payments mirrors that of PSL payments—they are considered regular wages subject to all normal payroll taxes and withholding requirements. PSL payments must be included in regular payroll reporting and W-2 forms, and are deductible by employers as a business expense.

Supplemental Leave

Of course, employers may, but are never required to, voluntarily provide supplemental parental leave benefits. An employer that provides paid leave that exceeds the state-required minimums may receive a tax credit pursuant to Section 45S of the Internal Revenue Code of 1986 ("IRC"), as may be amended and in effect from time to time. To qualify, the employer must have an active written policy providing eligible employees access to at least two weeks of paid family and medical leave annually, paid at 50% or more of normal wages.[20]

The IRC § 45S tax credit is not available to cover the costs of benefits required by state or local law or benefits paid by state or local government. In order to qualify for the credit, the employer must meet the minimum tax credit eligibility requirements on top of any leave benefit required by state or local law.

For example, to qualify for the tax credit, a New York employer with more than five employees would have to provide eligible employees with three weeks of annual paid sick leave at 100% wage replacement. The first 40

hours of paid sick leave benefits merely comply with PSL regulations. The employer could claim the credit on the supplemental benefit because it satisfies the requirements of IRC § 45S.

Coordination of Leave Benefits

Understanding how the various leave programs interact is crucial for both employers and employees. Notably, employers typically have a written policy stating which leave types must be used first and/or which leave types run concurrently. Regardless of whether leaves are taken consecutively or concurrently, each program maintains its distinct characteristics and requirements. For example, an employee giving birth might simultaneously qualify for FMLA and PFL leave, effectively using their 12 weeks of each program during the same period. However, the financial implications differ significantly—while the FMLA provides job protection without pay, the employee would receive PFL benefits during this overlapping period.

The new PPL adds another wrinkle in the coordination of benefits. An expectant mother might use PPL for prenatal appointments while saving FMLA leave for post-birth bonding time. Similarly, PSL can be strategically utilized for pregnancy-related medical appointments once PPL's 20 hours are exhausted. Employers should note that they cannot require employees to use one type of leave before another, nor can they mandate that employees exhaust other paid time off program benefits before accessing PSL or PPL.[21]

Provided an employee meets the eligibility requirements for each program, the choice of which leave program to use, and when, generally remains with the employee, subject to the FMLA rules and employer policies regarding concurrent use. This flexibility, while beneficial to employees, requires careful tracking and administration by employers to ensure compliance with the varying requirements of each program.

Path Forward

As demonstrated above, the legal framework for parental leave in New York is governed by different laws that may result in varied outcomes and can be confusing to individuals and businesses alike. It is important to note that these laws are minimum standards, and many employers offer longer paid or unpaid parental leave periods.

Enactment of the PPL is a positive sign that Albany is aware of flaws in the system and is a willing partner in an effort to expand coverage. But the PPL merely plugs a specific hole and doesn't address other gaps in the programs.

New York has made significant strides in mandating parental leave since the enactment of the PFL, but it remains to be seen whether New York will continue with a piecemeal approach that enacts small-scale changes or whether New York will take a deep dive into the various laws and create a single, unified parental leave law that provides the most coverage to the most people—something along the lines of a minimum of 12 weeks of fully-paid leave funded by the employer; no employee contributions; open to all employees of public, private or nonprofit employers of any size; use for pre- or postnatal care; continuation of health care benefits; and job protection.

Expanding parental leave is widely popular among most employees,[22] and the New York State legislature has taken notice; so maybe more change is in the air.

1. Swedish Inst., *Work-Life Balance, Sweden.se*, https://sweden.se/work-business/working-in-sweden/work-life-balance (last updated Nov. 27, 2024).
2. Sophia M. Mitchell, Issue Brief: History of Paid Leave in the United States, Women's Bureau, U.S. Dep't of Labor, (Mar. 2024), https://www.dol.gov/sites/dolgov/files/WB/paid-leave/HistoryOfPaidLeaveUS.pdf.
3. Family and Medical Leave Act of 1993, Pub. L. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 5 U.S.C., 29 U.S.C.).
4. 12 NYCRR § 380-7.1 (2025).
5. Lab. Law § 196-b.
6. *Id.*
7. This paragraph and the next are taken from Wage & Hour Div., Dep't of Labor, *FMLA Frequently Asked Questions*, https://www.dol.gov/agencies/whd/fmla/faq (last visited Jan. 23, 2025).
8. N.Y. State, Eligibility, https://paidfamilyleave.ny.gov/eligibility (last visited Jan. 23, 2025).
9. N.Y. State, *New York Paid Family Leave Updates for 2025*, https://paidfamilyleave.ny.gov/2025 (last visited Jan. 23, 2025).
10. N.Y. State, *Bonding Leave for the Birth of a Child*, https://paidfamilyleave.ny.gov/bonding-leave-birth-child.
11. N.Y. State, *supra* note 9.
12. Dep't of Tax'n & Fin., N.Y. State, Important Notice: New York State's New Paid Family Leave Program (Aug. 2017), https://www.tax.ny.gov/pdf/notices/n17_12.pdf.
13. *Id.*
14. N.Y. State, *New York Paid Sick Leave*, https://www.ny.gov/new-york-paid-sick-leave/new-york-paid-sick-leave (last visited Jan. 23, 2025).
15. Lab. Law § 196-b(4)(a)(i)-(ii).
16. N.Y. State, *supra* note 14.
17. N.Y. State, *Paid Prenatal Leave Frequently Asked Questions*, https://www.ny.gov/new-york-state-paid-prenatal-leave/frequently-asked-questions (last visited Jan. 23, 2025).
18. *Id.*
19. N.Y. State, *Paid Prenatal Leave Information for Employees*, https://www.ny.gov/new-york-state-paid-prenatal-leave/information-employees (last visited Jan. 23, 2025).
20. I.R.C. § 45S(c)(1)(A)-(B).
21. N.Y. State, *supra* note 17.
22. Juliana Menasce Horowitz et al., *Americans Widely Support Paid Family and Medical Leave, but Differ Over Specific Policies, Pew Rsch. Ctr.* (Mar. 23, 2017), https://www.pewresearch.org/social-trends/2017/03/23/americans-widely-support-paid-family-and-medical-leave-but-differ-over-specific-policies/ (finding 82% of Americans support paid maternity leave and 69% support paid paternity leave).

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FOCUS: PERSONAL INJURY

PI Lawyers: Ignorance of the Workers' Compensation Lien Is No Excuse

Rasheim Donaldson

It is imperative that personal injury lawyers fully understand the relationship between third-party actions and workers' compensation, law governing workers' compensation liens, and value of future workers' compensation benefits.

If the injured worker has a separate workers' compensation attorney, the personal injury lawyer must consult with that attorney because the personal injury lawyer (1) lacks authority to settle the workers' compensation case and (2) may not be able to accurately assess the value of future workers' compensation benefits. Failing to take the right steps before resolving work-related cases can have devastating consequences.

Third-Party Actions by Injured Workers

The injured employee has the right to pursue a negligence claim against a third-party while claiming workers' compensation benefits for a work-related injury.[1] A key principle to comprehend is that the third-party action cannot be settled, discontinued, or compromised without the carrier's written consent or a compromise order.[2]

When the employee pursues a workers' compensation claim and a third-party action, the workers' compensation carrier has a lien against any third-party recovery.[3] The carrier must contribute some of the costs, including attorney fees and disbursements.[4] The carrier will receive a credit for the remaining net recovery from the third-party, which reduces the carrier's future financial obligation.[5] The employee is entitled to reimbursement of the third-party litigation expenses that apply to the carrier's credit.[6]

Third-party actions are personal injury or wrongful death lawsuits arising from the same facts that give rise to a workers' compensation claim.[7] Third-party actions also include legal malpractice actions[8] (for failing to timely file a negligence or wrongful death lawsuit), medical malpractice actions,[9] and civil rights lawsuits against the employer.[10]

The Carrier's Lien

The carrier is the employer or insurance carrier responsible for covering lost wages and medical expenses.[11] The carrier's lien is its financial interest in the third-party action, stemming from benefits provided to the worker. The lien is automatic, meaning no formal notice of the lien is required.[12]

The lien prevents the worker from recovering twice for the same accident, prioritizes the carrier's interest, protects the carrier from problematic settlements, and shifts the financial burden to the responsible party.[13] The lien excludes carrier's defense costs and related expenses.

Consent and Compromise in Settling Third-Party Actions

The carrier's clear, written consent is required to settle[14] or discontinue the third-party action.[15] Simply agreeing to reduce the lien is not considered consent,[16] and verbal consent is inadequate.[17] Conversely, the carrier's participation in the third-party settlement may prevent it from later challenging consent.[18]

Consent letters must explicitly state the carrier's consent to the entire third-party settlement.[19] The letter should detail the lien terms, reduction amount, and net recoverable lien. If *Burns* applies, the letter should include language reserving the plaintiff's rights under *Burns* and specify the *Burns* percentage.[20] The letter should not mention *Kelly* if there has been no *Kelly* reduction, and there should be no statement about further reduction if it does not apply.[21]

The preservation of rights is essential. Even the carrier's failure to expressly reserve its future credit when consenting to settlement may result in a waiver.[22]

Failing to obtain the carrier's consent can have harsh consequences. The failure to secure consent for settlement is inexcusable even if there is no current lien.[23] The same severe consequences flow from the lack of consent in matters with prospective liens. The carrier can sue to recover its lien.[24]

Without a compromise order, oversight could jeopardize future workers' compensation benefits. To appreciate the impact, it is crucial to understand that those benefits can include the right to reopen the case for indemnity benefits for up to 18 years, the right to reopen the case for medical treatment for life, permanent partial disability benefits for up to 10 years, and permanent total disability benefits which can last a lifetime.[25]

Attorneys can consider a compromise order as an alternative to consent. The carrier's approval is not necessary when there is a compromise order.[26] A compromise order is issued by a judge in the court handling the third-party case that approves the settlement.[27] Compromise order applications consist of a petition, attorney's affidavit, and a physician's affidavit.[28]

Compromise orders are time-sensitive, and approval should occur within three months of settlement.[29] Beyond that, approval may be granted, but it requires a showing that the delay has not prejudiced the carrier.[30]

Limits on Carrier's Liens

Since third-party actions vary, it is important to determine when the carrier's lien is inapplicable . For example, some lawsuits include loss of consortium claims. A loss of consortium claim made by one spouse is distinct from the personal injury claim filed by the injured spouse.[31] The court can divide the recovery between the personal injury claim and loss of consortium claim.[32] Attorneys should argue that a lien can only be applied to the personal injury claim, not to the loss of consortium award.[33]

Similarly, the lien can be reduced or eliminated in work-related vehicular accident cases.[34] That said, the importance of consent cannot be overstated, especially when there is no present lien. The failure to get consent will forfeit *all future* workers' compensation benefits.[35] This is a major pitfall when benefits surpass "basic economic loss." The client can lose all future benefits, and the lawyer can be sued. Therefore, even in vehicular cases, the carrier's consent is critical.

New York's Workers' Compensation Law and No-Fault Insurance Law provide lost wages and medical benefits.[36] Under No-Fault, a person injured in a vehicular accident can be reimbursed for "basic economic loss," which covers lost earnings and medical expenses, up to $50,000.[37] The carrier does not have a lien for amounts within "basic economic loss."[38] Essentially, the carrier doesn't have a lien in car accident cases until total payments exceed $50,000.[39] No-fault limits wage reimbursement to $2,000 monthly for up to three years.[40] Nevertheless, the carrier's lien may apply when there are no-fault coverage issues.

It is also vital to understand that the lien does not apply to an uninsured or underinsured motorist (UM/SUM) recovery, which is a first-party recovery from a payor who is not a tortfeasor.[41] The attorney must meticulously research the applicability of the lien.

Lien Reductions

Given the significance of the carrier's lien, attorneys should take a strategic approach to minimize it. The lien can be reduced based on the carrier's proportionate share of the third-party litigation costs, including attorney's fees and disbursements.[42] The carrier's share is based on its benefits from the third-party settlement, which depends on the nature and scope of the workers' compensation award.[43]

There are three lien reduction scenarios.

First, when there is no further workers' compensation liability, the carrier's proportionate share and liability are determined by the ratio of the lien to the third-party settlement. There are no future credit or offset issues.

Second, in all other cases except death cases or permanent total disability, the carrier's proportionate benefit and liability are determined by the ratio of the lien to the third-party settlement.[44] The carrier's remaining liability is resolved through partial credit against future workers'

compensation awards or benefits.[45] Since future benefits are "speculative" at the third-party settlement occurs, the carrier is not required to pay for future benefits until they become due.[46]

As benefits accrue, the carrier must pay its equitable share, under *Burns v. Varriale*.[47] Payments based on *Burns* are at a reduced rate, but the claimant may be entitled to payments at the normal workers' compensation rate when *Burns* payments are depleted.[48]

Third, in death and permanent total disability cases, the carrier's future liability for indemnity benefits is factored into the total benefit, proportionate benefit, and proportionate liability.[49] The benefits are "non-speculative." Since the carrier benefits from third-party settlements, it must contribute its "equitable share" of litigation costs.[50] This requires the carrier to reduce or potentially eliminate its lien. The carrier's share is explained in *Kelly*.[51]

The attorney must be able to calculate the lien value, discern whether a lien reduction is warranted, and know when the carrier is entitled to a credit.

Conclusion

Understanding the intersection of third-party settlements and workers' compensation liens is essential. Always get the carrier's written consent from before settling or make a timely compromise order application. Protect the client's rights under *Burns* and avoid referencing *Kelly* if it is inapplicable.

When approaching a Section 32 settlement of the workers' compensation case in exchange for a further lien reduction, proceed cautiously, keeping in mind: (a) the valuation of future workers' compensation benefits, (b) the potential need for deficiency compensation, and (c) the scope of authority in the retainer agreement.

When appropriate, consider exchanging full indemnity credit for no medical credit; further reducing the lien for full medical credit, with Medicare set-aside (future medical treatment projection costs) to be funded out of the third-party recovery; shifting some of the recovery to a loss of consortium claim; and negotiating how third-party proceeds will be divided.

Insightful attorneys will be empowered insight required to maximize the client's recovery in every case.

1. Workers' Compensation Law ("WCL") § 29(1).
2. WCL § 29(5).
3. WCL § 29(1).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Clark v. Oates & Burger Co.*, 16 A.D.2d 490 (3d Dept. 1962).
8. *McDowell v. LaVoy,* 63 A.D.2d 359 (3d Dept. 1978).
9. *Prentice v. Levy*, 27 A.D.3d 970 (3d Dept. 2006).
10. *Matter of Beth V v. NYS Ofc. Of Children & Family Svcs.*, 22 N.Y.3d 80 (2013).
11. WCL § 29(1).
12. *Calhoun v. West End Brewing Co,* 269 App.Div. 398 (4th Dept. 1945); *Comm's of State Ins. Fund v. Allstate Ins. Co.*, 41 Misc.2d 189, *aff'd*, 42 Misc.2d 1414 (Sup. .Ct., N.Y. Co. 1963); *Comm's of State Ins. Fund v. Sims*, 187 Misc. 815 (Sup.Ct., Albany Co. 1946).
13. *Kelly*, 456 N.E.2d at 793ñ95.
14. *Matter of Johnson v. Buffalo & Erie Private Industry Council*, 84 N.Y.2d 13 (1994).
15. *Djukaonovic v. Metropolitan Cleaning LLC*, 194 A.D.3d 1275 (2021).
16. *Sandles v. Suffolk County Police Dept.*, 89 A.D.2d 6821 (3d Dept. 1982).
17. *Cosgrove v. County of Ulster*, 51 A.D.3d 1326 (3d Dept. 2008).
18. *Richter v. Ramistain Systems*, 57 A.D.3d 1186 (3d Dept. 2008).
19. *Johnson*, 84 N.Y.2d 13.
20. *Burns v. Varriale*, 9 N.Y.3d 207 (2007).
21. *Matter of Kelly v. State Insurance Fund*, 60 N.Y.2d 131 (1983).
22. *Brisson v. County of Onondaga*, 6 N.Y.3d 273 (2006).
23. *Matter of Waters v. City of New York*, 273 A.D.2d 786 (3d Dept. 2000).
24. *Matter of Nunes v. National Union Fire Ins.* Co., 272 A.D.2d 401 (2dDept. 2000).
25. NYS Workers' Compensation Board, *Disability Classifications*, available at https://www.wcb.ny.gov; NYS Workers' Compensation Board, *Understanding Your Schedule Loss of Use Award*, available at https://www.wcb.ny.gov.
26. WCL § 29(5).
27. *Id.*
28. *Id.*
29. WCL § 29(5); *Furtado v. Mario's Bakery*, 17 A.D.3d 527 (2d Dept. 2005); *Bernthon v. Utica Mutual Ins. Co.*, 279 A.D.2d 728 (3d Dept. 2001); *Singh v. Ross*, 12 A.D.3d 498 (2d Dept. 2004).
30. *Furtado*, 17 A.D.3d at 528.
31. *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498 (1968): *Buckley v. National Freight*, 90 N.Y.2d 210 (1997); *Mizko v. Gress,* 191 Misc.2d 229 (Sup. Ct. Ulster Co., 2002).
32. *See, Matter of Raponi v. Orange & Rockland Utils.*, 221 A.D.2d 786 (3rd Dept. 1995); *Matter of Feller v. Sano-Rubin Constr. Co.*, 62 A.D.2d 1071 (3rd Dept. 1978).
33. *See, Scheer v. New York State Ins. Fund*, 22 Misc.3d 239 (Sup. Ct. Erie County, 2007).
34. WCL § 29(1-a).
35. *Parmelee v. Int'l Paper Co.*, 157 A.D.2d 878 (3d Dept. 1990).
36. WCL § 29(1); Insurance Law § 5102(a)(2).
37. Insurance Law § 5102(a)(2).
38. WCL § 29(1-a); *Dietrick v. Kemper Ins. Co.*, 76 N.Y.2d 248 (1990); *Johnson v. Buffalo & Erie County Private Industry Council*, 84 N.Y.2d 13 (1994).
39. *Id.*
40. Insurance Law § 5102(a)(2).
41. *Shutter v. Phillips Display Components Co.*, 90 N.Y.2d 703 (1998).
42. WCL § 29(1).
43. *Id.*
44. *Burns v. Varriale*, 9 N.Y.3d 207 (2007); *Stenson v. NYS Dept of Transp.*, 84 A.D.3d 22 (3rd Dept. 2011); *Terranova v. Lehr Constr. Co.*, 30 N.Y.3d 564 (2017).
45. Burns, 9 N.Y.3d at 215ñ17.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Kelly*, 60 N.Y.2d 131 (1983); *Bissell v. Town of Amherst*, 18 N.Y.3d 697 (2012).
50. *Kelly*, 60 N.Y.2d at 131.
51. *Id.*

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FOCUS:
LABOR AND EMPLOYMENT LAW

Speak to Me No More!*

Rhoda Y. Andors

**Hamlet*, Act 3, Scene 4*

In *Amazon.com Services LLC*,[1] the National Labor Relations Board ("NLRB") recently decided that an employer violates the National Labor Relations Act ("NLRA") when the employer speaks about its views on unionization in a meeting that its employees are compelled to attend during working hours, under threat of discipline or discharge.[2] For 76 years before the *Amazon* decision, such meetings, known as "captive audience meetings," had been permissible under the NLRB's precedential decision in *Babcock v. Wilcox*.[3] Amazon upended the longstanding precedent of *Babcock*, and overruled Babcock and its progeny.[4]

The NLRA and the *Amazon* Decision

The NLRA applies to most private sector employers in the United States.[5] Section 7 of the NLRA states, in part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities…"[6]

It is an unfair labor practice under Section 8(a)(1) of the NLRA for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by Section 7.[7]

Section 8(c) of the NLRA, which protects an employer's right to free speech, states "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."[8]

In *Amazon*, the NLRB held that "captive audience meetings" violate Section 8 (a)(1) of the NLRA because the meetings "have a reasonable tendency to interfere with and coerce employees in the exercise of their Section 7 right to freely decide whether or not to unionize."[9] The NLRB further held that in the context of a labor relations setting, an employer's right to free speech under Section 8(c) "cannot outweigh the equal rights of the employees to associate freely;"[10] rather, the employer's and employees' rights under Sections (8)(a)(1) and 8(c) must be reasonably balanced.[11]

About the NLRB

The NLRB is an independent federal agency with the authority "to make, amend and rescind…rules and regulations" to carry out the provisions of the NLRA.[12] The NLRB's authority is bifurcated. On one side, the NLRB Board ("the Board"), composed of five members appointed by the President, with the advice and consent of the Senate, acts as a quasi-judicial body and decides cases based on the formal record of proceedings before NLRB Administrative Law Judges. On the other side, a General Counsel, similarly appointed, acts independently of the Board to investigate and prosecute unfair labor practice cases.[13]

The Facts in *Amazon*[14]

In 2021, a group of Amazon employees founded a union and began organizing at two Amazon fulfillment and storage centers in Staten Island. Amazon responded with a campaign to dissuade the employees from signing the union's authorization cards and from electing to join the new union.

As part of its campaign, Amazon held a series of meetings that employees were required to attend during the workday. At one meeting, attended by 50 employees, an Amazon manager spoke at length about the company's "open door" policy and how much it valued its "direct relationship" with employees. The manager stated further that the company could not make improvements if it did not know the employees' concerns and he urged them to escalate their concerns "up the chain of command" if they did not get satisfaction from human resources personnel.

In another context, the manager's speech might have seemed innocuous, but in the context of an ongoing organizing campaign the NLRB did not find it so. The Board agreed with its General Counsel that Amazon "unlawfully solicited and impliedly promised to remedy employee grievances" to discourage the employees from joining the union, which violated Section 8(a)(1) of the NLRA.

Amazon's employees were also required to attend many "captive audience meetings" where the company's agents made statements opposing union representation in general and the new Amazon union specifically. In its *Amazon* decision, the Board observed that:

> [a]t one point in the campaign, [Amazon] held meetings at its JFK8 facility every 45 minutes from 9 a.m. to 4 p.m. and 7 p.m. to 4 a.m. 6 days a week. Managers personally notified employees that they were scheduled to attend, escorted them to the meetings, and scanned their ID badges to digitally record attendance.

Again, in another context, such personal attention might have seemed harmless, but here the Board found that Amazon's actions were strong arm tactics to compel employees' attendance at the anti-union meetings. The Board held that Amazon's "captive audience meetings" were unlawful pursuant to Section 7 of the NLRA, violating the employees' rights "to decide whether, when and how they will listen to and consider their employer's views" on their choice to unionize or not. Amazon's compelling the employees' attendance amounted to a "threat of reprisal" and was without the free speech protection of the First Amendment for the employer.

Amazon Overrules *Babcock*

Amazon overruled the NLRB's 1948 decision in *Babcock & Wilcox*, in which the Board had considered a similar scenario where the employer had compelled its employees to attend meetings during which the employer expressed its anti-union views. In *Babcock*, the NLRB Board held that the employer's actions were not unlawful pursuant to Section 8(c) of the NLRA. "Although expressive

of the respondent's antipathy toward the Union, the conduct herein does not contain any threat of reprisal or force or promise of benefit and is therefore protected by the guaranty of the free speech amendment."[15]

However, in *Amazon*, the Board held that "Section 8(c)'s unambiguous meaning is that employers may noncoercively express their views on unionization, but they may not *compel* employees to listen to them," further explaining that:

> by compelling employees to attend a captive-audience meeting and communicating its own message there, the employer creates a reasonable tendency that economically dependent employees will feel inhibited from exercising free choice as to whether, when, and how to participate in the decision concerning union representation. This tendency is eliminated if the employer expresses its views to employees who voluntarily choose to attend such a meeting, because such a meeting does not carry the threat of discipline or discharge for not attending.[16]

Amazon apparently distinguishes *Babcock's* reading of Section 8(c) because it is the employer's act of *compelling* the employees' attendance at the "captive audience meetings" that creates an implicit threat of discipline or discharge, rather than an explicit threat of reprisal or force by the employer which was found to be absent in *Babcock*.

Amazon's Safe Harbor Guidance

Amazon provides specific guidance for employers to establish "a safe harbor from liability for employers who wish to express their views concerning unionization in a workplace, work-hours meeting with employees."[17] "Reasonably in advance of the meeting," the employer must inform employees that: "1. The employer intends to express its views on unionization at a meeting at which attendance is voluntary; 2. Employees will not be subject to discipline, discharge, or other adverse consequences for failing to attend the meeting or for leaving the meeting; and 3. The employer will not keep records of which employees attend, fail to attend, or leave the meeting."[18]

Takeaways

Pursuant to *Amazon*, counsel should advise employers of the unlawfulness of their holding "captive audience meetings" with their employees. Whether employers will risk holding voluntary meetings under the NLRB's "safe harbor" provisions, which may be cumbersome, remains to be seen.

While the Trump administration may appoint new NLRB Board members who are more pro-employer, and who may reverse *Amazon*, counsel should be mindful that New York State enacted its own "captive audience" law in 2023, which amended New York Labor Law § 201-d, requiring every employer to post a sign informing employees of their rights under the state's "captive audience" law.[19]

It would not be surprising if *Amazon* faces constitutional challenges in the future, along the lines of the strong dissent in *Amazon*, which considered the majority decision a "flagrantly unconstitutional overreach [which] was decisively rejected by the Supreme Court as a violation of the First Amendment guarantee of freedom of speech" in an earlier era.

1. *Amazon.com Services LLC*, 373 NLRB No. 136 (Nov. 13, 2024).
2. 29 U.S.C. §§ 151-169.
3. *Babcock & Wilcox*, 77 NLRB 577 (1948).
4. *Amazon*, *19.
5. 29 U.S.C. § 152(2)("The term 'employer' includes any person acting as an agent of an employer…but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act…or any labor organization (other than when acting as an employer)…").
6. 29 U.S.C. § 157.
7. 29 U.S.C. § 158(a)(1).
8. 29 U.S.C. § 158(c); Salinas Val. Broad. Corp. v. N. L. R. B., 334 F.2d 604, 608 (9th Cir. 1964).
9. *Amazon*, *12.
10. *Amazon*, *24.
11. *Id.*
12. 29 U.S.C. §156; https://www.nlrb.gov/about-nlrb/who-we-are, last viewed Nov. 12, 2025, 4:13 p.m.
13. *Id.*
14. *Amazon* was a lengthy decision which addressed multiple unfair labor practices. This article's focus is limited to the company's compulsory meetings for employees. The facts in this section of this article are from *Amazon*.
15. *Babcock*, 576.
16. *Amazon*, *24.
17. *Amazon*, *29.
18. *Id.*
19. NYLL§ 201-d(1)(d); S4982/A6604.

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NASSAU ACADEMY OF LAW

CELEBRATING
WOMEN'S HISTORY MONTH
MARCH

March 4 (Hybrid)
Dean's Hour: William Rehnquist—The Chief Justice as Counter Revolutionary
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

This will be the final installment in a four-part series chronicling the most impactful chief justices. This program will focus on William Rehnquist (1924-2005), the sixteenth Chief Justice of the United States from 1986 to 2005. From 1972 to 1986, he had been an Associate Justice. Committed to a more conservative reading of constitutional law, the Supreme Court's prevailing philosophy for the last 40 years mostly reflected Rehnquist's commitment to altering the direction of the Court as established during the Warren era. Rehnquist led an evenly divided Court, which leaned rightward, and which decided every hot-button issue of its day.

Guest Speaker:
Rudy Carmenaty, Deputy Commissioner of the Nassau County Department of Social Services and the Department of Human Services

March 6 (In Person Only)
Dean's Hour: Insights from Justice Gretchen Walsh
With the NCBA Appellate Practice Committee
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

Justice Gretchen Walsh sits in the Commercial Division, the Ninth Judicial District's Environmental Claims Part and a Civil Trial Part of the Westchester County Supreme Court. In addition to her civil assignments, Justice Walsh also sits on the Supreme Court, Appellate Term, Ninth and Tenth Judicial Districts. Prior to her appointment to the bench, she was Principal Court Attorney to the Hon. Alan D. Scheinkman, J.S.C., presided over disciplinary hearings, and helped develop the E-Filing Protocols for Westchester County's NYSCEF Program. Prior to joining the court, Justice Walsh was a commercial litigator.

Guest Speaker:
Hon. Gretchen Walsh sits on the Supreme Court, Appellate Term, Ninth and Tenth Judicial Districts

March 10 (Hybrid)
Criminal Court for Family Lawyers
With the NCBA Family Court Law, Procedure & Adoption Committee and the Criminal Courts Bar Association of Nassau County
5:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

Family Court practitioners often represent clients who are facing criminal charges, sometimes related or unrelated to their Family Court matters. Should the client testify at trial? Consent to a forensic evaluation? Make an admission? Join this panel discussion on best practices for Family Court lawyers to follow and consider in their representation of criminal clients in Family Court proceedings.

Guest Speakers:
Robert Schalk, Schalk, Ciaccio & Kahn, P.C.; **Scott Gross**, Law Offices of Scott Gross, P.C.; **Justin Feinman**, Feinman & Gellman, PLLC; and **Marc Gann**, Collins Gann McCloskey & Barry PLLC

March 18 (Hybrid)
Dean's Hour: Immigration Enforcement Updates
With Nassau County Assigned Defender Plan
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

The new administration has passed numerous executive orders dramatically changing immigration enforcement and policy. This CLE will discuss how these executive orders and policy changes impact noncitizen clients' criminal court cases; the newly enacted Laken Riley Act; and the 287(g) agreement recently entered between Nassau County and the U.S. Department of Homeland Security.

Guest Speakers:
Jackeline Saavedra-Arizaga and **Michelle Caldera-Kopf**, Suffolk County Legal Aid Society Immigration Unit Attorneys and Long Island Regional Immigration Assistance Center

March 25 (Hybrid)
Dean's Hour: Solving the Late Notice of Claim Dilemma with CPLR 409
With the NCBA Plaintiff's Personal Injury Committee
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

PROGRAM CALENDAR

Plaintiff's attorneys may meet a prospective client with a compelling medical malpractice claim, only to find out that the defendant is a public hospital and the time for serving notice of claim has lapsed. The only chance to salvage the case is to petition for leave to serve late notice of claim. But if you don't have all the records, must you either move on an incomplete record or delay even longer until your target provides the chart? Fortunately, CPLR 409 provides a mechanism for making your motion ASAP while ensuring that the motion is decided on the complete chart.

Guest Speaker:
Christopher J. DelliCarpini, Sullivan Papain Block McManus Coffinas & Cannavo PC

March 28 (Hybrid)

Dean's Hour: The Art and Craft of Persuasive Writing
With the NCBA Appellate Practice Committee
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

This workshop will engage participants in the art and craft of writing persuasive briefs. The presenters will share their brief writing experience from law practice and teaching at St. John's Law School. Common approaches among legal writing experts will be shared, including tips for writing persuasively and concisely. Emerging issues in ethics and AI will be discussed.

Guest Speakers:
Prof. Robin Boyle is Professor of Legal Writing at St. John's University School of Law.
Asst. Prof. Colleen Parker teaches Legal Writing, Public Interesting Drafting, and the Externship Seminar at St. John's University School of Law.

April 7 (IN PERSON ONLY)

An Evening with the Guardianship Bench 2024
With the NCBA Elder Law, Social Services & Health Advocacy Committee
5:30PM Dinner and Cocktails; 6:30 Program
2.0 CLE credits in Professional Practice
Member $70; Non-Member $85; Court Staff $40

Jurists from Nassau, Suffolk, Kings and Queens Counties will participate in an hour-long meet and greet, followed by a round-table discussion of guardianship practice and procedure.

Guest Speakers:
Hon. Arthur M. Diamond (Ret.), Moderator; **Hon. Maria Aragona** (Kings County); **Hon. Gary Carlton (Nassau County)**; **Hon. Rachel Freier** (Kings County); **Hon. David J. Gugerty** (Nassau County); **Hon. Chris Ann Kelley** (Suffolk County); **Hon. Gary F. Knobel** (Nassau County); **Hon. Lee A. Mayersohn** (Queens County); and **Hon. Bernice D. Siegal** (Queens County)

In person only

2025 ANNUAL SCHOOL LAW CONFERENCE

MARCH 21, 2025

Touro University Jacob D. Fuchsberg Law Center, 225 Eastview Drive, Central Islip, NY

Sign-in begins 8:00AM
Program 9:00AM—2:30PM
Registration fee includes continental breakfast, lunch and written materials.

CLE Credits
4 Professional Practice; 1 Cybersecurity, Privacy & Data Protection—Ethics;
1 Diversity, Inclusion & Elimination of Bias

You Need to Calm Down—Collective Bargaining Do's and Don'ts
Moderator Neil M. Block, Ingerman Smith, LLP; Alyson Mathews, Bond Schoeneck & King, PLLC; Steven A. Goodstadt, Ingerman Smith, LLP; Michael G. Vigliotta, Volz & Vigliotta, PLLC; Adam S. Ross, Keane & Beane, P.C.; and Joseph Lilly Frazer & Feldman, LLP

Me!—Navigating Employee Mental Health Concerns
Dennis O'Brien, Frazer & Feldman, LLP; Sharon N. Berlin, Keane & Beane, P.C.; and Joshua S. Shteierman, Volz & Vigliotta, PLLC

I Forgot that You Existed—A Review of the Intricacies of the Open Meetings Law, FOIL and FERPA
Anthony J. Fasano, Guercio & Guercio, LLP; Laura A. Granelli, Jaspan Schlesinger Narendran LLP; and Michael G. McAlvin, Ingerman Smith, LLP

Long Story Short—An Overview of Title IX, Mixed Sports and Related Issues
Lauren Schnitzer, Bond Schoeneck & King, PLLC; Howard M. Miller, Bond Schoeneck & King, PLLC; and Daniel Levin, Frazer & Feldman, LLP

I Knew You Were Trouble—A Refresher on Civil Service Law Procedures
Gregory A. Gillen, Guercio & Guercio, LLP; Lawrence J. Tenenbaum, Jaspan Schlesinger Narendran LLP; and Sophia R. Terrassi, Ingerman Smith, LLP

Delicate—Best Practices for Registration and Enrollment
Christie R. Jacobson, Guercio & Guercio, LLP; Mara N. Harvey, Bond Schoeneck & King, PLLC; and Sarah A. Gyimah, Volz & Vigliotta, PLLC

Karma—How to Address Due Process Complaints and Attorney Fees
Jacob S. Feldman, Frazer & Feldman, LLP; S. Fahad Qamer, Law Office of S. Fahad Qamer; and Candace J. Gomez, Bond Schoeneck & King, PLLC

...Ready for It?—Exploring Legal Issues Related to Cybersecurity and the Use of Artificial Intelligence in the School Environment
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One Last Homicide Case

Hon. Edward W. McCarty III, Ret.

As they approach old age, every former homicide prosecutor and homicide defense lawyer believes that they are still ready to try one more challenging murder case. Yet, the reality of age and stamina tells them that such a calendar call will never come again. I am fortunate because that call came to me in the form of a personal investigation into the murder of my great-grandfather Maximillian Hauck. This review deals with a murder that took place in Germany nearly 85 years ago which, I can state with certainty, has now been solved.

In 1976, while serving as a Nassau County Assistant District Attorney, I was assigned to the Homicide Bureau. The Homicide Bureau consisted of four Assistant District Attorneys whose responsibilities entailed the investigation and prosecution of all homicides within Nassau County. The Assistant District Attorneys assigned to the Homicide Bureau worked closely with the detectives who were assigned to the Homicide Squad of the Nassau County Police Department. The Assistant District Attorney (ADA) assigned to the Homicide Bureau was on call for one week per month during which he would be assigned to all homicides taking place during that period. This assignment required the ADA to respond to the homicide scene, take statements when appropriate, attend the autopsy of the murder victim, further investigate the case and, if an arrest took place, present the case to a Grand Jury and, when appropriate, take the case to trial. During the 1970s and 1980s, Nassau County experienced a homicide rate of approximately 30-35 homicides per year, which was far below the then-national average, but above the rate experienced in Nassau County today.

All the ADAs assigned to the Homicide Bureau quickly developed an expertise in the investigation and disposition of death cases. During my assignment to the Bureau, I was tremendously fortunate to be mentored by the Nassau County Medical Examiner, Dr. Leslie Lukash. He was a nationally recognized expert in the field of forensic medicine and he nurtured my interest in this field. During the period of our friendship, he directed a team of forensic experts who went to South America to identify the remains of Dr. Josef Mengele, who committed mass atrocities in the Auschwitz-Birkenau Concentration Camps in Poland during World War II. I also experienced homicide cases at the international level when I conducted homicide investigations, as an Army Reserve Judge Advocate officer, in Kuwait and Haiti. As my experiences in the field of homicide investigation and prosecution grew, my suspicions also grew that my great-grandfather Maximillian Hauck may have been a murder victim in Nazi Germany.

Dr. Karl Brandt at the Nuremberg Doctor's Trial

My grandfather Curt Hauck had immigrated to the United States from Germany in the early 1900s. He came from a small region in Germany called Upper Silesia, which bordered on Poland and Czechoslovakia in eastern central Germany. He left behind his father (my great-grandfather Maximillian Hauck) and his family, never to return to Germany.

Shortly after the end of World War II, my grandfather learned that, sometime during the reign of Adolf Hitler from 1933 to 1945, his father had died under unusual circumstances. The only facts that my grandfather and his German family ever learned was that Maximillian Hauck had been transferred from his Upper Silesia nursing home to a regional center where he died immediately after his admission. An urn with his ashes and a death certificate, supplied to the family, indicated that he died on the date of admission to the facility from a medical condition that he had not been known to be suffering from. This puzzled the family because, although over 80 years old, Maximillian Hauck was in excellent health, but suffering from the early onset of dementia, as witnessed by his family shortly before his "transfer." The family in Germany was wise enough not to question the Nazi authorities about his death.

These sparse facts were the only data that my family and I knew about Maximillian Hauck's death, but I always felt that there must be more to it, and it was a possible homicide. As a Judge Advocate Officer in the United States Army Reserves, I had several assignments to Germany, and Berlin in particular, but I could never learn any more than the meager facts that my family had been told after Maximillian Hauck died. A trip and general research at the United States Holocaust Memorial Museum in Washington, D.C. also failed to add to my investigation into the possible homicide.

In 2022, I learned of a book entitled *The Nazi Doctors* which I suspected could shed some light on my investigation.[1] So, I ordered the book through the Nassau Library System. When the book arrived, I learned that it was an extremely detailed study of over 500 small-print pages. It was written in 1986 by Dr. Robert Jay Lifton MD, a psychiatrist and professor at the John Jay College of Criminal Justice in New York City. As I started to read the book, little did I know that it would contain the facts leading to my solving the murder of Maximillian Hauck. One chapter, in particular, dealt with a Nazi Aktion T-4 Program, which led me to further research concerning this genocidal program.

Through my research, I uncovered that, in 1939, Adolf Hitler's personal physician Karl Brandt MD met with high-ranking Nazi official Philipp Boukler at 4 Tiergardenstrasser, Berlin (now the site of Berlin's Philharmonic Hall). The plan they developed from this and subsequent meetings became known as the Aktion T-4 Program. Under their T-4 Program, six regional centers were established throughout Germany for the elimination of German citizens who, due to age or infirmity, were no longer worthy of continued life. These centers were located at Bernburg, Brandenburg, Grafeneck, Hadamar, Hartheim and Sonnenstein, Germany. Karl Brandt would administer the program and supervise its daily operations.

These centers would gather qualified patients, under the T-4 criteria, from nursing homes and medical treatment facilities within their jurisdiction. They would send specially designed buses from these facilities to gather their patients. These gray and windowless school-type buses were designated throughout Germany as the "Gray Buses" and were feared by patients and many healthcare personnel.

When a Gray Bus arrived at a nursing home, nurses from the buses gathered patients and their records for

transportation to a T-4 facility. These patients were divided by age, sex, and cognitive abilities. When the Gray Bus would arrive at any of the six T-4 facilities, the same operational plan was followed. Each patient on the bus was assigned a nurse who would personally chaperone the patient through the admission and homicide process. The patient was evaluated by a physician who reviewed his/her records and then did a cursory physical examination. When this intake ritual was completed, the assigned nurse would take the patient into the shower room.

The shower room was, in fact, a carbon monoxide gas chamber. All six facilities had one and followed the same procedures. The nurse removed the clothing from her patient and informed him/her to prepare for a shower. When the room was sufficiently full of patients, the nurses would leave and the chamber was sealed. Carbon monoxide gas was then pumped into the chamber. This type of gas was a commonality in the T-4 Program, and it was made through a generator or obtained from the exhaust of the Gray Buses.

Death for the patients was not instantaneous or painless. Death from the deadly carbon monoxide gas only takes place when the circulatory system becomes 60% saturated with the gas. During the period of developing concentration of gas within the body, it causes intense respiratory and other-system pain. Fear and the patient's actions to obtain breathable oxygen dominate their every action. This period of lethal development of the gas within the bloodstream can take anywhere from ten to twenty minutes. When there were no signs of life coming from the chamber, employees designated as Stockers would enter the gas chambers and remove the bodies for communal cremation. The ashes from these communal cremations, along with death certificates citing a fictitious medical cause of death, would then be sent to the victims' families. I now knew the details of how Maximillian Hauck was murdered.

By the end of the first year of its operation in 1940, an estimated 70,000 infirm German children, adolescents, and adults had been murdered under the terms of the T-4 Program. Ordinary German citizens were in an uproar over the Program. On December 2, 1940, the Vatican issued a statement specifically condemning the T-4 Program. As a result of the public discontent, the T-4 Program was discontinued in September of 1941 with the closing of the six original murder facilities.

Unfortunately, the medical killings did not stop. The German medical community merely adopted extremely liberal definitions of eugenics and euthanasia under a new program developed in Berlin and implemented in healthcare facilities throughout Germany. By the end of the war, over 300,000 German citizens were murdered at the hands of their healthcare providers, with 85% of the 1940 nursing home population being killed by 1945. All of these murders took place in Germany with little, if any, condemnation from the German medical community.

I am convinced that my investigation has established, beyond a reasonable doubt, that Maximillian Hauck was killed in 1940 or 1941 as a result of the conspiracy of Dr. Karl Brandt and Phillipp Boulher in the creation of the T-4 Program. He was taken, without prior notice to him or his family, from his Upper Silesia nursing home in good physical health by a Gray Bus bound for an area killing center. His regional killing center was most likely at Bernburg, Germany.

Maximillian Hauck was murdered by the admission of carbon monoxide gas shortly after his arrival. He had no underlying conditions which would have resulted in his natural death upon arrival at the regional killing center. The cause of his death and the ashes delivered to his family were a fiction. He had been mercilessly murdered, and his ashes co-mingled with those victims murdered with him.

It greatly disturbs me that those involved in the daily administration of each of the killing centers of the T-4 homicide conspiracy were never brought to justice. I am particularly enraged by the actions of the nurse who prepared Maximillian Hauck for his shower in the gas chamber. To think that the last person, with whom he had contact, was a nurse who feigned concern for his care but, in fact, was preparing him for murder, is particularly disturbing.

I had solved my last homicide case, but it would not be going to trial. For his conspiracy to commit murder through the T-4 Program, and other crimes against humanity, Dr. Karl Brandt was later convicted by an international tribunal at Nuremberg and hanged in 1948. Phillipp Boulher committed suicide by biting into a cyanide capsule shortly after his capture by American forces in May of 1945. By defining who Maximillian Hauck was, how he was murdered, and how his killers paid for their crimes, brings a sense of justice, however delayed, for him, his progeny and all humankind.

1. Robert Jay Lifton, The Nazi Doctors: Medical Killing and the Psychology of Genocide 592 (2nd ed. 2017).

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U.S. Court of Appeals Judge Eunice Lee

Continued from Page 1

noticeably frustrated with interrupting advocates.

When asked for guidance on drafting appellate briefs, Judge Lee emphasized the importance of clear and logical organization. Specifically, she suggested outlining the arguments before writing the brief to ensure that the structure serves the goal of clearly and effectively explaining the background of the case and the relevant issues. She further urged attorneys to use thoughtful section headings to help organize the arguments in their briefs. Regarding the citation and discussion of applicable caselaw, Judge Lee stressed that her court will only give serious consideration to cases from other circuits or from lower courts where the Second Circuit itself has not fully addressed the issue at hand.

Judge Lee also suggested that attorneys provide sufficient explanations of important precedents in the body of their briefs so that judges are persuaded of the merits of the client's case without having to look up and review the cited cases. Finally, Judge Lee returned to the theme of civility and decorum in warning the audience that taking a hostile tone in their briefs is off-putting to appellate judges and counterproductive to establishing the merits of an attorney's arguments.

In addition to requesting guidance on the nuances of appellate practice, those in attendance at the Q&A session also asked Judge Lee to peel back the curtain on the decision-making process at the Second Circuit. She revealed that the judges assigned to the panel for a particular case receive copies of the briefs and record several weeks before the oral argument date, but in accordance with an informal Second Circuit norm designed to preserve the judges' pre-argument objectivity, refrain from discussing the case with each other prior to oral argument.

Judge Lee explained that the panel discusses the case at length during the robing room conference immediately after oral argument, where they also usually decide the outcome of the appeal and assign the writing of the panel's decision to one of the judges. According to Judge Lee, the reasoning supporting the decision and other less significant details are often shaped by the subsequent exchanges among the panel judges as the decision is drafted and finalized over a period of time following the post-argument conference.

Judge Lee approaches the decision-making process as a collaborative effort and tries to reach agreement with the other panel judges on the outcome of the case and the reasons for reaching that outcome, as she generally believes that an opinion supported by a consensus of the panel judges contributes to the force and legitimacy of the court's decision. Relatedly, when asked for her views about issuing dissenting opinions, Judge Lee revealed that during her three-plus years on the court she has been somewhat hesitant to dissent from majority decisions due to her feeling that a judge should only dissent if they strongly disagree with the majority. However, she asserted that recently she has been rethinking this philosophy, thus hinting that she may be willing to resort to dissenting opinions more often in the future.

Responding to multiple questions about whether the political views of appellate judges influence their rulings, Judge Lee expressed her belief that the way that any judge approaches a case is generally informed by their background and experience. As an example, she explained that her extensive experience in criminal law informs the way she views criminal appeals. However, she emphasized that while she has been on the Second Circuit, judges have never explicitly expressed their political views in ruling on a case, and she believes that any such political influences come into play only subconsciously as part of a judge's background.

Finally, when asked about the effectiveness of programs to diversify the federal judiciary, Judge Lee was uncertain about the effects of these programs. However, she also noted that since joining the Second Circuit she has noticed that other individuals from different backgrounds have also become federal judges. Judge Lee underlined that participating in events like the NCBA session is important to her because she wants to let the public know that people from diverse professional and racial backgrounds can become judges and wants to encourage aspiring jurists with different backgrounds to pursue their goal of joining the judiciary.

Sitting Second Circuit Court of Appeals judges don't often appear at NCBA events, and Judge Lee did not disappoint the large audience that attended the Q&A session. Her career as an advocate for the underrepresented was reflected in her pragmatic and candid responses to the steady stream of questions from the Domus crowd, who were edified by the judicial philosophy and professional advice of a member of one of the most highly esteemed courts in the world.

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What type of procrastinator are you?

THE PERFECTIONIST: Unrealistic expectations, too much attention to details
THE WORRIER: All-or-nothing mindset and analysis paralysis
THE DREAMER: Great ideas but lacks execution and follow-through
THE DEFIER: Negative view of what others expect from you

Small action is forward movement.

Tips

- **Set manageable, realizable goals.**
- **Commit to five minutes of targeted effort. Even if it's opening the file to read your final notes, you have begun.**
- **Create single tasks or small chunks of work that can be completed.**
- **Bounce back from a lost day. Make a short list of things to do the following day and then let it go.**
- **Allocate a specific date and time for recurring activities.**
- **Take something off your list permanently that is unrealistic or unnecessary.**
- **Count backward from five and then dive in!**
- **Change your mindset: The next 10 minutes are going to go by whether I accomplish a task or not. I may as well do something!**
- **Use the nothing alternative. You either do the task at hand, or you do nothing at all. No alternative distractions or busy work.**

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FOCUS:
LAW AND AMERICAN CULTURE

California Dueling: Warren v Nixon

Rudy Carmenaty

Earl Warren and Richard Nixon were both Republican politicians from California. Both ran for office on the same party ticket. Both aspired to the White House. Both would obtain high office thanks to the patronage of Dwight Eisenhower. But there the similarities end. No two men in public life could have been more different.

Acrimony and mutual recriminations marked their relationship. This was an animosity which began as an intramural rivalry in California. Their hostility grew in intensity as each man moved to the national stage. So did the consequences for American law and American governance.

Eisenhower appointed Warren Chief Justice, fulfilling a campaign promise made at the 1952 Republican convention. At that same convention, Nixon became Ike's vice-presidential running mate. Within sixteen years, Nixon would himself be elected president in his own right.

Warren grew up in Bakersfield and was educated at Berkeley. In 1942, he was elected Governor. Warren compiled a distinguished record of public service, in spite of his participation in the internment of Japanese Americans during World War II.

Richard Nixon was born in Yorba Linda. He attended Whittier College and Duke Law School. After naval service in World War II, he was elected to the House in 1946. The darling of Cold War conservatives, his meteoric rise would see him reach the Senate by 1950, the vice-presidency by 1952.

Warren himself ran for Vice President in 1948. Everyone expected the Republicans to win. Everyone, that is, except the electorate. After Thomas Dewey's unexpected defeat, Warren began eyeing the White House. As a three-term governor, Warren was a genuine contender for the nomination.

Yet as a California liberal, Warren was out of step with mid-western conservatives like Ohio Senator Robert Taft. Taft, known as Mr. Republican, was the son of William Howard Taft. The elder Taft presided over a divided party in 1912, dooming his hopes for reelection. Forty years later, the GOP was again split.

Warren's only hope, and it was a slim one, was a deadlocked convention. Back then, conventions actually selected the nominee. The competition between Ike and Taft was fierce. The seating of several disputed delegations proved critical to the outcome. The General's backers proposed a fair play amendment.

This fair play amendment led to the credentialling of pro-Eisenhower delegations, thus bolstering the General's prospects. Nixon quietly lobbied for fair play. He also courted conservatives by giving the impression he favored Taft. Meanwhile, as California's junior senator, he was nominally promised to Warren.

The California delegation had been pledged to its "favorite son." Nixon had other plans. Behind closed doors, Nixon discreetly diminished Warren's standing among GOP regulars. At the same time, he was garnering their support for Eisenhower.

While Warren's support among party stalwarts was soft, he enjoyed bipartisan support in California, where Democrats outnumbered Republicans. Paradoxically, it was this broad appeal which ignited the Warren/Nixon grudge in 1946. Nixon was making his initial bid for public office that year.

With Warren running for reelection on both party lines, Nixon sought his endorsement. Warren refused. Warren went so far as to discourage others from backing Nixon's candidacy. Nixon ran a no-holds-barred campaign. Warren begrudged Nixon's bull-dog tactics. Nixon won all the same.

In 1950, Nixon found himself in another tight race. This time for a U.S. Senate seat against Helen Gahagan Douglas. Nixon branded Douglas the *Pink Lady*. She, in turn, tarred him as *Tricky Dick*. Warren again kept his distance. Warren, thereafter, took to referring to Nixon as Tricky Dick at every opportunity.

Two years later, thanks to Nixon, most California delegates were quietly supporting Eisenhower. Nixon was promised the vice-presidential slot for his labors. Warren was unaware of Nixon's maneuverings. When Warren got wind of what was taking place, he personally complained to the General.

Belying his image as apolitical, Eisenhower finessed the situation. Once it became evident Eisenhower was to be the nominee, Warren cut his own deal. Warren's support reaped a promise from Eisenhower, the "first vacancy on the United States Supreme Court" would go to him.[1]

After the initial roll call, Ike led Taft 595 to 500, just nine votes shy of the 604 required.[2] Interestingly enough, Warren Burger, who Nixon would nominate to replace Warren as Chief Justice in 1969, led several Minnesota delegates in switching their votes.[3] The final tally was 800 for Ike, 280 for Taft, and 77 for Warren.[4]

That September Nixon was hit with a scandal that almost derailed his career. The New York Post published a story accusing Nixon of having a secret slush fund. In fact, the fund, used to reimburse campaign expenditures, was perfectly legal. Warren's people may have been behind the story.[5]

There was considerable pressure to drop Nixon from the ticket. He went on national television to profess his innocence. Nixon, taking a cue from Franklin Roosevelt, used his dog Checkers as a political prop. Forever known as the *Checkers Speech*, Nixon's performance preserved his political fortunes.

In currying Ike's favor, Nixon would be more than just one heartbeat away from the presidency. He cemented his position as the Republican heir apparent. Had Nixon been dropped, Warren could have been a likely replacement. Ike went on to handily defeat Adlai Stevenson that fall.

Eight months into Eisenhower's first term, Chief Justice Fred Vinson died unexpectedly. Ike had never anticipated he would appoint Warren Chief. He thought an associate justiceship would open up first, but Warren stuck to his guns and asserted he was due "the first opening."[6]

Unable to get around his promise, the President gave Warren a recess appointment. Warren was confirmed the following year, becoming the nation's fourteenth Chief Justice. Eisenhower later considered his appointment of Warren his "biggest damn-fool mistake" while in office.[7]

Warren ushered in a legal revolution beginning with *Brown v Board of Education*. Nixon supported the *Brown* decision, having witnessed segregation first-hand while attending Duke Law. As Vice President, he endorsed the 1957 Civil Rights Act. As President, he moved to desegregate southern schools in the 1970s.

Today, Warren is remembered as a great civil libertarian. Yet his own record on racial matters is not unblemished. As California Attorney General, he supervised the internment of the Japanese. It was an action Warren came to regret and may have colored his subsequent decisions as Chief Justice.

That being said, there was no love lost between the two men. Warren believed Nixon undercut any chance of his becoming the presidential nominee. Warren would make the point that "Nixon cut my throat from here to here, and gesture with his finger across his neck" for effect.[8]

For his part, Nixon was never one to forgive a slight. Quite simply, they loathed each other. During the Eisenhower years, their respective positions resulted in an uneasy truce between them. But this bad blood persisted until Warren's death in 1974.

In the 1960s, they would often clash. After Nixon's defeat at the hands of John F. Kennedy, Nixon was in the political wilderness. After leaving the vice-presidency, he practiced law in Los Angeles. Eisenhower urged him to run for governor in 1962. It was a mistake. Nixon lost to incumbent Pat Brown.

Warren's son publicly supported Brown and Warren even came to

California to pose for pictures with the governor.[9] When Nixon gave his so-called last press conference where he said, "you won't have Nixon to kick around anymore," it was rumored Warren was savoring Nixon's troubles with JFK aboard Air Force One.[10]

Written off as a loser, Nixon moved to New York City for a fresh start. There he became a partner at Nixon, Mudge, Rose, Guthrie & Alexander. He even argued a case before the Warren Court—*Time, Inc. v Hill*.[11] It was a 5-4 decision which Nixon lost. Warren, however, voted with the minority.

At the same time, the Warren Court was issuing landmark decisions expanding the rights of the accused. As crime rose, civil unrest over race relations mounted, and opposition over the Vietnam War escalated, Nixon saw a campaign issue that would pave his path to the Oval Office.

The year 1968 was an annus horribilis for America. The election was marked by the assassinations of Martin Luther King and Robert Kennedy, the abdication of Lyndon Johnson, stalemate in Vietnam, and the chaotic Democratic convention in Chicago. All made for a bitterly divided electorate.

Nixon called for law and order. Holding the Warren Court's rulings responsible, Nixon vowed to appoint strict constructionists. Nixon's themes resonated with many as the Court had become a lightning rod. Grass roots calls were simmering for years to impeach Warren. Nixon skillfully exploited the issue.

Nixon campaigned against the Warren Court as much as he was campaigning against his Democratic opponent Hubert Humphrey. To Warren's chagrin, Nixon appeared poised to win in November. That June Warren submitted his letter of resignation to President Johnson. It was a calculated move.

Fearing Nixon would appoint a conservative chief justice, Warren's resignation was conditional, effective upon the confirmation of his successor. LBJ nominated Associate Justice Abe Fortas. But Warren's timing was also motivated by more than his sincere desire to save his legacy on the court.

Warren could not stand the thought of his replacement being nominated by his bête noire. LBJ and Warren's calculations backfired. Fortas was filibustered in the Senate. LBJ had already announced in March that he would not seek another term. With the Senate failing to advance Fortas' nomination, it was withdrawn.

Johnson then decided to leave the vacancy open for the next president to fill. Warren stayed on through the Court's 1968–1969 term. After Nixon's victory, the question arose whether Warren would now follow through with his already announced retirement.

Warren was at liberty to rescind his letter of resignation. After all, a successor had not yet been confirmed. Liberals urged Warren to stay. Warren refused to do so on principle. Warren feared his actions would appear too political. As if he was staying-on just to deny Nixon the appointment.

An understanding was arrived at. Warren would leave in June 1969. Nixon, as noted, chose Warren Burger. Eisenhower had appointed Burger to the DC Circuit Court of Appeals in 1956. Nixon sought to shift the Supreme Court rightward. He would prove not entirely successful with this endeavor.

No doubt Burger was to the right of Warren. Burger, nevertheless, presided over a fractured court which at most modified but did not overturn Warren era decisions. There was no counterrevolution. In some areas, namely abortion with *Roe v Wade*, the Burger Court went further than the Warren Court ever did.

All of Nixon's appointees save William Rehnquist, who recused himself, voted against the President in the case of *United State v Nixon*.[12] This decision forced Nixon's hand, compelling him to release the Watergate tapes, which led to his resignation on August 9, 1974.

Warren died exactly one month before Nixon was forced from office. On his deathbed, Warren pleaded with Justices William O. Douglas and William Brennan to tell him which way the Nixon case was going. The justices informed the dying Chief that the decision would not go in Nixon's favor.

Warren's last words to his former colleagues were, "if Nixon gets away with that, then Nixon makes the law as he goes along … The old Court you and I served so long will not be worthy of its traditions if Nixon can twist, turn, and fashion the law."[13] Their mutual contempt knew no bounds.

This episode was but the coda to a nearly thirty-year ordeal between Warren and Nixon. Warren died a contented man. At the time of his death and since, Warren has been lauded as one of the great Chief Justices. By any measure, he was one of the most consequential.

Nixon died twenty years later in 1994. He spent that time trying to recover his tattered reputation, an objective which was perhaps insurmountable. Nixon did rehabilitate himself sufficiently to become a foreign policy sage. Not surprisingly, the first line of his obituary was that he became the only man thus far to resign the presidency.

Warren and Nixon where contesting for the highest stakes imaginable—the presidency and the Supreme Court. Both men have long since passed and their personal rivalry died with them. Still the residue from their quarrel continues unabated.

It can be seen every time the name of a prospective justice, or even when that of a lower court judge, is submitted. Confirmations to the federal bench are ideological battlefields camouflaged as congressional hearings. It can also be seen in the political arena whenever a presidential candidate rallies against court decisions.

Because of the seeds planted by Earl Warren and Richard Nixon, the soil of our political and judicial landscapes have been tainted. It's doubtful the country will ever realize a time when politics does not unduly impact law, or our legal system does not unduly influence politics.

1. David A. Kaplan, *Judging Why Earl Warren Was Hailed as 'Super Chief'*, New York Times (December 24, 1989) at https://www.nytimes.com.
2. W.H. Lawrence, *Eisenhower Nominated on the First Ballot; Senator Nixon Chosen as His Running Mate; General Pledges 'Total Victory' Crusade*, New York Times (July 12, 1952) at https://www.nytimesarchive.com.
3. *Id.*
4. *Id.*
5. John A. Farrell, *The Inside Story of Richard Nixon's Ugly, 30-Year Feud with Earl Warren*, Smithsonian (March 21, 2017) at https://www.smithoninamag.com.
6. Kaplan, *supra.*
7. Frederick D. O'Brien, *1953 50 Years Ago*, American Heritage (August/September 2003) at https://www.americanheritage.com.
8. *Id.*
9. Farrell, *supra.*
10. *Id.*
11. 385 U.S. 374 (1967).
12. Farrell, *supra.*
13. 418 U.S. 683 (1974).

Rudy Carmenaty is Deputy Commissioner of the Nassau County Department of Social Services. He is the President-Elect of the Long Island Hispanic Bar Association. Rudy can be reached at Rudolph.Carmenaty@hhsnassaucountyny.us.

In Brief

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

Alan J. Schwartz has been elected as Secretary of the Nassau County Magistrates Association, the organization of village justices that distributes information and instructions as to the duties and authority of the village justices of Nassau County in the execution and performance of their respective duties.

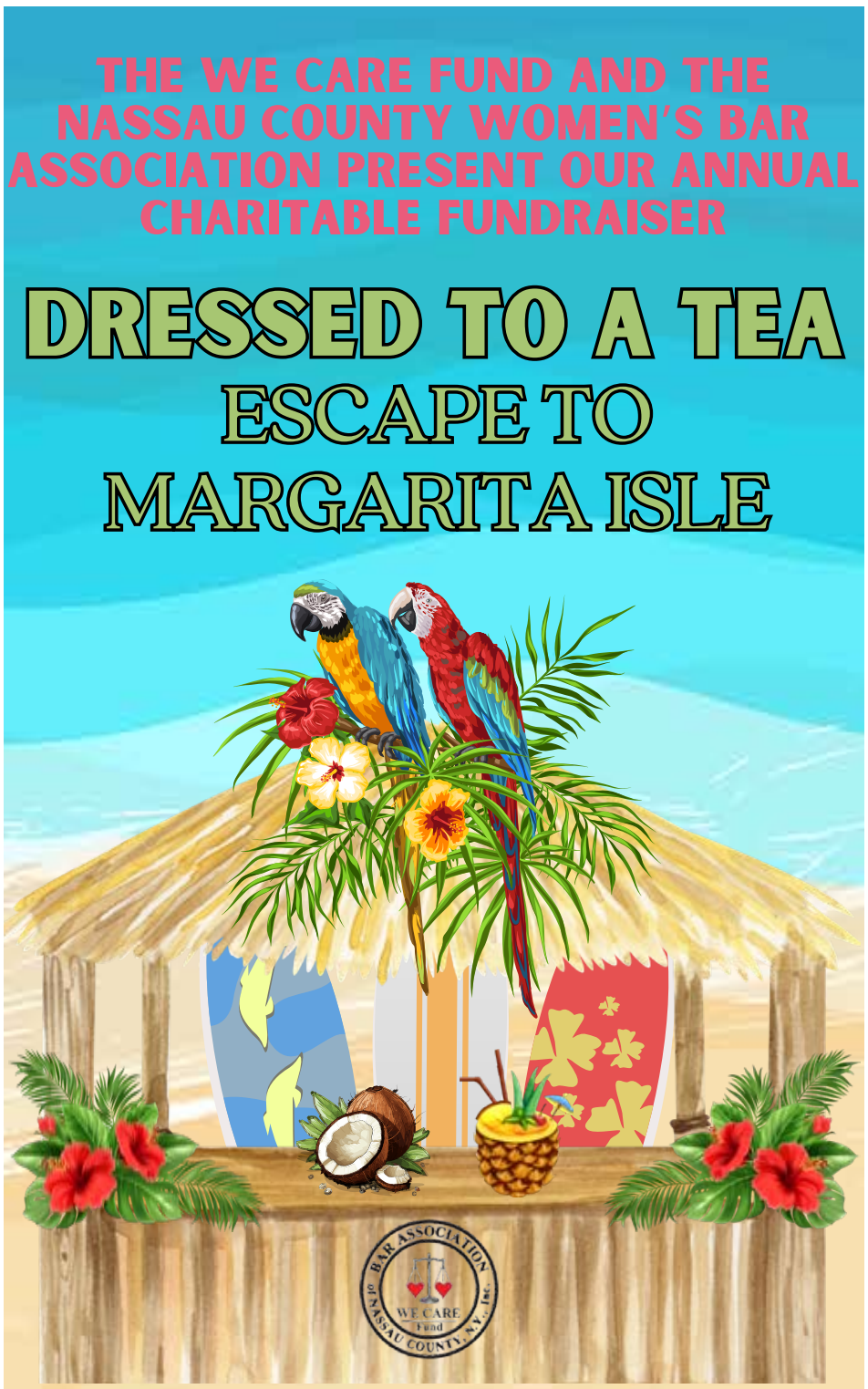
Former NCBA Matrimonial Law Committee and NCBA Grievance Committee Chair, **Lee Rosenberg**, of Rosenberg Family Law PC, has been named President-Elect of the American Academy of Matrimonial Lawyers NY Chapter.

Hon. Gail Prudenti, Partner at Burner Prudenti Law, P.C., has been appointed as the Chair of the Suffolk County Bar Association (SCBA) Judicial Screening Committee.

Futterman Lanza LLP has relocated to a larger and more convenient office in Smithtown to support its growth. This move coincides with the firm's 20th anniversary, now employing 14 attorneys.

Forchelli Deegan Terrana LLP is proud to announce the creation of a Tax practice group. **Robert H. Groman** will co-chair the practice group, who will be working with **Lorraine S. Boss** to deliver outstanding tax advisory and tax controversy services. **Camila Morcos** was recently admitted to the New York State Bar and began her position as an Associate in the firm's Tax Certiorari practice group and is also a member of its Real Estate practice group. Immediately prior to her admission, Camila was a law clerk at the firm.

Capell Barnett Matalon and Schoenfeld LLP Partner **Robert S. Barnett** participated in the National Conference of CPA Practitioners (NCCPAP) Nassau/Suffolk Chapter's Annual Tax Season Roundtable on March 5. Barnett and Partner **Yvonne R. Cort** will be presenting at NCCPAP's "Tax Return Tips and Traps" program on March 25.



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Year of the Snake

NCBA Members and guests attended the Asian American Attorney Section's Second Annual Lunar New Year Celebration on February 7. Performers from Ten Tigers Kung Fu Academy and Yes I Can Performing Arts Center entertained the packed room at Domus.





Photos by Hector Herrera

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35th Annual Children's Festival

On Wednesday, February 19, The WE CARE Fund, the charitable arm of the NCBA, hosted its 35th Annual Children's Festival, where nearly 200 deserving children from local Nassau County organizations were treated to a day of toys and games, sweet snacks, dancing, and a special visit from Mr. Met.



Photos by Hector Herrera

CALENDAR | COMMITTEE MEETINGS

COMMITTEE CHAIRS

Access to Justice	Hon. Maxine Broderick and Rezwanul Islam
Alternative Dispute Resolution	Ross J. Kartez
Animal Law	Harold M. Somer and Michele R. Olsen
Appellate Practice	Amy E. Abbandondelo and Melissa A. Danowski
Asian American Attorney Section	Jennifer L. Koo
Association Membership	Adina L. Phillips and Ira S. Slavit
Awards	Sanford Strenger
Bankruptcy Law	Gerard R. Luckman
Business Law Tax and Accounting	Raymond J. Averna
By-Laws	Deanne M. Caputo
Civil Rights	Patricia M. Pastor
Commercial Litigation	Christopher J. Clarke and Danielle Gatto
Committee Board Liaison	James P. Joseph
Community Relations & Public Education	Ingrid J. Villagran and Melissa A. Danowski
Conciliation	Salvatore A. Lecci
Condemnation Law & Tax Certiorari	Robert L. Renda
Construction Law	Adam L. Browser
Criminal Court Law & Procedure	Christopher M. Casa and Amanda A. Vitale
Cyber Law	Thomas J. Foley and Nicholas G. Himonidis
Defendant's Personal Injury	Jon E. Newman
District Court	Bradley D. Schnur
Diversity & Inclusion	Hon. Maxine Broderick and Hon. Linda Mejias-Glover
Education Law	Liza K. Blaszcyk and Douglas E. Libby
Elder Law, Social Services & Health Advocacy	Lisa R. Valente and Christina Lamm
Environmental Law	John L. Parker
Ethics	Mitchell T. Borkowsky
Family Court Law, Procedure and Adoption	Tanya Mir
Federal Courts	Michael Amato
General, Solo & Small Law Practice Management	Jerome A. Scharoff
Grievance	Robert S. Grossman and Omid Zareh
Government Relations	Michael H. Sahn
Hospital & Health Law	Kevin P. Mulry
House (Domus)	Steven V. Dalton
Immigration Law	Pallvi Babbar
In-House Counsel	
Insurance Law	Michael D. Brown
Intellectual Property	Sara M. Dorchak
Judicial Section	Hon. Gary F. Knobel
Judiciary	Dorian R. Glover
Labor & Employment Law	Marcus Monteiro
Law Student	Bridget M. Ryan and Emma P. Henry
Lawyer Referral	Gregory S. Lisi
Lawyer Assistance Program	Daniel Strecker
Legal Administrators	
LGBTQ	Jess A. Bunshaft
Matrimonial Law	Karen L. Bodner
Medical Legal	Bruce M. Cohn
Mental Health Law	Jamie A. Rosen
Municipal Law and Land Use	Elisabetta Coschignano
New Lawyers	Byron Chou and Michael A. Berger
Nominating	Rosalia Baiamonte
Paralegal	
Plaintiff's Personal Injury	Giulia R. Marino
Publications	Cynthia A. Augello
Real Property Law	Suzanne Player
Senior Attorneys	Stanley P. Amelkin
Sports, Entertainment & Media Law	Ross L. Schiller
Supreme Court	Steven Cohn
Surrogate's Court Estates & Trusts	Michael Calcagni and Edward D. Baker
Veterans & Military	Gary Port
Women In the Law	Melissa P. Corrado and Ariel E. Ronneburger
Workers' Compensation	Craig J. Tortora and Justin B. Lieberman

TUESDAY, MARCH 4

Women in the Law
12:30 p.m.
Catherine Savio, Kaitlyn Flynn, Jennnifer Abreu, Katie Lachter, Wendy Sheinberg, and Christina Bezas will speak on "Women's Path to Partnership," celebrating Women's History Month.

WEDNESDAY, MARCH 5

Association Membership
12:30 p.m.

Real Property Law
12:30 p.m.
Certilman Balin Partner Carrie Adduci will speak on "Tips and Best Practices for Drafting and Negotiating Real Property Contracts."

Animal Law
5:30 p.m.

THURSDAY, MARCH 6

Hospital & Health Law
8:30 a.m.

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

Publications
12:45 p.m.

TUESDAY, MARCH 11

Labor & Employment Law
12:30 p.m.
Susan Tylar and Andrea Batres will present on recent developments in federal sector law.

WEDNESDAY, MARCH 12

Asian American Attorney Section
12:30 p.m.
Justice Karen Lin of the Queens County Supreme Court will be the guest speaker.

Matrimonial Law
5:30 p.m.
Hon. Joseph R. Conway, Hon. Marie F. McCormack, Nancy E. Gianakos and Jennifer Rosenkrantz will speak on "The Impact of Domestic Violence as a Factor in Equitable Distribution."

WEDNESDAY, MARCH 19

Ethics
5:30 p.m.

Insurance Law
5:30 p.m.

Surrogate's Court Estates & Trusts
5:30 p.m.

THURSDAY, MARCH 20

Association Membership
12:30 p.m.

Elder Law, Social Services & Health Advocacy
Senior Attorneys
12:30 p.m.
Hon. Gary F. Knobel and Julia L. Santo, Esq. will be speaking on advance directives and how to avoid guardianship.

Workers' Compensation
5:30 p.m.

FRIDAY, MARCH 21

Alternative Dispute Resolution
12:30 p.m.

Access to Justice
12:30 p.m.

MONDAY, MARCH 24

Intellectual Property
12:30 p.m.

WEDNESDAY, MARCH 26

General Solo & Small Law Practice Management
12:30 p.m.

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

TUESDAY, APRIL 1

Women in the Law
12:30 p.m.

WEDNESDAY, APRIL 2

Real Property Law
12:30 p.m.

THURSDAY, APRIL 3

Hospital & Health Law
8:30 a.m.

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

Publications
12:45 p.m.

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