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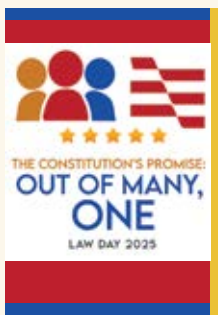

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Hon. John Gleeson to Receive Distinguished Service Medallion

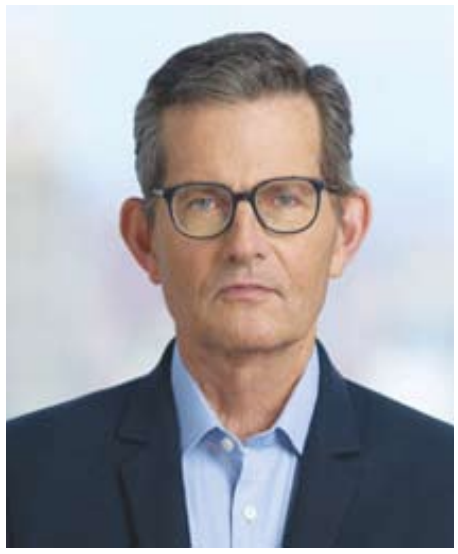
The Nassau County Bar Association is proud to announce that Hon. John Gleeson—former U.S. District Court Judge, federal prosecutor and renowned trial and appellate attorney—will be presented with the 81st Distinguished Service Medallion (DSM) during its Annual Dinner Gala, to be held on May 10, 2025, at the Cradle of Aviation Museum in Garden City.

The DSM—the highest honor bestowed by the NCBA—is given annually to a person of high moral character and integrity, celebrating their efforts to enhance the reputation and dignity of the legal profession. First presented in 1939 to U.S. Senator Carter Glass of Virginia, past recipients include U.S. Presidents, Supreme Court Justices, Governors, federal and state legislators and judges, and esteemed members of Nassau County's legal community.

Distinguished Career

Judge Gleeson was born in the Bronx in 1953, earned his B.A. from Georgetown University in 1975, and his J.D from the University of Virginia School of Law in 1980. Following his law school graduation, he was Law Clerk for Hon. Boyce Martin, U.S. Court of Appeals for the Sixth Circuit.

After four years in private practice, Judge Gleeson became an Assistant U.S. Attorney in 1985 for the Eastern District of New York. During his decade in Brooklyn, he served as Chief of the Criminal Division, Chief of Special Prosecutions, Chief of Organized Crime, and Chief of Appeals. Among his many high-profile cases, Judge Gleeson was the lead prosecutor in the murder and racketeering trial of



Gambino family crime boss, John Gotti. His decade-long efforts to convict Gotti was depicted in his 2022 book, *The Gotti Wars: Taking Down America's Most Notorious Mobster*. (The Nassau County Bar Association hosted a well-attended book signing with Judge Gleeson in September 2022.)

Judge Gleeson was nominated by President Bill Clinton in 1994 to serve on the U.S. District Court for the Eastern District of New York, filling the seat vacated by Hon. Jack B. Weinstein—the 1995 recipient of the NCBA Distinguished Service Medallion. He presided over more than 200 civil and criminal jury trials and authored more than 1,500 published opinions while serving on the bench for 22 years.

Gleeson returned to private practice in 2016 as a litigation Partner with Debevoise & Plimpton LLP in its White Collar & Regulatory Defense and Commercial Litigation Groups. He was nominated by President Joe Biden on May 11, 2022, to serve as a member of the United States Sentencing Commission. He and confirmed by the U.S. Senate on August 4, 2022, by a voice vote. He served until his term expired on January 3, 2025.

The NCBA Annual Dinner Gala—the Bar Association's largest attended social event of the year—is set for Saturday, May 10, 2025, at the Cradle of Aviation Museum. The special evening celebrates not only Judge Gleeson but also honors NCBA Members who have contributed 50, 60, and 70 years of service to the legal profession. Visit www.ncbadinnerdance.com for details about sponsorships and journal advertisements.

For more information, contact the NCBA Special Events Department at events@nassaubar.org or (516) 747-4071.

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From the President

Daniel W. Russo

It is with great pride that I can report that on August 23, 2024, the Nassau County Bar Association Assigned Counsel Defender Plan, commonly known as Nassau 18b, went live with an electronic case management system ("CMS"). This system has revolutionized not only how Nassau 18b collects and evaluates data regarding the utilization of 18b resources by indigent citizens but has also streamlined the process by which 18b attorneys get paid for their work.

Simply stated, 18b attorneys represent indigent clients who can't afford to pay an attorney and—for any number of reasons, such as legal conflicts—can't be represented by the Legal Aid Society of Nassau County. 18b attorneys practice in criminal court where clients' liberty is at risk or in the family court, where a variety of issues can emerge, including children's custody issues. The 18b attorneys of Nassau County are some of the most experienced attorneys in their field and they work tirelessly to make sure that anyone who can't afford an attorney has their constitutional right to counsel met.

Before the new CMS was put in place, 18b attorneys would fill out "vouchers" in Microsoft Excel, recording each time entry. Upon completing the voucher, the attorney would print it, sign it and either hand deliver it or mail it to the NCBA 18b office. Once the voucher was received by the 18b office, it would go through 18b office's processing system, whereby the information on the voucher was manually entered into an antiquated database and reviewed and approved by the 18b Administrator. Upon completion of this step, approximately twice a week the vouchers would be picked up by a courier who would ferry the vouchers to the various courthouses throughout the County.

Once the judges reviewed and approved the vouchers, they would be couriered back to the 18b office for further processing, and ultimately, delivered to Nassau County for review, audit, and processing. This process was beyond outdated and would result in 18b attorneys sometimes having to wait four to six months to get paid for their services.

Thankfully, the Office of Nassau County Comptroller Elaine Phillips and the staff of Nassau's 18b—under the leadership of Administrator Robert Nigro and Deputy Administrator Lindsay Boorman—knew this system was completely untenable and together set out to fix it. This was no small task as Nassau's 18b panel is one of the largest in New York—involving over 200 individual attorneys, judges and court staff of all four Nassau courts, and multiple Nassau County and New York State government agencies. Let me rephrase my prior sentiment, this was a herculean task.

That said, after many months of planning and development meetings between the 18b administrators, the Comptroller's Office and the courts, the system was designed and launched in August 2024. In short, the CMS has taken what was a four-to-six-month process and reduced it to days. Now attorneys can keep track of their time and create and submit vouchers online.

18b administrators and all Nassau County judges are able to review and approve vouchers electronically, and all vouchers approved by the court for payment are transmitted to the county electronically via a bridge that integrates the CMS with Nassau County's accounting system. Once transmitted to the county directly into its accounting system, the vouchers are processed and paid anywhere from two days to two weeks following their receipt.

In addition, the new system allows the 18b administrators to monitor, and when necessary, adjust attorney caseloads and panel resources which was an all but impossible task under the old system. These adjustments not only benefit the 18b practitioners but also the citizens of Nassau County who rely on the Assigned Counsel Defender Plan to ensure that their day in court is just.

On behalf of the members of the Nassau County Bar Association, I would like to thank Robert Nigro, Lindsay Boorman and the staff of the NCBA Assigned Counsel Defender Plan as well as Nassau County Comptroller Elaine Phillips and her staff for recognizing a major problem and springing into action to resolve it. A project of this size and complexity does not get completed as efficiently as this one without the collaboration of true professionals working with the common goal of fixing an old ideal for the betterment of the people that ideal is meant to serve.

The Assigned Counsel Defender Plan is in a better position to support those who need it because of the leadership of Bob Nigro, Lindsay Boorman and Comptroller Phillips. Thank you for a job truly well done.

FOCUS: IMMIGRATION

Civics and History Exceptions and Exemptions to Naturalization Requirements

Linda Goor Nanos

The finish line for immigrants in the journey for legal assimilation to the United States is naturalization to become a U.S. citizen. The first step is becoming a lawful permanent resident (green card holder, in the vernacular). Residence may be through a relative petition with entry to the U.S. as a lawful resident; through non-immigrant visas such as student to specialty occupation to employment sponsorship; or through the arduous process of humanitarian programs for asylees, victims of abuse or crime, or special immigrant juveniles. Regardless of how residence is acquired, the immigrant must hold that status for five years (or three years if married to a U.S. citizen) to apply for naturalization.

Citizenship is not automatic, unless the immigrant derives status through a U.S. citizen parent by acquiring legal residence before the age of 18 years or by being registered as a birth abroad to a U.S. citizen. All others apply using the fourteen-page Application for Naturalization, form N-400, and appear for an interview, at which time they must meet educational requirements. The educational requirements include language proficiency, both written and spoken, and civics knowledge.[1] The United States Citizenship and Immigration Services website, uscis.gov, has the naturalization forms, instructions, and study materials. This article will explore the exemptions and exceptions, but to do so, we must explain the standard requirements.

Language Proficiency

The language proficiency is determined by the applicant's ability to read, write, and speak English. When applicants enter the naturalization interview, they are asked to raise their right hand and swear to tell the truth, and the interview continues from there in English. If applicants do not appear to follow instructions or understand the review of their applications, they may be summarily dismissed and asked to return for a second interview. If the applicant understands spoken English, he or she must pass a reading test by demonstrating the ability to read one of three sentences with a pronunciation that the examiner can understand. Omission of short words or errors in intonation will not disqualify the applicant. The final hurdle is the writing test which can be the most difficult requirement for many, some of whom may have a different alphabet in their native language. Again, three sentences are given, in this case dictated, and the applicant must write at least one in a manner that is understandable to the officer.

The Civics Test

The next hurdle in the qualifying process is the Civics Test.[2] Ten questions are asked pertaining to the history, principles, and form of government of the United States. The applicants must answer six correctly. The questions are taken from a study sheet of one hundred facts and principles. If the applicant fails any part of the educational requirements, he or she will have a second chance at a follow up interview within 90 days.[3]

The immigration law takes into consideration that some immigrants lack the educational background in their own languages or the opportunity to become educated in this country and provides exemptions and exceptions to the requirements. These exemptions may be for age combined with length of lawful permanent residency.

Exemptions

As to speaking, reading, and writing English, for those age 50 or older with 20 years of residence, immigration law provides an exemption to the English requirement. Also exempt are those age 65 and older with 15 years of lawful permanent residency. In either case, the interview will be conducted in the native language with the assistance of an interpreter. These may be remote interpreters called by telephone line and put on

speaker. For those applicants with an age and length of residency language exemption, the civics test will still be given in the applicants' native language to assure their knowledge of U.S. history and government. For those age 65 with 20 years of residence, the civics test is a shorter version culled from a limited list of 20 facts on history and government, instead of the standard 100.

There is a situation in which an applicant may be exempt from the language and civics requirement: the medical disability exemption.[4] If a person is medically, mentally, or emotionally disabled, the disability must be documented by a physician on the Medical Certification for Disability Exceptions, Form N-648.[5] The form is submitted with the N400 application and must have been completed within 180 days of the application's filing.

It is in a client's best interest for an attorney representative to be in touch with the office of the doctor who will be completing the form. Granting of the exception is extremely strict and the form must detail the doctor's familiarity with the patient, testing performed to diagnose, and how the diagnosis relates specifically to the inability to pass the English or civics requirement. Failure to provide details will result in a rejection of the exemption by the officer.

The role of an attorney is limited in a naturalization interview. The Officer is generally not receptive to interference by counsel in the review of the N400 application or the testing. For this reason, the applicant may choose to waive the presence of counsel, but it may be encouraged to have an attorney present to make sure that exceptions or exemptions to the standard requirements are properly applied.

Oath of Allegiance

The final step of the naturalization process involves taking an Oath of Allegiance to the United States of America. In the case of a severely disabled individual, if the applicant doesn't fully understand the oath, it may be signed by a legal guardian or a primary custodial caregiver who is of a close family relationship.[6] The N400 instructions provide guidance on who qualifies to sign.

Benefits of Naturalization

U.S. citizenship can ease foreign travel on a U.S. passport and provide visa-free travel to certain countries; enhance access to government benefits and services; increase job and educational opportunities; provide greater political participation; expand immigration sponsorship of family members; and provide legal rights and protections abroad. For all these reasons, the ability to naturalize is a coveted right and the goal of many foreign nationals residing in the United States. The exemptions and exceptions provided by the Immigration and Nationality Act seek to ensure that no person is permanently ineligible to achieve this goal.

1. 8 CFR 312.1.
2. 8 CFR 312.2.
3. 8 CFR 312.5(a).
4. 8 CFR 312.2(b)(1).
5. 8 CFR 312.2(b)(2).
6. USCIS Policy Manual Vol 12 Part J Chapter 3.

Linda Goor Nanos is a senior attorney at Nanos, Gomez and Vekiarelis in Garden City, New York. She has been practicing immigration law for over forty years and is a member of the American Immigration Lawyers Association. She can be reached at lnanos@nanosimmigration.com.

FOCUS: HOSPITAL AND HEALTH LAW

The Role of the Civil Liability Tort System in an Age Where Artificial Intelligence (AI) Impacts Healthcare

Steven E. Pegalis, Adam Herbst, Valentina Battista, Rania Elsanhoury, Lara Hakim, Kyle Hunt and Michael San Roman

In an article published February 13, 2024, in the Journal of the American Medical Association ("JAMA") entitled "AI's Threat to the Medical Profession"[1] the following is stated:

> "AI has entered the medical field so rapidly and unobtrusively that it seems as if its interactions with the profession have been accelerated without due diligence or in-depth consideration. It is clear that AI applications are being developed with the speed of lightning, and from recent publications it becomes frightfully apparent what we are heading for and not all of this is good."

Another JAMA article published January 23, 2024, makes reference to "AI snake oil" and the fact that "… using AI in medicine is important—but so is proceeding with caution, … and dangers of overestimating AI's abilities exists."[2]

Stakeholders for these issues include not only physicians and other medical providers but also hospitals and medical organizations; health insurers and liability insurers; and companies that create, service and promote artificial intelligence ("AI") products and systems.

We maintain that safety for all patients and justice for all patients injured or harmed due to error require the continued undiluted incentivization and accountability influences that have been intrinsic to civil tort liability. No pretext for promoting AI innovation should dilute or modify the civil liability tort system.

If AI can and will enhance diagnosis and treatment, then its realized potential benefits become mandatory and tort liability must incentivize that mandate.

Artificial Intelligence (AI) and Healthcare

Artificial intelligence and machine learning ("ML") algorithms have become tools in which a machine processes large amounts of data in order to "learn" patterns and perform tasks in similar ways to and theoretically beyond the level of the human brain.

AI is being used in many ways in many industries, the implications of which are only just beginning to be understood. One early indication of how these tools may be applied to the administration of health services include predicting in advance that a patient will develop a potentially serious condition. For example, ML based models have been used by medical providers to predict the development of sepsis in ICU patients. Earlier prescription of antibiotics might prevent and/or limit adverse effects of sepsis. Such programs might be expanded beyond ICU patients.[3]

AI Potentially Can Be Misused to Impair Quality Healthcare

We are all familiar with the fact that AI unrelated to healthcare can be harmful. For example, it can be used to mislead individuals and populations of people.

Currently pending is a class action civil case against a health insurance company alleging that the company had used, and is using, an AI algorithm to deny claims for post-acute care services in Medicare Advantage. The allegation is that, despite a high AI error rate, the health insurer continued to deploy the technology because only a very small number of its members, i.e., less than 1%, generally appeal denied claims due to the fact that the patient's impaired conditions, lack of knowledge and lack of resources militated against appeal.[4]

Thus, the suit alleged that the health care insurer collects policy premiums without paying for care for its elderly policy holders using its AI model to disagree with determinations made by actual healthcare physicians.

We do not intend to imply a prejudgment of a pending civil legal case which ultimately must be resolved based on the quality of the evidence in a context of due process, but it certainly bears mentioning.

AI and Civil Liability

One recent paper noted that AI carries risks of harm and therefore the law of torts should deal with these risks "without acting as a barrier to innovation." It was suggested that this might justify a departure from existing schemes of liability arising under current tort law.[5]

That notion is pure nonsense. The risks of harm created by AI can be linked to defects in the AI products and/or systems. Tort law acts as an incentive for those who create and promote healthcare-related AI to avoid or at least limit such defects.

The risks of harm created by AI also are linked to provider complacency. When used in place of the due diligence mandated by the liability tort system, AI potentially can weaken that diligence due to overreaching/complacency.

The mandate for anti-complacency and due diligence remains the same with or without AI. Esoteric intellectualizing that such a due diligence mandate required by the undiluted tort system could be a barrier to impliedly "good" AI innovation is inconsistent with principles of safety.

Another paper suggested looking for "new legal solutions" for addressing AI liability issues,[6] that a defense for a claim involving AI-driven technology that causes injury might be "assumption of risk,"[7] and "no fault" civil liability might apply for AI related injury.[8]

If an AI product is defective, then tort law applicable to product liability would apply. Such law has in the past proven to be a force making consumer products safer. Whether the negligence associated with AI enhanced care is called malpractice or called negligence, we do not need esoteric new words to define negligence.

Safety is linked to accountability. No fault means no accountability. Assumption of risk is an idiotic notion yet now shows up in legal literature. Safety is not and cannot be a barrier to AI innovations that improves the quality of care.

We can look to the past when the cries of the insurance companies and medical profession sought tort reform as a solution to litigation. What made healthcare safer was the fear of accountability which made the medical profession identify deficiencies and make care safer through guidelines and standards.

The Response of the Anesthesia Medical Specialty to the Medical Liability "Crisis" of the 1970s

The American Society of Anesthesiologists ("ASA") responded to what they characterized as a litigation crisis by using information from closed liability cases to adopt mandatory standards. A prominent member of this specialty stated the following:

> "The malpractice crisis galvanized the profession at all levels, including grass-root clinicians, to address seriously issues of patient safety. [As a result] strong leaders emerged who were willing to admit that patient safety was imperfect and that, like any other problem, patient safety could be studied and interventions planned to achieve better outcomes."[9]

The ASA understood the "crisis" was terrible things happening to patients. The ASA did not dilute its response by creating optional guidelines or by denying that their existing patient safety efforts were imperfect.

By using information from closed liability claims and then adopting mandatory standards, the ASA created a proactive approach to patient safety, and they did reduce the incidence of avoidable injury and death in a medical specialty known to be intrinsically hazardous to patients. One dramatic statistic is that following the initiation of the ASA's safety efforts, the mortality rate per anesthetic procedure went from 1–2/per 10,000 to 1 per every 200,000/300,000 procedures. As an added bonus, their insurance premiums "dropped dramatically."[10] This was achieved without lobbying for legal immunity.

A Culture of Safety

In 1999, the Institute of Medicine ("IOM") published a landmark document concerning medical errors.[11] The IOM cited the ASA as having established the model for properly responding to this issue.

In its report entitled "To Err is Human, Building a Safer Health System," IOM urged a study of adverse medical events with root cause analysis, that would focus on creating systems of care similar to those successfully used by the airline industry to make air travel safe. The IOM cited the ASA initiatives in support of the idea that all medical specialties must act "... to break the cycle of inaction." The IOM's focus was to prevent future error and not to focus on blaming individuals for past errors. However, the IOM noted "... this discussion of focus does not mean that individuals can be careless. People must still be vigilant and held responsible for their actions." And the IOM noted that although the "unsafe practitioner" was believed to be rare, there must be "rapid identification" of these unsafe practitioners.

The IOM in 1999 stated that *unsafe care is one of the prices we pay for not having clear lines of accountability*.

Subsequent to the IOM landmark report, other medical specialties used approaches similar to the ASA.[12] For example, the Hospital Corporation of America—which yearly performed 220,000 obstetrical deliveries—studied closed obstetrical liability claims. This led to the formulation and implementation of a comprehensive revision of the patient safety process. Again, the result was a "win-win" situation, with a sharp reduction in the number of fetal and maternal injuries and greatly reduced rates of litigation.

What Do We Maintain?

1) AI does not make issues of safety complex as some maintain.
2) The capability of AI to benefit patients must not be allowed to in any way blunt or weaken the accountability motivations that civil liability has proven works toward safer care.
3) Safety issues remain the same regardless of AI advances as medical capability increases. Each patient is entitled to the best, most accurate and earliest diagnosis and then effective treatment currently available.
4) Legal civil accountability must continue to incentivize safety as AI advances. Medical and insurance stakeholders should embrace the justice and accountability our legal system delivers.

Conclusion

The IOM has defined quality of care and a culture of safety for the 21st century. The liability tort system applied to health care energizes and motivates safety through accountability. The authors of this paper are part of a legal profession making us subject to ethical mandates. As members of the legal profession, we must adhere to ethical mandates to pursue only meritorious legal cases based on evidence. The medical profession and their risk managers must also strive for fair payments and greater safety.

In the era of AI enhancement, personalized care intertwined with increased trust necessitates honesty, reinforcing the importance of legal accountability.

1. A. Fogo, A. Kronbichler, I. Bajema: A.I.'s Threat to the Medical Profession; JAMA February 13, 2024, Vol. 331, No. 5.
2. M. Suran, Y. Hswen: How to Navigate the Pitfalls of AI Hype in Health Care; JAMA January 23, 2024, Volume 331, Number 4.
3. R. Adams, et al., Prospective, Multi-Site Study of Patient Outcomes after Implementation of the TREWS Machine Learning-Based Early Warning System for Sepsis. Nature Medicine/Vol.28/July 2022/1455-1460.
4. See: Paige Minemyer, UnitedHealth hit with class action over alleged use of AI to deny Medicare Advantage Claims, Nov. 15, 2023, Payers/Quetex; *Lokken v. the UnitedHealth Group, Inc., et al.*, US District Court Minnesota.
5. Soyer, B. and Tettenborn, A., Artificial Intelligence and Civil Liability-Do we Need a New Regime? International Journal of Law and Information Technology, 2022, 30, 385-397.
6. H. Sullivan, S. Schweikart, Are Current Tort Liability Doctrines Adequate for Assessing Injury Caused by AI, AMA Journal of Ethics, Feb. 2019, Vol. 21, No.2:E160-166.
7. A. Stein, Assuming the Risk of Artificial Intelligence, Boston University Law Review, Vol. 102:979.
8. E. Marchisio, SN Soc Sci (2021) 1:54 [Suggesting applications of "traditional" civil liability may represent a disincentive to new AI technologies.]
9. David M. Gaba, Anesthesiology as A Model for Patient Safety in Health Care, 320 Brit. Med. J. 785 (2000). See also John H. Eichhorn, et. al., Standards for Patient Monitoring During Anesthesia at Harvard Medical School, 256 JAMA 1017, 101720 (1986).
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11. L. Kohn, J. Corrigan, M. Donaldson, eds. To Err is Human: Building a Safer Health System, Institute of Medicine, 2000.
12. S. Clark, et al. Improved Outcomes, Fewer Cesarean Deliveries, and Reduced Litigation: Results of a New Paradigm in Patient Safety. Am. J. Obstet. & Gynecol. 2022 Feb. 202(2); 97-105(Hosp. Corp. Of America/re Obstetrics).

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FOCUS: REAL PROPERTY

Conservation Easements—The Good, Bad and Ugly

Jeffrey D. Forchelli and Brian R. Sahn

In recognition of the need to preserve the nation's heritage, open space and ecosystems, Congress allows an income tax deduction for owners of significant property who give up certain rights of ownership to preserve the land or buildings for future generations. This methodology is known as the "conservation easement." The Internal Revenue Service (IRS) has made specific requirements in order for the donor to receive the financial benefit. However, in some cases, it has been determined that certain taxpayers abuse this benefit by taking inappropriately large deductions, using questionable appraisals, or using and/or developing properties in a manner not consistent with IRS rules and regulations.

Generally, a taxpayer cannot qualify for a deduction in property for an easement which is considered a partial interest in land. As stated by the court in *Hoffman Props. II, LP v. Comm'r*,[1] "(a)s a general rule, the Internal Revenue Code doesn't allow taxpayers to take a charitable deduction for a donation of a partial interest in property (like an easement). I.R.C. § 170(f)(3)(A); Treas. Reg. § 1.170A-14(a). But there's a narrow exception to that rule for what's called a "qualified conservation contribution." I.R.C. § 170(f)(3)(B)(iii); Treas. Reg. § 1.170A-14(a). To qualify, the donation must be 'exclusively for conservation purposes.' I.R.C. § 170(h)(1)(C); Treas. Reg. § 1.170A-14(e)."

Elements

Specifically, § 170(f)(3)(B)(iii) states that a deduction may be allowed for the value of a qualified conservation contribution if the stated requirements are met. IRC § 170(h)(1) defines a "qualified conservation contribution" as a contribution: of a qualified real property interest[2] (IRC § 170(h)(1)(A)), granted in perpetuity (IRC § 170(h)(2)(C)), to a qualified organization (IRC § 170(h)(1)(B)), and exclusively for conservation purposes (IRC § 170(h)(1)(C)).

Under Internal Revenue Code (IRC) § 170 and Treasury Regulation (TR) § 1.170A-14, property owners may qualify for a tax deduction via creation of a "conservation easement," an easement granted for the preservation of land areas for outdoor recreation, protection of natural habitat or ecosystem, preservation of open space, and preservation of a historically important land area or historic building. The "deed" describes the conservation purpose, the restrictions and permissible uses of the subject property. Such easements permanently restrict how land or buildings are used, in recorded instruments. The land owner does not necessarily have to give up fee ownership, but does have to agree to permanent restrictions, such as no future development which run in perpetuity and are binding on all successive land owners.

IRC § 170 (h)(5)(A) details the perpetuity requirement for the property owner to qualify for the tax incentive: "A contribution will not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity." "In other words, the donation of an easement will not qualify for a charitable deduction unless the taxpayer can guarantee that both the grant of the interest and the conservation goals which it serves will endure for quite a long time—forever, to be exact" *Hoffman Props. II, LP v. Comm'r*.

The preservation into perpetuity may be carried out by a "qualified organization." The IRS defines a "qualified organization" as a public charity (501(c)(3) entity) having a commitment to protect the conversation purposes of the donation with the resources to enforce the restrictions of the easement, or a government unit described in IRC § 170(b)(1)(A)(v)[3] and (vi)[4].

To qualify, the conservation contribution must be exclusively for conservation purposes (IRC § 170(h)(1)(C)), and is otherwise legally enforceable by the donee, to prevent uses of the property that are inconsistent with the conservation purposes of the donation. (TR § 1.170A-14(g)).

Furthermore, in a circumstance where the easement is extinguished or a change in conditions surrounding the property making the continued use of the easement impossible or impractical, TR § 1.70A-14(g)(6) established that this occurrence does not necessarily invalidate the in-perpetuities requirement and provides two required elements for the continued satisfaction of the in-perpetuities requirement. The first is that the restriction was "extinguished by judicial proceeding" and second that "all of the donee's proceeds from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution."

Valuation

Assuming all other elements are established, the next task is to determine the value of a conservation easement by way of a qualified appraisal prepared and signed by a qualified appraiser.[5] Such appraiser should have experience in conservation easements. Value means fair market value (FMV) of the easement or perpetual conservation restriction at the time of the contribution.[6] Where there are analogous sales of conservation easements in the area, the FMV will be based on those sales as well. If there are no like circumstances and past sales of easements in the area, the FMV is then (generally) the difference of the FMV of the underlying property before and after the creation of the easement. The latter of the two methods of appraisal is used most often as there are generally no substantial record of comparable sales of similar conservation easements.

The appraisal should expressly state that it is being done for tax purposes. Further, date of value must be no more than 60 days before the date of the gift but no later than the due date of donor's tax return including any extensions of the tax return on which the deduction is first claimed.[7] The donor should thoroughly review the appraisal with its own experts, so as not to pay in excess of FMV leaving the donor open to charges of conferring impermissible private benefit or private inurement[8] and thus threaten its charitable tax status.

Elements of the appraisal must include (i) information about the contributed property with sufficient detail taking into account the value of the property; (ii) the condition of the property; (iii) the terms of any agreement between donor and donee; (iv) a declaration of the appraiser wherein the appraiser, among other things, acknowledges penalties for overvaluation; (v) a statement that the appraisal was prepared for income tax purposes; and (vi) the methodology for valuation, including a justification for using sampling and an explanation of sampling procedure used.[9]

Syndicated Easements

Not only can individuals claim tax deductions from the creation of conservation easements but businesses and pass through entities, more often partnerships, can take advantage of this code section. It is important to note that these types of transactions draw more red flags with the IRS than traditional conservation easements. In recent years, this tax shelter has been abused by taxpayers who have little to no connection to the property for which the easement was created but are still able to take advantage of the tax deduction. Unlike in a regular individual easement, Syndicated Conservation Easements (SCEs) generally involve a business (such as a Partnership) owning land of which they have created a conservation easement for tax deduction purposes, following which the business will sell its shares as an investment opportunity that allows investors to use the deduction gained from the creation of the easement. This type of technique is one that many tax experts believe to be an abuse of IRC § 170 as many partnerships have begun to overestimate and provide misleading appraisals as an attempt to attain the highest tax deduction possible. The IRS has deemed this exchange as a "listed transaction" (specifically designed for tax avoidance) to the extent that it is an abusive transaction that must be reported.

The IRS annually releases a list of the "worst of the worst tax scams" called the "Dirty Dozen" and for the past several years SCEs have been included on that list.[10] The main issue is the intentional overvaluing of property and in turn the easements themselves, which leads to a higher tax deduction. The IRS commissioner stated that this process essentially allows taxpayers to buy deductions at the end of any given year. Given the above, the IRS has shown increased regulation by requiring the reporting of these transactions whenever they occur and requiring participants and material advisors (individually) to file forms acknowledging their use of a conservation easement. The IRS has found a positive trend in the court system, in that they find more success in investigating syndicated partnerships and reducing their grossly inflated easement valuations to what the actual market price was at the time of the donation, while also attaching substantial penalties to the partners claiming the inflated deductions. Taxpayers nevertheless challenged the IRS and with some success, thus the IRS sought to revise its regulations, which were eventually enacted on October 8, 2024, regulating certain SCE transactions.[11]

Conclusion

Conservation easements are a useful tool to protect otherwise unprotected open space land or historic property and buildings while offering the landowner distinct tax advantages. But the IRS is on guard to prevent abuses. Strict adherence to IRS protocols and requirements is recommended as is using experienced tax counsel and appraisers very familiar with the IRS regulations to mitigate against audits and other inquiries.

1. *Hoffman Props. II, LP v. Comm'r*, 956 F.3d 832, 835 (6th Cir. 2020).
2. This refers to the entire interest of the donor other than the qualified mineral interest (i.e., the donor's interest in subsurface oil, gas or other minerals and the right of access to such minerals). IRC § 1.170A-14(b)(i).
3. A State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes.
4. A public charity which receives substantial support in the form of grants and contributions from governmental units, the general public, and other public charities.
5. For federal tax purposes and until further guidance is issued, the IRS currently considers a qualified appraisal to be one that complies with the requirements in TR § 1.170A-13(c) and is conducted by a qualified appraiser in accordance with generally accepted appraisal standards. Generally accepted appraisal standards means the substance and principles of the Uniform Standards of Professional Appraisal Practice ("USPAP"), as developed by the Appraisal Standards Board of the Appraisal Foundation.
6. The value of the donated easement must meet the definition of FMV as defined by Treas. Reg. § 1.170A-1(c)(2): The FMV is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts.
7. Marcum Accountants Bulletin: New IRS Regulations: What Constitutes A Qualified Appraisal? August 24, 2018, [Date last accessed 01/02/2025], https://shorturl.at/KEqiD.
8. Land Trust Alliance, Easement and fee land appraisals, landtrustalliance.org [Date last accessed 01/02/2025] https://shorturl.at/TAIX8.
9. Marcum Accountants Bulletin: New IRS Regulations: What Constitutes A Qualified Appraisal? August 24, 2018, [Date last accessed 01/02/2025], https://shorturl.at/KEqiD.
10. Internal Revenue Service, Treasury and IRS issue final regulations identifying syndicated conservation easement transactions as abusive tax transactions, Internal Revenue Service, [Dase last accessed 01/02/2025], https://shorturl.at/kTZS1.
11. *Id.*

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FOCUS: ENVIRONMENTAL LAW

Rechargeable Batteries Required for Renewable Energy Success: Despite State Guidance and Safety Review, Public Concerns Remain at the Local Level

John L. Parker

New York's climate change strategy relies upon renewable energy, and its success requires battery energy storage systems. Climate change laws require a significant amount of rechargeable battery storage. These batteries provide vital infrastructure for the resilient energy system that will meet the growing energy demands of Long Island communities and businesses.
The larger battery systems require government approvals, and the issues and challenges involved in their siting were the subject of a recent Nassau Academy of Law Dean's Hour CLE event.[1]

State Guidance for Local Government Review and Approval

The state has provided guidance for local governments as they develop approval processes for battery energy storage. In fact, the New York State Energy Research and Development Authority has set forth a series of model documents.[2]

The model local law and regulations specifically address state energy and fire codes, site plan requirements, special use permit standards, decommissioning, and decommissioning funding issues.[3] Notably, they propose that the site plan application require an approved emergency operations plan that addresses fire risk. The model permit is for smaller systems (600 kwh or less), and it is similarly focused on requiring that safety standards be met, including that the state's Uniform Fire Prevention and Energy Conservation Construction Code be followed for the systems.[4]

Addressing safety concerns is a priority because New York's transition timeline to emission-free electricity is ambitious. The Community Leadership and Climate Protection Act specifies that 70% of the state's energy must come from renewable energy sources by 2030, and 100% must be emission-free by 2040. The New York State Comptroller's recent report noted that continued review is needed to assess whether renewable energy efforts will meet the legally mandated goals.[5]

Local Community Concerns Lead to Battery System Moratoriums

These efforts, however, have not prevented public fire and safety concerns. Despite efforts of the state to initially address battery siting issues through these model documents, the siting of these systems has been the subject of some controversy. Battery system fires have raised safety issues, resulting in municipalities enacting moratoriums. The moratoriums suspend the approval process, and they effectively stop new projects from being proposed for development in these communities.

In the Town of North Hempstead, a one-year moratorium on siting was approved.[6] The Town of Oyster Bay has extended its moratorium on siting new battery energy storage systems for six months to provide time for it to assess fire risks and to ensure emergency responders are adequately trained.[7]

Moratoriums reflect a trend in some communities seeking to weigh the benefits of clean energy storage against the need for safety protocols. The local fire safety officials do not necessarily oppose battery energy storage systems, but they are working to find a safety balance and have expressed support for the moratoriums. These officials argue that fire safety measures must be addressed to their satisfaction before battery facilities are built to protect the community, the fire fighters, and first responders.

New York's Fire Safety Working Group Proposes Changes

New York's efforts to keep the energy transition on schedule resulted in a multi-agency response to public safety concerns.[8] The Working Group formed to address safety concerns found that regulatory changes were needed to the existing energy and building rules. The regulatory process is underway, and it addresses state fire prevention and building codes.[9] The goal of the Working Group was to enhance safety standards.[10]

Among other key findings is that although the battery fires can be intense, there were not significant environmental impacts caused when fighting and extinguishing them based upon reviews that included, in part, the fire in East Hampton.[11] Community members

have questioned whether there are sufficient resources in the volunteer fire departments for mutual aid response. Some advocates question whether environmental impacts from these fire events have been effectively addressed given Long Island's underground water supply.[12]

Already, Long Island is a leader in achieving renewable goals, particularly in solar installations.[13] In 2023, the state increased the reliance on battery energy storage, doubling the requirements to six gigawatts of power, which, alone, is enough to roughly power almost 4.5 million homes. On December 26, 2024, the state's focus on climate issues received a significant boost when the Climate Change Superfund Act was signed into law, authorizing significant recoveries from fossil fuel producers to be used to fund climate change initiatives.[14]

The Long Island Power Authority recently announced it approved two new utility scale battery energy storage contracts.[15] These proposals are for a 50 MW project on a portion of the Shoreham Nuclear Power Plant site, and a 79 MW project in Hauppauge.[16] These projects include twenty-year contracts and provide certainty for both the battery operator and LIPA. The agency views these efforts as necessary to meet its commitment to a 100% carbon free grid and to provide a resilient and consistent energy supply. Notably, these projects went through the State Environmental Quality Review Act process and will comply with the Working Group's recommendations.

Climate Times They Are A-Changin'

New York's focus on climate is not surprising as more data becomes available about the extent and implications of increased temperatures and changing weather patterns. Temperatures continue to climb, with 2024 being the hottest year on record.[17] In fact, if current trends continue, this may well be the coolest year of the rest of our lives.[18] Not surprisingly, insurance premium increases for most individuals and businesses result from climate disasters.[19]

The data shows that the magnitude of the challenge is not receding. In fact, the energy needed to power our lifestyles continues to increase.[20] The efforts to deal with climate change, without a doubt, will continue to present an expensive proposition to communities and businesses throughout the world.

The international efforts to address climate issues also continue, despite uncertainty about future efforts after the presidential election. In fall 2024, world leaders joined together at the International Conference of the Parties (or COP). The primary climate goal, however, may not be achievable.[21] The Paris Agreement of 2015 sought to limit temperature increases to the 1.5°C threshold to limit the worst environmental damage.[22] Although participants from all nations struggled for consensus, negotiators agreed on $300 billion per year in future funding, which raised concerns because estimates indicate that over $1 trillion a year is needed.[23] The question of whether the United States will again leave the Paris Agreement has been raised, even though leading corporate executives, including Exxon's chief, do not want that to happen.[24] While there are clear indications of a new direction from the incoming administration, the end result, ultimately, is unclear.[25]

Conclusion: Battery Storage Importance Grows

States will continue to play a significant, if not expanding role, in the effort to address the changing climate. This is especially true given the uncertainty of changing federal priorities after the election. New York

law commits the state to a renewable energy future. The battery storage systems needed for these initiatives to succeed require local approvals and they rely upon careful planning and financing for reasonable economic returns to justify their construction. These batteries will power homes and businesses from renewable energy when the sun has set or the winds are tranquil, providing resilience and reliability. Battery storage is the necessary part of the climate effort to achieve international goals at local scale.

In some communities, battery storage will likely face continued public safety concerns as new projects are proposed. Energy providers have acknowledged the importance of using battery energy storage for a viable and reliable energy system. As climate law milestones approach, these systems will be increasingly in demand, and necessary, for businesses and residents to meet their energy needs.

While there are questions underlying the local moratoriums, efforts are underway to address them. Given what is at stake, some have expressed concerns that the ambitious goals may require an expanded state role, including consideration of pre-emption of local control in the siting process. While the future is unwritten, the role for battery storage has been charted.

1. Dean's Hour: Time to Change the Batteries: A Look at the Challenges Facing the Siting of Battery Storage with the NCBA Environmental Law, Governmental Relations, and Municipal Law and Land Use Committees," (Nov. 18, 2024). This CLE will be available on-demand to NCBA members at https://www.nassaubar.org/cle-on/.
2. New York Battery Energy Storage Guidebook, November 2024, *available at* www.nyserda.ny.gov (last visited Dec. 28, 2024).
3. Battery Energy Storage System Model Law, *available at* www.nyserda.ny.gov (last visited Dec. 28, 2024).
4. Battery Energy Storage System Model Permit, *available at* www.nyserda.ny.gov (last visited Dec. 28, 2024).
5. See, "Climate Act Goals – Planning, Procurements, and Progress Tracking: Report 2022-S-4," available at osc.ny.gov (last visited Oct. 15, 2024).
6. See, "North Hempstead Oks 1-year moratorium on battery energy storage systems," *available at* www. newsday.com (last visited Dec. 5, 2024).
7. See, "Town Extends Construction Moratorium On Of Battery Energy Storage Systems," *available at* https://oysterbaytown.com (last visited Nov. 3, 2024).
8. Governor Hochul Convenes Inter-Agency Fire Safety Working Group Following Fires in Jefferson, Orange, and Suffolk Counties, *available at* governor.ny.gov (last visited Nov. 4, 2024); New York's Inter-Agency Fire Safety Working Group, NYSERDA, *available at* www.mnyserda.ny.gov (last visited Nov. 1, 2024).
9. NOTICE OF RULE IN DEVELOPMENT; State Uniform Fire Prevention and Building Code (19 NYCRR Parts 1219 to 1229) State Energy Conservation Construction Code (19 NYCRR Part 1240), *available at* https://dos.ny.gov (last visited Dec. 1, 2024).
10. Initial Recommendations Released from Inter-Agency Fire Safety Working Group; Working Group Outlines Recommended Enhanced Safety Standards for Battery Energy Storage Systems, *available at* www.nyserda.ny.gov (last visited Oct. 15, 2024).
11. Initial Findings Released From Inter-Agency Fire Safety Working Group On Emergency Response: Available Analyses Find No Reported Injuries, No Harmful Levels of Toxins Detected at Sites of Battery Storage Fires, *available at* www.nyserda.ny.gov (last visited Oct. 15, 2024). https://www.nyserda.ny.gov/About/Newsroom/2023-Announcements/2023-12-21-Governor-Hochul-Announces-Results-of-Fire-Safety-Working-Group, *last visited on* October 15, 2024.
12. See,"Long Island activists see more questions than answers in report on battery storage fires," *available at* www.newsday.com (last visited Oct. 15, 2024).
13. See, "Long Island exceeding NYS green-energy goals for solar power, heat pump installations," *available at* www.newsday.com (last visited Oct. 31, 2024).
14. See, "New York to fine fossil fuel companies $75 billion under new climate law," *available at* www.reuters.com (last visited Dec. 26, 2024); 2024 N.Y. Laws Chap. 679.
15. Stephenson: Battery storage will help create a stronger electric grid, *available at* https://libn.com (last visited Dec. 27, 2024).
16. LIPA Board of Trustees Approve Two Utility-Scale Battery Energy Storage Contracts, *available at* https://keycaptureenergy.com (last visited Dec. 28, 2024).
17. See, "2023 was extremely hot. Then came 2024," available at www.npr.org (last visited Dec. 27, 2024).
18. See, "2024 was hot – but it might be the coldest year of the rest of your life," *available at* www.nationalgeographic.com (last visited Dec. 26, 2024).
19. See, "Climate change is making home insurance costs more expensive. These maps show prices and weather risks in your state," *available at* www.cbsnews.com (last visited Dec. 1, 2024).
20. See, "Global Electricity Demand is Rising Faster Than Expected, I.E.A. Says," *available at* www.nytimes.com (last visited Nov. 15, 2024).
21. See, "This year set to be first to breach 1.5C global warming limit," *available at* www.bbc.com (last visited Nov. 1, 2024).
22. See, "What to expect as the UN's COP29 climate change summit begins in Azerbaijan," *available at* www.pbs.org (last visited Nov. 11, 2024).
23. See, "Inside the Frantic Maneuvers That Saved COP29 Talks at a Cost," *available at* www.bloomberg.com (last visited Dec. 1, 2024).
24. See, "Exxon Chief to Trump: Don't Withdraw From Paris Climate Deal," *available at* www.nytimes.com (last visited Nov. 12, 2024).
25. See, "COP29: US climate envoy says work will continue despite Trump's return," *available at* www.reuters.com (last visited Nov. 11, 2024).

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FOCUS: CYBER LAW

Online Prior Written Notice: An Idea Whose Time Has Gone?

Christopher J. DelliCarpini

In December, the Court of Appeals handed down its decision in *Calabrese v. City of Albany*, holding that complaints about roadway defects submitted through a municipality's online reporting system can satisfy prior written notice laws.[1]

This unanimous decision was not unprecedented, but neither was it expected by municipalities that established such systems. In fact, it may lead municipalities to change or abandon such systems and even amend their prior written notice laws. Until then, however, counsel can use *Calabrese* as a guide for determining whether a particular system satisfies the controlling law in a given case.

The Requirement of "Written Notice"

Today, a thicket of laws ensures that no city, county, town, or village in New York can be sued for a roadway defect unless prior written notice had been received by the designated official. Towns and villages have express statutory protections,[2] though they may supersede them with local laws.[3] Highway Law § 139 authorizes counties to enact such laws, which Nassau and Suffolk Counties have done.[4] For almost a century, New York City has required prior written notice.[5] Even "second class cities" enjoy this protection,[6] though Glen Cove and Long Beach have their own local laws as well.[7]

Courts have strictly construed such laws in determining what constitutes written notice. Neither verbal nor telephonic communication, not even calls to 311, will suffice where a municipal employee reduced the complaint to writing.[8] And, where the statute requires written notice to a particular official, constructive notice is no defense; that another government employee received the notice is immaterial.[9] The only judicially recognized exceptions to this statutory requirement are "that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality."[10]

Calabrese Updates "Written Notice" for the Internet Age

Calabrese arose when the plaintiff lost control of his motorcycle after striking a depression in a street in the City of Albany. He sued the city, which, after discovery, moved for summary judgment, arguing that it never received prior written notice as required under local law.[11]

The city did receive communications about potholes through its online reporting system, SeeClickFix. But it argued that this did not constitute prior written notice because such communications supposedly were not sent to the statutorily designated official in the city's Department of General Services ("DGS").[12] In fact, a subsequent government reorganization eliminated that position, though the prior written notice law was never updated. The trial court denied the motion and the Third Department affirmed.

At the outset, the Third Department read the local law to designate the successor to the designated official, rather than require notice to a position that no longer existed. Then, the Court held that complaints through SeeClickFix constituted written notice since the city promoted the system as the way for the public to submit such complaints and internally routed each for follow up.[13]

Thus, the Court distinguished *Horst v. City of Syracuse*, where the Fourth Department held that complaints through the city's online reporting system were not written notice.[14] Those complaints, the Third Department noted, were separate from written notices kept by the statutory designee.[15]

The Third Department also disregarded the disclaimer on the SeeClickFix complaint form that use of the system would not constitute written notice: "defendant cannot utilize administrative forms that compromise and/or conflict with the legislatively adopted prior written notice law."[16]

The Third Department granted leave to appeal, and the Court of Appeals unanimously affirmed the denial of the city's motion for summary judgment.

First, the court held that complaints made through SeeClickFix were written notice. It reaffirmed that transcribed verbal complaints are not "written," but that online communications like emails are.[17] The court also found significant that SeeClickFix "was the City's sole process for recording road defect reports ... and the system did not route such reports through any third party."[18]

The court then held that complaints through SeeClickFix were "actually given" to the statutory designee. Though the SeeClickFix complaints were not addressed to the designee, SeeClickFix was "the only system used by DGS to log, track, and follow up on road defect reports, including all road defect reports received from DGS employees in the field or from members of the public who call or submit reports by regular mail."

In so holding, the court distinguished not just *Horst* but also *Gorman v. Huntington*, which held that sending notice to the municipal agency responsible for such complaints was no substitute for sending it to the statutory designee. The court also relied on *Sprague v. City of Rochester*, which held that notice to a subordinate could constitute notice to the statutory designee if that official was "empowered to establish unwritten practices regulating the inspection and repair of the streets and sidewalks as they saw fit, delegating authority to foremen to act son their behalf."[19]

The Beginning of Online Written Notice—Or the End?

Calabrese can guide parties in litigation, but municipalities may respond without waiting for the next lawsuit. The day after the court handed down *Calabrese*, Albany announced that it was discontinuing its use of SeeClickFix; the mayor's office encouraged citizens to report roadway defects by phone.[20] While other municipalities continue to use the service, the City of Syracuse submitted an amicus brief in support of Albany's appeal, an indication that it may similarly respond. Counsel should therefore pay attention to whether, how, and when reporting protocols change across the state.

Rather than simply abandoning online reporting, municipalities may also amend their prior written notice laws to avoid exposure from such systems. Two days after Calabrese, two members of Albany's Common Council proposed an amendment to

the city's prior written notice law, requiring that such notice "shall be manually subscribed, and shall be delivered to the Corporation Counsel by hand, first class, or certified mail."[21] Evidently this proposal has already been submitted to the mayor; a public hearing held December 30—not two weeks after *Calabrese*—attracted no comments.[22]

Legislatively redefining written notice is not without precedent. *Calabrese* acknowledged that municipalities could write into their laws their own definition.[23] Indeed, the memorandum supporting the Albany amendment argued that it was "in keeping with the intent of the statute as it was originally enacted."[24] But the memorandum described that intent as to "ensure that municipalities will not be held responsible for injuries caused by defects about which they are not aware," and online reporting, if anything, makes it easier to make a municipality aware of such defects.

Another possible response would be for municipalities to reconfigure how they internally process online roadway complaints. Significant in *Calabrese* was that SeeClickFix was the central repository for all such complaints, which the bureaucracy routed to the responsible employees under the statutory designee. Conceivably, a government could internally stovepipe such online complaints while maintaining a separate system for receiving "written notice."

However municipalities react to *Calabrese*, counsel in similar cases should determine whether any online reporting system constitutes prior written notice by answering the following questions:

1. Does the operative prior written notice law expressly require complaints to have been submitted by mail or another particular method—or does it merely require written notice to the statutory designee, however delivered?
2. Did the online reporting system require citizens to type their complaints—or did it merely accept verbal complaints, leaving it to municipal employees to type them up?
3. Did the municipality promote the online system as the way for citizens to complain about roadway defects—or did it maintain a separate path for prior written notice to be received by the statutory designee?
4. Did the municipality route online complaints to the statutory designee or their subordinates—or to a department outside the designee's hierarchy?

Local governments have benefitted from internet access, posting email addresses for departments and officials and accepting online payments for everything from taxes to utilities to parking tickets. Whether they will continue this trend and facilitate roadway complaints via online reporting systems depends on whether the intent of prior written notice statutes is to encourage reporting or minimize liability. In the meantime, *Calabrese* frames the inquiry on whether and when online complaints constitute prior written notice.

Postscript: "Cyber Law" is Law

This article began with the intent to write on some aspect of "cyber law," but the most broadly significant takeaway is that cyberspace is not an independent jurisdiction with its own body of law. We may specifically regulate online transactions, but generally applicable law—like prior written notice statutes and judicial decisions applying them—otherwise governs our conduct online and "IRL." Before we rush to craft new rules for online conduct, therefore, we must understand how the laws that have long governed our conduct can and should apply to our activities online.

1. 2024 N.Y. Slip Op. 06289 (Dec. 17, 2024).
2. Town Law § 65-a(1); Village Law § 6-628; CPLR 9804.
3. Hempstead Town Code ch. 6; N. Hempstead Town Code ch. 59A; Oyster Bay Town Code ch. 160.
4. *E.g.*, Nassau County Administrative Code § 12-4.0(e); Suffolk County Charter § C8-2(A)(2).
5. New York City Administrative Code § 7-201(c)(2).
6. 2nd Class Cities § 244.
7. Glen Cove City Charter § C4-4; Long Beach City Charter § 256A(1).
8. *Gorman v. Huntington*, 12 N.Y.3d 275 (2009); *Carney v. City of New York*, 232 A.D.3d 535 (1st Dep't 2024).
9. *Amabile v. City of Buffalo*, 93 N.Y.2d 471 (1999); *Fleur v. Janowitz*, 228 A.D.3d 636, 638 (2d Dep't 2024).
10. *Yarborough v City of New York*, 10 N.Y.3d 726, 728 (2008), *quoted in Reynolds v. Poughkeepsie*, 230 A.D.3d 1260 (2d Dep't 2024).
11. *Calabrese*, 221 A.D.3d 1152, 1152 (3d Dep't 2023).
12. *Id.* at 1153–54.
13. *Id.* at 1154.
14. 191 A.D.3d 1297 (4th Dep't 2021).
15. *Calabrese*, 221 A.D.3d at 1154–55.
16. *Id.* at 1155.
17. *Calabrese*, 2024 N.Y. Slip Op. 06289 at *3–4.
18. *Id.* at *3.
19. *Id.* at *4.
20. *Albany dropping SeeClickFix* after court ruling in negligence case, Times Union (Albany, NY) (Dec. 18, 2024).
21. Local Law M of 2024, available at https://bit.ly/4iVTHds.
22. A video recording of the hearing is available at https://bit.ly/3DTSwer.
23. *Calabrese*, 2024 N.Y. Slip Op. 06289 at *3 (citing *Wolin v. Town of N. Hempstead*, 129 A.D.3d 833, 835 (2d Dep't 2015)).
24. Local Law M of 2024, *supra* n.21, at Supporting Memorandum.

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NASSAU ACADEMY OF LAW

February 11 (Hybrid)

Dean's Hour: Charles Evans Hughes—Guardian of the Constitution and Statesman of the Law
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

This will be the second in a four-part series chronicling the four most impactful chief justices. This program will focus on Charles Evans Hughes (1862-1948), the eleventh Chief Justice who held the office from 1930 to 1941. Hughes also served as an Associate Justice from 1910 to 1916 and was a member of the Permanent Court of International Justice at the Hague. He was also the 36th Governor of New York, the 1916 Republican presidential nominee, and President Harding's Secretary of State.

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

February 25 (Hybrid)

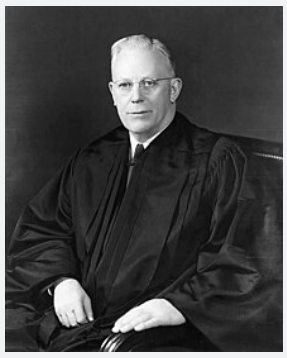
Dean's Hour: The Domestic Violence Survivors Justice Act (DVSJA)
With Nassau County Assigned Defender Plan 18B
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

On May 14, 2019, the Domestic Violence Survivors Justice Act (DVSJA) was signed into law, amending PL 60.12 by authorizing the imposition of alternative sentences for survivors of domestic violence. The use of an expert who can testify to the dynamics of an abusive relationship—and how it affects a victim's behavior—can help explain the misunderstandings of domestic violence and may help to obtain resentencing under the DVSJA. They can explain the cumulative effects of trauma and how that abuse contributed to the conduct. Experts are key to explaining the age-old question that people ask of survivors, that is why they didn't leave the abuser.

Guest Speaker:
Dr. B.J. Cling, Ph.D., J.D. is a clinical psychologist and lawyer. She has both a clinical and forensic private practice in New York City and teaches at John Jay College of Criminal Justice in the areas of psychology and law.

February 27 (Hybrid)

Dean's Hour: Earl Warren—The Chief Justice as California Progressive
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35



This will be the third in a four-part series chronicling the four most impactful chief justices. This program will focus on Earl Warren (1891-1974) who was perhaps the most unassuming man ever to have such a consequential impact on American Constitutional law or on the whole of American society. Warren was the fourteenth Chief Justice, serving from 1953 to 1969. Prior to his appointment, Warren had been both the Attorney General and the Governor of California and who came to the Court with considerable real-world government experience, honed from years in the political arena. This acumen enabled him to emerge as the principled leader of the Warren Court.

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

February 27 (In Person Only)

A Murder in Money—The Tragedy of Emmet Till
With the NCBA Diversity & Inclusion Committee
5:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

The tragedy of African American teenager Emmett Till's murder in 1955 would eventually culminate with the passage of the Emmett Till Antilynching Act of 2022 when the nation at last addressed in legislation its lamentable history with the crime of lynching. But for more than a century, the law offered Blacks little or no protection in the Jim Crow South or elsewhere against vigilante violence. The circumstances which gave rise to young Till's murder speak to a broader societal failure.

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

PROGRAM CALENDAR

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, Esq., 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, Commercial Division, 9th Judicial District's Environmental Claims Part, and Westchester County Supreme Court Civil Trial Part

March 10

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

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

NCBA Member—**$150**
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School Personnel—**$250**
Purchase orders accepted from school districts.

FOCUS: LAW AND AMERICAN CULTURE

Brother, Brother, Brother There's Far Too Many of You Dying...

Rudy Carmenaty

***When would the war stop? that's what I wanted to know ... the war inside my soul.*[1]**

—Marvin Gaye

On April Fool's Day 1984, Marvin Gaye was shot and killed. Had he lived just one more day, he would have turned forty-five. Yet, the agonies which consumed Marvin's soul were as potent as his genius. To have lived another day would only have prolonged his anguish.

The end of Marvin Gaye's life was rooted in its beginning. For his assailant was his father. Marvin touched countless lives with his music. The one person he was never able to reach was his paternal namesake, Marvin Pence Gay, Sr. Since childhood, Marvin had rebelled against his father's authority.

But the real tension between them was over Marvin's attachment to his mother, Alberta. Mother and son were unusually close. Alberta encouraged Marvin to pursue his dreams against her husband's dictates. She doted on Marvin, and "Marvin had a lot of love, more than normal, for his mom."[2]

Alberta became Marvin's feminine ideal. She set a standard, in his mind and in his heart, that no woman could match. Their intimate rapport was an ongoing source of friction. Gay, Sr. resented of the bond which existed between his wife and his son. A bond which excluded him.

This Oedipal dynamic plagued Marvin.[3] In the years since, secrets long hidden behind closed doors amongst father, mother, and son have been laid bare. Marvin seemed to carry the weight of the world on his shoulders. His death provided the coda to a lifetime of acrimony and sexual confusion.

The one enigma that does persist, was his killing an act of filicide or was it suicide by different means? No doubt Gay, Sr. pulled the trigger. He pled no contest when charged with the killing. It is also widely known Mavin endured bouts of severe depression and often contemplated taking his own life.

All of which stands in stark contrast to his public persona. Gaye first came to prominence with Motown in the 1960s. On stage Marvin was suave and sexy, his voice silky smooth. *I Heard It Through the Grapevine, Ain't Nothing Like the Real Thing,* and *Let's Get It On* are but a sampling of his many memorable hits.

Whether solo or with Tammi Terrell, he conveyed a potent mixture of sensitivity and sensuality which made him a fan favorite. However, Gaye's seminal achievement as a recording artist reflected the unrest which at the time convulsed the nation and his troubled psyche.

Released in 1971, *What's Going On* captured the zeitgeist of the times. This was no bubble-gum pop LP. Exploring themes of war, inner-city poverty, pollution, and racial injustice, the album provides an existential soundtrack for a man as ill-at-ease with the world around him as he is with himself.

What's Going On surveys a ravaged American landscape from the perspective of a returning Vietnam veteran. Marvin's songs reflect the disillusionment of countless African Americans who went to war to preserve freedom abroad, a freedom denied them here at home.

Inspiration came from Marvin's younger brother Frankie. Frankie had been in Vietnam. The stories that Frankie and other vets shared moved Marvin to tears. Marvin had joined the Air Force a decade earlier to escape his father. It proved to be a misstep, as Marvin was singularly ill-suited for military service.

Marvin's nonconformity led to his receiving a general discharge under honorable circumstances, as opposed to an honorable discharge. His discharge papers unequivocally state that "Marvin Gaye cannot adjust to regimentation and authority."[4]

Commencing with his father, Marvin defied any man who asserted any measure of control over him. Another authority figure Marvin resisted was Motown impresario Berry Gordy. Gordy had made Marvin a superstar. Nonetheless, Marvin chaffed under Gordy's assembly line methods in the recording studio.

This contest of wills between Marvin and Motown came to a

climax during the making of *What's Going On*. Gordy's business model demanded crossover dance tunes. He did not want a protest album released on his label. Marvin, a preacher's son, was captivated by a messianic vision as if God were using him as his instrument.

The album proved to be an immediate sensation with both critics and the public. *Mercy Mercy Me, Inner City Blues*, and the title cut all made the Billboard top ten. Gordy, in retrospect, admitted that Marvin had been right all along. *What's Going On* remains more than half-a-century later a clarion call for a better world.

Berry Gordy was also Marvin's brother-in-law. His sister Anna was the singer's first wife. Anna was Marvin's champion at Motown. Being seventeen years older, she loved him, and she pampered him. Anna fulfilled the role of an erotic mother-figure, until their mutual infidelities wrecked their marriage.

If Marvin found in Anna a surrogate for Alberta, he tried to play Pygmalion in his second marriage to Janis Hunter. Jan was barely sixteen when they met. Marvin tried to mold Jan in the image of his perfect female—Alberta. This relationship likewise faltered. This disturbing pattern recurred in all of Marvin's romances.

Not surprisingly, Marvin was also reckless with his money. By the end of the seventies, he owed $2 million in back taxes and was forced to declare bankruptcy.[5] These financial difficulties led him to record the album *Here, My Dear* to satisfy both the demands of the IRS and Anna's claims for alimony.

In 1982, an unexpected resurgence put Marvin back on top. CBS Records released the single *Sexual Healing,* earning Gaye his first Grammy award.[6] Marvin sang *What's Going On* on the *Motown 25* television special and gave a soulful rendition of the National Anthem at the NBA All-Star Game the following year.

These brilliant flashes hid a disturbing reality. The bane of Marvin's chaotic existence was cocaine. His addiction made him manic and paranoid. He believed people were trying to kill him. Marvin's anxiety was accentuated by a deep melancholy. He would find his escape in his twisted relationship with his father.

Marvin Gay, Sr. had been a minister with an obscure Hebrew Pentecostal sect that combined elements of charismatic Christianity with Orthodox Judaism. At home, he was a harsh disciplinarian who lorded over his family. Marvin described him as "a very peculiar, changeable, cruel, and all-powerful king."[7]

There was nothing Marvin could do to please his father. As a child, he would provoke his father in the vain hope he could somehow secure his father's approval. For his troubles, Marvin was beaten mercilessly. Gay, Sr. often menaced Marvin and his siblings by saying: 'I brought you into this world, I can take you out.'[8]

Gay, Sr. was also a crossdresser. One can only imagine a young boy's confusion as his preacher father, the ultimate patriarchal figure, would put on a wig and parade around the house in his wife's clothes. This proclivity was well-known in the neighborhood. It subjected the family to gossip and caused Marvin to be bullied.

Introspective by nature, Marvin questioned his own manhood. He asserted his masculinity by becoming a sex symbol admired by women the world over. What's more, Marvin took up such masculine pursuits as boxing and harbored ambitions of trying out for the NFL's Detroit Lions.[9]

Having the surname 'Gay' added to these difficulties. When he entered show biz, Marvin altered his last name by adding a letter 'e' (hence 'Gaye') to further separate himself from his father and his father's perplexing sexuality. Gay,

Sr. rejected the name change just as he disapproved of Marvin singing the devil's music.

Many black performers who began in the church faced comparable objections. The fault lines between the sacred and the secular run deep. But again, there was more to it. Gay. Sr. begrudged his son's fame. He saw Marvin's success as a threat to his position as head of the house, even as he lived off his son's royalties.

In 1983, Marvin returned to the Los Angeles home he had purchased for his parents. He was beset on all sides by his paranoia, his tax problems, his ex-wives, and his impotency. Marvin spent most days in his bathrobe. He rarely left his room. Drug dealers and sycophants supplied Marvin with a steady stream of cocaine.

In the months leading up to Marvin's shooting, father and son kept a wary distance from each other. Gay, Sr. had told members of the family, if Marvin ever laid hands on him, he would kill him.[10] That fateful morning, father and son confronted one another for the last time.

Gay, Sr., agitated over some missing papers, went to Marvin's room. There he found Alberta and Marvin laughing. Gay, Sr. began berating Alberta. Marvin, seizing the moment, stood up to his father. He demanded Gay, Sr. stop haranguing his mother. Marvin had never been so bold. It was a calculated move.

Marvin then pushed his father to the floor, punching and kicking the old man. It must have been a catharsis after the many thrashings at his father's hand. Gay, Sr. was humbled, literally and metaphorically. Gay, Sr. has lost his hold over Marvin. No longer the dominant figure, it was more than Gay, Sr. could bear.

Alberta, frightened by his actions and his anger, persuaded Marvin to stop beating his father. A humiliated Gay, Sr. retreated to his bedroom. Marvin must have known his fate was sealed right then and there. His father's rage turned out to be the mechanism the singer would tap to end his life.

A few minutes later, Gay, Sr. emerged with a Smith & Wesson .38 special. In an ironic twist, Marvin had given the revolver to his father as a Christmas gift.[11] The first shot hit Marvin point-blank in the chest. Gay, Sr. fired again, this time striking Marvin's shoulder. The first shot proved fatal. Marvin would soon be dead.

Alberta screamed in horror as the shots were fired before her eyes. She ran out of the house in a panic. Hearing gunfire, Marvin's brother Frankie and his wife Irene ran to the main house. The couple had been living on the grounds in a guest cottage. It was Frankie who found a fatally wounded Marvin, bleeding profusely.

Marvin would die cradled in Frankie's arms. By triggering his father, a dying Marvin confessed that he was in fact committing suicide. His father had been his weapon of choice. Marvin's final words, spoken barely above a whisper, more in relief than in sorrow, were:

> *"I got what I wanted... I couldn't do it myself, so I had him do it... it's good, I ran my race, there's no more left in me."*[12]

Marvin was pronounced dead on arrival at California Hospital Medical Center.[13] Gay, Sr. was taken into custody. Officers found him sitting serenely on the porch. He did not resist, but he did have the wherewithal to claim self-defense. When asked if he loved his son, all Gay, Sr. could muster was "Let's say I didn't dislike him."[14]

Gay, Sr., deemed competent to stand trial, was initially charged with first degree murder. He was then permitted to plead to a single charge of voluntary manslaughter. He got a six-year suspended sentence, five years of probation, and he never spent a day in prison.[15]

With Marvin dead, Alberta at last found the courage to file for divorce. Their Oedipal tragedy was complete:

> *Now I realize that he didn't love me any more than he loved Marvin. My love for Marvin and Marvin's love for me was so strong. My husband was jealous of that love. He was jealous of Marvin ever since Marvin was a baby. It's all in the Bible. Jealousy destroys. It destroyed Marvin, it destroyed my husband.*[16]

Although the court ruled the killing a homicide, Marvin's words indicate otherwise. Perhaps that explains the lenient sentence Gay, Sr. ultimately received. Alberta died in 1987. Gay, Sr. died in 1998. Marvin has been dead for forty years. Yet, his music lives on.

Marvin Gaye lived a life marked by tragedy, a tragedy not of his own making. Marvin wanted simply to be loved. He wanted his father's love. That was not possible. As for his mother, Marvin's feelings for Alberta were problematic to say the least.

Thus, Marvin came full circle, dying at the hands of the father who long tormented him and mourned by mother whom he truly loved. The lyrics from *What's Going On* offer a defining and poignant epitaph to a gifted man whose passions went unrequited.

Mother, mother
There's too many of you crying
Brother, brother, brother
There's far too many of you dying
You know we've got to find a way
To bring some loving here today

Father, father
We don't need to escalate
You see, war is not the answer
For only love can conquer hate
You know we've got to find a way
To bring some loving here today.[17]

1. David Ritz, *Divided Soul* (1st Ed. 1985) 153.
2. Michael Goldberg, *Trouble Man*, Rolling Stone (May 10, 1984) 13.
3. Ritz, 145.
4. *Id.*, 36.
5. Goldberg, 13.
6. Gaye earned two Grammy awards in 1983, for *Best R&B Vocal Performance, Male and Best R&B Instrumental Performance*. In 1996, Marvin posthumously received the Grammy Lifetime Achievement Award.
7. Ritz, 13.
8. *Marvin Gaye's Son Says Regular Family Argument Ended His Father's Life*, Jet (July 29, 1991) 81.
9. Ritz, 134.
10. *Id.*, 333.
11. Madeline Hiltz, *Why Wasn't Marvin Gaye's Father Convicted Of His Murder? Vintage News* (November 22, 2021) at https://www.thevintagenews.com.
12. Nii Ntreh, *"I got what I wanted" – Why Marvin Gaye was shot and killed by his own dad with a gun Marvin bought for him*, Face2Face (October 28, 2019) at https://face2faceafrica.com.
13. Goldberg, 16.
14. Hiltz, *supra.*
15. *Id.*
16. Ritz, 340.
17. Marvin Gaye, *What's Going On Lyrics* at https://genius.com.

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.

Erin A. Lue-Hing has joined Meyer, Suozzi, English & Klein, P.C. as an Associate in the Litigation & Dispute Resolution practice group, based in the Garden City office. Shareholder **A. Thomas Levin**, former NYSBA and NCBA President, has concluded 20 years of service as a Trustee of the Historical Society of the New York Courts, and has been honored by election as Trustee Emeritus. He was also re-elected as Counsel to the Society and will continue to serve on the Executive Committee.

Moritt Hock & Hamroff LLP has announced that **Brian Adelman** and **Jodi B. Zimmerman** have been elevated to Partner, while Ronald P. Perry has been elevated to Counsel, effective January 1. Additionally, Partner **Danielle J. Marlow** has been elected to serve as Co-Chair of its Litigation Practice Group.

Rivkin Radler LLP has announced that **Catherine Savio** and **Sean Simensky** have been elected firm Partners.

Andrea Tsoukalas Curto, a Land Use & Zoning Partner at Forchelli Deegan Terrana LLP, was appointed an Affiliate Board Member of the Commercial Industrial Brokers Society of Long Island (CIBS) and Co-Chair of the CIBS W Committee. **Mary Mongioi** was appointed Co-Chair of the firm's Corporate and Mergers & Acquisitions practice group. Partner **Gregory S. Lisi** was interviewed for an article in PBS magazine *Next Avenue* regarding workplace accommodations for older workers. The article was written by NCBA Member **Linda Goor Nanos**, a frequent contributor to the publication.

Robert S. Barnett and **Gregory L. Matalon**, Partners at Capell Barnett Matalon and Schoenfeld LLP, will present "Estate and Trust Income Taxes for Attorneys" at the Nassau Academy of Law's Dean's Hour on February 11. Barnett will also present "LLC Tax Transformation" for the National Business Institute on February 4.

Harris Beach Murtha is pleased to announce the successful combination of Harris Beach PLLC and Murtha Cullina LLP to form a new legal powerhouse with more than 250 lawyers working across 16 offices in Connecticut, Massachusetts, New Jersey, New York and the District of Columbia.

Futterman Lanza, LLP welcomes Associate **Anna Ivanenko Gavrysh** to its growing Garden City office where she will concentrate her practice in the areas of elder law, estate planning, estate administration, and trusts/trust administration.

FOCUS: MUNICIPAL LAW

Stay in Your Lane! Prevent Misuse of License Plate Reader Data

Joshua D. Brookstein

Catching criminals is a good thing. Preventing a crime from occurring in the first place is a really good thing. It is not a surprise that federal, state, and local governments dedicate sizable portions of their yearly budgets to train and operate sophisticated police departments to serve and protect its citizens. This is a core function of government. However, as technology continues to evolve, governments at all levels must ensure that the latest and greatest crime prevention and enforcement tools are not used against the very same people they are meant to protect. Enter the debate on the release of license plate reader (LPR) data for non-law enforcement purposes.

What are LPR Cameras?

An LPR is a camera that is typically attached to a pole or a police car that catalogs every license plate that it reads. Police departments may also maintain LPR cameras at certain locations within its jurisdiction. LPR cameras are used to, among other things, identify wanted persons, stolen vehicles, stolen plates, missing persons, vehicles wanted in connection with an Amber Alert, and local plates of interest. These cameras can provide police departments and other law enforcement agencies with critical information about when a vehicle entered or left a crime scene and enable police officers to identify a vehicle suspected to be used in the commission of a crime.

The use of LPR cameras across Nassau County is rising. The Old Westbury, Muttontown-Upper Brookville, City of Glen Cove, Old Brookville, Brookville, and Oyster Bay Cove Police Departments have all made sizable purchases of LPR cameras.[1] On January 6, 2024, members of the Nassau County Legislature's Rules Committee unanimously advanced a measure to the full body to install 20 license plate reader cameras in Jericho.[2]

LPR cameras, when used in connection with crime prevention and criminal investigations, serve a legitimate public purpose. But what if this ever-present law enforcement tool is deployed for matters completely unrelated to law-enforcement?

Can or should civil litigants be permitted to utilize LPR technology and its data to prove negligence or breach of contract cases? Should parents be permitted to access LPR data to track their child's movements? Can parties in divorce proceedings use LPR data to prove the existence of an alleged paramour at the marital residence? Is there a basis in law to request such information? How can police departments protect this data from being used for purposes unrelated to law enforcement?

Parties can use a variety of mechanisms to attempt to obtain LPR data. The most common methods are by submitting a FOIL request or by subpoena.

Submitting a FOIL Request

In its legislative declaration of Article 6 of the Public Officers Law (also known as the Freedom of Information Law), the New York State Legislature opined that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the government.[3]

While §§ 84 through 90 of the Freedom of Information Law provide the public with broad access to government records, disclosure is subject to certain exemptions. Some exemptions include records that are specifically exempted from disclosure by state or federal statute, records that if disclosed would constitute an unwarranted invasion of personal privacy, and records that are compiled for law enforcement purposes only to the extent that disclosure would interfere with law enforcement investigations or judicial proceedings, deprive a person of a right to a fair trial or impartial adjudication, identify a confidential source or disclose confidential information relating to a criminal investigation, or reveal criminal investigative techniques or procedures, except routine techniques and procedures.[4]

There is limited case law surrounding FOIL requests for LPR data. In *Matter of Lane v. Port Wash. Police Dist.*, the petitioner sought records identifying the number and location of LPR cameras, the rules promulgated for the cameras, and for the last five years, any alerts, emails, or correspondence sent to other law enforcement agencies sharing information derived from the police department's cameras.[5] The police department objected to the request and the petitioner filed suit. Noting that the subject police department had apparently no rules to govern the use of LPR cameras, the court found that the risk of indiscriminate use by the department to target law abiding citizens was high, and opined that the police department failed to prove that the law enforcement exemption applied to disclosure of the number and location of the cameras.

Serving a So-Ordered Subpoena

In a docketed case, parties may attempt to serve a so-ordered subpoena on a police department. Although generally the disclosure provisions of the CPLR should be liberally construed, the scope of permissible discovery is not unlimited and courts are invested with broad discretion to supervise discovery.[6] Furthermore, confidential information in the care and custody of governmental entities may be barred from discovery pursuant to an entity's assertion of its public interest privilege.

The privilege includes confidential information communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged.[7] Determining "whether the privilege attaches in a particular setting is a fact-specific determination for a fact-discretion weighing court, operating in-camera if necessary. The public interest, and what adds up to sufficient potential harm to it, are necessarily and inherently flexible concepts."[8]

Public Policy Implications

LPR cameras are an important tool that police departments use to protect citizens. Granting access to LPR data for reasons totally unrelated to law enforcement, namely, to aid a party in private disputes, potentially compromises a police department's use of the information and makes available strategic, confidential information as to the methodology police departments used to protect the public.

While New York has not enacted specific legislation prohibiting the release of LPR data for non-law enforcement purposes, several states, including, but not limited to, California,[9] Florida,[10] Maine,[11] Arkansas,[12] Oklahoma,[13] and Tennessee[14] have. The reason such states have prohibited the release of LPR data for non-law enforcement purposes is because the disclosure of police department LPR data to civil litigants, or other non-law enforcement requesting parties, essentially allows a crime fighting tool to be used to assist in civil litigation and invade personal privacy.

Disclosure of LPR data will allow civil litigants to use law enforcement tools to essentially surveil anyone who drives through a particular jurisdiction and analyze the data to effectively chart where an individual goes to, such as to eat, pray, or engage in recreation.

While a recorded "read" by a license plate reader is not an invasion of privacy, "the cumulative effect of many "reads" or bits of government (often police) collected information must be considered. This raw accumulated data can create a non-contextual "mosaic" which is essentially a high-resolution image of an individual, defined by his or her vehicle's randomly recorded movements and locations." *See Gannet Co., Inc. v. County of Monroe*.[15]

Enlisting police to engage in non-criminal disputes between neighbors, relatives, or even strangers may be contrary to the public good. Municipal attorneys must carefully evaluate any request for LPR data and the implications of the release thereof.

1. https://www.newsday.com/long-island/towns/license-plate-readers-nassau-villages-supziu5p.
2. https://www.newsday.com/long-island/politics/nassau-license-plate-readers-jewrrsnd.
3. NY Pub Off § 84.
4. NY Pub Off § 87(2)(e).
5. 221 A.D.3d 698 (2d Dept. 2023).
6. 87 A.D.3d 1108 (2d Dept. 2011).
7. 93 N.Y. 2d 1 (1999).
8. *Id.*
9. Calif. Veh. Code § 2413, Calif. Civil Code. §§ 1798.29 and 1798.90.5.
10. Fla. Stat. § 316.0777.
11. 29-A M.R.S.A. § 2117-A(2).
12. Ark. Code §§ 12-12-1801 to 12-12-1808.
13. Okla. Stat. §§ 47-4-606.1.
14. Tenn. Code §§ 55-10-302, 10-7-504(a).
15. 47 Misc. 898 (Sup. Ct. Monroe Cnty. 2015).

Joshua D. Brookstein is a Partner at Sahn Ward Braff Coschignano PLLC in Uniondale, representing owners, developers, municipalities, religious institutions, and health systems in all aspects of municipal law, and land use and development. He is a past Chair of the NCBA Community Relations & Public Education Committee (CRPE) and is the founder and Chair of the CRPE's School Engagement Subcommittee. He can be reached at jbrookstein@sa hnward.com.

2024 HOLIDAY STAFF FUND DONORS

We wish to thank the following members and law firms who donated to the 2024 Holiday Staff Fund. Your generosity is greatly appreciated.

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Take Control of Your Mental Health

Mental health is the bedrock of a happy, productive life. Legal professionals, when faced with challenges to their crucial stability and strength, often have a particularly hard time admitting that they are human. The fear of showing weakness is real, but the consequences of not seeking help are often worse.

Three Reasons Why Seeking Help Is Worth the Risk

1. Anxiety, fear, sadness, compulsive/impulsive behaviors and anger rarely go away on their own. Taking the first step toward addressing a problem can make a huge difference in your outlook and reduce symptoms.

2. Left untreated, mental health problems can get out of control quickly and take a major toll on your personal, professional and financial life. Finding help early is the best way to get back on track before any significant damage is done.

3. LAP provides professional, confidential mental health services ranging from counseling to intervention. No matter where you are in your struggle, we can help.

ADHD Management Skills – A 6-Part Dean's Hour CLE Workshop - Ongoing

Each one-hour session will focus on a different skill and provide takeaways and practical skills to help attendees manage their ADHD symptoms.
The remaining dates for the Hybrid 12:30-1:30PM Dean's Hour ADHD Education Series for Lawyers are as follows:

- February 6—Part 4
- February 13—Part 5
- February 20—Part 6

Sharing Balance – An Ongoing Virtual Support Group Series

Do you struggle to maintain work/life balance? Join the conversation in our weekly support group!

- Tuesdays from 1:00-1:45pm (via Zoom)
- https://bit.ly/LAPSupportGroupReg and fill out our brief, one-time registration form.

ADHD Support Group Series COMING THIS SPRING

This group will meet every other Thursday at 12:00pm on Zoom (schedule TBA). These will be drop-in meetings, no registration required, no cost to attend, and all are welcome.

For more information about any of our programs, contact Beth Eckhardt at eeckhardt@nassaubar.org.

FOCUS: EDUCATION LAW

Conducting an Education Investigation

Brittany N. Hulbert

There are many practice areas within the realm of education law. Whether advocating for a plaintiff or defending an institution, often times working in the legal profession involves being on someone's "side." However, some aspects of education law require impartiality that an attorney new to this concept (or one who has spent a majority of their practice drafting motions and oppositions on behalf of their clients) may have difficulty adjusting back into.

Investigations occur in all realms of law. Whether a complaint is made to a company's human resources or a government agency, there are many instances in which attorneys or non-attorneys alike may be employed to act more like a fact-gatherer than an advocate. Decisions like B*uettner-Hartsoe v. Baltimore Lutheran High School Association*,[1] which established that private schools can be subject to Title IX investigations if they receive federal funding, and *Davis v. Monroe County Board of Education*,[2] which clarified a school's responsibility in peer sexual harassment, discuss and clarify legal issues such as an institution's duty or responsibility under laws like Title IX.

While these pivotal cases, and others like them, are important for establishing the rights of students, employees, faculty, and institutions alike, how does an attorney prepare to conduct an investigation that doesn't involve Title IX or another formal investigation process?

Before You Begin

When you receive notice from an institution, such as an elementary or middle school, or college or university, you will be tasked with having both an understanding of the nature of the complaint as well as what is being asked of you by the institution.

Read the complaint. Whether you receive an email package from the institution's human resources or an email chain containing multiple correspondences that make up the entirety of the complaint, be sure to gather every document and read through them all thoroughly. It is your job to take in every piece of information, and the best way to go about this is to fully understand the situation at hand before you continue communicating with the institution.

Prepare your file. It is likely that you will end up with many documents, screenshots, .jpeg images, and emails which will end up as exhibits in your investigation report. You'll also have a notes sheet, research, and other documents such as handbooks or school manuals that you will have to locate and gather. Once you receive any initiating documentation, begin organizing your file. Make separate folders for documents, exhibits, report drafts, and your notes. Every attorney will have a different method for their organization. All that matters is that every document you received, and every note you took, is accounted for when it comes time to build up the final report.

Identify your witnesses. Before, or as you begin reading the complaint, you will know who the complainant is. After this, it is up to you to identify who the complaint is about and begin gathering names of potential witnesses. Not every single person named may end up being someone that you speak to, depending on their role. However, it is best to begin with identifying each named person's role within complaint so that you can later identify whether this witness has relevant information.

Schedule. Some investigations occur in-person. Other investigations can occur over video platforms, like Zoom. Often, both will occur within a single investigation. Is the complaint made by a student or faculty member during a time when the school is not in session? (i.e., summer break). Does the complainant specifically want to meet in person? Is the gravity of this complaint something that the institution, or the investigators, believe needs to be understood face to face? Is every witness available to meet in-person throughout the course of a singular day? Discuss with the institution those witnesses you plan to interview and receive their contact information or have the institution schedule for you. Determine important deadlines, like when the report is due and whether any witness has specified that they can only meet on certain days or at certain times. Once you build your schedule, be prepared to schedule additional interviews as you learn additional facts and the roles that witnesses played throughout the instance(s) making up the complaint.

Know your job. Each institution is different and has its own process for conducting investigations. The nature of any complaint can be drastically different, from sexual harassment, including a Title IX investigation that also contains other components requiring your instant report, to two colleagues having a dispute over who received a better office space.

Some institutions may ask you to create a recommendation at the end of your report, identifying and recommending a plan of action for the institution to follow given the findings of the investigators. The recommendations could vary from suggesting sensitivity training to suspension, or even termination. They could also include recommendations to the institution, such as updating their own policies and procedures to prevent a similar situation from occurring in the future.

Other institutions may have their own plan for how they will deal with the information gathered during the course of the investigation, and may ask you to simply gather all the facts and documents relating to the complaint and provide them in a concise report. Though it is your duty to remain impartial through the entirety of the investigation, it is important to keep in mind whether you will be asked to make recommendations so that you are prepared to use the facts and evidence to support your conclusions.

During the Investigation

As the investigator, the most important job you have is to gather all the information received and provide that to the institution. While this is mainly allowing each witness to talk, there are some things to keep in mind both during and between interviews.

Don't give too much information. It is important to provide the witness with some information before you start asking them to talk. Witnesses such as the complainant will understand why they are speaking with you, but it is likely that other witnesses will have little to no understanding of why they are being asked to meet. When you begin the interview, it is important to introduce yourself and inform the witness that there was a complaint made, and that the investigators want to speak with them to learn information about whatever club, sport, office, etc. is being investigated. It is also wise to instruct the witness not to speak with anyone else, or tell anyone that they were interviewed, as the interview process must remain confidential. Then, you can proceed with asking general introductory questions to begin the interview process and take notes as the witness speaks. The witness may have questions, like, "what will happen after this interview?" or "is anyone in trouble?" Do your best to respond to the questions without providing information that may give up the nature of the complaint or who the complainant is.

Ask questions. Though the most important part of every interview is allowing the witness to speak as much as they'd like and to gather the information they provide, it is imperative that you ask the right questions. There are sometimes certain questions that will inadvertently remind the witness of another incident that occurred, or another memory they have on the topic or person being discussed. Do not be afraid to follow up on things the witness stated once they finish speaking. There are times when witnesses will divulge information that not even the complainant, or the institution was aware of, that may even relate to or require a separate investigation. It is your responsibility as the investigator to ask the follow-up questions needed until you have an understanding of everything the witness discussed.

Invite the witness to follow up if needed. Once you end the interview, thank the witness for their time and remind them that they can always follow up with the investigators if they remember any important details or have any follow up information they forgot to share. An open line of communication where the witness feels comfortable to share information is the best to ensure that no detail goes unrecorded.

Concluding And Final Thoughts

As you finalize your report and prepare to send it to the institution, keep a few small details in mind. Remember to include all documents you received as exhibits and that any manuals, handbooks, rules, or regulations reviewed should also be included as exhibits. Also keep in mind to note in the report when the investigation initiated and concluded. Witnesses can decline to be interviewed, and in some instances, these rejections should also be noted in the report.

There are other factors that may influence the way the investigation proceeds, including whether the complainant has obtained an attorney or even if the complainant refuses to speak further on their initial complaint. As always, once you gain more experience in completing education investigations, you will find your own processes and procedures for preparing, conducting interviews, gathering evidence, and drafting reports that will allow you to complete each investigation as thoroughly as possible.

1. *Buettner-Hartsoe v. Baltimore Lutheran High Sch. Ass'n.*, 2022 US Dist. LEXIS 130429, at *11 (D. Md. July 21, 2022, Civil Action No. RDB-20-3132).
2. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

Brittany N. Hulbert is an Associate at Augello Law Group, P.C. in New York City, a labor and employment, education law, and commercial litigation firm. She can be reached at brittany@augellolaw.com.

Nassau County Courts Induction Ceremonies

L-R: County Court Supervising Judge Teresa K. Corrigan, Family Court Supervising Judge Ellen R. Greenberg, Supreme Court Justice Gregg Roth, Family Court Judge Lisa Daniels, NCBA President Daniel W. Russo, Supreme Court Justice Terence P. Murphy, Nassau Supreme Court and Matrimonial Center Supervising Judge Jeffrey A. Goodstein and Tenth Judicial District Administrative Judge Vito M. DeStefano

L-R: Tenth Judicial District Administrative Judge Vito M. DeStefano, County Court Supervising Judge Teresa K. Corrigan, NCBA President Daniel W. Russo, District Court Judge Veronica Renta Irwin, District Court Judge Charles McQuair, District Court Judge Ryan E. Cronin, District Court Supervising Judge Tricia M. Ferrell, Nassau Supreme Court and Matrimonial Center Supervising Judge Jeffrey A. Goodstein and First Deputy Chief Administrative Judge Norman St. George

L-R: County Court Supervising Judge Teresa K. Corrigan, NCBA President Daniel W. Russo, District Court Judge Sean Wright Judge, District Court Judge Michele M. Johnson, District Court Judge Lisa A. LoCurto, Tenth Judicial District Administrative Judge Vito M. DeStefano, Nassau Supreme Court and Matrimonial Center Supervising Judge Jeffrey A. Goodstein and District Court Supervising Judge Tricia M. Ferrell

Photos by Hector Herrera

Insights from the Federal Bench: Appellate Advocacy with Second Circuit Judge Eunice C. Lee

On Thursday, January 23, NCBA Members packed Domus to receive practical insights and learn appellate strategies from federal Judge Eunice C. Lee of the U.S. Court of Appeals for the Second Circuit. The CLE program was sponsored by the Nassau Academy of Law and the NCBA Appellate Practice Committee. Corporate Partner PrintingHouse Press (PHP) generously sponsored the buffet dinner for the event.

Photos by Hector Herrera

FOCUS: MENTAL HEALTH

ADHD in the Legal Profession: A Double-Edged Sword

Elizabeth Eckhardt, PhD, LCSW

Attention Deficit Hyperactivity Disorder (ADHD) is a neurodevelopmental disorder affecting millions of individuals worldwide. While often perceived as a hindrance, ADHD can also provide powerful advantages to those in professions as mentally and physically demanding as the law.

Prevalence of ADHD Among Lawyers

Recent studies reveal a disproportionately high prevalence of ADHD among lawyers compared to the general population. A landmark 2016 study by the American Bar Association (ABA) found that 12.5% of lawyers reported having ADHD, compared to approximately 4.4% of adults in the general U.S. population. This significant disparity suggests that individuals with ADHD may be drawn to the legal profession or that the demands of legal practice may exacerbate underlying ADHD tendencies.

Understanding ADHD

ADHD is characterized by a persistent pattern of inattention, hyperactivity and/or impulsivity that interferes with functioning or development. The Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5) outlines three types of ADHD:

1. **Inattentive** type is characterized by difficulties with organization and focus. Individuals may struggle to follow instructions or complete tasks and may be easily distracted. They may appear forgetful or confused.
2. **Hyperactive** type is characterized by excessive fidgeting, restlessness and impulsivity. Individuals may often interrupt others, act without reason and find waiting their turn difficult.
3. **Combined** type includes symptoms of both.

Benefits and Challenges of Practicing Law with ADHD

While ADHD can pose challenges, there are certain characteristics of ADHD that can be advantageous for lawyers.

- ***Hyperfocus.*** Hyperfocus is a state of intense concentration on a particular task or activity. While it can lead to neglect of other responsibilities, it can also be a superpower for lawyers who need to immerse themselves in complex cases or legal research. The ability to intensely focus for extended periods can facilitate in-depth analysis and the development of creative legal strategies.
- ***Creativity and Problem-Solving.*** ADHD is often associated with a unique cognitive style, characterized by divergent thinking and an ability to think outside the box. This can be a significant asset in legal practice, where innovative solutions and arguments are often required. Lawyers with ADHD may excel at identifying novel approaches to legal problems and developing creative solutions for their clients.
- ***Energy and Drive.*** The hyperactivity associated with ADHD can translate into a high level of energy and drive, which is often beneficial when attempting to meet the demands of practicing law. Lawyers with ADHD often thrive in fast-paced environments and possess the stamina to handle long hours and heavy workloads.
- ***Resilience and Adaptability.*** Living with ADHD requires individuals to develop coping mechanisms and strategies for managing their symptoms. This can foster resilience and adaptability, qualities that are essential for navigating the challenges of legal practice. Lawyers with ADHD may be better equipped to handle unexpected setbacks and adapt to changing circumstances.

Despite these potential benefits, ADHD can also present significant challenges for lawyers.

- ***Time Management and Organization.*** Difficulties with organization and time management can hinder a lawyer's ability to meet deadlines, manage caseloads and maintain accurate records. This can lead to missed opportunities, professional setbacks and increased stress.
- ***Prioritization and Task Completion.*** Prioritizing tasks and completing them efficiently can be particularly challenging for individuals with ADHD. This can result in procrastination, missed deadlines and a sense of being overwhelmed.
- ***Focus and Attention.*** Maintaining focus and attention during long meetings, hearings or while reviewing extensive legal documents can be difficult for lawyers with ADHD. This can lead to errors, missed details and decreased effectiveness.
- ***Impulsivity and Emotional Regulation.*** Impulsivity can manifest as interrupting others, speaking out of turn, or making hasty decisions. This can negatively impact professional relationships and courtroom demeanor. Difficulties with emotional regulation can also lead to heightened stress and anxiety.

Many lawyers who struggle with ADHD describe feeling desperate, overwhelmed, and burnt out. If left untreated, these feelings can lead to compromised legal practices, neglected clients and cases, unmet deadlines and more.

Strategies for Success

Lawyers with ADHD can employ several strategies to mitigate challenges and leverage strengths.

Seek diagnosis and treatment. Obtaining a formal diagnosis and appropriate treatment, including medication and therapy, can significantly improve ADHD symptoms and enhance overall functioning.

Develop organizational systems. Implementing structured organizational systems, such as calendars and filing systems (both online and physical) as well as task management apps, can help lawyers manage their time, caseloads and deadlines effectively.

Utilize assistive technology. Assistive technology, such as text-to-speech software, voice recorders and noise-canceling headphones, can aid in focus, organization and task completion.

Take advantage of apps developed specifically to assist in the management of ADHD. These apps assist with areas that challenge adults with ADHD the most: managing distractions; managing information; managing time; enhancing creativity; getting more sleep and being more productive. A comprehensive list can be found at https://www.additudemag.com/mobile-apps-for-adhd-minds.

Create a supportive work environment. Establishing a supportive work environment that accommodates individual needs can be beneficial. This may involve flexible work arrangements, minimized distractions and open communication with colleagues and supervisors.

Practice self-care. Engaging in regular exercise, mindfulness practices, and stress-reduction techniques can improve focus, emotional regulation and overall well-being.

Seek mentorship, Coaching, and Support. Mentorship and coaching from experienced professionals can provide valuable guidance and support in developing strategies for success. It is also helpful to meet with other attorneys who struggle with ADHD who can share the struggles of living and working with ADHD, as well as the tips and tricks that have worked for them.

ADHD presents a unique set of benefits and challenges for lawyers. While difficulties with organization, focus, and impulsivity can pose obstacles, the traits of hyperfocus, creativity and resilience can be significant assets in the legal field. By understanding its complexities and implementing effective coping strategies, lawyers with ADHD can achieve great professional (and personal) success.

The NCBA Lawyer Assistance Program (LAP) and the Academy of Law are currently sponsoring the Dean's Hour Hybrid Education Series entitled, "ADHD Education Management Skills: Understanding and Working with the ADHD Brain." This program is offered Thursdays from 12:30 p.m. to 1:30 p.m. through February 20. Upon completion of the series, LAP will resume bi-monthly ADHD support groups for lawyers.

You can also attend LAP's weekly Counselors Connect Virtual Discussion Group where you can share tips, learn from others and lend and receive support with other lawyers committed to increasing work/life balance. Please contact Dian Mills O'Reilly at doreilly@nassaubar.org for information on these and other LAP services.

Elizabeth Eckhardt, PhD, LCSW is Director of the NCBA Lawyer Assistance Program. Dr. Eckhardt provides professional counseling, outreach, and education to lawyers, judges, law students, and their immediate family members who struggle with substance use, depression, anxiety, and other mental health challenges. She can be reached at eeckhardt@nassaubar.org.

FOCUS: FREEDOM OF INFORMATION LAW

FOIL Law's Personal Privacy Exemption and Latest Updates

Bryan Barnes

Personal Privacy Exemption Overview

Sections 87 and 89 of the Public Officers Law ("POL") contain the governing rules for the New York Freedom of Information Law ("FOIL"). "FOIL imposes a broad duty of disclosure on government agencies" and "[a]ll agency records are presumptively available for public inspection and copying" unless a recognized statutory exemption applies.[1] Those exemptions are contained in POL § 87(2).

One of the most often used exemptions allows agencies to withhold records where their disclosure would result in an "unwarranted invasion of personal privacy."[2] The "personal privacy" exemption is further elaborated in POL § 89(2)(b), which contains eight separate grounds and categories of records that the New York Legislature determined constitute an "unwarranted invasion of personal privacy."[3] This list of categories of records that are exempt from disclosure under the personal privacy exemption is non-exhaustive; examples of the enumerated categories are medical and credit histories.[4]

When the requested records do not fall within one of the eight enumerated categories in POL § 89(2)(b), the agency and reviewing court should apply a balancing test and weigh the private interest of confidentiality against the public interest in disclosure.[5] In addition, as stated in *Matter of Ruberti, Girvin & Ferlazzo v. New York State Division of State Police*, "what constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable person of ordinary sensibilities."[6] Further, "if a court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection…and order disclosure of all nonexempt, appropriately redacted material."[7]

Recent Decisions Concerning the Personal Privacy Exemption

The rules governing the personal privacy exemption and when it may be properly invoked have created issues of contention for a long time, but within the last several months a series of cases was decided in the Appellate Division, Second Department, that have provided new clarification and guidance. The first of these cases involves the requested disclosure of police disciplinary records and the second case involves a request for audio recordings of a call seeking help in a domestic violence dispute.

A summary of these two recent appellate cases shows that the Second Department caselaw analyzing the personal privacy exemption has been evolving in such a way as to embrace more of the aspirational goals of FOIL in favor of disclosure. These aspirational goals are that there is a broad duty on the government to provide disclosure of its records and that each exemption to disclosure under FOIL should be "narrowly construed," with the burden on the government to prove that the exemption applies.[8]

Matter of Gannet Co., Inc. v. Town of Greenburgh Police Department

In *Matter of Gannet Co., Inc. v. Town of Greenburgh Police Department*,[9] decided on July 31, 2024, the appellate court reversed the New York Supreme Court ruling that the privacy exemption allowed for a blanket exemption to withhold law enforcement officer disciplinary records.

The case originated from a FOIL request made by the newspaper *Democratic & Chronicle* seeking law enforcement disciplinary records relating to misconduct committed by members of the Greenburgh Police Department ("GPD").[10] The GPD responded to the request by withholding all officer disciplinary records created prior to the repeal of Civil Rights Law § 50-a,[11] which occurred on June 12, 2020. The GPD also withheld unsubstantiated and substantiated allegations of misconduct on the basis of the personal privacy exemption.[12] The FOIL response was administratively appealed and the Greenburgh Town Board granted the appeal only to the extent that the records created after the repeal of the Civil Rights Law § 50-a that contained substantiated allegations of misconduct should be released, but otherwise denied the appeal with respect to all other records sought.[13] The Supreme Court, Westchester County, denied further relief.

The Second Department found that the Supreme Court erred in concluding that the privacy exemption under Public Officers Law § 87(2)(b) created a blanket exemption allowing the respondents to categorically withhold the disciplinary records of unsubstantiated allegations of misconduct.[14] In reaching its conclusion, the appellate court relied on *Matter of Newsday, LLC. v. Nassau County Police Department*,[15] decided on November 22, 2023, and reached the same conclusion in rejecting the same blanket exception for law enforcement disciplinary records.

Matter of Gannet Co., Inc. v. Town of Eastchester Police Dept.

Approximately three months later, the Second Department decided *Matter of Gannet Co., Inc. v. Town of Eastchester Police Department*,[16] which involved a request for the audio recordings of a call to the Eastchester Police Department requesting help in a domestic violence situation. The Supreme Court for Westchester County had denied the petition in the Article 78 proceeding and it was appealed to the Second Department.[17]

The appellate court reversed the Westchester Supreme Court insofar as it ordered an in camera review of the requested material in order to determine whether it should be disclosed.[18] The Second Department recognized that while the material at issue could meet the reasonableness test of "objectionable to a reasonable person of ordinary sensibilities," there was enough uncertainty to merit further analysis.[19] As of this writing, there has not been a final determination in this case since the Westchester Supreme Court has not yet had its in camera review and no final determination has been made.

Conclusion

These two appellate cases illustrate that the jurisprudence regarding the application of the personal privacy exemption is still evolving. The common theme is that bright line rules and blanket exceptions are being replaced with more of a case-by-case factual analysis, with greater emphasis on the overarching aspirational goal of greater transparency.

1. *Matter of Hepps v. New York State Dept. of Health*, 183 A.D.3d 283, 287 (3rd Dept. 2020).
2. POL § 87(2)(b).
3. POL § 89(2)(b).
4. *Hepps*, 183 A.D.3d at 287.
5. *Id.* at 288.
6. *Id.* (quoting *Matter of Ruberti, Girvin & Ferlazzo v. New York State Div. of State Police*, 218 A.D.2d 494, 498 (3rd Dept. 1996)).
7. *Matter of Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 275 (1996).
8. *Id.* at 288.
9. *Matter of Gannett Co., Inc. v. Town of Greenburgh Police Department*, 229 A.D.3d 789 (2nd Dept. 2024).
10. *Id.* at 789.
11. L 1976, ch 413, § 1; amd, L 1981, ch 778, § 1, eff July 27, 1981; L 1986, ch 757, § 1, eff Aug 2, 1986; L 2002, ch 137, § 1, eff July 23, 2002; L 2011, ch 62, § 53 (Part C, Subpart B), eff March 31, 2011; L 2014, ch 516, § 1, eff December 17, 2014.
12. 229 A.D.3d 789.
13. *Id.*
14. *Id.* at 792.
15. *Matter of Newsday, LLC v. Nassau County Police Department*, 222 A.D.3d 85 (2nd Dept. 2023).
16. *Matter of Gannet Co., Inc. v. Town of Eastchester Police Department*, 218 N.Y.S.3d 700 (2nd Dept. 2024).
17. *Id.* at 701.
18. *Id.*
19. *See generally id.* at 702.

Bryan Barnes works in the Nassau County Attorney's Office as a Deputy County Attorney assigned to the Legal Counsel Bureau. He can be reached at BBarnes@nassaucountyny.gov.

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CALENDAR | COMMITTEE MEETINGS

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Alternative Dispute Resolution	Ross J. Kartez
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Construction Law	Adam L. Browser
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Cyber Law	Thomas J. Foley and Nicholas G. Himonidis
Defendant's Personal Injury	Jon E. Newman
District Court	Bradley D. Schnur
Diversity & Inclusion	Sherwin Safir
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
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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, FEBRUARY 4
Women in the Law
12:30 p.m.

Elder Law Social Services Health Advocacy
5:30 p.m.

Guest speaker Laura Brancato will speak on "Current Trends in Guardianship."

WEDNESDAY, FEBRUARY 5
Real Property Law
12:30 p.m.

Insurance broker Trisha Devine will speak on "Insurance Facts Attorneys Need to Know."

THURSDAY, FEBRUARY 6
Commercial Litigation
12:30 p.m.

Guest speaker, Hon. Timothy S. Driscoll, will speak on trials in the Commercial Division. The Committee meeting is sponsored by Corporate Partners Printing House Press and vdiscovery.

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

FRIDAY, FEBRUARY 7
Asian American Attorney Section
5:30 p.m.

Attend the Second Annual Lunar New Year Celebration and enjoy a Chinese buffet dinner by Panda House Restaurant, traditional lion dance by Ten Tigers Kung Fu Academy, and music and dance performances by Yes I Can Performing Arts.

MONDAY, FEBRUARY 10
Family Court Law, Procedure & Adoption
12:30 p.m.

TUESDAY, FEBRUARY 11
Labor & Employment Law
12:30 p.m.

THURSDAY, FEBRUARY 13
Hospital & Health Law
8:30 a.m.

Matrimonial Law
5:30 p.m.

Guest speakers Justice Edmund M. Dane, Byron Chou, Esq. and Louis Panariello, CPA/ABV/CFF will speak on "Cryptocurrency Unveiled: Tools for Attorneys to Trace and Investigate Digital Assets."

TUESDAY, FEBRUARY 18
Education Law
12:30 p.m.

WEDNESDAY, FEBRUARY 19
Ethics
5:30 p.m.

Insurance Law
5:30 p.m.

THURSDAY, FEBRUARY 20
Diversity & Inclusion
6:00 p.m.

MONDAY, FEBRUARY 24
Access to Justice
12:30 p.m.

TUESDAY, FEBRUARY 25
Plaintiff's Personal Injury
12:30 p.m.

Grievance
12:30 p.m.

WEDNESDAY, FEBRUARY 26
General Solo Small Law Practice Management
12:30 p.m.

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

Guest speaker Richard L. Furman, Esq. will speak on "The Fundamentals of Cargo Transportation Law for the Commercial Attorney."

Government Relations
5:30 p.m.

THURSDAY, FEBRUARY 27
Association Membership
12:30 p.m.

Lawyer Assistance Program
12:30 p.m.

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

FRIDAY, FEBRUARY 28
Appellate Practice
12:30 p.m.

TUESDAY, MARCH 4
Women in the Law
12:30 p.m.

WEDNESDAY, MARCH 5
Real Property Law
12:30 p.m.

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