Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

January 2021 www.nassaubar.org Vol. 70, No. 5

Follow us on Facebook

SAVE THE DATE

LAW DAY

Advancing the Rule of Law Now

Thursday, April 29, 2021

See pg. 6 for details

NCBA DINNER GALA

Saturday, May 8, 2021

6:00 PM

See pg. 6 for details

WHAT'S INSIDE

OF NOTE

NCBA Member Benefit—I.D. Card Photo

Obtain your photo for Secure Pass Court ID cards

Only For New Applicants

Cost $10

UPCOMING PUBLICATIONS COMMITTEE MEETINGS

Thursday, February 4, 2021 at 12:45 PM

Thursday, March 4, 2021 at 12:45 PM

Nominating Committee Seeks Candidates for NCBA Board of Directors

The Nominating Committee is seeking active NCBA Members who want to serve on the Nassau County Bar Association Board of Directors. The deadline to apply is Monday, January 25, 2021.

The NCBA Board of Directors consists of the President, President-Elect, Vice-President, Treasurer, Secretary, 24 elected Directors, as well as the Dean of the Nassau Academy of Law, Chair of the Young Lawyers Committee, NCBA delegates to the NYSBA House of Delegates, and all past presidents on the Bar Association.

NCBA Officers and a class of eight Directors are elected at the Annual Meeting in May and take office June 1. Officers serve for one-year terms and Directors hold office for 3-year terms.

NCBA Members who wish to be nominated must be a Life, Regular, or Sustaining Member of the Association for at least three consecutive years, and an active member of a committee for at least two consecutive years. The Nominating Committee also considers each applicant's areas of practice, leadership positions in the Nassau County Bar Association and other organizations, and the diversity of experience and background a candidate would bring to the Bar's governing body.

The Nominating Committee consists of nine Members of the Association who previously served on the Board of Directors. Elena Karabatos, NCBA Immediate Past President "once removed," is Chair of the Committee and Immediate Past President Richard D. Collins serves as Vice-Chair.

"The Nominating Committee is seeking candidates with diverse experiences and skills who are committed to serving our Long Island community and legal profession," says Karabatos. "We need leaders who can confront the challenges faced by our Bar Association during this unprecedented time and help create opportunities for Members to recover from the pandemic."

Interviews with candidates will begin in February; the Committee will nominate one person for each Officer—other than President—and Director position and issue its report at least one month prior to the 2021 Annual Meeting and Election to be held on Tuesday, May 11.

NCBA members interested in applying to become a Director or Officer should forward a letter of intent, application, resume or curriculum vitae no later than January 24 to Nominating Committee Chair Elena Karabatos at epost@nassaubar.org or NCBA, 15th & West Streets, Mineola, NY 11501. The application can be downloaded on the Bar's homepage at www.nassaubar.org.

2020 Virtual Holiday Celebration

The COVID-19 Pandemic did not deter the NCBA from holding one of its most long-standing traditions, the Annual Holiday Celebration. While Members could not be together at Domus in person to celebrate the holidays, they were able to enjoy the Holiday Celebration from the comfort and safety of their homes via Zoom on Thursday, December 3, 2020.

As is tradition, NCBA Past Presidents joined in the virtual mixing of the Wassail Bowl, President-Elect Gregory S. Lisi told his rendition of the "True Tail of Wassail" with a creative and humorous video presentation, and NCBA Past Presidents Andy Simons and Joe Ryan lead the group with a pre-recorded, festive holiday sing-along.

The recording of the Virtual Holiday Celebration can be found online at www.nassaubar.org for you to enjoy.

Photo by Jennifer Groh

NCBA CORPORATE PARTNERS 2020-2021

Nassau County Bar Association Corporate Partners are committed to providing Members with the professional products and services they need to succeed.

NCBA Corporate Partner Spotlight

vdiscovery

Michael Wright
(212) 220-6111
michaelw@vdiscovery.com
www.vdiscovery.com

NCBA's newest Corporate Partner, vdiscovery, is a Manhattan-based provider of proprietary and in-breed solutions in computer forensics, document review, and electronic discovery, bringing deep expertise, efficient solutions, and an exceptional client experience to corporations and law firms for over 40 years.

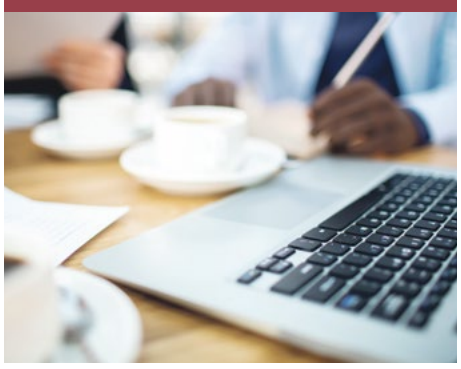
PHP PrintingHouse Press

John Farrell
(212) 624-9985
jfarrell@phpny.com
www.phpny.com

Since 1970, PHP has worked diligently to be the industry's leading appellate services provider delivering innovative solutions that address the needs of clients as well as the appellate industry at large.

PHP is a proud corporate partner of WE CARE, the nationally recognized fund of the Nassau Bar Foundation, the charitable arm of the Nassau County Bar Association.

FOCUS:
LABOR LAW



Paying for Convenience: Pitfalls for Employers in On-Call Scheduling

Debra L. Wabnik and Amanda B. Slutsky

After months in quarantine, businesses in New York State began opening and bringing employees back to their worksites. However, with restrictions on the number of occupants in a location and fluctuating operations, employers are often faced with difficulties in scheduling staffing. In these uncertain times, a business might not know its needs in advance, but must be prepared for an influx of customers at any time. For example, a restaurant owner could expect a Monday dinner service to be relatively light, so a small staff is scheduled. Unexpectedly, there is a rush of customers and the owner does not have enough staff onsite or non-scheduled employees available on their day off. One method employers use in these situations to keep business expenses low but still meet customer needs is to schedule employees as "on-call."

There are various ways an employer can schedule an employee as on-call. An employer may maintain an on-call policy, whereby the employee is required to remain at the worksite and work when requested, but can otherwise use the time in any manner (*i.e.,* sleeping, watching movies). Alternatively, an employer could require the employee to stay at home during the on-call shift and only come to work if called. Additionally, an employer can allow the employee to do whatever the employee wants at any location during the on-call shift. As another option, an employer can schedule an employee and request the employee contact the employer prior to the shift starting to see if he or she is needed.

At first glance, scheduling an employee as on-call seems to be a simple method to give the employer the flexibility it needs in these unprecedented times. But in doing so, an employer can open itself up to liability under the New York Labor Law[1] and the Fair Labor Standards Act,[2] not only for on-call pay, but also for overtime pay, attorney's fees, and liquidated damages.

Under both statutes, employers must pay employees who are on-call and called into work for the scheduled shift. However, when an on-call employee is not asked to actually work, or is only asked to work for a portion of the on-call time, caution must be exercised. Generally, if the employee is not able to use on-call time as the employee pleases, the employee is considered "engaged to wait," and on-call time is considered compensable time.[3] If the employee is engaged to wait and works more than forty hours that week, it is critical the employer pay the overtime rate to avoid liability.

A definitive rule to determine whether an employee is engaged to wait has not been established.[4] Courts urge against it, and often let a jury decide whether an on-call shift was compensable, or whether the employee had too much freedom to be considered working and was therefore merely "waiting to be engaged," which is not compensable. This involves engaging in a heavily fact-dependent analysis to determine if the employee was "engaged to wait."[5] For example, in determining that an employee who used on-call time to play cards and partake in other activities was engaged to wait, the United States Supreme Court noted that "[r]efraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity."[6] In another case, the court found the plaintiff was waiting to be engaged for hours when the plaintiff was free to leave the worksite, use the time for "personal activities," and did not have to work until told to do so.[7]

The United States Supreme Court explained the impossibility of a rigid rule, stating that the required inquiry:

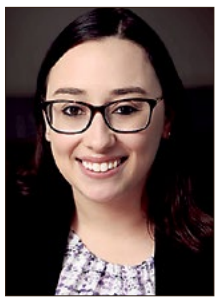
> …involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself. [8]

Simply put, if an employee is waiting to receive work or be told what to do, and can go where the employee pleases, the employee is likely waiting to be engaged, and need not be compensated. On the other hand, if the employee is limited in location and/or activity, the employee likely must be paid. Other considerations include the terms of any company policy or employment contract, the frequency with which the employee is contacted, the time the employee is given to respond, and discipline imposed for the failure to respond.[9]

Because each case is different, an employer must be careful when scheduling an employee as on-call. The employer should establish an explicit and consistent policy that outlines an employee's rights while on-call, the employer's expectations, and the location of the on-call shift.[10] With this in mind, scheduling employees as on-call could be the solution struggling employers need to maintain their bottom-line, but knowing they have staff available if necessary.

1. 12 N.Y.C.R.R. § 142-2.1.
2. 29 C.F.R. §§ 785.15, 785.16.
3. 29 CFR § 785.15; *O'Neil v. Mermaid Touring, Inc.*, 968 F. Supp. 2d 572, 581 (S.D.N.Y. 2013).
4. *O'Neil*, 968 F. Supp. 2d at 581.
5. *Id.*
6. *Armour & Co. v. Wantock* 323 U.S. 126, 133 (1944)
7. *Calderon v. Mullarkey Realty, LLC*, 2018 U.S. Dist. LEXIS 97224 *54-55 (E.D.N.Y. June 10, 2018).
8. *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944).
9. *See id.*; *Moon v. Kwon*, 248 F. Supp. 2d 201, 229-30 (S.D.N.Y. 2002).
10. *O'Neil*, 968 F. Supp. 2d at 581.

Debra L. Wabnik is a partner at Stagg Wabnik Law Group LLP with extensive experience in general litigation, labor and employment law, and banking litigation.



Amanda B. Slutsky is an associate at Stagg Wabnik Law Group LLP and practices labor and employment law.

President's Column

FROM THE PRESIDENT

Dorian R. Glover

Let us open 2021 with a fresh start. This New Year is unlike any other, where our Bar has the opportunity to flourish! Chief Judge Janet DiFiore said, "At this unprecedented moment in our state and nation's history, we all need to do what we can to support one another and ensure that we will not only meet this challenge but emerge from it stronger and more united than ever before."

One challenge that we will soon face is the surge in legal matters. Remember when we were faced with the question of how to address the challenges of a legal profession which generally requires in-person contact with all involved parties; congregating in TAP parts with other attorneys awaiting courtroom assignments; real estate closings in conference rooms; conducting depositions to observe body language to test the veracity of one's statements; or trials? The answer is we not only faced the challenges, but we also mastered technology so that our function would have a seamless transition.

When Hon. Norman St. George, Nassau County Administrative Judge, invited our COVID-19 Task Force to the Supreme Court on October 15, 2020, we witnessed the court's preparation in compliance with Phase 4.1 of Return to In-Person Operations, which consisted of protective safety measures and protocols with courtroom layout changes; clear partitions (erected on two sides of the judge's bench); and the relocation of juror seating to courtroom rows where spectators previously sat.

In addition, we learned the witnesses will testify from the jury box and the tables (where attorneys sit with their clients) have been rotated in the courtroom to provide for more distancing. Attorneys will only deliver remarks from a podium. Spectators will be seated in another courtroom and will be able to view the proceedings with state-of-the-art technology. At our year-end call last month, Justice St. George shared that as soon as we receive the "green light, (to return to Phase 4.1), we are ready!"

We will also succeed with the challenge of the upcoming surge in legal matters. In my capacity as NCBA President, I have received the call to support the courts with a new alternative dispute resolution program. The goal is to handle 50 cases per month in conjunction with other ADR/mediation providers. As soon as the Bar receives the green light, we will be ready!

Our mission remains unchanged: to deliver competent legal services to all without regard to their ability to pay; and to protect and improve our system of justice. Throughout this year, you can enjoy a fresh start with our free CLE programs; showcase your expertise by writing an article for the Nassau Lawyer; and grow your business and referrals through our Lawyer Referral Service Program.

Allow me to give special mention to the Chairs of our 50+ committees who provide learning opportunities as well as keep members engaged; WE CARE Advisory Board, Chaired by Mike Masri and Hon. Jeffrey A. Goodstein, who are excelling in the tradition of making charitable financial contributions to community organizations in need; our Lawyer Assistance Program (LAP), directed by Beth Eckhardt, PhD, and the Lawyer Assistance Committee chaired by Jacqueline A. Cara, who offer a 24-hour confidential helpline that is available to lawyers, judges, and law students in need of supportive counseling services for mental health and addiction, free of charge and always confidential; Nassau Academy of Law Dean Anthony Michael Sabino, elevating the Bar with informative and instructive continuing legal education programs; and our staff, led by Executive Director Elizabeth Post, who continue to demonstrate their commitment to Members and the overall success of the Bar Association.

Please note that our January Board of Directors Meeting will be special as we will continue the tradition of meeting jointly with the Suffolk County Bar Association. Invited guests include Hon. Norman St. George, Administrative Judge, Nassau County; Hon. Andrew A. Crecca, Administrative Judge Suffolk County; and Scott Karson, New York State Bar Association President.

As we host the meeting remotely, I also look forward to welcoming Hon. Derrick J. Robinson, Suffolk County Bar Association President, and his Board of Directors.

Looking forward to our fresh start in 2021!

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

Nassau Lawyer

The Official Publication
of the Nassau County Bar Association
15th & West Streets, Mineola, N.Y. 11501
Phone (516)747-4070 • Fax (516)747-4147
www.nassaubar.org
E-mail: info@nassaubar.org

Published by
Long Island Business News
(631)737-1700; Fax: (631)737-1890

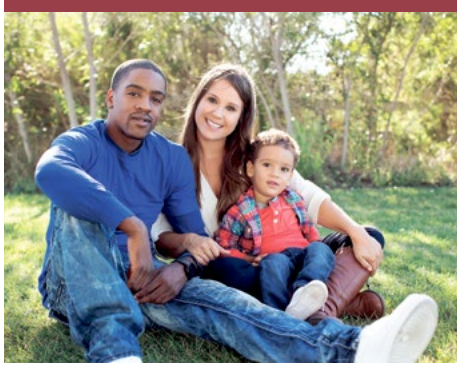
Publisher Joe Dowd
Graphic Artist Wendy Martin

Nassau Lawyer (USPS No. 007-505) is published monthly, except combined issue of July and August, by Long Island Commercial Review, 2150 Smithtown Ave., Suite 7, Ronkonkoma, NY 11779-7348, under the auspices of the Nassau County Bar Association. Periodicals postage paid at Mineola, NY 11501 and at additional entries.

Postmaster: Send address changes to the Nassau County Bar Association, 15th and West Streets, Mineola, NY 11501.

FOCUS:
FAMILY LAW

Cultural Competence in the Family Court



Hon. Linda K. Mejias

> If knowledge is the better part of judgment, then gaps in knowledge, whether legal or social, can lead to gaps in judgment. And those gaps in judgment, however small, can have profound effects on the one who is being judged.[1]

We have all heard that justice is blind, and certainly we are familiar with Lady Justice—the personification of the virtue of justice. Lady Justice originated as Justicia; a Roman goddess introduced by Emperor Augustus around 13 BC. She stands tall in her draping robes—in one hand she holds the scales by which she measures the weight of the evidence, and in the other she wields a sword demonstrating the authority of the court.

But Lady Justice was not always blind. It is only since the mid-16th century that she has, in many though not all depictions, worn a blindfold signifying her impartiality. She was to be blind to wealth, power, or other status. It is noteworthy that race, gender, religion, and disability were not included as characteristics to be included in the application of impartiality. The addition of the blindfold to Lady Justice makes evident that the application of fair and impartial justice is not static. but rather ever evolving, striving for true justice.

The term "blind justice" must now, more than ever, be carefully qualified. To what degree should it be blind and to what specifically and how so. Justice must be blind to characteristics which would give one party an unfair advantage over the other, but it cannot be blind to all characteristics.

Cultural Competence in a Multicultural Community

Today, the idea that judges ought not consider nor favor individuals based upon race, socioeconomic status, gender, sexual identity, or disability is considered the foundation for the fair administration of justice for all, but as a sitting Family Court Judge, I am challenged with the idea that I must be totally blind to characteristics and circumstances of the litigants I see every day, especially when recognizing and acknowledging such characteristics and circumstances inform me in useful ways which would indeed result in the most just outcome for all parties and subject children. What I am describing is the practice of cultural competence and humility which inform our perception of access to justice and the fair and just application of the law.

The first step to becoming culturally competent is understanding what culture is and its impact on the individual's daily life. Culture is the "set of distinctive spiritual, material, intellectual and emotional features of society or a social group and…encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs."[2]

Culture vastly impacts how a person defines justice, conflict, and disorder. It plays a large role in defining how the person determines when it is appropriate to involve third parties, including the state and/or court, in resolving problems and conflicts. Culture also impacts how a person describes events or incidents, and how they fashion responses or solutions to problems and conflicts. It is, however, when differing cultures intersect within the justice system, that misunderstandings and missed opportunities for creative problem-solving can present themselves, unless of course judges are able to identify, understand, and consider the litigants culture. Simply put, we, as judges, cannot continue to be blind to culture and to continue to be so deepens the already notable and apparent inequities in our current legal system.

Certainly, most of us have heard the terms cultural competence and cultural humility, as well as implicit bias, but perhaps you are not clear what that all means.

"Cultural competence means [we have] been educated about other cultures, humility is how we should be practicing that competence in the field." Sarah Elizabeth, social worker and Blogger. Cultural competency is the ability to operate effectively across different cultures. It is a process that requires an individual to question fundamental personal and professional assumptions before he or she can acquire the skills to assess the differences in terms of practical consequences. "For legal professionals, cultural competency has been defined more specifically as 'the ability to adapt, work and manage successfully in new and unfamiliar cultural settings.'"[3]

Cultural humility, on the other hand, is a multidimensional practice, which requires a willingness to put aside what you know, or what you *think* you know, about a person or a group, based upon known or personally held generalizations about their culture, and further requires an openness to understanding and accepting what the person or group itself has determined to be their "personal culture."[4]

Cultural Competence in Practice

So, how can the judiciary put cultural competence into practice in the family court to ensure that the law is justly applied to all litigants while ensuring the best interests of children. I will give you a small example.

A few years back, in a custody proceeding before me, a mother (non-English spelling, and born and raised in a Latin American country), and a father (a white man born in the United States) were embroiled in a difficult custody dispute over an infant born out of a weekend affair. Both parties were represented by counsel (both white American counsel), and the subject child was also represented by counsel (also white American).

The infant child was living with the mother and the father sought sole custody of the child based upon several reasons including, but not limited to, his perceived deficiencies in the mother's child-rearing practices, e.g., that the mother gives the child chamomile tea and administers other herbal remedies to the child. It was not disputed that the child had been seen by a pediatrician regularly for well visits and did not present with any medical or health issues other than normal issues such as gas. The Attorney for the Child was deeply concerned and even went so far as to characterize the mother's actions as abuse.

This is where the opportunity to practice cultural competence comes in. After making a searching inquiry surrounding the Father's allegations and AFC's concerns, I took a deep breath, and proceeded to explain that there appeared to be possible cultural differences present here. I shared with counsel and the parties that I was raised in a Latino household where it was a common practice to give infants and children herbal remedies before resorting to medications. I went on to share with counsel and the parties that I myself gave such herbal remedies to my own child. Immediately the looks of concern washed away from everyone's faces, and I could see that the mother felt understood and seen.

I felt a sense of hope to see that the father and the attorneys seemed open to learning about and understanding the mother's culture. What I have just described is a perfect example of cultural humility in practice. Taking the time to explain this cultural difference gave the parties and counsel the ability to get past non-issues and work towards a more just outcome for the parties and certainly for the child.

Cultural Competence as a Prerequisite for Justice

Later that day when I thought about this interaction, I concluded that before a judge can identify and explain a cultural difference, she must have the capacity and training to be able identify potential cultural issues. The just should be trained to make the proper inquiry to flesh out the cultural differences which may affect the outcome of a matter or the application of the law. Just as we are trained to identify legal issues in law school, as members of the judiciary we must be able to identify instances when cultural differences may bear on the cases at before us. Taking time to understand and make inquiry of the parties will give us the complete picture so that we can make decisions based upon the totality of circumstances.

I have found that the best application of the law and the best outcomes come when we take the time to take a step back and take the litigant as they are—taking into consideration where they come from and what their life experience has been.

> Cultural competence means [we have] been educated about other cultures."

To be clear, being culturally competent should not be confused with being culturally biased, which can either unfairly disfavor or favor a group, which would clearly not produce a just outcome. Being culturally competent and putting cultural humility into practice does not mean that a judge will favor or disfavor a group, but rather that it means that the judge ought to take a holistic approach to the administration of justice in family court.

A culturally competent bench can be achieved with education and training, however, the best and most effective step towards creating a more culturally competent bench is to actively pursue diversity on the bench so that it reflects the community it serves. Until appropriate and sufficient diversity is achieved on the bench, bias training must be mandatory for all judges, court staff, and administration. Indeed, among the recommendations presented by Secretary Jeh Johnson in the Report from the Special Advisor on Equal Justice in the New York State Courts, is that the court system develop and mandate comprehensive bias training for judges and non-judicial employees that focuses on implicit bias, racial bias, and cultural sensitivity.[5]

In order to achieve a fair and just legal system we must take off our blindfolds, put in our contact lenses of cultural humility, and take the time to really see, listen and understand.

1. Monica Driggers, J.D., *The Courtroom in a Diverse Society: Understanding the Need for Cultural Competence*, Wellesley Centers for Women (Research & Action Fall/Winter 2009), available at https://bit.ly/37YpvuP.
2. Aastha Madaan, *Cultural Competency and the Practice of Law in the 21st Century*, ABA (March 1, 2017),

See CULTURAL COMPETENCE, Page 20

Hon. Linda K. Mejias has been a Judge in Nassau County Family Court since 2017. She also served on the NCBA Board of Directors.

FOCUS:
LABOR LAW

It's Not Just a Form: The Importance of Properly Completing Form I-9

Rachel Baskin

Since the Immigration Reform and Control Act (IRCA) was passed in 1986,[1] all US Employers are obligated to confirm the employment authorization of all employees. Not only must employers confirm the employment authorization of employees, but in some circumstances, they are required to maintain such records even after the employee has left the company. In light of the economic downturn due to the COVID-19 pandemic, an uptick in worksite inspections makes compliance with Form I-9 requirements a priority for employers and legal practitioners alike.

Employer's Obligation

Specifically, the law requires employers to provide the most updated Form I-9 for new employees to complete within three days of the employee's hire. Employers have the option to complete the paper Form I-9 and retain records accordingly, or to use the e-Verify tool created by United States Citizenship and Immigration Services (USCIS).[2] If relying on the paper form, the most updated form can be found on the USCIS's website.[3] USCIS frequently changes forms with little to no notice, so it is incumbent upon employers who are paper documenting to ensure they are using the latest Form I-9.

Similarly, it is the employer's obligation to ensure that the Form I-9 is properly executed. While it may seem as though it is simply providing routine information and checking boxes, there are various pitfalls about which employers need to be aware to avoid employment discrimination claims[4] from an employee and government penalties in the event of an audit.

Pitfalls to Avoid

First, in order to avoid employment discrimination claims, employers must become familiar with the "List of Acceptable Documents" on the I-9 Form.[5] Employers can provide this list to employees to ensure that employees present acceptable documents, all of which must be original documents; an employer cannot accept copies. USCIS has provided guidance for employers reviewing original documents to confirm their authenticity.

Specifically, USCIS advises when reviewing documents, "if they reasonably appear to be genuine and to relate to the person presenting them, you must accept them. To do otherwise could be an unfair immigration-related employment practice. If the document(s) do not reasonably appear to be genuine or to relate to the person presenting them, you must not accept them."[6]

That said, if an employer has knowledge that the documents presented do not demonstrate an employee's work authorization, the employer cannot hire such an individual. Federal regulations define knowledge not just as actual knowledge but also constructive knowledge, but warn that knowledge cannot be inferred from a person's appearance or accent.[7]

While at first blush, it may seem prudent to "over document" in order to shield an employer from an audit and financial penalties, it is important to understand that the Form I-9 requirements are designed to protect both the employer and the employee.

In fact, under no circumstances can an employer require an employee to present any specific documents to show proof of employment authorization. Requiring that an employee present specific documents can result in a claim for employment discrimination where an employee presents acceptable documents to show employment authorization, but it is rejected because it is not what the employer requested.

Specifically, the Department of Justice, Immigrant and Employee Rights (IER) Section reviews potential claims based on discrimination related to citizenship status discrimination, national origin discrimination, unfair documentary practices; and retaliation/intimidation.[8] Notably, IER is available to answer questions for both employers and employees about employment practices, and their hotlines are available on their homepage.[9] Similarly, IER provides technical guidance on the anti-

See FORM I-9, Page 20

Rachel Baskin is a founding member of Livits Ayass Baskin PLLC, located in Rockville Centre. Rachel is the former NY Chapter Chair of the American Immigration Lawyers Association (AILA) and practices immigration law exclusively, with a focus on business and family immigration matters.

FOCUS:
LABOR LAW

Second Circuit Provides Practitioners with Clarity When Settling Unpaid Wage Cases

Matthew Weinick

In 2015, the Washington Post observed that unpaid wage and hours cases brought in federal courts under the Fair Labor Standards Act ("FLSA") were growing faster than any other category of cases.[1] So, it was not surprising that on August 7, 2015, New York's employment law bar felt shockwaves after the Second Circuit decided *Cheeks v. Freeport Pancake House, Inc.*[2] *Cheeks* set the requirement that FLSA settlements be approved by a court or the Department of Labor, mandating a determination of the fairness of the settlement, including the reasonableness of attorneys' fees.

Whether it was simply human nature to react negatively to change, or whether *Cheeks* actually imposed unfair requirements or undue hardships on litigants, it cannot be debated that *Cheeks* left unanswered questions, and employment attorneys uncertain about whether their FLSA settlements would pass judicial scrutiny. Among other things, plaintiffs' lawyers were particularly concerned about the court's role in reviewing attorneys' fees, and defense counsel were concerned that agreements could not be confidential and had to be filed on a public docket.

But, two debated questions were recently decided by the Second Circuit: (1) can litigants avoid *Cheeks* by using rules of procedure other than a stipulated dismissal, such as an offer of judgment, and (2) what is the court's role in determining the fairness of attorneys' fees in FLSA settlements. The answers and their implications are discussed below.

History of FLSA Settlements and *Cheeks*

Generally, the FLSA establishes rules for minimum wage and overtime pay for workers. The FLSA allows workers to sue employers for FLSA violations. But, unlike most lawsuits where parties can freely and privately settle the case, seeds of uncertainty concerning whether parties could privately settle FLSA claims were sown in 1945.

In *Brooklyn Savings Bank v. O'Neil*, an employee was not paid overtime wages, but the employer later paid the owed wages in exchange for a release of FLSA claims.[3] The employee nonetheless sued the employer for liquidated damages available under the FLSA. The Supreme Court ruled that the employee could not waive his entitlement to the liquidated damages because no genuine dispute existed as to whether the employee was entitled to liquidated damages. The question of whether parties could privately settle FLSA claims when such settlements resolved the genuine dispute between the parties, however, remained unaddressed.

The next year, the Supreme Court addressed that question, in part, and again injected uncertainty into FLSA settlements when it ruled that private settlements cannot be enforced when the dispute relates to whether the employer is covered by the FLSA.[4] The support for this rule stems from the proposition that public policy prohibits employees from bargaining away rights provided to them by Congress. The Court therefore determined "neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage."[5]

Fast forward to 2015, the *Cheeks* Court was presented with a question about FLSA settlements not before answered by the Supreme Court or a Circuit Court. The issue in *Cheeks* was whether parties to an FLSA lawsuit can, pursuant to FED. R. CIV. P. 41(a)(1)(A)(ii), privately settle the case without approval by a district court or the Department of Labor ("DOL").[6]

In *Cheeks*, after engaging in discovery, the parties agreed on a private settlement and, pursuant to Rule 41(a)(1)(A)(ii), filed a joint stipulation and order of dismissal with prejudice. The district court, finding FLSA actions to be an exception to Rule 41, declined to accept the stipulation as submitted and directed the parties to "file a copy of the settlement agreement on the public docket," "show cause why the proposed settlement reflects a reasonable compromise of disputed issues rather than a mere waiver of statutory rights brought about by an employer's overreaching," and "show cause . . . explaining why the proposed settlement is fair and reasonable." The parties instead asked the court to certify the question of whether FLSA actions are in fact an exception to Rule 41's general rule that allows parties to dismiss an action by filing a stipulation of dismissal. The district court ordered a stay and certified the question for interlocutory appeal.

The Court of Appeals agreed with the district court that absent judicial or DOL approval, employees cannot settle FLSA claims via a private stipulated dismissal with prejudice.[7] The court reasoned that because of the FLSA's unique policy considerations such as ensuring that workers receive fair pay and are adequately compensated for working long hours, the FLSA is a uniquely protective statute and thus within Rule 41's "applicable federal statute" exception. The court explained that the need for such heightened employee protections remains even when the employees are represented by counsel.

Litigants Can Avoid *Cheeks* by Using Offer of Judgment

Less than five years after *Cheeks*, the Second Circuit decided *Mei Xing Yu ("Mei") v. Hasaki Restaurant, Inc.*.[8] In *Mei*, the Second Circuit answered one of the questions debated since *Cheeks*—whether litigants can avoid *Cheeks* by using some other rule of procedure (i.e., a procedure other than a stipulated dismissal). The Second Circuit answered that question affirmatively.

Mei filed an FLSA claim against his employer. Early in the litigation, the employer made a Rule 68 offer of judgment, which Mei accepted. The district court, however, ordered the parties to submit their settlement agreement to the court for a fairness review and approval per *Cheeks*. Both parties filed an interlocutory appeal, disputing the propriety of the district court's request.

The Second Circuit reversed, holding that judicial approval is not required for Rule 68(a) offers of judgment which settle FLSA claims.[9] The Court of Appeals explained that "[t]he plain purpose of Rule 68 is to encourage settlement and avoid litigation," the plain language of the Rule "leaves no discretion in the district court to do anything but enter judgment once an offer has been accepted" because of the Rule's mandatory and absolute command that the clerk *must* enter judgment, and the Act itself contains no language requiring judicial approval before an FLSA claim can be settled or otherwise dismissed.

The Second Circuit distinguished between private settlements and Rule 68(a) judgments, noting the latter are "publicly-filed, stipulated judgments between parties to an action brought in a court of competent jurisdiction after litigation has been commenced pursuant to § 216(b) of the FLSA." The Court further emphasized that no precedents support requiring judicial review of stipulated judgments. Absent such support, the Second Circuit was not ready to agree with the district court and "make th[e] interpretive leap in the context of Rule 68(a) offers of judgment.

The Court of Appeals acknowledged the similarities between *Cheeks* and *Mei*, but declined to extend *Cheeks*' holding to offers of judgment, affirming that the decision in *Cheeks* is limited to only Rule 41(a)(1)(A)(ii) dismissals with prejudice.[10] The Court further noted that the Supreme Court has recently underscored the importance of giving the FLSA nothing more than a "fair reading." In sum, *Cheeks* does not bar parties from settling an FLSA case via a Rule 68 offer of judgment.

District Court's Role in Reviewing Attorneys' Fees Is Limited

Two months after *Mei*, the Second Circuit decided another FLSA-related issue in *Fisher v. SD Protection Inc.*,[11] concerning the limits on district courts' powers when reviewing attorneys' fees for *Cheeks* fairness hearings. In *Fisher*, plaintiff and his former employer settled an FLSA action with a stipulated dismissal with prejudice, pursuant to FED. R. CIV. P. 41, for $25,000. Under the settlement agreement, $23,000 would be paid to Fisher's attorneys for fees and costs, and $2,000 would be paid to Fisher himself. In other words, the attorneys' fees would consume the bulk of the settlement proceeds.

Per *Cheeks*, the district court reviewed the settlement agreement for fairness, including the reasonableness of attorneys' fees and costs.[12] Finding the allotted attorneys' fees to be objectionable, the district court *sua sponte* modified the distribution of the settlement funds as between plaintiff and his attorneys, awarding Fisher $15,055 (i.e., 60.22% of the settlement amount) and his attorneys only $8,250 in fees and $1,695 in costs (i.e., 33% of the settlement amount). The district court held, among other things, that as a matter of policy, the maximum fee percentage that plaintiffs' attorneys can earn from an FLSA case settlement is 33% of the total settlement amount.

On appeal, the Second Circuit rejected the district court's imposition of a proportionality limit on recoverable attorneys' fees and held that "the district court abused its discretion in rewriting the settlement agreement by modifying the allotment of the settlement funds."[13] The Court agreed that whenever an FLSA settlement agreement includes an allocation of attorneys' fees and costs, a district court is required to review the reasonableness of the allocation, but when a district court finds a proposed terms unreasonable, "it cannot simply rewrite the agreement."[14] The only two options available for the district court are to either reject the settlement agreement or allow the parties to revise the agreement. In its discretion, the district court may suggest to the parties an amount the court would find reasonable under the circumstances,

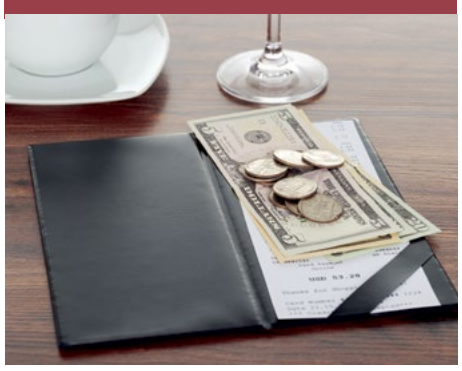
See UNPAID WAGE, Page 19

Matthew Weinick, partner with Famighetti & Weinick, PLLC in Melville, represents individuals in employment litigation matters and constitutional torts. He is Chair of the NCBA Labor and Employment Law Committee and can be reached at mbw@fwlaw-pllc.com or at http://liny-employmentlaw.com.

Ashkhen Oganesyan is a Hofstra Law student and law clerk with Famighetti & Weinick, PLLC and assisted in drafting this article.

FOCUS:
LABOR LAW

End of the Tip Credit in the Miscellaneous Industries



Michael A. Berger

During the height of the COVID-19 pandemic, Governor Andrew Cuomo seemingly issued new Executive Orders weekly placing restrictions on businesses. Between all of the Executive Orders, mandating which businesses were permitted to open and the maximum capacity at which they could operate, one of the significant changes affecting New York State businesses that has been overlooked is the phasing out of the tip credit for employers covered by the Minimum Wage Order for Miscellaneous Industries and Occupations (the "Miscellaneous Wage Order").

As of December 31, 2020, in addition to the ever-changing conditions under which businesses must operate, businesses subject to the Miscellaneous Wage Order are no longer permitted to take a tip credit against their employees' wages. This change will have implications for many employers, including but not limited to, those in the nail salon, hairdresser, car wash, and valet parking industries.[1] As discussed below, this change will not apply to restaurants, bars, hotels, or any businesses covered by the Hospitality Industry Wage Order ("Hospitality Wage Order").[2]

Tip Credit for Miscellaneous Industries

New York is often considered one of the most progressive jurisdictions in the country when it comes to protections for workers. While the fight for a $15 federal minimum wage rages across the country, New York has already implemented annual wage increases that will bring workers in every region of New York State to a $15 per hour minimum wage.

While all employers must pay their workers at least the New York State minimum wage, until recently, employers governed by the Miscellaneous Wage Order were subject to complicated and confusing regulations that permitted them to take a tip credit against the required State minimum wage, provided eligible employers met certain requirements.[3] Pursuant to section 142-2.5(b) of the New York Codes, Rules and Regulations ("N.Y.C.R.R."), tips or gratuities "may be considered a part of the minimum wage" so long as:

(i) the occupation was one in which tips "have customarily and usually constituted a part of the employee's remuneration";

(ii) there is substantial evidence that the employee's tips at least equal or exceed the allowance claimed by the employer; and

(iii) "the allowance claimed by the employer is recorded on a weekly basis as a separate item in the wage record."[4]

If an employer satisfied each of the above-referenced conditions and the employee's weekly average tips brought his total pay above minimum wage, the employer was permitted to take an allowance for tips.[5] The amount of the allowance varied based on the employer's number of employees and geographic location.[6] For example, until June 29, 2020, an employer in New York City with ten or fewer employees was permitted to take a tip credit of $2.25 "for an employee whose weekly average of tips received is between such Low tip amount [$2.25] and the High tip amount [$3.65]" and a tip credit of $3.65 "for an employee whose weekly average of tips received equals or exceeds such High tip amount [$3.65]."[7] In contrast, if the employer was located in Nassau County or Suffolk County, the tip credits available ranged from $1.95 on the low end to $3.20 on the high end.[8] In upstate counties, the tip credits ranged from $1.75 to $2.90.[9]

Elimination of Tip Credit in Miscellaneous Industries

At the end of 2017, Governor Cuomo directed the New York State Labor Commission to determine the impact of tip credits on employers and workers across the State and recommend a solution.[10] After holding hearings and receiving testimony from business owners, business groups, and workers, the Labor Commission recommended the elimination of the tip credit in the industries covered by the Miscellaneous Wage Order.[11] In response to this recommendation, on December 31, 2019, the Commissioner of Labor, Roberta Reardon, adopted the recommendation and ordered, pursuant to New York Labor Law § 659(2), that section 142-2.21 of the N.Y.C.R.R. be amended as follows:

> Notwithstanding any other provision contained in this part, tips or gratuities, shall not be considered a part of the minimum wage on or after December 31, 2020, provided, however, that no employer shall claim a tip allowance in excess of fifty percent of the applicable allowances listed in this part and rounded to the nearest five cents on or after June 30, 2020.[12]

In doing so, the Department of Labor phased in the elimination of the tip credit over the span of one year, purportedly to provide businesses adequate time to adjust.[13] Employers were permitted to take the full tip credit from January 1, 2020 to June 29, 2020 and 50% tip credit from June 30, 2020 to December 30, 2020.[14] As a result, Long Island employers in the miscellaneous industries were no longer permitted to take a tip credit of $3.20, but rather 50% of that value, $1.60.[15]

As of December 31, 2020, the tip credit was completely eliminated and all employers subject to the Miscellaneous Wage Order were no longer permitted to consider tips and gratuities as part of their employee's minimum wage. Instead, employers are required to pay their employees a cash wage of the full New York State minimum wage, regardless of how much their employees receive in tips.[16]

In reaching the decision to recommend the elimination of the tip credit, the New York State Department of Labor cited various concerns including "widespread confusion about whether or not [workers] are entitled to earn minimum wage," "rampant wage theft in particular industries," and a concern that tip credits are inappropriate in certain industries.[17] The Department of Labor's recommendation will likely resolve some of these concerns. The elimination of a sliding scale for allowances depending on the amount of tips received and the employer's number of employees will alleviate confusion among workers as to their wages and may reduce inadvertent wage theft resulting from the complex calculation of allowances.

Hospitality Industry

It is important to note the Miscellaneous Wage Order and its elimination of the tip credit in miscellaneous industries will not affect employees and employers in the hospitality industry. Restaurants and hotels can still take the tip credit from their employees' wages, provided they meet the requirements set forth in the Hospitality Wage Order.[18]

While amendments to the tip credit in the Hospitality Wage Order may be forthcoming, restaurants and hotels need not eliminate tip credits in calculating employees' cash wage for the time being. However, with the start of the new year, employers must nevertheless be aware of the new minimum wage on Long Island and the new cash wage, tip credit and tip threshold beginning December 31, 2020.[19]

1. *See Governor Cuomo Announces End of Subminimum Wage Across Miscellaneous Industries Statewide*, Governor.NY.gov (Dec. 31, 2019), https://on.ny.gov/3qH6423. The miscellaneous industries include all industries other than hospitality, farmworkers,

See TIP CREDIT, Page 17

Michael A. Berger is an associate in the Employment and Labor Practice Group at Forchelli Deegan Terrana LLP.

In Brief

Marian C. Rice

In December, **Ronald Fatoullah** of Ronald Fatoullah & Associates presented "Strategic Use of Medicaid Trusts" for the National Business Institute. In collaboration with Concierge Health and 305 West End Assisted Living in New York City, Ron also presented "Managing Family Dynamics in The Estate Planning Process."

Desiree M. Gargano, an Associate in the Employment Law and Litigation Practice Groups at Certilman Balin, was named to the 2021 Best Lawyers, "Ones to Watch."

Russell I. Marnell of the Marnell Law Group has been named to the New York Metro Super Lawyers list for the sixth year in a row in the practice area of Family Law. Marnell is also AV-rated by Martindale Hubbell and listed in its Bar Register of Pre-Eminent Lawyers. In addition, he has earned an Avvo rating of 10 (out of 10).

NCBA Member, **Bill Corbett** and Ann, his wife, were among four honorees recognized at the 7th Annual Hearts for Russ Awards Virtual Program for their outstanding efforts to encourage live and deceased organ donations and tissue donations.

Jennifer B. Cona announced a re-branding and reorganization of the law firm she founded in 1998. Effective immediately, the firm formerly known as Genser Dubow Genser Cona LLP, will now be known as Cona Elder Law PLLC, making it easier to identify the practice area.

The In Brief column is compiled by Marian C. Rice, a partner at the Garden City law firm L'Abbate Balkan Colavita & Contini, LLP, where she chairs the Attorney Professional Liability Practice Group. In addition to representing attorneys for 35 years, Ms. Rice is a Past President of NCBA.

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

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

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

FOCUS:
LABOR LAW

Recruiting Diverse Public Sector Employees

Martha Krisel

General Rule and Limited Exceptions

Under New York State Civil Service Law, public sector employees are hired through competitive testing. After applying for, qualifying for, and passing a Civil Service exam, the applicant is included on an established list from which public sector employers recruit. That established list is based upon the universe of applicants who passed the exam and meet requirements that include residency. The list has a fixed date, expiring no less than one year but no more than four years after its establishment.[1]

In Nassau County, when an appointing authority[2] has a vacant position, it submits a formal request to the Nassau County Civil Service Commission (Civil Service) for the current established list. That appointing authority uses that list to "canvass," which simply means that it notifies applicants, starting with those that scored the highest, of the opportunity. An applicant that has been canvassed can decline the position under certain circumstances.[3]

When the appointing authority interviews or evaluates applicants, it is entitled to non-select (reject) two applicants for any reason at all,[4] other than an illegal reason. The appointing authority must, however, select one of the first three applicants; this is referred to as the "Rule of Three."[5] Should one, two, or all three applicants decline the position, the appointing authority continues to canvass, moving through the list from highest to lowest grade order. And, of course, available funding impacts the ability of the appointing authority to work its way—in grade order—through the established list.

Commitments to diversifying the public sector work force do not play a role in the canvass process, with limited and specific exceptions. For example, a position that includes bathing female children can be limited to the selection of a female applicant.[6] In addition, veteran status entitles applicants to extra points.[7] And, religious accommodations for test rescheduling must be granted upon request.[8] Also, applicants can be hired without competitive testing when an arm of the New York State Department of Education (ACCES-VR) certifies a disability.[9]

Prohibited Deviation from Established Lists

With the exception of the use of properly announced *bi-lingual* competitive exams, the Appellate Division cited Civil Service Law when it disallowed an appointing authority to give preference to candidates on the basis of fluency. The Second Department prohibited Suffolk County from adding a **new** qualification of fluency/proficiency in Spanish *after* certification of a list of eligibles.[10] Specifically, the Second Department reviewed a challenge to the Police Department's "determination to appoint out of turn three Spanish-speaking eligibles…on the basis of their linguistic ability."[11] In this case, Suffolk County used oral examination, subsequent to the list establishment, to identify fluent candidates. The Second Department rejected this methodology, even though it recognized the need for diversity:

> The record adequately demonstrates the need for bilingual officers to adequately service Suffolk's substantial Spanish-speaking community, as well as the fact that normal recruitment programs have so far failed to satisfy this need. Be that as it may, an attempt to impose other and further qualifications, not listed in the examination notice, after the certification of the list of eligibles is palpably improper and is not to be condoned.[12]

Similarly, the Third Department rejected appointment procedures **subsequent** to the New York State Troopers' announcement of a two-part competitive examination that assessed a 65% weight to written performance and a 35% weight to physical performance.[13] When New York State funding allowed the hiring of two sets of new troopers (50 new Troopers, and 50 new Troopers to police interstate highways), the trial court held that the established list controlled. The Third Department summarized the Troopers' strategy:

> However, instead of offering appointment to as many of those ranked highest on the eligible list as would fill this complement of Troopers, respondents proposed to appoint only 75 candidates in that fashion. In order to further an avowed goal of procuring greater representation of certain minorities and women in the State police, it was decided that the remaining 25 candidates would be obtained by separately appointing the 15 highest ranked 'ethnic minority' eligibles and the 10 highest ranked female eligibles without regard to their individual placement among all others so listed.[14]

Rejecting that strategy and affirming the trial court's direction to appoint Troopers solely on the basis of their ranking on the existing eligible list, the Appellate Division held that the New York State Superintendent can exercise the power of appointment "only through the process of competitive examination."[15] Further, even though "examination scores need not always constitute the sole basis for determining fitness and…some leeway must be accorded to the appointing authority in making final selection" the answer to the "narrow question as to whether the Superintendent may constitutionally depart from the apparent results of an examination to the extent of making appointments that allow a preference to ethnic minorities and females…is no."[16]

The Third Department relied upon the fact that "both males and females took part in the examination on an equal footing. Thus, respondents use of a sexually mixed eligible list can only signify that the position of Trooper is not one for which the work demands individuals of one sex."[17]

Importance of Pre-Application Recruitment

With the constraints of Civil Service Law identified in this article, diversity strategies must focus upon recruitment designed to attract a diverse population to apply for the examinations that ultimately form the basis of established lists.

In 2020, Governor Cuomo issued Executive Order 203,[18] which established the "Committed to a New York State Police Reform and Reinvention Collaboration." To implement Executive Order 203, New York State issued Resources and Guides for Public Officials and Citizens.[19] Focusing specifically on law enforcement recruitment, in its section entitled "Recruiting a Diverse Workforce," the lack of awareness of opportunities is identified as an impediment.

Education and outreach in advance of the closing date of the application period increases the pool of eligibles legally and consistent with Civil Service Law. Toward that end, the Commission works directly with Nassau County's Offices of Asian-American, Hispanic

See RECRUITING, Page 17

Martha Krisel is the Executive Director of the Nassau County Civil Service Commission, NCBA Past President, and COVID-19 Task Force Chair.

PROGRAM

Pre-registration is REQUIRED for all Academy programs. Go to nass
CLE material, forms, and zoom link will be sent to pre-r
All programs will be offered via ZOO

January 11, 2021
Dean's Hour: U.S. Supreme Court 2019-20 Review
Program sponsored by NCBA Corporate Partner Champion Office Suites
12:30-1:30PM
1 credit in professional practice

January 13, 2021
Dean's Hour: Understanding the New Child Parent Security Act and Second Parent Adoptions
Program sponsored by NCBA Corporate Partner Champion Office Suites
1:00-2:00PM
1 credit in professional practice
Skills credit available for newly admitted attorneys

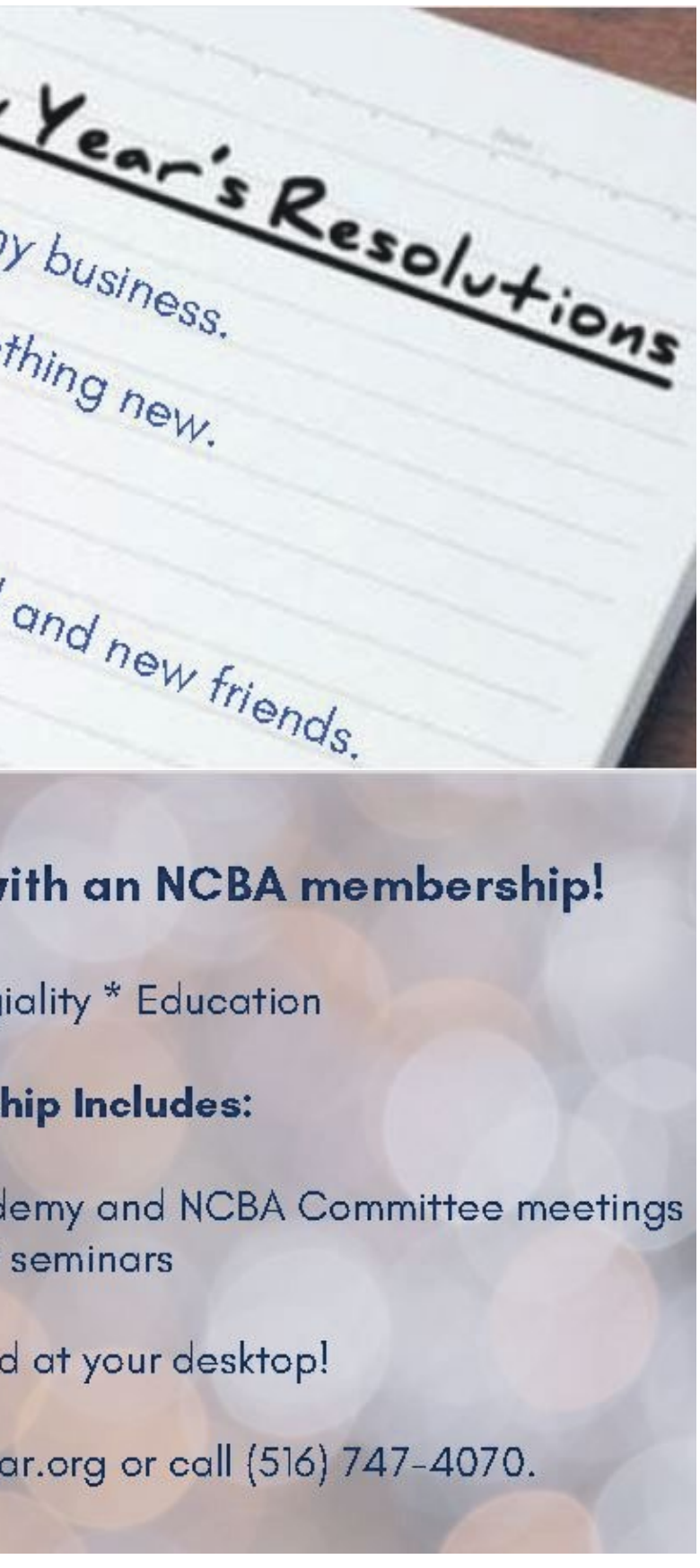
January 20, 2021
Dean's Hour: PPP Loan Is a Fake! How to Determine if a Paycheck Protection Program Loan Is Fraudulent and How to Handle a Related Criminal Investigation
Program sponsored by NCBA Corporate Partner Champion Office Suites
12:30-1:30PM
1 credit in professional practice
Skills credits are available for newly admitted attorneys

January 22, 2021
Dean's Hour: Bankruptcy and Divorce
Program sponsored by NCBA Corporate Partner Champion Office Suites and Cardinal Financial Company
12:30-1:30PM
1 credit in professional practice
Skills credits available for newly admitted attorneys

January 26, 2021
Mortgage Foreclosure Referee: Part 36 Certified Training
6:00-8:00PM
2 credits in professional practice
Program is excluded from free CLE offer.
Pricing: $100 NCBA Members; $200 Non-Members

1 CALENDAR

aubar.org and click on CALENDAR OF EVENTS to register.
egistered attendees 24 hours before program.
OM unless otherwise noted.



January 28, 2021
Dean's Hour: Signed and Sworn—A Notary Primer During the Pandemic Age
Program sponsored by NCBA Corporate Partner Champion Office Suites
12:30-1:30PM
1 credit in ethics
Program open to non-attorneys; $20 fee applies

February 3, 2021
Dean's Hour:
Spirit Which Prizes Liberty: Abraham Lincoln
Program sponsored by NCBA Corporate Partner Champion Office Suites
12:30-1:30PM
1 credit in professional practice

February 4, 2021
Recent Rules in Real Estate: An Update on Real Estate Law Trends since the Pandemic
Program sponsored by NCBA Corporate Partner Champion Office Suites
5:30-8:30PM
3 credits in professional practice
Skills credit are available for newly admitted attorneys

February 10, 2021
Dean's Hour: Running A Lean Practice In 2021
Program sponsored by NCBA Corporate Partner Champion Office Suites
12:15-1:15PM
1 credit in professional practice.
Skills credits are available for newly admitted attorneys

FOCUS: TECHNOLOGY

A Few Thoughts on Making Technology a Lawyer's Best Friend

Scott J. Limmer

In today's hectic legal climate, technology can make or break your practice. Those who have been able to adapt during the pandemic, have been those who have been able to run a virtual practice with the help of video conferencing. But there are other tools available that will empower you to run a leaner and more efficient practice. Below are some suggestions that might prove helpful.

E-signature

This may sound familiar. After a video consultation with a new client, you are told later that day that you're hired. So you pull up a standard retainer, make some edits, and email it to the client with instructions to print, sign, scan, and email back.

But what if the client doesn't have ready access to a printer? You are now left wondering how long it will take for them to retain you. As a business owner, you want the sign-up process to go as smoothly as possible. The most convenient and reliable way to have a client sign a retainer is to use an E-signature app.

An E-signature app can automate the entire process creating documents with fields that can be customized and then sent off. Clients can review the retainer agreement and sign with their mouse or by checking off a box.

E-signatures can be used on a wide array of documents. It also speeds up the process, since it takes far less time than mailing. E-signatures is also more client-friendly. Some of the most popular apps are Docusign, eSignature and Signnow.

On-Line Appointment Scheduler

All attorneys know the feeling of sitting down to begin an important project. As soon as you start to really dig in, you are interrupted by clients wanting an update on their cases. Naturally you feel obligated to take their calls. Before you know it, you never really got to the original project you wanted to address.

Perhaps the perfect solution to this situation is an online appointment scheduler. Countless attorneys' professional and personal lives have been improved by using this type of device. An attorney can use it to designate specific times during the week when they will be available to speak with clients and allow the client to schedule an appointment by using the law firm's website.

For instance, you could designate Thursdays from 1:00 pm to 6:00 pm for client updates and only allow your scheduler to make appointments during that time frame. If you set expectations with the client as soon as you are retained, they will know when you are available to speak with them and when they should schedule an appointment.

Of course, there will always be emergencies requiring you to take the client's call right then and there. But with an online appointment scheduler, you are able to exercise greater control over your schedule, as opposed to your clients setting your schedule for you.

Virtual Receptionist

Using a virtual receptionist means never having to worry about anyone calling in sick. It means you will no longer have to take those after-hours calls yourself. And it means never missing a call.

Not only do you have that security, but a virtual receptionist can also be used for tasks such as responding to clients or handling information for intake. You can set one up with a script for answering your phone and giving instructions on how to contact you, based on the information the virtual receptionist is given.

You can have it put calls through to you based on any criteria you set, or you can have it take messages that you can check at the end of the day. It all depends on an individual attorney's needs and preferences. Ruby Receptionists comes highly recommended, but other reliable services are Map Communications, Lex Reception and AnswerForce.

Google My Business

This free local marketing tool allows business owners and marketers to manage how their business is displayed. If you own a law practice, this is a must. The reality is that Google My Business is the phone book of the internet, so if you want to be found, you must have a listing.

Having a Google My Business account gives you the ability to list your business location on Google Maps and for local search results. You can also display other important information about your office, such as opening/closing times, contact details, or a link to your website.

It also gives clients the ability to leave reviews, which boosts your appeal to potential new clients. And it's a free service. Again remember, you can't be seen if you aren't on Google.

Password Manager

The world has come a long way from picking your favorite stuffed animal or your kids' initials as your passwords. Your many accounts contain sensitive information about yourself, your practice, and most importantly information pertaining to your clients. The damage that someone could cause by getting into your accounts could be troubling for you (and your malpractice carrier).

Several years ago, I decided to change every password I had to a 24-digit automatically generated code containing numbers, letters, and symbols. I did this with the help of a password manager which generated the password, filled in the website, and then saved it in its database.

You want to get a password manager that will work on all devices. All you need to do then is remember the master password for the app, as opposed to all your log-ins. Once set, it is very easy to maintain.

It can also save common online information, speeding up the information you fill out frequently, like your home or work address or credit card information. Some of the more common password managers are 1Password, Last Pass, and Keeper.

Wi-Fi Speed

Having reliable internet reception is a must wherever you are working from. Many households have multiple people on numerous devices at the same time using up all sorts of data. (I have used up to four internet connected devices at one time, while my wife and kids have done the same).

If you feel your connection is slow or your video conference app is unstable or freezing, start by checking your speed. There are many free apps to test your download and upload speeds, but the most widely used is www.speedtest.com. You should run it at various times during the day to see what kind of speeds you are getting. If the speed is not what your provider promised, then determine if the problem is with your devices or with the provider.

Mesh Wi-Fi

Like having good bandwidth, you need to be able to have access to that bandwidth from all areas of your home. You may want to be able to access hard to reach places like your basement, attic, or backyard so that you can easily move around without being concerned about dropping service.

The best purchase I made when the pandemic started was a mesh wi-fi system to give my home and backyard full coverage. This was accomplished using a base station and two modules that are plugged into outlets around the house. It is a one-time cost that makes it possible to take your device out to the backyard to do some work.

Google Suite

G Suite is a collection of enterprise-based products offered by Google such as Gmail, Drive, Docs, Sheets, and so on—to help streamline your business. Some of the features include

- The ability to send professional email from your business web address (you@yourcompany.com).
- 30GB of storage which allows you to store information on the cloud so it may be accessed by any device. Advanced administrative controls that allow you to add and remove users, add two step verification and single sign on for your employees.
- Mobile device management that allows you to keep your Law Offices data secure. You can easily locate devices, require passwords and erase data if an employee goes rogue.

The ability to use all their apps and have your business look and be run in a professional way is most definitely worth the $5.00 a month charge.

Cloud Backup

You must choose among the following options:

A) You can save all your documents and important items in a folder on your desktop that can only be accessed from that computer,

B) You have a server in your office that you can log into from the office or remotely, or

C) You can save all your documents and important items in a folder on your desktop that will be saved in the cloud and can be accessed by any device with an internet connection.

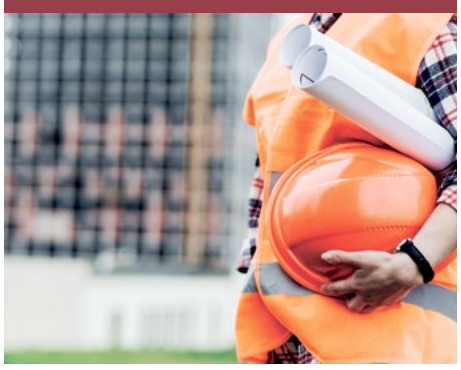
Using the cloud is a no-brainer. It not only gives you unfettered access, but it is also secure and if your device breaks, you don't lose anything, because it's all in the cloud. When you get your new device, log in, and there are your files. It also alleviates the need to maintain expensive and unsecure servers in your office. Popular cloud solutions are Google Drive, Dropbox, Apple iCloud, Box and Amazon Storage.

The legal landscape is ever changing, and the pace of that change is unpredictable. If the current pandemic has taught us anything, it is that your legal practice must adapt to new circumstances if it is to survive. New technologies offer valuable tools not only to meet these challenges but enable your office to thrive no matter what may come.

Scott J. Limmer concentrates his practice in the areas of criminal defense and college discipline defense. He is the co-host of the podcast "Reboot Your Law Practice." He is also Chair of the NCBA General, Solo, and Small Law Firm Practice Management Committee. Scott can be reached at Scott@Limmerlaw.com.

FOCUS:
LABOR LAW

A Primer on Affirmative Action for Construction Contractors



John Caravella

All businesses must avoid discriminating against members of protected classes when making employment decisions, but federal contractors, including construction contractors, must also take affirmative steps to ensure that they hire and promote members of protected classes. As discussed below, these affirmative action requirements derive from several discrete legal authorities and carry a range of undesirable sanctions for violators.

Moreover, recent changes in antidiscrimination law suggest a growing tension between affirmative action and color- and gender-blindness that may further complicate matters for construction contractors in the future. While the laws discussed herein apply to all federal contractors, provisions vary between construction and non-construction contractors. This article focuses on affirmative action as it pertains to construction contractors in particular.

There are three primary sources of affirmative action requirements: Executive Order 11246; the Rehabilitation Act of 1973; and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (the "VEVRAA").

Executive Order 11246

Executive Order 11246, as amended, applies to equal opportunity regardless of race, color, religion, sex, sexual orientation, gender identity, or national origin and requires federal contractors to take affirmative action to ensure that applicants are employed, and employees are treated during employment without regard to the foregoing classes.[1] The Rehabilitation Act of 1973 requires federal contractors to take affirmative action to employ and advance in employment qualified individuals with disabilities.[2] The VEVRAA requires federal contractors to take affirmative action to employ and advance in employment qualified covered veterans, including disabled veterans and recently separated veterans.[3]

The three schemes of affirmative action requirements affect construction contractors differently and impose different requirements. Executive Order 11246's coverage spans all construction contracts with the federal government and its agencies, and all contracts undertaken with federal funds, where the contract sum is at least $10,000.[4] Relevant exceptions include contracts for work to be performed outside the United States by workers from outside the United States and contractors giving hiring preference to Native American Indians with respect to projects on or near Native American Indian reservations.[5] Given the narrow field of applicable exemptions, essentially all construction contracts with federal authorities will be subject to equal opportunity and affirmative action requirements as to race, color, religion, sex, sexual orientation, gender identity, or national origin.

Where Executive Order 11246 applies, the contractor must initially maintain personnel records for up to two years from the date of making the record or the personnel action involved, including not only documentation as to employees but also job applications, postings, and submissions from applicants.[6] The contractor must be able to identify the gender, race, and ethnicity of employees and applicants in connection with these records.[7] While construction contractors are not required to develop a written affirmative action plan under Executive Order 11246 and its regulations,[8] they must take affirmative actions including the following:

- Making employment opportunities known to minority and female recruitment sources;
- Reviewing equal employment opportunity policies with all minority and female employees;
- Specifically directing recruitment efforts to minority, female, and community organizations, schools with minority and female students, and minority and female recruitment and training organizations;
- Encouraging present minority and female employees to recruit other minorities and women; and
- Annually evaluating all minority and female employees for promotional opportunities and encouraging minority and female employees to seek or prepare for such opportunities through training.[9]

Rehabilitation Act of 1973

Much like Executive Order 11246, the Rehabilitation Act applies to construction contracts where the contract sum is more than $10,000, including subcontracts where the project owner is the federal government or one of its agencies.[10] There is also a similar exclusion for employment activities outside the United States.[11] Unlike Executive Order 11246, however, the Rehabilitation Act imposes greater requirements, in the form of a written affirmative action plan, where the above criteria are met and where the employer has more than 50 employees and a covered contract for least $50,000.[12]

Under the Rehabilitation Act and its regulations, there is a similar two-year record-keeping requirement concerning personnel actions, with the same abbreviated period for smaller employers.[13] Above and beyond that, however, the regulations require contractors to expressly invite applicants and employees to self-identify as a person with a disability.[14] Where the size of the employer and contract necessitate a written affirmative action plan, its requirements include:

- Ensuring that personnel practices allow for the consideration of applicants and employees with disabilities for hiring or promotion;
- Ensuring that physical and mental job requirements that might screen out persons with disabilities are related to the job in question and born of business necessity;
- Addressing performance problems of individuals with known disabilities by inquiring whether the problem is related to the disability and whether the individual requires a reasonable accommodation;
- Specifically recruiting qualified individuals with disabilities, such as by sharing job openings with a state developmental services office or a private organization that specializes in training and placement of individuals with disabilities; and
- Maintaining records of hiring activities with respect to individuals with disabilities for three years.[15]

VEVRAA

As opposed to Executive Order 11246 and the Rehabilitation Act, VEVRAA has its own, distinct application. Construction contracts with the federal government and its agencies of more than $150,000 are subject to VEVRAA.[16] Like the laws discussed above, VEVRAA applies only to employment activities within the United States, [17] and like the Rehabilitation Act, the requirement for a written affirmative action plan only applies to contractors with more than 50 employees.[18]

VEVRAA requires substantially similar actions to those under the Rehabilitation Act, but for the fact that they apply to covered veterans rather than individuals with disabilities. The two-year record-keeping requirements for general personnel records are the same, with the same reduced record-keeping requirement for smaller employers.[19] Contractors must invite applicants and employees to self-identify as covered veterans,[20] and where required, an affirmative action plan must ensure that personnel processes permit advancement, direct outreach efforts to appropriate agencies, and maintain hiring records for three years, albeit geared toward protected veterans in this instance.[21] Additionally, contractors must list employment opportunities with employment service delivery systems so qualified covered veterans may be referred,[22] and finally, contractors must set benchmarks for hiring qualified covered veterans, which may be calculated in alternative ways, and retain records concerning their setting of benchmarks for three years.[23]

While the foregoing laws concern employment actions vis-à-vis minority groups, contractors must nevertheless avoid giving the impression of hostility to what might be considered "majority" groups. Recently, President Donald J. Trump signed into law Executive Order 13950, which contains several provisions relevant to affirmative action programs and applicable to federal construction contracts. With respect to all federal construction contracts except those exempt from Executive Order 11246, contractors are forbidden from using "any workplace training that inculcates in [their] employees any form of race or sex stereotyping or any form of race or sex scapegoating[.]"[24] Race or sex stereotyping is defined as "ascribing character traits, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex."[25] Race or sex scapegoating is defined as "assigning fault, blame, or bias to a race or sex, or to members of a race or sex, or to an individual because of his or her race or sex."[26]

Executive Order 13950 might seem like it is at odds with a statutory and regulatory scheme geared toward affording advancement opportunities for minority workers, but these provisions can be reconciled. Executive Order 13950 does not mandate treatment of workers regardless of race or sex, which would of course preclude affirmative action. Rather, it requires neutrality in training, which cannot assign any particular characteristics, including fault for the necessity of affirmative action laws, to any race or gender. Ultimately, both as a matter of compliance with Executive Order 13950 and avoiding workplace conflict, construction contractors should discuss race and

See A PRIMER, Page 19

John Caravella is a construction attorney and formerly practicing project architect at The Law Office of John Caravella, P.C., representing architects, engineers, contractors, subcontractors, and owners in all phases of contract preparation, litigation, and arbitration across New York and Florida. He also serves as an arbitrator to the American Arbitration Association Construction Industry Panel. Mr. Caravella can be reached at John@LIConstructionLaw.com or (516) 462-7051.

FOCUS:
SPORTS & ENTERTAINMENT

Curt Flood: Vindication in Defeat

Rudy Carmenaty

I lost money, coaching jobs, a shot at the Hall of Fame. But when you weigh that against all the things that are really and truly important, things that are deep inside you, then I think I've succeeded.

— Curt Flood

Although not widely heralded, Curt Flood is quite probably the most impactful figure in American sports during the last half-century. Flood transformed the sporting world, but he did so by his actions in the courtroom.

In 1969 Flood refused a trade from the Cardinals to the Phillies.[1] Bound by the reserve clause, paragraph 10(A) of the uniform contract signed by all professional ballplayers, his options were limited—either go to Philadelphia or retire from the game.[2] Finding neither acceptable, Flood decided to take on baseball's powers-that-be.

Flood filed suit asserting the reserve system constituted a conspiracy in violation of the Sherman Anti-Trust Act as well as a form of involuntary servitude in violation of the Thirteenth Amendment. He was up against not only the full weight of Major League Baseball (MLB), but also half-century of Supreme Court precedent.

Flood risked it all, losing in the Southern District of New York (SDNY), at the 2nd Circuit Court of Appeals and, ultimately, before the Supreme Court. Once a celebrated athlete, he became an outcast. But his legal challenge help transform the landscape of labor relations in baseball and beyond.

The current system of free agency was not brought about by Flood's lawsuit. Rather it was the result of labor arbitration that emancipated the ballplayer. But Flood served as the catalyst, and he deserves the recognition that his sacrifice merits.

I am pleased that God made my skin black – but I wish He had made it thicker.

— Curt Flood

Curt Flood was a transformative figure. A man of character and courage, he cut across all boundaries– sports, economics, race, culture. As with Muhammed Ali, Flood put it all on-the-line. The difference being that Ali won his Supreme Court case, while Flood lost in an excruciatingly close decision.

Inspired by Jackie Robinson, Flood went to Mississippi in 1962 in support of the NAACP.[3] Enduring the indignities of Jim Crow, African-American players, in those days, could not stay in the same hotel as their white teammates. Flood would lead the effort to have the Cardinals integrate their spring training facilities in Florida.

In 1964, following the Cardinals' World Series victory,[4] Flood rented a house for his family in the Bay Area suburb of Alamo. They were barred from the home by the owner with a loaded shotgun, who didn't know Flood was African-American when the lease was signed.[5] Flood sued and won.

The premier defensive centerfielder of his era, Flood went a record 568 chances without committing a single error for a record of 226 consecutive games.[6] But in the 1968 World Series, Flood was blamed for the loss. Misplaying a line drive by Jim Northrup of the Detroit Tigers, the error unfairly became the defining moment of his career.

The play marked the beginning of Flood's decline. After the series, he got involved in a contract dispute. Flood made $72,500 in 1968.[7] In 1969, he held out for $100,000 ultimately settling for $90,000.[8] By the end of the 1969 season, he would be gone from St. Louis.

I often wondered what I would do if I were ever traded because it happened many, many times, and it was 'part of the game.' And then suddenly it happened to me. … by God, this is America, and I'm a human being. I'm not a piece of property. I'm not a consignment of goods.

— Curt Flood

On October 8, 1969, Flood was told by Jim Toomey, assistant to GM Bing Devine, that he had been traded.[9] He was upset he got the news from a "mid-level front office coffee drinker."[10] As the co-captain of a team that had won two World Series titles, he felt he deserved more respect.

The Phillies offered Flood a salary of $100,000.[11] But it wasn't the money. Flood saw the issue as one of principle, that he wasn't some commodity to be bought and sold at the whim of the owners. But the reserve clause bound him, in seeming perpetuity, to play wherever he was told to.

Flood consulted his attorney about suing MLB under the Sherman Anti-Trust Act. The Sherman Act outlaws collusion and monopolistic business practices in restraint of interstate commerce. Flood then turned to Marvin Miller, the Executive Director of the Major League Baseball Players Association (MLBPA).

Miller told him that a lawsuit would be costly, would take years to resolve and, even if he did win, it was inevitable that he would not receive any substantial money damages.[12] He was also giving up any future association with MLB. Flood remained steadfast. He decided to go forward regardless of the consequences.

Although Flood received the backing of the MLBPA for his lawsuit, the players themselves were less than enthusiastic. Most were not willing to jeopardize their own careers and, frankly, many were all too willing participants in the system that governed the game.[13]

The case of *Flood v. Kuhn* was commenced in the SDNY in 1970.[14] Kuhn was Bowie Kuhn, the Commissioner of Baseball, who had previously been MLB's legal counsel. Kuhn and the owners were determined to keep things as they had always been.

The owners argued that the elimination of the reserve system would undermine competitiveness by allowing the rich teams to sign the best free agents. They added that not having the reserve clause might foster corruption among the players. After all, a player might throw a game to curry favor with another team at contract time.

MLB's best argument was that free agency undermined the investment made in player development as star players could leave without any corresponding compensation. A similar argument was made in the NFL resulting in the now defunct "Rozelle Rule," wherein the Commissioner had the authority to award draft choices thus diminishing the value of free agency.[15]

If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress, and not by this Court.

— Harry Blackmun, majority opinion in *Flood v Kuhn*

The owners, whose records many say reveal a proclivity for predatory practices, do not come to us with equities. The equities are with the victims of the reserve clause. I use the word "victims" in the Sherman Act sense, since a contract which forbids anyone to practice his calling is commonly called an unreasonable restraint of trade.

— William O. Douglas, in dissent

Flood was also battling the weight of history. In a unanimous 1922 decision, Oliver Wendell Holmes ruled in *Federal Baseball Club v. National League* that baseball was not interstate commerce under the Sherman Act.[16] In effect, this decision carved out a one-of-a-kind exemption for MLB not accorded boxing, football, or basketball.[17]

This anomaly was affirmed thirty years later by the Warren Court in *Toolson v. NY Yankees*.[18] This case dealt specifically with the reserve clause. With far less justification than Holmes, the Court said that Congress has the power to subject baseball to the anti-trust laws but hasn't.

Determining Congressional intent based upon an absence of legislative action, the Court took it as a tacit acknowledgement that MLB is not subject to the anti-trust laws. In effect, baseball's exemption stands because Congress has failed to correct an earlier Supreme Court precedent.

On June 19, 1972 the Court ruled 5-3 in favor of MLB.[19] Justice Lewis Powell recused himself because he owned Anheuser-Busch stock.[20] Before Powell's recusal there was, after an initial vote, a 5-4 majority in Flood's favor.[21] With Powell out, the Court was deadlocked 4-4. Chief Justice Warren Burger then switched sides for a 5-3 majority.[22]

The majority opinion by Justice Blackmun is simply absurd. The Court ruled in baseball's favor, but admitted the grounds for the anti-trust exemption were specious. MLB was indeed interstate commerce. Baseball's exemption from the anti-trust laws is an aberration.

Blackmun's decision acknowledges the error created by the Court, but leaves it up to Congress to remedy it. Flood's arguments were given short shrift. The opinion is not merely flawed, but in a mechanical application of *stare decisis* it doubles down on the prior mistakes enunciated in *Federal Baseball* and *Toolson*.

Holmes' 1922 decision repeatedly has been misread by later courts to create the paradigm that it is the intent of Congress, by its inaction, not to regulate MLB. Since Congress is unwilling to act, subsequent courts must somehow continue to adhere to this flawed precedent.

In his dissent, Justice Douglas, seeing the situation clearly, notes that "Baseball is today big business that is packaged with beer, with broadcasting, and with other industries."[23] As such, *Federal Baseball* is a "derelict in the stream of law that we, its creator, should remove."[24]

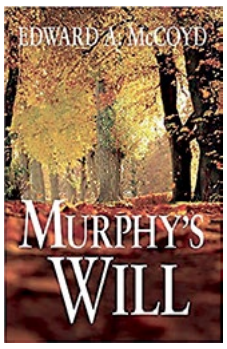
Douglas, perhaps lamented joining the opinion in *Toolson* twenty years prior, asserts that the Court created the problem and the Court can and should do away with it. Justice Marshall issued a separate dissent and Justice Brennen

See CURT FLOOD, Page 20

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

BOOK REVIEW

Murphy's Will by Edward A. McCoyd, Esq.



Publisher: New Street Publishing (February 29, 2020)

Paperback: 260 pages

ISBN-13: 978-0965411868

Ever dream of leaving it all behind—the incessant chatter of the electronic age—disappear into the wilderness—get back in touch with nature? As set out in the beginning of the novel *Murphy's Will*, the main character Hannibal Murphy heeds the "call of the wild," journeying to Colorado then later to Mexico, Guatemala, and Peru in search and to understand why native peoples built temples for self-glorification. To Hannibal, these towering structures symbolized the moral corrosion that precipitated the downfall of the ancient societies who inhabited these geographic areas.

Three years later, Hannibal emerges back in the United States just as his mother lands a new job as Attorney Tim O'Leary's secretary. Thus begins another chapter in the career of Tim O'Leary, whose adventures in the practice of trusts and estates began in Edward A. McCoyd's first two books *Simpson's Will* and *Forester's Will*. In his third book, *Murphy's Will*, McCoyd juxtaposes the greed and excesses of the 1980's with the harmony and personal fulfillment of a life lived close to nature. The author, cofounder of McCoyd, Parkas & Ronan in Garden City, provides detailed practical advice in his work, drawing upon his many years of experience and practice in trust and estates law.

Murphy's Will centers on the following fact pattern: Testator bequeaths assets to his son, named Hannibal Murphy, specifying that they are to be held in trust until he reaches 25. He appoints his brother as the Executor and his ex-wife as the Trustee. Testator dies from injuries sustained in a car accident. After suing the other driver, the Estate settles for $ 6 million.

Unfortunately, the Executor fails to turn over the assets from the settlement to the Trustee. Instead, seeking personal profit, the Executor invests the assets in speculative stock options. As soon as the Trustee institutes a compulsory accounting proceeding against him, he leaves town. Only the Executor knows where the stock options are located. It is a race against time to ensure that the Beneficiary receives the assets from the trust, despite the machinations of the Executor.

In *Murphy's Will*, greed and excess is personified by the unscrupulous Executor and by the investment firm with whom he deposits the assets, EF Hutton.[1] The antidote to societal sickness is "the tonic of wildness,"[2] as the author illustrates through the novel's main character, the Beneficiary Hannibal Murphy. Readers meet Hannibal just as he re-enters the United States, and begins working as a trail guide in Vermont. On a parallel course, the author leads the reader along the legal trail to prevent a fraud upon the Beneficiary and to put the money in the rightful hands. Along the way, McCoyd provides insight into the intricacies of petitioning the Surrogate's Court for an accounting, the appointment of an administrator c.t.a. (cum testamento annexo),[3] and issuance of a court ordered subpoena to inspect files of the Executor.

In this novel, Edward A. McCoyd also shares his deep appreciation for the natural beauty of Vermont. As the plot unfolds, McCoyd treats his reader to an evening of music under the stars at the von Trapp Lodge in Stowe, Vermont. He provides instructions, albeit in excruciating detail, how to hitch a fallen tree to the back of a truck in order to clear it from the road.

Finally, McCoyd highlights the Smokey House Center ("SHC") in Danby, Vermont, where teenagers learn traditional farming methods, and also develop the self-confidence and camaraderie that often eludes today's youth. SHC is a "genuine farming operation, including a full complement of teenagers and pre-teens working diligently to keep the place running, and seeming to be doing so with only minimal adult supervision and guidance." It has "five thousand acres of forest and farmland…to protect for future generations, and its primary function is to "educat[e] young people from the area about the preservation of their rural heritage."[4]

Murphy's Will concludes with a road map for life, as Hannibal shares the insights gained from his research into ancient civilizations and his forays into the wilderness. In his hikes through Central and South America, Hannibal "saw many temples and monuments that powerful people made others build for them." Eventually, these people passed on and the jungle grew back. This awareness inculcates a deep respect for nature, in its hills and mountains. "All of this is for all of us, not just a few, and it's our job to protect it. If we build, we won't build to show off. We'll build only what we need, and then we'll build to help others."[5]

What an inspiring message!

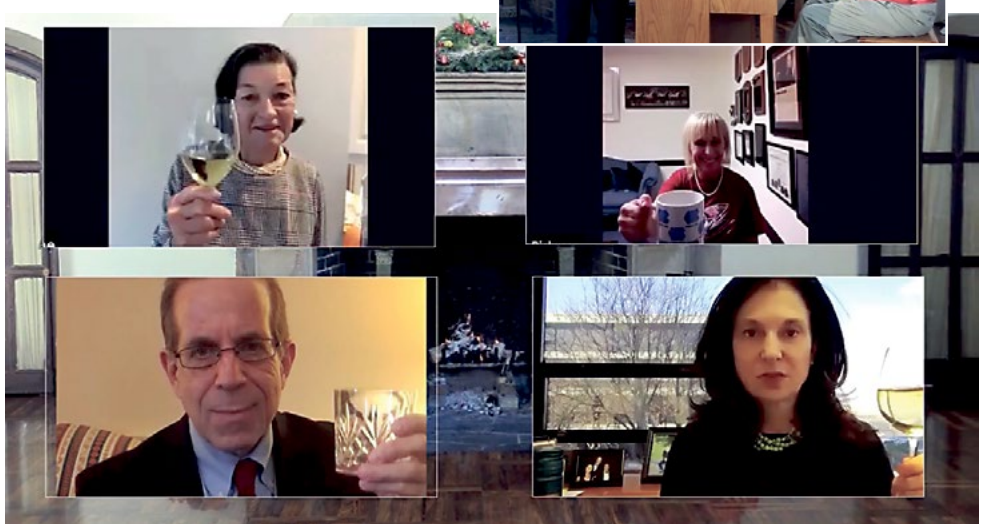
A word of caution to the nonlawyer. A consistent sense of urgency pervades the book, creating the impression that once Hannibal turns 25 years old, all will be lost. Upon closer inspection, there are actually two issues that drive the plot forward. In the first part of the book, the Trustee (Hannibal Murphy's mother) and her lawyer strive to locate the Beneficiary before his 25th birthday. The concern here is that the if the trust expires, she will lose her status as Trustee and cannot petition the court to compel an accounting.

A different issue is at play once Mrs. Murphy establishes contact with her son: "Of greater concern was the possibility that the court might drag its feet in reviewing the files, giving [the Executor] time to make off with the estate assets, assuming he hadn't done so already."[6] Amid the intricacies of the novel's plot and the suspenseful final chapters, it is not easy to make sense of the timing issues from a legal perspective. For this reason, the novel's best audience is an attorney relatively new to the practice of trusts and estates, to whom *Murphy's Will* provides sound mentorship and practical advice.

1. Nathaniel C. Nash, *E.F. Hutton Guilty in Bank Fraud: Penalties Could Top $10 Million*, N.Y. Times, May 3, 1985, at A1.
2. Henry David Thoreau, Walden, 238 (2007 ed.).
3. "Administration with the will annexed. Administration granted in cases where a testator makes a will without naming any executors; or where the executors who are named in the will are incompetent to act, are deceased, or refuse to act." *Administration of Estates Cum testamento annexo* (CTA), Black's Law Dictionary (6th ed. 1990).
4. Edward A. McCoyd, *Murphy's Will*, 211 (2020).
5. *Id.* at 250.
6. *Id.* at 175.

Ellin Cowie is a member of the NCBA Publications Committee, and a foreclosure defense attorney.

NCBA December 3, 2020 Virtual Holiday Celebration



NCBA Committee Meeting Calendar January 11, 2021 - February 4, 2021

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

SURROGATE'S COURT ESTATES & TRUSTS
Brian P. Corrigan
Monday, January 11
5:30 p.m.

CIVIL RIGHTS
Bernadette K. Ford
Tuesday, January 12
12:30 p.m.

LABOR & EMPLOYMENT LAW
Matthew B. Weinick
Tuesday, January 12
12:30 p.m.

LGBTQ
Charlie Arrowood/Byron Chou
Wednesday, January 13
9:00 a.m.

LEGAL ADMINISTRATORS
Dede Unger/Virginia Kawochka
Wednesday, January 13
12:30 p.m

MATRIMONIAL LAW
Samuel J. Ferrara
Wednesday, January 13
5:00 p.m

DIVERSITY & INCLUSION
Hon. Maxine Broderick
Wednesday, January 13
6:00 p.m.

PLAINTIFF'S PERSONAL INJURY
Ira S. Slavitt
Tuesday, Januray 19
12:30 p.m.

WOMEN IN THE LAW
Edith Reinhardt
Tuesday, January 19
12:30 p.m.

ALTERNATIVE DISPUTE RESOLUTION
Marilyn K. Genoa/Jess A. Bunshaft
Tuesday, January 19
6:00 p.m.

ASSOCIATION MEMBERSHIP
Michael DiFalco
Wednesday, January 20
12:30 p.m.

ELDER LAW SOCIAL SERVICES HEATH ADVOCACY
Katie A. Barbieri/Patricia A. Craig
Wednesday, January 20
12:30 p.m.

APPELLATE PRACTICE
Jackie L. Gross
Thursday, January 21
12:30 p.m.

EDUCATION LAW
John P. Sheahan/Rebecca Sassouni
Thursday, January 21
12:30 p.m.

DISTRICT COURT
Roberta D. Scoll/S. Robert Kroll
Friday, January 22
12:30 p.m.

HOSPITAL & HEALTH LAW
Leonard M. Rosenberg
Monday, January 25
12:30 p.m.

GENERAL, SOLO AND SMALL LAW PRACTICE MANAGEMENT
Scott J. Limmer
Tuesday, January 26
12:30 p.m.

ANIMAL LAW
Kristi DiPaolo
Tuesday, January 26
6:00 p.m.

CRIMINAL COURT LAW & PROCEDURE
Dana L. Grossblatt
Wednesday, January 27
12:30 p.m.

INTELLECTUAL PROPERTY
Frederick L. Dorschak
Thursday, January 28
12:30 p.m.

REAL PROPERTY
Alan J. Schwartz
Wednesday, February 3
12:30 p.m.

COMMUNITY RELATIONS & PUBLIC EDUCATION
Joshua D. Brookstein
Thursday, February 4
12:45 p.m.

PUBLICATIONS
Christopher J. DelliCarpini/Andrea M. DiGregorio
Thursday, February 4
12:45 p.m.

Tip Credit ...

Continued From Page 8

and building service. *See Minimum Wages for Tipped Workers*, New York State Department of Labor, https://on.ny.gov/372K3mn.
2. N.Y. Comp. Codes R. & Regs. tit. 12, § 146-3.1.
3. *Id.* § 142-2.5(b).
4. *Id.*
5. *See id.*
6. *See id.* § 142-2.5(b)(2)(i).
7. *Id.*
8. *See id.* § 142-2.5(b)(2)(i)(b).
9. *See id.* § 142-2.5(b)(2)(i)(c).
10. *See New York State Subminimum Wage Hearings, Report and Recommendations to Governor Andrew M. Cuomo*, New York State Department of Labor, pg. 4, https://on.ny.gov/3oDCg4C.
11. *See id.* at pg. 9.
12. *Order of Commissioner of Labor Roberta Reardon Pursuant to Labor Law Section 659(2)*, New York State Department of Labor (Dec. 31, 2019), https://on.ny.gov/373IXH4; see N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.21.
13. *See Governor Cuomo Announces End of Subminimum Wage Across Miscellaneous Industries Statewide*, supra n.1.
14. *See Order of Commissioner of Labor Roberta Reardon Pursuant to Labor Law Section 659(2), supra* n. 12; *see also* N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.21.
15. *See Minimum Wages for Tipped Workers, supra* n.1; *see also Minimum Wage Poster – Attention Miscellaneous Industry Employees*, New York State Department of Labor, https://on.ny.gov/373ZtGU. As of June 30, 2020, on Long Island, employers were entitled to pay their employees a cash wage of $11.40 per hour when tips were at least $1.60 per hour and $12 per hour when tips were at least $1 per hour, but less than $1.60 per hour.
16. N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.21; *see Minimum Wages for Tipped Workers, supra* n.1.
17. *See New York State Subminimum Wage Hearings, Report and Recommendations to Governor Andrew M. Cuomo, supra* n.10, at pg. 3.
18. N.Y. Comp. Codes R. & Regs. tit. 12, § 146-1.3.
19. *See id.* §§ 146-1.2, 146-1.3.

Recruiting ...

Continued From Page 9

and Minority Affairs. Each agency has links on its website to Civil Service job interest cards and application information and forms, and each agency collaborates with Civil Service training on the Civil Service system generally, on the application process and on the qualification process.[20]

Training includes overall education about the many facets of a public sector career, as well as detailed instructional classes on how to complete an application and how to determine in advance of completing an application that an individual's background (education and employment history) meets the qualifications.

This strategy is a long-range plan to increase diversity in the public sector, including in law enforcement, notwithstanding the limitations of New York State Civil Service Law.

1. Civil Service Law §56/
2. "APPOINTING OFFICER" means the officer, commission or body having the power of appointment to subordinate positions. Nassau County Civil Service Rule Book Definitions.
3. Nassau County Rule Book XVI(5) provides that [t]he name of the person declining appointment shall be eliminated from further certification from the eligible list unless declination is for one or more of the following reasons:
   (a) Insufficiency of compensation offered when below minimum of grade of the position for which the examination was held;
   (b) Location of employment;
   (c) Temporary inability, physical or otherwise, which must be satisfactorily explained by the eligible in writing. The Commission shall enter upon the eligible list the reasons for its action in such cases.
4. Civil Service Law §61.
5. Civil Service Law §61(1) (Appointment or promotion from eligible lists).
6. Civil Service Law § 50(8) (Limitation of eligibility to one sex).
7. Extra veteran's points are provided under Civil Service Law § 85(3).
8.Civil Service Law §50(9) (Examination of candidates unable to attend tests because of religious observance).
9. Civil Service Law §50(10) ("Determination of disability shall be made by a medical officer employed or selected by the civil service department or the municipal commission having jurisdiction.") *See also* Civil Service Law §55-a; https://bit.ly/36PHsMy.
10. *Roske v. Keyes*, 46 A.D.2D 366 (2d Dept. 1974).
11. *Id.* at 368.
12. *Id.*
13. *Ruddy v. Connelie*, 61 A.D.2d 372 (3d Dept. 1978).
14. *Id.* at 373.
15. *Id.* at 374..
16. *Id.* at 375.
17. *Id.* at 376.
18. https://on.ny.gov/2IjiSdu.
19. https://on.ny.gov/36Mfrp2.
20. https://www.nassaucountyny.gov/1437/Departments.

NCBA Collects Toys for Local Nonprofit

This year for the holidays, the Nassau County Bar Association (NCBA) held a toy drive for New Hour for Women and Children LI, a nonprofit organization that provides meaningful support to current and formerly incarcerated women, their children, and families. Toys were generously donated by NCBA Members and staff. We are so proud to lend a helping-hand to our community during these difficult times and brighten the holidays for the children.

HOW YOU CAN HELP THE WE CARE FUND

MAKE A DONATION

Show your support for the WE CARE Fund by making a donation today by visiting **nassaubar.org/donate-now**.

AMAZON SMILE

Do your regular online shopping using **smile.amazon.com** and choose **Nassau Bar Foundation, Inc.** as your charity of choice. Amazon will donate 0.5% of eligible purchases to WE CARE!

We Care

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

DONOR	IN HONOR OF
Matthew and Deanna Lepage	To commemorate our wedding.
Hon. Marilyn K. Genoa	Sheryl and Paul Lerner's new granddaughter, Eden Sarah.
Hon. Marilyn K. Genoa	The staff of the NCBA in gratitude for all that they do for our Association.
John and Joseph Ardito, Ardito & Ardito Attorneys At Law	Best wishes for good health, peace, and happiness this holiday season!
Roger Kahn	Champion Office Suites clients
Veronica Jones-Johnson	Hon. Andrea Phoenix being installed as President of the Theodore Roosevelt Inns of Court
Michael Masri	The WE CARE Advisory Board

DONOR	IN MEMORY OF
Andrew M. Thaler	Stanley Thaler
Warren Hoffman	Byron Divens' Father
Dana J. Finkelstein	All those who have lost their lives to Covid-19.
Hon. Denise Sher	Desmond C. Corrigan, husband of Hon. Teresa K. Corrigan
Hon. Marilyn K. Genoa	Joseph Galatta, brother-in-law of John and Doreen Reali
Hon. Andrea Phoenix	Desmond C. Corrignan, husband of Hon. Teresa K. Corrigan

IN MEMORY OF BARBARA SCOTT GIANELLI

Joanne and Hon. Frank Gulotta, Jr.
Hon. Leonard and Deborah Austin
Hon. Denise Sher
Hon. Andrea Phoenix

IN HONOR OF THE WE CARE FUND

Schlissel Ostrow Karabatos, PLLC
Abraham B. Krieger
Joseph Lo Piccolo
Florence Fass
Hon. Andrea Phoenix
Hon. Denise Sher
Hon. Marilyn K. Genoa
George Frooks
Kathleen Wright
Charlene Thompson
Adrienne Hausch
Emily Franchina
Hon. Maxine Broderick
Christopher Clarke
Hon. J. Gardiner Pieper
Beacon Light Foundation
Adrienne L. Hausch
Hon. Carnell T. Foskey
Emily Franchina, Franchina Law Group

IN MEMORY OF HON. ELAINE JACKSON STACK

Hon. Jeffrey Goodstein
Jerome A. Scharoff
The Biblowitz Family—Jen, Lewis, Jonah, and Nate
Nina Koppelman
Patricia Latzman
Frank Tiscione
Hon. Marilyn K. Genoa
Alan B. Hodish
Charlotte M. Betts
Gregory S. Lisi
Kenneth Marten
Joan M. Dudley
Dana Finkelstein
James P. Joseph, Joseph Law Group
Hon. Denise L. Sher
Emily Franchina
Mary Ann Aiello
Evelyn Kalenscher

Checks made payable to Nassau Bar Foundation — WE CARE

Contributions may be made online at www.nassaubar.org or by mail:

NCBA Attn: WE CARE

15th & West Streets Mineola, NY 11501

A Primer ...

Continued From Page 13

sex discrimination and affirmative action only in terms of the employer's obligation without offering any opinions on whether—or why—such measures are proper or necessary.

Penalties for Nonconpliance

Noncompliance, whether with Executive Order 13950, Executive Order 11246, the Rehabilitation Act, or VEVRAA, carries a series of penalties. Under all of these laws, a construction contract may be cancelled, suspended, or terminated in the event of a violation, and the contractor may be debarred from being awarded federal contracts.[27] Other potential penalties include backpay to employees with interest and injunctions against further violations,[28] as well as the withholding of progress payments.[29]

Earlier this year, the Department of Labor's Office of Federal Contract Compliance Programs, which enforces the affirmative action laws, resolved a complaint against federal construction subcontractor EnviroVantage Inc. for failing to hire 12 eligible female workers, resulting in the contractor paying $100,000 in back wages and interest and agreeing to hire 12 eligible female workers as positions became open.[30] The resolution of a complaint for Fort Myer Construction Corp.'s violations, including violating the affirmative action laws by failing to hire qualified female and African American applicants, involved a payment of $900,000 and a commitment to offer positions to 7 qualified women and 30 qualified African Americans as positions become available.[31]

Under the threat of the foregoing sanctions, construction contractors must walk a proverbial tightrope to comply with affirmative action requirements. Although the introduction of Executive Order 13950 does not outright contradict those requirements, it suggests the idea of a departure from affirmative action that may or may not take off. Ultimately, this field of law continues to evolve, and navigating it successfully will continue to require extraordinary tact on the part of construction contractors and their attorneys

1. Exec. Order No. 11,246, 30 Fed. Reg. 12319 (Sep. 24, 1965); as amended by Exec. Order No. 11,375, 32 Fed. Reg. 14303 (Oct. 13, 1967); Exec. Order No. 12068, 43 Fed. Reg. 46501 (Oct. 5, 1978); Exec. Order No. 13,665, 79 Fed. Reg. 20749 (Apr. 8, 2014); and Exec. Order No. 13,672, 79 Fed. Reg. 42971 (Jul. 21, 2014).
2. 29 USC § 793(a).
3. 38 USC § 4212(1).
4. 41 CFR § 60-1.5(a)(1); 41 CFR § 60-4.1.
5. 41 CFR § 60-1.5(a)(3) and (7).
6. 41 CFR § 60-1.12(a). The time period is one year from the date of making the record or the personnel action involved if the contractor has fewer than 150 employees or its contract sum is less than $150,000.
7. 41 CFR § 60-1.12(c).
8. 41 CFR § 60-2.1(b).
9. 41 CFR § 60-4.3(a).
10. 29 USC § 793(a).
11. 41 CFR § 60-741.4.
12. 41 CFR § 60-741.40.
13. 41 CFR § 60-741.80.
14. 41 CFR § 60-741.42.
15. 41 CFR § 60-741.44.
16. 38 USC § 4212. The figure of $150,000 is adjusted from $100,000 in the original VEVRAA to account for inflation per 48 CFR § 1.109.
17. 41 CFR § 60-300.4.
18. 41 CFR § 60-300.40(a). The regulations specify that the affirmative action plan requirement also applies only where the contractor has a contract in excess of $100,000, but this is presently redundant, given the current threshold dollar amount for VEVRAA to apply at all.
19. 41 CFR § 60-300.80(a).
20. 41 CFR § 60-300.42.
21. 41 CFR § 60-300.44.
22. 38 USC § 4212.
23. 41 CFR § 60-300.45.
24. Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sep. 22, 2020).
25. *Id.*
26. *Id.*
27. *Id.*; Executive Order 11246 Secs. 207(7), 209; 41 CFR § 60-1-27(b); 41 CFR § 60-300.66; 41 CFR § 60-741.66(a).
28. 41 CFR § 60-1-26(2); 41 CFR § 60-300.65 (a)(1).
29. 41 CFR § 60-300.66.
30. U.S. Department of Labor. *New Hampshire Federal Construction Subcontractor Enters Agreement to Settle Hiring Discrimination Found by U.S. Department of Labor.* https://bit.ly/3oujX1E.
31. U.S. Department of Labor. *Fort Myer Construction Will Pay $900K to Settle Discrimination and Harassment Case Involving 371 Women and Minorities,* https://bit.ly/3oIlYaJ.

Unpaid Wage ...

Continued From Page 7

but the court exceeds its authority when it unilaterally changes the terms of a contract agreed to by parties.

Mei and *Fisher* Provide Clarity to Local Attorneys

Mei and *Fisher* answered two important questions which lingered in the wake of *Cheeks*. First, litigants are free to settle and dismiss FLSA actions without judicial review by using (and accepting) a Rule 68 offer of judgment.[15] Though this provides certainty for parties to know that their settlements will not be rejected by a court, it does not alleviate concerns about confidentiality, since the judgment will be docketed.

Second, plaintiffs' attorneys are not constrained to fees of one third of a settlement amount.[16] Indeed, plaintiffs' attorneys can rest easy knowing that their fees for work on lower value FLSA cases is not necessarily tied to the damages available. In other words, plaintiffs' attorneys are now incentivized to take smaller FLSA cases because they still stand to earn fees based on their reasonable work spent on the case.

1. "Why Wage and Hour Litigation is Skyrocketing," *Washington Post*, Nov. 25, 2015 *available at* https://www.washingtonpost.com/news/wonk/wp/2015/11/25/people-are-suing-more-than-ever-over-wages-and-hours.
2. 796 F.3d 199 (2d Cir. 2015).
3. 324 U.S. 697, 700 (1945).
4. *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114-15 (1946).
5. *Id.* at 116.
6. *Cheeks*, 796 F. 32 at 202.
7. *Id.* at 200.
8. 944 F.3d 395 (2d Cir. 2019).
9. *Id.* at 412-14.
10. *Id.* at 411. The Court in *Cheeks* did not consider whether parties may settle Rule 41(a)(1)(A)(ii) dismissals without prejudice. *Id.* "Nor did it address other avenues for dismissal or settlement of claims, including Rule 68(a) offers of judgment." *Id.*
11. 948 F.3d 593 (2d Cir. 2020).
12. *Id.*
13. *Id.* at 602, 605 (noting the Circuit "repeatedly rejected the notion that a fee may be reduced merely because the fee would be disproportionate to the financial interest at stake in the litigation).
14. *Id.* at 605.
15. 944 F.3d at 410.
16. 948 F.3d at 602.

Form I-9 ...

Continued From Page 6

discrimination provision.[10]

Second, employers must not over-document an employee's proof of work authorization. For instance, if an employee presents documentation on List A of the List of Acceptable Documents, the employer should not require any additional documents. In the event that the employer includes additional documents on the Form I-9, s/he may be increasing the chances of financial penalties in the event that Homeland Security Investigations (HSI), the investigative arm of the Immigration and Customs Enforcement (ICE)[11] division of the Department of Homeland Security conducts an audit. As explained below, ICE reviews all violations, even those that appear minor such as over documenting when evaluating potential penalties.

Not only can over-documenting lead to penalties, but so too can failure to timely complete Form I-9. Again, the form must be completed within three business days of the employee's start date.[12] While the employee is solely responsible for completing Section 1 of the Form I-9 and providing documentation demonstrating work authorization, the employer is ultimately responsible for the proper execution of the entire form. Sections 2 and 3 must be timely completed by the employer. It is important to note that when reviewing documents, the employer is not required to maintain photocopies of work authorization documents; however, the employer must establish a consistent policy — always retain copies or never retain copies.

Once Form I-9 is completed, it must be retained by the employer for all current employees (hired after November 6, 1986) as well as terminated employees, for at least one year after the date of termination, or three years after the date of hire, whichever is longer.[13]

Internal Audits

It is advised that employers conduct their own internal audits and review the current I-9 regulations to ensure compliance. As with completion of Form I-9, when conducting internal audits an employer must consider both employment discrimination and immigration consequences. Immigration and Customs Enforcement has provided guidance for employers conducting internal audits, which all employers should review.[14] Specifically, ICE reminds employers that internal audits cannot be discriminatory and/or retaliatory in nature; employers should not consider citizenship or national origin when conducting internal audits. ICE also provides guidance for employers to conduct the audits and correct deficiencies.[15]

That said, when an employer is unable to verify employment, or notices an issue at the time of an internal audit, it is incumbent upon the employer to try to correct the Form I-9. This means that the employer must provide the employee with a reasonable amount of time to explain any discrepancies. Discrepancies can arise for numerous valid reasons such as name changes, typographic errors, etc. However, if an employer knowingly hires an employee without employment authorization, the employer could face potential penalties. Before making any termination decisions, it is critical that employers review such decisions with counsel to avoid potential violations of employment laws.

HIS/ICE Penalties for I-9 Violations

Penalties for I-9 violations arise during the course of an audit by HSI/ICE and can be significant for violations. Monetary penalties can be in the range of $573 to in excess of $20,000.[16] That said, ICE has some discretion when considering potential fines. Specifically, ICE will consider the following factors: the size of the business; the employer's good faith effort to comply with I-9 regulations; the seriousness of the violations; whether the violation involved unauthorized employees; and the employer's history of previous violations.[17] Accordingly, to mitigate damages, all US employers should consider internal audits to ensure compliance with federal immigration regulations.

1. Pub.L. 99-603, 100 Stat. 3445 (Nov. 6, 1986).
2. *See* 8 C.F.R. § 274a.2(e)-(i).
3. *See* https://bit.ly/3lVaaA3.
4. *See* 8 U.S.C. § 1324b.
5. *See Id.*
6. Handbook for Employers M-247, available at https://bit.ly/33XzWNK.
7. *See* 8 C.F.R. § 247a.1(l).
8. *See* United States Department of Justice, Immigrant and Employee Rights Section, available at https://bit.ly/3n3jseu.
9. *See Id.*
10. *See* Technical Assistance Letters, available at https://bit.ly/3oC0Oe5.
11. *See* https://www.ice.gov/hsi
12. 8 CFR 274a.2(b)(1)(ii)
13. 8 CFR 274a.2(b)(2)(i)(A)
14. *See* Guidance for Employers Conducting Internal Employment Eligibility Verification Form I-9 Audits, available at https://bit.ly/2IsaxEw.
15. *See Id.*
16. *See* Form I-9 Inspection Overview, available at https://bit.ly/2LblxXH.
17. *See Id.*

Curt Flood ...

Continued From Page 14

concurred with both dissents in the case.

MLB praised the decision. For the MLBPA, it confirmed that collective bargaining would be the path going forward. As for Flood, it was more than just a courtroom defeat. The experience was a personal disaster that led to a decade-long decline.

In the 1980's, Flood regained his dignity and found a new life after baseball. In 1992, the NAACP presented Flood with its 1st Jackie Robinson Award.[25] Unfortunately, three years later, he was diagnosed with throat cancer. On January 20, 1997, just two days after his 59th birthday, Curt Flood died.

Fittingly, it was Martin Luther King Day. A martyr for the cause of free agency, his sacrifice was an affirmation of the dignity of the African-American athlete. He should be remembered; indeed he should be celebrated once again. At the very least, Curt Flood should be in the Hall of Fame in Cooperstown.[26]

1. Flood was traded with Tim McCarver, Byron Browne, Joe Hoerner for Dick Allen, Jerry Johnson, and Cookie Rojas. After Flood refused the trade, Willie Montanez and Jim Browning were sent instead.
2. Ronald Blum, *Curt Flood set off the free-agent revolution 50 years ago* (December 24, 2019) at https://apnews.com.
3. Brad Snyder, *A Well-Paid Slave* (2006) 60.
4. The Cardinals were World Series Champions in 1964 (beating the Yankees 4-3) and again in 1967 (beating the Red Sox 4-3).
5.Snyder, *supra* n.3, at 63.
6. Mike Eisenbath, *The Cardinals Encyclopedia* (1999) 181.
7. *Sports Illustrated* Cover (Oct. 7, 1968).
8. Snyder, *supra* n.3, at 6.
9. *Id.* at 1.
10. *Id.*
11. Deron Snyder, *Today's stars still reaping fruits of Flood's fight for free agency 50 years ago* (December 25, 2019) at www.washingtontimes.com.
12. Allen Barra, *How Curt Flood Changed Baseball and Killed His Career in the Process* (July 12, 2011) at https://the atlantic.com..
13. Howard Burns, *Curt Flood's Sacrifice: Sports' Most Meaningful Trade* at https://bleackerreport.com.
14. 316 F. Supp.271 (S.D.N.Y. 1970).
15. William Wallace, *Rozelle Rule Found in Anti-trust Violation* (December 31, 1975) at www.nytimes.com.
16. 259 U.S. 200 (1922).
17. *United States v. International Boxing Club of NY,* 348 U.S. 236 (1955) (Boxing); *Radovich v. NFL,* 352 U.S. 445 (1957) (Football); *Haywood v. National Basketball Association* 401 U.S. 1204 (1971)(Basketball).
18. 346 U.S. 356 (1953).
19. 407 US 258 (1972).
20. Anheuser-Busch owned the Cardinals.
21. Barra, *supra* n.12.
22. *Id.*
23. 407 U.S. 258 (1972)(Douglas dissent).
24. *Id.*
25. Barra, *supra* n.12.
26. Flood had a life-time .293 batting average, hit .300 or better six times with a high of .337 in 1967; he won seven Gold Gloves and was a three-time All-Star.

Cultural Competence ...

Continued From Page 5

available at https://bit.ly/3gmBplO. e

3. *Id.* (citing Sylvia Sevens, *Cultural Competency: Is There an Ethical Duty*, Oregon State Bar Bull. (Jan. 2009))..

4. "Cultural Humility, Part I — What Is 'Cultural Humility'?", The Social Work Practitioner (Aug. 19, 2013), available at https://bit.ly/2JMWwBM.)

5. Report from the Special Advisor on Equal Justice in the New York State Courts (Oct. 1, 2020), available at https://bit.ly/39Y4Hpw.