Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

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SAVE THE DATE

NASSAU ACADEMY OF LAW BRIDGE THE GAP WEEKEND
March 12 and 13, 2022
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LAW DAY: TOWARD A MORE PERFECT UNION—THE CONSTITUTION IN TIMES OF CHANGE
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UPCOMING PUBLICATIONS COMMITTEE MEETINGS
Thursday, March 3, 2022, at 12:45 PM

Chief Judge Janet DiFiore to Receive 78th Distinguished Service Medallion at 122nd Annual Dinner Gala

Ann Burkowsky

A long-standing tradition of the Nassau County Bar Association (NCBA) since the 1930s—the Distinguished Service Medallion Award—has been presented annually to an individual of high moral character and integrity who has enhanced the reputation and dignity of the legal profession.

This prestigious award is the highest honor one can receive from the Nassau County Bar Association. Past recipients have included U.S. Presidents, a vast array of judges of various courts, including the United States Supreme Court and the Court of Appeals, world-renowned philanthropists, political leaders, governors, and county executives, as well as the top attorneys throughout our country.

The NCBA is proud to announce that the 78th Distinguished Service Medallion will be awarded to the Chief Judge of the Court of Appeals and the State of New York, Hon. Janet DiFiore, a leader devoted to public service, the mentorship of young lawyers, and the fair and inclusive administration of justice. The leaders of the NCBA look forward to honoring her at the 122nd Annual Dinner Gala on **May 14, 2022**, at the Long Island Marriott in Uniondale.

Extraordinary Judicial Career

A graduate of C.W. Post, Long Island University (B.A. 1977) and St. John's University School of Law (J.D. 1981), Chief Judge DiFiore began her judicial career in 1998, when she was elected to the Westchester County Court. She was then elected a Justice of the New York State Supreme Court for the 9th Judicial District. Upon taking office in January 2003, she was appointed by then-Chief Judge Judith Kaye to serve as Supervising Judge of the Criminal Courts for the 9th Judicial District. Her work during this time was dedicated to reform court processes to provide greater access to justice for litigants who could not afford counsel. In addition, she was able to successfully clear a massive case backlog for those courts under her supervision.

In 2005, Chief Judge DiFiore was elected District Attorney of Westchester County, where she was ultimately reelected in 2009 and 2013. In a county with nearly one million residents reflecting the broad economic, social, racial, and ethnic spectrum of New York State, Chief Judge DiFiore worked collaboratively with numerous community stakeholders and government partners to address issues that impact underserved communities, including poverty, gang violence, domestic violence, child abuse, bias crimes, and the enhanced use of DNA to prove the innocence of wrongly convicted criminals.

Appointment to Chief Judge of New York State

On December 1, 2015, Janet DiFiore was appointed by then Governor Andrew Cuomo to Chief Judge after the unanimous confirmation by the New York State Senate and was sworn into office on January 21, 2016.

Her first order of business, the "Excellence Initiative," was an approach to achieving operational and decisional excellence with the New York State Court System that remains successful but ongoing.

Within her role as Chief Judge, she has launched major reforms to improve the delivery of justice to underserved communities, established Opioid Treatment and Intervention Courts, upgraded and modernized the New York City Housing Court, leveraged technology to improve Family Court services, created mandatory court-sponsored ADR programs, and instituted a broad array of efforts to expand access to civil justice for low-income New Yorkers.

Exceptional Leadership Through Pandemic

Under the leadership of Chief Judge DiFiore during COVID-19, New York's complex in-person court system was transformed into a functioning virtual model that continued to provide access to justice and enable the New York State courts to remain open and functioning at all times.

This virtual model has been copied throughout the country by other state court systems and chief justices.

Join NCBA in Honoring Chief Judge DiFiore

The Annual Dinner Gala is the largest social event of the Nassau County Bar Association. It will be held on **Saturday, May 14, 2022**, at the Long Island Marriott. In addition to the Distinguished Service Medallion Honoree, NCBA Members who have been admitted to the Bar for 50, 60, and 70 years will also be honored that evening and recognized for their years of service to the legal profession. We hope you will join us to pay tribute to this year's honorees.

If you are interested in purchasing sponsorships or journal ads, see the insert in this issue of *Nassau Lawyer* or visit www.ncbadinnerdance.com. You may also contact Ann Burkowsky in the NCBA Special Events Department at events@nassaubar.org or (516) 747-4071.

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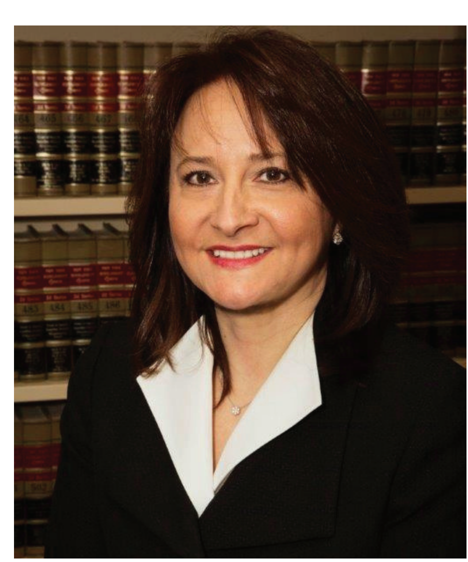

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The firm's attorneys have devoted themselves exclusively to the highly specialized fields of matrimonial and family law, and have extensive experience dealing with a full range of matrimonial issues, among them: agreements (pre-nuptial, post-nuptial, and separation), custody and visitation, equitable distribution, spousal and child support issues, license and professional practice valuations, enforcement and modification proceedings, awards of counsel fees and experts fees, as well as an extensive family law appellate practice.

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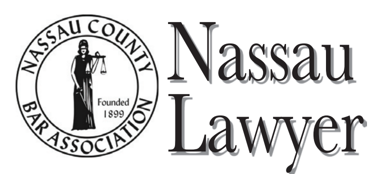

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You Are Not Alone

From the President

Gregory S. Lisi

I know that the last couple of years have made the world seem like a lonelier place. Shutdowns, working from home, quarantining, court closures, school closures, clients not wanting to come into the office, friends not wanting to go out, not seeing our colleagues, etc. Even at a large firm like mine, we are stuck in our offices with the doors closed. We call each other on the phone instead of dropping into each other's offices. Everyone is staying "COVID distant" and you feel guilty if you walk down your hallway and forget to bring your mask. Even when you are in an office filled with people, you can feel isolated. This can all be a little depressing.

However, do not despair. You are not alone. Domus, much like almost every restaurant in Nassau County, the UBS Arena, and the Paramount Theater—is open for business. The Nassau County Bar Association is continuing to hold events, and most are in person. We have upcoming **networking cocktail events** scheduled, including the **Committee Chair Networking Cocktail Hour** on February 23 and April 4, and the **Affinity Bar Networking Event** this Spring. Further, our two newest events, the **Sustaining Members Networking Cocktail Hour**, will be on March 16, and the **NBCA Past Presidents Dinner** will be March 31.

Further, the caterer is open for lunch and dinner events. In fact, they are hosting a **Valentine's Day Lunch** on February 16, a **St. Patrick's Day Lunch** on March 16, an **Administrative Professional Day lunch** on April 27, and a **Cinco de Mayo lunch** on May 5. I brought my Labor and Employment Department to the Thanksgiving and Holiday Luncheons back in November and December and everyone had a ball. In fact, those two lunches combined welcomed over 250 people to Domus. Everyone raved about the food and the company. It was a lot of fun, and the price for excellent food was right.

Additionally, every Wednesday at 12:30 PM, I invite you to have **Lunch with the President**. You do not need a reservation. Join me if you need a lunch companion or want to discuss the Bar, or anything else with the President. Feel free to call me at (516) 248-1700, if you want to confirm that I will be there, but I am almost always there.

The Nassau Academy of Law is still offering **in-person and hybrid CLE programs,** which include the following:

- February 1—"Per My Previous E-Mail": Improving Your Digital Communication Program, sponsored by NCBA Corporate Partner Champion Office Suites
- February 2—Keeping the Faith Baby: The Many Legacies of Adam Clayton Powell, Jr. (Law and American Culture Lecture Series), with the NCBA Diversity and Inclusion Committee
- February 4—Who Owns Your Ink? Intellectual Property Protection in Tattoos, with the NCBA Intellectual Property Law Committee and sponsored by NCBA Corporate Partner Champion Office Suites
- February 7—Essential Estate Planning Trends and Updates 2022, with the NCBA Surrogate's Court Estates and Trusts Committee
- February 8—PowerPoint in Practice
- February 9—Taking Down the Shingle: Preparing Yourself (and Your Clients) for the Closing/Retiring of a Law Firm Practice: Part 3—Life After Esq.: Preparing for Retirement and Informing Your Clients, presented by NCBA Corporate Partner Opal Wealth Advisors
- March 9—The French Connection Real to Reel (Law and American Culture Lecture Series), with the NCBA Diversity and Inclusion Committee
- March 10—Trauma Informed Lawyering in Matrimonial Practice, with the NCBA Matrimonial Law Committee, sponsored by NCBA Corporate Partners MPI Business Valuation and Advisory and Champion Office Suites
- March 15—Service Dogs, Emotional Support Animals and Other Animal Companions, with the NCBA Animal Law and Civil Rights Committees
- March 30—Ethics of a Residential Real Estate Closing, presented by NCBA Corporate Partner Tradition Title Agency Inc.
- March 31—Reflections from the Appellate Division Clerk's Office, with the NCBA Appellate Practice Committee
- April 6—Contract That Changed Baseball: Branch Rickey, Jackie Robinson, Brooklyn, and America (Law and American Culture Lecture Series, with the NCBA Diversity and Inclusion Committee
- April 27—Internal Investigations, Legal and Ethical Issues in Getting the Answers You Need
- May 3—A Supreme Study in Scandal: The Rise and Fall of Abe Fortas (Law and American Culture Lecture Series), with the NCBA Diversity and Inclusion Committee
- June 9—Lessons in Law, Love and Loyalty: The Abdication of Edward VIII (Law and American Culture Lecture Series), with the NCBA Diversity and Inclusion Committee

The Nassau Academy of Law, along with the NCBA Immigration Law Committee and Nassau County Assigned Counsel Defender Plan, is sponsoring an 8-part lunchtime hybrid series in the spring, "Defense Counsel's Guide to Padilla Compliance (In Bite Size Chunks!)," on the following topics:

- March 22—ICE Enforcement and Removal Priorities
- April 5—Responsibilities Under Padilla v. Kentucky
- April 14—Different Forms of Immigration Status and Immigration Relief
- April 26—Review of the Criminal Grounds of Inadmissibility
- May 4—Review of the Criminal Grounds of Deportability
- May 11—Immigration Definition of a Conviction
- May 17—Strategies for Handling Specific Offense and Recent Criminal-Immigration Law Decisions
- June 1—Post-Conviction Relief for Non-Citizens

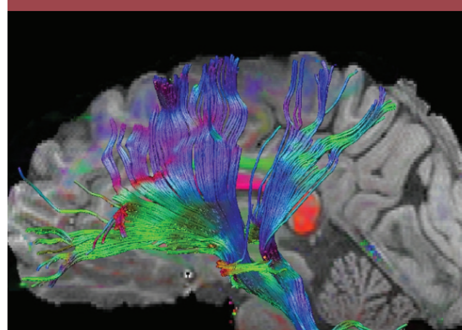
Furthermore, the **Hon. Joseph Goldstein Bridge-the-Gap Weekend** is being held from March 12-13, 2022, at 8:30 AM to 4:30 PM each day. Newly admitted attorneys will earn 7 credits in professional practice; 6 in skills; and 3 in ethics. Experienced attorneys will earn 13 credits in professional practice; 3 in ethics. Anyone can attend in person or via Zoom. It is free to current NCBA members. Attorneys can attend the whole weekend, a single day, or individual classes.

There is so much going on down at the Nassau County Bar Association. Take advantage of it. You are not alone. Do not let the fear of COVID make you feel isolated. You are a part of the NCBA family. I look forward to seeing you at Domus.

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.

FOCUS: PLAINTIFF'S PERSONAL INJURY

Use of Diffuse Tensor Imaging in Traumatic Brain Injury Litigation



Giulia R. Marino and Catherine Papandrew

A Traumatic Brain Injury (TBI) is an injury to the brain that is caused by a sudden traumatic event involving the head.[1] These injuries can be suffered in a multitude of events, such as slip and fall incidents and motor vehicle accidents. TBIs have a broad range of short- and long-term complications that affect how the brain functions cognitively, physically, and socially in both the present and future.[2] Some of these complications can be mild and resolve quite quickly, while others are more severe and can impact a patient for the rest of their lives.[3]

TBIs can present through a wide range of symptoms. Short-term symptoms can include concussion, headache, fatigue, dizziness, and confusion. Long-term effects of a TBI can be quite debilitating and life altering. Behavioral changes, difficulty with motor functions, and the inability to retain information are examples of potential long-term effects, as are seizures and loss of coordination. A TBI in a child can cause a disruption in the development of their brain. As adults, we may be taking medications, such as blood thinners, that can exacerbate a mild TBI and turn it into a life-threatening situation.[4]

In the United States, annually, over 1.7 million individuals experience a traumatic brain injury.[5] The CDC reports that in 2019, approximately 166 Americans died from a TBI-related injury each day.[6] Because TBI injuries range from mild to severe, the former can be difficult to diagnose as conventional radiological testing, i.e., computed tomography (CT scan) and magnetic resonance imaging (MRI) generally fail to reveal microscopic brain pathology.[7] Over the past several years, Diffuse Tensor Imaging has emerged as a diagnostic tool in suspected cases of TBI.

Diffuse Tensor Imaging

Diffuse Tensor Imaging (DTI), a specialized type of MRI testing, differs from CT scans and traditional MRI testing. CT scans are generally used to diagnose a skull fracture or an emergent medical situation, such as a subdural hematoma. Traditional MRI testing, while providing a level of enhanced imaging as compared to a CT scan, detects macroscopic, not microscopic, areas of white matter damage in the brain.[8]

In *Andrew v. Patterson Motor Freight, Inc.*,[9] Dr. Eduardo Gonzalez-Toledo, the neuroradiology expert designated by the plaintiff, explained DTI imaging detects microscopic changes in the white matter of the brain associated with mild TBI by measuring the "direction of movement or flow [known as diffusion] of water molecules through tissue."[10] DTI imaging can detect abnormalities in the white matter of the brain as water molecules "move through damaged tissue at different rates and in different directions than it does in healthy tissue."[11]

The use of DTI imaging is extremely helpful in cases where neurological symptomology, such as dizziness, headaches, irritability, fatigue, sleep disturbances, nausea, blurred vision, hypersensitivity to light and noise, depression, anxiety and deficits in attention, concentration, memory, executive function and speed of processing are present but radiological evidence is lacking.[12] Instances in which radiological evidence is unavailable generally arise in mild cases of TBI which account for 75% to 85% of all reported injuries.[13]

Federal Rules of Evidence Rule 702 and the Daubert Standard

The acceptance of DTI Imaging, as evidence in TBI cases, has met with a degree of success in the federal court system. Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony.

In the seminal case, *Daubert v. Merrell Dow Pharms., Inc.*,[14] the United States Supreme Court set forth criteria for admissibility of scientific expert testimony pursuant to Rule 702. Known as the *Daubert* standard, prior to admission of expert testimony, the trial court judge must first determine if such testimony is "(1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." The foregoing requires a preliminary assessment by the trial court judge as to "whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[15]

DTI and the Federal Courts

Challenges to the admissibility of DTI imaging, pursuant to *Daubert*, are being denied in federal courts across the country. Cases decided in Florida and Kentucky are illustrative of the trend.

In *Marsh v. Celebrity Cruises, Inc.*, the plaintiff suffered a mild TBI as the result of a slip and fall on a cruise ship.[16] The plaintiff underwent DTI imaging and designated a certified neuroradiologist and radiologist as an expert witness. Defendants subsequently sought to exclude the expert testimony as to the DTI imaging on the basis it constituted "junk science" and the expert testimony was "unsubstantiated speculation."[17] The *Marsh* court, however, found otherwise. In arriving at its decision to admit the expert testimony, the court noted DTI imaging is deemed "reliable and had been admitted in federal courts throughout the United States for nearly a decade."[18]

In a 2016 case, *Roach v. Hughes*,[19] defendants challenged the admissibility of DTI imaging under *Daubert* as "too speculative and unreliable." The *Roach* litigation arose from a motor vehicle accident in which the plaintiff alleged a TBI. In applying the *Daubert* criteria, the *Roach* court found DTI a proven and established imaging modality. In so holding, the court noted DTI imaging is "FDA approved and is a commercially marketed imaging modality that has been in clinical use for the evaluation of suspected head traumas including mild traumatic brain injury."[20]

Federal courts in other jurisdictions, including Indiana, Colorado and Louisiana, have similarly found DTI imaging admissible pursuant to the *Daubert* standard.

The *Frye* Standard

In contrast to Federal courts, state courts in New York are not as quick to accept DTI imaging as evidence. In New York, the *Frye* standard must be met, which means that "expert testimony based upon scientific procedures or principles is admissible, but only after a principle or procedure has gained general acceptance in its specific field."[21] Furthermore, you may demonstrate this "general acceptance" through scientific writings, judicial opinions, or expert opinions other than that of the expert in question.[22]

DTI Imaging and New York State Courts

In *LaMasa v. Bachman*, a rear-end collision motor vehicle accident case in New York county, DTI imaging was introduced as evidence in support of plaintiff's TBI.[23] Defense made a post-verdict motion, stating, among many other things, that it was improper of the court to permit plaintiff's expert neuroradiologist to testify regarding the results of plaintiff's DTI.[24] The matter ended up in the Appellate Division, First Department, where defense argued that the plaintiff presented no evidence that DTI imaging for diagnosing TBI was generally accepted in the field of radiology.[25] The court held that although plaintiff's experts relied on "new technologies and methodologies," they also relied upon

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"well-established and recognizable diagnostic tools," such as MRIs, and therefore, this expert testimony was admissible and met the *Frye* standard.[26]

Over ten years later, the issue resurfaced in *Brouard v. Convery*, a Suffolk County motor vehicle accident matter in which plaintiff suffered a TBI.[27] The court reviewed the previous decision in *LaMasa v. Bachman*. However, in this case, it was held that DTI did *not* meet the *Frye* standard because it did not have the general acceptance of the scientific and medical community for use in the medical treatment of patients with TBIs.[28] The court was guided by the decision in *Dovberg v. Laubach,* which allows scientific writings to demonstrate general acceptance of a scientific principle or procedure in the field.[29] In 2014, a "white paper" entitled *Imaging Evidence and Recommendations for Traumatic Brain Injury: Advanced Neuro and Neurovascular Imaging Techniques*, was published in the American Journal of Neuroradiology, and was widely supported by the medical community.[30] It stated that the data from DTI is confined to use in "the research arena of group comparisons," and that insufficient evidence existed to conclude that DTI can be used routinely in medical treatment of the individual patient.[31] The court held that this "white paper" cast significant doubt upon the reasoning in *LaMasa*, and reflected updated research and medical opinion on DTI.[32] Plaintiff thereafter made a motion to reargue the matter, based upon the issue that DTI was not only to be used in this case to prove TBI, but also to prove causation.[33] Here, the court considered the decisions made in the federal court regarding DTI, but ultimately declined to accept them as they are persuasive and not binding.[34]

In contrast, in *Siracusa v. City Ice Pavillion, L.L.C.*, a Queens County personal injury matter involving a plaintiff who suffered a TBI from an ALS ice bucket challenge, the court held that DTI was accepted as a reliable means of diagnosing TBI, and that it was accepted in the medical community.[35] The court based this decision largely on the precedent from the *LaMasa* case.

Most recently, in December 2021, Westchester County rendered another contrasting decision regarding the admissibility of DTI in TBI cases.[36] In this case, plaintiff was involved in a motor vehicle accident in which plaintiff was a passenger in a vehicle that was struck from behind.[37] The motion work done by both sides was voluminous. Plaintiff submitted nine clinical expert affirmations, while defendant provided expert affirmations and scholarly articles on the topic. The court felt the plaintiff established that there is a general acceptance of DTI in the medical and scientific community, and therefore took judicial notice of the reliability of DTI without conducting a *Frye* hearing.[38]

Conclusion

Although slow to gain recognition in New York, challenges to DTI imaging in federal courts have generally been rejected. As the technology continues to evolve, much like CT scans and traditional MRIs, DTI imaging is likely to gain traction in New York courts in the future.

1. https://www.ninds.nih.gov/Disorders/All-Disorders/Traumatic-Brain-Injury-Information-Page
2. *Id.*
3. *Id.*
4. *Id.*
5. Shenton ME, Hamoda HM, Schneiderman JS, et al. *A Review of Magnetic Resonance Imaging and Diffusion Tensor Imaging Findings in Mild Traumatic Brain Injury*, Brain Imaging Behav. June 2012 6(2): 2, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3803157/
6. https://www.cdc.gov/traumaticbraininjury/index.html.
7. Shenton ME, Hamoda HM, Schneiderman JS, et al., *supra* note 5, at 7 -9.
8. Shenton ME, Hamoda HM, Schneiderman JS, et al., *supra* note 5.
9. *Andrew v. Patterson Motor Freight, Inc.*, No. 6:13CV814, 2014 U.S. Dist. LEXIS 151234 (W.D. La. Oct. 23, 2014).
10. *Id.* at 22.
11. *Id.*
12. Shenton ME, Hamoda HM, Schneiderman JS, et al., *supra* note 5, at 3.
13. Shenton ME, Hamoda HM, Schneiderman JS, et al., *supra* note 5, at 2.
14. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).
15. *Id.*
16. *Marsh v. Celebrity Cruises, Inc.*, No. 1:17-cv-21097-UU, 2017 U.S. Dist. LEXIS 216486 (S.D. Fla. Dec. 15, 2017).
17. *Id.* at 6.
18. *Id.*
19. *Roach v. Hughes*, No. 4:13-CV-00136-JHM, 2016 U.S. Dist. LEXIS 192835 (W.D. Ky. Mar. 9, 2016).
20. Id. at 8.
21. *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).
22. *Dovberg v. Laubach*, 154 A.D.3d 810, 813 (2d Dept. 2017).
23. *LaMasa v. Bachman*, 56 A.D..3d 340 (1st Dept. 2008).
24. *Id.*
25. *Id.*
26. *Id.*
27. *Brouard v. Convery*, 59 Misc.3d 233 (Sup. Ct., Suff. Co. 2018).
28. *Id.*
29. 154 A.D.3d 810 (2d Dept. 2017).
30. http://www.ajnr.org/content/36/2/E1.
31. *Id.*
32. *Brouard*, supra note 27, at 237.
33. *Brouard v. Convery*, 2019 Trial Court Order.
34. *Id.*
35. *Siracusa v. City Ice Pavilion, L.L.C.*, 57 Misc.3d 267 (Sup. Ct., Queens Co.. 2017).
36. *Blake v. New York Central Mutual Fire Insurance Company*, Westchester County, Index No.: 60727/2018.
37. *Id.*
38. *Id.*

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FOCUS: TRIAL PRACTICE

Trial Practice in 2022—Preparing for the Unpredictable

Brian Gibbons

"If you don't like the weather in New England, just wait a few minutes." – Mark Twain

This saying refers to weather patterns, which seem to change by the minute. The same can be said about news related to COVID-19, in that the "trends" related to vaccination rates, infection rates, and the overall state of the pandemic seem to change by the day. Although some information in this article may become stale before publication, the goal is to give some practical insight about how trials can be expected to proceed in greater New York City in 2022. While this article is being published in *Nassau Lawyer*, its scope extends beyond Mineola and Hempstead.

For the day-to-day professional lives of trial attorneys in Greater New York City, COVID-19 has hit "pause." Before March 2020, personal lives were also literally planned around one's trial calendar.

"Honey, how about a long weekend in the Catskills in mid-July?"

"Don't book anything—I may be on trial then."

Sound familiar?

Since March 2020, jury trials have been largely on hold.[1] Some places in the United States have gotten creative to keep the trial calendars moving, like conducting virtual trials with remote jurors. These efforts have received mixed reviews, at best.[2] Thankfully, the New York Unified Court System has consistently geared its efforts toward in-person jury trials, with masks and social distancing in mind, and reserved remote practices to conferences and motion arguments.

Putting aside the unpredictable nature of COVID variants, and their impact on trials in the short term, attorneys should be prepared for 2022 trial practice in the Greater New York City area. This article incorporates experience and advice from attorneys who have tried cases in the second half of 2021 in Nassau and Suffolk Counties, each of the five boroughs, Westchester, and the Eastern District of New York in Central Islip. The goal of this article is to help prepare for 2022 trial practice, from a tactical perspective.

Jury Selection Logistics

Trial attorneys who have not tried a case in the past year have been most curious about the jury selection process. Depending on the venue, some court clerks have been pre-screening the jurors to gauge COVID-19 concerns. Along those lines, an attorney who has tried several civil matters in New York City in 2020-21 noted that not a single juror he questioned voiced any concern about COVID-19, and more importantly, no juror expressed an inability to be fair because of COVID-19. This dynamic suggests the clerk's offices are doing an admirable job pre-screening the jury pool. Without pre-screening a large percentage of the jurors would be likely to cite COVID concerns as a basis to be excused, which could result in several days to select a jury. To the extent court clerks have been pre-screening jurors, that practice should continue for the next several months.

Jury selection logistics seem to depend largely on the venue and the type of case. For example, in Suffolk County, jury selection this fall was proceeding "as usual," in that the litigants and the jurors utilized a jury selection room, while fully masked, and the attorneys questioned the jurors as they would have before March 2020. Also, additional space was mandated between jurors, to ensure social distancing. To that end, other than masked and distancing, the jury selection process was largely familiar to the attorneys. Conversely, in New York City venues and in Nassau County Supreme Court, jury selection has been conducted in either large courtrooms or in a central jury room, also to ensure social distancing. The courts have been instructing the jurors and the litigants to always remain masked, with the exception of litigants being permitted to briefly "unmask" to introduce himself/herself at the start.

Also, New York City courts have used smaller jury pools to ensure proper distancing—particularly if a larger courtroom is not available.

In the Eastern District, a criminal trial this past fall (which, of course, requires 12 jurors plus alternates) utilized pools of roughly 150 jurors—far more than a typical civil trial. There, the juror being questioned by the litigants, and by the judge, would approach a podium, alone, and would remove his/her mask while being questioned. All other jurors would remain masked and seated until the clerk drew his/her name.

Good trial attorneys use the jury selection process to endear themselves to the jury, and to develop allies. The jury "endearment" process has become much trickier since there is much less gauge of facial expressions. This dynamic leads to more uncertainty about whether the attorney has picked a "good" jury or not. The "unchartered waters" of reading masked jurors' facial expressions tends to bleed into the trial itself. If trial attorneys never really know what jurors are thinking, now they REALLY don't know what they're thinking.

Trial Logistics

During trial, attorneys often look to "take charge" of the courtroom by moving around the room, speaking directly to jurors, approaching witnesses at appropriate times, and using facial expressions, inflection, and body language throughout the course of the trial. COVID-era trials limit opportunities to take control of the courtroom. For example:

- Obviously, jurors are masked throughout trial—this is consistent across greater New York City venues. As a result, just as during jury selection, attorneys' ability to read jurors' facial expressions is diminished throughout trial. Moreover, "reading the eyes" of masked jurors with any degree of predictability remains an ambitious goal.
- To ensure social distancing, jurors are often spread out such that three jurors are placed in the jury box, with the rest (plus alternates) in the gallery behind the litigants. As a result, the attorney cannot look at most of the jurors while questioning a witness, thereby making it more difficult to gauge how the jurors perceive that witness. The value of perceiving a juror's smirk, or furrowed brow, while a witness is testifying can affect strategy. Attorneys are now less able to perceive those facial expressions.
- Attorneys are often instructed to remain seated at their respective tables, or stationary at a podium, even while questioning the witnesses, since allowing an attorney to roam the courtroom would tend to violate social distancing guidelines. As a result, a trial attorney has less capacity to "own" the courtroom for dramatic effect, for example, while cross-examining a witness or delivering a summation.
- In many cases, witnesses testify unmasked, but behind plexiglass, to allow jurors to see their facial expressions during testimony.
- Depending on the venue, and even the judge, additional attendees are permitted to be observe trials, but with differing protocols. In Queens, for example, a risk manager was permitted to attend trial, the back row of the courtroom, as far away from the jurors as possible. Conversely, Kings Supreme Court has utilized a live stream of a trial, which allowed attendees to observe the trial from an adjacent courtroom in the same building.

Jury Deliberations and Damages

In recent years, even before COVID-19, jury polarization has been a topic of concern.[3 4] Whether due to the current political divide in the United States, media reporting on more extreme verdicts, or other facts, there has been a recent trend for jurors to be more "dug in," in that plaintiff jurors are more plaintiff-friendly, whereas defense jurors have been more skeptical of plaintiffs. (Of course, this is a very broad generalization, but much has been written on this topic in recent years, well before COVID.)

Many attorneys have not noticed any increased jury polarization during COVID, as compared to a few years earlier, at least based on the verdicts rendered. That said, given the hardships over the past two years, jurors have been less receptive to non-economic damages in the personal injury context, particularly when the claimed injury is relatively modest. Conversely, jurors have been more receptive to economic damages—when an injury renders a plaintiff unable to work. Again, this generalization is based on a limited sample size, but is nevertheless worth relaying.

Given the recent surge in Omicron cases in New York and around the United States, judges are aware of the increased risk of infection, and in one case, asked deliberating jurors to work overtime to reach a verdict before an infection (and potential mistrial) comes to pass.[5] Interesting times, to be sure.

Little else is known about what is discussed—COVID or otherwise—in jury deliberations during COVID-era trials—but that's the idea. Jury deliberations were and are sacrosanct, and whether COVID concerns are truly impacting the deliberation process is unknown.

Difficulty Reducing Trial Backlog

As of late December 2021, there were over 1900 cases pending on the DCM jury trial calendar in the Nassau County Supreme Court, not including the over 400 medical malpractice cases. Trial practice is essential to clear this backlog since the tougher cases to settle often need the proverbial "courthouse steps" to incentivize both parties to reach a settlement—even a begrudging one. The problem has been logistics. Specifically, amidst current COVID spacing requirements, the maximum number of jury trials (in Nassau County Supreme Court) can be expanded to five at one time with a maximum of three attorneys. For cases with more than three attorneys the CCP Courtroom is being used for jury selection and trial. This limits such multi-attorney jury trials to one at a time on cases which can take multiple weeks to complete.

Reducing trial backlog, with trial practice so limited right now by settlements is not as simple as it sounds. First, the cases that currently remain on the trial calendar, in many instances, are there for a reason. That is, they are tough cases to settle, where each side is entrenched in a position. Second, along the same lines, many plaintiffs may be inclined to say, "I have waited this long for a trial date and should not have to settle for a discount now." Third, many may have read about "The Great Resignation" during COVID, which refers to significant turnover in the workforce. The insurance/risk management industry has experienced its share of turnover, and newly hired risk managers' first priority is to "make their mark," and not to pay out big money on inherited claims. These factors make reducing the trial backlog an arduous task.

Eventually, the trial "floodgates" will open, and for trial attorneys on both sides of the aisle, the incentive to resolve to cases now should be evident. Because once those floodgates do open, courts will be more likely to send inexperienced attorneys out to select juries, out of necessity. Clients should be advised of this likelihood now, identifying cases that can be settled, and utilizing various ADR programs—such as the one implemented by Hon. Vito M. DeStefano in Nassau Supreme[6]—whenever possible.

Conclusion—The Craft of COVID Trial Practice

Trying a case is a craft, meaning that the skills involved in trial practice incorporate both art and science. As trial attorney Stephen Barry aptly puts it, "The science of trial is the same, but the art is completely different right now."[7]

In terms of the science being the same, in a personal injury context, the plaintiff still has the burden of proof as to both liability and damages. The plaintiff still must convince the jury that the defendant is liable for plaintiff's accident, and that the accident proximately caused plaintiff's injury, leading to damages. The defendant may still present witnesses on liability and damages, cross-examine plaintiff's witnesses, and present an alternative theory to the jury. None of that is changed.

But the *art* of the trial has changed, in the following significant ways:

- Jurors are masked, and in many cases, behind the trial attorneys during witness testimony, thereby making it more difficult to "read" jurors as trial progresses;
- Attorneys are not permitted to roam the courtroom, approach witnesses, or in some instances, to even leave their respective tables or podiums; and
- Multiple-attorney trials are even more problematic since multiple attorneys also means multiple clients—and many courthouses simply do not have the resources to conduct these trials in a socially distanced environment right now.

Trial attorneys are tasked with the same job as before—to convince a jury of the client's position. The goal remains the same, but the pathway to that goal is completely different than it has been in the past—hopefully, just in the short term.

1. Victoria McKenzie, "Plaintiffs Attys in Limbo, with Jury Trials 'Impossible' in NY," LAW360 (Dec. 15, 2021, 6:32 pm EST), https://www.law360.com/articles/1448701/plaintiffs-attys-in-limbo-with-jury-trials-impossible-in-ny.
2. National Center for State Courts, "Why Texas Justices Halted a Virtual Jury Trial" (June 11, 2021), https://www.ncsc.org/newsroom/jure/2021/why-texas-justices-halted-a-virtual-jury-trial.
3. Robert A. Clifford, "Polarized Juries?" National Law Review (March 6, 2018), https://www.natlawreview.com/article/polarized-juries.
4. Claire Luna and Jack Oliver, "Juror Perspectives in the Post-COVID Era," For the Defense (Nov. 2021), https://digitaleditions.walsworth.com/publication/?i=729352&ver=html5&p=42.
5. https://www.audacy.com/krld/news/national/citing-covid-judge-prods-maxwell-jury-to-work-longer-hours.
6. Commercial Division, Nassau County, Rules of the Alternative Dispute Resolution Program, http://ww2.nycourts.gov/courts/comdiv/nassau_ADR_Rules.shtml.
7. Telephone interview with Stephen Barry (Jan. 7, 2022).

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FOCUS: BOOK REVIEW

The Night Watchman
A Novel, By Louise Erdrich

Publisher: Harper Collins
Copyright: 2020
Hardcover: 464 pages
ISBN: 978-0-06-267118-9
Price: $28.99

Rhoda Y. Andors

Who is the Night Watchman? He is Thomas Wazhashk—smart, honest and reliable—who nightly patrols a new jewel bearing[1] plant on the reservation of the Turtle Mountain Band of Chippewa in North Dakota. Thomas is a tribal official who also watches over the reservation, writing letters to senators and commissioners, after midnight, in between his rounds at the plant, in the perfect penmanship he learned at the government boarding school[2] he was forced to attend as a child.

"*Time to write. Thomas positioned himself, did the Palmer Method breathing exercises he had learned in boarding school, and uncapped his pen. He had a new pad of paper from the mercantile, tinted an eye-soothing pale green. His hand was steady…*"[3]

In Chippewa, "wazhashk" is the muskrat, though hardworking and lowly, crucially, in "the beginning, after the great flood, it was a muskrat who helped remake the earth." Thomas Wazhashk is "perfectly named." When the Turtle Mountain Band is suddenly threatened with disaster, a bill in Congress calling for the tribe's "termination,"[4] he must help remake the world if the tribe is to survive.

So begins this extraordinary novel by Louise Erdrich, which was awarded the Pulitzer Prize for fiction in 2021. As Erdrich later explains, Thomas's character was inspired by her grandfather, who was the chairman of the tribe in the 1950s.

"*Thomas was of the after-the buffalo-who-are-we-now generation. He was born on the reservation, grew up on the reservation, assumed he would die there also. Thomas owned a watch. He had no memory of time according only to the sun and moon. He spoke the old language first, and also spoke English with a soft grain and imperceptible accent. This accent would only belong to those of his generation.*"

"In the 1950s, the United States came up with a plan to solve what it called the 'Indian Problem.' It would assimilate Native Americans by moving them to cities and eliminating reservations."[5] In 1954, Erdrich's grandfather travelled to Congress with a tribal delegation to oppose the termination legislation on behalf of the Turtle Mountain Band, one of the first tribes slated for termination, and "the first to mount a fierce defense."

"*A statement of strong opposition. Then a ladle of corn syrup---appreciation for the efforts and time of the government, extra dollops for Senator Watkins and the Associate Commissioner of Indian Affairs…the authors of the two measures that would strip the people of everything.*"

In Erdrich's novel, in counterpoint to the character of Thomas, is Pixie Paranteau, his 19-year-old niece, who asks to be called "Patrice." Pixie is of the second generation, poised between the old ways and the new, "who had been raised speaking Chippewa but had no trouble speaking English, who had followed most of her mother's teachings, but also became a Catholic."

"*Patrice knew her mother's songs, but she had also been a class valedictorian and the English teacher had given her a book of poems by Emily Dickinson…She had seen how quickly girls who had got married and had children had been worn down before the age of twenty. Nothing happened to them but toil. Great things happened to other people. The married girls were lost, 'Distant strains of triumph.'*[6] *That wasn't going to be her life*"

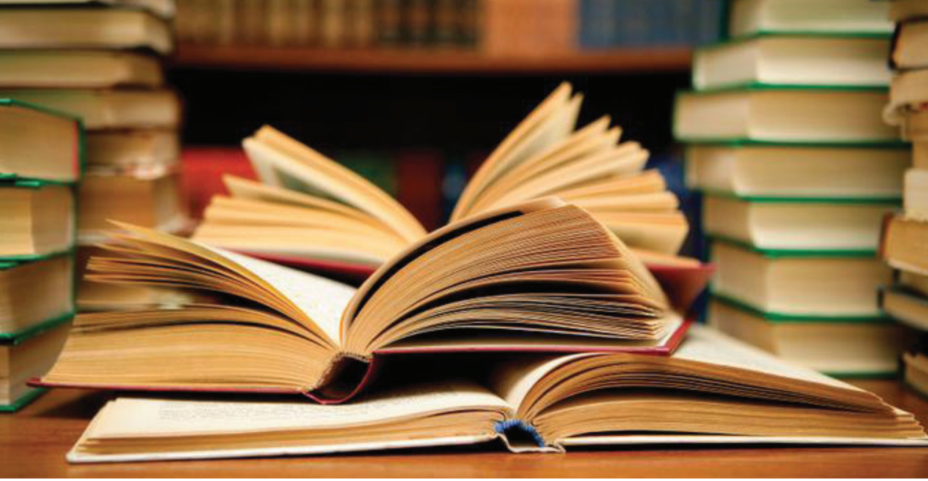
On weekdays, Pixie hitches a ride with her friends to the new plant where she has a good job. "Not a trapping, hunting or berry picking job but a white-people job," which supports her mother, Zhaanat, and brother Pokey. Her father, a violent drunk, is mostly absent, but can show up, unexpectedly.

"*Knowing how much they needed Patrice's job, it was her mother's, Zhaanat's, task during the week to sit up behind the door with an ax. Until they had word where their father had landed next, they all had to be on guard. On the weekends, Zhaanat took turns with Patrice. With the ax on the table and the kerosene lamp, Patrice read her poems and magazines.*"

Pixie is saving a bit of her paycheck to follow her sister, Vera, to Minneapolis. Vera had applied to the local Relocation and Placement Office[7] and then left the reservation for the city with her new husband. Since then, Vera has disappeared.

"*They got some money to set up a place to live, and training for a job. Many people came back within a year. Some, you never heard from again.*"

In the *Night Watchman*, as in her other acclaimed novels, *Love Medicine* and *The Round House*, Erdrich creates a menagerie of unique, interrelated characters, and speaks authentically in each of their different voices—male and female, Native American and white, the innocent and the evil, and tribal elders, horses and ghosts.



There is Wood Mountain, a young boxer from the tribe in love with Pixie: "*Without thinking, like it was natural, he tried out the smile he practiced in the shaving mirror*;" and Barnes, the yellow-haired math teacher and boxing coach, who is also in love with Pixie: "Numbers befriended him throughout the day. He noticed connections, repetitions… *Numbers also attached to people. He saw Pixie as a 26….*"

There is Valentine Blue, Pixie's best friend, who can be cruel, "*All you ever have is lard on bread*," and the kinder Doris Lauder, a white farm girl, who jokes that her perfume is "*Eau de Better than Manure*."

Roderick is a visitor from the other side, and Thomas's third-grade friend, who died of tuberculosis after being locked in a cold cellar at the government boarding school: "*They sawed my lung out, dumbhead!*"

Then, there is Zhaanat, Pixie's mother: "*Sometimes she knew things she should not have known. Where a vanished man had fallen through the ice. Where a disordered woman had buried a child of diptheria. Why an animal gave itself to one hunter and not another….*"

As in Erdrich's other novels, in *The Night Watchman*, the present, acutely perceived through all the senses, and the past, told and retold, coexist. Biboon, Thomas's elderly father, has understood for years that "*Time is all at once, back and forth, upside down*."

When Thomas comes home at daybreak to sleep under an old quilt, he sees that: "*It was a quilt of patches left over from the woolen coats that had passed through the family. Here was his mother's navy blue. It had been made from a trade wool blanket and to a blanket it had returned. Here were the boys' padded plaid wool jackets, ripped and worn. These jackets had surged through the fields, down icy hills, wrestled with dogs, and been left behind when they took city work. Here was Rose's coat from the early days of their marriage, blue-gray and thin now, but still bearing the fateful shape of her as she walked away from him, then stopped, turned, and smiled, looking at him from under the brim of a midnight-blue cloche hat, daring him to love her. They'd been so young*."

Will Thomas and the tribal delegation succeed in Washington, D.C.? What does Pixie find in Minneapolis? Does she pick one of the lovestruck suitors? Will Vera return? As *The Night Watchman* moves back and forth in time, the reader can expect the unexpected.

1. A "jewel bearing" is a plain metal bearing in which a metal spindle spins in a jewel-lined pivot hole. Such bearings were commonly used in mechanical watches. ASM Materials Engineering Dictionary, 1992; https://thewatchmanual.com/jewels-in-watches/
2. "Throughout the 19th and 20th centuries, thousands of Native children in the United States and Canada were forced into assimilationist boarding schools that sought to strip them of their culture and heritage. Many died from disease, starvation, or physical abuse. Most were buried hastily, sometimes two or three small bodies to a grave." Mary Annette Pember, *A History Not Yet Laid to Rest*, The Atlantic, Nov. 24, 2021.
3. All italicized and quoted passes are from *The Night Watchman*, unless otherwise cited.
4. "On August 1, 1953, the United States Congress announced House Concurrent Resolution 108, a bill to abrogate nation-to-nation treaties, which had been made with American Indian Nations for 'as long as the grass grows and the rivers flow.'" *The Night Watchman*, Author's Note.
5. https://www.apmreports.org/episode/2019/11/01/uprooted-the-1950s-plan-to-erase-indian-country
6. "Distant strains of triumph" is a line from the Emily Dickinson poem, *Success Is Counted Sweetest*.
7. In response to the federal termination policy, the Bureau of Indian Affairs ("BIA") "began a voluntary urban relocation program. American Indians could move from their rural tribes to metropolitan areas…BIA pledged assistance with locating housing and employment." https://www.archives.gov/education/lessons/indian-relocation.html

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FOCUS: ETHICS

TV and Movie Lawyers—Are They Making the Rest of Us Look Bad?

Cynthia A. Augello

When watching legal dramas on television or in the movies, many lawyers, probably to the dismay of their viewing companions, are likely to comment "that would never happen in real life." Often, TV and movie "lawyers" are portrayed as ethically challenged as they bend rules or disregard them altogether.

In a December 2020 poll, individuals were asked to rate the honesty and ethical standards of individuals in various fields. In the 15 fields represented, lawyers ranked the fifth lowest, only slightly ranking above business executives, advertising practitioners, car salespeople, and members of Congress.[1]

In the earlier years of television, producers of lawyer shows most likely did not consult with actual lawyers. Now, a large number of TV shows employ lawyer advisors or the writer/creator of the shows are current or former practitioners. For example, David E. Kelley, who created *Picket Fences, L.A. Law, Ally McBeal, The Practice*, and *Boston Legal*, was an attorney.[2]

Do non-lawyers view these television shows and believe the behavior of these fictional lawyers represent the actual practice of law? On such shows, it is not uncommon to see lawyers during closing arguments vouch for clients or directly address specific jurors or witnesses.

Prime-time Example

In reviewing several legal dramas, it is easy to understand from where the public misperception stems. For example, in *How to Get Away with Murder*, it is nearly impossible to keep track of the numerous ethical violations portrayed. The show's main character, Analise Keating, is a criminal defense attorney and a law professor. She hires students from her class to assist her in her law practice.

Keating accepts a client accused of murder, because she believed her own husband actually committed the crime. She proceeds to bury evidence that would have implicated her husband even though she needed to link her husband to the murder to exonerate her client. During the entirety of the murder investigations and associated legal case, Keating has an affair with a police officer handling the investigation. As if that is not ethically improper enough, one of Keating's students/interns dated the client accused of the murder.

The Good, But Not-so-ethical Wife

Another show that blurs the lines of ethical rules was *The Good Wife*. In one episode, Diane Lockhart clicks on a link in an email she believed to be from her partner, Alicia Florrick. The computer screen instantly goes dark, and a message pops up giving the firm seventy-two hours to pay $50,000 or all of the files of the firm would be deleted. Thereafter, Diane learns that the files have not been backed up. Rather than losing all the files, the firm paid the ransom.

In 2012 Rule 1.1 of the ABA's Model Rules—the duty of competence—was modified in Comment 8 to require that lawyers know and understand "the benefits and risks and associated with relevant technology."[3] Comment 8 to New York Rules of Professional Conduct (RPC) 1.1 states: "To maintain the requisite knowledge and skill, a lawyer should … (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information."[4] As early as 2004, N.Y. State Bar Association Ethics Opinion 782 opined that a lawyer who uses technology to communicate with clients must use reasonable care with respect to such communication, and therefore must assess the risks attendant to the use of that technology.[5]

In another episode, and one that could easily have happened during this age of COVID, the webcam in opposing counsel's office is accidentally left on after a zoom-like deposition is adjourned. Alicia and three other lawyers in her firm watched and listened as opposing counsel discussed issues unrelated to the case. The attorneys in Alicia's office then discuss whether the Rules of Professional Conduct prohibit them from watching and listening.

When Alicia attempts to tell opposing counsel that their webcam is still on (they are unable to hear her), she overhears them say that Alicia's firm will be gone within 48 hours.

After hearing this, Alicia and her colleagues continue to listen. It could be argued that Alicia and her colleagues violated RPC 3.4: Fairness to Opposing Party and Counsel which states: A lawyer shall not: (a)(6) knowingly engage in other illegal conduct or conduct contrary to these Rules.[6] New York Penal Law §§250.00[7], 250.05 makes it a felony to use a device to overhear or record in-person conversations at which one is not present without the consent of at least one party to that conversation.[8]

Better Call Saul—Just Don't Ask Him About Ethics

Forgetting for a moment that the main character in *Better Call Saul*, Saul Goodman helps his clients launder money and hire hit men, there are other ethical violations that may be less obvious to non-lawyers and leading to the abysmal poll findings. For example, in one episode, Saul attempts to expand his business by setting up a publicity stunt where he stages the rescue of a worker putting up an attorney advertising billboard for him.

RPC 8.4 (c) requires that a lawyer or law firm shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.[9] Arguably, staging a rescue just to have people witness it and expand business could be seen as dishonest, fraudulent, deceitful, and as a misrepresentation of the event that took place.

Suits—The Entire Premise of the Show is an Ethical Violation

Is Mike Ross a brilliant lawyer? Yes and no. He has no law degree but talks his way into an associate position at a top New York law firm. He and the partner who hired him knowing of the lack of a law license, Harvey Spector, spend a large amount of time ensuring no one learns of their secret. When others at the firm learn of it, the dynamic duo convinces them to also keep the secret.

RPC 5.5 concerns the unauthorized practice of law and states:

"(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.

(b) A lawyer shall not aid a nonlawyer in the unauthorized practice of law."[10]

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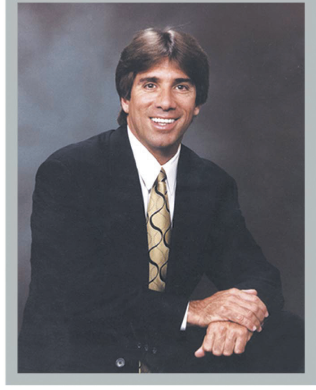

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The comments to the rule specifically address the various violations committed in *Suits*. Comment 1 states that subdivision (b) prohibits a lawyer from aiding a non-lawyer in the unauthorized practice of law. Comment 2 indicates that " limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons."[11]

If we somehow move beyond the unauthorized practice of law and the various coverups, the attorneys routinely fail to inform clients of settlement offers, speak to parties represented by counsel, threaten criminal prosecution in civil matters to gain an advantage during settlement discussions, and ignore obvious conflicts of interest. While an enormously entertaining show, it begs the question—do people think these are "good" lawyers and do things like this really happen?

Addressing the various ethical rules violations, failing to inform clients of settlement offers would violate RPC 1.4(a)(1)(iii) requiring that a lawyer promptly notify a client of material developments in a matter including all plea or settlement offers.[12] Speaking to a party that is represented by counsel violates RPC 4.2 which states "[i]n representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law."

The lawyers in *Suits* never received prior consent before engaging in such conversations with represented parties. Threatening criminal prosecution to obtain a settlement advantage would violate RPC 3.4(e) requiring that no lawyer shall "present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."[13] Finally, conflicts of interest are addressed in various rules. Specifically, RPC 1.7, 1.8, and 1.9 all address the conflicts of interest issues showcased on *Suits*.[14]

Eli Stone—Making Lawyers Look Stone Cold

One episode of *Eli Stone* included a full-blown disciplinary proceeding before the California State Bar where the character's capacity to practice law was challenged after Eli was singing in court. It turned out that Eli had an inoperable brain aneurysm making way for his license to be saved by the Americans with Disability Act.

Due to the disability, however, the character begins to care about his clients, rather than just about winning cases, leading viewers to a possible assumption that civil litigators who are "well" would only care about making money.

Verdict on Lawyer's Ethics

Lawyer shows on television and movies with legal themes are created for entertainment, not as a primer on real legal work or ethics. Otherwise, all cases would go from complaint to trial in a mere 42 minutes. Yet, one cannot help but wonder if these shows and depictions have an impact on the image of the profession in the eyes of the public.

1. https://news.gallup.com/poll/1654/honesty-ethics-professions.aspx.
2. https://en.wikipedia.org/wiki/David_E._Kelley.
3. https://bit.ly/3G3k0uC.
4. https://bit.ly/3FbxFP3.
5. https://nysba.org/ethics-opinion-782/.
6. https://bit.ly/3FbxFP3.
7. https://bit.ly/3sY6Zi8.
8. https://bit.ly/3sY79pK.
9. https://bit.ly/3FbxFP3.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*

Cynthia A. Augello is the Principal of the Law Offices of Cynthia A. Augello, PC handling primarily matters involving defense of employment law litigation and general commercial litigation. She is also the Vice-Chair of the NCBA Publications Committee.

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Ronen Sarraf and
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Introduction and Fact Pattern

Lisa met Michael while he was working abroad in the United Kingdom and she was finishing her undergraduate education. They began dating, then got engaged and married within three months. Michael was asked to relocate back to New York and they moved there together. Michael, a U.S. citizen, sponsored Lisa for her green card and signed a Form I-864, Affidavit of Support. But the relationship soured within a year. Michael became financially controlling and verbally abusive. He refused to consider individual or marriage counseling. Lisa had no job or savings. She was unable to find work and was ineligible for most public assistance because she lacked citizenship. Facing homelessness, she finally consulted with attorneys about her legal options.

For family law attorneys this may initially appear as a simple uncontested divorce with possible domestic violence issues. In brief marriages like this one, getting financial remedies such as spousal support can be difficult. Moreover, spousal support is a minefield of unrealistic expectations and strong emotions, which often requires litigation to resolve. Lisa will need considerable help.

For immigration lawyers, the fact pattern is obvious: CR1, I-130, a conditional green card, upcoming I-751, and possible VAWA petition. There will be some strategic choices to make, with respective pros and cons, but allowing Lisa to remain in the U.S. is likely, although not assured. How she will pay for these services is another matter.

But what about the Affidavit of Support, Form I-864? Michael sponsored Lisa and promised to financially support her. This frequently overlooked and rarely enforced document deserves a second look. For the immigrant spouse, it's a lifeline. Most family law attorneys do not routinely consider the I-864 as part of their case strategy for the non-monied spouse. As a result, this source of support is often entirely overlooked.

It is common for immigration issues to overlap with family law issues when one of the parties is not a citizen. In this article we will focus on the I-864 Affidavit of Support, where a citizen sponsor agrees to financially support their immigrating spouse—and how it can help a divorce where few other viable options exist.

Whether you are representing the citizen spouse (almost always the monied spouse) or the permanent resident spouse sponsored by the affidavit (usually the non-monied spouse) it is vital to know the rights, responsibilities, risks and obligations involved. Ideally, these are issues that should be addressed in a prenuptial agreement. But prenups, in these situations, are still relatively rare and some courts have not enforced prenups with regards to I-864 obligations. In cases where a married couple includes a spouse holding immigration status, legal issues concerning divorce and immigration can become intertwined.

Waiting for a Green Card While Married

An immigrant who is married to and living with a U.S. citizen enjoys a special privilege. That person only needs to wait three years[1] before applying for U.S. citizenship, instead of meeting the usual five-year residency requirement.

However, in order to benefit from this three-year eligibility period, the immigrant will need to stay married and living with the U.S. citizen for the entire three years, all the way up to the time of being approved for U.S. citizenship. If a divorce occurs first, the immigrant will have to accrue a full five years of permanent residence before becoming eligible to apply for U.S. citizenship.[2]

Marriage Fraud

A divorce is not automatically viewed as a sign of immigration marriage fraud. Plenty of truly married couples bicker or see their marriage collapse, despite their earlier plans and hopes. Whether someone immigrating through marriage can obtain or keep a green card after a divorce depends on how far along they are in the immigration application process.

Understandably, the U.S. government is concerned with people entering into sham marriages in order to obtain U.S. residency, whether for a payment of money, based on friendship, or something else. Most family law attorneys are familiar with these scenarios. Although every couple is asked for extensive proof that their marriage is bona fide, the U.S. government knows that such things can be faked. It wants to see whether the couple can really uphold the possible fraud for another two years.

To attain full permanent residence status, the conditional resident will, within the 90 days before this two-year testing period is over, need to file a petition (USCIS Form I-751) with U.S. Citizenship and Immigration Services (USCIS). Of course, the 90-day window does not apply to those seeking divorce or abuse waivers.

Ideally this is done as a joint petition signed by both spouses, and includes evidence that the marriage is ongoing. (Children's birth certificates, for example, are an excellent form of proof, and so are photographs of family events. Even records of visiting a marriage counselor can help; couples trying to commit marriage fraud don't ordinarily seek out therapists to help save the relationship.)

What is the I-184 Affidavit of Support?

The I-864 Affidavit of Support is required for almost all immigrants that have U.S. family members, i.e., a sibling, parent, or spouse. The I-864 demonstrates that the immigrant, while residing in the United States, has adequate financial support and will not require public assistance.[3]

Applicants who seek permanent residency (i.e., a green card) through a U.S. family member, such as a spouse, must be financially sponsored.

By signing an I-864 Affidavit of Support, the sponsor agrees to use their income and assets to support the immigrant family member. The affidavit creates an enforceable contract to help defray the obligations of government entities that provide public assistance.[4]

The Form I-864 is usually one of many documents that are signed during the course of an immigration application. This form is signed not by the intended immigrant but by the "sponsor" who becomes legally bound to financially support the intended immigrant if he or she is unable to do so. Once signed, the I-864 becomes a binding contract between the sponsor and the U.S. government, of which the sponsored immigrant is a beneficiary.

Public Policy Considerations—U.S. Immigration and Form I-864

For better or worse, a century-old bedrock principal of U.S. immigration policy is that the US should not admit those deemed likely to become a "public charge."[5] For decades, the Form I-864 has been the practical manifestation of that principal.[6] Not surprisingly, the I-864 is mandatory in nearly all family-based immigration cases.[7]

The I-864 is essentially a risk-allocating device designed to ensure that U.S. taxpayers bear little of the financial risks associated with this new immigrant. The I-864 accomplishes this with two financial levers.

First, it obligates the sponsor to repay any government assistance (e.g., food stamps, social security insurance, Medicaid, etc.) consumed by the beneficiary. Second, it requires the sponsor to ensure that the sponsored immigrant is always supported with a minimal amount of money; specifically, at least 125% of the federal poverty line.

While the poverty guidelines are updated annually and actual financial amount varies based on geography and personal circumstances, the current (2021) monthly amount is $1,342 for a single adult. In other words, a sponsor must ensure that the sponsored immigrant earns or receives at least that much a month. Any amount that the sponsored immigrant earns less than $1,342, the sponsor must make up. In certain situations, these amounts can add up, especially if months or years pass without any financial support. In certain circumstances, like those involving our fictional "Lisa," these amounts can be life changing.

What Are the Financial Obligations of the Sponsoring Spouse?

By signing the affidavit, the sponsor agrees to support their spouse at an annual income that is not less than 125% of the federal poverty line (or, if the sponsoring spouse is on active duty in the U.S. Armed Forces or U.S. Coast Guard, the amount is 100% of the federal poverty line).

A sponsor's responsibilities only terminate upon the following five events:

- The immigrant becomes a U.S. Citizen.
- The immigrant has worked or received credit for 40 quarters of work (about 10 years of employment) as defined by the Social Security Administration.
- The immigrant no longer holds permanent resident status and has left the U.S.
- The immigrant is subject to removal, but seeks and obtains in removal.

proceedings, a new grant of status based upon a new I-864 (if required); or,

- Either spouse dies.

Very clearly, a divorce does not void the contract or end the I-864 financial obligations.

Regardless of the waiver or denial of maintenance, or the allocation of property in a divorce, the sponsor spouse is still obligated to meet their responsibilities under the I-864.

The immigrant can bring suit in federal court to obtain and enforce the promised support. Also, a federal, state, or local agency may sue to enforce reimbursement in the amount of public benefits provided to the immigrant spouse.

Considerations for Divorcing Couples

Even if maintenance is waived or denied in the judgment of divorce, it does not alter the sponsor's obligations under the I-864.

A divorced spouse's "income" and any property awarded in divorce proceedings, can become implicated in an I-864 analysis. If your client signed an I-864, it is important that they know that a divorce judgment may not relieve them of their obligations.

Likewise, if your client is supported by an I-864, it is important that they are aware they are ineligible for certain federal, state, or local means-tested public benefits, because the agency will consider the sponsor's resources in determining eligibility.

Enforcement of the I-864 Against the Sponsoring Spouse

In crafting the I-864, the government recognized that some sponsors may refuse to fulfill their financial obligations to the detriment of both the indigent immigrant and taxpayer-backed support programs on which sponsored immigrants usually rely. Sometimes sponsors (like our fictional "Michael") do shirk these responsibilities. As a result, lawmakers passed rules that allow sponsored immigrants to sue their sponsors, something which the I-864 explicitly notes, to enforce these financial responsibilities. To encourage sponsor compliance, and the retention of qualified counsel to prosecute such claims, the law also contains a fee shifting provision. Sponsors who are successfully sued must not only pay the money they owe the immigrant but must also pay attorneys' fees and costs incurred to compel such payment.

As a result of these rules, sponsored immigrants are able to hire lawyers on a contingency basis—usually without having to pay any upfront costs—to sue their sponsors. This means that attorneys who handle I-864 cases usually cover all the litigation expenses and only get paid if they win. This is in contrast to how most divorce or immigration lawyers charge their clients on an hourly or flat-fee basis. Indeed, family law cases and the state courts in which they are typically litigated, prohibit contingency fee arrangements.

Federal Court Jurisdiction

While state and federal courts share concurrent jurisdiction, I-864 enforcement actions are best suited for federal court. That is because the legal claim is based entirely on a body of law and immigration policy that is federal in origin, and raises purely federal questions. Moreover, federal judges are more likely to enforce the actual terms and rigid contractual framework of a contract between the defendant-sponsor and the U.S. government, wherein the sponsored immigrant plaintiff is a beneficiary.

In contrast, bringing I-864 claims in state court, especially in the context of a divorce or other domestic state law proceeding, potentially complicates already complex issues and could result in erroneous judicial decisions. This is because state court judges may reflexively apply equitable concepts to what is a strict breach of contract claim for which there are few, if any, defenses. For example, in Family Courts, "income" is often imputed to a party who is not working, or who benefits from living with a family member. However, the federal rules governing I-864 rights specifically define "income" which state court judges may not appreciate.

Finally, most courts have held that state divorce law cannot be used to waive I-864 rights. As the Ninth Circuit held in *Erler*:[8]

> Thus, under federal law, neither a divorce judgment nor a premarital agreement may terminate an obligation of support. Rather, as the Seventh Circuit has recognized, "[t]he right of support conferred by federal law exists apart from whatever rights [a sponsored immigrant] might or might not have under [state] divorce law." *Liu v. Mund*, 686 F.3d 418, 419–20 (7th Cir. 2012).

Nevertheless, some courts will entertain the idea that a precisely worded global settlement, separation agreement, or divorce decree may extinguish the financial support obligations of a sponsor. These fact patterns vary widely and are unique enough to require a case by case analysis. Similarly, obtaining citizenship through other means, such as with another sponsor, VAWA or another route that allows for self-sponsorship, presents complications that must be thoroughly vetted before taking any action.

Immigration Fraud and New York Divorce Matters

Whether a sponsor will be on the hook for financial support depends on whether the I-864 has already been submitted to the U.S. government and whether the application for residency gets approved. If it's still early in the process, sponsors can seek to withdraw the I-130 Petition for Alien Relative or refuse to supply the signed I-864.

If, however, all application materials have been submitted and the sponsored immigrant's application for residency has been approved, it's probably too late to back out. While allegations of fraud may undo or fatally affect a residency petition, fraud alone may not be sufficient to extinguish the financial obligations imposed by the I-864. While penalties for fraud may be imposed, the I-864 contains only five terminating events and fraud is not one of them.

If the I-130 immigrant petition is still pending before USCIS, the agency may ultimately deny it or set it aside if the U.S. petitioner requests its withdrawal.[9] If the I-130 has already been approved but the case is awaiting an interview at a U.S. consulate or at a USCIS filed office, the government officials handling the case will ask enough questions to uncover the divorce and deny the case at that time.

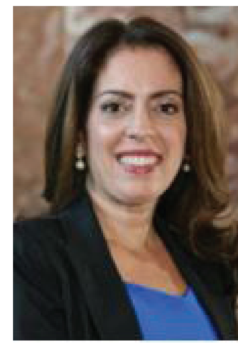
This will initiate removal (deportation) proceedings in immigration court that may, ultimately, extinguish the I-864 obligations. If not, those obligations remain and can be enforced.

Conclusion

The financial obligations that immigrants are owed based on the Form I-864 is a significant benefit that warrants attention and, in rare instances, enforcement. For the family law attorney, this presents a useful, powerful and underutilized tool.

1. https://www.nolo.com/legal-encyclopedia/how-i-married-us-citizen-us-citizenship.html.
2. *Id.*
3. https://www.uscis.gov/i-864.
4. https://www.uscis.gov/green-card/green-card-processes-and-procedures/affidavit-of-support
5. Act of Aug. 3, 1882, 22 Stat. 214.
6. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (creating the binding Affidavit of Support).
7. Section 213(A) of the Immigration and Nationality Act. 8 U.S.C. §1183a; 8 C.F.R. §213a.1 – 213a.5.
8. *Erler v. Erler*, 824 F.3d 1173 (9th Cir. 2016).
9. https://www.nolo.com/legal-encyclopedia/what-if-i-change-my-mind-about-petitioning-my-family-member-immigrate.html.

Ronen Sarraf is a co-founding member of Sarraf Gentile LLP, a New York based law firm that represents immigrants and others in federal complex litigation nationwide. The firm's cases have recovered over $2 billion. For more information, please visit www.sarrafgentile.com or email Ronen at ronen@sarrafgentile.com.



Jacqueline Harounian, is the Managing Partner of Wisselman Harounian Family Law, established in 1976. The firm is a recognized Tier 1 by US News and World Report, and rated AV Preeminent by Martindale Hubbell. Visit www.lawjaw.com for more information.

NAL PROGRAM CALENDAR

Pre-registration is REQUIRED for all Academy programs. Go to nassaubar.org and click on CALENDAR OF EVENTS to register. CLE material, forms, and zoom link will be sent to pre-registered attendees 24 hours before program. All programs will be offered via HYBRID unless otherwise noted. Please RSVP to academy@nassaubar.org 24 hours before program date to attend in person.

FEBRUARY 1, 2022

12:30 PM – 1:30 PM

Dean's Hour: "Per My Previous E-Mail"—Improving Your Digital Communication

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FEBRUARY 2, 2022

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(Law and American Culture Lecture Series)

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FEBRUARY 4, 2022

12:30 PM – 1:30 PM

Dean's Hour: Who Owns Your Ink? Intellectual Property Protection in Tattoos

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FEBRUARY 7, 2022

12:30 PM – 1:30 PM

Dean's Hour: Essential Estate Planning Trends and Updates 2022

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1 Credit in Professional Practice

*(**Program Rescheduled from January 25, 2022)*

FEBRUARY 8, 2022

12:30 PM – 1:30 PM

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12:30 PM – 1:30 PM

Dean's Hour: Taking Down the Shingle—Preparing Yourself (and Your Clients) for the Closing/Retiring of a Law Firm Practice—Part 3: Life After Esq.—Preparing for Retirement and Informing Your Clients

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1 Credit in Professional Practice

FEBRUARY 15, 2022

6:00 PM – 7:30 PM

Know Your Rights: Protecting Yourself from Scams in the Time of COVID-19

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FEBRUARY 16, 2022

12:30 PM – 1:30 PM

Dean's Hour: Cybersecurity—Data Protection

With the NCBA Business Law, Tax and Accounting Committee

1 Credit in Professional Practice

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NAL PROGRAM CALENDAR

FEBRUARY 16, 2022

5:30 PM – 7:30 PM

Elements of a Jury Trial: Jury Selection, Focus Groups and Expert Consultants (ZOOM ONLY)

2 Credits in Professional Practice

Skills Credits Available for Newly Admitted Attorneys

FEBRUARY 23, 2022

12:30 PM – 1:30 PM

Dean's Hour: Rainmaking for Attorneys

1 Credit in Ethics

FEBRUARY 24, 2022

12:30 PM – 1:30 PM

Dean's Hour: Reading the Writing on the Wall: Graffiti and Real Property Rights

With the NCBA Real Property Committee

Program sponsored by NCBA Corporate Partner Tradition Title Agency, Inc.

1 Credit in Professional Practice

FEBRUARY 24, 2022

5:30 PM – 7:30 PM

Know Your Rights: Landlord and Tenant Options for Post-COVID Proceedings

With the NCBA Committee Relations and Public Education Committee and the NCBA Diversity and Inclusion Committee

2 Credits in Professional Practice

Skills Credits Available for Newly Admitted Attorneys

*(**Program Rescheduled from January 25, 2022)*

MARCH 2, 2022

5:30 PM – 7:30 PM

Extreme Emotional Disturbance Defense: A Case Study (ZOOM ONLY)

With the NCBA Criminal Courts Law and Procedure Committee and the Nassau County Assigned Counsel Defender Plan

2 Credits in Professional Practice

Skills Credits Available for Newly Admitted Attorneys

MARCH 3, 2022

5:30 PM – 7:30 PM

Elements of a Jury Trial: Openings (ZOOM ONLY)

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FOCUS: PERSONAL INJURY LAW

Burden of Proof and the “Storm in Progress” Rule

Ira S. Slavit

Under the “storm in progress” rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm.[1] The rule is in derogation of a property owner’s common law duty to maintain its premise in reasonably safe condition and suspends any obligation to shovel snow while continuing precipitation is re-covering surfaces as fast as they are being cleaned, thus rendering the effort fruitless.[2]

This article will discuss the legal principles involved in the “storm in progress” rule and review decisions rendered in 2020 and 2021 regarding the rule.

Generally, a defendant moving for summary judgment in an action where the plaintiff alleges injury due to a snow and ice condition bears the burden of establishing, prima facie, that it neither created the snow or ice condition that allegedly caused the plaintiff to fall nor had actual or constructive notice of that condition.[3] This burden can be satisfied by presenting evidence that there was a storm in progress at the time of plaintiff’s accident. Where the evidence in the record is clear that the accident occurred while the storm was still in progress, defendants may avail themselves of the rule as a matter of law.[4]

Although the rule might seem straightforward, as with most things the devil is in the details. Issues that arise can include: was the weather event sufficiently significant to qualify as a storm; when did the storm end; were the property owner’s corrective efforts reasonably timely or in compliance with local codes; did the conditions that caused the plaintiff’s accident arise from the ongoing storm or from a previous snowfall; and

did the property owner undertake corrective efforts while the storm was in progress, such as shoveling, that worsened or exacerbated the existing conditions.

Defendants can use weather records, expert meteorological affidavits and transcripts of deposition testimony to establish that at the time of a plaintiff’s accident a storm was in progress or that they did not have a reasonable time from when the storm ended to take remedial action.[5] It is not necessary that all of these types of evidence be submitted. An affidavit from a meteorologist was held to be sufficient in *Gould v 93 Nyrpt, LLC*.[6] In *Brito v New York City Housing Authority*, the plaintiff’s testimony at a municipal hearing or a deposition alone can be sufficient to warrant summary judgment if the plaintiff testifies.[7]

To be in admissible form and properly considered by the court, weather records must either be certified as business records (CPLR 4518[a]) or taken under the direction of the United States weather bureau (CPLR 4528).

A lull in the storm does not impose a duty to remove the accumulation of snow or ice before the storm ceases in its entirety. However, if the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation the rule is not applied.[8]

The standard for the length of time following a storm’s cessation that a property owner must take corrective action is one of reasonableness. However, a local code may establish such a time. For instance, NYC Administrative Code §6-123(a) requires property owners to remove snow from sidewalks within four hours after the snow ceases to fall, thereby providing a valid storm in progress defense where the accident occurs within four hours of the cessation of the storm.[9] Section 16-123 applies to a public sidewalk and not to a private walkway, and was therefore of no avail to a defendant who sought summary judgment on the basis that plaintiff’s accident occurred within two hours of the storm’s cessation.[10]

Even where a defendant establishes that a storm was in progress, there are several ways that that a plaintiff can nevertheless overcome the defense. One way is by proving that an accident “was caused by a slippery condition at the location where the plaintiff fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant had actual or constructive notice of the preexisting condition.”[11] This is most often where the defendant’s initial effort to clear snow from the previous storm was negligent or where melting and re-freezing occurs after the initial snow removal.

A second way is if during the storm a property owner elects to remove snow but did not use reasonable care in doing so.[12] However, in *Balagyozyan v Fed. Realty Ltd. Partnership*,[13] the defendant obtained summary judgment by demonstrating that the snow removal efforts it undertook during the storm did not create a hazardous condition or exacerbate the natural hazard created by the storm.

Importantly, the “storm in progress” rule does not apply to certain statutory causes of action, such as Labor Law §241(6). This is because the “storm in progress” rule is a product of the common law, whereas, in effect, the rules set forth in the Industrial Code (Safety and Health Code Rules of the NYS Department of Labor)[14] establish

concrete safety standards and duties that, in some instances, supersede common-law principles.[15] In contrast, the “storm in progress” rule applies to Labor Law §200 because that statute “merely incorporates the general common-law standard.”[16]

In *Darcy v State*,[17] the claimant slipped and fell on ice on a ramp and alleged the State violated Industrial Code §23-1.7 (d), which sets forth duties regarding slipping hazards at construction sites, including ramps. The court noted that the statute’s provisions include no exception for storms in progress, refused to apply the storm in progress rule, and granted claimant’s summary judgment motion on that Industrial Code violation.

It is noteworthy that the court also rejected defendant’s argument that comparative negligence precluded summary judgment, citing to the Court of Appeals seminal decision in *Rodriguez v. City of New York* holding that a plaintiff on a summary judgment motion “does not bear the burden of establishing a prima facie case of defendant’s liability and the absence of his or her own comparative fault.”[18]

Movants’ Common Missteps

The years 2020 and 2021 saw numerous cases where defendants failed to prima facie establish the “storm in progress” defense. They failed for reasons including that the defendants failed to submit their meteorological evidence in admissible form, submitted with their motion papers weather reports or deposition transcripts that themselves raised issues of fact, failed to establish that the plaintiff’s fall was a result of a storm in progress rather than a previous storm, and failed to establish that their snow remediation measures did not worsen the naturally occurring conditions.

Three recent decisions of the Appellate Division, Second Department held that the defendants, inter alia, failed to establish, prima facie, that a storm was in progress at the time of the accident or that they did not have a reasonable opportunity after the cessation of the storm to remedy the alleged slippery condition.[19] Therein the defendants’ climatological data was not authenticated or taken under the direction of the United States weather bureau, the climatological data was gathered from a neighboring county, and the data was inconsistent with the plaintiffs’ sworn testimony, the transcripts of which were annexed to the defendants’ moving papers.

Although in admissible form, in *Taylor v Kwik Fill-Red Apple*, an affidavit from a defendant’s meteorologist was held to not support summary judgment where the opinion of expert meteorologist was not supported by the evidence in the record.[20]

In *Kearse v 40 Wall St. Holdings Corp.*,[21] the defendants established that a snowstorm was in progress at the time of plaintiff’s fall but failed to establish that the accident was a result of an icy condition which developed from that snowfall rather than one that occurred two days earlier.

In *Sax v Women and Children’s Hosp. of Buffalo and Kaleida Health*,[22] defendants submitted the deposition testimony of plaintiff, who testified that it had snowed the night before the accident but not at the time of her fall, and that, while the sidewalks and ramp to the staircase of defendants’ building had been cleared of snow, the steps were still snow-covered.

Plaintiffs’ Opposition Papers

Plaintiffs had mixed results in cases where they claimed that their fall was not from the storm in progress but was instead from an earlier storm. Plaintiffs were unsuccessful where no evidence was offered from which it could reasonably be inferred that it resulted from a negligent attempt by defendants to remove the snow and where the expert’s conclusion that the melting and refreezing of accumulated snow from prior snowfall caused plaintiff’s fall was speculative.[23]

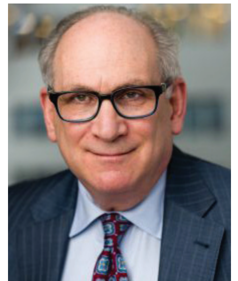
Plaintiff’s expert successfully raised an issue of fact in *Schoonmaker v Starfire Realty Holdings, LLC*, wherein plaintiff’s accident occurred on January 16, 2018.[24] The expert opined: “Although light snow was ongoing at the time of the incident, there would have been no melting and refreezing of the snow, and thus any ice present at the incident site would have originated on the morning of January 13, when the sharp drop in temperature rapidly froze wet areas solid. … Given that there was no precipitation or snowfall on January 14 or 15, any ice which formed as a result of the freeze on January 13 would have remained present and visible (uncovered by new snow) during the days prior to the fall.”

In *Agosto v 1 Sadore Lane Realty Corp.*,[25] plaintiff’s testimony that it was not snowing when she fell was enough to raise an issue of fact in the face of meteorological data and defendants’ meteorologist’s affidavit showing that there was a storm in progress. *See also Anderson v New York City Hous. Auth. and Arghittu-Atmekjian v TJX Companies, Inc.*[26]

In *Daniel v E. Williston Union Free School Dist.*,[27] the court found that the same evidence that prima facie established that a storm was ongoing at the time of plaintiff’s accident also raised a triable issue of fact as to whether the sheet of ice upon which the injured plaintiff slipped was from a storm that had occurred two days prior, rather than the one in progress. Further, in opposition to the motion, the plaintiffs submitted the affidavit of a meteorologist, with attached climatological data, who opined that the ice was a result of a preexisting condition on the sidewalk.

In *Ayala v City of New York*,[28] summary judgment was granted to the defendant because the plaintiff did not submit weather data in admissible form. In *Giron v New York City Hous. Auth.*,[29] plaintiff undermined her contention that an issue of fact existed as to whether snow and ice removal work created or exacerbated a dangerous condition with her own testimony that the stairway had not been shoveled, sanded, or salted at the time of her accident.

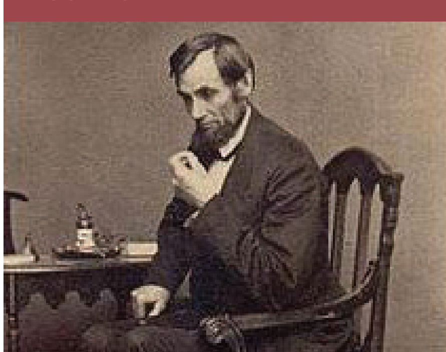
1. *Sherman v New York State Thruway Auth.*, 27 N.Y.3d 1019, 1020-21 (2016).
2. *Powell v MLG Hillside Assoc., L.P.*, 290 A.D.2d 345, 345 (1st Dept. 2002).
3. *Beaton v City of New York*, 196 A.D.3d 625, 626 (2d Dept. 2021).
4. *Kovel v Glenwood Mgt. corp.*, 2021 N.Y. Slip Op 06805 (1st Dept. Dec. 7, 2021).
5. *Murphy v Goldman Sachs Group, Inc.*, 198 A.D.3d 511 (1st Dept. 2021).
6. 191 A.D.3d 1452 (4th Dept. 2021).
7. 189 A.D.3d 1155, 1156 (2d Dept. 2020).
8. *Johnson v Pawling Cent. School Dist.*, 196 A.D.3d 686 (2d Dept. 2021).
9. *Eduardo v Webster Equities LLC*, 194 A.D.3d 643, 644 (1st Dept. 2021).
10. *Edmund-Hunter v Toussie*, 190 A.D.3d 946, 947 (2d Dept. 2021).
11. *Larsen v Speedway LLC*, 5:19-CV-897, 2021 WL 4551940, at *3 (N.D.N.Y. Oct. 5, 2021).
12. *Morris v Home Depot USA*, 152 A.D.3d 669, 670, 59 N.Y.S.3d 92 (2d Dept. 2017).
13. *Balagyozyan v Fed. Realty Ltd. Partnership*, 191 A.D.3d 749 (2d Dept. 2021).
14. 12 N.Y.CRR Part 23.
15. *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 503 (1993) *Rothschild v Faber Homes, Inc.*, 247 A.D.2d 889, 890 (4th Dept. 1998).
16. *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 503 (1993).
17. 73 Misc 3d 1219(A) (Ct Cl 2021).
18. 31 N.Y.3d 312, 324-325 (2018).
19. *Beaton v City of New York*,196 A.D.3d 1677 (2d Dept. 2021); *Johnson v Pawling Cent. School Dist.*, 196 A.D.3d 686 (2d Dept. 2021); *Itzkowitz v Val. Natl. Bank Corp.*,191 A.D.3d 962 (2d Dept. 2021).
20. 181 A.D.3d 1317, 1318 (4th Dept. 2020), *rearg denied sub nom.*, 185 A.D.3d 1482 (4th Dept. 2020).
21. 185 A.D.3d 1015, 1016 (2d Dept. 2020).
22. 191 A.D.3d 1352 (4th Dept. 2021), *rearg denied sub nom. Sax v Women and Children's Hosp. of Buffalo*, 195 A.D.3d 1504 (4th Dept. 2021).
23. *Eduardo v Webster Equities LLC*, 194 A.D.3d 643, 644 (1st Dept. 2021); *Ponce v BLDG Orchard, LLC*, 191 A.D.3d 613 (1st Dept. 2021).
24. 1:18-CV-1352 (DJS), 2020 WL 5517235, at *3, 4 (N.D.N.Y. Sept. 14, 2020).
25. 190 A.D.3d 631, 631 (1st Dept. 2021).
26. 188 A.D.3d 405, 405 (1st Dept. 2020); 193 A.D.3d 1395 (4th Dept. 2021).
27. 180 A.D.3d 750 (N.Y. App. Div. 2020).
28. 198 A.D.3d 407 (1st Dept. 2021).
29. 187 A.D.3d 603 (1st Dept. 2020).



Ira S. Slavit is chair of the NCBA Community Relations and Public Education Committee and immediate past chair of the plaintiff's Personal Injury Committee. He is an attorney with Levine & Slavit, PLLC with offices in Manhattan and Mineola, and can be reached at islavit@newyorkinjuries.com or at (516) 294-8282.

FOCUS:
LAW AND AMERICAN CULTURE

The Spirit Which Prizes Liberty: American Law in the Age of Lincoln



Rudy Carmenaty

We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory, stretching from every battlefield, and patriot grave, to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.

– Lincoln's First Inaugural Address March 4, 1861

With malice toward none, with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation's wounds; to care for him who shall have borne the battle, and for his widow, and his orphan – to do all which may achieve and cherish a just, and a lasting peace, among ourselves, and with all nations.

– Lincoln's Second Inaugural Address March 4, 1865

Abraham Lincoln actually was born in a log cabin. His youth was marked by frontier poverty. Completely self-taught, Lincoln embraced the law as a means of upward mobility. He became one of the most prominent attorneys during the first half of the 19th century. It was Lincoln's grounding in the law that enabled Lincoln, as president, to meet the daunting Constitutional crisis arising from the Civil War.

Lincoln practiced law for nearly a quarter of a century prior to the presidency. Twice a year, he rode circuit traversing on horseback across central Illinois trying cases. He would go from county seat to county seat, literally bringing the law or rather the administration of justice to communities in remote areas.

A 'prairie lawyer' in the truest sense, Lincoln embodied the free-wheeling nature of his times. As a practitioner, he was versatile, well-versed, and possessed a knack for making the complex seem simple. Lincoln was an exceptionally persuasive litigator, combining thorough preparation with a folksy manner geared to disarm his adversaries, convince the judge, and sway a jury.

Lincoln's fidelity to the rule of law served as the moral foundation of his political life. It was in the law that Lincoln found his self-respect. He appreciated instinctively the profound evil inherent in slavery. As a polemist, he had trained himself in the fine art of crafting an argument and convincing others.

Lincoln skillfully navigated the crosscurrents of his age. As a Whig, he served in the Illinois legislature and a single term in Congress. With the repeal of the Missouri Compromise and the expansion of slavery under the Kansas/Nebraska Act of 1854, he reentered the political fray as a Republican. This would be the issue that would propel Lincoln to the White House.

In 1858, he campaigned for a Senate seat from Illinois. His debates with Stephen Douglas captured the public's imagination while exposing the nation's fault lines. The arguments Lincoln and Douglas advanced expressed the American people's conflicting sentiments over the divisive issue of slavery. This senate race was a harbinger of the 1860 presidential election.[1]

Both men were brilliant advocates for their respective positions, and they were also a study in contrast. On one side there was the tall, lean, angular Lincoln. Moral in tone, he warned that slavery's extension was a mortal threat to the republic. Douglas was short and stout. His platform called for 'popular sovereignty,' allowing territories to decide the issue for themselves.

As great a lawyer as Lincoln was, it was Lincoln the President who fundamentally reaffirmed the true meaning of the Constitution. With the Union's military victory and the Reconstruction Amendments[2] ratified after his death, the rule of law was reasserted but at the cost of four bloody years when brother literally turned on brother.

Lincoln won the presidency in a four-man contest among a fractured, volatile electorate. Lincoln defeated Douglas (Democrat), John C. Breckenridge (Southern Democrat), and John Bell (Constitutional Union).[3] He won with less than 40% of the popular vote, but with 180 electoral votes as compared to Douglas, with 12, Breckenridge, with 71, and Bell, with 39 votes.[4]

Lincoln instinctively believed that the republic could only be saved by effective executive leadership. But the war prevented any hope of conciliation. The tab for the challenges not addressed by Franklin, Adams, and Jefferson at the nation's founding finally came due. It fell to Lincoln to complete the unfinished business of 1776 and 1787.

Lincoln's journey was a lonely one. Over the course of little more than four years in office, his face became weathered and lined reflecting the burdens he carried. Yet throughout his torment, he retained his compassion as evidenced by his generous use of the pardon power. The depths of his humanity were profound, and his winsome humor added texture to his sorrowful demeanor. In the war's initial stages, he deferred to his commanders, all of whom were West Pointers. Lincoln fired various generals during the war as each proved unsatisfactory until Grant. Lincoln himself had limited military experience, serving in the Illinois militia during the Black Hawk War. In Congress, he had voted against the Mexican War in 1848.

Frustrated, Lincoln taught himself military strategy as he had taught himself the law. He began reading books on operations and tactics borrowed from the Library of Congress. Ultimately under the Constitution, it is the President who determines military policy. Civilian control over the armed forces was but one of the legal issues with which he grappled.

As commander-in-chief, Lincoln assumed total control of the war effort. He exercised what was then unprecedented authority for an American President. He put the nation on a total war footing. Lincoln imposed a blockade of Confederate ports, called up state militias, instituted a military draft, expanded the Army and Navy, closed post offices and newspapers, and jailed Confederate sympathizers.

In April 1861, Lincoln authorized the suspension of habeas corpus. The nation's capital was poorly secured and nearby Baltimore was a hotbed of Confederate agitation. Many were arrested, including John Merryman at Fort McHenry, who was held without a warrant.

Merryman's attorney petitioned the Circuit Court for Maryland for relief. Chief Justice Roger Taney, as the Circuit Justice, ruled ex parte in Merryman's favor. He ruled that Article I, Section 9 reserves to Congress the power to suspend habeas corpus and that the president's actions were unconstitutional.[5]

Lincoln ignored the ruling. More than ideology separated these two men. Lincoln had campaigned, both in 1858 and 1860, against Taney's infamous Dred Scott decision.[6] During his inaugural address, after the Chief Justice administered the oath, Lincoln obliquely chastised the Court.

The President checkmated the Chief Justice by asserting the superiority of his position over that of the federal courts. Calling Congress into special session on July 4, 1861, Lincoln issued a message defending his suspension of habeas corpus, maintaining that it was both necessary and constitutional for him to do so without Congress' prior approval.

In 1863, Congress passed the Habeas Corpus Suspension Act.[7] The law empowered Lincoln to suspend habeas corpus for the duration of the Civil War. The law was rendered inoperative at war's end. Lincoln, in effect, received retroactive approval for his actions from another branch of government.

Lincoln believed all three branches are on an equal footing, none of which is superior to the other, during ordinary times. However, only the President, being elected by all of the people, has the sole responsibility and the unique burden "to preserve, protect, and defend the Constitution."[8]

As such, Lincoln established the paradigm of the President as war leader, a conception of a powerful presidency that was superior to both Congress and the courts during wartime. Lincoln's primary objective was the preservation of the Union. The Union was inviolable. For Lincoln, secession was tantamount to anarchy and had to be suppressed. There is little doubt that Lincoln, under the national emergency, bent the Constitution to his will. But as he noted, are all the laws "but one, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?"[9]

Lincoln defended his expansive exercise of executive authority because he was elected by the American people to confront the supreme crisis necessitating actions which would have been impermissible otherwise. The exigencies of war accentuate executive authority. It is the President alone, as the commander-in-chief, who has the power to ensure the republic's survival. Neither the Congress nor the courts can fulfill this function.

Lincoln's power was predicated on the law and only for the duration of the emergency. The historical record is clear: had Lincoln not been President when he was, the United States would not have survived. Only Lincoln had the ability and the will to see the nation through this most profound trial. The President was committed to preserving the Union at all costs.

The Union would indeed be saved, slavery abolished, and democracy preserved. Re-elected in 1864 on the National Union ticket, Lincoln defeated Democratic candidate General George McClellan. McClennan had been removed by Lincoln as commander of the Union Army.

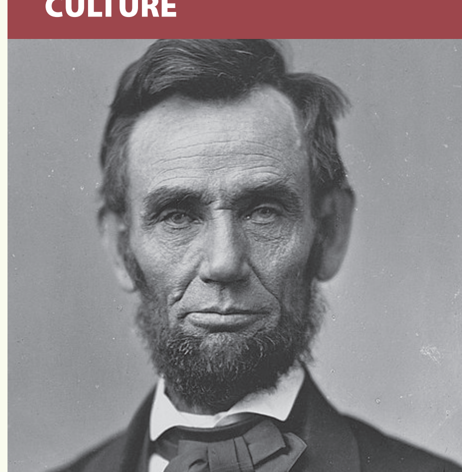
Lincoln's labors led to victory when General Lee surrendered to General Grant on April 9, 1865. Tragically, Lincoln was assassinated shortly thereafter on April 14, 1865.

1. Lincoln lost the election to Douglas, as the Democrats captured the Illinois legislature and sent Douglas to Washington. This was before the adoption of the Seventeenth Amendment allowing for the direct election of Senators. The two men met again in 1860.
2. The Thirteenth Amendment (1865) abolishes slavery; the Fourteenth Amendment (1868) extended equal protection guarantees against the states and defines citizenship in effect overturning *Dred Scott v Sandford*; and the Fifteenth Amendment (1870) grants African-American men the vote.
3. 1860 Presidential Election at https://www.270towin.com.
4. *Id.*
5. *See Ex parte Merryman* 17 F.Cas. 144 (C.C.D. Md. 1861).
6. *See Dred Scott v. Sandford* 60 U.S. 393 (1857).
7. 12 Stat. 755 (1863).
8. US Constitution, Article II, Section 1, Clause 8.
9. Abraham Lincoln, *Message to Congress in Special Secession* July 4, 1861.

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 Co-Chair of the NCBA Publications Committee and Vice-Chair of the Diversity ad Inclusion Committee.

FOCUS: LAW AND AMERICAN CULTURE

Evolution of Lincoln's Gettysburg Address



Rudy Carmenaty

Nearly eight score years ago, Abraham Lincoln first spoke the words forever seared into this country's conscience. The date: November 19, 1863. The place: the Soldiers' National Cemetery in Gettysburg, Pennsylvania. The occasion: a dedication ceremony. The speech: immortal.

In little more than two minutes of spoken prose, Lincoln captured a unique moment in time. Harking back to the founding in 1776, Lincoln detailed the nation's anguish giving meaning to the crucible then unfolding. Ultimately, Lincoln set forth a vision of renewal and affirmation.

As no recording exists of what was actually said that day, Lincoln's exact words have been lost to history. There are five distinct versions of the Gettysburg Address, which were written in Lincoln's own hand between November 1863 and March 1864.

These alternate renderings differ slightly but tellingly. The five versions take their respective names by being linked to a particular individual. In chronological order, copies are associated with John G. Nicolay, John Hay, Edward Everett, George Bancroft, and Alexander Bliss.

The following versions are attributed to John G. Nicolay (1832-1901) and John Hay (1838-1905). Lincoln's private secretaries, both men were with Lincoln in Washington and at Gettysburg. These versions were written just before the speech was delivered. Neither contains the words "*under God*" in the final paragraph, although the use of the phrase was reported in the press.[1]

The Nicolay version is commonly referred to as the first draft. It came to light when a facsimile was replicated in an article written by Nicolay for *Century Magazine* in 1894.[2] The Hay or second draft was later unearthed among Hay's papers. It should be noted that both vary from contemporaneous newspapers accounts of the speech.

Executive Mansion,
Washington,...,186

Four score and seven years ago our fathers brought forth, upon this continent, a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal.

Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived, and so dedicated, can long endure. We are met on a great battlefield of that war. We come to dedicate a portion of it, as a final resting place for those who died here, that the nation might live. This we may, in all propriety do.

But, in a larger sense, we cannot dedicate we cannot consecrate we cannot hallow, this ground. The brave men, living and dead, who struggled here, have hallowed it, far above our poor power to add or detract. The world will little note, nor long remember what we say here; while it can never forget what they did here. It is rather for us, the living, we here be dedicated to the great task remaining before us that, from these honored dead we take increased devotion to that cause for which they here, gave the last full measure of devotion that we here highly resolve these dead shall not have died in vain; that the nation, shall have a new birth of freedom, and that government of the people, by the people, for the people, shall not perish from the earth.

—John G. Nicolay Draft

Four score and seven years ago our fathers brought forth, upon this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.

Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived, and so dedicated, can long endure. We are met here on a great battlefield of that war. We have come to dedicate a portion of it, as a final resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this.

But in a larger sense, we cannot dedicate we cannot consecrate we cannot hallow this ground. The brave men, living and dead, who struggled here, have consecrated it far above our poor power to add or detract. The world will little note, nor long remember, what we say here, but can never forget what they did here. It is for us, the living, rather to be dedicated here to the unfinished work which they have, thus far, so nobly carried on. It is rather for us to be here dedicated to the great task remaining before us that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion that we here highly resolve that these dead shall not have died in vain; that this nation shall have a new birth of freedom; and that this government of the people, by the people, for the people, shall not perish from the earth.

—John Hay Draft

The ensuing versions of the Gettysburg Address were written by Lincoln in the months after the speech was delivered. The President, as any good lawyer, refined each successive manuscript adding texture to his words and sentiments.

The next known version was the one furnished to Edward Everett (1794-1865). Everett's copy was obtained in order to be bound, along with Everett's own Gettysburg oration, to raise funds on behalf of servicemen at the Sanitary Fair in New York.[3]

Orator, educator, clergyman and statesman, Everett was the featured attraction at the dedication ceremony. He wound up speaking for two hours. Everett would later write the President: ***"I should be glad, if I could flatter myself that I came as near to the central idea of the occasion, in two hours, as you did in two minutes."***[4]

Four score and seven years ago our fathers brought forth, upon this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.

Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived, and so dedicated, can long endure. We are met on a great battlefield of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives, that that nation might live. It is altogether fitting and proper that we should do this.

But, in a larger sense, we cannot dedicate, we cannot consecrate we cannot hallow this ground. The brave men, living and dead, who struggled here, have consecrated it far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here. It is for us, the living, rather, to be dedicated here to the unfinished work which they who fought here, have, thus far, so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us that from these honored dead we take increased devotion to that cause for which they here gave the last full measure of devotion that we here highly resolve that these dead shall not have died in vain that this nation, under God, shall have a new birth of freedom and that government of the people, by the people, for the people, shall not perish from the earth.

—Edward Everett version

The historian George Bancroft (1800-1891) was the next to receive a handwritten copy of the Gettysburg Address. Bancroft sought to reproduce it in facsimile. It was to be included in his tome *Autograph Leaves of Our Country's Authors* to be sold by the Soldiers' and Sailors' Sanitary Fair in Baltimore.[5]

Four score and seven years ago our fathers brought forth, on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.

Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived, and so dedicated, can long endure. We are met on a great battlefield of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives, that that nation might live. It is altogether fitting and proper that we should do this.

But, in a larger sense, we cannot dedicate, we cannot consecrate we cannot hallow this ground. The brave men, living and dead, who struggled here, have consecrated it far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here. It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us that from these honored dead we take increased devotion to that cause for which they here gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain that this nation, under God, shall have a new birth of freedom, and that government of the people, by the people, for the people, shall not perish from the earth.

—George Bancroft version

Lincoln's script was written on both sides of the stationary he used. Because of this, it could not be reproduced as Bancroft had originally intended. A replacement was subsequently requested by Alexander Bliss (1827-1896) for use in *Autograph Leaves of Our Country's Authors.*[6]

The sole version which Lincoln signed and dated; it was prepared in March 1864.[7] This is the definitive manuscript of the Gettysburg Address.

Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.

Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. We are met on a great battlefield of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this.

But, in a larger sense, we cannot dedicate—we cannot consecrate—we cannot hallow—this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here. It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.

Abraham Lincoln
November 19, 1863
—Alexander Bliss version

The authentic Bliss version can now be found in the Lincoln Bedroom. Oscar Cintas (1887-1957), a former Cuban Ambassador to the United States, bequeathed it to the American people. His one stipulation was that it be kept as part of the collections maintained at the White House.[8] It has been on display since 1959.[9]

All five versions are available in Volume VII of the *Collected Works of Abraham Lincoln*, published by Rutgers University Press. With their various nuances, they provided a brief glimpse into Lincoln's creative process. As with all of Lincoln's literary gifts, the Gettysburg Address should not only be remembered but heeded, savored as well as treasured.

1. Roy P. Blaser, *The Collected Works of Abraham Lincoln* VII, 21 (1st Ed. 1955).
2. *Id. at* 17.
3. *Id. at* 21.
4. *Id. at* 25.
5. *Id. at* 22.
6. *Id.*
7. *Id.*
8. In 1949, Cintas paid a then-record $54,000 at auction. *See White House Copy of the Gettysburg Address* at https://americanhistory.si.edu/documentarygallery/exhibitions/gettysburg_address_2.html.
9. The timing appears to have coincided with Fidel Castro's take-over of Cuba and his government's demand on all property once owned by Cintas, who died two years earlier.

May 2022 at Domus

Law Day is traditionally celebrated in early May and recognizes the role of law in the foundation of our country and its importance in society. The theme of this year's Law Day is "Toward a More Perfect Union—The Constitution in Times of Change."

Please join us in May 2022 as our Bar Association recognizes the importance of Law Day and celebrates it with the awarding of the Liberty Bell and Peter T. Affatato Awards, along with the Pro Bono Attorney of the Year Award.

Additional details to follow.

NCBA 2021-2022 Corporate Partners

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NCBA Corporate Partner Spotlight

Realtime Reporting

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Realtime Reporting, Inc. is a national court reporting staff that provides reliable court reporting and litigation support services for depositions, examinations before trial, arbitrations, hearings, and meetings, at anytime and anywhere in the United States. Attorneys, administrators, and staff trust Realtime to manage all their court reporting, transcription, and litigation support needs.

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In Brief

Michelle E. Espey of Farrell Fritz, P.C. has been named a Fellow of the New York Bar Foundation.

Jeffrey D. Forchelli, Chairman and Co-Managing Partner of Forchelli Deegan Terrana LLP (FDT), congratulates partner **Stephanie M. Alberts** on being appointed Co-Chair of the firm's Tax, Trusts & Estates practice group and **Cora A. Pappas**, who was promoted to a Tax, Trusts & Estates Legal Assistant. **Gerard R. Luckman**, a Partner and Chair of the firm's Bankruptcy & Corporate Restructuring practice group, was elected President of the Turnaround Management Association's (TMA) Long Island Chapter.

Marc L. Hamroff of Moritt Hock & Hamroff LLP has announced that **Julia Gavrilov** and **Dennis Kucica** have been elevated to Partner, that **Brian Adelman** has been elevated to Counsel, and that **Alexander Widell**, a Partner of the firm, has been elected to serve as Co-Chair of the firm's Litigation Practice Group, effective January 1, 2022. **Leslie A. Berkoff,** a Partner of the firm, has been recognized by Lawdragon as one of its 500 Leading U.S. Bankruptcy & Restructuring Lawyers for 2022.

Gary M. Meltzer, Partner at Meltzer, Lippe, Goldstein & Breitstone, LLP has announced that the firm signed a 10-year lease of the entire 19th floor (5,835 square feet) at Heron Tower, 70 East 55th Street in Manhattan. The 27-story, Class A office building is located between Madison and Park Avenues. The firm will relocate from its current offices at 460 Park Avenue in spring 2022. On January 12, Gary M. Meltzer was a panelist on the "New York Making a Big Comeback" webinar produced by the *New York Real Estate Journal*.

Marian C. Rice

Hon. Leonard B. Austin has recently retired from the bench after a remarkable and longstanding judicial career which included his ascension to the Appellate Division, Second Department, as an Associate Justice. There, he served with distinction for nearly thirteen years and handled matters involving a wide breadth of complex subject areas. He has now joined NAM (National Arbitration and Mediation) as a neutral and will be arbitrating and mediating cases that will include commercial and matrimonial disputes.

Karen Tenenbaum, LL.M. (Tax), CPA, presented "IRS Tax Collection and Trust Fund Recovery Penalties" at the NYS Society of CPAs, Relations with the IRS Committee. She also spoke about "Offers in Compromise and Installment Agreements" at a webinar for CPA Academy. As Chair, Karen moderated "Pass-Through Entity Taxes—A Primer for Practitioners" at the Suffolk County Bar Association Tax Law Committee. Her Melville-based firm, Tenenbaum Law, P.C., represents taxpayers in IRS and NYS tax matters.

Michael Cardello III, a Partner of the firm Moritt Hock & Hamroff LLP, has been elected to serve as a Fellow of The New York Bar Foundation.

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.

New Members

We Welcome the Following New Members Attorneys

Sheharyar Ali

Randy C. Botwinick

Dayna Camardi

Elaine M. Camlet
Kirschenbaum & Kirschenbaum

Ketsia Desmangles

Alexander M. Gayer
Meltzer Lippe Goldstein & Breitstone LLP

Norma Giffords

Emily Marie Giunta

Victor Gorman

Konstantinos Katsoulis

Michael Kohan

Michael Nicholas Lazard

Pooja Mathur

Tanvir Haque Rahman
Rahman Law P.C.

Ronen Sarraf
Sarraf Gentile LLP

Giuliana Eva Trivella
Trivella & Forte LLP

LAWYER WELLNESS CORNER
Reflect and Connect

February 17 is Random Acts of Kindness Day

Kindness is a lot more important than we think. When we give or receive kindness, feel-good hormones and neurotransmitters like serotonin, oxytocin, and endorphins are released. Scientific studies have found that kindness can:

- **Lift our mood**
- **Relieve pain**
- **Reduce inflammation**
- **Increase the feeling of strength and energy due to helping others**
- **Make one feel calmer**
- **Decrease feelings of depression**
- **Increase feelings of self-worth**

Below are some examples of simple acts of kindness that can make a big difference in someone's life…including your own!

- **When in line to get your morning coffee, pay for the person behind you.**
- **Compliment at least two people, strangers or people you know.**
- **Send a positive text to four people.**
- **Donate items in your home that you haven't used in the past year.**
- **Leave a note for a colleague thanking them for something they did well, even if they were supposed to do it!**
- **Think about ways to help your neighbor, e.g., bring the garbage pail in from the street.**
- **Look for opportunities to volunteer your time. It has been found that for people who are 55 years or older and volunteer, have their risk for dying early cut in half.**

If you would like to make a donation to LAP or learn about upcoming programs, visit nassaubar.org and click on the "Lawyer Assistance Program" page on the home screen.

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Nassau County Bar Association Lawyer Assistance Program

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*The NCBA Lawyer Assistance Program is directed by Beth Eckhardt, PhD, and the Lawyer Assistance Committee is chaired by Jacqueline A. Cara, Esq. This program is supported by grants from the NYS Office of Court Administration. *Strict confidentiality protected by § 499 of the Judiciary Law.*

NCBA Committee Meeting Calendar
Feb. 1, 2022 – March 3, 2022

Questions? Contact Stephanie Pagano at (516) 747-4070 or spagano@nassaubar.org.
Please Note: Committee meetings are for NCBA Members.
Dates and times are subject to change. Check www.nassaubar.org for updated information.

FAMILY COURT LAW & PROCEDURE
TUESDAY, FEBRUARY 1
12:45 P.M.
Susan G. Mintz

IMMIGRATION LAW
TUESDAY, FEBRUARY 1
5:30 P.M.
George A. Terezakis

REAL PROPERTY LAW
WEDNESDAY, FEBRUARY 2
12:30 P.M.
Alan J. Schwartz

COMMUNITY RELATIONS & PUBLIC EDUCATION
THURSDAY, FEBRUARY 3
12:45 P.M.
Ira S. Slavit

PUBLICATIONS
THURSDAY, FEBRUARY 3
12:45 P.M.
Andrea M. DiGregorio/ Rudolph Carmenaty

CIVIL RIGHTS
TUESDAY, FEBRUARY 8
12:30 P.M.
Bernadette K. Ford

EDUCATION LAW
WEDNESDAY, FEBRUARY 9
12:30 P.M.
John Sheahan/Rebecca Sassouni

MEDICAL-LEGAL
WEDNESDAY, FEBRUARY 9
12:30 P.M.
Christopher DelliCarpini

MATRIMONIAL LAW
WEDNESDAY, FEBRUARY 9
5:30 P.M.
Jeffrey L. Catterson

MUNICIPAL LAW AND LAND USE
THURSDAY, FEBRUARY 10
12:30 P.M.
Judy L. Simoncic

LABOR & EMPLOYMENT
MONDAY, FEBRUARY 14
12:30 P.M.
Matthew B. Weinick

PLAINTIFF'S PERSONAL INJURY
TUESDAY, FEBRUARY 15
12:30 P.M.
David J. Barry

WOMEN IN THE LAW
TUESDAY, FEBRUARY 15
6:00 P.M.
Edith Reinhardt

ANIMAL LAW
TUESDAY, FEBRUARY 15
6:00 P.M.
Florence M. Fass

BUSINESS LAW, TAX & ACCOUNTING
WEDNESDAY, FEBRUARY 16
12:30 P.M.
Jennifer L. Kool/ Scott L. Kestenbaum

ELDER LAW SOCIAL SERVICES HEALTH ADVOCACY
WEDNESDAY, FEBRUARY 16
12:30 P.M.
Ariella Gasner/Suzanne Levy

ASSOCIATION MEMBERSHIP
WEDNESDAY, FEBRUARY 16
12:45 P.M.
Michael DiFalco

ETHICS
WEDNESDAY, FEBRUARY 16
4:30 P.M.
Avigael Fyman

SURROGATES COURT ESTATES & TRUSTS
WEDNESDAY, FEBRUARY 16
5:30 P.M.
Brian P. Corrigan/ Stephanie M. Alberts

ALTERNATIVE DISPUTE RESOLUTION
THURSDAY, FEBRUARY 17
12:30 P.M.
Michael Markowitz/ Suzanne Levy

APPELLATE PRACTICE
THURSDAY, FEBRUARY 17
12:30 P.M.
Jackie L. Gross

DIVERSITY & INCLUSION
THURSDAY, FEBRUARY 17
6:00 P.M.
Rudolph Carmenaty

DISTRICT COURT
FRIDAY, FEBRUARY 18
12:30 P.M.
Roberta School

IMMIGRATION LAW
TUESDAY, MARCH 1
12:30 P.M.
George A. Terezakis

COMMERCIAL LITIGATION
TUESDAY, MARCH 1
12:30 P.M.
Jeffrey A. Miller

REAL PROPERTY LAW
WEDNESDAY, MARCH 2
12:30 P.M.
Alan J. Schwartz

COMMUNITY RELATIONS & PUBLIC EDUCATION
THURSDAY, MARCH 3
12:45 P.M.
Ira S. Slavit

PUBLICATIONS
THURSDAY, MARCH 3
12:45 P.M.
Andrea M. DiGregorio/ Rudolph Carmenaty

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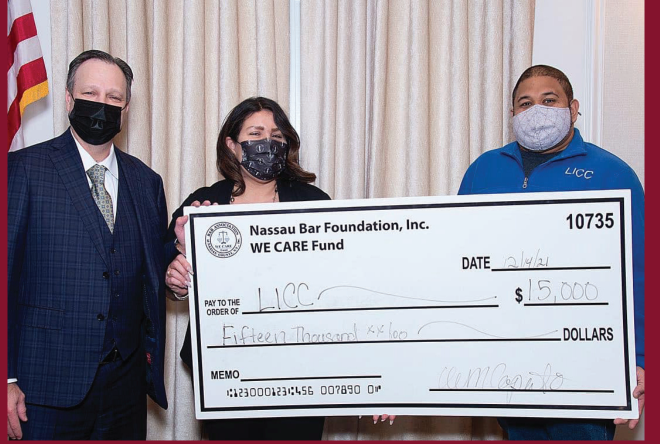

At the end of 2021, the WE CARE Fund distributed grants to 22 charities, totaling over $145,000. All funds raised by WE CARE are are given to local organizations that provide aid to children, the elderly, and those most in need throughout Nassau County. These organizations provide basic necessities such as clothing, food, and shelter to those who often go without. NCBA President Gregory S. Lisi and WE CARE Co-Chair Deanne Caputo presented the checks to Big Brothers/Big Sisters, Long Island Council of Churches, Christmas Dream, Long Island Sled Hockey, and Girl Scouts of Nassau County, among others.

Photos by: Hector Herrera

We Care

WE CARE Fund Receives Jaspan Schlesigner Heart of the Community Award

The WE CARE Fund is proud to accept the Jaspan Schlesinger Heart of the Community Award. To celebrate the firm's 75-year anniversary, Jaspan Schlesinger LLP has chosen 75 not-for-profit organizations to present this award to, along with a generous donation that will go directly towards helping those most in need in Nassau County. The WE CARE Fund would like to extend its deepest gratitude to Jaspan Schlesinger LLP for choosing WE CARE as one of the 75 deserving organizations.

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The NCBA is grateful for these individuals who strongly value the NCBA's mission and its contributions to the legal profession.

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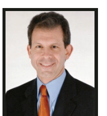

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