Nassau Lawyer

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THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

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NASSAU ACADEMY OF LAW BRIDGE THE GAP WEEKEND

March 12 and 13, 2022

Contact Jennifer Groh at (516) 747-4464 or jgroh@nassaubar.org

122ND ANNUAL DINNER GALA

Saturday, May 14, 2022

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UPCOMING PUBLICATIONS COMMITTEE MEETINGS

Thursday, February 3, 2022, at 12:45 PM

Nominating Committee Seeks Candidates for NCBA Board of Directors

The Nominating Committee is seeking active NCBA Members who want to serve on the Nassau County Bar Association Board of Directors. The deadline to apply is Monday, January 24, 2022.

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

NCBA Officers and a class of eight Directors are elected at the Annual Meeting on May 10 and take office June 1, 2022. Officers serve for one-year terms and Directors hold office for 3-year terms. Officers and Directors are sworn in at the Installation on June 7, 2022.

The Nominating Committee is also tasked this year with nominating a candidate to fill a vacant elected Director position; that candidate will be voted on by the Board of Directors and serve until the Annual Meeting on May 10, at which time the vacancy shall be filled for the balance of the term expiring June 1, 2024.

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

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

"The Nominating Committee is seeking candidates with diverse experiences and skills who are committed to serving our community and legal profession," says Collins. "We need leaders who can confront the challenges faced by our Bar Association during these unprecedented times and help create value for Members."

Interviews with candidates will begin in early February; the Committee will nominate one person for each Officer—other than President—and Director position and issue its report at least one month prior to the 2022 Annual Meeting and Election to be held on Tuesday, May 10.

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

NCBA Assumes Role of *Nassau Lawyer* Publisher

The Nassau County Bar Association is proud to announce that it has become the Publisher of *Nassau Lawyer*, the monthly publication of the NCBA.

"For many years the NCBA has worked with outside publishers to design and sell advertisement in *Nassau Lawyer*," says NCBA President Greg Lisi. "After considering offers from multiple publishers, we determined that self-publishing provides the Bar Association with the greatest financial oversight while giving our Publications Committee and professional staff the creative flexibility to enhance *Nassau Lawyer* and bring it to the next level."

Nassau Lawyer is distributed 11 times a year to nearly 4,000 NCBA Members and helps businesses and law firms market their services to legal professionals in Nassau County. *Nassau Lawyer* is mailed twice to year to over 10,000 Nassau County lawyers registered with the NYS Unified Court System Office of Court Administration.

Law firms, legal services, and businesses seeking to advertise in Nassau Lawyer can now purchase ads directly from the Bar Association. NCBA members will now receive special rates and discounted packages—a new perk of membership!

Looking to grow your law firm in 2022? See the **insert** within this issue or contact nassaulawyer@nassaubar.org for questions.

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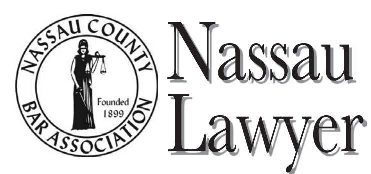

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2022 Nassau County Bar Association

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From the President

Gregory S. Lisi

Many of us are happy to see 2021 come to an end. Everyone likely knows somebody who became seriously ill, or worse, with COVID, and we were all stuck working remotely since the previous spring. Most of us didn't get vaccinated until February or March; I know I didn't get mine until April, and others were well after that.

Then things started to turn around. In August, 250 guests—including three of the last four presiding justices of the Appellate Division, Second Department—attended our Dinner Gala held at Domus, indoors.

Since then, we have continued to host well-attended events at Domus, including monthly Board of Directors meetings; BBQ at the Bar in September; Judiciary Night, attended by 200 attorneys and judges in October; a Diversity and Inclusion Networking event on Constance Baker Motley, which attracted 45 people; the Committee on Committees networking event had 40 unique attorneys at Domus; and the Thanksgiving lunch, put on by the Caterer, had 150 people in attendance at Domus. Even the holiday party in December, with Rosalia's great Tale of Wassail, had 100 people.

It is exciting to begin the long march back towards normalcy. Many of us are now getting the booster and are working full time in our offices. As the NCBA continues to move forward, we are excited to announce that the buffet lunch and salad bar are back—served in the Domus dining room on Tuesdays, Wednesdays, and Thursdays—and the a la carte menu is available Monday through Friday as well. Stop by for good food and conversation. I am at Domus every Wednesday for Lunch with the President and the caterer is scheduling monthly special luncheons, such as the New Year's Luncheon planned for January.

Improving attendance at committee meetings and the lunch crowd is where we plan to focus efforts in the new year, as those numbers remain low. As I write my column, New York Governor Kathy Hochul has issued an Executive Order to combat the omicron winter surge that compels businesses without a proof of vaccination requirement to require masks be worn indoors until January 15, 2022. (Please note that by the time this is published, there may be a change in the status.)

The NCBA is following the Executive Order and requiring all staff and visitors to wear masks unless eating and drinking at meetings or in the dining room. However, I believe the current spike will be a short-term issue and we can revitalize the committees and dining room in 2022.

Do not let this current speed bump on the way back to normalcy stop you from enjoying the benefits of membership or deter you from coming to Domus in 2022. Governor Hochul reported that, "According to the CDC as of December 18, 2021, 94.3 percent of adult New Yorkers have received at least one vaccine dose. So far, 32,372,596 total vaccine doses have been administered, and 136,402 doses have been administered over the past 24 hours."

These statistics, plus the everyday precautions the NCBA and caterer are taking—such as cleaning and disinfecting the building daily, frequently changing the filters on the air conditioning system, providing hand sanitizer at the buffet and throughout the building, and placing masks at the front entrance for visitors—will help keep Domus as safe as possible.

Some Members are coming back because they understand the value of networking with colleagues in person, meeting with our excellent CLE speakers and seeing their friends and colleagues, but in-person attendance has been low. I have spoken to the Chairs of the Committees and they believe that Members are not attending meetings and Academy seminars in person not because of a fear of COVID, but instead the record-breaking number of Members using Zoom for its convenience. What can we do to get greater attendance at Domus?

I am personally a fan of Zoom and think it should continue to be used now and in the future. However, I do think we can make certain exceptions to having all committee meetings on Zoom as we go into the New Year. To give us time to see how the winter surge goes, I am planning that effective February 1, 2022:

- All Executive Committee and Board of Directors meetings will be in person only.
- Any committee featuring a judge, high-level government or elected official, or other renowned speaker, will be in person, unless the speaker objects.
- The Committee on Committees and the affiliate Bar networking events will be in person only.

I believe the vast majority of meetings will remain hybrid well into the future. This will allow those who wish to network with their colleagues to do so, while still allowing those who cannot be in attendance the opportunity to hear our great speakers, get CLE credit, and partake in important aspects of being a member of the NCBA.

Make a resolution in the new year to come to Domus to have lunch, attend committee meetings, and participate in Bar events. We are only as strong as our membership, and we need your support.

As always, I welcome your comments and am here to answer any questions you might have. I hope you and your families have a happy and healthy New Year.

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: IMMIGRATION LAW

Niz-Chavez: A Major Breakthrough in Immigrant Removal Defense

Linda G. Nanos

While immigration defense attorneys are churning out *Niz-Chavez* motions, lawyers who do not practice immigration law are asking, what is a *Niz-Chavez*?

On April 29, 2021, the Supreme Court issued a decision, with a six-to-three majority, that attacked the foundation of immigrant removal proceedings in *Niz-Chavez v. Garland*.[1] Removal cases begin with filing a charging document—known as a Notice to Appear (NTA)—with the Executive Office of Immigration Review (immigration court). According to the Immigration and Nationality Act,[2] this charging document must contain the time and place of the hearing. It is logical that a Notice to Appear must give notice of where and when the respondent is to appear, but in many cases, the date the case will be placed on the immigration court calendar is not known. In those cases, the NTA often states the date is "to be set" or "to be determined." The charging document would then be followed with a hearing notice to advise the respondent when and where to appear.

The filing of the charging document with the immigration court has the critical effect of stopping the accumulation of time in the United States as a defense against removal, known as the stop-time rule.[3] The *Niz-Chavez* Court held that if all of the essential information of date, time, and place to appear is not on the NTA, it is defective. It further held that a defective NTA does not trigger the stop-time rule. One of the most common defenses to removal is cancellation of removal based upon the length of time in the United States. The length of time residing in the U.S. that is required for the defense of cancellation of removal varies depending upon whether the respondent is a non-lawful permanent resident, in which case it is ten years, or a lawful permanent resident, which is seven years from admission in any status. Unless the NTA is served ten or seven years, respectively, after the respondent entered the United States, cancellation of removal has not been an option as a defense because of the stop-time rule.

Niz-Chavez opened a floodgate of Motions to Reopen removal orders to apply for the defense that was blocked at the time the document was served but is now viable after the passage of years and the presence of a defective NTA. The Office of Chief Counsel of U.S. Immigration and Customs Enforcement published a legal notice on June 9, 2021, that it would not oppose these motions to reopen under *Niz-Chavez* through November 16. After that time, the motions can still be filed but may meet opposition from government counsel.

This is not the first time that the Supreme Court made a ruling about the validity of Notices to Appear. In *Pereira v. Sessions*—which pre-dated *Niz-Chavez*—there was a similar ruling that found that an NTA which lacked time and place to appear is defective and does not trigger the stop-time rule.[4] That decision was also met with a flurry of motions to re-open removal orders to advance cancellation of removal defenses. Those motions were stopped short by decisions in the Board of Immigration Appeals,[5] and Circuit Courts that held that the subsequent delivery of a hearing notice to the address provided by the respondent remedied the defect of the NTA.

In *Niz-Chavez*, the Court sought to resolve the disparate findings in lower courts. The Court gave the language of the regulations a literal interpretation. Where Congress stated that "a" Notice to Appear with all of the required information commenced the proceeding, the article "a" referred to a single document, not successive documents providing notice. The government's agreement not to oppose motions to re-open is an acceptance of the *Niz-Chavez* ruling as the definitive answer after numerous court challenges followed the *Pereira* decision.

Immigration defense attorneys are culling files to find defective NTA's in order to decide whether to file a motion to re-open. The defective NTA is not the end of the analysis. The next question is whether there is a prima facie case for cancellation of removal. This would include analyzing the requisite length of time the respondent has resided in the U.S., good moral character, and hardship to a qualifying relative in the case of non-lawful permanent residents. Winning a cancellation of removal defense carries high burdens of proof for all of the requirements.

There may be a hybrid strategy of reopening with a prima facie cancellation defense and then adding another defense that may have better likelihood of success, such as adjustment of status based upon an approved relative petition. The immigration court will be faced with a logistical quagmire caused by newly re-opened cases while already suffering from dockets that are backlogged from a lengthy pandemic shut-down. Cancellation of removal grants have a number limit which causes eligible cases to be placed on a waiting list. The long waiting list will be exacerbated by a barrage of cancellation-of-removal cases.

The reverberations of *Niz-Chavez* will not stop with the re-openings to file cancellation-of-removal defenses. Litigation has already been filed in circuit courts to decide whether an immigration judge properly ordered removal in absentia when the respondent was not given notice of the hearing date on the charging document, i.e., based on a defective NTA.[6] This issue can be expected to work its way up to the Supreme Court as well. All of this activity in the judicial branch may prompt Congress to step in and pass legislation that will protect the government from these challenges. In the meantime, it is a formidable task for immigration defense attorneys to analyze cases, and then file and defend *Niz-Chavez* motions.

1. 141 S.Ct 1474 (2021).
2. Immigration and Nationality Act § 239(a)(1), 8 USC § 1229 (a)(1).
3. INA § 240A(d)(1) 8 USC § 1229a, states that accrual of time ends when the noncitizen is served with a notice to appear.
4. 138 S. Ct. 2105 (2018).
5. *Matter of Bermudez-Cota*, 27 I&N Dec. 441(BIA 2018).
6. As of the time of this writing, *Rodriguez v Garland*, No. 20-60008 U.S. App., (5thCir. Sept. 27, 2021) remanded the matter to determine whether an absentia order should be vacated based upon the same defective notice on a Notice to Appear that lacks the time and date to appear.

Linda G. Nanos has practiced immigration law in Nassau County for forty years and is a member of the NCBA Immigration Law Committee and the American Immigration Lawyers Association.

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FOCUS: IMMIGRATION LAW

Immigration Enforcement, Upside-Down

David Sperling and Chartrisse Adlam

The new political landscape, and the departure of President Donald Trump, has resulted in a sea change in immigration enforcement. This article will examine some of those changes and its impact on client representation.

Change in Priorities

As of 2021, the new priorities of Immigration and Customs Enforcement ("ICE") are (1) public safety (which focuses on non-citizens who have been convicted of certain crimes); (2) border security (which focuses on non-citizens who are recent entrants after November 1, 2020); and (3) threats to national security (which focuses on non-citizens who have engaged in, or are suspected of engaging in, certain activities such as terrorism, espionage, and organized gangs or related activities and whose apprehension is necessary to protect the national security of the United States).[1] Individuals with outstanding orders of deportation are no longer a priority, as long as those individuals maintain a "clean" record.[2] Also, the Immigration Courts are increasingly open to the termination of removal or deportation cases—a stark contrast to the Trump administration, which stripped judges of their discretion to adjudicate cases of prosecutorial discretion.

Furthermore, ICE is no longer conducting mass raids on workplaces where undocumented immigrants are employed. First, this practice was a huge drain on enforcement resources. Second, the current administration recognizes that the real problem is exploitative employers. This shift in strategy recognizes that when undocumented workers are exploited, the employer not only causes a disadvantage to business competitors, they create an unfair labor market. The employers' illegal acts can range from substandard wages to unsafe working conditions to human trafficking and child exploitation.[3] The sea change in enforcement comes about as a result of much needed executive actions and policy changes.

Change In Backlog, Resources, and Technology

As of the beginning of 2021, there were nearly 1,300,000 backlogged cases in Immigration Court, in large part due to the shutdown of the courts during the pandemic.[4] However, the backlog is not entirely attributable to the pandemic. In 2015, the backlog was approximately 500,000.[5] While other courts managed to re-open and recover from the pandemic earlier, the Immigration Court re-opened only in July 2021.

Unlike other courts that reopened with about the same number of judges they had shut down with, the Immigration Court in New York City reopened with more than double the number of immigration judges, as well as more court locations, which has led to more confusion in the backlog process. It is unclear at this point how rapidly the backlog may be overcome, especially considering the continuing threat of the pandemic and its variants.

The main positive post-pandemic factor for the Immigration Court is that it has caused the Immigration Court to enter the technology age.[6] For the immigration practitioner, this was desperately needed. The Immigration Court did not regularly allow even the most basic technology tools, such as e-mail, fax, or e-filing, which are normal tools used by practitioners for the filing of court submissions and applications.[7]

All filings, even for emergencies, had to be done in person or by mail. In this new world, Immigration Court proceedings are now being conducted mostly through video and telephonic hearings.[8] The video and audio conferences have been a welcome change for immigration practitioners, who often took hours to arrive with their clients at court in Manhattan for, mostly, procedural hearings. Full-merits hearings are still generally held in person, however.

Change in The Law

Another part of the sea of change is the vacatur of several critical decisions of the Board of Immigration Appeals ("BIA").[9] There are an estimated 1,000,000 immigrants with removal or deportation orders.[10] In the pre-Trump era, the BIA held, in *Matter of Avetisyan*, that judges could sua sponte administratively close removal cases.[11] More specifically, *Avetisyan* held that the Immigration Judges (IJ) and the BIA may administratively close removal proceedings—even over the opposition of a party—if the closure is otherwise appropriate under the circumstances, and that IJs or the BIA should weigh all relevant factors in deciding whether administrative closure is appropriate. But, during the Trump administration, *Matter of Castro-Tum* eliminated the possibility of administrative closure.[12] However, the most recent decision by the Biden administration—*Matter of Cruz-Valdez*—restores that very important tool of docket control and prosecutorial discretion.[13] The ability of the Immigration Court to administratively close cases goes a long way towards clearing the Immigration Court's backlogged dockets.

Another key reversal of a Trump administration decision restored protection for survivors of gang and gender violence. That is, the Trump administration essentially overruled prior precedent when it issued *Matter of A-B*, a decision that severely restricted asylum eligibility, particularly for those fleeing violence in the Northern Triangle of Central America. As a result of *Matter of A-B*, adjudicators were forced to deny more asylum claims.[14] Now, the Trump-era decision has been effectively reversed.

Similarly, in *Matter of L-E-A- II*, the Trump administration targeted asylum based on family-group membership. Departing from longstanding precedent, *L-E-A- II* found that in "the ordinary case, a nuclear family will not, without more, constitute a 'particular social group' because most nuclear families are not inherently socially distinct."[15] However, *Matter of L-E-A- III*, restored the grounds of "family" as a particular social group.[16]

The result of these rulings opened important pathways for asylum applicants, many of them from Central America. The decisions to vacate the most harmful Trump-era attorney general decisions on asylum is surely very welcome for asylum applicants.

Practical Tips and the Prospect of Deportation

As always, criminal-law defense attorneys should inquire into the background of anyone they represent to determine if their client is a non-citizen. Counsel should also inquire if their client has had contact with immigration enforcement. There is a duty to inform a non-citizen of the immigration consequences of a guilty plea,[17] and failure to adequately research a client's background could result in a seemingly advantageous plea leading to mandatory deportation.

Even if the immigrant client has had no previous encounters with the law, deportation could still be looming, depending on circumstances. For example, if the client is taken into custody on a serious criminal charge, police will advise ICE, which will initiate the client's physical removal.

Also, immigrants often lose their Orders to Show Cause or Notices to Appear and end up never appearing for their hearings, which results in in-absentia deportation orders. Sometimes, these failures-to-appear are a result of an immigrant's lack of knowledge that important information is contained in the paperwork they receive when they first encounter ICE. And, that paperwork is mostly in English. Careful review of the paperwork is necessary and should be undertaken by counsel and client.

Conclusion

Non-citizens, including those with deportation orders but no serious criminal record, face a relaxed enforcement policy under the Biden administration. However, prospects for any form of comprehensive immigration reform remain bleak with a hyper-partisan and closely divided House and Senate.

1. Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities, John D. Trasvina - Principal Legal Advisor, May 27, 2021.
2. Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities, John D. Trasvina - Principal Legal Advisor, May 27, 2021.
3. Memorandum – Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual, Policy Statement 065-06, Oct. 12, 2021 – Alejandro N. Mayorkas – Department of Homeland Security Secretary.
4. Transactional Records Access Clearinghouse (TRAC), Syracuse University - trac.syr.edu/immigration/reports/654/
5. "Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges", GAO-17-438, Government Accountability Office, June 2017.
6. EOIR COURTS & APPEALS SYSTEM (ECAS) – justice.gov/eoir/ECAS
7. Immigration Court Practice Manual – Chapter 3 (Aug. 2, 2018 Version).
8. "Immigration judges struggling to work through inadequate technology, pandemic, union pushback" – Federal News Network, Tom Temin, Sept. 1, 2021; Immigration Courts Are Relying on Bad Tech – GEN, John Washington, April 25, 2019
9. The Executive Office for Immigration Review, the official name for the Immigration Courts, and the Board of Immigration Appeals (BIA) are both under the Department of Justice. ICE reports to the Department of Homeland Security.
10. "Removal" is a technical term for deportation instituted in 1997 with the IIRAIRA Act.
11. *Matter of Avetisyan,* 25 I&N Dec. 688 (BIA 2012).
12. *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).
13. *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021).
14. *Matter of A-B-.,* I&N Dec. 307 (A.G. 2021).
15. *Matter of L-E-A- II*, 27 I&N Dec. 581 (AG 2019).
16. *Matter of L-E-A- III*, 28 I&N Dec. 304 (A.G. 2021).
17. *Padilla v. Kentucky*, 559 US 356 (2010).

David Sperling is the founder of David M. Sperling and Associates, an immigration law firm with four offices on Long Island, including Hempstead.

Chartrisse Adlam is the firm's senior partner, and was previously a Senior Trial Attorney and Assistant Chief Counsel for ICE and its predecessor, the Immigration and Naturalization Service.

FOCUS:
ANTI-SLAPP LAW

Suit Over Aretha Franklin Movie Survives Anti-SLAPP Dismissal Motion

Ira S. Slavit

The movie *Respect*, released this past summer, is a biographical musical drama about Aretha Franklin, starring Jennifer Hudson, that contains performances of her most popular songs. *Respect* follows the first three decades of Ms. Franklin's life, culminating with her seminal two-day live performance at the New Temple Missionary Baptist Church in the Watts neighborhood of Los Angeles, California in 1972.

Aretha Franklin's parents were both gospel singers, and her father was a reverend. She and her four siblings grew up singing in their father's Detroit church. The concert at the New Temple Missionary Baptist Church marked her triumphant return, at the age of 29, to her gospel roots after enjoying extraordinary success in rhythm and blues and pop music. (Quickie quiz: Who wrote and first recorded the song "Respect"?[1])

A team at Warner Brother Films, led by the director Sydney Pollack, recorded the performance with the intent of releasing a film. The album, titled *Amazing Grace*, was released soon after the concert. It reached No. 7 on the Billboard 200 chart, is one of the biggest-selling recordings in gospel music history having gone double platinum (2 million sales) and won the 1973 Grammy Award for Best Soul Gospel Performance. The movie, also named *Amazing Grace*, was not released until 2018, a mere 46 years after the concert. Why so long?—the audio was not synchronized to the video during the recording, Ms. Franklin objected to the movie's release, and most pertinent to this article, a lawyer allegedly threatened litigation knowing he had no basis whatsoever to do so.

While filming the concert, a clapperboard, a device commonly used in filmmaking to assist in synchronizing picture and sound, was not used and thus the audio and video were not synchronized. This prevented the production of a commercially releasable movie. The footage lay in storage until 2007 when a man named Alan Elliott bought the footage from Warner Brothers' film division. Using newer technology, he was eventually able to put together a synchronized movie, which he then set out to distribute and release.

Ms. Franklin, however, blocked Mr. Elliott from showing the movie, threatening to sue him because he did not obtain her permission to do so. Following her passing in 2018, Mr. Elliott arranged for her family to view it, after which they agreed to its release.

According to Mr. Elliott, his ability to market the concert movie was diminished to the tune of $20 million to $50 million because attorney Barry Tyerman, the lawyer for the estate of the since-deceased movie's director, Sydney Pollack, advised potential distributors of the movie that his client had an ownership interest in the movie that had to be satisfied as part of any distribution deal even though the lawyer knew full well that no such ownership interest existed.

Mr. Elliott sued Mr. Tyerman and his law firm to recover damages in California state court.[2] The defendants moved for early dismissal of the lawsuit under California's anti-SLAPP law.[3] Since New York's anti-SLAPP statutes are modeled after California's, the court's analysis in *Elliott v. Tyerman* may be relevant to how New York's law is interpreted and applied.

New York's Anti-SLAPP Law

SLAPP is an anacronym for "Strategic Lawsuit Against Public Participation." SLAPP suits, rather than being brought to vindicate a valid legal claim, aim to burden defendants who have exercised their First Amendment rights and spoken on issues of interest to the public with overwhelming litigation costs so that they cease or retract their speech. Anti-SLAPP laws are designed to allow a targeted defendant to gain dismissal of a SLAPP suit quickly and without incurring high legal costs or invasive discovery.

New York's anti-SLAPP law, first passed in 1992, is contained in Civil Rights Law §§70-a and 76-a and in CPLR 3211(g) and 3212(h). In November of 2020, New York amended its anti-SLAPP laws in ways that dramatically sharpened its teeth. The amendments broadened the scope of protected speech from its earlier narrow application to lawsuits involving parties seeking permits, zoning changes, or other public permissions from New York State or its agencies. The statute now applies to "any communication in a place open to the public or a public forum in connection with an issue of public interest" or "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest . . . ."[4] "Public interest" is to be "construed broadly" and means "any subject other than a purely private matter."[5]

Further, the amendments made the awarding of attorney fees and costs to a party who prevails in obtaining dismissal of a SLAPP suit mandatory.[6] Awarding legal fees was discretionary under the prior law.

Defendants who believe they are the target of a SLAPP suit can move for early dismissal of the complaint under CPLR §3211(g) or for summary judgment under CPLR §3212(h). Where a defendant moving under either statute establishes that the lawsuit is based on their public communications or other free speech conduct, the burden shifts to the plaintiff to demonstrate that their claim has a "substantial basis in law" or is supported by a "substantial argument" for modifying the law.

The significance of the amendments of these CPLR provisions is two-fold. First, the statutes flip the usual rules concerning motions to dismiss and motions for summary judgment, where the moving party bears the initial burden of proving that they are entitled to the relief requested or the motion must be denied regardless of the sufficiency of the opposition. Under CPLR §3211(g) and §3212(h), the moving defendant does not have to initially show entitlement to dismissal or summary judgment, just that the lawsuit concerns the type of activity and parties to which CVR §§70-a and 76-a apply. Second, the requirement that plaintiff demonstrate that their claim has a *substantial* basis in law is much more demanding than a demonstration that the claim is cognizable at law or that an issue of fact exists.[7]

Other benefits to defendants moving to dismiss under the amended CPLR §3211(g) is that the filing of the motion stays all discovery except for discovery that the plaintiff establishes is necessary to defend against the motion,[8] and that the defendant is permitted to submit extrinsic evidence in support of its motion.[9] Both CPLR 3211(g) and 3212(h) require the court to grant preference in the hearing of the motion.

The amendments to New York's anti-SLAPP law have been held to apply retroactively.[10]

Decision in *Elliott v. Tyerman*

Like New York, California employs a two-prong analysis where a defendant moves for dismissal: the court first determines whether the lawsuit implicates activity the anti-SLAPP

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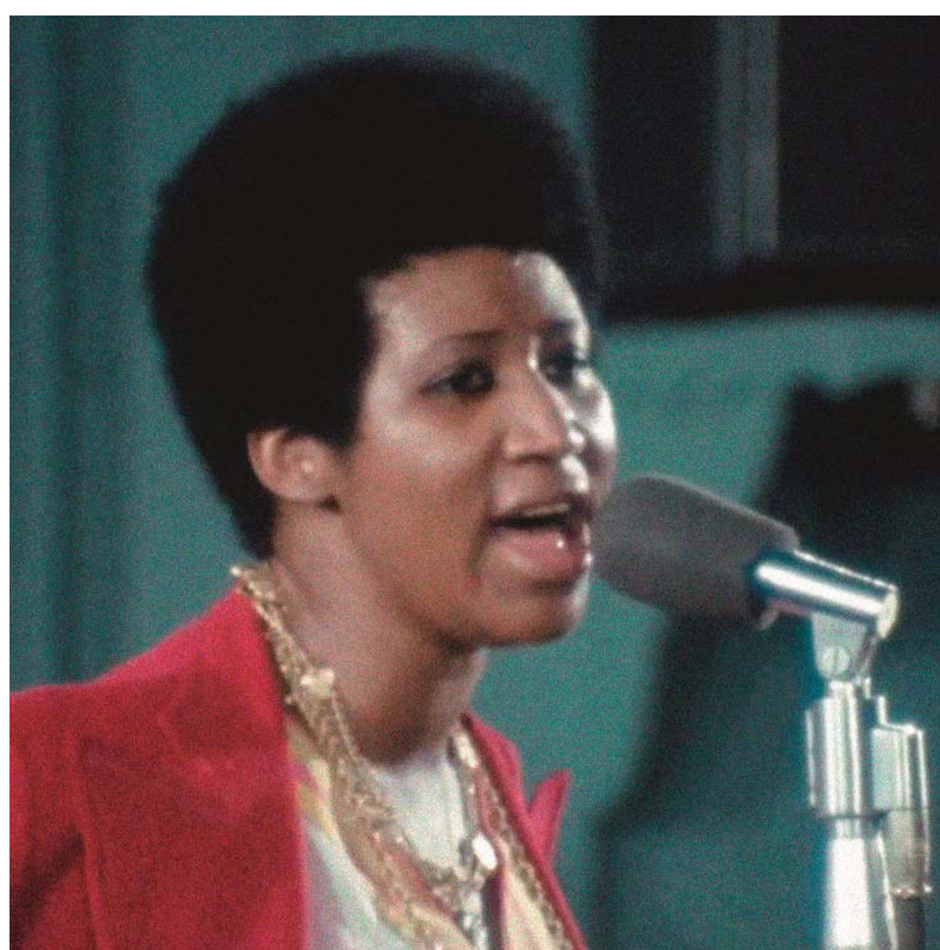

laws are intended to protect, and, if so, the court analyzes whether plaintiff has satisfied the burden of establishing that a substantial basis to the lawsuit exists.

As to the first prong, the court agreed that the defendants' pre-litigation allegations that Pollack had a right to the *Amazing Grace* film were made to protect their client's legal rights in anticipation of litigation and are protected activity within the meaning of the anti-SLAPP law. The court then turned to the second prong and evaluated the defendants' probability of prevailing on each of the seven causes of action pled.

The court held that issues of fact existed on the causes of action for trade libel (the publication of matter disparaging the quality of another's property, which the publisher should recognize is likely to cause pecuniary loss to the owner), and intentional and negligent interference with prospective economic relations. The court relied on Mr. Elliott's contentions that he had met with Tyerman as far back as 2008 and at no time did Tyerman tell Elliott that the Pollack estate had any claim against the film until Tyerman realized that the movie could be a commercial success. The court found that the plaintiffs established triable issues of material fact as to whether defendants' statements were well-founded, whether defendants had a good faith belief in contemplating litigation, and whether litigation was imminent.

The court dismissed the causes of action for interference with contractual relations, unfair competition, intentional infliction of emotional distress, and for negligent supervision/retention, finding that plaintiffs had not demonstrated a probability of prevailing on those causes of action.

In a twist, Elliott had hired the defendants to advise him concerning different matters in 2014. Elliott alleged that the defendants used that opportunity to obtain more information regarding *Amazing Grace*. Elliott contended that this created a conflict of interest and interfered with plaintiff's economic relationships in violation of numerous rules of ethis. The court did not rule on the ethical violations.

The defendants appealed the court's decision. The appeal is pending as of the time of this writing.

Mick Jagger in the House

The soundtrack of *Amazing Grace* is mostly traditional gospel songs mixed with some Carole King ("You've Got a Friend"), Rodgers and Hammerstein ("You'll Never Walk Alone") and others. There is an 11-minute version of "Amazing Grace."

One of the more uplifting songs is "Climbing Higher Mountains." By song's end, everyone in the church is on their feet. As the song gets going, the camera pans the audience and zooms in on one of the first to be standing and swaying with the music: it's Mick Jagger, with Ron Woods next to him. They were in Los Angeles recording the Rolling Stones' album *Exile on Main Street*.

Mick Jagger said this about the concert in an interview published in 2017 in the Los Angeles Times: "It was a really electrifying performance she gave, it raised the hair on the back of your neck. … It was a super-charged performance, a different Aretha on that day than I had experienced before."[11]

Other than two songs where she sat at a piano, Ms. Franklin performed standing at a podium at the front of the church. There was no elaborate light show or sound system, and barely any talking between the songs. She was accompanied on piano by Rev. James Cleveland, her mentor and the King of Gospel, the Southern California Community Choir, and Franklin's own rhythm section consisting of a drummer, a guitarist, a bassist, and a congas player. Though nothing like when the Queen of Soul performed her hits, the voice is unmistakable and remarkable for its power and beauty.

Ms. Franklin's career included No. 1 pop and R&B singles, and five Grammy awards. She was the first woman inducted into the Grammy Hall of Fame. She also earned a Presidential Medal of Freedom and the National Medal of Arts.

When the Reverend Cleveland introduced Ms. Franklin on the concert's first night, he joked that she can sing anything, even "Three Blind Mice," meaning that she could make anything she sings sound extraordinary. So true. Regardless of the ultimate result in *Elliott v. Tyerman*, Alan Elliott deserves great credit for his tenacity in bringing Ms. Franklin's extraordinary talent to the screen in *Amazing Grace*.

1. Answer: Otis Redding. Ms. Franklin's version of "Respect" peaked at #1 on Billboard on June 3, 1967, and was her first Grammy win, for Best Rhythm & Blues Recording and Best Rhythm & Blues Solo Vocal Performance, Female.
2. *Elliot v. Tyerman* 20STCV42553, Superior Court of California, County of Los Angeles, Civil Division
3. California Code of Civil Procedure § 425.16
4. Civil Rights Law §76-a(1.)(b)
5. Civil Rights Law § 76-a(1)(d)
6. Civil Rights Law §70-a(1.)
7. CPLR 3211(a)(7); CPLR 3212(b)
8. CPLR 3211(g)3)
9. CPLR 3211(g)(2)
10. *Palin v New York Times Co.*, 510 F Supp 3d 21, 27 [SDNY 2020]; *Sackler v Am. Broadcasting Companies, Inc.*, 71 Misc 3d 693, 699 [Sup Ct 2021]
11. *Los Angeles Times*, 12/24/2017; https://www.latimes.com/entertainment/music/la-et-ms-amazing-grace-movie-20181224-story.html

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FOCUS: ALTERNATIVE DISPUTE RESOLUTION

The Best ADR Program You've (Probably) Never Heard Of

Chris McDonald

The Nassau County Bar Association provides attorneys and their clients the opportunity to use expeditious, timesaving, and cost-effective arbitration or mediation to resolve disputes that might otherwise be litigated in the courts.

That statement, while true, may not strike readers as particularly newsworthy. After all, NCBA's alternative dispute resolution ("ADR") program has been in existence for many years. While it is also true that significant work went into revamping, reinvigorating, and expanding the program within the last decade, if *news* is defined as "a report of recent events,"[1] the program's overhaul isn't particularly newsworthy either.

That said, NCBA's ADR program may in fact be news to many members of the bench and bar. Why? Because the program is woefully underutilized. Indeed, at this very moment there are dozens of highly qualified arbitrators and mediators on the program's panels who have no active matters currently assigned to them through the NCBA. Defining *news* as "previously unknown information,"[2] the program's infrequent use suggests that it may be unknown to many or, alternatively, that its benefits are un- or underappreciated. Either way, further exploration of the program is in order.

Information About the NCBA ADR Program is Easy to Find

The NCBA ADR program (and/or its benefits) may not be well known, but that is not to say that NCBA has kept the program under wraps. In fact, the opposite is true. A quick visit to NCBA's website (www.nassaubar.org) demonstrates the point. Click on the "For Members" dropdown menu and the very first link—ADR Panels—leads to a page dedicated to the ADR program. That page goes on to explain that NCBA:

> [P]rovides an opportunity for attorneys and their clients to use expeditious, time-saving and cost-effective arbitration or mediation to resolve disputes that might otherwise be litigated in the courts.
>
> These NCBA services are available to the public as well as to all legal professionals. The panels of arbitrators and mediators are highly skilled and qualified attorneys, admitted to the New York bar a minimum of 10 years and screened by the NCBA Judiciary Committee.[3]

The ADR page has links to submission forms, agreements to arbitrate or mediate, the applicable rules for each process, lists of the panel members, and much more.

Not a member of NCBA? The website's "For Attorneys" dropdown also lists the ADR Panels link first. Not a lawyer? The first link in the "For the Public" dropdown likewise steers visitors to the ADR page (although, presumably because non-lawyers might not know what "ADR" stands for, the link itself helpfully says "Arbitration and Mediation" instead). NCBA even has colorful, glossy brochures explaining the program and its many benefits.[4]

The program's main benefits—the caliber of the neutrals and the time-saving, cost-effective ADR services they provide—are discussed briefly below.

NCBA's Highly Experienced Neutrals Have Wide Ranging Expertise

Having ten years of experience and being screened by NCBA's Judiciary Committee are minimum requirements for inclusion on the program's arbitration or mediation panels. Before a panel applicant even gets to the Judiciary Committee, the application is first vetted by NCBA's ADR Committee. NCBA's strict vetting process means that program neutrals are typically far more accomplished than the minimum requirements might suggest. The panels include former jurists, thought-leaders who teach and write on ADR and other legal topics, past and present chairs of dispute resolution-focused bar association committees, and faculty members for arbitration and mediation training CLEs.

Panel members also have subject matter experience in a wide variety of areas. Successful panel applicants don't just get placed on generic "mediator" or "arbitrator" lists. NCBA panels are subdivided into nineteen categories, and panel members typically have experience in multiple areas of the law. Whether it's a dispute between businesses or family members, or a dispute that pits employee against employer, insured against insurer, or tenant against landlord, or involves any number of other areas from accidents to zoning, there are panel members with relevant experience.[5]

Moreover, program rules state that preferences for a neutral having subject-matter experience "may be requested and will be considered, subject to availability."[6] Thus, even for categories *not* listed, parties may request neutrals with relevant experience. In that instance, the program's Advisory Council will work to identify the panel members best suited for handling the dispute.

NCBA ADR Program Is Expeditious and Cost-Effective

Assuming their paperwork is in order, parties who commence a mediation or arbitration through NCBA will be provided with lists of potential neutrals to choose from within a day or two.[7] Once selected, the neutral (or neutrals, if a panel of arbitrators is called for) will begin working to quickly and efficiently guide the matter toward a resolution. The NCBA Arbitration and Mediation Rules include various deadlines to keep the proceedings on track.[8]

The program's costs consist of (1) an administrative fee for NCBA and (2) capped hourly rates for participating neutrals. Service to the community is a key driver for both components of the program's cost structure. Administrative fees help NCBA maintain its vital role as "the leading source for legal information and services for the legal profession and the local community in Nassau County"[9] (Additional information about the services offered by NCBA, including community education, school programs, and legal consultation clinics, is available on the NCBA website; just click the "For the Public" dropdown menu). And, the capped fees are a significant benefit for the disputing parties themselves. Parties who utilize the program gain access to experienced arbitrators or mediators at low—often below market—hourly rates. By offering their services at sometimes steeply discounted rates, program neutrals effectively help subsidize the parties' payment of the NCBA administrative fee while also providing them with what amounts to "low bono" ADR services.

The up-front cost for a NCBA mediation or arbitration is $2,300, consisting of the administrative fee to NCBA ($500), plus a deposit ($1,800) to cover the first six hours of arbitrator or mediator time, at a rate of $300 per hour.[10] If fewer than six hours are spent on the case, the unused portion of the deposit will be refunded to the parties. If a case continues past the six-hour mark, the parties make arrangements to pay the neutral directly at the rate at $300 per hour for the duration of the matter.[11]

As noted above, many of the experienced neutrals who serve on NCBA panels can and often do charge more than $300 per hour for their ADR services in non-program matters. To demonstrate the program's cost savings, take as an example a mediator who, in private practice, charges $450 per hour. The up-front costs for the NCBA program are greater, but after a short time—here, by hour number four—the NCBA program becomes more economical:

Mediator Fee Structures	Hour 1	Hour 2	Hour 3	Hour 4	Hour 5
Private Practice Rate ($450/hour):	$450	$900	$1,350	$1,800	$2,250
NCBA Rate ($500 + $300/hour):	$800	$1,100	$1,400	$1,700	$2,000

To be clear, these are the total costs; in a typical two-party mediation, each side would pay half of the amounts shown. For a five-hour NCBA mediation costing $2,000, the plaintiff and the defendant would each pay $1,000, or the equivalent of $200 per hour.

The cost savings are even greater for multi-party and/or complex cases that might require multiple sessions over the course of several days. Because the NCBA program rate holds steady at $300 per hour throughout the engagement, the delta between the aggregate private cost and the aggregate program cost will continue to grow over time. For

example, if the fee comparison table above were extended out to the ten-hour mark, the difference between the aggregate rates would be $1,000 ($4,500 for a private mediation vs. $3,500 for a NCBA program mediation). The differences are most pronounced with panel arbitrations. Three-panel members, each charging $450 per hour in a private arbitration, would exceed the NCBA program cost by hour number two ($2,700 for a private arbitration vs. $2,300 for an NCBA program arbitration).[12]

Final Thoughts

Courts are perpetually overwhelmed, so there is an almost limitless supply of disputes that should be in mediation but aren't (yet). And there are contracts being negotiated every day that could have provisions identifying the NCBA program as the forum for arbitrating future disputes, but don't (yet). If NCBA's ADR program were used more often; (1) participating parties and their counsel would have their disputes addressed expeditiously by highly competent neutrals (often at discounted rates); (2) program neutrals would have the opportunity to put their dispute resolution skills to good use; (3) matters resolved through the program would ever so slightly help to reduce the burdens on court dockets; and (4) the administrative fees collected by NCBA would help it to continue its important work for the benefit of legal profession and the community at large—a rare win-win-win-win.

Incidentally, a third definition of news is "something having a specified influence or effect."[13] Whether any of what has been discussed above will spur greater interest in, and utilization of, the NCBA ADR program remains to be seen. In other words, only time will tell whether *this article* might qualify as "news."

1. *See* https://bit.ly/34H03fg (definition 1 a)
2. *See* https://bit.ly/34H03fg (definition 1 b).
3. *See* https://www.nassaubar.org/alternative-dispute-resolution-2/.
4. An online version of the brochure (the "NCBA ADR Program Brochure") is available here: https://bit.ly/3qiiuzl.
5. The complete list of panel categories with active members is as follows: Commercial, Construction, Elder Law, Environmental, Foreclosure, Guardianship, Health Care, Insurance Coverage, Intellectual Property, Labor and Employment, Landlord-Tenant, Land Use / Municipal / Zoning, Matrimonial / Family Law, Personal Injury / Property Damage / Medical Malpractice, Professional Malpractice, Real Property, Securities/Investments, Surrogate's Court, and Special Needs.
6. *See* Arbitration Rules of the Nassau County Bar Association Mediation and Arbitration Panels ("NCBA Arbitration Rules"), Rule ARB-8(a), available at https://bit.ly/33pAqyG; Mediation Rules of the Nassau County Bar Association Mediation and Arbitration Panels ("NCBA Mediation Rules"), Rule MED-6(a), available at https://bit.ly/3HWXaVM.
7. The rules also permit parties to select from the panels the arbitrator or mediator "they wish to serve as [the neutral] in their case." NCBA Arbitration Rule ARB-8(e); NCBA Mediation Rule MED-6(e).
8. *See, e.g.,* NCBA Mediation Rule MED-12(a) (unless otherwise agreed, mediation statements are due "at least ten (10) days before the first scheduled mediation session"); NCBA Arbitration Rule ARB-13(a) ("The Arbitrator shall fix the date and time for a pre-hearing conference which shall be conducted not less than five (5) business days, nor more than thirty (30) business days, after the Arbitrator has received notice of appointment.").
9. https://www.nassaubar.org/who-we-are/.
10. Per the NCBA ADR Program Brochure, "[i]n mediation, all costs and fees are shared equally by all parties unless the parties or their governing agreement provide otherwise. In arbitration, the claimant customarily advances the non-refundable administrative fee of $500. Arbitrator costs and fees are then usually shared equally by the parties unless the governing agreement provides differently, the parties agree otherwise, or the arbitration award allocates costs and expenses differently."
11. *See* NCBA Arbitration Rule ARB-24(b) and annexed Schedule of Arbitration Fees, n.1; NCBA Mediation Rule MED-17(b) and annexed Schedule of Mediation Fees, n.1.
12. Three private arbitrators charging $450 each over the course of two hours ($450 * 3 * 2) is $2,700; three NCBA arbitrators charging $300 each over the course of two hours ($500 administrative fee + ($300 * 3 * 2)) is $2,300.
13. *See* https://bit.ly/34H03fg (definition 1 c).

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FOCUS: LABOR AND EMPLOYMENT LAW

The Unknown Impact of Technology Upon the Portal-to-Portal Act in the Second Circuit

Debra L. Wabnik and Amanda B. Slutsky

The question of whether an employer must pay its employees for their commute has reappeared as the COVID pandemic wanes and employees who are used to working remotely return to the office more and more. It may seem obvious that an employer should not compensate employees for their commute, but it is not so cut and dry. Employees who are used to working from home, at the local coffee shop, or even at the beach find themselves sitting on trains or buses with the same ready access to work programs and electronic devices, allowing them to work on their commute. An employer might be liable for unpaid wages without a thorough understanding of the laws regarding commute/travel time.

In 1938, Congress passed the Fair Labor Standards Act ("FLSA") and created a country-wide minimum wage and overtime rate.[1] While the FLSA led to significant advances and protections for employees, it also opened the door to substantial liability for employers. To curb some of this liability, Congress passed the Portal-to-Portal Act (the "Act") in 1947, which eliminated an employer's obligation to compensate employees for "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform and activities which are preliminary to or postliminary to said principal activity or activities…."[2] Based on this language of the Act, an employee generally will not be compensated for commuting time.

A question arises, however, when employees perform tasks relevant to their jobs during the commute. Any "work" an employee performs while commuting is indeed compensable.[3] For purposes relevant to this article, the United States Supreme Court has defined "work" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."[4] De minimus activities that take only a few minutes beyond regular work hours are excluded.[5] Thus, to be compensated during commuting time, an employee must demonstrate that (1) the employee's activities during the commute constitute work and (2) the work was "an integral and indispensable part" of the job.[6] This two-part inquiry is highly fact dependent and rests on what exactly the employee did during the commute and whether this activity was done for the employer's benefit. For example, in *Reich v. New York City Transit Auth.*[7] and *Singh v. City of New York*,[8] the Second Circuit found that the employees were not entitled to compensation for their commute. The *Reich* plaintiffs transported police dogs during their commute. The *Singh* plaintiffs transported documents required for their jobs. In both cases, the plaintiffs alleged that their commutes were somewhat lengthened, responsibility during travel was heightened, and after work social opportunities were limited. The court held that these factors did not make the commute compensable.

In *Clarke v. City of New York*,[9] the physical weight of the items being transported during the commute resulted in a different potential outcome than *Reich* and *Singh*. The *Clarke* plaintiffs similarly alleged that they carried equipment back and forth from home to work every day during their commute. The court's decision turned on whether the plaintiffs had "to carry equipment that is significantly more burdensome than that typically carried in an ordinary commute."[10] The Second Circuit determined that those plaintiffs who commuted by car could not make this argument because the equipment merely sat in the car. The commute time could be compensable for those plaintiffs who used public transportation, however, depending on the weight of the equipment.[11]

This fact-based analysis is not limited to tasks performed during the commute. Activities performed before or after the commute may also be compensable.[12] The *Clarke* Court determined that the plaintiffs could also be compensated for the time they charged their laptops and printer batteries at home, if it was necessary to have charged equipment to conduct a critical portion of their job, i.e., inspections.[13] The court held that there was a question of fact as to whether these activities constituted "work," since plaintiffs claimed they had to switch out batteries and monitor the charging status.[14] Similarly, in *Medina v. Ricardos Mech., Inc.*,[15] the District Court for the Eastern District of New York determined that an employee who had to drive to a waystation to pick up tools needed to be compensated for his commute when the employee performed some sort labor, like loading necessary equipment into a van. When the employee was simply picking up the van without loading tools or if the tools were not necessary for work, however, it did not involve labor, and thus was not compensable.[16]

These cases demonstrate the fact specific analysis that goes into effectuating the purposes of both the FLSA and the Act. In an increasingly technology-based world, the inquiry becomes even more difficult. It is an everyday sight to see employees sending a work email while out to dinner or standing in line, and even more so on public transportation to the worksite. Where the courts will draw the line for the compensability of work performed electronically during a commute remains to be seen. It is likely a court would rule that an employee on an hour-long commute who takes fifteen minutes preparing and responding to a substantive email should be paid for that fifteen-minute period. But what if there was no reason for the employee to respond to the email at that time? What if the employee spent those fifteen minutes cleaning out junk emails from her work account, will that be considered an "integral and indispensable part" of the job? And how much work will be sufficient to make the whole commute compensable? The line will be drawn in each individual case. Until there is clear guidance from a court, one weapon for employers against unwittingly finding themselves having to pay for an employee's commute is to limit non-exempt employees' access to work programs and devices after work hours. Another, less drastic option is to institute a policy that work should only be performed during business hours, not during commuting/travel time. Any employee who breaks this rule would nonetheless have to be paid for the work performed but should be subjected to disciplinary action. These options are not likely to work for all employers, particularly those that adhere to the (unspoken or not) philosophy that employees should be available around the clock. Those employers run the risk of having to pay for the employee's commute, which may have potential overtime implications.

Specifically, if the "clock" starts an hour before the employee actually reports to the worksite because the employee engaged in a principal activity during the commute, that extra hour may push the employee over the forty-hour mark into overtime. Further, employers may find themselves paying for an extra half hour of work while an employee sits on the train watching a television show merely because the first half hour of the commute involved responding to substantive emails. Of course, employees should get paid for the work they do, but the many gray areas in our technology-driven world may lead to significant exposure to employers. Any employers wishing to get out in front of the potential exposure would be wise to either limit employee access or implement and enforce policies prohibiting work during their employees' commute.

1. 29 U.S.C. §§ 202, 206.
2. 29 U.S.C. §254(a).
3. 29 C.F.R. §785.41.
4. *Tennessee Coal, Iron & R. Co. v. Musoda Local No. 123*, 321 U.S. 590, 598 (1944) (holding superseded by 29 U.S.C. §254); *see also Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 31 (2014) (discussing definition of "work" as set forth in *Tennessee Coal, Iron & R. Co.*).
5. *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 692 (1946) (holding superseded by 29 U.S.C. §254); *see also Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 31 (2014) (discussing definition of "workweek" as set forth in Anderson).
6. *Singh v. City of New York*, 524 F.3d 361, 368 (2d Cir. 2008).
7. *Reich v. New York City Trans. Auth.*, 45 F.3d 646, 653 (2d Cir. 1995).
8. *Singh v. City of New York*, 524 F.3d 361, 370 (2d Cir. 2008).
9. *Clarke v. City of New York*, 2008 U.S. Dist. LEXIS 47683 at *12-13 (S.D.N.Y. June 16, 2008).
10. *Id.* at 18.
11. *Id.* at * 20-21.
12. 29 C.F.R. §790.6.
13. Clarke, 2008 U.S. Dist. LEXIS 47683 at *18.
14. *Id.* at 24-25.
15. *Medina v. Ricardos Mech., Inc.*, 2018 U.S. Dist. LEXIS 140940 at *1, 17 (E.D.N.Y. Aug. 20, 2018).
16. *Id.* at *11.

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5:30 PM – 6:30 PM
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FOCUS:
CRIMINAL LAW

Real-time Cell-Site Location Information (CSLI): Where Are We Going?

Charles Holster

In *People v. Costan*, decided last summer by the Second Department, the defendant was suspected of committing several robberies, and in 2012, the police were able to locate and arrest him in less than 24 hours, by having his wireless service carrier provide "real-time" cell site location information (CSLI) showing the current location of his cell phone.[1] The carrier was compelled to do so by a court order,[2] which had presumably been obtained under §2703 (c) and (d) of the Stored Communications Act, which would be held to be unconstitutional in 2018 in *Carpenter v. United States*.[3]

Last year, the defendant in *Costan* moved to suppress physical and identification evidence and his statements made to law enforcement officials arguing that the police were required by the Supreme Court's decision in *Carpenter* to obtain a warrant. The Second Department rejected the argument, noting that the determination in *Carpenter* "requiring law enforcement, in the absence of exigent circumstances, to obtain a warrant supported by probable cause before acquiring a person's historical CSLI, specifically does not encompass the acquisition of real-time CSLI at issue here."[4]

"Historical" CSLI is a record of where a cell phone has been in the past,[5] whereas "real-time" CSLI shows the phone's present location.[6] In *Carpenter*, the issue of whether a warrant is required to obtain real-time CSLI was explicitly left undecided.[7] If *Costan* is to be understood to mean that, as a matter of New York State law, a warrant is not required for real-time CSLI, regardless of whether there are exigent circumstances, then the Second Department is the first appellate court in New York State to so hold.

Previously, all four Departments, as well as the Second Circuit, had addressed the virtually identical issue in regard to the real-time tracking of a cell phone by pinging its built-in GPS feature;[8] and had denied suppression based upon exigent circumstances, without deciding if a warrant was required. The Second Department did so just three months after *Carpenter* was decided. In *People v. Lamb*, the Second Department stated: "Contrary to the defendant's contention, even if the pinging of the defendant's cell phone constituted a search implicating the protections of the Federal and State Constitutions…the People established that the police were justified in proceeding without a warrant due to the existence of exigent circumstances."[9]

The First Department, citing *Lamb*, also chose not to address the issue of whether a warrant was required, instead basing its affirmance on exigent circumstances. In *People v. Davis*, the Court stated that "[w]e need not decide whether the police needed a warrant for pinging (electronically locating) defendant's phone, which led to his apprehension, because the record supports each of the hearing court's alternative bases for denying suppression, that is, that the warrantless pinging was justified by exigent circumstances…and that defendant's statements were sufficiently attenuated from any preceding illegality."[10]

A similar approach had been taken by the Second Circuit in *United States v. Caraballo*. That case raised the threshold question as to whether the defendant had a subjective expectation of privacy in the evidence derived from the pinging, and the court stated that "[b]ecause we conclude that exigent circumstances justified the officers' pinging of Caraballo's phone, we need not today resolve this important and complex Fourth Amendment question."[11]

In *People v. Watkins*, which the Second Department had cited as authority in *Lamb*, the Fourth Department implied that the police did require a warrant for the real-time tracking of the cell phone, but that there were exigent circumstances which constituted an exception to that requirement: "Contrary to defendant's contention, the court properly refused to suppress evidence obtained by the police without a warrant from defendant's cell phone service provider. The provider disclosed information to the police concerning defendant's location through the use of a technique commonly known as 'pinging'…we conclude that the People established that exigent circumstances justified the police in proceeding without a warrant."[12]

The same inference can be drawn from the Third Department's opinion in *People v. Valcarcel:* "Furthermore, the record discloses that exigent circumstances existed to permit the police to ping and track the victim's cell phone without a warrant."[13]

There is no logical basis for the Second Department, in *Costan*, to have treated real-time CSLI differently from how it had treated real-time GPS data in *Lamb*. Each of these technologies has been recognized as a means by which law enforcement can effortlessly track the current location of a cell phone,[14] and police frequently seek both CSLI and GPS data from the wireless carrier.[15]

As noted, the Supreme Court acknowledged in *Carpenter* that "exigent circumstances" was one of the "case-specific exceptions" that would permit historical CSLI to be obtained without a warrant.[16] "Such exigencies," the Court stated, "include 'the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence.'"[17] In such circumstances, however, it is actually the current location of the subject cell phone, as revealed by real-time CSLI, that will be more helpful to law enforcement than its past locations, as shown by historical CSLI. Thus, despite the Supreme Court's statement in *Carpenter* that its holding was limited to historical CSLI, its discussion about exigent circumstances is more applicable to real-time CSLI.

Under the Stored Communications Act (SCA), where there is neither a warrant nor an order directing a wireless carrier to provide CSLI or GPS data to law enforcement, the provider may voluntarily do so (at the request of law enforcement) if it "in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency;"[18] If there is not an immediate "danger of death or serious physical injury," the police do not have any federal statutory authority to request that a wireless carrier ping a phone in the absence of a court order or warrant;[19] But, in practice, the provider has little choice but to rely upon the representation made by law enforcement that an emergency exists. Some providers have adopted their own policies of limiting the amount of time in which they will continue to track a subscriber's phone without receiving authorization from a court. SPRINT, for example, will only do so for 48 hours.[20] In at least one case, however, SPRINT continued to voluntarily track the phone because the police filed successive "Exigent Circumstances Request" forms.[21] Such requests are not subject to advance judicial scrutiny; and even if it can later be shown that there were no exigent circumstances, the SCA does not provide for suppression as a remedy.

It cannot go without mentioning that law enforcement also has the ability to ping a cell phone directly, using a "cell-site simulator—sometimes referred to as a 'StingRay,' 'Hailstorm,' or 'TriggerFish.'"[22] Even before *Carpenter*, the Southern District of New York, in *United States v. Lambis*, had held that the use of a cell-site simulator was a search, requiring a warrant: "The use of a cell-site simulator constitutes a Fourth Amendment search within the contemplation of *Kyllo*. Absent a search warrant, the Government may not turn a citizen's cell phone into a tracking device."[23] Since there was no warrant in *Lambis* authorizing the use of a cell-site simulator, the court granted suppression of the evidence recovered by DEA agents from the defendant's apartment,[24] implicitly rejecting the government's contention that any taint arising from the search dissipated when the agents gained consent to enter.[25]

Similarly, the New York Supreme Court, Kings County, ruled in *People v. Gordon* that the

failure to obtain a warrant to conduct a search with a cell site simulator "prejudiced the defendant since the most useful—and needed information—i.e. his location—was procured from the unlimited use of the cell site simulator. As conceded by the People, the police here were only able to gather the needed location information when they began to track the defendant's phone on or about April 12, 2016 with that enhanced technology and only then. The apprehension of the defendant was therefore accomplished only through the use of the improperly obtained information."[26] The court granted the defendant's request for suppression of any evidence obtained as a direct result of the use of the cell site simulator device, which included the results of the lineup; but it denied suppression of any potential evidence of defendant's behavior at the time of his arrest processing,[27] presumably based on attenuation.

While it is more convenient for the police to track a cell phone directly with their own cell site simulator, they achieve the same result when they have a wireless service provider track a subscriber's cell phone using real-time CSLI and/or GPS data. Therefore, a warrant should also be required for real-time CSLI and for real-time GPS data.

Although the real-time tracking of a cell phone might be of short duration in a given case, like in *Costan*, where the defendant was found and arrested in less than 24 hours, it can go on for months.[28] In *People v. Weaver*, the Court of Appeals recognized, ten years ago, that law enforcement could use the GPS technology in cellular telephones to track the movements of the user, and that this presented the same potential for abuse as the GPS tracking device that was attached to the defendant's van in that case. "And, with GPS becoming an increasingly routine feature in cars and cell phones, it will be possible to tell from the technology with ever increasing precision who we are and are not with, when we are and are not with them, and what we do and do not carry on our persons—to mention just a few of the highly feasible empirical configurations."[29] In a recent case in New York Supreme court, Bronx County, the Court expressed the view that "[a] person's legitimate expectation of privacy in [CSLI] is even greater when it is obtained, as it was here, in real-time."[30]

Regardless of the technology that is used, law enforcement should not be permitted to track an individual's cell phone in real-time, directly or indirectly, without first obtaining a warrant supported by probable cause, unless there are exigent circumstances, and in that event, a warrant should be sought as soon as reasonably practical, but in all events within 48 hours.

1. 197 A.D.3d 716, 718, 720 (2d Dept. 2021).
2. *Id.* at 718.
3. 138 S.Ct. 2206, 2217, 2220-2223 (2018). For an in-depth discussion of *Carpenter, see* https://llrx.com/author/charles-holster/
4. 197 A.D.3d at 720 (emphasis added).
5. *People v. Davis*, 72 Misc. 3d 580, 584 (Sup. Ct., Bronx Co. 2021); *see, e.g., People v. Fashakin*, 194 A.D.3d 526 (1st Dept. 2021); *United States v. Johnson*, 804 Fed.App'x 8, 10, 12 (2d Cir. 2020), *cert. denied sub nom. Anderson v. United States*, 141 S.Ct.1430 (2021).
6. *See, e.g., United States v. Blakstad*, No. 19 CR. 486 (ER), 2020 WL 5992347, at *3 (S.D.N.Y. Oct. 9, 2020).
7. The Court stated that "[w]e do not express a view on matters not before us," and the first of the two matters that it cited as examples was "real-time CSLI." 138 S.Ct. at 2220.
8. For a cogent discussion of the mechanisms underlying CSLI and GPS data derived from "pinging," *see United States v. Caraballo*, 831 F.3d 95, 99 (2d Cir. 2016).
9. 164 A.D.3d 1470, 1471 (2d Dept. 2018) (citations omitted).
10. 184 A.D.3d 525, 526 (1st Dept. 2020). The defendant there apparently argued that his statement should be suppressed because the tracking of the cell phone was illegal; and that his arrest was the result of that "preceding illegality." To the same effect, *see Davis*, 72 Misc.3d at 583-584, where it was argued that "his arrest was a fruit of information obtained in execution of the orders and warrants" for the tracking of his cell phone.
11. 831 F.3d 95, 102 (2d Cir. 2016).
12. 125 A.D.3d 1364 (4th Dept. 2015).
13. 160 A.D.3d 1034, 1037-1038 (3d Dept. 2018) (citation omitted).
14. *People v. McDuffie*, 58 Misc.3d 524, 531-532 (Sup. Ct., Kings Co. 2017).
15. *People v. Davis*, 72 Misc.3d 580, 591 (Sup. Ct., Bronx Co. 2021); *People v. Cutts*, 62 Misc.3d 411, 415 (Sup. Ct., N.Y. Co. 2018); *People v. Moorer*, 39 Misc.3d 603, 605-606, 609-618 (Monroe County Ct. 2013).
16. 138 S.Ct. at 2222.
17. *Id.* at 2223; see, e.g., *People v. Lively*, 163 A.D.3d 1466, 1467-1468 (4th Dept. 2018).
18. *Moorer*, 39 Misc.3d at 604-605; *see also* 18 U.S.C. §2702(c)(4); *Caraballo*, 831 F.3d at 98-99, 105 (emphasis added).
19. *Moorer*, 39 Misc.3d at 610-611.
20. *Id.* at 607.
21. *Id.* at 605-606.
22. *United States v. Lambis*, 197 F.Supp.3d 606, 609, 611 (S.D.N.Y. Jul. 12, 2016).
23. *Id.* at 611; *see also Parrilla v. United States*, No. 13-CR-360 (AJN), 2021 WL 4066021, at *20, n.11 (S.D.N.Y. Sept. 7, 2021).
24. *Lambis*, 197 F. Supp., at 616.
25. *Id.*, at 612.
26. 58 Misc.3d 544, 551 (Sup. Ct., Kings Co. 2017).
27. *Id.*
28. *Moorer*, 39 Misc.3d at 605-606.
29. 12 NY3d 433, 442 (2012). (emphasis added).
30. *Davis*, 72 Misc.3d at 584.

The author's Garden City law practice is concentrated on civil and criminal appeals. He can be reached at cholster@optonline.net or (516) 747-2330.

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FOCUS:
CIVIL RIGHTS LAW

Civil Rights Law §50-a Repeal

Jared A. Kasschau and
Adam M. Moss

One and a half years after passage of hot-button legislation, the battle is still just beginning.

In June 2020, the New York State Legislature passed legislation to repeal Civil Rights Law § 50-a. For decades, §50-a placed restrictions on the release of police disciplinary records in the context of litigation as well as within the sphere of Freedom of Information Law ("FOIL") requests. Specifically, §50-a required that "personnel records used to evaluate performance toward continued employment or promotion" for police and other law enforcement officers could not be released unless permitted by the officer, or required to be released by court order. In 2014, the State Committee on Open Government ("Committee") opined that §50-a had "been expanded in the courts to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer."[1] Along with the repeal of §50-a, the State Legislature also amended the FOIL statute to expressly address requests concerning law enforcement disciplinary records.[2] While the media has often characterized the §50-a repeal as a mandate for the widespread release of disciplinary records by police departments,[3] the impact and meaning of the legislation are not yet fully understood. Case law interpreting the repeal is rapidly developing both in Federal and State courts and controversy abounds in at least three different contexts: FOIL, state prosecutions, and federal civil rights litigation.

In the FOIL realm, the overarching question courts must grapple with is whether police disciplinary records should now largely be treated like any other FOIL-able records, or whether §50-a repeal and the FOIL amendments require greater disclosure of law enforcement disciplinary records than other governmental records under FOIL.

One crucial question in this context is whether records relating to allegations made against officers that were not ultimately substantiated are required to be released. The Committee has long taken the position that with respect to FOIL requests for disciplinary records of public employees that are not ultimately substantiated, such records need not be disclosed, where the agency determines that their release would constitute an unwarranted invasion of personal privacy.[4] Subsequent to the repeal of §50-a, the Committee opined that the same standard now applies for law enforcement agencies, i.e., they are not required to disclose disciplinary records for law enforcement officers in connection with allegations that have not been substantiated.[5]

In *NYCLU v. City of Syracuse*, the court agreed with the Committee's analysis, holding that "the repeal of CRL §50-a does not require documents related to unsubstantiated claims against police officers to be released. Further, the public interest in the release of unsubstantiated claims do not outweigh the privacy concerns of individual officers."[6] Similarly, in *Newsday LLC v. Nassau County Police Dep't*, the court held that "[w]here an agency has determined that disclosure would result in an unwarranted invasion of personal privacy, among other reasons, the requested records may be withheld in their entirety."[7] However, another decision, *Schenectady PBA*, took the contrary view, arguing that the legislative intent was "to require disclosure of police personnel records, upon FOIL request, even when such records reflect no more than allegations."[8]

Another key FOIL issue relates to the impact of the §50-a repeal on records of disciplinary actions that resulted in a confidential settlement, or where such records were required to be sealed pursuant to collective bargaining agreements. In *Uniformed Fire Officers v. De Blasio*,[9] various New York City law enforcement unions, including the NYC PBA, commenced an action to enjoin the City from proactively releasing these types of records. A Second Circuit panel did not expressly find that the City was obligated to release the records, but concluded that if the City affirmatively chose to release them, such release would not violate the CBA provisions at issue or violate contract rights for past settlements. The Second Circuit noted that reading §50-a into past agreements "would protect against all changes in legislation…and severely limit the ability of state legislatures to amend their regulatory legislation."[10]

However, at the state court level, a Monroe County Supreme Court judge agreed with the Brighton Police Patrolman Association that the State Legislature did not intend for the §50-a repeal to retroactively disturb collective bargaining agreements and confidential settlements pre-dating §50-a that restricted certain police disciplinary records from release. The court observed that there was no language in the §50-a repeal legislation to suggest that retroactive effect was intended, and that "to now allow for retroactive disclosure of the details of these same settlements would be to deprive these officers of their contractual or accrued rights."[11]

Determining how to respond to FOIL requests is not the only question confronting municipal entities; recent decisions have sought to ascertain the impact of the §50-a repeal on disclosure obligations in criminal prosecutions. The prosecution's discovery obligations underwent significant changes after criminal justice reforms were initially passed by the State Legislature in 2019. Now, some courts are pointing to the §50-a repeal as a factor broadening the People's obligations with respect to disclosure of police disciplinary records. In *People v. Cooper,*[12] an Erie County Court judge analyzed the discovery obligations of the prosecution to turn over disciplinary records for officers involved pursuant to the CPL §245 requirement to provide automatic discovery of materials in the possession of the prosecution (or in possession of persons under control of the prosecutor), which tend to impeach the credibility of a testifying prosecution witness.[13] The court held that officer disciplinary records must be provided under automatic discovery, and further, that providing a list of disciplinary actions, rather than the underlying records themselves, is not sufficient disclosure prior to filing a certificate of compliance in light of the §50-a repeal. According to that court, "[§50-a] was repealed to specifically allow for the information to be available in the cross examination of police witnesses. Any impeachment material relative to a prosecution witness must be disclosed. When the prosecution witness is a law enforcement officer that information includes the officer's disciplinary records."[14] In the Nassau County District Court decision *People v. Salters*, the court similarly noted that disciplinary records in their entirety must be turned over as part of automatic discovery, "particularly in light of the repeal of Civil Rights Law §50-a."[15]

Courts in other jurisdictions have treated this issue differently. In the Suffolk County Supreme Court case *People v. Randolph*, the court, noting the §50-a repeal, held that only disciplinary records in connection with substantiated and unsubstantiated allegations (but not records where an officer was exonerated or allegations were unfounded) were required to be provided by prosecutors under automatic discovery.[16] In *People v. Gonzalez*, a Kings County Supreme Court justice held that underlying records that related to substantiated allegations did not have to be provided in automatic discovery; a listing of such allegations would suffice.[17] And in the Queens County Supreme Court decision *People v. Perez*, the court held that unsubstantiated allegations were simply not discoverable, stating that, §50-a "was not in any way integrated into the discovery statute. Nor was the repeal of §50-a attended by any concomitant amendment to CPL §245. Thus, the People's discovery obligations pursuant to Article 245 were exactly the same before and after the repeal of §50-a."[18]

Finally, federal courts are addressing whether the §50-a repeal will alter discovery obligations in the context of civil rights litigation. Courts are weighing when disciplinary records are required to be disclosed in discovery, and whether such records should be afforded a protective order. It has long been recognized that "New York state law does not govern discoverability and confidentiality in federal civil rights actions. Federal discovery is somewhat more liberal than New York State discovery," while at the same time, §50-a, could be considered in ruling on a discovery dispute, but as "only one of several factors to be considered…[.]"[19] The "longstanding prevailing practice of courts throughout the Second Circuit is to limit discovery of a defendant's disciplinary history to complaints, whether substantiated or not, about conduct similar to the conduct alleged in the complaint."[20] And generally, where disputes have arisen, the court would review records in camera before ordering them turned over. In *Walls v. City of New York*, however, the magistrate judge noted that the §50-a repeal was relevant to her finding that virtually all disciplinary summaries are relevant to assessing an officer's credibility.[21] However, in *Saavedra v. City of New York*, where the plaintiff similarly argued that broader discovery should be permitted in light of the repeal of §50-a, the District judge opined that what is considered relevant is unchanged by the §50-a repeal, holding that its repeal is irrelevant "because New York state law does not govern discoverability and confidentiality in federal civil rights actions" and accordingly, only conduct similar to the accusations or bearing on an officer's truthfulness are relevant and discoverable.[22]

Debates have also occurred as to whether disciplinary records should be subject to protective orders. For example, in *Mingo v. City of New York*, the City, citing to past practice, requested a confidentiality order for disciplinary summaries provided to plaintiff. In denying the request, the magistrate judge observed that after

the §50-a repeal, records no longer were required to be kept confidential under New York State law.[23]

Courts are still only beginning to untangle the implications of the §50-a repeal. In addition to cases that may be working their way up on appeal, the NYCLU has recently filed two new Article 78 petitions against NYPD and Nassau County PD, seeking disciplinary records.[24] Disputes of this nature will surely continue until the courts and/or the state legislature provide further guidance.

1. Committee on Open Government, Annual Report, Dec. 2014, at 3, available at https://www.nyclu.org/sites/default/files/field_documents/20211001_ecf_5_ex._1_0.pdf.
2. Pub. Off. Law §§84-90.
3. *E.g.,* Denis Slattery, New York Lawmakers vote to repeal 50-a, making police disciplinary records public, N.Y. Daily News, June 10, 2020, available at https://bit.ly/3xYX3Wb
4. Committee on Open Government, FOIL AO 19775, July 27, 2020, available at https://on.ny.gov/31BS4yk.
5. *Id.*
6. *NYCLU v. City of Syracuse*, 2021 NY Slip Op 21128, at *6-7 (Sup. Ct., Onondaga Co. May 5, 2021)).
7. *Newsday LLC v. Nassau County Police Dep't*, Index No. 601813/2021, at *4 (Sup. Ct. Nassau Co. Nov. 3, 2021).
8. *Schenectady PBA v. City of Schenectady*, 2020 NY Slip Op 34346(U), at *15 (Sup. Ct. Schenectady Co. Dec. 29, 2020).
9. *Uniformed Fire Officers Ass'n v. De Blasio*, 846 Fed. Appx. 25, 32 (2d Cir. 2021).
10. *Id.* (internal citations omitted).
11. *Brighton Police Patrolman Ass'n v. Brighton Police* Chief David Catholdi, 2021 N.Y. Misc. LEXIS 2697, at *4, Index No. 002814/2020 (Sup. Ct., Monroe Co. Apr. 16, 2021).
12. *People v. Cooper*, 71 Misc.3d 559 (Erie Co. Ct., Feb. 23, 2021).
13. *See* CPL §245.20(1)(k).
14. *Cooper*, 71 Misc.3d at 567.
15. *People. v. Salters*, 2021 NY Slip Op 50800(U) at *3-4 (1st Dist., Nassau Co. Aug. 20, 2021) ("[t]his cannot mean simply summaries of disciplinary records or officers' self-reporting questionnaires"); *see also People v. Herrera*, 2021 NY Slip Op 50280(U) (1st Dist. Nassau Co. Apr. 5, 2021).
16. *People v. Randolph*, 69 Misc.3d 770, 772 (Sup. Ct., Suffolk Co. 2020); *see also People v. Barralaga*, 2021 N.Y. NY Slip Op 21248 at *2 (Crim. Ct., N.Y. Co. Sept. 10, 2021). However, a subsequent Suffolk County Supreme Court decision held that regardless of whether allegations are substantiated, unsubstantiated, exonerated, or unfounded, "the People must determine whether the allegations underlying that investigation tend to impeach… Upon determination that an allegation tends to impeach and has a good faith basis, the investigation must be disclosed." *People v. Portillo*, 2021 NY Slip Op 21207 at *26 (Sup. Ct., Suffolk Co. 2021).
17. *People v. Gonzalez*, 2020 NY Slip Op 50924(U) at *2 (Sup. Ct., Kings Co. Aug. 19, 2020); *see also People v. Akhlaq*, 2021 NYLJ LEXIS 244 at *5 (Sup. Ct., Kings Co. Mar. 15, 2021).
18. *People v. Perez*, 2021 NY Slip Op 21165 at *8 (Sup. Ct., Queens Co. June 14, 2021).
19. *King v. Conde*, 121 F.R.D. 180, 187-88 (E.D.N.Y. 1988).
20. *Saavedra v. City of New York*, 2021 U.S. Dist. LEXIS 5752, , at *6-7, 19 civ. 7491 (S.D.N.Y. Jan. 12, 2021) (internal quotations omitted)
21. *Walls v. City of New York*, 502 F.Supp.3d 686 (E.D.N.Y. 2020).
22. *Saavedra*, 2021 U.S. Dist. LEXIS 5752 at *6-7.
23. *Mingo v. City of New York*, 2020 U.S. Dist. LEXIS 229918, at *2, 19 civ. 5806 (E.D.N.Y. Dec. 3, 2020).
24. *NYCLU v. NYPD*, Index No. 158971/2021 (Sup. Ct. N.Y. Co.); *NYCLU v. Nassau County*, Index No. 612605/2021 (Sup. Ct. Nassau Co.).

Jared A. Kasschau is a Member of Harris Beach, PLLC in Uniondale, and is the former County Attorney of Nassau County.

Adam M. Moss is Senior Counsel at Harris Beach, PLLC.

FOCUS: LEGAL RESEARCH TOOLS

Beyond the Big Two: Free Online Legal Research Tools

Jackie L. Gross and Christopher J. DelliCarpini

In their March 2021 article *Does Lawyering Matter? Predicting Judicial Decisions from Legal Briefs, and What That Means for Access to Justice*, University of Oregon School of Law professor Elizabeth Chika Tippet and her coauthors applied artificial intelligence techniques to analyze certain briefs submitted on motions for summary judgment.

One of their primary conclusions was that legal research and writing skills really do matter! Indeed, the authors concluded that an attorney's skill as a researcher as presented in their briefs appears to be extremely (if not most) important for predicting an attorney's outcome on his or her motions.[1]

With this precept in mind, we have endeavored to help our fellow lawyers "up their games" when preparing their briefs. Of course, some will say there is no substitute to subscribing to at least one (if not both) of the "Big Two" legal research providers: Lexis® and Westlaw. But not everyone can or wants to pay the subscription fees for these services. And no matter what, it is always an advantage to look beyond the obvious and see what can be found beyond the easy places to look.

Below are some of our favorite finds—if you click around and explore some or all of these websites, we think you'll be pleasantly surprised at what's available without having to pay a dime!

We've included URLs in the endnotes, but you can find each site easily in the future by simply typing the name of the website in your favorite web browser, then bookmark your favorites and free online legal research will be but a click away whenever you need it!

Index Websites

Several websites offer categories of links (also known as "Index Websites") leading to various legal resources, and these websites can be an easy starting point for your research.

New York Official Reports Legal Research Portal[2] offers a host of valuable New York resources, including the official forms, the New York Law Reports Style Manual, and the Guide to New York Evidence, a comprehensive overview of New York Evidence Law organized like the Federal Rules of Evidence.

Hofstra Law Library Online Research Resources,[3] like every law school library, has a web page with links to a wide variety of resources. Not all of them will provide free access to the same resources, so look around and bookmark the ones with your preferred selection. Unsurprisingly, law schools will provide more links for local resources, though they may also offer national or international resources in particular areas of practice.

Caselaw Databases

Court decisions are public records, so several public and private web sites offer access to decisions, the difference being how one searches each site and how each site lays out decisions for viewing and printing.

New York Law Reports Official Reports Service[4] offers access to every official New York decision since 1956. The Advanced Search[5] might not be as advanced as the search bar on the Big Two, and there's usually no headnotes or cite-checking tool. With practice, though, you can find exactly what you're looking for.

Google Scholar[6] offers case law from all state and federal courts through Google's super-simple search interface. Just click the Case Law button, then be sure to select the jurisdiction and courts that you want to search. Importantly, the decisions are formatted well enough to be submitted to the courts, an important consideration for appellate attorneys who now must file their authorities with the PDFs of their briefs.

FastCase®[7] offers an extremely robust database of state and federal case law (with an attractive layout for court submissions) as well as many treatises, books, and other content. New York attorneys can access FastCase for free with a free NYS Library Attorney Borrower's Card, also known as a "P-Card."[8]

Harvard Law School Caselaw Access Project[9] is an effort to expand public access to U.S. law, providing authorities from the Harvard Law School Library in a consistent format. It coordinates with FastCase, and accordingly shares that database's limitations.

Other sites to try out are **Anylaw™**,[10] which offers legal research organized by subject matter; and **LawPipe**,[11] which allows you with a few clicks to filter down by jurisdiction and subject matter.

Statutes, Codes, and Legislative History

Several public web sites offer access to New York state and local laws as well as legislative history. Some municipalities provide free access through private services.

New York State Legislature[12] offers the up-to-the-minute Consolidated Laws, Court Acts, Constitution, NYC Charter and Administrative Code, and the Rules of the Assembly and Senate.

New York Codes, Rules and Regulations[13] is provided by Westlaw but offers free access to the entire NYCRR. You browse by section or search by keyword or find a specific title, part, or section.

New York State Library Bill, Veto and Recall Jackets[14] provides links to a variety of legislative materials. The databases are not complete, so there is a chance that the materials that you seek are too old to be included. And to find what you're looking for may require the year and chapter number for the particular law.

NYSDOS Local Laws Search[15] offers county codes as well as local laws for all municipalities. The site does not allow you to browse within a municipality's laws, however; you can only search for particular laws.

General Code[16] offers browsable codes for towns and villages across New

York State, but does not offer county codes. In fact, municipal websites often link to General Code for their official code database. Parent company eCode360® offers a subscription service with advanced search options, archived codes, and alerts for code updates.[17]

Library of Congress Municipal Codes: A Beginner's Guide[18] also offers links to sites with current and older municipal codes from around the country.

Law Reviews and Scholarly Research

Of course, you can always just go to **Google**[19] and search for any case law, statute, or legal commentary of any kind. **Google Scholar** (found easily by typing in the word "scholar" into the Google search bar) and it also offers an Article search that encompasses scholarly articles on any subject.

Law Technology Today[20] offers a "Free Full-Text Online Law Review/ Journal Search," encompassing "over 300 online law reviews and law journals, as well as document repositories hosting academic papers and related publications such as Congressional Research Service reports." Coverage may not be complete, but for a search for articles on a topic this may do the trick.

bepress™ Legal Repository[21] "offers working papers and pre-prints from scholars and professionals at top law schools around the world." The Discipline Wheel allows visitors to easily survey the scope of the site, but the Advanced Search options let you drill down to find the kind of articles you're looking for.

LLRX.com®,[22] "a unique, free, independent, one woman owned, edited and published web journal in its 25th year of continuous publication," offers a database of over 2,500 articles for legal professionals, as well as a blog by its founder on current law-related topics.[23]

Blogs and Legal Encyclopedias

Speaking of blogs, several sites offer commentary on current events in law and the legal profession. **Justia Blawg Search**[24] indexes legal blogs by topic and highlights the most popular current blog posts. **FindLaw Legal Blogs**[25] also offers an index, but also offers subscriptions to FindLaw's online newsletters, which deliver the latest blog posts to your inbox. A Google search by statute or topic can also turn up lawyers (including top law firms) with individual blogs that might be worthy of bookmarking as well.

Other sites offer free legal encyclopedias. **Wex**[26], provided by Cornell University's Legal Information Institute, is a free legal dictionary whose entries are collaboratively created and edited by legal experts—a curated Wikipedia of the law, so to speak. **NOLO**[27] also offers a search engine for non-lawyers, linking to articles, attorneys, and DIY legal forms.

Other Resources

The Indigo Book, [28] "An Open and Compatible Implementation of A Uniform System of Citation," is a free version of the Bluebook. There probably have been some changes in legal citation since you graduated law school, so if you're citing an online article or blog post, you can find your answers here. **OpenJurist** offers free access to Black's and Ballentine's Law Dictionaries,[29] so you need no longer wonder about the difference between *a priori* and *a fortiori*. And the **World Legal Information Institute**[30] provides international legal resources.

An online resource like no other, **The Wayback Machine**[31] is an archive of the internet, allowing users to search web pages as they appeared in the past and to search collections of digital content. If you need to know what a web page looked like on a date in the past, you should be able to find it here.

Several sites offer access to archives of appellate arguments. The United States Supreme Court,[32] U.S. Court of Appeals,[33] the New York Court of Appeals,[34] and each Appellate Division[35] court offer archives of oral arguments going back years. **CourtListener**[36] also offers a database of some oral argument audio that you can search by case name, judge, date, or keyword.

Lawyering Matters!

Fortunately, lawyers have never had more research resources freely available. And it seems to just keep getting better and easier to level the playing field regardless of your firm's size or research budget. Take advantage of these opportunities and make your legal papers as persuasive and effective as they can be!

1. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3811710.
2. nycourts.gov/reporter/research/shtml.
3. https://law.hofstra.edu/library/research/online/index.cfm?alphaview.
4. https://govt.westlaw.com/nyofficial/Index.
5. https://iapps.courts.state.ny.us/lawReporting/Search.
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30. http://www.worldlii.org/.
31. https://archive.org/web/.
32. https://www.supremecourt.gov/oral_arguments/argument_audio/2021.
33. *E.g.*, https://www.ca2.uscourts.gov/oral_arguments.html.
34. https://www.nycourts.gov/ctapps/OA-Archives.htm.
35. The First Department has its own YouTube channel, https://www.youtube.com/channel/UCK8inKbo7p8Pn5zbc7X71nw/videos. The Second Department hosts its archives at https://www.nycourts.gov/courts/ad2/oral_argument_archives.shtml. *See also* https://www.nycourts.gov/ad3/AD3archive.html; https://ad4.nycourts.gov/go/live/.
36. https://www.courtlistener.com/audio/.

Jackie Gross is the current Chair of the NCBA Appellate Practice Committee and a Deputy County Attorney in the Appeals Bureau of the Nassau County Attorney's Office.

Christopher J. DelliCarpini is an attorney with Sullivan Papain Block McGrath Coffinas & Cannavo P.C. in Garden City, representing plaintiffs in personal injury matters. He is also Chair f the NCBA Medical-Legal Committee and Counsel to the Nassau Academy of Law. He can be reached at cdellicarpini@triallaw1.com.

FOCUS: LAW AND AMERICAN CULTURE

The Healing Power of the Law– Dr. Héctor Pérez García, the American G.I. Forum, and the Struggle for Civil Rights

Rudy Carmenaty

Dr. Héctor Pérez García was a renaissance man who championed the cause of equality for Mexican-Americans. It was said of Dr. García that he was "a man who in the space of one week delivers twenty babies, twenty speeches and twenty thousand votes."[1] Believing in freedom and opportunity, his vision was to extend the American dream to "his people."

Born in 1914 in Tamaulipas, México, Dr. García's family came to the United States in 1917.[2] He graduated from the University of Texas at Austin and received his medical degree at the University of Texas Medical Branch at Galveston.[3] He completed his residency at St. Joseph's Hospital at Creighton University in Omaha, Nebraska. At the time, no hospital in Texas would accept Héctor or any other Latino for admission to their residency programs.[4]

A genuine patriot, Dr. García volunteered to serve in the U.S. Army during World War II. At the outset, the Army initially failed to recognize his professional credentials, placing him in the infantry.[5] He had to prove that he was a qualified doctor. Dr. García became a combat surgeon in the Army Medical Corps. Dr. Garcia fought for recognition and for respect.

His military service in North Africa and in Europe earned him the Bronze Star and the European African Middle Eastern Campaign Medal with six battle stars.[6] Overseas, Dr. García learned to speak Italian, German, French, and Arabic, reflecting the many theaters where he was stationed. He left the Army with the rank of major.

Upon his return from military service, Dr. García opened a medical practice in Corpus Christi. The Doctor would not close his practice until poor health finally forced him to retire in 1996. Known as "*Dr. Héctor*," he provided medical care to his patients, charging whatever they could afford, often providing his services for free.

The Doctor's practice was on the west side of Corpus Christi, the Mexican-American section of town, where the rates of tuberculosis were among the highest in the nation.[7] For Dr. García, disease was as much an enemy as was discrimination. This work inspired a lifetime commitment

to meet the medical needs of Mexican and Mexican-American migrant workers.

In 1948, Dr. García led an investigation of conditions in migrant labor camps in Mathis, Texas.[8] There he found inordinately high rates of tuberculosis due to a lack of basic sanitation. The people he encountered were not only malnourished and diseased, but also ignored and neglected. His efforts drew widespread attention to poverty and discrimination in the barrios of South Texas.

Dr. García discovered that Mexican-American veterans were being improperly denied the benefits they had earned under the G.I. Bill of Rights.[9] Often they were being denied because they had little command of the English language. He established the American G.I. Forum of the United States to enable veterans to gain access to services from the Veterans Administration.

Over time, the American G.I. Forum would see its mission expand to the fields of education, farm labor, jury selection, and poll taxes. The organization led campaigns to desegregate schools, hospitals, and other public accommodations. The organization's motto, which was the Doctor's own, was "Education is our Freedom, and Freedom Should be Everybody's Business."[10]

The issue that galvanized Dr. García into action and put the G.I. Forum on the map concerned the matter of Private Felix Longoria. In 1945, Pvt. Longoria was killed in the Philippines.[11] Four years later, Longoria's remains were returned to his native Three Rivers, Texas. The local funeral home, the only one in Three Rivers, refused his widow the use of the chapel for a wake.[12]

Informed of what happened, the Doctor personally called the funeral director to confirm the facts of the matter. Dr. García then sent messages of protest to media outlets, elected politicians, and government officials—including Senator Lyndon Johnson.[13] The Longoria affair became national and international news, and the matter even impacted relations with Mexico and Latin America.

After looking into the matter, Senator Johnson offered to have Private Longoria's remains interred at Arlington National Cemetery with full military honors.[14] The Longoria Affair was a pivotal moment in the career of Dr. García, as it was the beginning of his long relationship with LBJ.

In 1960, Dr. García created and became the national coordinator of the Viva Kennedy Clubs, organized to elect John F. Kennedy.[15] He wanted the American G.I. Forum to remain non-partisan. Johnson was on the Democratic ticket as Vice-President in part because he could deliver Texas and the Southwest. The Democrats won the White House in a close election.

Dr. García and Mexican-Americans expected appointments and legislation that their efforts had earned during the campaign.[16] They would be disappointed. After President Kennedy was assassinated, the Doctor's old friend Vice-President Johnson assumed the presidency. LBJ delivered what JFK had promised.

As in 1960, members of the American G.I. Forum were instrumental in Viva Johnson Clubs contributing to LBJ's landslide victory in 1964.[17] The relationship between the Doctor and LBJ was complex but rewarding. Dr. García would always prod Johnson to go further: commit more resources, generate more programs, and make more appointments. No twentieth century President did more to advance equality.

In 1968, Johnson appointed the Doctor to the U.S. Commission on Civil Rights.[18] He was the first Mexican-American to serve as a member of the commission. But the high point of Dr. García's government service took place a year earlier. LBJ appointed Dr. García as an alternate representative with the full rank of Ambassador to the United Nations.[19]

The Doctor was tasked with improving U.S. relations with Latin America and Spain. Dr. García made history on October 26, 1967, when he addressed the United Nations General Assembly in Spanish. He was the first United States representative to speak before the U.N. in a language other than English.[20]

As a veteran and a member of LBJ's administration, he supported U.S. foreign policy. This put him at odds with the younger generation of anti-war activists. However, Dr. García was not blind to the toll the Vietnam War was exacting on the Latino community. Dr. Héctor and the American G.I. Forum would accompany the families of fallen soldiers to the airport to receive their sons' remains when they were returned from South East Asia.

With the election of Richard Nixon, Dr. García no longer had access to the White House and was not reappointed to the U.S. Commission on Civil Rights. Nevertheless, he continued working back in Texas to desegregate public schools and he campaigned against the effort to designate English as the official language of the United States.

In 1984, Dr. García was presented the nation's highest civilian award, the Presidential Medal of Freedom, by President Ronald Reagan.[21] Dr. García was the first Mexican-American to receive this honor. In total, the Doctor had known six presidents: Kennedy, Johnson, Carter, Reagan, G.H.W. Bush, and Clinton. Bill Clinton delivered the eulogy at his funeral.

Four months after closing his medical practice, Dr. García died at age 82 on July 26, 1996. Beyond his contribution as an individual, his lasting achievement is the American G.I. Forum. Nearly 75 years after its founding, the organization consists of over 500 chapters with 160,000 members in 24 states.[22]

As a young man, Dr. García had a vision that he could eliminate discrimination. His indignation was tempered by his determination to see Latinos enter the mainstream of American life. His goal was for Spanish-speaking Americans to obtain an education, engage in economic development, serve their country, and participate as first-class American citizens.

A proud member of the Greatest Generation, Dr. Héctor Pérez García made a significant difference in the life of the nation. A role model, he gave courage and leadership to a people hungry for courage and leadership. His efforts to secure civil rights for his people were both inspirational and practical.

1. *Héctor P. García* at https://humanitiestexas.org.
2. Aracelis Del Valle, *Héctor Pérez García* at www.learningtogive.org.
3. Hon. Solomon P. Ortiz, *The Dr. Héctor P. García Day in Texas*, Congressional Record (Oct. 6, 2009) at https://wwwgovinfo.gov.
4. *Dr. Héctor P. García Bio* at https://cityofmercedes.com.
5. Ignacio M. Garcia, *Héctor Pérez García In Relentless Pursuit of Justice 59* (1st ed. 2002).
6. García, Héctor P. at www.encyclopedia.com.
7. Ignacio M. Garcia, 77 supra.
8. Héctor P. García at https://military.wikia.org.
9. Ignacio M. Garcia, 90 supra.
10. *Héctor García-Physician, Civil rights & Facts-Biography* at https://www.biography.com.
11. Ivan Roman, *When a Fallen Mexican American War Hero Was Denied a Wake, A Civil Rights Push Began* (Oct. 9, 2020), https://bit.ly/3scae5e.
12. Ignacio M. Garcia, 108 supra.
13. *Id.* 118.
14. *Id.*
15 Norman Rozeff, *García, Héctor P (1914-1996)* at https://www.tshaonline.org.
16. *Id.*
17. Ignacio M. Garcia, 256 supra.
18. *Id*, 282.
19. *Id*, 274.
20. *Id.*
21. *Héctor P. García* at https://humanitiestexas.org.
22. Joel Holley, *Héctor P. García, 82, Dies, led Hispanic Rights Group*, New York Times (July 29, 1996) at hhttps://www.nytimes.com.

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.

NCBA Members, along with their families, enjoyed the 89th Annual Holiday Celebration at Domus on Thursday, December 9, 2021.

Thank you to the 2021 Annual Holiday Celebration Sponsors

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NCBA Committee Meeting Calendar
Jan. 11, 2022 – Feb. 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.

CIVIL RIGHTS
TUESDAY, JANUARY 11
12:30 P.M.
Bernadette K. Ford

WOMEN IN THE LAW
TUESDAY, JANUARY 11
12:30 P.M.
Edith Reinhardt

LABOR & EMPLOYMENT
TUESDAY, JANUARY 11
12:30 P.M.
Matthew B. Weinick

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

ETHICS
WEDNESDAY, JANUARY 12
4:30 P.M.
Avigael C. Fyman

MATRIMONIAL LAW
WEDNESDAY, JANUARY 12
5:30 P.M.
Jeffrey L. Catterson

REAL PROPERTY LAW
THURSDAY, JANUARY 13
12:30 P.M.
Alan J. Schwartz

MUNICIPAL LAW AND LAND USE
THURSDAY, JANUARY 13
12:30 P.M.
Judy L. Simoncic

REAL PROPERTY LAW
THURSDAY, JANUARY 13
12:30 P.M.
Alan J. Schwartz

DISTRICT COURT
FRIDAY, JANUARY 14
12:30 P.M.
Roberta D. Scoll

PLAINTIFF'S PERSONAL INJURY
TUESDAY, JANUARY 18
12:30 P.M.
David J. Barry

ELDER LAW SOCIAL SERVICES HEALTH ADVOCACY
TUESDAY, JANUARY 18
12:30 P.M.
Suzanne Levy/Ariella T. Gasner

ANIMAL LAW
TUESDAY, JANUARY 18
6:00 P.M.
Florence M. Fass

BUSINESS LAW, TAX & ACCOUNTING
WEDNESDAY, JANUARY 19
12:30 P.M.
Jennifer L. Koo/Scott L. Kestenbaum

ASSOCIATION MEMBERSHIP
WEDNESDAY, JANUARY 19
12:45 P.M.
Michael DiFalco

ALTERNATIVE DISPUTE RESOLUTION
WEDNESDAY, JANUARY 19
5:30 P.M.
Michael A. Markowitz/ Suzanne Levy

INTELLECTUAL PROPERTY
THURSDAY, JANUARY 20
12:30 P.M.
Frederick J. Dorchak

APPELLATE PRACTICE
THURSDAY, JANUARY 20
12:30 P.M.
Jackie L. Gross

DIVERSITY & INCLUSION
THURSDAY, JANUARY 20
6:00 P.M.
Rudolph Carmenaty

CONSTRUCTION LAW
FRIDAY, JANUARY 21
12:30 P.M.
Raymond A. Castronovo

IN-HOUSE COUNSEL
FRIDAY, JANUARY 21
12:30 P.M.
Michael DiBello

SURROGATES COURT ESTATES & TRUSTS
TUESDAY, JANUARY 25
5:30 P.M.
Brian P. Corrigan/ Stephanie M. Alberts

COMMERCIAL LITIGATION COMMITTEE
FRIDAY, JANUARY 28
12:30 P.M.
Jeffrey A. Miller

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

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

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

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Committee Reports

ETHICS COMMITTEE
MEETING DATE: 12/15/21

Chair: Avigael C. Fyman

Michael J. Langer

Member discussion held regarding ethics inquiries and committee members were encouraged to contribute to writing articles and presenting CLE lectures.

The following upcoming CLE lectures will be co-sponsored by the Ethics Committee: (1) January 13, 2022, 5:30 p.m. entitled "*Two Yoots: What My Cousin Vinny Can Teach Attorneys About Ethics*," by Jennifer Groh, Omid Zareh and Si Aydiner; and (2) January 26, 12:30 p.m. entitled "*Ethics of Selling a Law Practice*," by Mitch Borkowsky.

Upcoming meeting will be held on January 12, 2022, at 4:30 p.m. via Zoom.

The Committee Reports column is compiled by Michael J. Langer, a partner in the Law Offices of Michael J. Langer, P.C. Langer is a former law clerk in the United States Court of Appeals for the Second Circuit, and a former Deputy County Attorney in the Office of the Nassau County Attorney. Langer's practice focuses on matrimonial and family law, estate and commercial litigation, and criminal defense.

New Members

We Welcome the Following New Members
Attorneys

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WE CARE Fund Thanksgiving Drive 2021

Photos by: Hector Herrera

The WE CARE Fund was able to distribute 200 Thanksgiving meals, complete with all the trimmings, to Nassau County families in need.

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

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Steve Schlissel	Josephine Kantor, mother of Carol Kantor
Hon. Ira B. Warshawsky	Daniel J. Dillon
Hon. Denise L. Sher	Joseph J. Ra, former Town Attorney for the Town of Hempstead
Meredith Freed	Hon. Elaine Jackson Stack
Nancy E. Gianakos	Gil Blum, father of Andrew Blum
Michael G. LoRusso	Michael A. LoRusso
Kimberly's Friends in Nassau County Family Court	Ralph Snow
Brenda Stack Freed	Hon. Elaine Jackson Stack
Hon. Angelo A. Delligati	John Marshall

WE CARE Fund Gingerbread University 2021

By popular demand, this year's Gingerbread University was takeout only, and was another success! Each kit contained one gingerbread house and extra candy and icing to personalize the house. WE CARE would like to thank all those who purchased a gingerbread kit, as well as the 2021 Gingerbread University Sponsors.

MONDAY, SEPTEMBER 19, 2022

*The WE CARE Golf and Tennis Classic was Founded by Stephen W. Schlissel in 1996.

BROOKVILLE COUNTRY CLUB & THE MUTTONTOWN CLUB

In Brief

Vishnick McGovern Milizio LLP (VMM) managing partner **Joseph Milizio** is proud to announce that the firm has been named one of the "Best Law Firms in America" 2022 by *U.S. News & World Report–Best Lawyers*. VMM also received a regional ranking for its Elder Law practice, led by NCBA members **Bernard McGovern**, **James Burdi**, and **Constantina Papageorgiou**. In addition, partner **Joseph Trotti**, head of the firm's Litigation Department and Matrimonial & Family Law practice, is named to "The Best Lawyers in America" 2022 for Family Law Mediation. VMM congratulates partner Constantina Papageorgiou of the firm's Wills, Trusts, and Estates and Elder Law practices for being named one of "Nassau County's Women of Distinction" by *The Island Now* newspaper group. Partner James Burdi, also of the firm's Wills, Trusts, and Estates and Elder Law practices and the head of its Special Needs Planning sub-practice, led a webinar on November 23 for parents and caregivers of QSAC (Quality Services for the Autism Community).

Marian C. Rice

Leslie A. Berkoff, a Partner and Chair of the Dispute Resolution practice group in the Garden City office of Moritt Hock & Hamroff, has been appointed by the American Bar Association to serve as Chair of the Dispute Resolution Committee of the Business Law Section.

Dana Walsh Sivak, senior associate at Cona Elder Law, was honored by the Long Island Business News at their 40 Under 40 event.

Julia Gavrilov, counsel in the Garden City office of Moritt Hock & Hamroff LLP, has been named as one of the Top Women in Equipment Finance for 2021 by The Monitor in recognition of her outstanding commitment, achievements, and leadership in the equipment finance industry.

Mary E. Mongioi, a Partner of Forchelli Deegan Terrana, LLP, and Chair of the firm's Veterinary practice group, is one of the 119 exemplary women included in Crain's New York Business' 2022 Notable Women in Law list of honorees. **Danielle E. Tricolla** and **Robert L. Renda** have been promoted to Partner effective January 1, 2022.

Troy G. Rosasco of Hansen & Rosasco, LLP has been chosen as New York Metro Super Lawyers for the fifth straight year in the area of Mass Torts involving 9/11 Victim Compensation Fund claims.

Hon. Edward L. Lieberman was honored at the Nassau County Village Officials Association's 95th Annual Dinner Gala and Testimonial.

Mark E. Alter, senior partner in the Law Offices of Mark E. Alter, has again been nominated and now named to the 2021 Super Lawyers List. Mr. Alter was selected in the category of Personal Injury Litigation (Plaintiffs). **Erica L. Alter**, an associate attorney in the Law Offices of Mark E. Alter, has been selected to the 2021 New York Rising Stars list.

Partners **Justin C. Frankel** and **Jason A. Newfield**, founders of the national disability insurance law firm Frankel & Newfield, have been named to the New York Metro Super Lawyers list as two of the top New York metro area lawyers for 2021.

Karen Tenenbaum presented "NYS Telecommuting, IRS & NYS Tax Collections, Federal & NYS Trust Funds & NYS Bulk Sales" at the IEEE Financial Summit. She also presented "Preparing for a Successful State Audit Defense and Alternative Strategies" for NYSSCPA, New York and Tri-State Taxation Conference. Karen's interview with Bruce Stout discussing NYS Residency and IRS Passport Revocation was released on YouTube. Karen and Jacob Schuster co-wrote an article discussing New York State Driver's License Suspensions that was recently featured in the *Nassau Lawyer*.

David S. Feather of Feather Law Firm, P.C. spoke at the Nassau Academy of Law on December 15, 2021, on LGBTQ Rights in the Workplace.

Capell Barnett Matalon & Schoenfeld LLP Partner **Gregory Matalon** published an article, "Utilizing Current High Gift Tax Exemptions Before 2026 (or Sooner)" for the *New York Law Journal*. Partner **Robert Barnett's** article "Income Tax Planning for Trusts—Impact of PLR 202118002" was published in Thomson Reuters' *Journal of Taxation*. Additionally, Robert Barnett and Greg Matalon were speakers at the NYS Society of CPAs Estate Administration Conference. Partner **Yvonne Cort** recently lectured for the NYS Society of CPAs, Nassau and Suffolk Chapters, on the topic of NYS and NYC residency audits. Robert Barnett spoke for the same group regarding equity compensation and stock options. We are also pleased to announce that Yvonne Cort has been invited to join the steering committee of Women Owned Law, a group supporting and advocating for women legal entrepreneurs.

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.

NCBA Sustaining Members 2021-2022

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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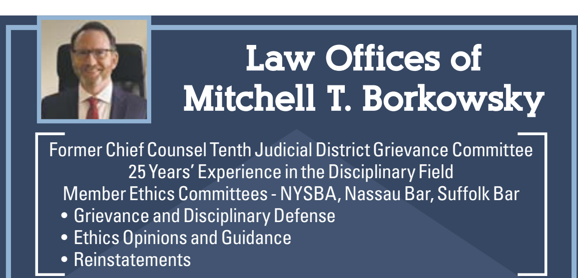

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