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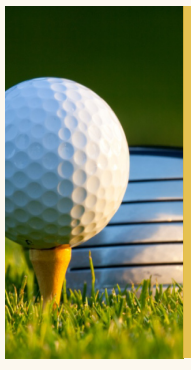

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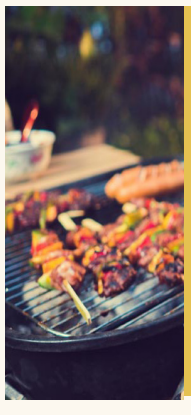

BBQ AT THE BAR

THURSDAY, SEPTEMBER 7

Meet the President

By: Ann Burkowsky

The Nassau County Bar Association (NCBA) is pleased to welcome Sanford Strenger, a Partner in the firm Salamon Gruber Blaymore & Strenger, P.C., as its 121st President. A long-time member of the NCBA for over 35 years, President Strenger has been active on numerous NCBA Committees, task forces, and as a Delegate to the NYSBA.

President Strenger will be installed on Tuesday, June 6, 2023, at Domus, the Home of the Association, with close family members, friends, and colleagues in attendance. President Strenger's first column can be found on page three of this issue.

Education and Career

President Strenger attended the University of Rochester, where he obtained a BA in History and an MS in Public Policy Analysis. He then attended Benjamin Cardozo School of Law where he received his J.D. In law school, Strenger was a member of its Criminal Law Clinic and worked closely with then director Barry Scheck, who was developing the groundwork for the Innocence Project—dedicated to the utilization of DNA evidence to prove the innocence of individuals wrongfully convicted of crimes.

Post-graduation, Strenger was admitted to state and federal courts of New York and New Jersey, and later the United States Court of Appeals for the Second Circuit.

President Strenger began his law career serving as an Associate at various law firms from 1985 to 1990 in Manhattan and Long Island. In 1990, he joined Farrell Fritz PC, where he represented major corporations and financial institutions, including Exxon, Home Depot, EAB, and Dime, as well as many Long Island businesses and municipalities.

In 2000, he became Partner at the firm Salamon Gruber Blaymore & Strenger PC, where he currently practices and routinely litigates complex real estate, commercial, corporate, health care, and environmental matters in federal and state courts; and before administrative agencies from inception through trial; and appellate practice and counsels' clients on commercial, real estate and health care transactions.

Mr. Strenger is also an arbitrator and mediator and has served as a neutral in numerous matters.

Professional Affiliations

President Strenger is an active member of numerous organizations, including the New York State Bar Association, New York State Bar Foundation, NYS Unified Court System Part 36, and Theodore Roosevelt American Inn of Court, among others. Mr. Strenger was an initial member of the NYSBA Technology and the Practice of Law Committee, has lectured on technology issues facing law firms, and taught the subject of electronic evidence in law schools.

In addition, he has lectured nationally on coastal zone issues and the Public Trust Doctrine and has also served as a judge for the Yale Mock Trial Association, and the Nassau County Bar Association Moot Court and Mock Trial competitions.

The Year Ahead

President Strenger's goal for the upcoming Bar year follows the theme of "A Year of Member Engagement." In keeping with his belief that a bar association is tasked with the primary mission of enhancing its members' practice of law and lives through education, access to decision makers, networking, and social opportunities, as well as enhancing the local community, Mr. Strenger plans to place a focus on expanding opportunities for members to market their skills to fellow members and others through the addition of new networking opportunities throughout the Bar year and to encourage support of access to justice efforts and pro bono services for our veterans.

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From the President

Sanford Strenger

It is my distinct honor to serve as the 121st President of the Nassau County Bar Association. As this is my first President's Column, let's get acquainted. I have been a member of the NCBA for over 35 years. Throughout that time, I have been active on numerous committees. I have served as the Chairperson of the NCBA Conciliation Committee (attorney fee disputes), Access to Justice Committee, Financial Oversight Committee, several presidential task forces, and as a Delegate from the NCBA to the New York State Bar Association House of Delegates.

I graduated from the Bronx High School of Science, and later the University of Rochester, where I obtained a BA in History and an MS in Public Policy Analysis. I then attended Benjamin Cardozo School of Law. At Cardozo, I was a member of the Criminal Law Clinic and worked with its Director, Barry Scheck in the South Bronx, as he was developing the foundation for the Innocence Project.

In my spare time, I practice law as a Partner at Salamon Gruber Blaymore and Strenger P.C., a small commercial law firm in Roslyn Heights. I am a trial lawyer who has tried many matters, both jury and non-jury, running the gamut from contract, real estate, tort, administrative and environmental claims. My practice these days focuses on real estate and corporate matters, both in litigation and transactional. I am an arbitrator and mediator and have served as such on multiple engagements. Throughout my legal career, I have been fortunate to have been mentored by great lawyers who taught me the intellectual beauty of the law, the tools of the trade, and the obligation to play mentorship forward.

Now that you know more than you probably wanted to know about me, let's discuss some thoughts that I have about the coming year. I am big on themes, and as such, the theme for my presidency is the "Year of Member Engagement." It is my view that a bar association is charged with the primary mission of enhancing its members' practice of law and their lives through education, access to decision-makers, networking, and social opportunities. To fully achieve its mission, it is also charged with acting to enhance the communities where its members live by providing opportunities for its members to give back to their community.

We will be updating our website to make it more user-friendly and to have content that enhances your practice. With the assistance of Gary Port, Chair of our Veterans and Military Law Committee, we will undertake an initiative for NCBA to proactively provide pro bono services to our veterans, who need our help now more than ever before. With the additional grant monies obtained through the efforts of Immediate Past President Baiamonte, I look forward to the implementation of new initiatives of our Lawyers Assistance Program (LAP), and our LAP Committee expanding to include new members to assist in future fundraising efforts. I will also work toward establishing a formal advisory council for our Assigned Defender Program (18b) to assist it in its important function in our criminal justice system.

I am very proud of the creation of our new Asian American Attorney Section, as well as our new Cyber Law and Law Student Committees this past year. These additions demonstrate the forward-thinking of our Bar Association. NCBA has been a leader in diversity and innovation which will remain front and center in the coming year.

With the assistance of Past President Greg Lisi, we will strive to hold regular networking events at Domus to increase your ability to market your skills to our fellow members and other professionals. As part of these networking activities, we will look to provide opportunities for attorneys who desire to return to practice after a lengthy hiatus to meet and make valuable contacts. Through committees such as the New Lawyers Committee, I will encourage the NCBA to undertake increased social activities at Domus, including an "Iron Chef" competition, where we will learn who is the top chef at NCBA. Stay tuned.

In furtherance of the theme of "Year of Member Engagement," I will follow in Greg's footsteps and be present at Domus on Wednesdays for "Lunch with the President" and hope you join me to share ideas, stories, or just say hello.

I look forward to collaborating with the WE CARE Fund and our Academy of Law, with its new Director Stephanie Ball and new Dean Michael Ratner. I also plan to put a spotlight on our Lawyer Referral Service program and work toward its expansion with a new staff director and advertising to increase the quantity and quality of referrals.

Over the coming months, I will be highlighting the many things this Bar Association does to enhance your practice, better the lives of the people of this county, and how you can become involved within this column. During my years of membership in the NCBA, I have learned that no one has a monopoly on ideas. Come home to Domus and partake in all our wonderful programs and activities. Feel free to reach out to me to share your ideas and help me to make my presidency the "Year of Member Engagement."

2023 Installation of NCBA and NAL Officers and Directors

Tuesday, June 6, 2023
6:00 PM at Domus

There is no charge for this event.
Contact the NCBA Special Events Department at events@nassaubar.org or (516) 747-4071 to pre-register.

NCBA Announces Addition of Three New Committees

The 2023-2024 membership year will allow members to take part in three new committees: Asian American Attorney Section, Cyber Law, and Law Student.

Asian American Attorney Section: Open to all Members, no matter your ethnicity—will address the legal needs of the Asian attorney, confront Asian bias, disseminate relevant information, and hold networking and social events among the Asian attorney community.

Cyber Law Committee: Educates Association Members on mandatory "technology proficiency" and cybersecurity issues, as well as provide a platform for attorneys practicing in the area of cyber law to gather and share practice information and experiences in the field.

Law Student Committee: Provides law students the opportunity to network with practicing attorneys, gain insight into the legal field, and foster professional relationships with peers and future colleagues.

NCBA Committees are open to **MEMBERS ONLY**. If you are interested in joining one or more of these committees, contact Stephanie Pagano at **spagano@nassaubar.org** or **(516) 666-4850**.

FOCUS: APPELLATE LAW

Memoranda of Law in the Record on Appeal

Charles Holster

"[A] memorandum of law is properly included in a record on appeal for the sole purpose of establishing that an issue has been preserved for [appellate] review."[1] This singular purpose is critical, since an argument which was not preserved in the lower court may generally[2] not be considered on appeal.[3] However, an appellate brief should not cite a memorandum of law as record evidence of any facts, since it has no evidentiary value.[4]

In the Fourth Department, a memorandum of law may be included in the record on appeal only "where preservation for review is at issue."[5] This is not stated in one of the Fourth Department's Local Rules; but rather, it is stated on the Court's website with a citation to case law. Before the appeal is perfected, the appellant has to establish that "preservation is at issue," by entering into a stipulation to that effect in the lower court, or by making a motion there to settle the record.[6]

There is no such requirement in the First, Second, or Third Department. In each of those Departments, the issue of whether an argument advanced on appeal was preserved below will not arise until after the appeal has been perfected. The issue is less likely to arise if the record on appeal includes the memoranda that were filed by both the appellant and the respondent.

It will not suffice to merely assert in an appellate brief that an argument was preserved below in a memorandum of law if it is not included in the record on appeal.[7] Thus, if the appellant failed to include his own memorandum of law in the record on appeal, and it is argued in the respondent's brief that the appellant's argument was not preserved, the appellant would have to make a motion to file his memorandum as a "supplemental record."[8] Since it could take weeks for such a motion to be decided, the motion would also have to include a request for an extension of time to file the appellant's reply brief.[9]

Conversely, it could be the respondent who makes a motion for an order directing the appellant to file his memorandum as a "supplemental record." The respondent might do so if the appellant's brief advances an argument which the appellant did not make in the memorandum he filed in the lower court. It could then be cited in respondent's brief.

If the record on appeal does not include the memorandum of law that was filed below by the respondent, and it is the respondent's position that its memorandum will show that the arguments that it intends to advance in its brief were preserved, the respondent may make a motion for an order directing the appellant to file that memorandum as a "supplemental record,"[10] or permitting the respondent to do so.[11] The need for the respondent to make such a motion would be obviated if, at the time the appeal is perfected, the appellant includes in the record on appeal any memorandum that the respondent filed in the lower court. Doing so would also enable the appellant to cite that memorandum in his reply brief if it shows that the respondent's brief advances an argument which it did not make below.[12]

If there is both an appeal and a cross-appeal, which requires the parties to concur on the joint record to be filed, and the opposing party will not consent to the inclusion of the memoranda, a motion should be made for an order directing that they be included.[13] If it is discovered after the fact, that the "joint" record that was filed does not include the memoranda, a motion should be made for permission to add them as a "supplemental record."[14]

In addition to the delay that would be caused if any of the motions discussed above have to be made, the cost of the litigation would be increased, and an additional burden would be imposed upon the appellate court. Such adverse consequences would far outweigh any additional printing costs that would be incurred if the memoranda were simply included in the record on appeal at the time the appeal is perfected.

Before perfecting an appeal from an order deciding a motion, where memoranda of law were among the motion papers submitted to the lower court, it is necessary to review the short form order, or the decision and order, to be sure that it lists the memoranda of law among the papers that the motion court considered.[15]

If the submissions on the motion in the lower court were prepared in compliance with the Uniform Rules for the Trial Courts, the memoranda of law will be the only document in the record that shows the legal arguments that were made.[16]

If the recital in the order does not mention the memoranda, this should be brought to the attention of the lower court in a motion to resettle.[17] Otherwise, the Appellate Division will not treat the memoranda as if they were a part of the record on appeal, even if they are included.[18] As stated by the Second Department, "[t]he recital requirement contained in CPLR 2219 (subd [a]) is designed to identify those papers which should be included in the record on appeal."[19]

If there is a decision which directs that an order be settled on notice, counsel for the prevailing party who drafts the proposed order should make reference to the memoranda when reciting the submissions upon which the order is based. If he does not, counsel for the losing party, who will be taking the appeal, should submit a proposed counter-order which does so.

1. *Brown v. Smith*, 85 A.D.3d 1648 (4th Dept. 2011).
2. A purely legal argument may be considered for the first time if it is clearly supported by facts already in the record. *DeRosa v. Chase Manhattan Mtge. Corp.*,10 A.D.3d 317, 319-320 (1st Dept. 2004); or, in rare instances, it may be considered in the interest of justice. *White v. Weiler*, 255 A.D.2d 952 (4th Dept. 1998).
3. *Hunt v. Bankers and Shippers Ins. Co. of New York*, 50 N.Y.2d 938 (1980); *Melcher v. Apollo Med. Fund Mgmt. L.L.C.*, 84 A.D.3d 547 (1st Dept. 2011).
4. *People v. Parker*, 70 A.D.2d 387, 388 (1st Dept. 1979]; *106 Spring Street Owner LLC v. Workspace, Inc.*, 166 A.D.3d 503 (1st Dept. 2018); *Onewest Bank, FSB v Michel*, 143 A.D.3d 869, 871 (2d Dept. 2016); *Boice v. S (In re Dissolution of Therm, Inc.)*, 132 A.D.3d 1137 (3d Dept. 2015).
5. Under the heading of "Court Help" on the home page, click on "Perfecting an Appeal." On the next page, click on "Record on Appeal." It is stated there, in paragraph C, section 2, subdivision (a), that "[m]emoranda of law and oral argument on motions constitute legal argument and generally are not included in the record on appeal. They may be included in the record on appeal in some circumstances, however, such as where preservation for review is at issue (see e.g. *Matter of Lloyd v. Town of Greece Zoning Bd. of Appeals [appeal No. 1]*, 292 AD2d 818, lv dismissed in part and denied in part 98 NY2d 691, rearg denied 98 NY2d 765)." See also, *Byrd v. Roneker*, 90 A.D.3d 1648 (4th Dept. 2011).
6. See 22 N.Y.C.R.R. 1000.4 [a] [1] [i], [ii]; *Zuley v. Elizabeth Wende Breast Care, LLC*, 2016 N.Y. Slip Op. 70354(U) (4th Dept. 2016); *Geneva Gen. Hosp. v. Assessor of Town of Geneva*, 2013 N.Y. Slip Op. 62395 (4th Dept. 2013). The order deciding such a motion is appealable. *Byrd v. Roneker, supra*, 90 A.D.3d at 1648; *Matter of Lloyd v Town of Greece Zoning Bd. of Appeals [appeal No. 1], supra*, 292 A.D.2d at 818-819.
7. *Petralia v. N.Y. State Dep't of Labor*, 191 A.D.3d 1466, 1467 (4th Dept. 2021).
8. *Osmanzai v. Sports & Arts in Schools Found., Inc.*, 2013 N.Y. Slip Op. 75826 (2d Dept. 2013).
9. *Id.*
10. *Simpson v. 16-26 E. 105, LLC*, 2019 N.Y. Slip Op. 72932(U) (1st Dept. 2019); *Oved & Oved LLP v. Zane*, 2018 N.Y. Slip Op 66600(U); *Pena v. Boys-Manny*, 2022 N.Y. Slip Op. 74620(U) (2d Dept. 2022).
11. *Emigrant Mortgage Company, Inc. v. Washington Title Insurance Company*, 2010 N.Y. Slip Op. 73066(U) (2d Dept. 2010).
12. Compare, *Old House Lane, LLC v. Silverstein Contracting & Dev. Corp.*, 190 A.D.3d 427 (1st Dept. 2021).
13. *Simmons v. Brooklyn Hospital Center*, 2010 N.Y. Slip Op. 66560(U) (2d Dept 2010).
14. *W. Park Assocs., Inc. v. Everest Nat'l Ins. Co.*, 2012 N.Y. Slip Op. 64753 (2d Dept. 2012).
15. CPLR 2219(a).
16. "Affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law." (22 N.Y.C.R.R. §202.8[c]). The Rule does not mention affirmations; but, one court has stated that they may briefly summarize counsel's legal position, without citing case law, in addition to stating the facts within the attorney's direct knowledge. *Davis v. Cliffside Rehab. & Residential Healthcare Ctr.*, 65 Misc.3d 1219(A), n 1 (Sup. Ct., Bronx Co., 2019).
17. *Singer v. Bd. of Educ. of City of New York*, 97 A.D.2d 507 (2d Dept. 1983).
18. *Lamberta v. Long Island Rail Road*, 51 A.D.2d 730 (2d Dept. 1976); *Chaudhuri v. Kilmer*, 158 A.D.3d 1276 (4th Dept. 2018).
19. *Singer v. Bd. of Educ. of City of New York, supra*, 97 A.D.2d at 507.

Charles Holster is former Chair of the NCBA Appellate Practice Committee. His Garden City law practice is concentrated on civil and criminal appeals. (www.appealny.com). He may be reached at 516-747-2330 or cholster@optonline.net.

FOCUS:
COURT OF APPEALS

The Court of Appeals in *Henry v. NJ Transit Corporation* Reaffirms the Importance of Preservation

Melissa A. Danowski

Under CPLR 5601, a litigant can take an appeal to the Court of Appeals as of right in only four circumstances.[1] One such circumstance, found in CPLR 5601(b)(1), is based on constitutional grounds: a party can appeal from an Appellate Division order that finally determines the action if the construction of the federal or state constitution is directly involved.[2]

On March 21, 2023, the Court of Appeals decided *Henry v. NJ Transit Corporation*[3] by dismissing the appeal on jurisdictional grounds. In so doing, the court reaffirmed its rule that unpreserved questions of law, not subject to any preservation exception, may not be the predicate for an appeal as of right under CPLR 5601(b)(1).[4]

The question of law involved was whether the defendant, NJ Transit Corporation ("NJ Transit"), as an arm of the state of New Jersey, was entitled to dismissal pursuant to the doctrine of interstate sovereign immunity. Because NJ Transit did not raise that defense in the Supreme Court proceedings, the Court of Appeals dismissed the appeal.[5]

The Background Facts

In October 2014, Kathleen Henry was a passenger on a bus owned by the defendant NJ Transit and driven by a NJ Transit driver in the scope of his employment.[6] The bus was traveling in the Lincoln Tunnel from Manhattan to New Jersey when it collided with a motor vehicle.[7] Ms. Henry was thrown to the floor and sustained shoulder injuries.[8]

In June 2015, Ms. Henry filed a personal injury lawsuit against NJ Transit and the bus driver in New York County Supreme Court. NJ Transit and the driver served an answer that did not include an affirmative defense based on interstate sovereign immunity.[9] The matter ultimately proceeded to trial, and in December 2018 a jury returned a verdict for Ms. Henry. The jury awarded $800,000 in past and future pain and suffering damages in addition to medical expenses.

The NJ Transit defendants made a post-trial motion pursuant to CPLR 4404(a). The motion sought a new trial, or alternatively, a reduction of damages.[10] In between the time that the motion was fully briefed in April 2019 and the decision and order was issued in July 2019, there was a change in the law governing interstate sovereign immunity.[11]

The Supreme Court of the United States Decides *Hyatt III*

In May 2019, the Supreme Court of the United States decided *Franchise Tax. Bd. of California v. Hyatt (Hyatt III)*.[12] *Hyatt III* overruled *Nevada v. Hall*,[13] which was the law at the time of the commencement of Ms. Henry's lawsuit. *Hall* involved similar facts to Ms. Henry's case. A bus owned and operated by an arm of the State of Nevada was involved in an accident on a highway in California.[14] The Supreme Court in *Hall* held that the State of Nevada could not claim constitutional immunity from the suit in California.[15] Under *Hall*, states were subject to private suits in sister states' courts irrespective of their consent.[16]

Forty years later, and while NJ Transit's post-trial motion was pending in the *Henry* case, the Supreme Court in *Hyatt III* overruled *Hall* and held that states retain their sovereign immunity from private suits brought in the courts of other states.[17]

NJ Transit Defendants Appeal to The Appellate Division

NJ Transit appealed from the order denying the relief sought in their post-trial motion.[18] Before the First Department, Appellate Division, NJ Transit invoked the sovereign immunity defense for the first time, based on the ruling in *Hyatt III*.[19] NJ Transit acknowledged that it did not raise the defense in the trial court and explained that it had no basis in law to raise the defense until *Hyatt III* was decided—after trial and after the post-trial motion papers were submitted.[20] NJ Transit argued that because the defense of sovereign immunity speaks to the court's subject matter jurisdiction, it may be raised at any time, including for the first time on appeal.[21]

NJ Transit reiterated that it was entitled to a new trial or a reduction of damages for the reasons argued in

the trial court.[22] But the principal argument on appeal was to dismiss the case wholesale based on its entitlement to sovereign immunity.

NJ Transit, as an arm of the State of New Jersey, posited that it was immune from suit in New York's courts absent its express consent.[23] Since it did not expressly consent, interstate sovereign immunity applied.[24]

The Appellate Division unanimously rejected NJ Transit's arguments and affirmed the trial court's order.[25] The court found that NJ Transit waived its sovereign immunity defense by raising it for the first time on appeal.[26] The decision reasoned that the sovereign immunity defense pre-dated the Supreme Court's decision in *Hyatt III* and thus NJ Transit could have raised the defense as early as when it served its answer.[27] NJ Transit waived the defense because it did not place the plaintiff or the trial court on notice in its responsive pleadings, during pretrial litigation, at trial, or on its post-trial motion.[28]

The Court of Appeals' Decision

NJ Transit appealed to the Court of Appeals on the basis that the case presented novel constitutional issues of public importance concerning interstate relations. As a threshold matter, the Court of Appeals considered whether it had jurisdiction to hear the appeal under CPLR 5601(b)(1) and N.Y. Constitution article VI.[29]

The Appellate Division, which has interest of justice jurisdiction, had the power to review whether, by its conduct, NJ Transit waived its sovereign immunity argument.[30] In contrast, the Court of Appeals found that it lacked jurisdiction to reach and decide the unpreserved question.[31] The Court of Appeals never reached the issue to opine on the Appellate Division's holding that NJ Transit waived its sovereign immunity by raising it too late. The appeal was dismissed, leaving the Appellate Division order intact.[32]

The Takeaway

The result in *Henry* underscores why it is imperative to preserve legal issues for potential appellate review. If there is a valid, applicable defense or argument, it should be incorporated in the record, and early. But as was the case in *Henry*, there is sometimes precedent that forecasts a defense or argument will likely be a loser. So, when should an argument, claim, or defense be included?

Like most legal questions, it depends. A good starting point is to be mindful of the definition of frivolous conduct as found in the Uniform Rules of the Trial Courts. Subdivision (c)(i) of section 130-1.1 provides that an argument is frivolous if "it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law."[33]

The decision of whether to argue for an extension, modification or reversal of existing law can be case dependent and requires consideration of many factors including the strength of supporting legal analysis, trends in the case law across jurisdictions, and current challenges pending on appeal. Appellate law practitioners tend to keep a pulse on these issues. It is one

of the reasons why it has become increasingly more common for litigants to retain appellate counsel to collaborate with the trial team early in litigation. An appellate lawyer can assist in case strategy and act as a safety net to ensure that the case is prepared for a range of appellate possibilities.

The failure to preserve a legal issue can be a death knell in some cases. For Ms. Henry, the defendants' preservation failure worked in her favor. At the end of the day, she gets to keep her damages award. Objectively, the result is fair because while NJ Transit may have been entitled to dismissal on sovereign immunity grounds, ultimately it suffered the harsh consequence of failing to preserve its defense.

But consider another scenario. In 2013 the Court of Appeals decided *Hecker v. State of New York*, where a party ultimately benefitted from a failure to preserve an argument.[34] The Appellate Division exercised its interest of justice jurisdiction and ruled in favor of the defendant on an unpreserved question. The Court of Appeals in *Hecker* recognized that the basis for the Appellate Division's ruling was not preserved, and thus held it had no power to review the Appellate Division's exercise of its discretion to reach that issue, or the issue itself.[35]

Curiously, the case law holds that the Appellate Division, in certain circumstances, is jurisdictionally empowered with something that the Court of Appeals does not have: interest of justice jurisdiction to reach and decide unpreserved questions of law.[36] If the parties do not argue about a question of law in the trial courts, even if the Appellate Division reaches and decides the appeal based solely on an unpreserved question of law, the Court of Appeal's jurisdictional rules prevent review. That leaves the Appellate Division with the last word.

Like *Hecker* once was, *Henry* is the latest cautionary tale on preservation. In fact, for decades, legal commentators have argued for reform of the preservation rule that precludes Court of Appeal review of an unpreserved issue of law while allowing the Appellate Division to do so in exercising its interest of justice jurisdiction.[37] Unless and until that reform occurs, *Henry* is a reminder of how the preservation of legal issues during trial court proceedings often determine the success or loss on appeal.

1. CPLR 5601.
2. CPLR 5601(b)(1).
3. *Henry v. NJ Transit Corporation*, --- N.E.3d ----, 2023 NY Slip. Op. 01466 (Mar. 21, 2023).
4. *Id.*
5. *Id.*
6. *Henry v. New Jersey Transit Corp.*, No. 156496/2015, 2019 N.Y. Slip. Op. 31903(U) (N.Y. Sup. Ct. July 03, 2019).
7. *Id.*
8. *Id.*
9. *Henry v. New Jersey Transit Corporation*, 195 A.D.3d 444 (1st Dept. 2021).
10. *Henry v. New Jersey Transit Corp.*, No. 156496/2015, 2019 N.Y. Slip. Op. 31903(U) (N.Y. Sup. Ct. July 03, 2019).
11. See Defendant-Appellant's Br., 2020 WL 8877861 (October 5, 2020); *Henry v. New Jersey Transit Corp.*, No. 156496/2015, 2019 N.Y. Slip. Op. 31903(U) (N.Y. Sup. Ct. July 03, 2019).
12. *Franchise Tax Bd. of California v. Hyatt*, --- U.S.---, 139 S. Ct. 1485 (2019).
13. *Nevada v. Hall*, 440 U.S. 410 (1979) *overruled by Hyatt III* (supra).
14. *Id.*
15. *Id.*
16. Three Justices dissented in Hall: Chief Justice Burger, Justice Blackmun, and Justice Rehnquist. *Id.* at 427.
17. *Franchise Tax Bd. of California v. Hyatt*, --- U.S.---, 139 S. Ct. 1485 (2019).
18. Defendant-Appellant's Br., 2020 WL 8877861 (October 5, 2020).
19. *Id.* at *2.
20. *Id.* at *5.
21. *Id.*
22. *Id.*
23. *Id.* at *9.
24. *Id.*
25. *Henry v. New Jersey Transit Corporation*, 195 A.D.3d 444 (1st Dept. 2021).
26. *Id.* at 445.
27. *Id.*
28. *Id.*
29. *Henry v. NJ Transit Corporation*, --- N.E.3d ----, 2023 NY Slip. Op. 01466 (Mar. 21, 2023).
30. *Id.* at FN 7.
31. *Id.*
32. *Id.*
33. 22 NYCRR §130-1.1(c)(1).
34. *Hecker v. State of New York*, 20 N.Y.3d 1087 (2013).
35. *Id.* at 1087.
36. *Matter of Barbara C.*, 64 N.Y.2d 866 (1985) (recognizing that the Appellate Division may "reach and decide issues which are not properly preserved").
37. *People v. Epakchi*, 37 N.Y.3d 39, 63 (2021) (Wilson, J., dissenting) ("For decades, members of this Court and legal commentators have sought judicial reform of the Court's strict preservation doctrine to address these and other scenarios that impede our ability to declare what the law is"). See also Brian J. Shoot, The Legislature's Power to Correct the Anomaly of Benefitting from A Failure to Preserve an Argument for Appellate Review, 80 Alb. L. Rev. 1323, 1353 (2017); and Rob Rosborough, Could The Court of Appeals Overrule its Jurisdictional Barrier to Review Unpreserved Questions of Law Reached and Decided by the Appellate Division?, NYSAPPEALS.COM, (Feb. 11, 2022), available at https://nysappeals.com/2022/02/11/could-the-court-of-appeals-overrule-its-jurisdictional-barrier-to-review-of-unpreserved-questions-of-law-reached-and-decided-by-the-appellate-division/.

Melissa A. Danowski is a Partner in the Appellate Advocacy & Litigation Strategy group at Mauro Lilling Naparty LLP in Woodbury. Melissa serves as the Co-Chair of the NCBA Appellate Practice Committee and Co-Vice Chair of the NCBA Community Relations and Public Education Committee. She can be reached at mdanowski@mlnappeals.com.

FOCUS:
THE LEMMON CASE

The Lemmon Slave Case Exhibit Commemorated in Nassau Supreme Court

Ira S. Slavit

The Nassau County Equal Justice in the Courts Committee commemorated The *Lemmon* slave case, a traveling exhibit of the Historical Society of the New York Courts, in a ceremony held in the Supreme Court lobby on April 5, 2023.

The *Lemmon* Slave Case, officially *Lemmon v. New York*, is celebrated for the stand New York Courts took against slavery.[1] A writ of *habeas corpus* freed eight slaves who were temporarily in New York when their owner, Juliet Lemmon, a resident and citizen of the State of Virginia, transported them through New York while relocating with her family to Texas. The slaves were kept locked in a New York City hotel room, but a free Black man, Louis Napoleon, learned of their presence and the writ ensued.

Slavery was abolished and all slaves declared free in New York as of July 4, 1827, pursuant to legislation passed in 1817.[2] The statute, however, contained four exceptions to emancipation, one of which permitted slaveholders to retain their slaves in New York if their stay was less than nine months.[3] All of the exceptions were repealed by the Legislature in 1841.[4]

Mrs. Lemmon opposed the writ on the grounds that the circumstances under which the slaves were brought into New York precluded them from gaining their freedom under the statute and that New York s law violated the U.S. Constitution.

Hon. Elijah Paine, Jr., Justice of the Superior Court of New York, held that the slaves were free and issued a writ of *habeas corpus*. The Supreme Court affirmed Justice Paine's decision. The Virginia legislature appealed to the New York Court of Appeals, contending that New York's statute violated the full faith and credit, privileges and immunities, and commerce clauses of the Constitution, and constituted a deprivation of life, liberty, and property without due process of law.

The Court of Appeals analyzed and rejected each of the constitutional objections and affirmed the judgment in 1860. The court held that the 1841 repeal of the exceptions to emancipation left the provisions of the 1817 law in effect and reflected the Legislature's clear intent that if any person should introduce a slave into this State, in the course of a journey to or from it, or in passing through it, the slave shall be free.[5] The case could not be appealed to the U.S. Supreme Court because the Civil War broke out.

When *Lemmon* was decided, slaves were not considered citizens under the U.S. Supreme Court's *Dred Scott* decision: Black Americans, free or enslaved, were not citizens and therefore the rights of the Constitution did not apply.[6] Bound by *Dred Scott*, the Court of Appeals could consider only Mrs. Lemmon's right to due process; the non-citizen slaves had no such right at that time.

Speaking at the Nassau Supreme Court ceremony were Hon. Vito M. DeStefano, Administrative Judge, Tenth Judicial District, Nassau County, Hon. Philippe Solages, Jr., Court of Claims Judge and Acting Supreme Court Justice, Nassau County, Tracy Auguste, Esq., Associate Court Attorney, Supreme Court, Nassau County, and Ananias Grajales, Esq., Chief Clerk of Nassau County Supreme Court.

Judges attending the ceremony included Hon. Norman St. George, Deputy Chief Administrative Judge for Courts Outside of New York City; Hon. Tricia M. Ferrell, Supervising Judge of the District Court of Nassau County; Hon. Catherine Rizzo, Justice of the Supreme Court; and judges from the Supreme, County and District Courts.

In addition to other court personnel, attorneys, and representatives of the Nassau County Bar Association, also present at the ceremony were a group of students and teachers from Division Avenue High School in Levittown who had come to the courthouse for a tour of the building.

The Equal Justice in the Courts Committee is co-chaired by Judge DeStefano and Nassau County District Court Judge, Hon. Andrea Phoenix. At the ceremony, Judge DeStefano spoke about the pivotal role courts play in the pursuit of justice, referencing Judge St. George's oft-stated observation that the judicial system is what separates order and justice from anarchy and lawlessness.

Judge DeStefano described how artwork hanging in the Supreme Court lobby reflects the importance of good citizens and good human beings working, moving forward, striving, and persevering to eliminate injustice. Directing everyone's attention to Eastman Johnson's painting depicting slaves escaping to freedom, A Ride for Liberty the Fugitive Slaves, c. 1862, Judge DeStefano noted that it points towards a portrait of Hon. Moxey Rigby, the first African American elected to the Nassau County District Court.

Discussing the exhibit and the work of the Equal Justice in the Courts Committee, Judge DeStefano commented that, "the fundamental and animating principle behind equal justice in the courts and access to justice is that every human being is entitled to be treated with dignity and respect and that everyone should be able to pursue their God-given rights to life, liberty, and the pursuit of happiness."

Judge Solages acknowledged the portrait of Judge Rigby and also the portrait in the lobby of Hon. Kathleen Kane, the first woman judge elected in Nassau County. He noted that the U.S. Constitution, a copy of which is exhibited in the courthouse lobby, is the bedrock of democracy notwithstanding that the word democracy does not appear in it. The judge reviewed the history of Long Island's connections to slavery, a word that he noted is also absent from the original Constitution.

In particular, Judge Solages spoke about the slave ship, *La Amistad*, a schooner seized by the U.S. government off the coast of Long Island. Africans on the ship who had been abducted from Sierra Leone to be sold as slaves in Cuba mutinied, killing the ship's captain and cook. Ultimately, the US Supreme Court held that the Africans were free persons and ordered their immediate release.[7]

Court Attorney Tracy Auguste directed her remarks primarily to the high school students, asking them to take a step back from the exhibit and breathe it in to understand its full meaning. She made the facts surrounding the *Lemmon* case relevant to the students, observing that the oldest slave was 23 years old, not much older than them. She emphasized that slavery can never be forgotten and that even today, people continue to have to fight for their rights. Ms. Auguste spoke passionately to inspire the students to take up the mantle from Justice Paine and the attorneys who represented the slaves and dedicate themselves to fighting for justice and perhaps someday return to the courthouse as attorneys advocating for their client's rights.

The *Lemmon* exhibit was on display in the Nassau County Supreme Court building from March 27 through April 7, and in the County Court building from April 10 through April 21, 2023. It continues its travels to several courthouses in Suffolk County and thereafter in the boroughs of New York City. The exhibit will make a total of 45 stops in courthouses throughout the State.

In addition to the traveling exhibit, the Historical Society commemorates the *Lemmon* case with a video, *The Lemmon Case: 1852-1860 A Prelude to the Civil War*, narrated by James Earl Jones. The Historical Society's website lionizes the New York Courts for the decisions in *Lemmon* because they were rendered in same era as the *Dred Scott* decision and as the Fugitive Slave Act of 1850 that required enslaved people to be returned to slaveholders, even if the formerly enslaved were in a free state.[8]

The Historical Society of the New York Courts was founded in 2002 by the then New York State Chief Judge Judith S. Kaye. The Society's website states that its mission is to preserve, protect and promote the legal history of New York, including the proud heritage of its courts and the development of the Rule of Law. The Society promotes its mission through educational outreach to New York State students, and public programs and publications on these themes which inform our knowledge and role as citizens today.[9]

Readers interested in the history of the Nassau County Bar Association can peruse *A Toast to Domus: The Legacy of the Nassau County Bar Association*, published in 2020 and available online.[10]

1. 20 N.Y. 562 (1860).
2. *Laws* of 1817, *ch.* 137.
3. *Laws* of 1817, *ch.* 137," 9,15.
4. *Laws* of 1841, *ch.* 247.
5. 20 N.Y. at 601-602, 619.
6. 60 U.S. 393 (1856).
7. *United States v. The Amistad,* 40 U.S. 15 Pet. 518 518 (1841).
8. https://history.nycourts.gov/the-lemmon-slave-case.
9. https://history.nycourts.gov/mission-history/.
10. https://www.nassaubar.org/wp-content/uploads/2020/04/Domus-History-Book-Final.pdf.

Ira S. Slavit is an NCBA Director, Chair of the NCBA Community Relations and Public Education Committee, and immediate past Chair of the Plaintiff's Personal Injury Committee. He is co-chair of the Community Outreach and Programs Subcommittee of the Nassau County Equal Justice in the Courts Committee. An attorney with Levine & Slavit, PLLC, he can be reached at islavit@newyorkinjuries.com or (516) 294-8282.

FOCUS: JUDICIAL NOTICE DOCTRINE

Federal Discretion—The Judicial Notice Doctrine

Ian Bergström

Basically, federal courts are vested with discretion accepting or disregarding purported facts within the context of civil lawsuits and criminal proceedings. The statutory basis of judicial notice is Federal Rule of Evidence 201. The litigant's mere demand for judicial notice is insufficient for the federal court to exercise such power because the doctrine entails nuance. Litigants should be knowledgeable about the legal standards and topic areas to strategically request the exercise of judicial notice.

Judicial Notice Under the Federal Rules of Evidence

Federal Rule of Evidence 201(b) "permits judicial notice of an adjudicative fact when the fact is: one [1] not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[1] Adjudicative facts are defined as "the ultimate facts in the case, plus those evidential facts sufficiently central to the controversy that they should be left to the jury unless clearly indisputable."[2]

Further, adjudicative facts are subject to the purview of Federal Rule of Evidence 201.[3] "Legislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally, while adjudicative facts are those developed in a particular case."[4] Federal courts are vested with discretion accepting or declining the exercise of judicial notice regarding purported facts.[5] Federal Rule of Evidence 201 governs the exercise of judicial notice.[6] In *Pina v. Henderson*, the Second Circuit declared that purported facts should not be supplemented outside the confines of the record, "unless the fact is clearly beyond dispute."[7]

Federal courts are statutorily permitted to sua sponte exercise judicial notice responsive to the litigant's presentation of materials establishing the purported fact.[8] In *Gulf Insurance Co. v. Glasbrenner,* the United States District Court for the Southern District of New York declared that the litigant's request for judicial notice is subject to the "reasonable dispute" inquiry, regardless of whether the litigant proffered the requisite materials.[9] The federal courts can exercise judicial notice through the conclusion of civil lawsuits and criminal proceedings.[10] Litigants are statutorily permitted to challenge the exercise of judicial notice before or after the movant's request is granted pursuant to Federal Rule of Evidence 201.[11] If the federal court exercises judicial notice, then the court is mandated to "instruct the jury to accept the ... fact as conclusive."[12] In *Repouille v. United States*, the dissent referred to the judicial notice doctrine as "informal inquiries" because the purported fact is not established by means of an evidentiary showing.[13]

The Dynamic of Judicial Notice

The federal courts can exercise judicial notice regarding motions for judgment on the pleadings, motions to dismiss, and summary judgment applications.[14] Federal courts can exercise judicial notice accepting the purported facts alleged within pleadings, and "other documents in the public record" regarding unrelated proceedings.[15] Such unrelated court filings are "not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings."[16] United States District Court for the Southern District of New York proclaimed that courts "frequently" exercise judicial notice regarding "filing dates."[17] United States District Court for the Eastern District of New York declared that courts "may ... take judicial notice of the state-court foreclosure proceedings."[18] Federal courts can exercise judicial notice regarding "divorce proceedings" and "court records."[19] In *Latifi v. Gonzales*, the Second Circuit held that election results are within the purview of judicial notice.[20] District courts determined that judicial notice is appropriate regarding medical terminology and dictionary definitions, regardless of whether the terminology and definitions are available by means of the internet or physical books.[21]

In *Davis v. Cotov*, United States District Court for the Eastern District of New York exercised judicial notice that an individual "violat[ed] parole" and "plead guilty to the parole violation" after reviewing the "Administrative Appeal Decision Notice."[22] The First Circuit determined that the trial court appropriately exercised judicial notice of the "criminal convictio[n]" at issue pursuant to Federal Rule of Evidence 201.[23] The criminal defendant did not "articulat[e]" the "reason why the court below was not ... justified in taking judicial notice" regarding the "prior conviction, particularly given the district judge's familiarity with the defendant's criminal case."[24] Generally, litigants do not typically dispute the accuracy of "[g]eograph[ic]" locales, so judicial notice should be appropriate.[25] The traveling distance and traveling time between American territories is subject to the judicial notice doctrine.[26] Furthermore, courts have freedom utilizing "internet mapping tools" to calculate such traveling distance and traveling time including "Google Maps."[27] Courts should not exercise judicial notice as to the "navigability" of waterways, unless "a matter of common knowledge and free from doubt."[28]

Judicial notice is appropriate regarding the existence of "foreign judgment[s]."[29] Foreign "criminal judgment[s]" can set forth "an official statement ... of the facts stated" therein.[30] The "facts adjudicated" within the judgments are deemed "prima facie evidence," but the assertions should not be deemed "truth[ful]."[31] Federal courts should exercise judicial notice as to "government[al] statistics" and "census figures."[32] In *Banton v. Belt Line R. Corp.*, Supreme Court of the United States exercised judicial notice "that the purchasing power of money" weakened during a certain timeframe.[33] Supreme Court of the United States determined

that judicial notice of an economic "depression" and "decline of market values" is appropriate.[34] However, "experts" must articulate the severity of such "decline" regarding, inter alia, the applicable raw materials and "industr[ies]."[35] In *In re GE Securities Litigation*, United States District Court for the Southern District held that judicial notice of "well publicized stock prices ... is permissible...."[36]

In *Sinclair v. Ziff Davis, L.L.C.*, United States District Court for the Southern District of New York exercised judicial notice that a social media company promulgated "agreements and policies."[37] Notably, the trial court declined to interpret the "meaning" of corporate contracts and "policies" because same were deemed "a question of law for the court, rather than a question of fact ...."[38] Judicial notice is permissible regarding "publicly available information," media publications, "internet website[s]," "internet material," and YouTube "services."[39] In *E. Profit Corp. v. Strategic Vision U.S., L.L.C.*, United States District Court for the Southern District of New York disregarded the defendant's contention that judicial notice should be exercised to acknowledge the truthfulness of statements throughout "articles."[40] In *Daniel v. Paul*, the Supreme Court of the United States referenced the trial court exercising judicial notice of "ingredients" within "bread" and "soft drin[k]" products "moved in interstate commerce."[41] The trial court declared, "The soft drinks were botted locally, but certain ingredients were probably obtained by the bottlers from out-of-State sources."[42]

1. See *Pina v. Henderson*, 752 F.2d 47, 50 (2d Cir. 1985) (citing Fed.R.Evid. 201(b)).
2. See *Snell v. Suffolk County*, 782 F.2d 1094, 1105–06 (2d Cir. 1986).
3. See *U.S. v. Hernandez-Fundora*, 58 F.3d 802, 812 (2d Cir. 1995).
4. See *U.S. v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).
5. See *generally Perry v. Estates of Byrd*, 13-CV-01555 (ALC) (FM), 2014 U.S. Dist. LEXIS 91272, *3-4 n.2 (S.D.N.Y. 2014).
6. See *Fed.R.Evid.* 201.
7. See *Pina*, 752 F.2d at 50.
8. See *Fed.R.Evid.* 201(c)(1)–(2).
9. *Fed. R. Evid.* 201(b); Fed R. Evid. 201(d); *Gulf Insurance Co. v. Glasbrenner*, 343 B.R. 47, 63 (S.D.N.Y. 2006).
10. See *Fed.R.Evid.* 201(d).
11. See Fed.R.Evid. 201(e); see *also 5-Star Management v. Rogers*, 940 F.Supp. 512, 519 (E.D.N.Y. 1996).
12. See *Fed.R.Evid.* 201(f).
13. See *Repouille v. U.S.*, 165 F.2d 152, 154 (2d Cir. 1947) (Frank, J., dissenting).
14. Fed.R.Civ.P 12(b)(6); Fed.R.Civ.P. 12(c); Fed. R.Civ.P. 56; *L-7 Designs, Inc. v. Old Navy, L.L.C.*, 647 F.3d 419, 422 (2d Cir. 2011); *In re Frito-Lay N. Am., Inc.*, 12-MD- 2413 (RRM) (RLM), 2013 U.S. Dist. LEXIS 123824, *10 (E.D.N.Y. 2013); *In re Outlet Dept. Stores, Inc.*, 49 B.R. 536, 537 n.2 (S.D.N.Y. Bankr. 1985).
15. See *generally Carruthers v. Flaum*, 388 F.Supp.2d 360, 365 n.4 (S.D.N.Y. 2005).
16. *Liberty Mutual Insurance Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992); *Global Network Communications Inc. v. NYC*, 458 F.3d 150, 157 (2d Cir. 2006); *Enron Corp. v. Springfield Association, LLC* (In re Enron Corp.), 379 BR 425, 431 (S.D.N.Y. 2007).
17. See *Gulf Insurance Co.*, 343 B.R. at 63.
18. See *Solomon v. Ocwen Loan Servicing, L.L.C.*, 12-CV-2856 (SJF) (GRB), 2013 U.S. Dist. LEXIS 57373, *11 (E.D.N.Y. 2013).
19. See *generally Chase v. Czajka*, 04-CV-8228 (LAK) (AJP), 2005 U.S. Dist. LEXIS 4425, *5 n.2 (S.D.N.Y. 2005); *Langenberg v. Sofair*, 03-CV-8339 (KMK), 2006 U.S. Dist. LEXIS 65276, *3 n.4 (S.D.N.Y. 2006).
20. See *Latifi v. Gonzales*, 430 F.3d 103, 106 n.1 (2d Cir. 2005).
21. *Snyder v. Cindy Law, P.A.*, 09-CV-1364 (GLS) (RFT), 2010 U.S. Dist. LEXIS 139539, *2-3 n.1 (N.D.N.Y. 2010); *Reid v. Time Warner Cable*, 14-CV-3241 (DLI) (RML), 2016 U.S. Dist. LEXIS 21783, *4 n.4 (E.D.N.Y. 2016); *Brickey v. Supt. Franklin Correctional Facility*, 10-CV-085 (FJS) (RFT), 2011 U.S. Dist. LEXIS 24483, *7 n.3 (N.D.N.Y. 2011); *Veras v. Jacobson*, 18-CV-6724 (KMK), 2022 U.S. Dist. LEXIS 106299, *3 n.4 (S.D.N.Y. 2022).
22. See *Davis v. Cotov*, 214 F.Supp.2d 310, 315–16 (E.D.N.Y. 2002).
23. See *generally Kowalski v. Gagne*, 914 F.2d 299, 306 (1st Cir. 1990) (citing Fed.R.Evid. 201).
24. See *id.*
25. See *U.S. v. Hernandez-Fundora*, 58 F.3d 802, 811 (2d Cir. 1995).
26. See *Rindfleisch v. Gentiva Health System*, 752 F.Supp.2d 246, 259 (E.D.N.Y. 2010); see *also Carroll v. U.S.*, 267 U.S. 132, 159–60 (1925).
27. See *generally Rindfleisch v. Gentiva Health System*, 752 F.Supp.2d at 259 (see footnote number thirteen (13)); see *generally Dynka v. Norfolk S. Ry. Corp.*, 09-4854, 2010 U.S. Dist. LEXIS 59664, *2 (E.D. Pennsylvania 2010) (see footnote number two (2)).
28. See *Arizona v. California*, 283 U.S. 423, 448 (1931).
29. See *A.I. Trade Fin. v. Centro Internationale Handelsbank AG*, 926 F. Supp. 378, 387 (S.D.N.Y. 1996).
30. See *U.S. v. Garland*, 991 F.2d 328, 332 (6th Cir. 1993).
31. See *id.* at 332–33 (6th Cir. 1993).
32. See *Canadian St. Regis Band of Mohawk Indians v. New York*, 82-CV-0783, 2013 U.S. Dist. LEXIS 94381, *44–45 (N.D.N.Y. 2013).
33. See *Banton v. Belt Line R. Corp.*, 268 U.S. 413, 422 (1925).
34. See *Ohio Bell Telephone Co. v. Pub. Util. Com.*, 301 U.S. 292, 301 (1937).
35. See *id.*
36. See *In re GE Securities Litigation*, 19-CV-1013 (DLC), 2020 U.S. Dist. LEXIS 81544 (S.D.N.Y. 2020) (see footnote number ten (10)).
37. See *Sinclair v. Ziff Davis, L.L.C.*, 454 F. Supp. 3d 342, 345 (S.D.N.Y. 2020).
38. See *Sinclair*, 454 F. Supp. 3d at 345.
39. *Gonzales v. National Westminster Bank PLC*, 847 F.Supp.2d 567, 569 (S.D.N.Y. 2012); *Lan Lan Wang v. Pataki*, 396 F.Supp.2d 446, 453 (S.D.N.Y. 2005) ("The Court may ... take judicial notice of public documents...."); Fed.R.Evid. 201(b)-(d); *Pataki*, 396 F.Supp.2d at 453; *NYS Electric & Gas Corp. v. U.S. Gas & Electric, Inc.*, 697 F.Supp.2d 415, 434 (W.D.N.Y. 2010); *Business Casual Holdings, LLC v. YouTube, LLC*, 2022 US Dist LEXIS 50166, *2, 21-CV-3610 (JGK) (S.D.N.Y. 2022).
40. See *E. Profit Corp. v. Strategic Vision U.S., L.L.C.*, 18-CV-2185 (LJL), 2020 U.S. Dist. LEXIS 239663, *10 (S.D.N.Y. 2020).
41. See *Daniel v. Paul*, 395 U.S. 298, 305 (1969).
42. See *id.* at 313.

Ian Bergström is a civil litigation attorney assigned to the litigation section with the Office of the Nassau County Attorney. Ian Bergström is also a Sustaining Member of the Nassau County Bar Association.

NAL PROGRAM CALENDAR

June 13 (IN PERSON ONLY)

Dean's Hour: Update on New York's Bail Laws
With the NCBA Criminal Court Law and Procedure Committee
12:30PM-1:30PM
1.0 credits in professional practice

Please join our distinguished panel for a discussion about the upcoming changes to New York's bail laws.

Guest Speakers:
Hon. Michael Montesano, Nassau County District Court
Marc C. Gann, Esq., Collins Gann McCloskey & Barry, PLLC
Ali Ajamu, Esq., Nassau County District Attorney's Office
Timothy Naples, Esq., The legal Aid Society of Nassau County

Moderator:
Christopher M. Casa, Esq.

June 14 (HYBRID)

Part 1 of two-part Paralegal Series—Dean's Hour: The Laws and Rules that Govern Motion Practice and Explain How to Use Them to Your Client's Advantage
12:30PM-1:30PM

Paralegals add value when they can help attorneys with motion practice in the age of e-filing. This two-part program series will give paralegals an overview of Supreme Court motion practice and advice on preparing motion papers in specific scenarios.

Guest Speaker: Christopher J. DelliCarpini, Esq., Sullivan Papain Block McGrath Coffinas & Cannavo P.C.

June 28 (HYBRID)

Part 2 of two-part Paralegal Series—Dean's Hour: The Rules and Regulations to the Most Common Kinds of Motions, Including Discovery Motions, Summary

In Brief

Marc Hamroff of Moritt Hock & Hamroff is pleased to announce the opening of a new office in the Fort Lauderdale, Florida metro area serving the Southeast Florida market. Marc Hamroff, **Julia Gavrilov**, and **Robert Cohen** will address legal developments affecting the equipment finance industry this year and best practices for managing them at the Equipment Leasing and Finance Association (ELFA) Legal Forum from May 7 to 9.

Ronald Fatoullah of Ronald Fatoullah & Associates is hosting an Elder Law and Medicaid Lunch & Learn for professionals on June 7. The event will be held at Russo's on the Bay in Howard Beach. During the month of May, Ron presented several webinars regarding Medicaid updates.

Lori A. Sullivan has joined Meltzer, Lippe, Goldstein & Breitstone, LLP as a Partner in the firm's Trust & Estate Litigation practice group. **Mary O'Reilly**, Co-Chair of the firm's Trusts & Estates practice group and a partner at the firm, was one of only 23 trusts and estates practitioners elected a Fellow of The American College of Trust and Estate Counsel (ACTEC) for 2023.

Kevin Schlosser, Shareholder and Chair of the Litigation & Dispute Resolution Department of Meyer, Suozzi, English & Klein, P.C. was among the New York State Bar Association panelists to discuss "There Has to be a Better Way: Changing How We Practice to Obtain Professional Satisfaction."

Marian C. Rice

Karen Tenenbaum moderated the joint webinar, "Artificial Intelligence and ChatGPT for Lawyers: 101 Disruptive Prompts Lawyers Can Use to Run Their Law Firm," for the Nassau and Suffolk Academies of Law; co-hosted an "IRS Problem Solving Day" with the IRS Taxpayer Advocate Service; spoke to the Metropolitan Association of Home Inspectors on "Tax Audits for Sole Entrepreneurs"; and co-presented to the Nassau/Suffolk Chapter of NCCPAP, "OMG My Client Owes Taxes! What Can I do to Help?." Karen was awarded the SCBA Eileen Coen Cacioppo Excellence in Curriculum Development Award.

Jacqueline Harounian has recently joined the Board of Directors of JALBCA (Judges and Lawyers Breast Cancer Alert).

Thomas J. Garry, Partner at Harris Beach PLLC, moderated Franklin H. Williams Commission Seminar on Diversity in New York Judiciary.

Stuart H. Schoenfeld, Partner at Capell Barnett Matalon and Schoenfeld was named one of 2023's Top Lawyers of Long Island by the *Long Island Herald*. Partner Yvonne R. Cort was the moderator of a panel "Strategies and Tips for Navigating Collection Appeals" at the nationally renowned New York University's 15th Annual Tax Controversy Forum. Cort was also quoted in the *Wealth of Geeks* article, "You Missed the Tax Filing Deadline? Here's How to Get Back on Track." Partner Robert S. Barnett presented "Elder Law Planning and Related Income Tax Aspects/ Current Issues in Trust Design" for the New York State Society of CPAs 2023 Estate Planning Conference. Partner **Gregory L. Matalon** presented "New York State Estate Tax Cliff and the 'Santa Clause'" for the Long Island Community Foundation. In addition, Barnett and Matalon presented "Shareholder Agreements and the Connolly Decision" for the Long Island Accountants and Financial Planners Network.

Alan E. Weiner received the Gary H. Friedenberg Service Award from the Estate Planning Council of Nassau County, Inc.

In recognition of Asian American, Native Hawaiian, and Pacific Islander Heritage Month, the Appellate Division, Second Department is celebrating its first annual **Hon. Randall T. Eng** Awards ceremony.

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 40 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.

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FOCUS: LAW AND AMERICAN CULTURE

Fakes, Forgeries, and Frauds: Clifford Irving's Howard Hughes Hoax

Rudy Carmenaty

This must go down in history. I don't remember any script as stretching the imagination as this yarn turned out to be. I don't know [Clifford] Irving. I never saw him. I never even heard of him until a matter of days ago when this thing first came to my attention.

—Howard Hughes

I had never realized I was committing a crime – I had thought of it as a hoax.

—Clifford Irving

In January 1972, author Clifford Irving confessed in open court to perpetrating the most fanciful literary hoax of all time. Claiming he had secured the cooperation of the ever-reclusive Howard Hughes, Irving purportedly co-wrote a so-called 'authorized autobiography' of the billionaire. It was all a hoax and a scam.

Howard Hughes, at the time, was not only the richest man in the world, but also the most mysterious. Indeed, his life defies easy summation—for he was a business tycoon, a pioneer aviator, a Hollywood mogul, a Washington powerbroker, and an eccentric recluse. And these varied descriptions barely scratch the surface.

An enigmatic figure, Hughes had great affluence, which bought him considerable influence. There seemed to be no limit to either his talents or to his enormous fortune. Hughes personally piloted the very planes which he helped design and which Hughes Aircraft built to his exacting specifications.

Hughes was a real-life version of the swash-buckling characters Clark Gable played in the movies. With his trademark moustache, he even resembled Gable. Hughes in his heyday courted the spotlight assiduously and was romantically linked in the tabloids to Jean Harlow, Ava Gardner, and Katherine Hepburn.

Hughes became an icon who left his mark across the American landscape. That was until his idiosyncratic nature and a series of spectacular plane crashes impaired his physical health and undermined his mental stability. Hughes suddenly, and without rhyme or reason, withdrew from public view.

Today if Howard Hughes is remembered for anything, it is for his eccentric behavior. Hughes suffered from OCD—obsessive-compulsive disorder. When young, it accounted for much of his drive. As with many sufferers of OCD, he had an all-consuming mania for cleanliness and a phobia regarding germs.

As he aged, Hughes' inexplicable behavior became more acute. He insisted on using Kleenex tissues to pick up objects to insulate himself from bacteria. In his later years, he was looked after by a retinue of Mormon retainers. Serving as sterile automatons, the Mormons rigidly implemented Hughes' bizarre hygienic rituals.

As Hughes retreated from the world, he was neither seen nor photographed. Yet he maintained his hold on the public's imagination. Press and public alike speculated about his living like some crazed hermit cloistered in his Las Vegas penthouse. Who was the real Howard Hughes was a question everyone was asking?

This situation proved an irresistible temptation for Clifford Irving. A mildly successful writer, Irving devised the most brazen con job in the history of American publishing. Irving was a charming rogue who managed to swindle McGraw Hill and Time-Life to the tune of over a million dollars.

Irving first came up with this scheme after reading "*The Case of the Invisible Billionaire*," an April 19, 1970 *Newsweek* cover story about Hughes.[1] This article provided him not only the spur, but the piece also contained samples of Hughes handwriting which Irving was able to use to forge letters and signatures.

Another stimulus may have come from Irving's prior literary association with Elmyr de Hory, the noted art forger. A Hungarian-born painter, de Hory made a small fortune imitating the works by Modigliani, Picasso, Matisse and selling them to museums, galleries, and private collectors.[2]

While both men were living on the Spanish island of Ibiza, de Hory asked Irving to write his life's story. The resulting book—*Fake* (1969)—cemented their friendship. When Time named Irving the Con Man of the Year, the magazine used a portrait of Irving painted by de Hory on its cover.[3]

Irving produced dispatches that appeared to be in Hughes' handwriting. Emulating the script of letters printed in *Newsweek*, the forgeries were good enough to fool expert graphologists. Irving always claimed he had generated these forgeries with his own hand.[4] Conjecture has it that Irving had de Hory's help.

Irving delved deeply into Hughes's life, unearthing every detail that was publicly available. Then Irving caught a break. He obtained unpublished diaries by a Hughes confidant named Noah Dietrich. The specifics derived from Dietrich's diaries added an additional aura of authenticity which fooled many.

Irving proposed the prospective phony memoir to his editors at McGraw Hill. The imprint had previously published *Fake*. Irving's ruse was that Hughes was so taken by *Fake*, that it led to an ongoing correspondence between the two men. It was the billionaire, according to Irving, who suggested they collaborate on a book.

Playing his hand with considerable aplomb, Irving went ahead armed with his forged letters, particulars from Dietrich's diaries, and a lot of moxie. The editors at McGraw Hill were completely taken-in by Irving's intrigue. The book when published represented not only a potential best-seller, but quite a literary coup.

Frankly, it was just too good to be true. The text was cobbled together with the help of Irving's researcher Richard Susskind. Irving and Susskind each took turns pretending to be Hughes, while the other asked questions. By transcribing their taped conversations, the subsequent manuscript had an 'as-told-to' quality.

Irving's guile was not limited to the printed page. Acting on his own behalf and as Hughes' personal representative, Irving received an advance of $100,000, with an additional $400,000 to be paid to Hughes.[5] Irving later bargained the sum up to $765,000.[6] *Life* magazine bought the serial rights for $250,000.[7]

McGraw Hill's checks were, at Irving's direction, made out to "H. R. Hughes". The publisher naturally assumed the money would be going to Howard Robard Hughes. Why Hughes needed the money in the first instance, $400,000 is a paltry sum when compared to the billions Hughes controlled, was never asked.

These sums were deposited in a Swiss bank account opened not by a man, but by a woman who claimed to be one 'Helga Rosenkranz Hughes.'[8] The account, it turned out, had been open on a falsified Swiss passport by Irving's wife Edith Sommer.

Edith, a Swiss citizen, was not involved with the writing of the book. Her involvement came later. It was she who deposited and withdrew the monies received in Zurich. She participated only in this aspect of the fraud and did so only to bolster her troubled marriage with Irving.

In December 1971, McGraw Hill announced it would be publishing *The Autobiography of Howard Hughes*. Irving had bluffed his way past his editors, their lawyers, handwriting experts, and even a bevy of skeptical journalists. To every query, he seemed to have a clever comeback that somehow always sounded plausible.

In order to work, Irving's scheme depended on Hughes' acquiescence. Irving never thought that Hughes would come forward. Having convinced the publisher to keep things under wraps until they were ready to go to press, perhaps Irving had also conned himself.

Hughes, at the outset, remained silent. Suddenly his representatives contested the book's legitimacy. Irving claimed they were not speaking for Hughes but rather that he was. It would thus take the real Howard Hughes to put the upstart Irving in his place and expose him as a charlatan.

Hughes did so in his own inimitable fashion. As weird as Hughes may have been, he was still capable of rising to the occasion. A press conference was held in Los Angeles. Instead of appearing before the cameras, Hughes, who was in the Bahamas, was interviewed on the telephone.

Reporters questioned the disembodied voice to confirm Hughes' identity. Hughes did more than challenge the legitimacy of the manuscript. He stated unequivocally he did not know, nor had he ever heard of Clifford Irving.[9] A media maelstrom ensued. This was the pivotal moment when the hoax began to unravel.

As publication neared, McGraw Hill undertook an exhaustive investigation with the cooperation of Swiss banking authorities. The Swiss take their banking very seriously and were embarrassed by the scandal. McGraw Hill turned over the evidence it had accumulated to the U.S. Attorney for the Southern District of New York.

Irving's mistress, the Danish singer/socialite Nina van Pallandt, testified that Irving was fooling around with her when he was supposedly with Hughes. This revelation further diminished Irving's credibility. It also caused the rupture of the Irving's marriage. The couple divorced soon after they were released from their respective jail cells.

Boxed into a corner, Irving could no longer deny the obvious. Facing federal and state criminal charges, the Irvings and Susskind came clean. They made full confessions and pled guilty to lesser charges. Irving was forced to return the monies advanced by McGraw Hill and Time-Life.

The Irvings pleaded guilty to conspiracy in federal court. In state court, along with Susskind, they pled guilty to conspiracy and grand larceny. Irving was sentenced to two and one-half years and served seventeen months.[10] Susskind was sentence to six months, of which he served five.[11]

Edith served only two months of a two-year sentence, with the remainder of her time being suspended. After her release from the Nassau County jail, she returned to Switzerland. There she was prosecuted and served a further sixteen months in a Swiss prison for larceny and forgery.[12]

As the hoax unraveled, it became clear Irving had gambled on the proposition that Hughes was too ailing, too crazy, or too cloistered to unmask him. Although it was Hughes who put an end to charade, Irving had managed to do the near impossible—he got Hughes to come out from seclusion and go on the record.

One of the more interesting sidebars to the hoax revolves around another big-time scandal from the 1970's—Watergate. There is conjecture that burglars were sent to the Democratic headquarters at the Watergate complex fearing Irving's inquiries might disclose some unsavory connections between Hughes and President Nixon.[13]

Hughes died in 1976, appropriately enough in flight while en route from Acapulco to Houston. He had been staying in Mexico and in desperate need of medical attention. Despite being the richest man in the world, Hughes essentially died of malnutrition and living in self-imposed squalor.

Hughes' corpse was emaciated (weighing in at a scant ninety pounds), his finger and toenails had grown-out to absurd lengths, and the FBI needed to resort to fingerprints to conclusively identify the remains.[14] His multi-billion-dollar estate was divided among his surviving and estranged relatives after several court cases.[15]

After serving his time in prison, Irving became a sort of B-list celebrity and a regular on the tv talk show circuit. Always the self-promoter, the Hughes Hoax became his calling card, his claim to fame. Clifford Irving died of pancreatic cancer in 2017. The hoax was the first line in all his obituaries.

Richard Gere portrayed Irving in *The Hoax* (2006). The movie, which took considerable liberties with actual events, flopped at the box office. Irving resented Gere's depiction and renounced the film. He eventually published his manuscript—*Clifford Irving's Autobiography of Howard Hughes*—as an e-book in 2012.[16]

Therein lies the ultimate irony. Had Irving published the work as straight non-fiction or even as a novel, he would not have gotten into any trouble with the law. But he also would not have gotten either the six-figure advance from McGraw Hill or gotten his moment of fame/infamy.

Irving's scam speaks to more than one individual's desire to make a name for himself or to perpetrate a potentially lucrative con. With all his charisma, Irving could not have gotten as close as he did to pulling this caper off if not for the universal fascination with the lives of celebrities.

Irving's fifteen minutes of fame have long since lapsed. But the American people never seems to grow tired of scandal. In our media saturated age, the public must constantly be entertained. The true legacy of Clifford Irving's Howard Hughes Hoax rests with the appetites of the audience not the avarice of the huckster.

1. Jerry Brownstein, *The Great Hoax: A Tale from the Wild Days of Ibiza*, (April-June 2018) Ibicasa Magazine at https:///www.ibicasa.com.
2. de Hory and Irving were featured in Orson Welles' F *For Fake* (1973), a cinematic essay on artistry and authenticity.
3. February 21, 1972.
4. Perhaps he did, Irving's father was the noted illustrator Jay Irving.
5. William Grimes, *Clifford Irving, Author of a Notorious Literary Hoax, Dies at 87* (December 20, 2017) New York Tines at https:///www.nytimes.com.
6. Jennifer Kay, *Clifford Irving, Howard Hughes prankster, has died at 87*, (December 20, 2017) at https://www.660citynews.com.
7. Grimes, *supra*.
8. Kay, *supra*.
9. The press conference was such a sensation, that a Vinyl LP was released in 1972 consisting of a recording of the exchanges between Hughes and the reporters in Los Angeles.
10. Brownstein, *supra*.
11. Steve Marble, Clifford Irving, author of notorious Howard Hughes literary Hoax, dies at 87, (December 21, 20170 Los Angeles Times at https://www.latimes.com.
12. Kay, *supra*.
13. Michael Drosnin, *The Secret World of Howard Hughes*, (February 4, 1985) McLean's at https://archive.macleans.ca.
14. Bryan Kerr, *Howard Hughes Fingerprints Sent to the FBI – This Forgotten Day in Houston*, (April 6, 2015) at https://blog.chron.com.
15. Hughes had no children nor was he married when he died. After his death, a will supposedly written in Hughes' own hand was found at The Church of Jesus Christ of Latter-day Saints in Salt Lake City. The "*Mormon Will*" gave $1.56 billion to assorted charities and left $156 million bequeathed to Melvin Dummar. In 1978, a Nevada court determined the *Mormon Will* was a fake and ruled that Hughes died intestate. This incident later became the basis of the film *Melvin & Howard* (1980). Hughes's estate was eventually split in 1983 among 22 cousins.
16. Brownstein, *supra*.

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FOCUS:
EXPERT AFFIRMATIONS

Building A Better Expert Affirmation

Christopher J. DelliCarpini

Summary judgment motions are a fact of life in medical malpractice litigation, and they often hinge on the parties' medical expert affirmations. For the most part, the facts are not only undisputed but documented throughout the medical records. The issues then are whether the defendant physician departed from good and accepted medical practice and, if so, whether any of those departures proximately caused the injuries claimed—both of which require expert medical opinion.

Some common-sense techniques can ensure that our experts' affirmations present their opinions most effectively. Just as any expert's opinion can be conveyed in trial testimony comprehensible to any juror, it can also be reduced to an affirmation that any judge, clerk, or attorney can appreciate. Indeed, the more complex the issues, the more important that we lay out the expert's opinion as clearly as possible.

The Law of Expert Opinions

The CPLR says little directly about medical expert affirmations but offers some guidance. CPLR §3101(d)(1)(i) speaks to pretrial disclosure, but it gives the clearest indication of what expert opinions should provide: the subject matter of the expected testimony; the substance of the facts and opinions on which the expert will testify; the expert's qualifications; and the grounds for each opinion. CPLR §3212 permits submission of expert opinion for or against summary judgment without prior disclosure, though your court may require otherwise.[1]

The CPLR speaks in detail, however, to the execution of an expert affirmation. CPLR §2106(a) permits New York-licensed attorneys, physicians, osteopaths or dentists who are nonparties to make out an affirmation "under the penalties of perjury" instead of an affidavit. CPLR §2309(c) allows affirmations taken out of state if accompanied by a certificate of conformity that complies with Real Property Law §299-a.[2] CPLR §2001 permits courts to disregard defects in such certificates where no substantial right of a party is prejudiced but preparing a template certificate should help you avoid having to cite this rule.

The Uniform Rules apply to medical expert affirmations, including the word limits on "affidavits, affirmations, briefs, or memoranda."[3] In cases with multiple defendants facing different theories of liability, those limits may warrant multiple expert affirmations. Any affirmation exceeding 4,500 words, however, requires bookmarks in the PDF—easy enough to create, but a little practice before the filing deadline looms would be prudent.[4]

Appellate decisions show us what makes a sufficient medical expert affirmation. We all know that expert testimony is necessary to prove a deviation and proximate cause,[5] but experts must "specify the acceptable standards of medical care" applicable to the defendant and explain how the defendant did or did not deviate from those standards.[6] Merely recounting the treatment and conclusorily opining for or against it will not suffice.[7]

Expert Affirmation As Testimony, and As Exhibit

A medical expert's affirmation serves a similar purpose as trial testimony, and we should prepare the former much as we would the latter. The expert gives the substance, but the attorney provides the form, structuring the opinion for the most effective presentation. Litigators can review transcripts for the common, intuitive form that trial attorneys use to make medical opinions comprehensible to the lay juror—a goal no less desirable when our audience is a busy judge or law clerk.

Of course, the affirmation's immediate purpose is as an exhibit for or against summary judgment and must satisfy that role as well. It should refer to the motion exhibits, citing pages of particular relevance. It should support our arguments on the motion, though requests for relief belong in the attorney's affirmation and memorandum.

Speaking of exhibits, a few steps will make our medical record deposition exhibits easier to use down the road. If you make the entire chart from a given provider a single exhibit and then paginate it, you can refer in depositions to particular page numbers. This will make it much easier for the trial attorney, who may try the case

years hence, to identify the exact documents discussed at deposition and select trial exhibits. Paginating is quick and easy when the chart, however large, is a PDF—another reason to request medical records in electronic form and immediately scan any records that come in hard-copy.

Substance, Structure, and Style

Every medical expert affirmation should have certain elements, and there is every reason to present these elements with the same structural techniques that we use in our affirmations and memoranda. Even simple headings will identify where an affirmation presents the requisite elements, helping readers find those elements and helping attorneys ensure that we have covered the bases. Rare as it may be, a table of contents is perfectly acceptable in an expert affirmation if it will help your readers.

We understandably focus on the substance of medical expert opinion right, but style can make that substance easier to follow. Short sentences and short paragraphs make each point easier to digest before moving to the next. Formulaic language in the paragraphs can signal the elements of each opinion much as headings do. Citation to particularly relevant exhibits helps, though expert opinions need not do so as scrupulously as must a statement of material facts. And avoid the passive voice wherever possible; personal injury litigation is about accountability, which the passive voice obfuscates.

In addition to the common features, each section of the affirmation benefits from particular techniques.

The Introduction must meet certain legal requirements, but also should advocate for the expert's opinion. After declaring the requirements of CPLR §2106, a single prefatory paragraph (or just a sentence!) can summarize the expert's opinions before getting into the details.

The Qualifications section should show not just that your expert is legally qualified to offer opinion, but also that they have been in the defendant's shoes. Where a physician opines outside his or her area of specialization, they must lay a foundation for the reliability of their opinion.[8] But even where the expert has the credentials to testify, experience with the condition, procedure, device, or medication at issue will minimize the chances of speculative or conclusory opinions.

The Bases for Opinion can be a simple list of documents reviewed but should include the exhibits for and against the motion. Apart from that, a general reference to their experience and education will suffice without the expert opening themselves to impeachment with some learned treatise.[9]

Opinions on departure may not be simple but can and should be clear. A simple pattern is to begin, as you would at trial, with a brief statement of the expert's opinion followed by the bases for that opinion: the plaintiff's condition at the time; the standard of care for patients in such condition; the treatment rendered by the defendant physician; and an explanation of just

how that treatment did or did not depart from the standard of care.

We all know to qualify opinions with "to a reasonable degree of medical certainty," but language like "in this instance, the standard of care required..." and "the defendant did/did not depart from the standard of care because..." helps the reader identify the elements of each opinion. It may prove helpful to set out some background medicine, either up-front or throughout the affirmation as it arises in the narrative.

Opinions on causation must go step by step from the alleged departure to the claimed injury, touching on each and every possible intervening cause along the way. Too often opinions go on at length about the treatment and the departures, only to leave all mention of causation to a single paragraph at the end, almost as an afterthought. Devoting a separate section to the issue makes it easier for experts and attorneys to ensure that the issue is thoroughly addressed. A good example of defense and plaintiff's experts addressing causation in a case of delayed diagnosis is *Neyman v. Doshi Diagnostic Imaging Services, PC.*[10]

Rebuttal of opposing expert opinions is not available to the movant unless they can explain why their expert did not address in their motion papers those opposing opinions.[11] Where rebuttal is permitted, however, be sure to itemize the opposing expert's opinions and rebut each and every one, even if only be reference to earlier in the affirmation.

The Finished Product

When working with an expert through drafts of an affirmation, exchange word-processing files only if each of you will be directly editing the document.

The risk in exchanging such files is that they will not appear as intended on the recipient's computer. If only one party is making the actual edits, then exchange PDFs of each draft to ensure that the affirmation looks as intended.

When the expert sends you his executed affirmation, do not simply submit a scan as your PDF exhibit. Scans inevitably look worse than PDFs generated directly from word-processing software. Therefore make a PDF of the final draft and swap out the blank signature page for the scan of your expert's executed page. The result will be a cleaner document, and there is nothing objectionable about this technique provided that the text is exactly what the expert signed off on.

Parties (invariably plaintiffs) may redact the expert's name consistent with CPLR §3101(d)(1)(i), but the Second Department has held:

> A redacted physician's affidavit should not be considered in opposition to a motion for summary judgment where the plaintiff does not offer an explanation for the failure to identify the expert by name and does not tender an unredacted affidavit for in camera review.[12]

That explanation can come in the attorney's affirmation, but submit the unredacted affirmation to chambers when you file the unredacted affirmation. And whenever you must redact a document, the redaction feature in Adobe Acrobat or whatever PDF editing software you use will take less time, be more reliable, and look more professional than anything you could do with a magic marker.

The Learning Process

In an area as case-specific as medical expert affirmations, we can learn a great deal from successful affirmations in similar cases. In an era of mandatory e- filing, the expert affirmations in any case should be readily accessible on NYSCEF or PACER. We also should not hesitate to learn from our adversaries in a given litigation, recognizing what they do well and striving to match it in our own work. Both sides have an interest in the highest quality expert affirmations, as they will allow the court to expeditiously determine the motion on the facts and the law.

1. See *Washington v. Trustees of Methodist Episcopal Church of Livingston Manor*, 162 A.D.3d 1368, 1369 (3d Dep't 2018)(citing Third Judicial District Expert Disclosure Rule).
2. *Midfirst Bank v. Agho*, 121 A.D.3d 343, 348–49 (2d Dep't 2014).
3. 22 NYCRR § 202.8-b(e).
4. 22 NYCRR § 202.5(a)(2).
5. *Joyner v. Middletown Med., PC*, 183 A.D.3d 593, 594 (2d Dep't 2020).
6 *Dupree v. Westchester Co. Health Care Corp.*, 164. A.D.3d 1211, 1214 (2d Dep't 2018).
7. *Wodzenski v. Eastern Long Island Hospital*, 170 A.D.3d 925, 927 (2d Dep't 2019).
8. *DeGiorgio v. Racanelli,* 136 A.D.3d 734, 737 (2d Dep't 2016).
9. See *Reilly v. Ninia*, 81 A.D.3d 913 (2d Dep't 2011).
10. 153 A.D.3d 538 (2d Dep't 2017).
11. See *Master v. Boiakhtchion*, 122 A.D.3d 589, 590–91 (2d Dep't 2014).
12. *Colletti v. Deutsch*, 150 A.D.3d 1196, 1198 (2d Dep't 2017).

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FOCUS: LAW AND AMERICAN CULTURE

Norman Rockwell at the Bar: The Cornerstones of American Democracy—Civics, Civility, and Collaboration

Rudy Carmenaty

My fundamental purpose is to interpret the typical American. I am a storyteller.
——Norman Rockwell

On May 1, 2023, Law Day, the Nassau County Bar Association presented *Norman Rockwell at the Bar: The Cornerstones of American Democracy—Civics, Civility, & Collaboration*. The program was a tribute to the art of Norman Rockwell, and this article is an adaptation of the remarks delivered on this occasion.

Over more than half-a-century, Norman Rockwell was a sublime chronicler of life in the United States. Rockwell's art portrayed the American experience absent sarcasm or disenchantment. With benevolent affection, his pictures tell stories that reflect a pride in our country and a firm belief in our democratic heritage.

Rockwell has often been dismissed by the intelligentsia for being naïve and unsophisticated. His enormous popularity bred contempt among art critics. Yet there is more to his homespun images than meets the eye. His total body of work speaks to civility and fostering a collaborative spirit in challenging times.

In the 1920's, Rockwell captured the arcadia of the Jazz Age. In the 1930's, he provided a salve from the ravages of the Great Depression. In the 1940's, he depicted a nation steadfast during a global war. In the 1950's, he presented an expansive America at its zenith.

And in the 1960's, Rockwell documented the struggle with race and the halting progress made toward a more perfect union. By the 1970's, it was a reflective artist who depicted a more pluralistic America. By the time Rockwell died in 1978, it was a grateful nation that marked the passing of an American original.

Rockwell's brush captured everyday people going about their lives in all their simple glory. He specialized in showing the ordinary and doing so with tolerance and an appreciation for all our subtle, and not so subtle, differences. In his paintings, the artist/illustrator offers nuanced portraits which still resonate.

Rockwell's oeuvre consisted of thousands of original paintings and illustrations, which when taken together form a tapestry of our collective past. Renowned for his covers for *The Saturday Evening Post*, he garnered his first sale to the magazine in 1916.[1] This began an association that resulted in 322 original covers over the next forty-seven years.[2]

It should be noted, Rockwell did not paint his pictures to be seen as original oils on canvas. Rather, what he was selling to the *Saturday Evening Post* and to his commercial clients were reproduction rights. Once sold and the image reproduced, the painting was returned.

Only in later years did Rockwell, and his audience, realize there was a value to his creations beyond their initial sale. Perhaps the first inkling that his work would have a lasting impact was seen during World War II. Like most of his fellow countrymen, Rockwell desperately wanted to contribute to the war effort.

This patriotic impulse found its ultimate expression in a series of oil paintings called the *Four Freedoms*. These meticulously crafted images—*Freedom of Speech*, *Freedom of Worship*, *Freedom from Want* and *Freedom from Fear*—remain a vibrant paean to American ideals eight decades later.

As in peacetime, Rockwell emphasized the human dimension. A pacifist by nature, his illustrations did not glorify combat. He instead presented in his art a sense of decency and of democracy that was removed from the sordid aspects of warfare, and which stood in stark contrast to Nazi propaganda.

The paintings were inspired by President Franklin Roosevelt's 1941 State of the Union speech. FDR proclaimed four essential human rights that should be extended to every corner of the world. The Four Freedoms provided a rationale for American involvement in World War II following Pearl Harbor.

As envisioned and proclaimed by the President, the Four Freedoms were a tangible goal for world peace and a means of affirming human dignity:

> *In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms.*
>
> *The first is freedom of speech and expression–everywhere in the world.*
>
> *The second is freedom of every person to worship God in his own way — everywhere in the world.*
>
> *The third is freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants-everywhere in the world.*
>
> *The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor–anywhere in the world.*
>
> *That is no vision of a distant millennium. It is a definite basis for a kind of world attainable in our own time and generation. That kind of world is the very antithesis of the so-called new order of tyranny which the dictators seek to create with the crash of a bomb.*[3]

The motifs underlying the Four Freedoms became part of the Atlantic Charter signed by Roosevelt and Winston Churchill in August of that year.[4] The Atlantic Charter would later serve as the foundation of the Charter of the United Nations in 1945 and for the Universal Declaration of Human Rights in 1948.

Rockwell envisioned his rendition of the *Four Freedoms* as an affirmation of American values, and he devoted all his energies to their realization in relatable terms. His goal, simply stated, was "*to take the Four Freedoms out of the noble language [of FDR] and put them in terms everybody could understand.*"[5]

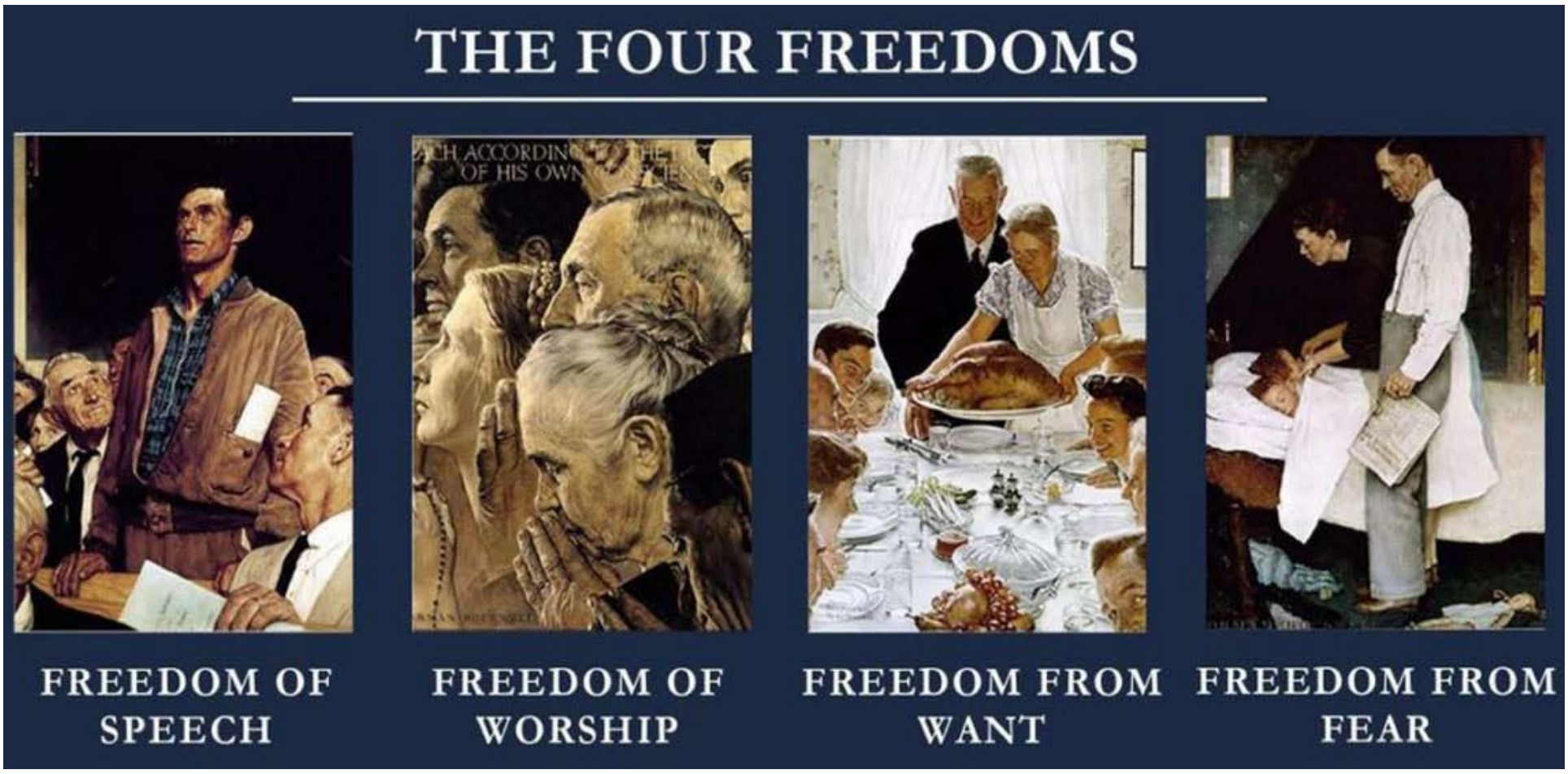
The paintings when completed were reproduced not on the cover but within the pages of the *Saturday Evening Post* over four consecutive issues in 1943: *Freedom of Speech* on February 20, *Freedom of Worship* on February 27, *Freedom from Want* on March 6, and *Freedom from Fear* on March 13.[6]

For each of the four paintings an essay was commissioned by the *Post*. Sequentially, the articles were penned by novelist Booth Tarkington, historian Will Durant, Filipino author Carlos Bulosan, and poet Stephen Vincent Benet.[7] The *Four Freedoms* were an immediate sensation and became a cultural phenomenon.

The government had initially rejected Rockwell's concept, fortunately his editors at the *Post* eagerly embraced the idea. This led the Treasury Department to sponsor a war bond drive in 1943. Seen by 1,222,000 people during a sixteen-city tour, the *Four Freedoms* raised $133 million.[8]

Freedom of Speech, along with *Freedom of Worship*, is in fact enshrined in the First Amendment to the Constitution. The idea behind *Freedom of Speech* was taken from an Arlington, Vermont town meeting. Once Rockwell conceived the theme, he used local townspeople as models.
The painting denotes a lone dissenter, speaking his mind freely, as he objects to spending money on the construction of a new school building.[9] Jim Edgerton—the painting's focal point—was a dairy farmer and he is presented in a Lincolnesque manner.[10] Edgerton differs from his neighbors in several ways.

First of all, he seems to be a man who works with his hands. He is dressed in working man's clothes, his



hands which grip the bench in front of him are unclean. Those surrounding him, all of whom are listening respectfully, are all wearing ties and jackets indicating that they are from the professional classes.

Since Edgerton does not wear a wedding ring, while one of his listeners does, it can be assumed that he is single and may not have any school-age children. In the end, Edgerton will be outvoted. Nevertheless, he has his say in the best traditions of direct democracy inherent in the New England town meeting.

Perhaps what is most needed today, considering the prevalence of 'cancel culture,' is a respect for opposing points of view and a belief that even when individuals disagree there is no cause to be disagreeable. Free speech comes easy if all concur. Its true test comes when discordant views are tolerated.

Themes of religious expression recur in Rockwell's paintings. *Freedom of Worship* depicts eight worshipers of different faiths and denominations in profile, standing shoulder to shoulder. The eight figures—men and women, white and black, old and young—are each seen in prayer and/or in contemplation of a higher power.

In the painting's lower right corner there is an Orthodox Jew. The young lady with the well-lit features on the left-side of the painting is holding a Catholic rosary. There is an African American woman, possibly a Baptist. Then there is a man between them who is seen holding his chin (in another example of Lincolnesque imagery). Maybe he is less fervent in his faith.

These people are worshipping, communally and separately, each in their own way yet at the same time. In short, it is an ecumenical scene that is embracingly ecumenical. Above them all is a Jeffersonian inscription. *Freedom of Worship* is the only one of the four paintings to contain any text, the legend reads:

> EACH ACCORDING TO THE DICTATES OF HIS CONSCIENCE

This was a time when the world was engulfed in religious hatred, and in Europe six million souls were being killed simply because they believed in the God of Abraham. Rockwell as an alternative painted a portrait of Americans affirming the free expression of their given faith with a respectful acceptance for the beliefs of others.

Freedom from Want, also known as *Rockwell's Thanksgiving*, is one of the artist's most popular images. It shows a family gathering indicating multi- generation affection and material abundance without any great ostentation. The painting depicts a family about to partake in a holiday meal.

The family patriarch stands at the head of the table as the matriarch presents a turkey on a platter to her loving family. The light from the window appears to give the proceedings a benediction from above and the image in many ways harkens back to a Puritan ideal of Americans being blessed in some special way.

In the succeeding decades *Freedom from Want* has taken on a life of its own. It revels in American virtue being rewarded. To some, the painting seems to promote consumer culture. Others have read the painting to suggest that freedom from want is to be found in private initiatives rather than from the government.

No matter how it has been interpreted, this idyllic image is emblematic of the 'American Dream' realized. Of the *Four Freedoms, Freedom from Want* best represents the popular conception of America most often embraced by Americans themselves and by people around the globe.

Freedom from Fear is the final installment in the series. This rather evocative painting has a mother and father putting their two small children to bed. The youngsters sleep peacefully, their watchful parents looking over them. The scene is universal in its implications, but it is firmly rooted in its time and circumstance.

It is the context of a world war that gives this tranquil scene its special poignancy. The father has a newspaper in his left hand with a banner headline reporting the 'horror' of aerial bombing. His concern, and that of his wife, is squarely on their children and the recognition that they are thankfully removed from harm's way.

Whatever FDR's specific defense policies may have been, Rockwell was able to articulate a vision of safety and security during an existential crisis which impacted the whole of American society and beyond. Of all the *Four Freedoms, Freedom from Fear* is the most intimate and it retains its impact most vividly still today.

Americans, in light of their current problems and various divisions, long for the values of community and continuity. Nostalgia often filters their view of the past. Perhaps there never was a golden age, except in Rockwell's fertile imagination. Therein lies the man's true gift.

As exemplified by the *Four Freedoms*, Rockwell painted his pictures during a time marked by depression, global war, civil unrest, and social dislocations. Present day America is not all that far removed from such conditions. For this is a time of economic troubles, world tensions, political turmoil, and ever-constant change.

Rockwell's paintings provide a balm of sorts which touches the heart and inspires what Abraham Lincoln called "*the better angels of our nature*."[11]

In Rockwell's art we see our yesterdays. We can, with a little effort, see today. And if we look closely enough, we can discover a path which points toward a better tomorrow.

1. Rockwell's first sale to the *Saturday Evening Post* was *Mother's Day Off* which appeared on the cover of May 20, 1916 edition of the magazine.
2. See Christopher Finch, *Norman Rockwell*. 332 Magazine Covers, (1st Edition 1979).
3. President Franklin Roosevelt's Annual Message (Four Freedoms) to Congress 1941 at https://www.archives.gov.
4. Sturt Murray and James McCabe, *Norman Rockwell's Four Freedoms*, 8 (1st. Edition 1993).
5. *Id.* at 13.
6. *Id.* at 61.
7. *Id.*
8. Laura Claridge, *Norman Rockwell A Life*, 313 (1st Edition 2001).
9. George Putnam, *Freedom of Speech Painting*, (January 3, 2019) at https://switchelphilosopher.blog.
10. Claridge, *supra*, 318.
11. Spoken by Lincoln at his First Inaugural Address, March 4, 1865.

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123rd Annual Dinner Gala
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Photos By: Hector Herrera

NCBA Committee Meeting Calendar June 6, 2023– June 28, 2023

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.

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WOMEN IN THE LAW
12:30 PM
Melissa P. Corrado/
Ariel E. Ronneburger

WEDNESDAY, JUNE 7
SURROGATES COURT
ESTATES & TRUSTS
5:30 PM
Stephanie M. Alberts/
Michael Calcagni

WEDNESDAY, JUNE 7
MATRIMONIAL LAW
5:30 PM
Jeffrey L. Catterson

TUESDAY, JUNE 13
LABOR & EMPLOYMENT
LAW 12:30 PM
Michael H. Masri

WEDNESDAY, JUNE 14
EDUCATION LAW
12:30 PM
Syed Fahad Qamer/Joseph Lilly

WEDNESDAY, JUNE 14
ALTERNATIVE DISPUTE
RESOLUTION
12:30 PM
Suzanne Levy/Ross J. Kartez

THURSDAY, JUNE 15
GOVERNMENT RELATIONS
12:30 PM
Nicole M. Epstein

TUESDAY, JUNE 27
DISTRICT COURT
12:30 PM
Bradley D. Schnur

WEDNESDAY, JUNE 28
CYBER LAW
12:30 PM
Thomas J. Foley/
Nicholas G. Himonidis

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