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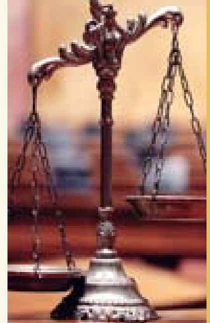

JUDICIARY NIGHT

THURSDAY, OCTOBER 10

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WE CARE FALL FESTIVAL

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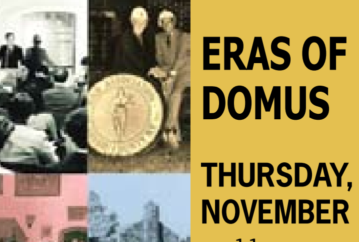

ERAS OF DOMUS

THURSDAY, NOVEMBER 14

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Join Us for NCBA Judiciary Night

The Nassau County Bar Association Judiciary Night—the Association's annual event to celebrate the esteemed judiciary of Nassau County—will be held this year on Thursday, October 10, 2024, at 5:30PM at Domus.

The special evening gives local attorneys and judges the opportunity to socialize and network with colleagues in a relaxed atmosphere while honoring Nassau County's judiciary. Experienced and new attorneys alike can build connections that will enhance their professional lives.

"The NCBA is very fortunate to have a local judiciary who are not only extremely hardworking and of the highest integrity but are also active in our Association and welcoming to our membership," says NCBA President Dan Russo. "Judiciary Night is our opportunity to recognize and thank our judiciary. It is a highlight of the Bar year."

Tickets are $105 for NCBA Members, $160 for non-members, and $70 for magistrates, law secretaries, court staff, and law students. Sponsorships are available from $250 to $1,000 and include event tickets. For more information or to register for Judiciary Night, contact events@nassaubar.org or (516) 747-1361.

Judiciary Night

Join the Nassau County Bar Association to celebrate the esteemed Judiciary of Nassau County.

Thursday, October 10, 2024
5:30 PM at Domus

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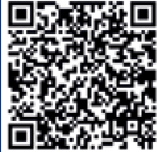

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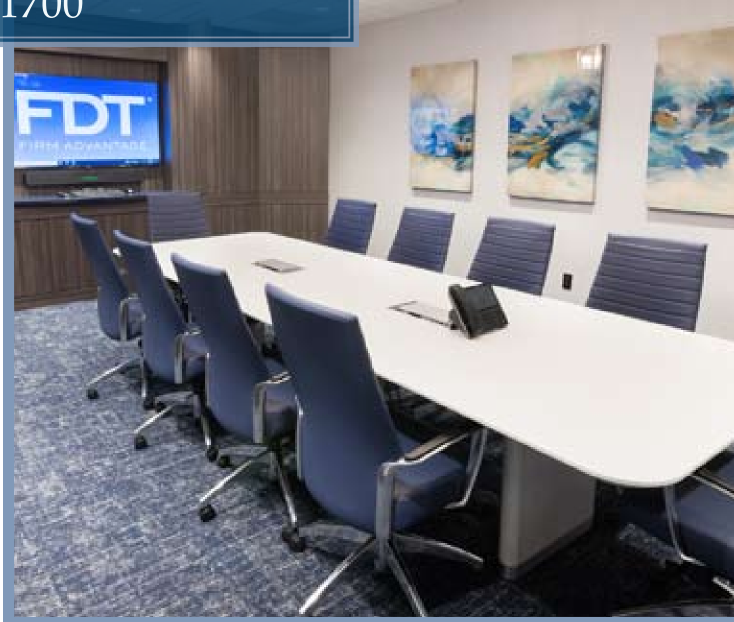

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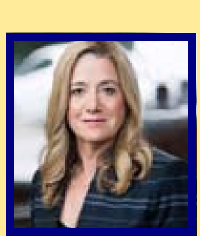
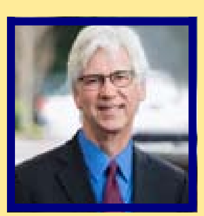
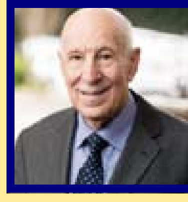
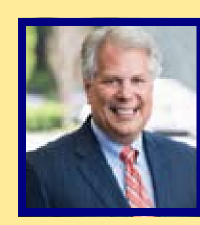

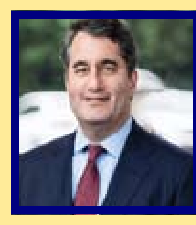

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From the President

Daniel W. Russo

On Saturday, September 21, I had the pleasure of attending dinner at the NCBA Lawyer Assistance Program (LAP) Fall Retreat. The evening was filled with warmth, inspiration, laughter and the occasional tear. I was truly humbled to be there and proud of our Association for offering a program that assists our colleagues in need during some of the toughest times in their lives.

Saturday evening inspired this column, a Q&A with LAP Director Beth Eckhardt. Beth and I hope that what follows will inform the attorneys and law students of Nassau County what LAP does and, perhaps, reach attorneys in need of LAP's assistance.

Dan: Beth, please explain to our readers what LAP is and what services it provides?
Beth: The NCBA LAP is one of only three lawyer assistance programs in New York State. LAP services are free, confidential, and available to lawyers, judges, law students, and their immediate family members who are struggling with substance use, mental health, job-related stressors, and other compulsive behaviors.

LAP provides professional counseling, peer support, outreach, and education to law schools, law firms, legal departments, and members of the NCBA. Because lawyers struggle with problematic drinking, depression, anxiety, and suicidality at higher rates than the general public, our programs include the prevalence of these issues and address the stigma of getting help. LAP also provides information on lawyer wellness, resiliency, vicarious trauma, and more.

Dan: In addition to LAP, we are fortunate to have a Lawyer Assistance Committee (LAC). I've often wondered what the difference is between LAC and LAP.
Beth: LAC is the backbone of LAP. LAC members are committed to helping lawyers in need. They organize and participate in outreach and education and serve as monitors for the LAP Monitoring Program. They also provide peer support, chair meetings, arrange and participate in CLEs, and plan the annual LAP 12-Step Retreat.

LAP is directed by a licensed mental health professional who provides direct services to lawyers, including treatment evaluations, need assessments, and referrals to outside counseling and treatment programs. The LAP Director also writes grants, oversees the administration of the program, participates in outreach and education, and supervises monitoring agreements.

Dan: What can members of the NCBA do to help LAP?
Beth: LAP is fortunate to be funded by grants provided by the Nassau Bar Foundation's WE CARE Fund, the Office of Court Administration, the NY Bar Foundation, and Nassau County Boost funds. These funds, however, are time-limited and subject to periodic applications. LAP remains in need of dedicated, long-term funding to ensure that the program can operate to its full potential.

There are several ways that NCBA members can assist the program. They can become members of the LAC or program volunteers. They can invite LAP to speak at their law firms or committee meetings. Most importantly, they can spread the word about LAP to help make sure that lawyers who are in need know that LAP is here for them.

Dan: How can LAP help lawyers who may not have a substance abuse or mental health problem but are drowning in work and have no time to enjoy life?
Beth: LAP is very concerned with lawyer well-being, and we know that work-life balance is essential to well-being. LAP hosts a weekly lawyer well-being support group on topics like time management, procrastination, peer support, setting boundaries, the signs of healthy and unhealthy stress, and law practice management are discussed. This group is held virtually on Tuesdays from 1:00 to 1:45 pm.

Dan: How can attorneys feel confident that their colleagues and members of their firms won't find out that they are getting help from LAP?
Beth: All LAP communications are privileged pursuant to *Judiciary Law Section 499* (expressly coextensive with attorney-client privilege) and New York Rule of Professional Conduct (RPC) 8.3(c)(2) (exempting LAP personnel from mandatory reporting requirements).

Dan: What can a lawyer do who is worried about a colleague who is struggling but doesn't want to approach the attorney themselves?
Beth: LAP often receives calls from lawyers who are concerned about a colleague. Some are concerned that a colleague is drinking too much or sees a change in behavior and appearance suggesting that the lawyer may be depressed. Some ask LAP to do an intervention for a family member or law partner whose professional and personal relationships and job performance have suffered due to substance use. Often these individuals want to remain anonymous. In such instances, a member of LAC or myself reaches out to the attorney and offer assistance.

Dan: What can an attorney do if they see a colleague struggling with substance use and acting in an unethical manner?
Beth: It is a professional responsibility and ethical obligation to report concerns regarding an impaired attorney's competence to practice law. LAP consults with law firms and legal departments on the use of the *Model Policy for Law Firms/Legal Departments Addressing Impairment.* The Model Policy was developed by the NYS Bar Association in April of 2010 and adopted by the NCBA the same year. The Model Policy includes the following information: defining the problem; professional responsibility; confidentiality; available resources; prohibitions and consequences; voluntary monitoring; and return to work agreements.

Dan: What can an attorney do who needs an inpatient or intensive outpatient rehabilitation program?
Beth: LAP understands how difficult it is to make the decision to go into an inpatient rehab program, worrying about your law practice can make this decision much more difficult. While LAP can assist in finding an inpatient rehabilitation program, LAC members can help make the transition into rehab less stressful. Members of the committee have assisted attorneys with organizing their caseloads, asking for extensions, seeking assistance from other attorneys to work with clients, and providing the peer support necessary to make this difficult decision.

Dan: Sometimes the NCBA gets calls from family members of attorneys who have passed away or can no longer practice and need to close their office. Can LAP help?
Beth: Several members of LAC are trained to assist in law office closings on an ad hoc basis when there are special or extenuating circumstances. This is not a paid service, or a service funded or financed by the Bar Association.

Dan: I've heard of judges who have been concerned about an attorney who appears to be having issues with cognitive impairment that is influencing their work. Can LAP help with that?
Beth: Cognitive impairment has become a growing concern within the legal profession. LAP recognizes the need for relevant education and outreach on this topic. In 2020, LAP facilitated a CLE entitled, *Aging in the Legal Profession: Be Aware and Be Prepared*. We plan to do a similar program this winter.

Dan: Can you tell me about LAP's Monitoring Program?
Beth: The LAP Monitoring Program—a diversion program established to provide an alternative to discipline when substance use, or mental health issues, have been identified as mitigating factors in an attorney's behaviors that have led to disciplinary actions—receives referrals from Committees on Character and Fitness and Grievance. Similarly, law schools require applicants to be completely forthcoming about their backgrounds. Failure to disclose information on a law school application may have serious consequences, including discipline, expulsion, and reporting to the Board of Law Examiners. When a law student contacts LAP with concerns about past behaviors, a consultation is conducted and in some cases the student volunteers to participate in LAP's Monitoring Program. To participate, the law student must agree to meet with a LAC member who is a trained monitor and to all criteria for participation. Monitoring agreements are typically one year and include a comprehensive psychological or substance use evaluation, participation in substance use or mental health treatment if indicated, recovery meetings, weekly meetings with their monitor, and random drug testing if indicated.

Dan: Any final remarks for our readers?
Beth: LAP is committed to providing services that improve the well-being of attorneys by offering peer and professional counseling services, assessment and referrals, monitoring and diversion services, recovery support, education, and outreach. If you are struggling, know of an attorney who is struggling, or if you would like to participate in LAP's programs, contact me at (516) 512-2618 or eeckhardt@nassaubar.org.

Please reach out to President Russo at drusso@lawdwr.com with any comments or suggestions.

**FOCUS:
COMMERCIAL LITIGATION**

Promises Versus Conditions: The Differing Treatment of Contract Provisions

John P. McEntee

Commercial litigators predominately litigate contract disputes. While many of these disputes turn on issues of fact, some are the product of imprecise drafting. With hindsight enabling them to view how the contract performance unfolded, litigators can often see how a disputed contract provision might have been drafted to reduce if not eliminate the likelihood of litigation. One recurring theme, it seems, is that drafters sometimes overlook the distinction between terms or promises, on the one hand, and conditions, on the other, as courts construe promises differently from a contract provision deemed to be condition.

"[A] condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises."[1] It typically "describe[s] acts or events that must occur before a party is obliged to perform a promise made pursuant to an existing contract," as distinguished "from a condition precedent to the formation or existence of the contract itself."[2] By contrast, a contract promise or term is "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."[3] That is, "[o]ne who makes a promise expresses an intention that some future performance will be rendered and gives assurances of its rendition to the promisee."[4]

The distinction between promises and conditions is reflected in a common type of contract, a contact for insurance. An insurer desiring to secure the payment of premiums could obtain a promise from the potential insured to pay the premium, which in the event of a default in payment would require the insurer to bring an action to recover the unpaid premium. Or the insurer could, as all do, expressly condition coverage on advance payment of the premium, which requires no affirmative act by the insurer to ensure payment.[5]

This promise/condition dichotomy is not absolute, though, for a contract provision can be both a promise and a condition (sometimes referred to as a "promissory condition") where a party promises to perform a condition.[6] But unless a party has a corresponding duty to see that the condition occurs, the non-occurrence of a condition is not a breach of contract.[7] In other words, conditions cannot be broken because they are not duties but are instead things that must occur to require performance.[8]

This principle is illustrated by *Weisner v. 791 Park Ave Corp.*, where a contract vendor's obligations under a contract for the sale of a cooperative apartment were conditioned on the consent of the corporation's Board of Directors or shareholders.[9] When the contract vendee's application was rejected by the Board, he asserted that the contract vendor "had a contract obligation to persuade the directors and/or stockholders to look with favor on his references."[10] The Court of Appeals rejected this argument, though, holding that the "[w]ords of condition" in the contract did not impose a corresponding obligation on the contract vendor to obtain the required Board consent.[11]

Contract conditions can be express or implied, with express conditions being "those agreed to and imposed by the parties themselves" while implied conditions, sometimes referred to as constructive conditions, are those "implied by law to do justice."[12] In some contracts, the intent of the parties is clear where, for example, a real estate purchase contract lists conditions under a heading "Conditions Precedent to Closing." Absent such a road map, though, a court must parse the contract language to determine whether the parties intended a provision to be a promise or a condition, looking for words of condition such as "if," "on condition that," or "unless and until."[13]

A determination whether a contract provision is a promise or an implied condition, on the one hand, or an express condition, on the other, may affect the enforceability of the contract in the event of incomplete performance, and it is for this reason that contract drafters are advised to distinguish carefully between promises and conditions. Where a contract provision is found to be a promise or an implied condition, the party seeking to enforce the contract need only prove substantial performance under the contract.[14] In *Hadden v. Consolidated Edison Co. of N.Y.*, the Court of Appeals, in addressing whether the contract had been substantially performed, held that

> [t]here is no simple test for determining whether substantial performance has been rendered, and several factors must be considered, including the ratio of the performance already rendered to that unperformed, the quantitative character of the default, the degree to which the purpose behind the contract has been frustrated, the willfulness of the default, and the extent to which the aggrieved party has already received the substantial benefit of the promised performance.[15]

Where there is doubt about whether there has been substantial performance, the question must be resolved by a trier of fact.[16]

With conditions, a trier of fact is not needed to determine whether there was substantial performance under the contract, as substantial performance will not excuse the failure to perform an express condition precedent: "If the parties have made an event a condition of their agreement, there is no mitigating standard of materiality or substantiality applicable to the non-occurrence of that event.[17] As one court noted, as "[e]xpress conditions must be fully performed; substantial performance will not suffice."[18]

Courts in close cases, concerned about the potential for forfeiture, are inclined to construe contract provisions as promises,[19] as "a contractual duty ordinarily will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition."[20] The Court of Appeals stated that this "interpretive preference is especially strong when a finding of express condition would increase the risk of forfeiture by the obligee,"[21] yet cautioned that this interpretive preference "cannot be employed if 'the occurrence of the event as a condition is expresses in unmistakable language.'"[22] And

while there is no required form of words to create a condition,[23] the New York Court of Appeals has found the "unmistakable language of condition" in words and phrases such as "if," "on condition that," and "unless and until."[24]

If a party conferred benefits on its contract counterparty in the course of substantially performing a contract but failed to fully perform a condition precedent, a question that sometimes arises is whether the substantially performing party can nonetheless recover under a quantum meruit theory, arguing that its contract counterparty would be unjustly enriched by the receipt of benefits under the subject contract.

Well-established caselaw suggests such a claim should fail, as the existence of a written contract will generally bar a quasi-contract claim. In *Pappas v. Tzolis*, the Court of Appeals stated: "The doctrine of unjust enrichment invokes an 'obligation imposed by equity to prevent injustice, *in the absence of an actual agreement between the parties concerned.*'"[25] In *Goldman v. Citicore I, LLC,* the Second Department held that "the parties entered into an actual agreement governing the subject matter of this counterclaim, therefore, the defendants may not recover damages for unjust enrichment."[26] And in *Hamrick v. Schain Leifer Guralnick*, the First Department held: "The unjust enrichment and constructive trust claims fail to state a cause of action since the subject matter thereof is governed by express written contracts."[27]

Although some courts have allowed recovery despite a failure to meet a condition precedent where there would be a "disproportionate forfeiture" arising from the failure "and the occurrence of the condition was not a material part of the agreed exchange,"[28] other courts have not,[29] and so reliance on such caselaw would be misplaced, particularly given the admonition of the New York Court of Appeals that "[e]xpress conditions must be literally performed."[30]

In closing, given the potential consequences of a court determination that a contract provision is an express condition or merely a promise, careful consideration of the language used to establish contract obligations can reduce the likelihood of unforeseen consequences in the event of litigation.

1. *Stonehill Cap. Mgt. LLC v. Bank of the West*, 28 N.Y.3d 439, 452 (2016)(quoting *IDT Corp. v. Tyco Grp., S.A.R.L.*, 13 N.Y.3d 209, 214 (2009)); *Oppenheimer & Co. v. Oppenheim*, 86 N.Y.2d 685, 691 (1995).
2. *Id.*
3. *Merritt Hill Vineyards Inc. v. Windy Heights Vineyard, Inc.*, 61 N.Y.2d 106, 112 (1984)(quoting Restatement (Second) of Contracts § 2(1)).
4. 8 Corbin on Contracts § 30.12.
5. 8 Corbin on Contracts § 30.12.
6. *See Merritt Hill Vineyards*, 61 N.Y.3d at 113 n.1.
7. *Id.*, at 103; Restatement (Second) of Contracts § 225(3) (1981).
8. *See Merritt Hill Vineyards*, 61 N.Y.3d at 106.
9. *Weisner v. 791 Park Ave Corp.*, 6 N.Y.2d 426, 430–32 (1959).
10. *Id.* at 433.
11. *Id.*
12. *Oppenheimer*, 86 N.Y.2d at 737, quoting Calamari & Perillo, Contracts § 11-8, at 444 (3d Ed.).
13. *See Oppenheimer*, 86 N.Y.2d at 691 (the subject "agreement unambiguously establishes an express condition precedent rather than a promise, as the parties employed the unmistakable language of condition ('if,' 'unless and until')"). *Accord P.S. Fin., LLC v. Eureka Woodworks, Inc.*, 214 A.D.3d 1, 26 (2d Dept 2023); *Bank of N.Y. Mellon v. Bey*, 191 A.D.3d 627, 628 (2d Dept 2021).
14. *See Oppenheimer*, 86 N.Y.2d at 692 (only substantial performance required for implied conditions); *McCormack Inc. v. Triton Constr. Co. LLC*, 2020 NY Misc LEXIS 1259, *19 (Sup.Ct., N.Y. Co. Mar. 17, 2020) ("Under the doctrine of substantial performance, a party who has failed to comply fully with the terms of a contract but has nevertheless substantially performed the contract, is immune from termination, and is entitled to recovery of the contract price, less specified contract damages").
15. 34 N.Y.2d 88, 96 (1974).
16. *Megrant Corp. v. John P. Picone, Inc.*, 2013 NY Misc LEXIS 6537, * 5 (Sup.Ct., Nassau Co., Jan. 2, 2013) (DeStefano, J.).
17. *Oppenheimer*, 86 N.Y.2d at 692; see P.S. Fin., 214 A.D.3d at 26; *South Nassau Med. Grp., P.C. v. 105 Rockaway Realty, LLC*, 208 A.D.3d 812, 814 (2d Dept 2022); *Bank of N.Y. Mellon*, 191 A.D.3d at 628.
18. *P.S. Fin.*, 214 A.D.3d at 26.
19. *See Oppenheimer*, 86 N.Y.2d at 691.
20. *Unigard Sec. Ins. Co. v. North River Ins. Co.*, 79 N.Y.2d 576, 581 (1992).
21. *Oppenheimer*, 86 N.Y.2d at 691 (citing Restatement (Second) of Contracts § 227(1)).
22. *Id.*
23. 8 Corbin on Contracts § 31.1.
24. *See Oppenheimer*, 86 N.Y.2d at 691 (the subject "agreement unambiguously establishes an express condition precedent rather than a promise, as the parties employed the unmistakable language of condition ('if,' 'unless and until')"). *Accord P.S. Fin.*, 214 A.D.3d at 26; *Bank of N.Y. Mellon*, 191 A.D.3d at 628.
25. 20 N.Y.3d 228, 234 (2012)(*quoting IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009))(emphasis in original).
26. 149 A.D.3d 1042, 1046 (2d Dept 2017).
27. 146 A.D.3d 606, 607 (1st Dept 2017).
28. *Danco Electrical Contractors v. Dormitory Authority of the State of New York*, 162 A.D.3d 412, 413 (1st Dept 2018); *PDL Biopharma, Inc. v. Wohlstadter*, 2019 NY Misc LEXIS 4932, *26 (Sup.Ct., N.Y. Co., Sept. 11, 2019).
29. *MLB Constr. Servs. v. Dormitory Auth. of the N.Y.*, 194 A.D.3d 1140, 1142-43 (4th Dept 2021).
30. *MHR Capital Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 645 (2009).

John McEntee is the Co-Managing Shareholder of the Long Island Office of Greenberg Traurig LLP. He is also an NCBA Past President and a former Chair of the NCBA Commercial Litigation Committee. He can be reached at John.McEntee@gtlaw.com.

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FOCUS: LABOR AND EMPLOYMENT LAW

Public Employer Regulation of Conduct with Eyes Toward the 2024 Election

Richard K. Zuckerman, Adam S. Ross, Alyssa L. Zuckerman, Sharon N. Berlin and Gianna L. Gualtieri

Can public employers stop employees from wearing clothing to work supporting their preferred candidate or pillorying that candidates' opponent? Can they present what that employee, in their non-work time, publicly post, including political memes and diatribes, on social media as evidence? Can a public employer stop a debate during lunch about which candidate will cause World War III before a proverbial war breaks out in the office? What is a public employer to do when its most pro-Harris employee has to interact, as part of their job, with the most pro-Trump member of the community?

Data from Gallup, Inc. shows that "[n]early half of U.S. workers in February said [that] they had discussed political issues with a coworker in the past month, and that has likely only increased as the presidential election has progressed."[1] It is natural to talk to coworkers about a variety of topics, but with people of different views now more inclined to view members of the other party as "dangerous" or even as enemies, political conversations in the workplace have the potential to be disruptive or, in the worst case scenario, lead to vandalism, destruction of property or violence.

As we head into the home stretch of the 2024-presidential election in a highly divided political climate, and with everything from red ties to blue hair coloring having the potential to open Pandora's box, a quick refresher on public employers' ability to regulate their employee's speech, is in order.

The Speech Rights of Public Employees

In 1892, referencing a police officer who was soliciting contributions for a political purpose, Justice Oliver Wendell Holmes famously stated, "the Petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[2] More than 130 years later, things are somewhat more complicated. In *Pickering v. Board of Education*, the U.S. Supreme Court clearly recognized that the public employees have speech rights protected by the First Amendment.[3]

In *Pickering*, the Court rejected the idea that public employees may constitutionally be compelled to relinquish the First Amendment rights that they would otherwise enjoy as citizens.[4] At the same time, the Court noted that a public employer has "interests as an employer in regulating the speech of its employees."[5] These divergent concepts have evolved into what is now known as the *Pickering* balancing test. Pursuant to *Pickering* and its progeny, a public employee's speech is protected by the First Amendment if (and only if): (1) the employee speaks as a private citizen; (2) the speech is based on a matter of public concern; and (3) the employee's interest outweighs the public employer's needs.[6] If this test is not met, then the speech is not protected by the First Amendment.[7]

When Is a Public Employee Speaking as a "Citizen" on a Matter of "Public Concern"?

If an employee makes statements pursuant to his/her/their official duties, the employee is not speaking as a citizen for First Amendment purposes.[8] As the Court explained in *Garcetti v. Ceballos*, the key inquiry is whether the speech is within the scope of the employee's duties, not whether it concerns those duties.[9]

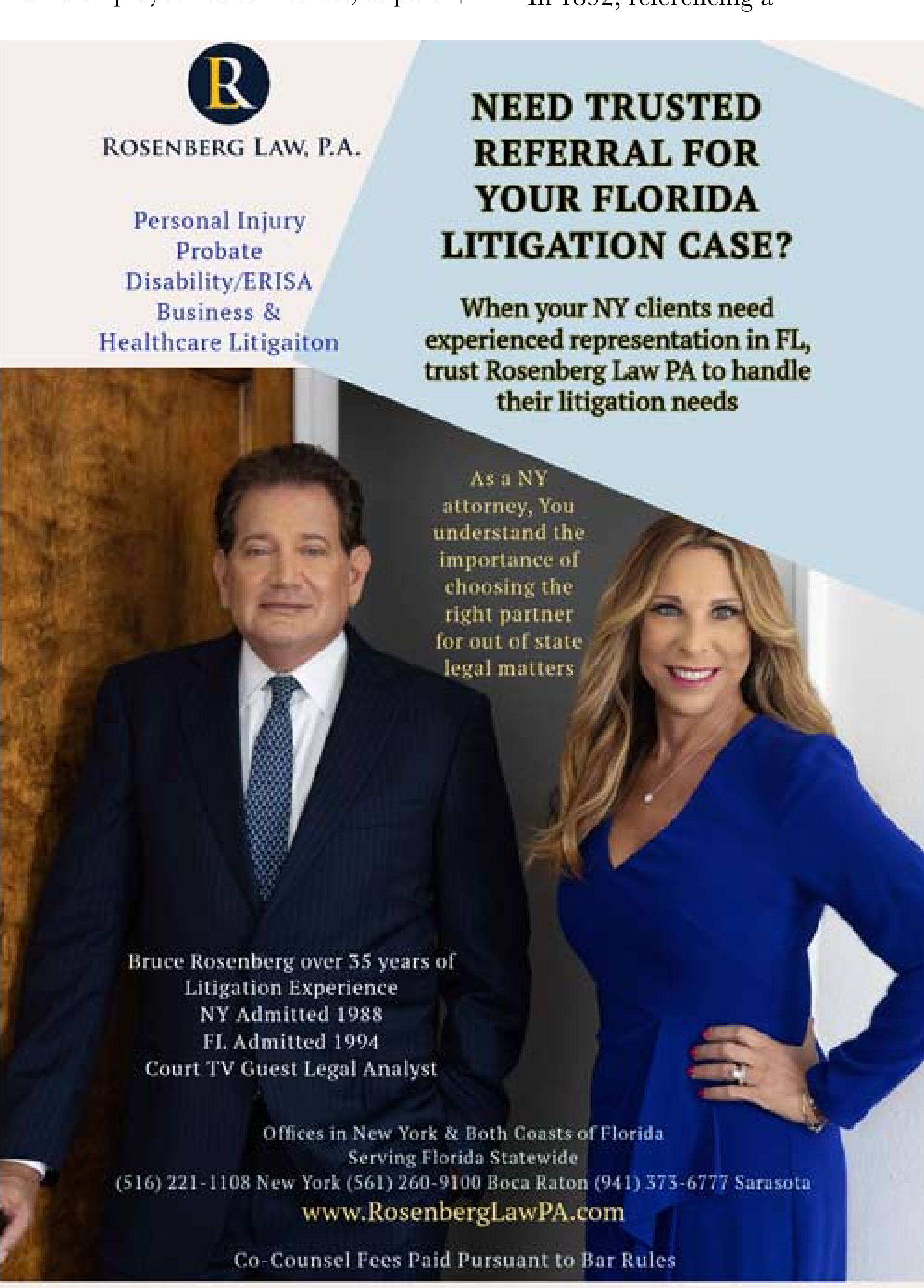
Notably, in *Montero v. City of Yonkers*, the Second Circuit held that a police officer and former union official's statements were protected because he spoke in his role as a union officer, and the statements were not made as a means to fulfill, or undertaken in the course of, his responsibilities as a police officer.[10]

Further, whether speech is about a matter of public concern turns on whether the speech is related to political, social or other community considerations.[11] For example, in *Connick v. Meyers*, the Supreme Court held that a district attorney's distribution of a questionnaire to solicit the views of her colleagues concerning whether an employee felt pressured to work on political campaigns was not a matter of public concern, but could be considered a matter of public concern in other circumstances.[12] Also, in *Kennedy v. Bremerton School District*, the Supreme Court held that a football coach's kneeling for prayer at the 50-yard line was protected.[13] The Court reasoned that the football coach was acting in his capacity as a private citizen and was otherwise not seeking to convey any government message.[14]

Particularly relevant to recent events, in *Rankin v. McPherson*, the Supreme Court concluded that a data entry employee's comments about the attempted assassination of a President to a co-worker, stating "If they go for him again, I hope they get him" was a matter of public concern and was also protected because the employee made the comment in a private conversation to a co-worker in a room that is not accessible to the public.[15]

Does the Employee's Interest Outweigh the Employer's Needs?

The determination of whether an employee's speech outweighs the employer's needs is based on the time, place, and manner of the speech. The more an employee's speech touches on matters of significant public concern, the greater the level of disruption to the government must be shown in order for a public employer to lawfully ban the speech.[16] For example, in *Santer v. Board of Education of East Meadow Union Free School District*, the Court held that disruption of school operations and potential risk of student safety outweighed the potential value of a group of teachers concerning collective bargaining issues.[17] The Court recognized that the disruption was so great that the District's interest outweighed the teachers' speech rights.[18] Also, in *Snipes v. Volusia County*, the Eleventh Circuit held that a police officer's racially charged posts on his personal Facebook page were not protected.[19] In analyzing the time, place and manner of the speech, the court concluded that the speech was not protected because: (i) the speech was offensive and vulgar; and (ii) was made while the police officer was on duty; and (iii) the posts were made on his public Facebook page.[20] Similarly, in *Bennett v. Metro. Gov't of Nashville & Davidson Cnty., Tennessee*, the court held that a public employee's use of a racial slur in connection with the 2016 presidential election was unprotected, concluding that the employer's interest in the administration of harmony



amongst the employee and her co-workers outweighed the employee's speech rights.[21]

Most recently, in *Lindke v. Freed*, the Supreme Court held that a city manager deleting unwelcome comments concerning the COVID-19 Pandemic (and eventually blocking the user) was protected speech.[22]
As a result, the Court adopted the following: when a government official posts about job-related topics on social media, the official is acting on behalf of the government if the official: (1) possessed actual authority to speak on the state's behalf; and (2) exercised the authority when he spoke on social media.[23]

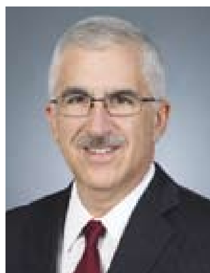
Staying Neutral

Equally important to analyzing content-based restrictions is the analysis (and avoidance) of viewpoint-based restrictions. It is key that viewpoint-neutral restrictions are implemented and do not result in a favoritism of one view over another.[24] In other words, it is generally unacceptable for a public employer to allow speech in favor of one side of a political debate, but not the other. Thus, if a public employer allows one employee to walk around with a mug with a picture of Kamala Harris, it needs to let another employee walk around with a mug with picture of Donald Trump. Because viewpoint-based restrictions target speech based on the speaker's views, these restrictions are "especially offensive to the First Amendment."[25]

Key Takeaways for Public Employers

It is imperative that, in the upcoming months, public employers take appropriate action in ensuring the balance of their employees' free speech rights and the regulation of public employment. With respect to maintaining order in the workplace this election season, counsel for public employers should consider the following for their public sector clients: (1) implementing a content and viewpoint-neutral policy; (2) applying it consistently across the spectrum of political speech; (3) prohibiting clearly abusive and harassing conduct, regardless of the political speech's viewpoint; and (4) ensure clear and accurate documentation of incidents that arise.

1. Katelyn Hedrick & Lydia Saad, *Talking Politics at Work: A Double-Edged Sword*, Gallop (Aug. 22, 2024), https://www.gallup.com/workplace/648581/talking-politics-work-double-edged-sword.aspx.
2. *McAuliffe v. City of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).
3. 391 U.S. 563, 574, 88 S. Ct. 1731, 1738, 20 L. Ed. 2d 811 (1968).
4. *Id.* at 568.
5. *Id.*
6. 547 U.S. 410, 418, 126 S. Ct. 1951, 1958, 164 L. Ed. 2d 689 (2006).
7. *Id.*
8. *Id.*
9. *Id.*
10. 890 F.3d 386, 398 (2d Cir. 2018).
11. *See Jackler v. Byrne*, 658 F.3d 225, 236 (2d Cir. 2011) (quoting *Connick v. Myers*, 461 U.S. 138, 147, 103 S. Ct. 1684, 1690, 75 L. Ed. 2d 708 (1983)).
12. 461 U.S. at 147.
13. 597 U.S. 507, 529, 142 S. Ct. 2407, 2424, 213 L. Ed. 2d 755 (2022).
14. *Id.*
15. 483 U.S. 378, 378, 107 S. Ct. 2891, 2893, 97 L. Ed. 2d 315 (1987).
16. *Lewis v. Cowen*, 165 F.3d 154, 162 (2d Cir. 1999).
17. 23 N.Y.3d 251, 13 N.E.3d 1028 (2014).
18. *Id.*
19. 704 F. App'x 848, 854 (11th Cir. 2017).
20. *Id.*
21. 977 F.3d 530, 540 (6th Cir. 2020); *see also Moore v. City of Roswell, Georgia*, 682 F. Supp. 3d 1287, 1300 (N.D. Ga. 2023) (public employer's interest outweighed public employee's speech rights in posting racially charged comments on social media).
22. 601 U.S. 187, 191, 144 S. Ct. 756, 762, 218 L. Ed. 2d 121 (2024).
23. *Id.*
24. *See e.g., Sussman v. Crawford*, 548 F.3d 195, 199 (2d Cir. 2008) (concluding that West Point's policy on prohibition of all forms of demonstrations, regardless of political or social views, was viewpoint-neutral).
25. *See Mazo v. New Jersey Sec'y of State*, 54 F.4th 124, 149 (3d Cir. 2022), *cert. denied sub nom. Mazo v. Way*, 144 S. Ct. 76, 217 L. Ed. 2d 13 (3d Cir. 2023); *see also Choose Life Illinois, Inc. v. White*, 547 F.3d 853, 865 (7th Cir. 2008) (restriction on the entire subject of abortion was viewpoint-neutral) (emphasis added).



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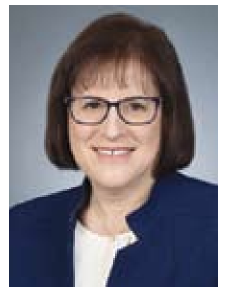

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FOCUS:
HOSPITAL AND HEALTH LAW

Health Insurers—Making Consumers Wait for Weight-Loss Drugs

Marc N. Aspis and Louis Q. Reynolds

Sweet tooth. The "Freshman 15." Packing on a few extra pounds during the holidays. For years, most people have considered these items as innocuous indulgences. But in America, as in much of the world, weight is an increasingly dangerous problem.

According to the Centers for Disease Control and Prevention ("CDC"), nearly three-quarters of American adults are overweight or obese.[1] The CDC defines "overweight" as having a body mass index ("BMI") of 25 to 29.9 and "obese" as having a BMI over 30.[2] As early as 2013, the American Medical Association ("AMA") defined obesity as a disease,[3] and the CDC and the World Health Organization likewise classify obesity as a disease.[4]

Obesity is dangerous, and the AMA notes that obesity is "associated with more than 200 comorbidities, such as diabetes, high blood pressure, heart disease and multiple types of cancer."[5] In addition to the dangers associated directly and indirectly with obesity, there is a huge financial cost as well, with the CDC estimating that obesity accounted for $173 billion in medical expenditures in 2019.[6] Furthermore, in many communities there is a negative stigma associated with obesity, enough of a stigma that New York City's Human Rights Law considers weight to be a "protected class," namely, it is illegal to discriminate in employment, housing and public accommodations based on a person's weight.[7]

People have started to take notice and are responding in a variety of ways. Restaurants and coffee shops will routinely list the caloric content of food. New diet crazes seem to crop up each day, be it intermittent fasting, the South Beach diet, the Mediterranean diet, the Atkins diet, the Paleo diet and countless others. Exercise trends are also multiplying in number as people try the gym, Peloton, commuting by bike, boot camps, CrossFit, marathons (and similar long-distance endurance challenges), counting steps, rowing machines and even goat yoga (yes, goat yoga is a real thing). At the same time, clothing companies are reacting to a new normal of heavier people by attempting to shift body-image perceptions by producing and selling clothing designed for larger people.

Among people who have tried at least one of the above diets or exercise routines, there is one example that, anecdotally at least, works wonders: weight-loss drugs. Without going too much into the science behind these medicines, weight-loss drugs generally make a person feel less hungry, fuller or both.[8] The Food and Drug Administration ("FDA") has approved eight drugs for weight loss, the most famous of which is a semaglutide known by its brand name Wegovy.[9] Diabetes drugs such as Ozempic or Mounjaro have yet to be approved specifically for weight loss by the FDA.

Health Insurance and Weight-Loss Drugs

A collection of federal and state bodies regulate health insurance in the United States. Much of nongovernmental federal health insurance is governed by the provisions of the Employee Retirement Income Security Act of 1974 (as may be amended and in effect from time to time, "ERISA") and regulations thereunder.[10] ERISA has been amended several times to include various provisions from other sources (*e.g.*, the Patient Protection and Affordable Care Act, the "ACA") and in some regards works in tandem with other laws such as the Internal Revenue Code of 1986, (as may be amended and in effect from time to time). While ERISA generally preempts state law, each state also has its own rules relating to health insurance coverage.

Under ERISA, a "group health plan" is "an employee welfare benefit plan to the extent that the plan provides medical care to employees or their dependents."[11] Group health plans are important benefits that employers provide to their employees. These plans come in different shapes and sizes with a main difference being the funding—either "self-funded" or "fully insured." In a self-funded plan, an employer will pay, from the employer's general assets, for medical claims as they arise (in essence, the *employer itself* serves as the insurance company). By contrast, in a fully insured plan, an employer has segregated assets to pay a pre-determined premium to the insurance company irrespective of the amount of medical claims. ERISA defines "medical care" as:

- Amounts paid for the diagnosis, cure, mitigation, treatment or prevention of a disease or amounts paid for the purpose of affecting any structure or function of the body.
- Amounts paid for transportation primarily for and essential to medical care.
- Amounts paid for insurance covering medical care.[12]

Nothing in ERISA expressly forbids health insurance from covering weight-loss drugs. Indeed, as obesity is widely recognized as a disease, insurance covering weight-loss drugs fits squarely within the definition of medical care, namely the mitigation and treatment of a disease (in this case obesity). Given the rather broad definitions of group health plan and medical care, plans, especially self-funded plans, have a fairly wide latitude in deciding which health treatments to cover and which not to cover. Just as there is no rule in ERISA forbidding coverage of weight-loss drugs, there is similarly no requirement for health insurance to cover weight-loss drugs.

Insurance companies, by and large, are seizing on the lack of formal requirements and are generally not covering weight-loss drugs or significantly limiting such coverage. This coverage gap is driven primarily by cost as U.S. list prices for some of the most common medications used for weight loss range from $900/month to more than $1,300/month, an amount that is often higher than the monthly premium paid by many individuals for insurance coverage.[13] Insurance companies that do cover weight-loss drugs may impose a host of prior authorization requirements to actually qualify for the drug, which may include the following:

- A statement that the drug is "non-experimental" and a determination from a physician that the drug is medically necessary.
- Completing a months-long wellness education program focusing on healthy life choices.
- An attestation that other diets and/or exercise programs have not worked.
- A BMI level that is well into the obese range.

Obese patients may find that weight-loss drugs are out of reach and for those patients that are already taking the drugs, they may face hurdles if insurers and health plans begin to change prior authorization criteria to further limit eligibility for the drugs.

To some, insurance companies and self-funded health plans are being penny wise and pound foolish. As mentioned above, obesity often puts individuals at higher risk for heart disease and cancer. The long-term costs of treating diabetes, heart disease and/or cancer are astronomical and undoubtedly higher than the cost of weight-loss drugs. An insurer or self-funded health plan's coverage of weight loss drugs as a preventive measure likely would reduce instances of chronic diseases associated with obesity for their covered populations, therefore likely reducing costs for insurers and self-funded health plans to treat those populations. Part of insurers' and self-funded health plans' reluctance to uniformly cover weight-loss drugs, however, may be due to the fact that the American health insurance model works on an annual basis, not a lifetime basis, a model that is unlikely to change. The potential cost-saving benefits of an insurer's or self-funded plan's "investment" in weight-loss drug coverage as a preventive measure would be best realized by an insurer or self-funded plan if the individuals who receive the weight-loss drugs remain covered by the same insurer or remain employed by the same employer's self-funded plan for their entire careers.[14]

The tension between cost, social benefit, permissive or prohibitive regulations is borne out in many states,[15] including New York. New York's Medicaid pharmacy program, NYRx, "covers medically necessary FDA-approved prescription and non-prescription drugs for Medicaid members."[16] However, weight-loss drugs are specifically excluded; NYRx goes so far as to state that "weight loss has never been a Medicaid-approved reason for covering a drug."[17] Perhaps even more surprising, NYRx singles out Wegovy, a drug specifically approved by the FDA for weight loss, as not "covered by NYRx when prescribed for weight loss."[18]

On the other end of the spectrum, the New York State Senate is considering a bill with a stated purpose "to provide Medicaid coverage for prescription drugs approved by the FDA for chronic weight to ensure greater healthcare accessibility and address the rising epidemic of obesity in our State."[19] The New York State Assembly proposes an even greater

expansion with a bill that is seeking to write the following into state law: "Every policy which provides medical, major medical, or similar comprehensive-type coverage shall provide comprehensive coverage for treatment of obesity, which shall include coverage for…FDA-approved anti-obesity medication."[20]

Practical Considerations

Moving forward, there is one safe assumption: obesity rates are not going to drop drastically, especially not in the immediate short term. Many other factors are nearly impossible to predict. Will the FDA approve other weight-loss drugs (brand name or generic) and, if so, will that drive down the cost of weight-loss drugs? Will federal and state health insurance regulations mandate coverage of weight-loss drugs, prohibit coverage of weight-loss drugs (if side effects and potential for misuse outweigh the benefits) or retain a middle ground that neither prohibits nor requires coverage? Will the federal and state/local governments offset the cost of weight-loss drugs? Will more/fewer plans cover weight-loss drugs?

Regardless of how the current dynamic changes (if at all), employers have to consider the cost/benefit of healthier employees. As discussed above, obesity leads to an increased risk of other health problems. A healthier workforce means less absenteeism and more productivity in companies of all sizes and across all industries, not just those that require strenuous physical activity. Employers need to determine how the cost of health insurance impacts their bottom lines. In other words, is paying high premiums for expensive weight-loss drugs more or less beneficial than paying high premiums because of a less healthy workforce? For employers who offer self-funded plans, are reserves sufficient to pay the high costs associated with chronic heart disease? For the insurance companies, the calculus is slightly different. Insurance companies need to balance the cost (and conditions) of covering weight-loss drugs with the desire to both offer attractive plans to consumers and remain profitable.

The delicate interplay of health insurance and weight-loss drugs seems likely to remain a fascinating topic for years to come. In the event federal or state legislation requires insurers or health plans to cover the costs of weight-loss drugs, insurers and employers must effectively use data to develop strategies to ensure coverage of such drugs is financially feasible within their existing models in light of the anticipated need for the drugs in their covered patient populations. They must also control costs through prior authorization requirements that achieve a balance between ensuring adequate patient access to the drugs and ensuring the drugs are used for their intended, approved clinical purpose (and not otherwise abused).

1. Cheryl D. Fryar, Margaret D. Carroll & Joseph Afful, *Prevalence of Overweight, Obesity, and Severe Obesity Among Adults Aged 20 and Over: United States, 1960–1962 Through 2017–2018*, CDC Nat'l Ctr. for Health Stat., https://www.cdc.gov/nchs/data/hestat/obesity-adult-17-18/obesity-adult.htm#Citation (last revised Jan. 29, 2021).
2. *Id.*
3. *Memorial Resolutions, Proceedings of the 2013 Annual Meeting of the House of Delegates*, AMA, ¶ 420 (approved Nov. 17, 2013), https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/public/hod/a13-resolutions_0.pdf.
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10. 29 USC §§ 1001-1461. Title I, Part 7 of ERISA specifically incorporates provisions of the Patient Protection and Affordable Care Act (ACA), the portability and nondiscrimination provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the mental health parity provisions of the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), the Newborns' and Mothers' Health Protection Act of 1996, the Women's Health and Cancer Rights Act of 1998 and the Genetic Information Nondiscrimination Act of 2008.
11. 29 USC § 1191b(a)(1).
12. 29 USC § 1191b(a)(2).
13. Louise Norris, *Does Health Insurance Cover Drugs Used for Weight Loss Such as Ozempic, Wegovy, Mounjaro, and Zepbound?*, Healthinsurance.org (Apr. 26, 2024), https://www.healthinsurance.org/faqs/does-health-insurance-cover-drugs-used-for-weight-loss-such-as-ozempic-wegovy-mounjaro-and-zepbound/.
14. Given employee turnover rates, an employer-sponsored health plan may be reluctant to offer coverage for weight-loss drugs if the health plan will not "realize" the investment in drug coverage if a covered employee leaves employment.
15. A state-by-state survey is beyond the purview of this article.
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17. *Id.*
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FOCUS: COMMERCIAL LITIGATION

The Changing Landscape of E-Discovery

Jacqueline Rappel and Gabriella Botticelli

Over the past ten years, discovery has increasingly shifted focus from the traditional hardcopy documents to electronically stored information ("ESI"). While the shift toward ESI discovery certainly began before 2020, the abrupt pivot to an increased remote workforce due to the COVID-19 Pandemic catapulted ESI discovery to the forefront. In this new world where a vast majority of business is conducted remotely or via email, the traditional days of paper documents might be largely behind us. Real estate closings can now occur remotely rather than the conference room, contracts are negotiated and executed via email, even notes are now taken on a tablet rather than a yellow pad. Commercial litigators and transactional lawyers alike must pay attention to how these changes affect the legal profession and adjust their practices accordingly.

The Commercial Division took notice of the rapidly evolving landscape and, in 2022, amended Commercial Division Rules 1, 8, 9, 11-c, 11-e and 11-g to address the standards and procedures applicable to ESI discovery. The majority of the changes are embodied in Rule 11-c and Appendix A which now apply to party discovery in addition to third-party discovery.

Appendix A to the Commercial Division Rules, titled "Guidelines for Discovery of Electronically Stored Information" ("Guidelines"), is a great resource for commercial litigators. Although the Guidelines remain "advisory," all commercial litigators should familiarize themselves with the Guidelines as they contain a wealth of information to assist in navigating ESI discovery. The Guidelines advise on everything from the conduct of the e-discovery process to the preservation and collection of ESI, as well as the form of ESI production.

The cost of ESI discovery can be extremely high—in many cases, the cost of ESI could start to approach, or even exceed, the amount sought in the litigation. Practitioners need to be aware of these costs to devise an appropriate litigation strategy. The amended Rule 11-c addresses the costs and efficiency of ESI discovery similar to the Federal Rules of Civil Procedure. The Guidelines encourage parties to tailor ESI demands to what is reasonable and proportionate to the litigation, "considering the burdens of the requested discovery, the nature of the dispute, the amount in controversy, and the importance of the materials requested to resolving those issues" [see Guidelines I(B)] and allows the court to weigh the costs and burden of ESI discovery against the benefit to the litigants to modify or deny requests.

One important, but potentially overlooked, section of the Guidelines discusses sources of discoverable ESI. Just some examples included in the Guidelines are "workstations, email systems, instant messaging systems, document management systems (e.g., Google Drive, Sharepoint, Confluence), collaboration tools (e.g., Microsoft Teams, Slack), social media, mobile devices and apps, cloud-based storage, back-up systems, and structured databases[.]" See Guidelines III(B). Attorneys need to be knowledgeable about the various sources of potentially discoverable information to best advise their clients on the preservation and retrieval portion of the discovery process and to ensure that all relevant information is captured and produced pursuant to the New York Rules of Professional Conduct. See N.Y Rules of Prof. Conduct, Rule 3.4(a)(1) ("A lawyer shall not: (a)(1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce").

Further, it is not uncommon for ESI document productions to consist of hundreds of thousands of pages of documents. With this increased volume, comes an increased risk for an inadvertent production of a privileged document. Rule 11-c(g) now contains an automatic claw-back provision, which provides that the inadvertent production of privileged materials does not constitute a waiver of the privilege and requires that the privileged documents be destroyed or returned, unless the claim is challenged.

In summary, the landscape of discovery in civil litigation continues on its trajectory towards complete ESI, rather than traditional hardcopy documents. All practitioners, even those who do not practice in the Commercial Division, should familiarize themselves with the Guidelines and the potential issues that arise with ESI discovery to ensure their practice of law evolves contemporaneously with the legal landscape.

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CIVIL LITIGATION

The Exchange of Surveillance Videos: Timing Is Everything

Maria Boultadakis and Bridget M. Ryan

When it comes to the production of pre-trial evidence, timing is everything. Attorneys must be cautiously aware of time constraints especially when in possession of video surveillance of a party. In its decisions, the Court of Appeals and the Appellate Division Second Department have warned all counsel that when a party is in possession of surveillance footage relevant to the case at bar, the timing of the disclosure of such footage is crucial.

Background

History has shown that discovery, including the exchange of video surveillance, has expanded and evolved over the past thirty years. Prior to 1992, practitioners were not obligated to disclose surveillance video at any time prior to trial.[1] This non-disclosure often led to "trial by ambush" where a defendant would surprise plaintiff for the first time at trial with video evidence contradictory to their deposition testimony.[2] In 1992, *DiMichel v. South Buffalo Ry. Co.* halted this practice when the Court of Appeals held that plaintiffs were entitled to surveillance videos prior to trial.[3]

CPLR § 3101(i) provides that disclosure must encompass all material, including films, photographs, video tapes, or audio tapes. The disclosure must include all portions of the material, rather than only the portions of the material that a party intends to use. While CPLR § 3101 was originally created with primarily public areas in mind, such as building lobbies or school hallways,[4] the ever-evolving technological frontier has expanded both the significance and use of surveillance footage. Additionally, with video and photograph capabilities now accessible to the average person, most of the population is often able to take their own surveillance footage, rather than having to rely on commercial buildings, specialized videographers, or private investigators. With the expansion of access to surveillance footage, it is not surprising that its importance to litigation is increasing, particularly when considering when to disclose.

Tai Tran et al. v. New Rochelle Hosp. Med. Ctr.

While CPLR § 3101(i) provides no fixed deadline for the disclosure of surveillance video footage, there have been some very important Court of Appeals and Appellate Division Second Department decisions specifically outlining the risk lawyers face at trial if the video is not timely exchanged.

In *Tai Tran et. al. v. New Rochelle Hosp. Med. Ctr.*, plaintiff injured his hand while at work, and later found out that defendant had been videotaping him after the workplace accident. Plaintiff subsequently moved for disclosure of the tapes, and defendant argued that they should not be required to disclose the tapes until after plaintiff was produced for a further deposition. The Appellate Division ruled that the tapes were discoverable only after plaintiff had been deposed.[5] However, the Court of Appeals, acknowledging the delicate balance between a "defendant's desire to withhold tapes to prevent tailored testimony and a plaintiff's need to obtain pretrial access for authentication,"[6] reversed the Appellate Division's order and ordered that the video of a party must be turned over prior to the plaintiff's deposition. Furthermore, prior to the decision in *Tai Tran*, surveillance footage was subject to qualified privilege: a party had to demonstrate substantial need for the footage that would also avoid undue hardship on their adversary in order for the footage to be discoverable.[7] The holding in *Tai Tran* confirmed that CPLR § 3101(i) directed full disclosure of the footage prior to the party's deposition, thereby eliminating the qualified privilege requirement.

Pizzo v. Lustig

In *Pizzo v. Lustig*,[8] the Appellate Division, Second Department discussed the difference between pre-deposition and post-deposition disclosure requirements for surveillance materials under CPLR § 3101(i) and the factors to be considered by a court in determining whether to preclude said videos.

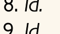
As to videos in the possession of a party prior to an adverse party's deposition, the court held that the defendant, the driver of a vehicle involved in an automobile accident, was not entitled to use—at trial or in opposing summary judgment in plaintiff's personal-injury action—surveillance video of the plaintiff that defendant had obtained but not exchanged prior to the plaintiff's deposition. Defendant had not disclosed the footage until well after the deposition had taken place. Defendant's failure to turn over the pre-deposition surveillance video before the plaintiff's deposition violated plaintiff's discovery notice, in which the plaintiff had demanded disclosure of photographs and videos. In addition, two court orders establishing deadlines for turning over videos and complying with discovery demands were in effect and defendant's noncompliance with their discovery obligations had lasted more than eight months.

However, with respect to videos taken after the party's deposition, the court held that the trial court did not improvidently exercise its discretion in denying plaintiff's motion for an order barring defendant from using the post-deposition surveillance video of the plaintiff at trial or in opposing summary judgment in a personal-injury action, where the videos at issue had been taken after plaintiff's deposition; defendant had disclosed both successful and unsuccessful surveillance videos as well as related reports in a manner that fully satisfied the substantive disclosure requirements; the disclosure was not significantly delayed from the cessation of surveillance; the disclosure occurred prior to the filing of a note of issue or a certificate of readiness; and the plaintiff was not prejudiced by the disclosure's timing, pursuant to CPLR §§ 3101(i) and 3126(2). The court further held that the plaintiff failed to establish that the alleged late disclosure of the surveillance material was willful or contumacious, or that the plaintiff was prejudiced in any way, and consequently, the preclusion motion of the post deposition surveillance video was denied in its entirety.[9]

How Does This Affect Pre-Trial Discovery in 2024?

Lawyers often ask themselves, what benefit can be gained by using a surveillance video? It is often the case that in personal injury matters, a defense counsel may believe the plaintiff may be feigning or exaggerating his or her injuries and surveillance footage may be the only way to confirm whether the injured party was telling the truth.

One must be reminded that the decision in *Pizzo* relates specifically to surveillance footage of a party. Again, timing is everything: a plaintiff's attorney must include demands for surveillance footage from the onset of their case to ensure they are exchanged timely and prior to their client's deposition. On the other hand, a defense attorney may choose to delay taking surveillance footage until after depositions so as to not be obligated to exchange the footage prior to plaintiff's deposition.

Finally, a defendant must keep in mind that in the event they are in possession of demanded surveillance footage prior to a deposition, they are obligated to disclose such footage together with other requested items prior to plaintiff's deposition. If not, the defendant will likely face the heavy sanction of preclusion. 

1. *Pizzo v. Lustig*, 216 A.D.3d 38, 189 N.Y.S.3d 579 (2d Dept. 2023).
2. *Id.*
3. *DiMichel v. South Buffalo Ry. Co.*, 80 N.Y.2d 184, 590 N.Y.S.2d 1 (1992).
4. *Pizzo, supra.*
5. *Tai Tran v. New Rochelle Hosp. Med. Ctr.*, 99 N.Y.2d 383, 786 N.E.2d 444 (2003).
6. *Id.* at 387.
7. *Pizzo v. Lustig*, 216 A.D.3d 38, 189 N.Y.S.3d 38 (2d Dept. 2023).
8. *Id.*
9. *Id.*

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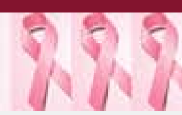


October 8 (Hybrid)

Dean's Hour: Litigating a Failure to Diagnose Breast Cancer Case
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

Explore unique procedural, evidentiary and damages issues faced in a medical malpractice failure to diagnose breast cancer case; continuous treatment and Lavern's Law statute of limitations issues; Dead Man's Statute evidentiary issue; and the proximate cause aspect of a delay in diagnosis case which permits a party to pursue damages of whether the departure caused or contributed to a diminution in the plaintiff's life expectancy or the percentage of chance for a better outcome.

Guest Speakers:
Lauren B. Bristol, Esq., Kerle, Walsh, Matera & Cinquemani; **William Spratt, Esq.,** Shaub, Ahmuty, Citrin & Spratt; and **Dominique Chin, Esq.,** Shaub, Ahmuty, Citrin & Spratt

October 9 (Hybrid)

Dean's Hour: ABA Formal Opinion 512—Generative Artificial Intelligence Tools
12:30PM
1.0 CLE Credit in Ethics & Professionalism
NCBA Member FREE; Non-Member Attorney $35

Many lawyers use Generative Artificial Intelligence (GAI) based technologies in their practices to improve the efficiency and quality of legal services to clients. A recent ABA Opinion identifies some ethical issues involving the use of GAI tools and offers general guidance for lawyers attempting to navigate this emerging landscape.

Guest Speakers:
Mitchell T. Borkowsky, Esq., Law Offices of Mitchell T. Borkowsky; **Christopher J. DelliCarpini, Esq.,** Sullivan Papain Block McManus Coffinas & Cannavo P.C.; and **Nicholas Himonidis, Esq.,** The NGH Group

October 10 (Hybrid)

Dean's Hour: Crime Scene Analysis
With the Nassau County Assigned Defender Plan
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

Hal Sherman—who has four decades of processing crime scenes—will explain how one goes about reviewing a crime scene in its entirety, including scene photos, reports, notes, and autopsy results.

Guest Speakers:
Hal Sherman, Forensic Evidence Analysis and Reconstruction Consultant, and **Amanda A. Vitale, Esq.,** Montefusco Law Group, and Vice Chair, NCBA Criminal Courts & Procedure Committee

October 15 (Hybrid)

Dean's Hour: The American Presidency and the Constitution—A Study in Power, the Law and Culture
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

Rudy Carmenaty discusses each element of Article II of the U.S. Constitution: the various amendments that pertain to the presidency, the origins of the office, impeachment, the Vice Presidency, the President's power as Commander-in-Chief, and the power to appoint executive officers and judges with advice and consent of the Senate.

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

October 16 (Hybrid)

Dean's Hour: Ways That Can Improve Your Defense Advocacy by Working with Social Workers/Mitigation Experts
With the Nassau County Assigned Defender Plan
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

Examine ways to improve your defense advocacy by collaborating with social workers/mitigation experts to get a client out of pretrial detention, improve sentencing options, or stabilize a client in the community.

Guest Speakers:
Kim M. Melendez, LCSW, Clinical Forensic Social Worker and Mitigation Specialist, and **Elizabeth M. Nevins, Esq.,** Maurice A. Dean School of Law at Hofstra University Defender Clinic

October 22 (Hybrid)

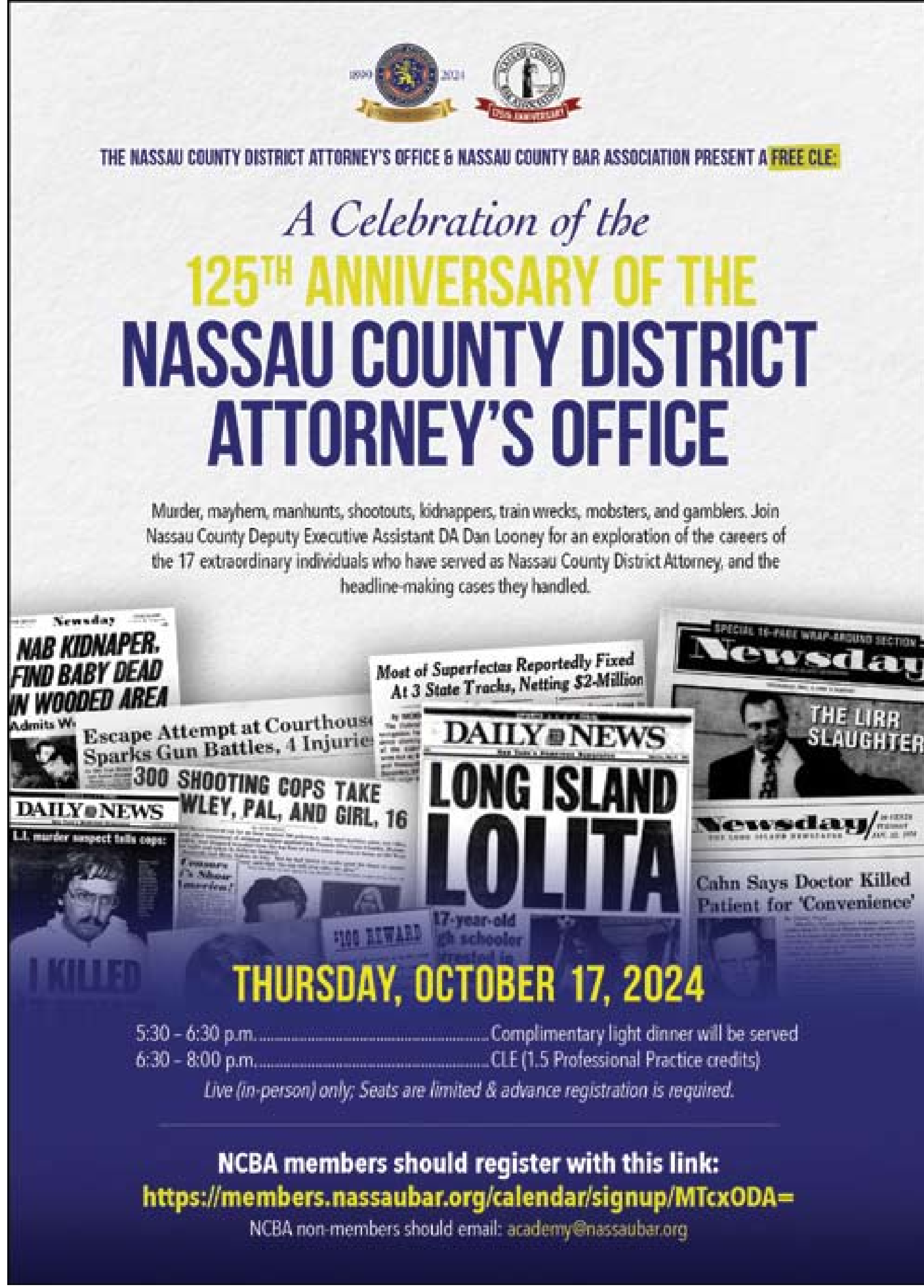
Dean's Hour: The New CPLR 2106—Affirmations Made Easy
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

The recently amended CPLR 2106 replaces the old rule for affirmations and effectively eliminates the

PROGRAM CALENDAR

need for affidavits in litigation. This program offers guidance on complying with the current rules and highlights the questions still unanswered.

Guest Speakers:
Hon. Richard G. Latin, JSC, Supreme Court, New York County; **Michael Kohan, Esq.,** Kohan Law Group; and **Christopher J. DelliCarpini, Esq.,** Sullivan Papian Block McManus Coffinas & Cannavo PC.



October 23 (Hybrid)

Dean's Hour: Traps When Buying or Selling a Business—Part 2 Ethical Issues
12:30PM
1.0 CLE Credit in Ethics & Professionalism
NCBA Member FREE; Non-Member Attorney $35

Business sale and acquisition involve many legal, financial, tax and ethical considerations. Part 2 of this two-part series explores ethical issues of some common traps and missed opportunities.

Guest Speakers:
Mitchell T. Borkowsky, Esq., Law Offices of Mitchell T. Borkowsky, and **Robert S. Barnett, Esq., CPA,** Capell Barnett Matalon & Schoenfeld, LLP

October 24 (In Person Only)

Real Estate Workouts
5:00PM – 6:00PM Dinner hosted by Capell Barnett Matalon & Schoenfeld LLP
6:00PM – 8:00PM CLE Program
2.0 CLE Credits in Professional Practice
NCBA Member FREE; Non-Member Attorney $70

As market conditions and interest rates change, many rental and development projects are financially stressed and require help to navigate debt restructuring and other workouts. Explore cancellation of debt rules, preparing Form 982, and calculations for recourse and non-recourse debt.

Guest Speakers:
Robert S. Barnett, Esq., CPA, Capell Barnett Matalon & Schoenfeld, LLP; **Alan Blecher, Esq., CPA,** CBIZ Marks Paneth; and **Jodi Bloom-Piccione, CPA,** Eisner Advisory Group LLC

October 30 (Hybrid)

Dean's Hour: *Connelly v. United States*
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

This program discusses the significance of buy-sell agreements in business succession planning and the impact of *Connelly v. United States,* the 2024 Supreme Court decision that changes estate tax implications of life insurance funding and shareholder buy-sell agreements.

Guest Speakers:
Robert S. Barnett, Esq., CPA, and **Henry Montag, CFP,** The TOLI Center East

November 6 (Hybrid)

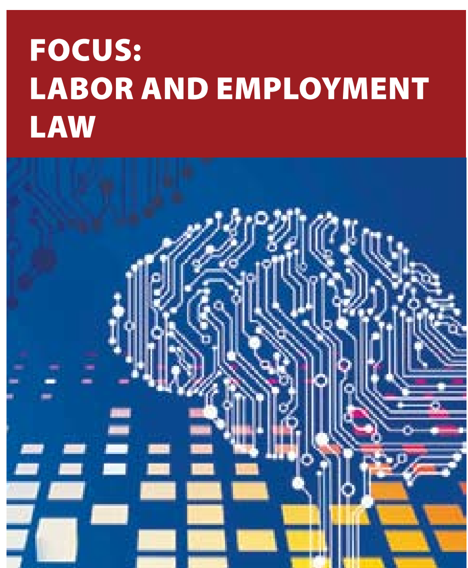
2024 Criminal Law Update
1:00PM – 4:00PM
With Suffolk Academy of Law, NCBA Criminal Court Law & Procedure Committee, and Nassau County Assigned Defender Plan
2.5 CLE Credits in Professional Practice and .5 CLE Credit in Ethics & Professionalism
NCBA Member FREE; Non-Member Attorney $105

This annual favorite addresses developments in federal and state case law and recent statutory changes. In-person attendance recommended.

Guest Speakers:
Hon. Mark D. Cohen (Ret), Touro University Jacob D. Fuchsberg Law Center; **Kent Moston, Esq.,** Legal Aid Society of Suffolk County; and **Robert M. Nigro, Esq.,** Nassau County Assigned Defender Plan

FOCUS: LABOR AND EMPLOYMENT LAW

The Impact of Artificial Intelligence Developments on Employment Law



Lauren M. Levine and Salvatore Puccio

A Starting Point: What is Artificial Intelligence and How is the Legal Landscape Responding?

In its simplest terms, artificial intelligence (AI) is the science of making machines think like humans. AI technology can process large amounts of data much faster than humans, and is capable of comprehension, problem solving, decision making, creativity, and, to a certain extent, autonomy.

Congress defines "AI" to mean a "machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments."[1] In the employment context, using AI has typically meant that the developer relies partly on the computer's own analysis of data to determine which criteria to use when making employment decisions.

As the world around us increasingly utilizes AI, the legal system is faced with the effects of AI. This article will address the specific uses of AI in the employment context, and the regulations being implemented (or proposed) to address the usage of this technology in human resource management.

AI and Employment Decision-Making

As we explore below, Employers are now facing a difficult balancing act with respect to AI. On the one hand, there is a risk of falling behind the times (as there is with any new technological innovation) by not utilizing AI. On the other hand, rushing to use AI when the legal landscape is still uncertain presents significant risks and challenges to employers if not used properly.

Employers may rely on different types of software that incorporate algorithmic decision-making during various stages in the employment process. Examples include: resume scanners that prioritize applications using certain keywords; employee monitoring software that rates employees on the basis of their keystrokes or other factors; "virtual assistants" or "chatbots" that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements; video interviewing software that evaluates candidates based on their facial expressions and speech patterns; and testing software that provides "job fit" scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived "cultural fit" based on their performance on a game or on a more traditional test. Each of these types of software relies on AI.

Regulatory Guidance on the Usage of AI

EEOC Guidance

In 2021, the U.S. Equal Employment Opportunity Commission (EEOC) announced an initiative to ensure that AI and other emerging technological innovations used in hiring and other employment decisions comply with federal civil rights laws. On May 12, 2022, the EEOC issued technical guidance on how the use of AI and other software tools to make employment decisions may violate the Americans with Disabilities Act (ADA).[2] The guidance explains how employers' use of software that relies on algorithmic decision-making may violate existing requirements under Title I of the ADA. It also provides practical tips to employers on how to comply with the ADA, and to job applicants and employees who think their rights may have been violated. On May 18, 2023, the EEOC published a second technical assistance document which focused on preventing discrimination against job seekers and workers under Title VII of the Civil Rights Act of 1964.[3] According to an EEOC press release, the new document builds on the previous EEOC guidance and discusses adverse impact, "a key civil rights concept, to help employers prevent the use of AI from leading to discrimination the workplace."[4]

The EEOC's guidance highlights the risks employers take when hiring vendors that use AI to assist in hiring. According to the EEOC, in many cases an employer is responsible under the ADA for use of algorithmic decision-making tools even if the tools ware designed or administered by another entity, such as a software vendor. For example, if an employer administers a pre-employment test, it may be liable under the ADA if the test discriminates against individuals with disabilities, even if the test was developed by an outside vendor. In addition, employers may be held responsible for the actions of their agents, which may include entities such as software vendors, if the employer has given them authority to act on the employer's behalf. Similarly, if the applicant tells the vendor it needs a reasonable accommodation and the vendor does not provide one, the employer would likely be responsible even if it was unaware that the applicant reported a problem to the vendor.

The EEOC guidance also focused on the potential for programs using AI to have disproportionate adverse effects on employees and potential employees based on factors such as race, color, religion, sex, and/or national origin.

White House, Congressional, and U.S. Department of Labor Interest in AI

The current White House has also created a blueprint for legislation addressing AI usage in the workplace, which includes a five-point system: (1) safe and effective systems; (2) algorithmic discrimination protections; (3) data privacy; (4) notice and explanation; and (5) human alternatives, considerations, and fallback. There is bipartisan support for AI legislation in Congress, which has convened multiple taskforces to address this issue.

In response to the White House initiative, the U.S. Department of Labor (DOL) released the "Artificial Intelligence and Worker Well-being: Principles for Developers and Employers" on May 16, 2024. The DOL's AI Principles for Developers and Employers include:

- **Centering Worker Empowerment:** Inclusion of workers and their representatives, especially those from underserved communities, in the development of such science and oversight of the AI systems in the workplace.
- **Ethically Developing AI:** AI systems should be designed, developed, and trained in a way that protects workers.
- **Establishing AI Governance and Human Oversight:** Proper oversight of the systems in place, including human fallback review and evaluation processes.
- **Ensuring Transparency in AI Use:** Employers should be transparent with workers and job

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seekers about the AI systems that are being used in the workplace.

- **Protecting Labor and Employment Rights:** Ensuring the new AI systems do not violate basic employment rights and protections.
- **Using AI to Enable Workers:** AI systems should assist, complement, and enable workers, and improve job quality.
- **Supporting Workers Impacted by AI:** Employers should support workers during job transitions related to AI.
- **Ensuring Responsible Use of Worker Data:** Current or prospective employees' data collected should be protected and limited in scope for the legitimate business purposes only.

AI Legislation in New York

States and cities are passing or proposing legislation aimed at addressing potential disparate impact from AI in the workplace. For example, employers in New York City must familiarize themselves with Local Law 144, which prohibits employers and employment agencies from using an automated employment decision tool (AEDT) in New York City *unless* they ensure a bias audit was done and provide required notices.[5]

In addition, the New York State Legislature has proposed legislation that would force employers to conduct bias audits and provide high levels of transparency if they use AI-based automated employment decision tools.[6]

Some of the requirements of these proposed bills are:

- Limitations on workplace surveillance
- Private right of action for violations
- Annual bias audit reporting
- Notice to applicants when AI-tools are being used for employment decision-making

Other Recent Developments

There have been many other developments in the AI employment arena. Below are two examples of recent updates that provide some insight into the parameters of this new body of law.

Case Law

The recent case of *Mobley v. Workday, Inc*.,[7] ap7discrimination laws. The plaintiff in that case claimed that he applied for over one hundred positions for which the employers utilized the defendant's applicant screening services. The crux of his claim is that despite him being qualified for all of the positions, the defendant's algorithmic decision-making tools, which utilize AI and machine learning (ML), discriminated against him and similarly situated job applicants by rejecting them on the basis of race, age, and disability.

Workday's customers delegated their traditional function of rejecting candidates or advancing them to the interview stage to Workday. The plaintiff alleged that Workday is liable for employment discrimination on three theories as: (1) an employment agency, (2) an agent of employers, and (3) an indirect employer.

Workday contended that as a software vendor, it is not a covered entity under anti-discrimination statutes and moved to dismiss the federal claims against it. Indirect employers and agents of employers may, however, be held liable as "employers" under the federal anti-discrimination laws.

The court denied the motion to dismiss because the plaintiff plausibly alleged Workday's liability on an agency theory.[8] To hold otherwise, would allow employers to escape liability for hiring decisions by saying that function has been handed over to someone else—or, in this case, to AI.[9]

Relevant to the widespread adoption of AI in human resource management, Workday attempted to draw a distinction between its role in the hiring process through the use of AI and a live human who is sitting in an office going through resumes manually. The court rejected that argument, finding that "[d]rawing an artificial distinction between software decision makers and human decision makers would potentially gut anti-discrimination laws in the modern era."[10]

The court also rejected Workday's motion to dismiss the plaintiff's disparate impact claims. According to the complaint, the plaintiff's resume/information includes his graduation from Morehouse, a leading HBCU, and shows his extensive employment history which could be assessed as a proxy for age.

The plaintiff also alleged that the required assessment and/or personality test are unlawful disability related inquiries designed to identify mental health disorders or cognitive impairments. His zero percent success rate at passing Workday's initial screening for over one hundred jobs, combined with allegations of bias in Workday's screening process, plausibly supported an inference that Workday's algorithmic tools disproportionately reject applicants based on factors other than qualifications, such as a candidate's race, age, or disability.[11]

Recent Legislation

In August 2024, Illinois amended its Human Rights Act (IHRA) to regulate the use of AI, including generative AI, in employment decisions by employers with operations in Illinois.[12] Illinois is the second state, after Colorado, to enact regulations expressly designed to address discrimination resulting from the use of AI and ML. Specifically, the IHRA makes it illegal for an employer to use AI that has the effect of subjecting individuals to employment discrimination on the basis of protected classes or to use zip codes as a proxy for protected classes.[13] The IHRA also requires employers to provide notice that they are using AI for the employment decisions enumerated in the statute.[14] The IHRA gives the Illinois Department of Human Rights the authority to adopt rules on the circumstances and conditions that require notice, the time period for providing notice, and the means for providing notice.[15] As mentioned above, many states are expected to follow suit, including New York.

What Does This Mean for Employers?

Employers need to be mindful of the new and expanding landscape of AI related regulations and laws. They must also understand the impact that AI and algorithmic decision-making may have on the applicant screening and hiring process and the potential risks and pitfalls of this new technology. AI is trained to learn, by providing the narrowest group of candidates. In doing so, AI may exclude certain omitted demographic features by combining factors that are correlated with race, age, or disability (or another protected classification), like zip code, college attended, and membership in certain groups. As we have seen in the *Mobley* case and based on the EEOC guidance, it is likely that both the employer and vendor may be held liable for this type of discriminatory screening, even if it is unintentional.

With that in mind, here are some pointers to minimize litigation risks, regulatory involvement, and employee complaints:

- Audit current AI systems for compliance with the guidelines above.
- Train members of management on the use of AI and how it is or may be implemented.
- Develop policies for the use of AI in the workplace.
- Verify that any third-party vendors are aware of regulations and will be assisting in providing applicable notices to applicants/employees, including that accommodations are available for testing/screening requirement tools.
- Ensure that there are human-backed alternatives and considerations for a fallback and final overview of applicants to avoid disparate impact.
- Ensure that any application-related testing does not discriminate against individuals with disabilities, such as reading tests, screen out timing, or tests requiring other algorithms that not everyone can access or use without accommodations.
- Ensuring that any AI-based tools do not automatically exclude persons of a certain age or demographic by limiting certain colleges, geographical locations/neighborhoods, or maximum years' experience.

1. H.R.6216 - National artificial intelligence act of 2020.
2. The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees | U.S. Equal Employment Opportunity Commission (eeoc.gov).
3. Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964 | U.S. Equal Employment Opportunity Commission (eeoc.gov).
4. EEOC Releases New Resource on Artificial Intelligence and Title VII | U.S. Equal Employment Opportunity Commission (eeoc.gov).
5. 2021 N.Y.C. Local Law No. 144, N.Y.C. Admin. Code. § 20-870.
6.(https://www.nysenate.gov/legislation/bills/2023/S8209#:~:text=2023%2DS8209%20(ACTIVE)%20%2D%20Summary,properly%2C%20and%20with%20meaningful%20oversight).
7. *Mobley v. Workday, Inc.*, Case No. 3:23-cv-00770-RFL, 2024 WL 3409146, (N.D. Cal. Jul. 12, 2024).
8. The plaintiff's theory that Workday is an employment agency was rejected and the court did not reach the question of whether Workday is an "indirect employer."
9. *Id.* at *5.
10. *Id.* at *6.
11. *Id.* At *8.
12. IL LEGIS 103-804 (2024), 2024 Ill. Legis. Serv. P.A. 103-804 (H.B. 3773) (WEST).
13. 775 ILCS 5/2-101(L)(1).
14. 775 ILCS 5/2-101(L)(2).
15. *Id.*

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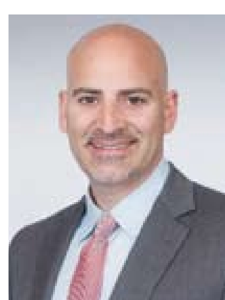

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FOCUS: LABOR AND EMPLOYMENT LAW

Employers Beware: Title VII Claims Are Expanding

Isaac S. Baskin

In recent months, both the United States Supreme Court and Second Circuit Court of Appeals have issued significant rulings lowering the standard for plaintiff-employees to establish disparate treatment claims under Title VII of the Civil Rights Act ("Title VII") against defendant-employers. These decisions make it harder for employers to defend against such lawsuits and, therefore, require attorneys to think more carefully before advising employers on how to deal with difficult, misbehaving, or underperforming employees. Indeed, the Supreme Court's decision in *Muldrow v. City of St. Louis, Missouri*[1] and the Second Circuit decision in *Bart v. Golub Corporation*[2] should make employers think twice before making an employment decision regarding any employee, especially any employee who the employer is seeking to discipline or terminate.

Courts analyze Title VII disparate treatment claims under the burden shifting analysis outlined in the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*.[3] Under this framework, the plaintiff-employee bears the initial burden of establishing a *prima facie* case of discrimination. To do so, the plaintiff-employee must establish, *inter alia*, that the employer subjected him or her to an adverse employment action under circumstances giving rise to an inference of discrimination. Once the plaintiff-employee raises such an inference of discrimination, the burden shifts to the defendant-employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. The burden then shifts back to the plaintiff-employee to present evidence that the defendant-employer's proffered reason is pretext for an impermissible motivation, i.e., discrimination prohibited by Title VII.

The Supreme Court in *Muldrow* addressed the first prong of the *McDonnell Douglas Corp*. burden shifting analysis: the plaintiff's burden to establish an adverse employment action. A plaintiff sustains an adverse employment action in the Title VII context if the plaintiff endures a materially adverse change in the terms and conditions of his or her employment. One adverse employment action many plaintiff-employees cite to is a transfer from one position to another. Before *Muldrow*, courts held that "a transfer is an adverse employment action if it results in a change in responsibilities so significant as to constitute a setback to the plaintiff's career."[4] The *Muldrow* Court altered this burden in holding that a transferee need only "show some harm respecting an identifiable term or condition of employment," but a "transferee does not have to show, according to the relevant text, [] that the harm incurred was *significant* [o]r serious, or substantial…"[5]

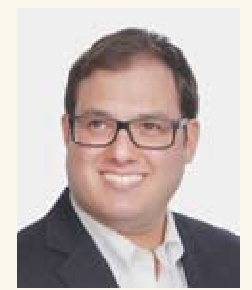
From 2008 to 2017, the female plaintiff in *Muldrow* was employed by the St. Louis Police Department as a plainclothes police officer in the Department's specialized Intelligence Division. In 2017, the Department transferred the plaintiff out of her division, and against her wishes, to another division, to replace her with a male officer in the Intelligence Division. The plaintiff's rank and pay remained the same, but her responsibilities, perks and schedule changed after the transfer. The Supreme Court held that while these changes may not be significant, they were enough to potentially establish that the plaintiff suffered an adverse employment action because of her gender in violation of Title VII. Therefore, the Court vacated the lower court's grant of summary judgment dismissing the case and remanded it. This holding lowers the bar for plaintiff-employees to establish adverse employment actions in Title VII disparate treatment cases, in particular, when relying on allegations concerning involuntary transfers.[6]

Next, the Second Circuit, in *Bart*, addressed the final stage of the *McDonnell Douglas Corp*. burden shifting analysis: the plaintiff-employee's burden to show that the defendant-employer's legitimate, non-discriminatory reason(s) for the adverse employment action(s) was pretext for discrimination prohibited by Title VII. The *Bart* court clarified that "a plaintiff may, but need not, show at the third stage of the *McDonnell Douglas* burden-shifting test that the employer's stated justification for its adverse action was nothing but pretext for discrimination; however, a plaintiff may also satisfy this burden by adducing evidence that even if the employer had mixed motives, the plaintiff's membership in [a Title VII] protected class was at least one motivating factor in the employer's adverse action."[7]

In *Bart*, the plaintiff was a female manager at Price Chopper who was terminated for falsifying food logs maintained for health and safety purposes. The plaintiff admitted that she falsified these food logs and that such falsification was a violation of the defendant's policies. However, at her deposition, plaintiff testified that her male direct supervisor, who was one of the individuals involved in the decision to terminate the plaintiff, made numerous remarks to plaintiff indicating that he believed women were not suited to be managers. The Second Circuit held that despite the undisputed evidence of plaintiff's misconduct, her testimony concerning her supervisor's comments was enough to defeat summary judgment and potentially establish that her gender played some role in her termination at trial. Accordingly, even employees who blatantly violate an employer's rules or other regulations may still be able to establish a claim of discrimination under Title VII.

Both of the rulings in *Muldrow* and *Bart* provide plaintiff-employees additional avenues to establish their Title VII claims. These decisions should give pause to employers before they take any action against a disruptive or misbehaving or underperforming employee. They also are a reminder for businesses to train their managers and supervisors on the changing legal landscape of discrimination laws to avoid the costs, in both time and money, of litigation. Thus, as employers face increased exposure to discrimination suits, attorneys play an even more important role in advising and defending their clients.

1. 144 S. Ct. 967 (2024).
2. 96 F.4th 566 (2d Cir. 2024).
3. 411 U.S. 792 (1973).
4. *De Jesus-Hall v. New York Unified Court Sys.*, 856 Fed, Appx. 328, 330 (2d Cir. 2021)(emphasis supplied and quoting *Galabya v. N.Y.C. Bd. of Educ.*, 202 F.3d 636, 641 (2d Cir. 2000)).
5. 144 S. Ct. at 974 (quotations and citation omitted).
6. *See e.g. Hacczynska v. Mount Sinai Health Sys.*, No. 23 Civ. 3091 (MKB), 2024 U.S. Dist. LEXIS 112830 at *27, fn. 13 (E.D.N.Y. Jun. 26, 2024)(noting that a plaintiff-employee "need only show *some* injury respecting her employment terms or conditions, rather than substantial injury" to state a Title VII claim of discrimination. (internal quotations and citations omitted)).
7. 96 F.4th at 567.



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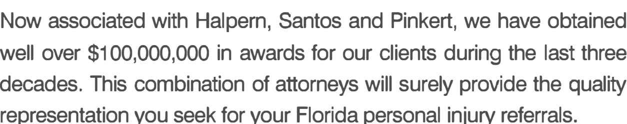

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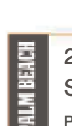

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If you have questions, please contact Dian Mills O'Reilly at DOREILLY@NASSAUBAR.ORG.

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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.

After nearly six decades of dedicated service, Nassau Suffolk Law Services announces its new name, **Legal Services of Long Island** (**LSLI**). This rebranding underscores the organization's commitment to providing critical legal assistance while emphasizing its distinct identity as the region's largest nonprofit provider of free civil legal services, separate and apart from any government agencies.

Harris Beach PLLC is pleased to announce **Paulo Coelho** has been recognized as 2025 *Best Lawyers: Ones to Watch® in America*.

Laurie B. Kazenoff is honored to have been selected as a 2025 Best Lawyer in Tax and her firm, Kazenoff Tax Law LLC, was selected as a Best Law Firm Tier 1—Tax.

Robert J. Kurre, Managing Partner of Kurre Schneps LLP, has been selected for the 31st edition of *The Best Lawyers in America®* for Elder Law, the eleventh consecutive year that he has been included in *The Best Lawyers in America*. Kurre also holds an AV Peer Review Rating from Martindale-Hubbell and is a Certified Elder Law Attorney (CELA).

Veteran litigator **Matthew K. Flanagan** has joined Marshall Dennehey as a Shareholder and Co-Chair of the firm's Disciplinary Board Representation Practice Group. He will divide his time between the firm's Melville and New York City offices. He was previously a Partner at Catalano Gallardo & Petropoulos, LLP in Jericho.

Vishnick McGovern Milizio (VMM) Managing Partner **Joseph Milizio**, head of the firm's Business and Transactional division, published a three-part series of articles on the legal aspects of exit and succession planning for businessowners and executives in Tax Stringer, the NYSSCPA journal. VMM Associate **Kristine Garcia-Elliott** published an article in the summer 2024 issue of the magazine *MASK: Mothers Awareness on School-Age Kids*, titled "Adulting 101: Legal Advice for Your Newly-Minted Adult." VMM Associate **Katherin Valdez-Lazo** was interviewed on September 12 in Long Island Business News (LIBN) about the new federal Corporate Transparency Act (CTA) and its implications for small and mid-size businesses.

Robert S. Barnett, Founding Partner of Capell Barnett Matalon and Schoenfeld LLP, will present a two-part series, "Traps When Buying or Selling a Business," and a seminar on "Real Estate Workouts" for the Nassau Academy of Law. Last month, Barnett lectured at the Practising Law Institute's 55th Annual Estate Planning conference on "Grantor Trusts—Currently and in the 2025 Green Book." At next month's 2024 Accounting and Tax Symposium (ATS), Partner **Yvonne R. Cort** will speak on NYS residency audits; Barnett and Partner **Gregory L. Matalon** will speak about Form 1041 Income Tax Planning and Design; Matalon and Partner **Erik Olson** will discuss IRS Forms 706 and 709; Barnett and Matalon will present on Buy Sell Agreements after Connelly; and Barnett and Partner **Stuart H. Schoenfeld** will speak about tax issues in elder care and supplemental needs planning.

FOCUS:
CIVIL LITIGATION

The New CPLR 2106

Michael Kohan

As of January 1, 2024, Civil Practice Law and Rules ("CPLR") 2106 was amended to its current form. The statute, as amended, allows any person to affirm a sworn statement in court documents in place of an affidavit, which previously required a notary public. This change has wide-reaching effects on lawyers and laypeople alike. While the amendment is still relatively new, its ramifications can already be seen in recent case law, as well as in practice. Given the significance of CPLR 2106, New York lawyers are well advised to acquaint themselves with the amendment and its real-life consequences.

CPLR 2106 Before the Current Amendment

Prior to a short-lived October 2023 amendment and the subsequent 2024 amendment, the CPLR had very stringent notarization requirements, with few carve-outs. CPLR 2106(a) only allowed certain categories of people (namely non-party attorneys, physicians, osteopaths, and dentists) to submit affirmations in lieu of notarized affidavits.[1] Other professionals such as chiropractors,[2] podiatrists, accountants and engineers still had to submit notarized affidavits.

Individuals outside of the United States could also submit an affirmation instead of an affidavit, provided the instrument included proper statutory language referencing penalties of perjury for false statements.[3] Barring that, the old statutory language made it so that the vast majority of litigants and non-party witnesses alike had to ensure that all sworn affidavits submitted to courts were notarized.

This adherence to notarization made it so that affidavits were widely required. Of course, this had significant practical implications. While attorneys could certainly sign affirmations, thanks to the CPLR 2106(a) exception, the requirement of notarized affidavits for litigants and non-party witnesses was oftentimes burdensome. If a client or other witness's notarized signature was required, the process of obtaining affidavits or verifying pleadings was undoubtedly lengthened.

The Amendments

The initial 2023 amendment to CPLR 2106(a), only in effect for about two months, permitted a "health care practitioner licensed, certified or authorized under title eight of the education law to practice in the state" to submit an affirmation.[4] Ostensibly, this short lived amendment allowed health care practitioners such as chiropractors, nurses, podiatrists, and physician's assistants, who previously had to submit notarized affidavits, to instead submit affirmations.

Now, under the current law and most recent amendment, CPLR 2106 simply reads:

> The statement of *any person* wherever made, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in New York in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:
>
> I affirm this ___ day of ______, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.[5]

Affirmations containing the above language now have the same effect as a notarized affidavit, for *all* affirmants, including those persons previously covered under the old CPLR 2106(a). The amendment renders obsolete the specific exemption required for lawyers and physicians.

Legislative sponsors of the current amendment felt that the previous notarization requirement was "unduly burdensome" to "litigants, non-party witnesses, county clerks, and courts" alike.[6] Further, federal courts had removed this notarization requirement long ago. 28 United States Code § 1746 permits unsworn declarations to be substituted for affidavits. The amendment aligns New York with the 20+ states already following this federal practice.[7]

Pros and Cons

Proponents of the amendment agree with its sponsors that it lessens the burden on attorneys and clients alike, especially with respect to litigants who did not readily have access to a notary. Oftentimes, litigants would have to scramble to find an accepting bank, stationary store, or court to get their court documents notarized. Now, there is no longer a need for counsel to either invite clients into the office in order to notarize a court document or to succumb to a nail biting waiting game while clients seek notarization on their own.

Conveniently, out-of-state litigants and non-party witnesses are also no longer required to provide certificates of conformity that confirm their notarized signature was obtained in accordance with the laws of New York State.

Finally, the newest amendment's proponents stress that the statutory language, specifying imprisonment or a fine for perjury, is a significant enough deterrent for lying in affirmations.

Opponents of the new CPLR 2106 find that simply affirming "under penalties of perjury" and acknowledging the possibility of a fine or imprisonment for making untruthful statements is insufficient to prevent lying. They posit that the notarial formality made it so that court documents helped confirm the signer's identity. Indeed, the mere presence of a notary public made the process more solemn and serious, and discouraged the affiant from lying in front of a state-licensed third party. For these opponents, the convenience-related advantages likely falter when compared to the perceived loss of the truth and affirmant identification.

Case Law Thus Far Concerning Affirmations

Various opinions this year have addressed the recent amendment and strictly construed the need for CPLR 2106's statutory language in affirmations.[8]

The Supreme Court, Queens County (Hon. Tracy Catapano-Fox), in *Zhou v. Central Radiology, PC*, held that merely stating that the witness affirms under penalty of perjury without stating the penalties for not doing so does not substantially comply with the new CPLR 2106.[9] In that medical malpractice action, the court echoed legislators' intent in noting that "the amendment to the statute was not made in an effort to lessen the seriousness of the affirmation and the consequences of making false statements, but instead was meant to reduce the burden of seeking a notary public to obtain a properly sworn affidavit." The court held as such even though the adverse party did not raise the affirmation's defect, citing the need "to uphold the integrity of the laws of New York, and ensure compliance by all parties."[10]

Other decisions published this year further emphasize the prudence of strictly restating the requisite statutory language. In the class action suit, *Reynolds v. Mercy Inv. Servs., Inc.*, the Eastern District made a passing reference to the new CPLR 2106 and held that under the new amendment, an affirmation must be in substantially the form language provided in the statute.[11]

In *Diego Beekman Mut. Hous. Ass'n Hous. Dev. Fund Corp. v. Hammond*, the Bronx County Civil Court upped the ante and held that the new statutory language is not merely a suggestion, but rather is mandatory.[12] When the form language is utilized, the case law thus far favors acceptance of the subject affirmation.

In *Hereford Ins. Co. v. Physio Care Physical Therapy, PC*, the form language accompanied an insurance adjuster's statement that summarized the plaintiff insurer's position on liability to obtain a default judgment.[13] The court held "that the statement submitted satisfies the requirements of CPLR 2106 as amended and must be regarded as having the same force and effect as an affidavit."[14]

Applicability of CPLR 2106 to Verification of Pleadings

The May 2024 Second Department decision of *Matter of Sweet v. Fonvil* held that an election validating petition containing CPLR 2106's affirmation language was properly verified and was therefore sufficient, without the need for notarization.[15]

The First Department, in *Matter of Grandsard v. Hutchinson*, affirmed a trial court (Hon. Richard Latin)[16] decision in holding that an attorney affirmation accompanying an election validating petition was invalid.[17] This affirmation, unlike *Matter of Sweet* affirmation, lacked the statute's "magic words" and simply affirmed under the penalty of perjury.[18] These cases can be reconciled, as the *Matter of Grandsard* court would have likely accepted the offending affirmation if it contained those magic words, including references to the statute's penalties. The trial court referred to the statute's necessary magic words as "impress[ing] on the witness the gravity of his factual account."[19]

Notably, neither of the courts above limited their holdings regarding the verification of pleadings using CPLR 2106 as being applicable solely to election law matters.

Advice to Counsel

Given the amendment's recency and the relatively small amount of authority at this time, attorneys should err on the side of caution and have a

template handy that "cuts and pastes" the exact CPLR 2106 language into affirmations. Practitioners should not rely on the statute's allowance for use of "substantially" the same language, as a practitioner's understanding of what substantially conforms to the statute may differ from that of a court.

When utilizing the new CPLR 2106 affirmation, attorneys should also ensure that their document is titled as an "affirmation" and not an "affidavit." Moreover, since CPLR 2106(a) is abolished and the new statute applies to everyone, when submitting attorney affirmations in support of a motion, attorneys should ensure that, like their clients, their affirmations also contain all of CPLR 2106's mandatory language.

When filing verified pleadings in cases where a summons or complaint is being filed on the cusp of the statute of limitations expiration, an attorney should stick with the usual notarized verification in order to avoid a clerk's wrongful rejection of a verification utilizing CPLR 2106's affirmation language.

On a personal note, a Nassau County matrimonial clerk wrongfully rejected an Answer because it contained a CPLR 2106 verification rather than a notarized one. The clerk erroneously relied on the NYSBA article that this article references which, incidentally, did not cite any binding authority prohibiting pleading verification under CPLR 2106. This was particularly bizarre because clerks are not permitted to reject court filings except in very limited circumstances and a purportedly defective verification is *not* one of them.[20]

Notarization Still Required

Further, pursuant to Domestic Relations Law § 236(B)(3), various documents central to matrimonial law—such as, prenuptial, postnuptial, and separation agreements—must still be "acknowledged or proven in the manner required to entitle a deed to be recorded."[21] Similarly, notarization remains necessary to convey real property.[22] The same holds true with the execution of formal estate planning documents, such as wills, trusts, powers of attorney, and health care proxies, which all appear to still require a notary public.

Finally, practitioners should not assume that a court will grant them leave to submit a new affirmation in the event they submit an affirmation that does not contain CPLR 2106's magic words. Although CPLR 2001 allows a court to "permit a mistake, omission, defect or irregularity…to be corrected, upon such terms as may be just," it is completely discretionary. Different courts have had varying tolerances for defective affidavits prior to CPLR 2106 as well as defective affirmations postdating the statute.[23]

What's Next?

At present, judicial and clerical inconsistency makes the amendment somewhat daunting in practice. Nonetheless, as attorneys test the waters and more case law is published, safe practical guidelines will become clearer. Furthermore, there is currently proposed legislation to expand the statute for use in administrative proceedings.[24] One thing is for sure—it remains to be seen just how far-reaching the use of unnotarized affirmations will become.

1. CPLR 2106(a) 2022.
2. *Fleck v. Calabro*, 268 A.D.2d 738 (3d Dept. 2000).
3. CPLR 2106(b) 2022.
4. CPLR 2106 (2023).
5. CPLR 2106 (emphasis supplied).
6. Sponsor's Mem., A.B. 5772 (N.Y. 2023).
7. Sponsor's Mem., *supra* n.6.
8. David Paul Horowitz and Katryna L. Kristoferson, Burden of Proof: Affirmation of Truth of Statement by 'Any Person' Redux, New York State Bar Association, May 24, 2024, available at https://bit.ly/3M4eVXo.
9. 2024 N.Y. Slip. Op. 24158 (N.Y. Sup., May 22, 2024).
10. *Id.* at 7.
11. No. 24-CV-0362 (NJC) (JMW), 2024 WL 496719 (E.D.N.Y. 2024).
12. 2024 N.Y. Slip Op. 50144(U) (Civ. Ct., Bronx County, Feb. 9. 2024).
13. 83 Misc. 3d 646 (Sup. Ct., N.Y. Co. 2024).
14. *Id.*
15. 2024 N.Y. Slip. Op. 02564 (2d Dept. May 10, 2024).
16. (NYSCEF Index No. 153605/2024).
17. 2024 N.Y. Slip. Op. 02613 (1st Dept. May 9, 2024).
18. Burden of Proof, *supra* n.10.
19. (NYSCEF Index No. 153605/2024).
20. CPLR 2102(c) ("A clerk shall not refuse to accept for filing any paper…except where specifically directed to do so by statute or rules…or order of the court"); See also, Uniform Rule 202.5(d)(1).
21. Harriet Newman Cohen, 'I Affirm. I Swear.' The Pandemic Has Transformed NY's Notarization Requirements—Or Has It?, New York Law Journal, July 26, 2024, available at http://bit.ly/3YMIkNo.
22. RPL § 298.
23. *Parra v. Cardenas*, 183 A.D.3d 462, 463 (1st Dept. 2020) (where court allowed party to file a corrected affidavit, nunc pro tunc). See also, *Matter of Grandsard, supra* (court dismissed a time sensitive election petition that was improperly verified by affirmation, without leave to renew).
24. Sponsor's Mem., A.B. 9478 (N.Y. 2024).

Michael Kohan is the Principal Attorney of Kohan Law Group, P.C., a boutique civil litigation firm in Manhasset. He also sits on the Appellate Division, Second Department's Committee on Character and Fitness and is the President of the Network of Bar Leaders (a coalition of over 50 bar associations). He can be reached at michael@kohanlawgroup.com.

Isabel Kupilik assisted with the preparation of this article and is an Associate with Kohan Law Group, P.C.

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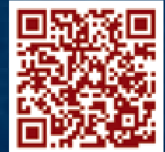

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Thank You

To everyone who donated to the We Care Fund In Tony's memory, the Falanga Family extends its deepest appreciation.

Sincerely,
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BBQ At the Bar

On September 5, over 250 judges, attorneys, law students and Corporate Partners gathered on the lawn of Domus to kick off the new Bar year and enjoy each other's company, perfect weather, and tasty BBQ.

Photos By Hector Herrera

CALENDAR | COMMITTEE MEETINGS

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Mental Health Law	Jamie A. Rosen
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Nominating	Rosalia Baiamonte
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Supreme Court	Steven Cohn
Surrogate's Court Estates & Trusts	Michael Calcagni and Edward D. Baker
Veterans & Military	Gary Port
Women In the Law	Melissa P. Corrado and Ariel E. Ronneburger
Workers' Compensation	Craig J. Tortora and Justin B. Lieberman

MONDAY, OCTOBER 7
Law Student
6:00 p.m.

TUESDAY, OCTOBER 8
Labor & Employment Law
12:30 p.m.

WEDNESDAY, OCTOBER 9
Civil Rights
12:00 noon

Matrimonial Law
5:30 p.m.

THURSDAY, OCTOBER 10
Hospital & Health Law
8:30 a.m.

Chair Kevin P. Mulry, Esq. will speak on "2024 False Claims Act Update."

Intellectual Property
12:30 p.m.

Guest speaker John R. Sepúlveda, Esq. will discuss "Navigating AI-Driven Content Creation and Copyright Challenges."

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

FRIDAY, OCTOBER 11
Criminal Court Law & Procedure
12:30 p.m.

Supervising Judges Teresa K. Corrigan and Tricia M. Ferrell will discuss current procedures, issues, and challenges for Nassau County Court and Nassau County District Court. In person only.

TUESDAY, OCTOBER 15
Senior Attorney
12:30 p.m.

Guest speaker, Bill Sebell, will speak on "Cryptocurrency 101, An Introduction to Crypto Currency."

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

This year's "Surrogate's Court Game Night" will be hosted by Nassau County Surrogate Margaret C. Reilly and presented by creators and game-judges John P. Graffeo, Esq., Lori Sullivan, Esq. and Sally Donahue, Esq.

WEDNESDAY, OCTOBER 16
Immigration Law
12:00 noon

Ethics
5:30 p.m.

THURSDAY, OCTOBER 17
Mental Health Law
8:30 a.m.

Detective Lieutenant James Pettenato of the Nassau County Police Department Community Affairs will present "Coffee with a Cop: Responding to Mental Health Crises in the Community," a Q&A style program covering wellness checks, 911 calls for mental health assistance, transportation to a hospital for a psychiatric evaluation, police reports, mental health training for police, and much more. Offered hybrid, Members are encouraged to join Lieutenant Pettenato at Domus.

Association Membership
12:30 p.m.

Supreme Court
12:30 p.m.

Insurance Law
5:30 p.m.

Worker's Compensation
5:30 p.m.

WEDNESDAY, OCTOBER 23
Business Law, Tax & Accounting
12:30 p.m.

THURSDAY, OCTOBER 24
Education Law
12:30 p.m.

FRIDAY, OCTOBER 25
Appellate Practice
12:30 p.m.

WEDNESDAY, OCTOBER 30
District Court
12:30 p.m.

New Lawyers
12:30 p.m.

THURSDAY, OCTOBER 31
Construction Law
12:30 p.m.

WEDNESDAY, NOVEMBER 6
Real Property Law
12:30 p.m.

Law Student
6:00 p.m.

THURSDAY, NOVEMBER 7
Hospital & Health Law
8:30 a.m.

Intellectual Property
12:30 p.m.

Publications
12:45 p.m.

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

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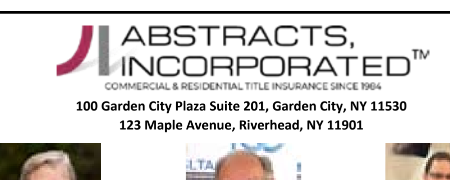

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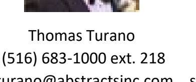
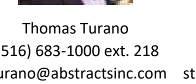

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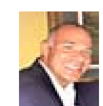

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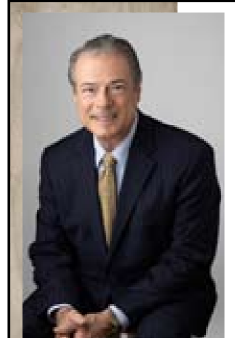

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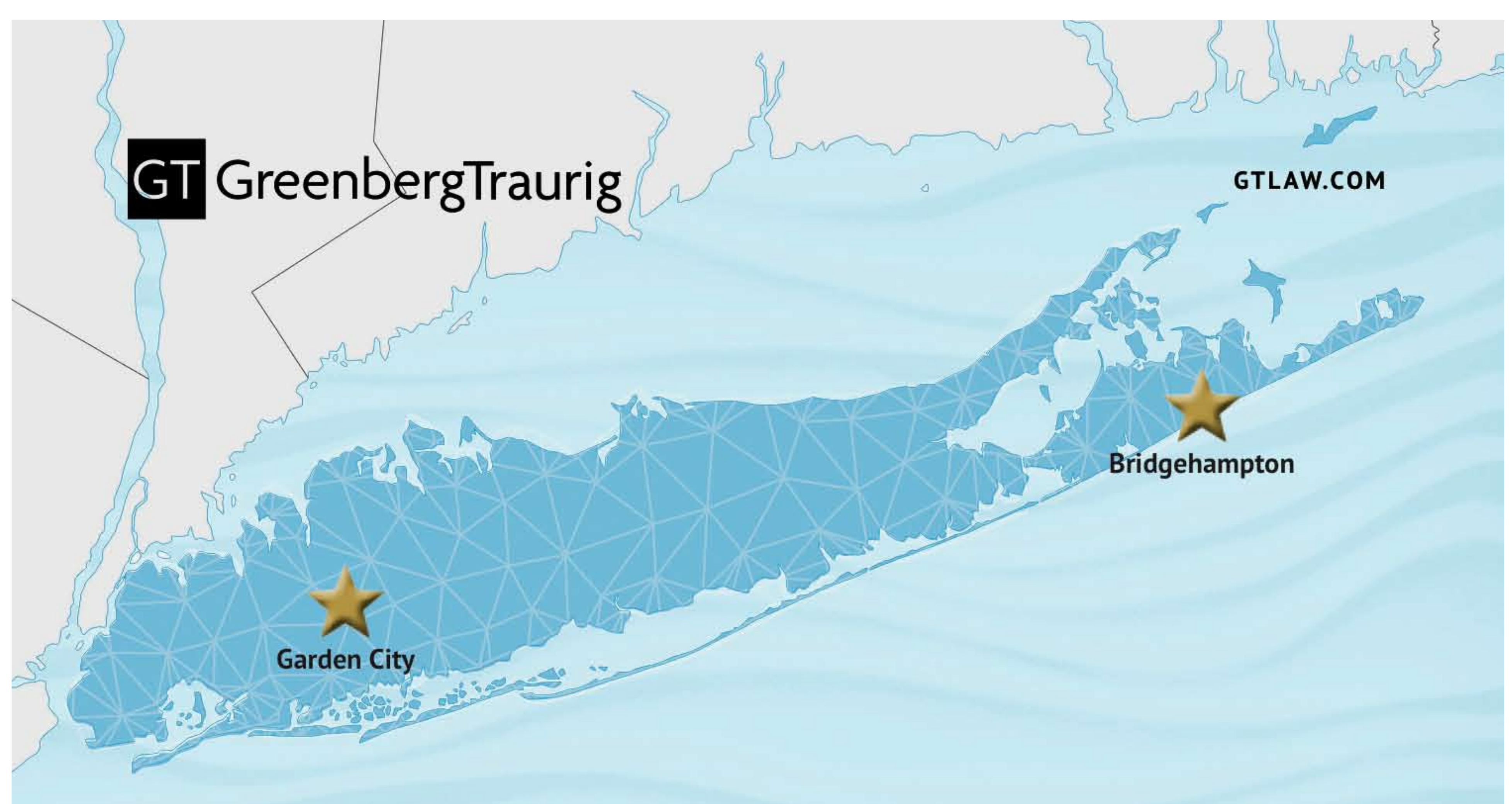

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