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Come for Lunch, Stay for CLE!

With warmer weather on the horizon and COVID-19 cases on the decline, we encourage you to take a break from the computer screen, get some fresh air, and head to the NCBA to attend CLE programs and your committee meetings—as there is truly nothing like coming together in person to network and learn something new.

Knowledgeable and Friendly Staff

The NCBA staff is available to you from 8:30 AM to 5:00 PM, Monday through Friday to assist you and answer any questions you may have, so be sure to stop in and say hello.

Want to know more about the Association or have an idea you would like to share? Executive Director **Liz Post** is available to meet with you. In need of a professional headshot? Building Manager **Hector Herrera** can help. Questions about CLE credit or an upcoming program? Visit the Academy to say hello to **Jen Groh** and **Patti Anderson**. Want to learn about the benefits of membership or join a committee? Visit **Donna Gerdik** and **Stephanie Pagano** in the Membership office.

Are you interested in writing an article for the *Nassau Lawyer,* attending an upcoming event, or getting involved with the WE CARE Fund? See **Ann Burkowsky** and **Bridget Ryan** in the Special Events office.

Interested in volunteering your time and expertise or looking to complete pro bono hours? **Madeline Mullane**, **Cheryl Cardona**, and **Omar Daza** can offer volunteer opportunities.

Are you in need of professional and peer support available to lawyers, judges, law students, and their immediate family members who are struggling with alcohol, drugs, gambling, and mental health problems? Lawyer Assistance Program Director **Dr. Beth Eckhardt** is here to provide resources. Looking to join the Lawyer Referral Information Service Panel? **Pat Carbonaro** and **Carolyn Bonino** are here to help you through the process. Looking for a bite to eat in a convenient and casual setting? Read on.

Come for Lunch, Stay for CLE

Did you know that the NCBA is one of the only bar associations in the country that has its own building with in-house dining facilities and catering services? Members can earn CLE credit, attend committee meetings, and enjoy lunch at the same time.

Lunch is served weekly by Esquire Catering, Inc., in our traditional style Dining Room from 12:00 noon to 2:00 PM, with a menu offering a variety of moderately priced à la carte sandwiches, salads, vegetarian options, and more—beverages included with your meal!

With over 100 CLE programs offered per year, members have a convenient place to lunch and learn with colleagues in a casual environment. "Being a member of the Bar isn't just about the profession—it's about making connections and developing relationships," shared active NCBA Member Ira S. Slavit. "Having an in-house caterer makes Domus the perfect place for that. There's something about showing up and being present at the Bar that you just can't get through a screen." For a list of upcoming CLE programs, turn to the centerfold of this issue. For a list of upcoming committee meetings, visit page 21.

Esquire Catering, Inc. at the Bar Association offers a complete range of catering services, including cocktail receptions, buffets, formal sit-down dinners, business meetings, and private events, including graduations, communions, birthdays, weddings, reunions, and more.

Catered events are held in the Main Dining Room and Great Hall for large parties, and the Founders Room or Board Room for more intimate events. Contact Esquire Catering, Inc. at **(516) 414-0879** for more information about holding your next celebration right here at the NCBA.

NCBA Annual High School Mock Trial Tournament

Jennifer C. Groh

The annual Mock Trial Tournament for high school students is one of the highlights of the Bar Association year, both for the competing teams and the attorneys involved in the advising and judging. The long-running program has helped further the students' understanding of trial advocacy and the legal system for over thirty years and has perhaps sparked a future career aspiration or two.

In past years, the hallways of the Nassau County Supreme Court have echoed with the excited voices and footsteps of 600 students from nearly 50 schools across Nassau County. Like so many other events these past few years, the COVID-19 crisis forced the re-thinking and re-imagining of this annual competition.

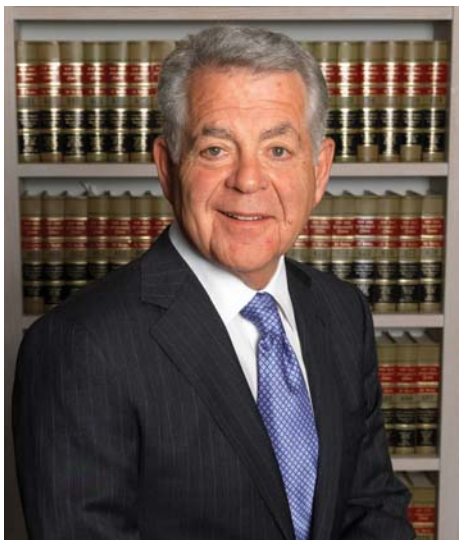
On February 10, the Mock Trial Tournament got underway once again, albeit virtually, thanks to the dedication of the NCBA members who volunteer their time to serve as attorney advisors for the 44 teams entered in the competition this year; as judges for the seven rounds that make up the competition; and as Chairs who oversee the running of the tournament each year.

The final round in April will determine the Nassau County champion which will go on to the statewide finals in May, hopefully to be held in person, health conditions permitting. The Mock Trial Tournament Chairs are Hon. Marilyn K. Genoa, Peter H. Levy, and Hon. Lawrence M. Schaffer, and the Administrator is Jennifer C. Groh, Director of the Nassau Academy of Law.

Jennifer C. Groh is the Director of Continuing Legal Education for the Nassau Academy of Law at the Nassau County Bar Association. The Nassau Academy of Law hosts CLE programs throughout the year. For additional information, contact Jennifer at jgroh@nassaubar.org or (516) 747-4077.

Gassman Baiamonte Gruner, P.C.

Preeminence in Matrimonial & Family Law



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Gassman Baiamonte Gruner, P.C., has established itself as Greater New York's premiere matrimonial and family law firm, and it is one of the most respected and sought-after matrimonial law firms servicing Long Island and the greater New York Metropolitan area.

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

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I'm Asking a Favor: Support the Domus Restaurant

FROM THE PRESIDENT

Gregory S. Lisi

All restaurants and venues in Nassau County are open for business. This includes the restaurant at Domus, which is an extremely important part of the membership experience at the NCBA. The lunch crowd at Domus had almost returned to pre-pandemic numbers after the COVID shutdowns during the first half of 2021. In fact, we hosted two special buffet luncheons, including the Thanksgiving Luncheon, which had over 150 guests, and the Holiday Luncheon, which had nearly 100 guests.

Regular weekdays at the restaurant had a low, but steadily increasing lunch crowd. While we had to close Domus for the first two weeks of January 2022 due to the surge in positive COVID cases, the restaurant at Domus has since reopened. Unfortunately, since that reopening, the lunch crowd attendance has been extremely low. I know that the Members of this Bar Association want to do what they can to support us during these unusual times. One of the most important things you can do is support the restaurant at Domus. The restaurant's survival and ability to thrive is vitally important to keeping the NCBA up and running.

To that end, I ask a favor; that all the members of this Bar Association agree to come to Domus for lunch once a month. Twice a month would be even better, but if the 4,000+ members would come once a month, the restaurant would be thriving once again. I further ask the members of the Board of Directors, Past Presidents, Committee Chairs, and the Academy Board to eat at Domus twice a month. To lead by example, the members of the Executive Board have pledged to eat at Domus three times per month at a minimum. I personally eat here at Domus at least twice a week, if not more. The food is excellent!

> "If you bring four people to a buffet lunch, the fourth buffet lunch will be free."

Special Deal at Esquire Catering

Esquire Catering has agreed to have a buffet on Tuesdays, Wednesdays, and Thursdays so that our members on a time restraint can eat lunch quickly (à la carte is also available).

I also asked our caterer to reward our members who come to Domus for lunch with a special deal. **If you bring four people to a buffet lunch, the fourth buffet lunch will be free.** This is a great opportunity to save a little money while introducing your associates and clients to the beautiful and tasty Domus restaurant.

The buffet menu changes daily, but some of the à la carte meals are so good I must mention them here. The best, in my opinion, is the salmon BLT. This is one of my favorite meals that is offered daily on the à la carte menu. I am also very partial to the chicken quesadilla. The french fries are also fantastic, always served hot and crispy, and are similar to McDonald's fries. In the mood for something warm in this cold weather? Chef Jeff's homemade soups are fantastic. Trust me, try the soup.

Further, Chef Jeff offers lunch specials every day. I had the penne alla vodka with grilled chicken last week and it was excellent! I also enjoyed the "Rodeo" burger with BBQ sauce that had so many delicious toppings—including my favorite—deep fried onions. There are many other items on the à la carte menu, including the usual lunch fare—hamburgers, chicken tenders, and salads.

The grilled chicken avocado wrap is always a great go to for me. They even offer a veggie burger for those who prefer a vegetarian option.

Additionally, Gary Cendroski, Esquire Catering Manager, has informed me that the restaurant is now allowing pick up orders if you do not have time to dine in the restaurant. You can call him at (516) 414-0879 and he will have your order ready to go when you arrive. So convenient!

Lastly, there are always catering options available on nights and weekends. Esquire Catering, Inc., can host so many events at Domus, including weddings and bar mitzvahs, as well as NCBA and even other bar associations' dinners and events. For example, the NCBA Labor and Employment Law Committee has been having an end-of-the-year dinner for nearly two decades and will again this year. Further, the NCBA Matrimonial Law Committee has been having their evening committee meetings catered every month. The food, and the service, is excellent.

So, I ask you, the Members of the Nassau County Bar Association, to consider having one or two lunches a month at Domus. It is open from 12:00 noon to 2:00 p.m. every weekday. If you go out to lunch, why not go to a place we all call home and support your Bar Association during these difficult times? I hope to see you there.

On February 15, the NCBA Commercial Litigation Committee meeting welcomed over 50 people at the NCBA for lunch with Guest Speaker Hon. Timothy S. Driscoll.

FOCUS: EDUCATION LAW

Do Disabled Students Have the Right to Counsel in Disciplinary Hearings?

Scott J. Limmer

College students who are accused of rules violations usually face a disciplinary hearing. Accusations for serious violations such as plagiarism, academic misconduct, and harassment of students or faculty may lead to serious penalties, including suspension or expulsion.

Students at public universities have a due process right to a fair hearing before that happens,[1] but academic institutions do not always place fairness to accused students at the top of their agendas. Students are at a particular disadvantage when academic policies prohibit them from being represented by counsel at disciplinary hearings.

This disadvantage is compounded when the student suffers from a mental health condition that impairs the student's ability to defend against the accusation. Under those circumstances, federal law may require the institution to accommodate a disability by allowing the student to be represented by counsel.

Why Schools Disallow Representation by Counsel at Disciplinary Hearings

Schools often justify policies that prohibit representation at disciplinary hearings by claiming that lawyers make the hearing "adversarial."[2] Yet hearings pitting one side against another are adversarial by nature.

If the school contends that a student violated a rule and the student denies that accusation, that makes the hearing adversarial. While representation by counsel levels the playing field for students, making the hearing fair does not make it any more adversarial. When schools are not represented by attorneys, they claim that students have an unfair advantage when they have legal representation.

That argument is disingenuous, since the school's lawyers helped the school create the disciplinary system and likely advised school administrators how to conduct the hearing. If schools are actually concerned that students gain an unfair advantage when they are represented by counsel, the school's remedy is to have its own lawyer represent the school at the hearing.

The real-world reason for the no-lawyer policy is one that schools will never admit. The school's administration has an overwhelming advantage when students are not represented by counsel. The no-lawyer policy assures that the school will maintain that unfair advantage.

Right to Counsel in Disciplinary Hearings

The Constitution does not compel a university to provide an accused student with a lawyer. The right to an appointed lawyer applies in criminal cases, not in student disciplinary hearings.[3] Still, schools cannot prevent students from retaining their own lawyers to advise them prior to disciplinary proceedings.

The question is whether a student's lawyer will be allowed to play a meaningful role at a disciplinary hearing. Some schools recognize that the right to a fair hearing includes the right to be represented by counsel. Unfortunately, many schools undercut that right by allowing the student's lawyer to only act in an advisory role.

As the student's advisor, an attorney may help the student prepare for the hearing. They will also be allowed to attend the hearing but be prohibiting from participating in any meaningful way. Some schools do not allow the student's advisor to attend the hearing at all.

Some courts have held that the right to due process includes the right to be represented at a disciplinary hearing by a retained lawyer. A larger number of courts have held that due process protections do not include representation by counsel.

Other courts have concluded that whether a student must be allowed to have a lawyer present depends on the complexity of the facts, whether the school is represented by a lawyer, whether the student has the ability to represent himself, and whether criminal charges have been filed against the student.[4]

With some exasperation, U.S. District Judge Philip Simon described the limitations that Notre Dame placed on lawyers at student disciplinary hearings:

> [A]t the Administrative Hearing, the accused student is essentially on his own. The actual presentation of the student's side of the case is left to the student himself, but with severe limitations. As noted, while he is permitted to have a lawyer or advisor present, those folks can't really do anything. They can't talk with the accused; they can't ask questions; they can't even pass notes to the accused. They are only permitted to consult with the students during breaks, given at the Hearing Panel's discretion. If, for example, a witness says something very inculpatory about the accused, and there is no break, the student can't talk with his advisor or lawyer about what he should ask the witness. And by the time the accused finally has a chance to talk with his advisor on a break, the witness could be long gone.[5]

Judge Simon rejected Notre Dame's explanation that students do not need lawyers because the disciplinary process is "educational," not "punitive." As Judge Simon saw it, being "thrown out of school, not being permitted to graduate and forfeiting a semester's worth of tuition is 'punishment' in any reasonable sense of that term."[6]

Students rarely succeed in arguing that they have a right to full participation of counsel at disciplinary hearings when expulsion or suspension is at stake. The hardship to students who are deprived of the right to counsel is even greater when a student's ability to defend against accusations of misconduct is impaired by a mental health impairment.

ADA and Rights of Disabled Students

Two federal laws prohibit discrimination on the basis of disability. Failing to provide disabled students with the same access to education as non-disabled students is a form of disability discrimination. The Rehabilitation Act applies to any educational institution that accepts federal funding, including student loan money.[7]

Title II of the Americans with Disabilities Act (ADA) prohibits a public entity from discriminating on the basis of disability.[8] Courts have recognized that public universities are "public entities" that are subject to Title II of the ADA.[9] The ADA protects "qualified" students with disabilities—that is, students with disabilities who are eligible to benefit from educational services.[10]

When a school has accepted a student into its educational program, it is difficult for the school to argue that a student is not qualified. While courts initially interpreted the ADA so narrowly that it only protected individuals with obvious, non-correctable disabilities, Congress amended the ADA in 2008 to make proof of a disability less onerous.[11]

Under the ADA, a physical or mental impairment of the function of a bodily system (including the brain)

or of the person's ability to engage in "major life activities" (including communication) meets the definition of a disability.[12] The regulations that implement the ADA recognize that a number of mental health impairments substantially limit brain functions, including autism, major depressive disorder, bipolar disorder, post-traumatic stress disorder, and obsessive-compulsive disorder.[13]

Modification of Disciplinary Hearings

While students who suffer from those conditions may be capable of functioning in an academic environment, they may face greater challenges than non-disabled students when they are forced to represent themselves at disciplinary hearings.

Places of public accommodation are required to make reasonable modifications in policies, practices, or procedures.

Such modifications are necessary to allow a disabled individual to take advantage of the services that are provided to others.[14] Education is among those services. Reasonable policy modifications must be provided unless a change of policy would "fundamentally alter" the nature of the service provided.[15]

When a school makes students participate in disciplinary hearings as a condition of acquiring an education, the school may need to modify its policies to allow disabled students to participate as meaningfully as a student who is not disabled. The modification requirement is intended to give disabled students the same meaningful access to services that is afforded to non-disabled students.[16]

If a mental health condition impairs a student's opportunity to participate in a hearing, modifying the hearing to permit the student's representation by counsel would seem to be a reasonable and necessary modification of the school's policy.[17]

Schools sometimes object to modifying their "no lawyer" policies on the ground that disabled students are not entitled to preferential treatment.

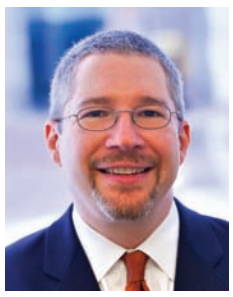
In the context of providing workplace accommodations to disabled employees, however, the Supreme Court has recognized that "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal."[18] The same is true of accommodations that give students the equal opportunity to complete an education.

The ADA's goal is to remove barriers that prevent disabled individuals from having the same access to services as non-disabled individuals.

Mental health issues often create formidable barriers to a student's access to justice. A student who suffers from depression might be unable to prepare for the hearing. A student who suffers from autism may be unable to present a defense with clarity. Any number of disorders may cause a student to respond poorly to the stressful hearing environment, harming the student's ability to understand the proceedings or to respond to accusations effectively.

A student whose disability impairs meaningful participation in a hearing does not have the same access to participation that non-disabled students enjoy. A lawyer who understands the ADA may be able to force a college to change its no lawyer policy when an accused student suffers from a mental health condition that makes self-representation unusually difficult.

1. *See, e.g., Woodis v. Westark Cmty. Coll.*, 160 F.3d 435, 440 (8th Cir. 1998) (public university students have a property interest in education that is entitled to due process protection); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) ("a student's interest in pursuing an education is included within the fourteenth amendment's protection of liberty and property"); *Gaspar v. Bruton*, 513 F.2d 843, 850 (10th Cir. 1975) (recognizing due process protection of property interest in university education); *see also Goss v. Lopez*, 419 U.S. 565 (1975) (public high school student is entitled to notice and an opportunity to be heard before school imposes a significant suspension).
2. Rutgers, for example, contends that a student disciplinary hearing "is not adversarial; its purpose is to educate the student and contribute to their ethical growth." *Frequently Asked Questions from Attorneys,* Rutgers, https://studentconduct.rutgers.edu/faqs/frequently-asked-questions-attorneys (last visited Dec. 27, 2021). It is difficult to understand how expelling a student furthers the purpose of educating the student.
3. *See* Martin A. Frey, *The Right of Counsel in Student Disciplinary Hearings*, 5 Val. U. L. Rev. 48, 59-60 (1970) (surveying cases).
4. *See generally* Mark S. Blaskey, *University Students' Right to Retain Counsel for Disciplinary Proceedings*, 24 Cal. W. L. Rev. 65, 66-67 (1987) (surveying cases and observing that "courts are in a state of disarray on this issue with each jurisdiction creating its own rules").
5. *Doe v. Univ. of Notre Dame*, No. 3:17CV298-PPS/MGG, at *25 (N.D. Ind. May. 8, 2017).
6. *Id.* at *26.
7. 29 U.S.C. §794. *See Argenyi v. Creighton Univ.*, 703 F.3d 441, 448 (8th Cir. 2013) (university that "receives financial assistance from federal agencies including the Department of Education . . . must comply with §504 of the Rehabilitation Act").
8. 42 U.S.C. §12132.
9. *See, e.g., Zukle v. Regents of University of California*, 166 F. 3d 1041, 1045 (9th Cir. 1999) ("Title II prohibits discrimination by state and local agencies, which includes publicly funded institutions of higher education.").
10. A "qualified individual with a disability" is a disabled individual "who meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 28 C.F.R. §35.104.
11. ADA Amendments Act of 2008, Pub. L. No. 110-325.
12. 28 C.F.R. §35.108(a)(1), (b)(1), (c)(1)(i).
13. 28 C.F.R. §35.108(d)(2)(iii).
14. 28 C.F.R. §35.130(b)(7).
15. *Id.*
16. *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (Rehabilitation Act); *Frame v. City of Arlington*, 616 F. 3d 476, 484 (5th Cir. 2010) (ADA).
17. *See* Logan J. Gowdey, *Right to Representation of Students with Disabilities in the ADA*, 115 Colum. L. Rev.2265 (2015) (arguing that the ADA may entitle students to representation at high school disciplinary proceedings when a disability impairs their meaningful participation).
18. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002).



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

FOCUS: ESTATE PLANNING

NFT Essentials for Estate Planners: Not a "Token" Estate Planning Opportunity

Azriel J. Baer, LL.M.

The tech rush is on, and clients are increasingly asking about non-fungible tokens or "NFTs." This article will take a brief glance at the NFT frenzy and explore some of the estate planning considerations to think about when planning with these assets.

What Are They?

On a basic level, an NFT is a digital asset with a unique identifying code that allows the NFT to be verified through the use of blockchain technology.[1] For example, an artist may create a digital artwork whose ownership is acquired through a code provided to the owner. When someone purchases an NFT, there is a public digital ledger entry which verifies the owner of the NFT. The only way to access the NFT is to have a private key, generally a series of twelve to twenty-four randomly generated words, that gives the purchaser access to the digital wallet that stores the NFT.[2]

Unlike cash in which one dollar can always be exchanged for another, no NFT can be directly substituted for another because each contains its own unique code. NFTs are often created by artists and celebrities as another way to monetize their work. In simple terms, instead of getting a painting to hang on a wall, the buyer of an NFT receives a digital file of an artwork.

The Craze

The value of the NFT market grew by 299% in 2020 when it was valued at $250 million. Technology for NFTs has been around since the mid-2010s, hit the mainstream in late 2017, and exploded in 2021.[3] The first NFT, a color changing octagonal sphere titled "Quantum," was created by Kevin McCoy in 2014.[4]

In March of 2021, Mike Winkelmann, a crypto artist who goes by "Beeple," sold an NFT titled "Everydays—The First 5000 Days" through Christie's auction house for a total of $69.3 million. This represents the third most expensive artwork sold at auction by a living artist. In February of 2021, another piece by Winkelmann sold for $6.6 million. The piece had been purchased the previous October for $67,000.[5]

Jack Dorsey, co-founder and CEO of Twitter, sold an NFT of his first tweet for $2.9 million.[6] What intrinsic value does an NFT have and why are people willing to pay vast amount of money for them is not clear. What is clear is that owners of NFTs stand to make substantial gains if their NFTs appreciate in value.

Gifting Considerations

Entity Ownership: Although one of the appealing aspects of owning an NFT is its relative ease of transfer, clients should consider placing an NFT into a limited liability company ("LLC"). Having an LLC own the NFT will simplify the transfer and allows for the potential to take discounts when gifting minority interests.

Password Protection: Make sure the client keeps the private key to the NFT in a secure place as the loss of the password could prove catastrophic with no way to retrieve the underlying NFT. Consider the case of Stefan Thomas, who lost the password that would give him access to over $250,000,000 worth of bitcoin.[7] Some people have the

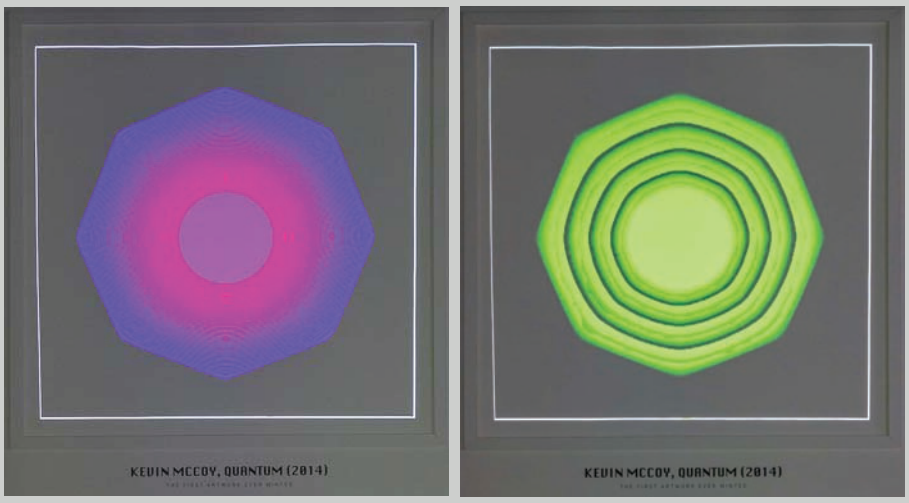
key engraved in a metal plate and store it in a secure location so that it can survive fire and flood. If gifting an NFT, the client needs to make the recipient understand the importance of securing the private key. In a gifting scenario, consider whether the IRS may try to include a gifted NFT in the estate of the donor if the donor retains access to the underlying password.

Basis Records: As with any asset, clients should keep careful records of the purchase price paid for an NFT in order to accurately report capital gain or loss on sale. When a donor gifts an NFT, the donee will receive the carryover basis of the donor. What can make basis reporting even more complicated is that many clients may purchase an NFT with crypto currency. This means that they may have to report a gain on the purchase itself in addition to when the NFT is later sold.

Types of Gifts to Consider: Although the expected reduction in the exemption amounts that many feared would occur in 2021 have yet to pass, the current increased federal estate, gift, and generation-skipping transfer ("GST") tax exemptions of $12.06 million are still scheduled to "sunset" on January 1, 2026 and revert back to their pre-2018 levels (approximately $5.49 million), indexed for inflation. In late 2019, the IRS announced, via final regulations, that individuals taking advantage of the increased gift and estate tax exclusion amounts in effect from 2018 to 2025 will not be adversely impacted after 2025 when the exclusion amount reverts to pre-2018 levels. Thus, individuals planning to make large gifts between 2022 and 2025 can do so without concern that they will lose the tax benefit of the higher exclusion level once it decreases after 2025. Current historically high exemption amounts mean that there is still a window for clients to make substantial gifts.

Outright gifts are popular as they are simple and can be completed swiftly. Such gifts, however, are included in the recipient's estate for estate tax purposes and do not provide any spousal or creditor protection.

Gifts to dynasty trusts, if structured correctly, have the added effect of removing the gifted property from the beneficiary's estate. If proper gift and GST tax exemptions are allocated to the gift, the future appreciation on the gifted property will not be subject to estate or GST tax on the beneficiary's death. Furthermore, the gift will be protected from spouses and creditors.



Pictured—Kevin McCoy, "Quantum" (2014-21), the first non-fungible token, which sold for $1.4 million in June of 2021 (image courtesy of Sotheby's)

Example: Jack purchases an NFT for $50,000 that he thinks will substantially appreciate in value. He transfers it to a trust for the benefit of his daughter, Jane, and he uses $50,000 of his lifetime gift and GST tax exemptions. Five years later, the NFT has increased in value to $2 million. Jack has essentially removed $2 million from his estate and only used $50,000 of his exemptions. The trust property (including future appreciation) will be available for Jane's benefit but will not subject to estate or GST tax on her death and will not be reachable by her creditors or her spouse.

Caution: Clients need to understand the risk of gifting assets that can decrease in value. When a client makes a completed gift, he or she generally will not be able to get back the exemptions that were applied. Given the volatile nature of the NFT market, clients should try to make gifts when values are low to reduce the risk of wasting exemptions.

Practical Tips

Remember to ask clients if they own NFTs when compiling asset lists. Consider granting trustees the power to invest in NFTs in the trust document as the prudent investor rule might preclude investment otherwise given the associated risk and market volatility.[8]

Make sure fiduciaries have the necessary skill set to manage NFTs and consider having clients name someone specifically to help with NFT administration if they think their named fiduciary will have problems.

Remember to attach a qualified appraisal when reporting NFT values for gift and estate tax purposes.

Conclusion

Under the right set of circumstance, NFTs can provide a powerful asset class for gifting. NFTs are complex, but planners who gain a basic understanding of how they work will better be able to spot issues as they arise. While it may be that NFTs are a fad or bubble waiting to burst, the current enthusiasm for NFTs does not appear to be waning.

1. Josie Thaddeus-Johns, *What Are NFTs, Anyway? One Just Sold for $69 Million*, N.Y. Times, March 11, 2021 last visited January 26, 2022, https://www.nytimes.com/2021/03/11/arts/design/what-is-an-nft.html#:~:text=An%20NFT%20is%20an%20asset,proof%20of%20authenticity%20and%20ownership.&text=Now%2C%20artists%2C%20musicians%2C%20influencers,previously%20been%20cheap%20or%20free.
2. Gerry W. Beyer, *An Update on NFTS-Non-fungible token*, The ACTEC Foundation (last visited January 26, 2022). Available at: https://actecfoundation.org/podcasts/non-fungible-token-nft-update/
3. Thaddeus-Johns, *supra* note 1.
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6. *Id.*
7. Nathaniel Popper, *Lost Passwords Lock Millionaires Out of Their Bitcoin Fortunes*, N.Y. Times, January 24, 2021 (last visited January 26, 2022). Available at: https://www.nytimes.com/2021/01/12/technology/bitcoin-passwords-wallets-fortunes.html.
8. Gerry W. Beyer, Non-Fungible Tokens: What Every Estate Planner Needs to Know (August 24, 2021). Available at SSRN: https://ssrn.com/abstract=3965888 or http://dx.doi.org/10.2139/ssrn.3965888.

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FOCUS:
FROM THE BENCH

Trial Practice and Evidence: Calling and Crossing the Adverse Party–Practices and Pitfalls

Hon. Arthur M. Diamond JSC (Ret.)

There was a moment soon after I retired that I wondered if being away from the courthouse would impact my inspiration for column topics. Fear not, dear readers! I soon received a complaint from an attorney who was on a non-jury trial and was prevented by the judge from cross-examining the adverse party after calling them as their witness. What's going on, she asked. How can I not be allowed to do this? Counsellor, consider me inspired!

As in all issues that involve the conduct of a trial, our analysis should start with the fundamentals. First, CPLR 4011 states that "the court may determine the sequence in which the issues shall be tried and otherwise *regulate the conduct of the trial* in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting of proper decorum." This discretion obviously covers the manner in which the attorney can question the witnesses, be it direct or cross examination. I strongly suggest if you have an evidentiary or procedural issue that you want resolved before the trial begins, advise the court of the issue, and attempt to get a ruling in advance, preferably on the record so that you can object and preserve the issue for appeal. Additionally, an evidentiary ruling will not serve as a reversible error unless a substantial right of a party is affected,[1] and a timely objection/motion to strike was made which objection or motion states the basis for the objection/motion on the record.[2]

Armed with this knowledge, let's get back to the question at hand—should you be allowed to call and cross examine the adverse party? If you are in the Second Department the answer is clearly yes…. albeit with a qualification which I will get to later. In the case of *Fox v. Tedesco* the appellate division addressed this question directly.[3] This was a damages trial resulting from personal injury suffered in an automobile accident. At trial the plaintiff called the defendant driver to the stand and sought to cross-examine and treat him as a hostile witness. The trial court refused to allow the questioning and plaintiff appealed the defense verdict. The appellate court wrote, "where an adverse party is called as a witness, it may be assumed that such adverse party is a hostile witness, and, in the discretion of the court, direct examination may assume the nature of cross-examination by the use of leading questions." (Citing *Jordan v. Parrinello*[4] and *Marzuillo v Isom*.[5])

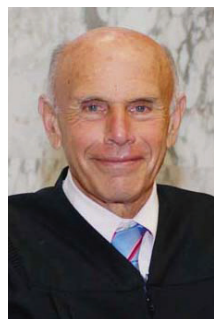
It is somewhat troublesome to me that the court chose to insert the phrase "in the discretion of the court" in the holding because clearly the trial court exercised their discretion in disallowing the questioning, and yet the appellate division reversed based on the evidentiary ruling. (The trial court also committed a second error which was to deny the admissibility of a certified police report, but I believe it extremely unlikely that that error would cause a reversal.) As noted, the court cited two cases which are worth reviewing. In *Jordan*, also a personal injury action, the court granted dismissal at the end of the plaintiff's case and the plaintiff appealed. Again, addressing the issue of the plaintiff cross-examining the defendant, the court stated, "it is well established that when an adverse party is called as a witness, it may be assumed that such adverse party is a hostile witness, and in the discretion of the court, direct examination may assume the nature of cross-examination by the use of leading questions."[6] Again, the court makes it clear on the one hand that "it is well settled" …but then includes what appears to be the somewhat limiting "within the discretion" language.

In the *Marzuillo* case, a medical malpractice action, the plaintiff called the defendant physician as her witness and proceeded to question him as an adverse party and, in fact, treated him as her expert witness. The Appellate Division again approved the practice, using the same language as previously noted.

These cases should leave no doubt in any trial court's mind that a party may always call the adverse party and lead them, that is, cross-exam them. So where does the trial court's discretion, consistently referred to by the appellate division cases, enter into the picture? The answer is also found in the *Fox, Parinnello, Marzuillo* trilogy. In all three of these cases, the appellate court makes clear that there is a distinction between CROSS EXAMINING THE ADVERSE PARTY AND IMPEACHING THE ADVERSE PARTY (or any other person) YOU HAVE CALLED AS A WITNESS. Thus, the rule: an attorney may not, I repeat, may not call the adverse party and impeach their credibility UNLESS the witness has made a contradictory statement under oath or in writing. (CPLR 4514)[7] Any other impeachment questions of one's own witness should be disallowed, and that is where the discretion of the trial court controls the narrative. This rule applies to ANY witness, not merely the adverse party. The most common objectionable areas of inquiry of one's own witness would be cross examining on topics such as bias, interest, or hostility. These must be saved for cross examination save for the "sworn statement" exception noted above. This applies to whether the witness is an adverse party or merely a witness in the case.

Over the years, I have seen firsthand that trial attorneys can confuse the subject of cross-examination of their witness with what I call pure impeachment of that witness. These three cases should, I hope, make it clear that the rule in the Second Department is that: a lawyer cannot be prevented from calling and crossing the adverse party, but that right clearly does not extend to the practice of calling that adverse party to impeach their credibility absent prior sworn testimony relevant to the issues at hand. Further, this prohibition applies to any witness in the case, not just a party.

1. *Horton v. Smith*, 51 NY2d 758 (CA 1980).
2. *Id.*
3. *Fox v. Tedesco*, 144 AD 3rd 538 (2d, 2005) at 539.
4. *Jordan v. Parrinello*, 144 AD2d 540 (1980).
5. *Jordan*, supra at 541.
6. *Marzuillo v. Isom*, 277 AD2d 362 (2000).
7. NY CPLR 4514.



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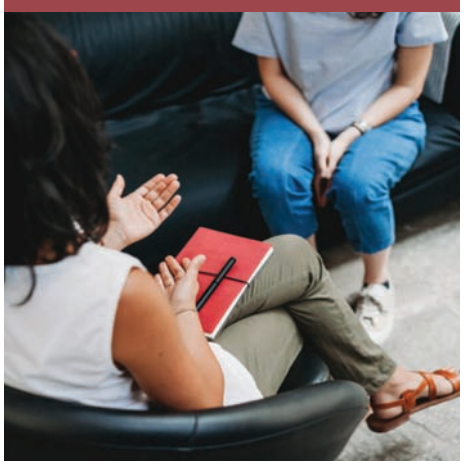
FOCUS:
MENTAL HEALTH LAW

Psychiatric Advanced Directives in Mental Health Planning



Sarah A. Chussler

When it comes to advanced planning for an adult individual's unexpected medical needs, practitioners in New York State counsel clients on the execution of health care proxies and living wills. These advanced directives allow an individual to express their medical treatment preferences. However, the focus is generally on end-of-life decisions, such as palliative care and life-sustaining treatment. For individuals whose medical needs include mental health conditions, a Psychiatric Advanced Directive ("PAD"), which sets forth the client's preferences for mental health treatment, should be considered. To date, the PAD has not been codified under New York law or declared to be valid by New York courts. Nonetheless, it may still prove to be useful and beneficial to clients, the courts, and medical professionals, in several ways.

Public Health Law, Article 29-C was enacted in 1991 and governs health care proxies in New York State.[1] It closely coincided with the Patient Self-Determination Act of 1990 passed by the U.S. Congress, which requires all states receiving Medicare and Medicaid funds to inform individuals of their right to execute advanced directives for future health care decision making.

A health care proxy allows a competent adult, known as the principal, to appoint an agent to serve as their medical decision-maker in the event of their future incapacity. This provides the principal with an opportunity to express their wishes and ensures that when the principal lacks the capacity to make medical decisions, the medical decisions made on their behalf are consistent with those previously expressed wishes.

The public health law provides a standard health care proxy form which includes the language that the health care agent is appointed "to make any and all health care decisions for me."[2] Health care decisions are defined as "any decision to consent or refuse to consent to health care," and health care is defined as "any treatment, service or procedure to diagnose or treat an individual's physical or mental condition."[3] While mental health decisions are considered to be health care decisions, the treatment of mental health conditions is unique in that a health care agent in New York cannot consent to the administration of psychotropic medications over the principal's objection.

When an individual is involuntarily admitted to a hospital pursuant to Mental Hygiene Law, Article 9, mental health treatment is governed by the rules and regulations of the Office of Mental Health ("OMH"). The OMH regulations prohibit the treatment of involuntarily admitted adult psychiatric patients absent court authorization.[4] The court authorization is obtained through a special proceeding, colloquially known as a *Rivers* hearing, wherein the court must determine whether a patient who is refusing treatment has "the capacity to make a reasoned decision with respect to the proposed treatment" prior to the administration of medication over the patient's objection.[5] Accordingly, in New York State, a health care proxy cannot empower a health care agent to consent to mental health treatment for an incapacitated principal.

The PAD is designed to provide a competent principal with the ability to state their mental health treatment wishes. As with a health care proxy, the PAD can provide for the designation of a health care agent to make decisions in the event of a future incapacity due to an acute mental health episode. The concept of the PAD is to provide authority for the health care agent to consent to the administration of certain psychotropic medications over the principal's subsequent refusal when acutely ill. Conversely, the PAD may be utilized to notify future treatment providers of the principal's history with treatment and identify any psychotropic medications the principal does not want in their course of treatment, or those medications which caused adverse reactions or side effects. The PAD may also identify the principal's preferences for providers and facilities if inpatient care is required, and likewise, preference for alternatives to an inpatient hospitalization.

While many states' laws allow for the usage of a PAD, it is not prescribed by New York State law and upon information and belief, the courts

have never ruled on the validity of the PAD. As the PAD is not provided for under New York law, the ability of an individual to set forth their mental health treatment directives and preferences in the PAD is comparable to the living will.

The living will allows an individual to set forth in detail their preferences for medical treatment, including preferences for various medical procedures or end-of-life treatment. Like the PAD, the living will is not a product of New York statute. However, unlike the PAD, the living will has gained widespread use and acceptance across the state as an advanced planning directive for medical decision-making and it has been recognized by the courts, including New York's highest court, the Court of Appeals.[6]

The living will has been judicially declared to be akin to an informed medical statement which, among other items, authorizes further medical treatment and constitutes "a clear and convincing demonstration that while competent the petitioner clearly and explicitly expressed an informed, rational and knowing decision… ."[7] As with the living will, the PAD can be an expression of a mentally ill individual's treatment wishes when an individual has capacity, which may aide a court in reaching its decision whether to grant or deny a *Rivers* application as the court is also required to determine, in part, the benefits to be gained from the proposed treatment, the adverse side effects of the proposed treatment, and any less intrusive treatment available.[8] The PAD may also demonstrate that an individual's refusal of mental health treatment is consistent with the wishes and desires they expressed while competent to do so.

The legislature has recognized the living will as a planning document in that the Court Evaluator in a Mental Hygiene Law Article 81 Guardianship proceeding is mandated to report to the court whether the subject of the proceeding, the Alleged Incapacitated Person, ever executed a living will.[9] Prior to the enactment of Mental Hygiene Law, Article 81, when asked to recognize the validity and binding effect of a living will, the Supreme Court, Nassau County noted that "only the legislature has the authority to enact a statute recognizing the validity of living wills, prescribing the means of execution of such documents, and the general guidelines that may be applicable to a broad range of situations."[10] The same holds true for the PAD. Unless and until the legislature enacts a statute providing for the validity of the PAD, legal, ethical, and medical concerns regarding the PAD call its use and application into question.

If the PAD is codified by statute, there are many considerations that will need to be considered, including the following: what constitutes capacity for a person suffering from a cyclical mental illness to sign the PAD; who is eligible for appointment as the health care decision-maker; who may serve as a witness; how and when can the PAD be revoked; should the PAD be indefinite or limited in duration; should the PAD provide for directives in addition to treatment, such as the care of the principal's minor children or dependents in the event of an involuntary hospitalization, and who should be notified in the event of an involuntary hospitalization; how will the PAD be enforced; and will the PAD carry a private right of action or immunity from liability.

Further public education on the PAD led by legal practitioners will help to thrust the PAD into the spotlight, to expand knowledge of this planning tool, and to garner widespread acceptance. A mental health lawyer is able to guide individuals and families with the execution of advanced directives to best address psychiatric care and treatment. The PAD has the potential to guide the judiciary in a Mental Hygiene Law, Article 9 proceeding for treatment over an individual's objection, and importantly, to inform mental health treatment providers of that individual's competent treatment preferences as the first encounter may be when the individual is in an acutely psychotic state unable to advocate on their own behalf. The uncertainty of the enforceability of a PAD in New York State has resulted in the PAD's underutilization. While its validity remains in question, practitioners should not overlook its potential practical applications and the real possibility that the execution of a PAD will empower a client suffering from a mental health condition to participate in their own care and treatment.

1. Pub. Health Law Article 29-C.
2. Pub. Health Law §2981(5)(d).
3. Pub. Health Law §2980(6); and Pub. Health Law §2980(4).
4. 14 N.Y.C.R.R. §527.8(c)(4); *Rivers v. Katz*, 67 N.Y.2d 485 (1986).
5. *Rivers*, 67 N.Y.2d at 497.
6. *In re* M.B., 6 N.Y.3d 437 n.1 (2006) ("A person can also express his or her wishes regarding life-sustaining treatment in what is known as a 'living will.'"); see *also, In re* Westchester County Med. Ctr (O'Connor), 72 N.Y.2d 517, 531 (1988) ("The ideal situation is one in which the patient's wishes were expressed in some form of a writing, perhaps a "living will," while he or she was still competent.").
7. *Saunders v. State*, 129 Misc.2d 45, 54 (Sup. Ct. Nassau Co. 1985).
8. *Rivers*, 67 N.Y.2d at 497-498.
9. Mental Hygiene Law §81.09(c)(5)(xi).
10. *Saunders*, 129 Misc. at 53.

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FOCUS: LABOR AND EMPLOYMENT LAW

NYC Salary Law Aims to End the Wage Gap

Debra L. Wabnik and Amanda B. Slutsky

On December 14, 2021, the New York City Council voted to make it an unlawful discriminatory practice for an employer not to post the minimum and maximum salary ranges in job advertisements. This new law becomes effective May 15, 2022, and amends the New York City Human Rights Law (NYAC §§8-102 and 8-107) and is on par with recent legislation in Connecticut, Colorado, and Rhode Island.

Specifically, the law provides that it is "an unlawful discriminatory practice to not include in job listings the minimum and maximum salary offered…The range for the listed maximum and minimum salary would extend from the lowest salary to the highest salary that the employer in good faith believes it would pay for the advertised job, promotion, or transfer…."[1] The law also applies to employers' internal postings for current employees. If an employer violates the law, it can be subject to a civil penalty up to $125,000, or up to $250,000 for a willful violation. The law was introduced by Councilwoman Helen K. Rosenthal who, based on her own experiences as a female in the workforce, "learned [her] salary was $5,000 less than [her] white male counterpart in [her] first city government job."[2]

Economic and legal experts have thus far applauded this new law.[3] New York City is known to have some of the most progressive employment laws in the country, and this addition strengthens the City's goal to eliminate discrimination in the workplace. Based upon this addition of transparency, employers may find themselves with better candidates who appreciate not being kept in the dark about salaries.[4] Now more than ever, employees feel and deserve to be treated with respect, and are willing to leave one job for another with a better work environment. Having this pay transparency from the start, potential employees will get a fresh perspective of the employer, which can ultimately save everyone time and lead to employees sticking around for the long haul.

Additionally, women will be on a more even playing field as they negotiate salaries with a more transparent scope of compensation. Women will be able to see what the real market value is of their experience and skill. As Economist Teresa Ghilarducci has explained, women can be "tied to a particular location or a commute schedule because of their family. So they're reluctant to do market check…and to see what they actually are worth…If pay was transparent, the employer would have to kind of fess up that they're probably paying their male workers more."[5] Also, negotiations involving a woman with a more ambitious personality (which has unfortunate negative connotations) "disproportionately end in impasse"[6] meaning that women who are more outspoken or more "empowered" in negotiations may not have the same positive outcome as men.[7] The expectation is that, armed with a range of the salary the potential employer can offer, women will end negotiations at or near where a male would, not at an impasse or making less. This can help change the pay disparity in many job fields, including the legal field where women are often paid less than their male counterparts.[8]

Although the law has a noble purpose, there are issues that may leave innocent employers with questions and exposed to liability. For example, the law establishes a "good faith" standard regarding the calculation of the salary range. Good

faith is hard to define, however, and the law does not even attempt to do so. Is it the employer's financial position at the time of posting, the market value based upon jobs of a similar level at similar size employers, or what the employer subjectively believes an individual should make? This standard can be highly particularized and may even reflect an unconscious bias if good faith is solely based upon the employer's personal belief.

Further, it is unclear whether the new law will open the door to a potential unlawful discriminatory practice claim if an employer ends up paying a different salary than advertised. For example:

> A stapler company advertises a position for a salesperson with 2 to 5 years of experience and a salary range of $50,000 to $75,000. A male applies for the position with 15 years of experience selling only stapler products, and a fair salary is $100,000. A female with 6 months experience for a paper clip company also applies, and a fair salary is $40,000. Can the company hire either applicant without potential legal ramifications?

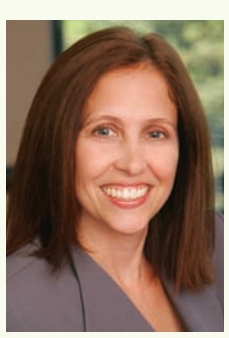
Employers will have to wait for the New York City Commission on Human Rights to issue guidance. Until then, employers may be wise to be more stringent in advertising the number of years or type of experience they want. Although this may narrow the applicant pool, the point of the law is to address discrimination and wage disparity. This new law, at the very least, should compel employers to sit down and reevaluate their pay structures. With this evaluation, employers may be able to eliminate present discrimination and prevent an issue in the future.

Connecticut and Rhode Island recently enacted laws similar to the New York City law. The Connecticut law passed in 2021 requires employers to provide applicants with a "wage range" upon request or if the applicant is offered the position.[9] Connecticut defines wage range as "the range of wages an employer anticipates relying on when setting wages for a position, and may include reference to any appliable pay scale, previously determined range of wages for the position, actual range of wages for those employees currently holding comparable positions or the employer's budgeted amount for the position."[10] Additionally, starting January 2023, Rhode Island will require employers to provide a wage range upon request by an applicant and prior to discussing compensation.[11]

Laws like these passed in New York City, Connecticut, and Rhode Island are becoming more and more popular. New York State is on the path to passing a law like the New York City law. The bill is currently in committee in the New York Senate. If passed, the law would amend the New York Labor Law, not the New York State Human Rights Law. The bill requires employers disclose compensation or range of compensation, a job description, and a general description of benefits and other forms of compensation when posting an employment opportunity. The bill defines "range of compensation" as "the range that the employer actually relied on in setting compensation for the position and may be based on, including but not limited to, any applicable pay scale or compensation model relied upon by the employer or the actual range of compensation for those currently holding the position."[12] Like the New York City law, the New York bill was proposed because "[p]ay secrecy remains a key contributing factor in perpetuating wage inequality and discrimination."[13]

The need for New York City's new law, and the expected passing of something similar in New York State, speaks to the continuing prevalence of discrimination and the wage gap in the workplace. It may also, however, open the door to innocent employers facing significant fines in trying to balance their own needs with the applicant pool. The New York City Commission on Human Rights will ultimately be charged with reconciling these issues but in the meanwhile, New York City (and hopefully New York State) is heading in the right direction.

1. 2021 N.Y.C. Council No. 1208-2018, available at https://on.nyc.gov/34iZ7hr.
2. Helen K. Rosenthal, TWITTER, (Dec. 15, 2021), available at https://bit.ly/34jqg3O.
3. Adrian Florido, *NYC Law to Mandate Salary Transparency. Will it Bridge Inequities?*, NPR (Jan. 2, 2022), available at https://n.pr/3oy8hNO (Interview with economist Teresa Ghilarducci who stated that "it should close the gender gap probably overnight."); Jack Kelly, *A Big Win for Workers: New York City Will Make It Mandatory For Companies to Disclose Salaries On Job Advertisements*, Forbes (Jan. 6, 2022), available at https://bit.ly/3LhwWQo ("This will be a complete game changer, and bode well for both people searching for a new job and current employees.")
4. Kelly Main, INC., *Millions of Businesses Will Be Impacted by NYC's New Salary Law. Here's How to Benefit From It*, INC. (Jan. 6, 2022), available at https://bit.ly/3LjrzAb.
5. Florido, *supra* n.3
6. Dannals, J.E., Zlatev, J.J., Halevy, N., & Neale, M.A., *The Dynamics of Gender and Alternatives in Negation*, Journal of Applied Psychology (2021).
7. Aimee Picchi, *A Catch-22 for Women: Negotiating for Higher Pay Can Backfire, Study Finds*, CBS News (Apr. 16, 2021), available at https://cbsn.ws/3JdFMwU.
8. Kelly Roberts, *Attorney Salary Negotiations: Are They to Blame for the Gender Pay Gap Among Lawyers?*, American Bar Association, Young Lawyers Division, 2016, available at https://bit.ly/3LgSrAN; Debra Cassens Weiss, American Bar Association Journal, *Pay Gap Has Widened for Male and Female Partners in Larger Law Firms, New Report Says*, ABA Journal (Sept. 15, 2020), available at https://bit.ly/3GEIM4C.
9. Conn. Gen. Stat. §31-40z.
10. *Id.*
11. R.I. General Assembly S0270 (2021); see also Jennifer Liu, *How Much Do Other Make For The Same Job? Here's Where Employers Are Required By Law To Share Salary Ranges When Hiring*, CNBC (Jan. 12, 2022), available at https://cnb.cx/3rB2Yzd (compiling list of states and localities that have pay transparency laws).
12. N.Y. Senate Bill S5598B (2021).
13. *Id.*



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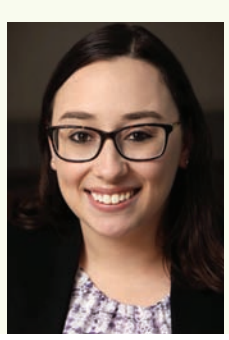

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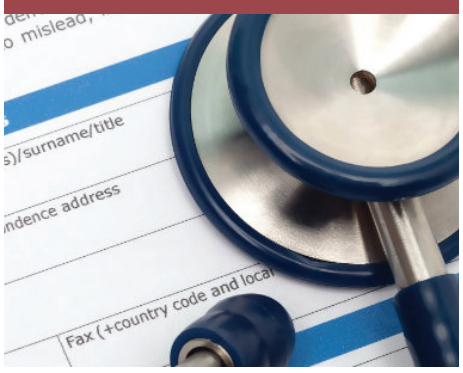
FOCUS: MEDICAL-LEGAL

Healthcare Fraud: Self-Disclosure Update



Mathew J. Levy and Seth A. Nadel

What is healthcare fraud? There are the obvious cases of greed, such as physicians billing for fictitious patients, services never performed and the rendering of unnecessary medical procedures. However, there is more to healthcare fraud than the obvious, like widely practiced rule-bending to assist patients, including exaggerating either the severity of a patient's condition, changing a patient's billing diagnosis or reported signs or symptoms that a patient did not have, to help the patient secure coverage for needed care. Recent events make clear that these infractions can result in serious problems.

The truth is that all well-meaning practitioners who bend the rules are placing their careers, indeed their very freedom, at risk.

For the first time since 2013, the United States Department of Health & Human Services Office of the Inspector General (OIG) has made substantive revisions to its Self-Disclosure Protocol (SDP).

Originally established in 1998, the SDP—now officially known as the "Health Care Fraud Self-Disclosure Protocol" pursuant to the recent updates—is intended to allow providers to voluntarily disclose evidence of fraud or improper billing practices in order to avoid the costs and business disruptions associated with government investigations and possible litigation. In other words, if a provider discovers that it has been previously reimbursed for claims which it knows or should have known to be legally improper (such as claims involving upcoding, overbilling, violations of the Anti-Kickback Statute, and others) rather than wait for the government to discover, investigate, and possibly sanction the provider, it can choose to voluntarily disclose the impropriety in the interest of a more expedient resolution.

A list of recent enforcement actions[1] on OIG's website illustrates just some of the types of claims which are commonly the subject of SDP disclosures. In several cases, providers paid penalties to OIG based on having disclosed that they employed individuals whom they knew or should have known were excluded from the Medicare or Medicaid programs. Other settlements came about as a result of disclosing instances of upcoding, billing for services provided by unlicensed individuals, or submitting claims for incident-to services not covered by Medicare. In one instance, a durable medical equipment (DME) company was required to pay $7.1 million for dispensing DME from locations not enrolled by CMS while representing the services were being performed at a different enrolled location.

Other than alleviating the anxiety inherent in knowing that a possible government enforcement action could strike at any time, the SDP has several notable benefits for providers which avail themselves of the process. One key benefit is that penalty calculations in SDP cases tend to be lower than in other government enforcement actions. Although there is no firm standard, OIG's general practice is to require damages in a minimum amount of 1.5 times the actual damage rate (i.e., the amount of the improper claims), whereas the False Claims Act[2] (FCA) and Civil Monetary Penalties Law[3] (CMP) can authorize up the *triple* damages in other cases. Providers who use the SDP also enjoy a presumption by OIG that they will not be required to enter into a Corporate Integrity Agreement (CIA), and a suspension of the provider's requirement to report and return overpayments under CMS regulations until a settlement of the disclosed matter is reached.

For 2021, there are several notable updates to the SDP. First, as mentioned, is the name, which has been amended to the "Health Care Fraud Self-Disclosure Protocol" (previously the "Provider Self Disclosure Protocol"), presumably to clarify that the SDP applies to any "person," rather than merely providers. OIG also published updated statistics, showing that between 1998 and 2020, OIG resolved over 2,200 disclosures, resulting in over $870 million in recoveries to the federal healthcare programs.

To focus its enforcement efforts and more efficiently allocate OIG's resources, the 2021 updates also provide for higher minimum settlement amounts required to resolve matters which come about as a result of SDP disclosures. Previously, resolutions under the SPD required minimum settlements of $50,000 for disclosed violations of the Anti-Kickback Statute, and $10,000 for all other violations. Under the 2021 updates, the minimum settlements for both have been doubled, to $100,000 and $20,000, respectively.

The 2021 updates also brought several logistical changes to the SDP process. Whereas previously the self-disclosing party could submit

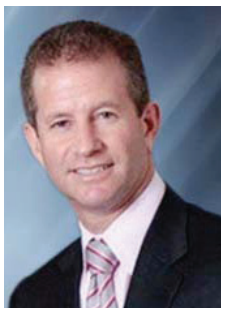
an SDP either by mail or through OIG's online portal, all disclosures must now be sent through the portal. There is also a new requirement that the self-disclosing party must identify the estimated damages to *each* federal healthcare program as well as the sum of all estimated damages. The updates further clarify additional requirements for use of the SDP for entities subject to existing Corporate Integrity Agreements and require the disclosing party to state that it is subject to a CIA, and to send a copy to the party's assigned OIG monitor.

Finally, the 2021 updates also contain minor changes to the provision regarding OIG's coordination with the United States Department of Justice (DOJ) in civil and criminal matters. Unfortunately, although the SDP can be a useful mechanism for more favorably resolving *civil* matters involving false claims, and while OIG may advocate for leniency by DOJ based on a party's self-disclosure, use of the SDP does not preclude a related civil investigation by DOJ unless DOJ chooses to participate in any resulting settlement. This has not changed with the 2021 update. However, the language of the SDP with respect to *criminal* matters has been edited to reflect the OIG no longer encourages parties to disclose potential criminal conduct, but that OIG will no longer advocate for a benefit in any prospective criminal matter based on the disclosing party's use of the SDP. In other words, OIG seems committed to leaving criminal matters to the DOJ, and a provider cannot rely on its use of the SDP to mitigate the consequences of any potential criminal conduct.

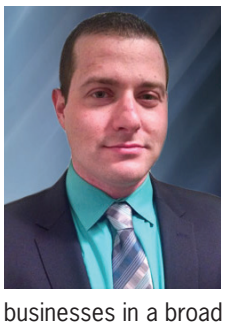
A full copy of the updated SDP may be found on OIG's website.[4]

It should also be noted that the New York State Office of the Medicaid Inspector General (OMIG) has adopted its own self-disclosure mechanism for providers to disclose identified overpayments previously paid under the New York *Medicaid* Program. Under New York Public Health Law §32(18), OMIG, in conjunction with the commissioner of the Department of Health, is required to develop protocols to effectuate the disclosure and collection of overpayments and monitor such collection efforts. OMIG specifies the bases of improper Medicaid payments as billing errors, misconduct by employees, reimbursement provided for services by excluded individuals and others. Per OMIG, in a similar fashion as OIG, a provider's good-faith disclosure of overpayments may be considered as a mitigating factor in any enforcement action resulting from such overpayment. Information on how providers may utilize OMIG's self-disclosure protocol may be found on OMIG's website.[5]

1. https://oig.hhs.gov/fraud/enforcement/?type=provider-self-disclosures.
2. 31 U.S.C. §§3729 - 3733.
3. 42 U.S.C. §1320a–7a.
4. https://oig.hhs.gov/documents/self-disclosure-info/1006/Self-Disclosure-Protocol-2021.pdf.
5. https://omig.ny.gov/provider-resources/self-disclosure.



Mathew J. Levy is a Shareholder/Director of Weiss Zarett Brofman Sonnenklar & Levy, P.C. and co-chairs the firm's corporate transaction and healthcare regulatory practice.



Seth A. Nadel, Associate at Weiss Zarett Brofman Sonnenklar & Levy, P.C. primarily represents physicians, medical practices, and other health-related businesses in a broad range of litigation, transactional, corporate, and regulatory compliance matters.

NAL PROGRAM CALENDAR

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

FEBRUARY 28, 2022

12:30 PM – 1:30 PM

Dean's Hour: Trauma Informed Lawyering in Matrimonial Practice

With the NCBA Matrimonial Law Committee

Program sponsored by NCBA Corporate Partners MPI Business Valuation and Advisory and Champion Office Suites

1 Credit in Professional Practice

MARCH 1, 2022

6:00 PM – 7:30 PM

A Healthy Approach to Patient Advocacy (ZOOM ONLY)

With the NCBA Community Relations and Public Education Committee

1.5 Credits in Professional Practice

Skills Credits Available for Newly Admitted Attorneys

MARCH 2, 2022

5:30 PM – 7:30 PM

Extreme Emotional Disturbance Defense: A Case Study

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

2 Credits in Professional Practice

Skills Credits Available for Newly Admitted Attorneys

MARCH 4, 2022

12:30 PM – 1:30 PM

Dean's Hour: Boots on the Ground—Local Lobbying on Long Island

With the NCBA Government Relations Committee

1 Credit in Professional Practice

Skills Credits Available for Newly Admitted Attorneys

MARCH 9, 2022

12:30 PM – 1:30 PM

Dean's Hour: The French Connection Real to Reel (Law and American Culture Lecture Series)

With the NCBA Diversity and Inclusion Committee

1 Credit in Professional Practice

MARCH 12-13, 2022

Hon. Joseph Goldstein Bridge-the-Gap Weekend

For Newly Admitted Attorneys: *7 Credits in Professional Practice; 6 in Skills; 3 Ethics*

For Experienced Attorneys: *13 Credits in Professional Practice; 3 in Ethics*

Sign up for the entire weekend, a single day, or individual classes.

MARCH 14, 2022

12:45 PM – 1:45 PM

Dean's Hour: Implicit Bias: Past, Present, and (How to Avoid in the) Future

With the Nassau County Equal Justice in the Courts Committee

1 Credit in Diversity, Inclusion, and Elimination of Bias

MARCH 15, 2022

1:00 PM – 2:00 PM

Dean's Hour: Service Dogs, Emotional Support Animals and Other Animal Companions

With the NCBA Animal Law and Civil Rights Committees

1 Credit in Professional Practice

Skills Credits Available for Newly Admitted Attorneys

NAL PROGRAM CALENDAR

MARCH 22, 2022
12:30 PM – 1:30 PM
Dean's Hour: Defense Counsel's Guide to Padilla Compliance (In Bite Size Chunks!): Part 1: ICE Enforcement and Removal Priorities
With the NCBA Immigration Law Committee and the Nassau County Assigned Counsel Defender Plan
1 Credit in Professional Practice
Skills Credits Available for Newly Admitted Attorneys

MARCH 23, 2022
12:30 PM – 1:30 PM
Dean's Hour: Pitfalls of Valuation: What Every Attorney Needs to Know
Program presented by NCBA Corporate Partner MPI Business Valuation and Advisory
1 Credit in Professional Practice
Skills Credits Available for Newly Admitted Attorneys

MARCH 24, 2022
12:30 PM – 1:30 PM
Dean's Hour: Accounts Receivable?—Can I Write You a Check? (Business of Law Lecture Series)
Program sponsored by NCBA Corporate Partner Champion Office Suites
1 Credit in Professional Practice

MARCH 29, 2022
12:30 PM – 1:30 PM
Dean's Hour: Advancing an Inclusive Workplace Climate for Women in the Law
With the NCBA Women in the Law Committee
1 Credit in Diversity, Inclusion, and Elimination of Bias

MARCH 30, 2022
12:30 PM – 1:30 PM
Dean's Hour: Ethics of a Residential Real Estate Closing
Presented by NCBA Corporate Partner Tradition Title Agency Inc.
1 Credit in Ethics

MARCH 31, 2022
12:30 PM – 1:30 PM
Dean's Hour: Reflections from the Appellate Division Clerk's Office
With the NCBA Appellate Practice Committee
1 Credit in Professional Practice
Skills Credits Available for Newly Admitted Attorneys

APRIL 4, 2022
12:30 PM – 1:30 PM
Dean's Hour: Nuts and Bolts of Foreclosure Defense
With the NCBA Mortgage Foreclosure Project
1 Credit in Professional Practice
Skills Credits Available for Newly Admitted Attorneys

FOCUS: LITIGATION

New Laws Change the Rules on Hearsay and Discovery of Insurance Coverage

Christopher J. DelliCarpini

Governor Kathy Hochul ended 2021 by enacting a flurry of legislation, signing twenty-one bills in the last week of December alone. Two of these new laws particularly impact litigation in New York and have already taken effect, presenting immediate opportunities for counsel who promptly get up to speed.

CPLR 4549: Expanding the Party-Admission Exception

Effective December 31, 2021, the new CPLR 4549 expands the party-admission exception to the hearsay rule, adding a second category of statements outside this exclusion:

> A statement offered against an opposing party shall not be excluded from evidence as hearsay if made by a person whom the opposing party authorized to make a statement on the subject *or by the opposing party's agent or employee on a matter within the scope of that relationship and during the existence of that relationship.* (emphasis added).

Until now, New York held to the common-law "speaking agent" rule, which admitted only the former category. As the Court of Appeals held almost forty years ago in *Loschiavo v. Port Authority of New York & New Jersey*: "the hearsay statement of an agent is admissible against his employer under the admissions exception to the hearsay rule only if the making of the statement is an activity within the scope of his authority."[1] As recently as 2017, the Second Department in *Wilson v. County of Westchester* affirmed that unauthorized statements were still inadmissible in New York courts:

> A statement by an agent who has no authority to speak for the principal does not fall within the "speaking agent" exception to the rule against hearsay "even where the agent was authorized to act in the matter to which [the] declaration relates."[2]

Under that rule, parties seeking to admit unauthorized admissions were left to argue another recognized exception to the hearsay rule, such as res gestae or spontaneous exclamation, with mixed results.[3]

The Federal Rules of Evidence have always applied a broader exception, to include unauthorized statements made during agency or employment on a matter within the scope of that relationship. Citing federal cases and Wigmore's citation of state cases, the Advisory Committee in 1972 recognized "Dissatisfaction with this loss of valuable and helpful evidence has been increasing."[4] Accordingly FRE 801(d)(2)(C) and (D) have always excluded both kinds of admissions from the definition of hearsay:

> A statement that meets the following conditions is not hearsay...The statement is offered against an opposing party and... was made by a person whom the party authorized to make a statement on the subject [or] was made by the party's agent or employee on a matter within the scope of that relationship and while it existed.

The debate over expanding New York's exception has been building for some time. In a 2013 article, Albany Law School professor Michael J. Hutter argued for adopting the federal rule.[5] State Senator Brad Hoylman's sponsor memo cited Professor Hutter's article in giving reasons for adopting the federal rule:

> While under current law it appears clear that a hearsay statement will be admissible if there was actual authority to speak on behalf of the party, such authority often may be shown only by implication in light of the circumstances of the employment or agency relationship. In practice, this tends to limit "speaking authority" to only the high levels of management.[6]

In a 2020 article, however, attorney John L.A. Lyddane defended the common-law standard and voiced several concerns about broadening the exception.[7]

The first problem that he saw was the unreliability inherent in all hearsay: "A hearsay statement based on an incomplete understanding of the facts, some other person's

hearsay statement, or any other infirm evidentiary footing, will not be identifiable as unreliable by the jury in determining the relative weight of available evidence."

Lyddane also noted that "not every employee has the same interest as that of her employer," meaning that an employee's desire to deflect blame on an unavailable coworker might also make any such "admission" less reliable.

Lyddane's third concern was the lack of evidence of circumstances to otherwise suggest that testimony about an unauthorized party admission is reliable:

> By the time a malpractice case reaches trial it is virtually guaranteed that the declarant to whom a statement is attributed will not be available to fill the gaps in information, place whatever was said in the appropriate context, or deny the statement altogether. Using such testimony seems inconsistent with the smooth operation of a system which relies on the ability to confront and cross examine the accuser and exclude infirm evidence from consideration.

CPLR 4549 is now law, however, and applies to pending litigation as of December 31, 2021. Therefore, statements that were inadmissible hearsay when an employee or agent was deposed last year may now be admissible once a foundation is laid. In *Browe v. CTC Corporation*, the Second Circuit recently restated the elements of the FRE 801(d)(2)(D) exception:

> A party seeking to admit such a statement must establish "(1) the existence of the agency relationship, (2) that the statement was made during the course of the relationship, and (3) that it relates to a matter within the scope of the agency."[8]

Lyddane's concerns will still be present, but if this hearsay is now admissible then any concerns about the testifying witness' capacity or credibility will have to be explored at trial, if not in deposition.

CPLR 3101(f): Mandatory Disclosure of Insurance Coverage

A completely-rewritten CPLR 3101(f), also effective December 31, 2021, requires automatic disclosure of insurance policies that were previously discoverable upon request.[9]

Now, sixty days after serving an answer, defendants must produce not just coverage limits on applicable policies but also:

- all primary, excess and umbrella policies
- a complete copy of any such policy, including declarations, insuring agreements, conditions, exclusions, endorsements, and similar provisions
- the contact information of any adjuster or third-party administrators and persons within the insuring entity to whom the third-party administrator is required to report
- the amounts available under any such policy to satisfy a judgment or reimburse payments made to satisfy the judgment
- any lawsuits that have reduced or eroded or may reduce or erode such amounts
- the amount, if any, of any payment of attorney's fees that have eroded or reduced the face value of the policy, along with the name and address of any attorney who received such payments

Even applications for insurance must be disclosed, and defendants have an ongoing obligation to update such information, up to sixty days after settlement.

The legislation also added CPLR 3122-b, which requires a certification "by the defendant . . . and a certification by any attorney appearing for the defendant" to the accuracy and completeness of the information produced.

These provisions apply retroactively to actions pending on December 31, in which: "Any information required by this act that has not previously been provided in pending cases shall be provided within sixty days after such effective date"—that is, March 1, 2022.

Obviously, plaintiff's counsel in personal injury cases should be at least contacting defense counsel in any cases where defendants have not already complied with the statute. Demanding counsel should not, however, simply fire off demands or letters advising their adversaries of this new requirement. The Uniform Rules now state: "To the maximum extent possible, discovery disputes should be resolved through informal procedures, such as conferences, as opposed to motion practice."[10] A good faith consultation about such matters "must take place by an in-person or telephonic conference."[11] Moreover, such personal consultations are an opportunity for counsel on both sides to agree on what will constitute compliance with this rule going forward, minimizing the chances of dispute or delay in future cases.

Conclusion

Counsel on different sides will have different views of changes like these to discovery and litigation practices. But each of us has an obligation to be aware of the latest legal developments, and to determine how best to use these rules to best advocate on our clients' behalf. Ironically, it is through communication and even collaboration with our adversaries that we will resolve disputes over such matters in the most efficient and equitable manner, so that we can concentrate our efforts on the truly determinative issues in each case.

1. 58 N.Y.2d 1040, 1041 (1983).
2. 148 A.D.3d 1091, 1092 (2d Dep't 2017)(quoting *Simpson v. New York* City Tr. Auth., 283 A.D.2d 419 (2d Dep't 2001).
3. See David J. Wallman, *Employees' Admissions in New York: Time for A Change*, 11 Touro Law Review 231, 236–41 (Fall 1994)(discussing cases).
4. Fed. R. Evid. 801 Advisory Committee's Notes, 1972 Proposed Rules, Note to subdivision (d).
5. Michael J. Hutter, "'Speaking Agent' Hearsay Exception: Time to Clarify, If Not Abandon," New York Law Journal (June 6, 2013).
6. S7903 Sponsor Memo.
7. John L. A. Lyddane, "Reasons To Maintain New York's 'Speaking Agent' Hearsay Rule," New York Law Journal (Jan. 17, 2020).
8. 15 F.4th 175 (2d Cir. 2021). In criminal cases, however, this exception is unavailable to admit out-of-court statements by government informants. *U.S. v. Behiry*, 20-3697-cr, 2021 WL 6061988 (2d Cir. Dec. 20, 2021).
9. 2021 N.Y. Laws 32 (Dec. 31, 2021).
10. 22 NYCRR §202.20-f(a).
11. 22 NYCRR §202.20-f(b).

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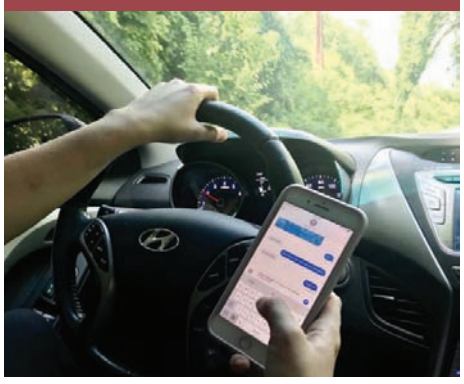
FOCUS: CRIMINAL LAW

What Constitutes Probable Cause for a Search Warrant for "Real-time" CSLI?



Charles Holster

This article about real-time geolocation information was prompted by the Second Department's decision last year in *People v. Costan*.[1] The defendant in that case was identified by witnesses as the perpetrator of several robberies. In 2012, his ex-girlfriend provided his cell phone number to the police, who obtained a court order which directed the defendant's wireless service carrier to provide his "real-time" cell site location information (CSLI).[2] The real-time CSLI revealed the current location of the defendant's cell phone, which enabled the police to locate and arrest him in a matter of hours.[3]

The court order had presumably been obtained under Section 2703(c) of the Stored Communications Act (SCA).[4] Under subdivision (d) of that same section, the standard for obtaining such an order was that the subscriber's CSLI would be "'relevant and material to an ongoing investigation."[5] However, in 2018, the Supreme Court held, in *Carpenter v. United States*,[6] that, in the absence of exigent circumstances, historical CSLI may not be obtained by law enforcement without a warrant based upon probable cause; and that the standard in Section 2703(d) "falls well short of the probable cause required for a warrant."[7]

The defendant in *Costan* moved to suppress the statements he had made to law enforcement officials, as well as the identification testimony, and the physical evidence seized incident to his arrest.[8] The decision *does not* state that the defendant moved to suppress the real time CSLI. It was apparently argued, however, that the real-time CSLI which led to his arrest was obtained without a warrant in violation of the Supreme Court's holding in *Carpenter*. The Second Department stated that the determination in *Carpenter*, "requiring law enforcement, in the absence of exigent circumstances,[9] to obtain a warrant supported by probable cause before acquiring a person's *historical* CSLI, specifically does not encompass the acquisition of *real-time* CSLI at issue here."[10]

On November 30, 2021, the Court of Appeals denied Mr. Costan's motion for leave to appeal.[11] At present, *Costan* is controlling authority for trial courts throughout New York State, since it is the only appellate division decision to have addressed the issue of whether a warrant is required for real-time CSLI in the absence of exigent circumstances.[12] In the future, however, one or more of the other three Judicial Departments may disagree with *Costan*, and hold that, as a matter of New York State law,[13] a search warrant based upon probable cause is required to obtain real-time CSLI, unless there are exigent circumstances. If that happens, a related issue will also have to be addressed, i.e.: What evidentiary showing is necessary to demonstrate probable cause for a search warrant for real-time CSLI?

The alternative ground for affirmance in *Costan* was that "even if *Carpenter* were to be applied here, the November 23, 2012 order containing an 'express finding of probable cause, which was supported by the People's evidentiary showing' *** was effectively a warrant for *Carpenter* purposes."[14] The nature of the People's evidentiary showing is not described in *Costan*, nor do the cases that it cites provide any insight. The courts that have addressed this question, in regard to either *real-time* CSLI or *historical* CSLI, have answered it in two different ways. Some have required a showing that the CSLI was likely to yield evidence of a crime, while others have held it to be sufficient that there was probable cause for the defendant's arrest.[15]

Showing that Real-Time CSLI Will Likely Yield Evidence of a Crime

After *Carpenter*, the Second Circuit, in *United States v. Johnson*, applied the same standard to *historical* CSLI that it applies to search warrants generally, i.e., ""whether, given all the circumstances set forth in the affidavit before [it] ... there is a fair probability that ... evidence of a crime' will be reflected in the records at issue."[16]

In *People v. Markellos*, a recent Nassau County case, where a warrant was sought for *historical* CSLI, as required under *Carpenter*, the court's decision stated that "[t]he cell site application [must] contain[] information establishing probable cause to believe that records relating to the location of defendant's phone would provide evidence of the location, planning, and execution of the underlying offenses."[17]

In *United States v. Acosta*, decided prior to *Carpenter*, the Southern District acknowledged that "[a]s to the GPS

tracking warrant, it is an open question in this Circuit whether the Government is required to demonstrate probable cause to obtain such a warrant."[18] However, it went on to state that, if such a requirement exists, it had been amply met, because the government's application demonstrated "that tracking of GPS data associated with the Target Cell Phone would reveal 'evidence of a crime' and 'property designed for use, intended for use, or used in committing a crime.' Fed.R.Crim.P. 41[c]."[19]

In *United States v. Shulaya*, decided prior to *Carpenter*, the Second Circuit stated that "if an affidavit demonstrates that the discovery of evidence through GPS tracking or cell site location information is probable, then a warrant may issue."[20] The court made no distinction between tracking with GPS data and tracking with real-time CSLI. It ruled that probable cause had been shown because "the detailed GPS Affidavit specifies which phones were to be tracked and how each of the purported owners of those phones was involved in the criminal conspiracy, including in ways that involved their cellphones."[21]

Showing Probable Cause for Defendant's Arrest

In re Smartphone Geolocation Data Application was decided prior to Carpenter by the Eastern District of New York. The court held that, if there is already an arrest warrant, there is no need to also obtain a search warrant for real-time CSLI: "[T]he issuance of an arrest warrant for the defendant in this case undermines any expectation of privacy in prospective cell site data. Therefore, under the circumstances, the Government need not obtain a search warrant."[22]

In *United States v. Okparaeke*, decided a year after *Carpenter*, the government applied to the Southern District of New York for a search warrant for real-time CSLI. According to the court's decision, the warrant application made the representation that "the cellphone number to be tracked would be *relevant to locating and investigating* the defendant, whom the Affidavit identified as currently engaged narcotics (sic) distribution."[23] There appeared to be no representation that the CSLI would probably yield further evidence of such crimes. Yet, the court found that there was probable cause for the real-time CSLI search warrant.[24] As was noted above, the Supreme Court held in *Carpenter* that a showing that CSLI would be "'relevant and material to an ongoing investigation' (18 U.S.C. §2703(d)) ***falls well short of the probable cause required for a warrant."[25] Although *Carpenter* involved *historical* CSLI, there is no apparent reason why the Court's observation should not also apply to real-time CSLI.

In two New York State, lower court cases, decided after *Carpenter*, the real-time tracking of the defendants' cell phones was sought for the sole purpose of locating the defendants to arrest them. In both cases, it was held that, if a warrant was required for such a *search*, the police only had to show that there was probable cause for the *arrest*.[26] In one of those cases, *People v. Davis (Jaquan)*, the court articulated its position in a particularly forthright manner:

> The applications did succeed in establishing probable cause to believe that the defendant had committed the crime of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree. They did not, however, claim to or succeed in establishing probable cause to believe that the GPS information would constitute evidence, at least in the conventional understanding of what "evidence" is, or that it would "tend to demonstrate" the defendant's culpability. Instead, the applications demonstrated, as they each explicitly claimed to do, probable cause that "[e]vidence helpful *to locate [the defendant]* [would] likely be obtained by using . . . cell site information and precision location/GPS information."[27]
>
> Of course, once located and arrested, it was possible that the defendant might have been found in possession of property connecting him to the crime, or might make an inculpatory statement, as the defendant did here. But that possibility does not constitute a probability, as CPL 690.10 (4) and 690.40 (2) require. Thus, the issue remains whether a search warrant may be issued solely for the purpose of finding and arresting a suspect.[28]

The *Davis* court answered that question in the affirmative, stating that "[i]t simply makes no sense that where probable cause exists that a person committed a crime and that GPS information can be used to locate and arrest him, CPL article 690 would not authorize the issuance of a search warrant to do so."[29] Since the *Davis* court gave this issue serious consideration in its decision, an appeal in that case would present a good opportunity for the issue to be addressed by the First Department. As of this date, *Davis* is still pending in the lower court.

Conclusion

There are differences of opinion among the courts which have addressed the issue of what constitutes probable cause for a search warrant for real-time CSLI. The dispute will have to be addressed in the event that the Second Department's holding in Costan is not followed by one or more of the other Judicial Departments, or if in the Second Department, its holding is challenged in a future case, and the Court of Appeals grants leave to appeal.

1. 197 A.D.3d 716 (2d Dept. 2021), lv. denied 2021 NY Slip Op 98500(U). The first part of this article was published by the Author in the January 2022 issue of Nassau Lawyer at pages 14-15 and can be found here: https://bit.ly/3HfWg6U.
2. *Id.*, at 718.
3. *Id.* at 718, 720.
4. 18 U.S.C. 2703(c); *But see People v. Simpson*, 62 Misc.3d 374, 385 (Sup.Ct., Queens Co. 2018).
5. 18 U.S.C. §2703(d).
6. 138 S.Ct. 2206, 2217, 2220-23 (2018).
7. 138 S.Ct. 2206 at 2221.
8. 197 A.D.3d at 717, 719.
9. Later in its opinion, the *Costan* Court discusses exigent circumstances, but only in regard to the warrantless entry of the police into the defendant's motel room. (*Id.*, at 720-721).
10. 197 A.D.3d at 720 (emphasis supplied).
11. 2021 NY Slip Op 98500(U).
12. *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 665 (2d Dept. 1984).
13. The New York State Court of Appeals has "on many occasions interpreted our own Constitution to provide greater protections when circumstances warrant and ha[s] developed an independent body of state law in the area of search and seizure *** [It has] adopted separate standards 'when doing so best promotes "predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens."'" (*People v. Weaver*, 12 N.Y.3d 433, 445 (2009)).
14. 197 A.D.3d at 720 (internal citations omitted). The *Costan* Court could have cited the "good faith" exception to the warrant requirement, because the CSLI was collected in 2012, and the police had complied with the law as it existed at that time. *See, e.g., People v. Edwards*, 63 Misc.3d 827, 833–38 (Sup. Ct., Bronx Co. 2019).
15. 197 A.D.3d at 720.
16. 804 Fed.App'x 8, 10 (2d Cir. 2020), *cert. denied sub nom. Anderson v. United States*, 141 S.Ct.1430 (2021).
17. 2020 NY Slip Op 51236, *7–8, 69 Misc.3d 1209(A) (Sup. Ct., Nassau Co. 2020).
18. No. S1 12 CR 224 PGG, 2013 WL 1890337, at *8 (S.D.N.Y. May 6, 2013).
19. *Id.*, at *7-8.
20. 17-cr-0350 (KBF), 2017 WL 6513690, at *6 (S.D.N.Y Dec. 20, 2017).
21. *Id.*, at *8.
22. 977 F.Supp. 2d 129, 147 (E.D.N.Y. 2013).
23. No. 17-CR-225 (NSR), 2019 WL 4233427, at *4 (S.D.N.Y. Sept. 6, 2019). (emphasis supplied).
24. *Id.*, at *3.
25. 138 S.Ct. at 2221.
26. *Davis*, 72 Misc.3d 580, 584 (Sup. Ct., Bronx Co. 2021); *People v. Cutts*, 62 Misc.3d 411, 412, 415 (Sup. Ct., N.Y. Co. 2018). Note, however, that in *Cutts*, the Court conflated "probable cause" with the lower standard in 18 U.S.C. §2703[d] of "relevant and material to . . . an ongoing investigation," which was ruled unconstitutional in *Carpenter* (138 S.Ct. at 2221). The *Cutts* Court stated that "[p]robable cause has been established to show that GPS/precision location is relevant to an ongoing criminal investigation."
27. 72 Misc.3d at 591 (emphasis supplied).
28. *Id.* at 592.
29. *Id.*

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

FOCUS: LAW AND AMERICAN CULTURE

Marriages Come and Go, but Divorce is Forever

Rudy Carmenaty

I married him against all evidence. I married him believing that marriage doesn't work, that love dies, that passion fades, and in so doing I became the kind of romantic only a cynic is truly capable of being.

—Nora Ephron, *Heartburn*

Everything is Copy is the new HBO documentary about Nora Ephron. Directed by her son Jacob Bernstein, the title comes from Ephron's mother Phoebe who lived by the adage: "*everything is copy; everything is material.*"[1] It would prove to be an apt metaphor for someone whose life's work was a clever blend of fact and fiction.

Ephron believed if she was the one who told the story than she could, if not alter reality, at least control the narrative: "if you slip on a banana peel, people laugh at you, but if you tell people you slipped on a banana peel, it's your joke. And you're the hero of the joke because you're telling the story."[2]

In her Roman à clef *Heartburn*, she crafted a tale based on her failed marriage to Carl Bernstein of Watergate fame. The novel serves-up a snarky souffle of wit, poignancy and revenge written from a woman's perspective. *Heartburn* also became the focus of a most unusual divorce settlement.

You fall in love with someone, and part of what you love about him are the differences between you; and then you get married and the differences start to drive you crazy.

—Nora Ephron, *Heartburn*

For those unfamiliar with Nora Ephron, she is perhaps best-known

for writing *When Harry Met Sally* and directing *Sleepless in Seattle*. She became one of the first bankable female filmmakers in Hollywood. Her films were sophisticated romantic comedies, presented with her sly humor and feminine insight.

But she was a lot more. Ephron made her initial reputation in the 1970s as an acerbic journalist, her bludgeon wit on full-display in the pages of *Esquire* and *New York* magazines. She would write and/or direct a dozen movies, see two of her plays mounted on Broadway, and publish several collections of humorous essays over a forty-year span.

Born in Manhattan, raised in Beverly Hills and educated at Wellesley, much of Ephron's comedy came from her own experiences. Her parents were playwrights turned screenwriters. Although they stayed together in spite of their difficulties, Nora herself would be twice divorced and thrice married.[3]

Heartburn resonates in its biting prose, tart re-telling of real-life events, and, most of all, its affirmation that women can be strong, vulnerable, and yes wickedly funny, all at the same time. As she once affirmed at a Wellesley commencement address: *Above all, be the heroine of your life, not the victim*.[4]

I think I was so entranced with being a couple that I didn't even notice that the person I thought I was a couple with thought he was a couple with someone else.

—Nora Ephron, *Heartburn*

Ephron met Carl Bernstein in 1973, the same year he received the Pulitzer Prize for his reportage in the *Washington Post*. Though each had achieved a certain measure of recognition amongst the New York/Washington media axis, she was insecure, and he was a philanderer.

They wed in 1976, a second marriage for both. By 1979, the couple would go their separate ways. Nora, then-carrying their second child, caught Bernstein in a torrid affair with BBC News producer Margaret Jay. Jay, the daughter of UK Prime Minister James Callahan, was at the time the wife of the British Ambassador to the United States Peter Jay.[5]

In spite of all tears, Ephron always saw the humorous potential of her predicament: "I knew even when the affair was happening that it was funny—I just wasn't laughing at the time. The whole thing was just too ludicrous."[6] Ephron left Bernstein and Washington behind, returning to New York to find solace.

Ephron was as resilient as her fiction is sublime. Her take on infidelity was infused by her impeccable sense of comic timing and the pathos that can only come from a brutal betrayal. Nora converted her pain into comedic gold, turning the tables on the unfaithful husband who cheated on her while she was pregnant.

Everyone always asks, was he mad at you for writing the book? and I have to say, Yes, yes, he was. He still is. It is one of the most fascinating things to me about the whole episode: he cheated on me, and then got to behave as if he was the one who had been wronged because I wrote about it!

—Nora Ephron, *Heartburn*

Heartburn recounts the break-up of Rachel Samstat, a food writer who resembles Nora, and political reporter Mark Feldman, Bernstein's alter-ego. Mark has an affair with Thelma Rice, a member of their DC social set. Published in 1983, the novel engendered considerable tongue-wagging about the characters' real-life counterparts.

Nora left no doubt she was the aggrieved party. Her thinly veiled satire was a means of literary pay-back. Spiced with an assortment of recipes, the kitchen knives are out as Carl Bernstein, the intrepid reporter who helped bring down Richard Nixon, is carved-up on a platter for being crude, cavalier, and chauvinistic.

Mark/Bernstein is depicted as someone "capable of having sex with a venetian blind" while Thelma/Ms. Jay is a "fairly tall person with a neck as long as an arm, a nose as long as a thumb and you should see her legs, never mind her feet, which are sort of splayed."[7] Nora proves that revenge is a dish best served cold.

Heartburn is catty in tone and scathing in result. It publicly skewered Bernstein, exposing his many shortcomings as a man and as a husband for all to see. With the literati always being prone to gossip, Bernstein's public reputation took a hit in the charmed circles he operated in. He was uncharacteristically circumspect when the novel came out.

However, when the film was announced, he became quite anxious. A movie attracts a far-wider audience and has a much longer shelf-life than a book. Bernstein was determined to use his only leverage, their as of yet unfinalized divorce, to salvage what was left of his privacy and his pride.

Of course, there are good divorces, where everything is civil, even friendly. Child support payments arrive. Visitations take place on schedule. …In my next life I must get one of those divorces.

—Nora Ephron, *I Remember Nothing*

Having gotten his comeuppance in the book's pages, Bernstein wanted to neuter the impact of the upcoming film which was set to star Meryl Streep and would be directed by Mike Nichols. Bernstein demanded to see Nora's screenplay and have a say in how he was going to be portrayed on film.

Although as a couple they separated in 1979, it would take more than five years for Nora and Bernstein to agree on the terms of their final divorce decree. The stumbling block during their protracted negotiations was the movie. It all became something of a public spectacle, conducted in the press as well as between the parties and their lawyers.

Nora announced her split from Bernstein by giving the item to columnist Liz Smith of the New York Daily News.[8] Even *Harper's* Magazine, the perennial stalwart of American literature and culture, published an excerpt from *Attachment A to the Marital Separation Agreement between Nora Ephron and Carl Bernstein*.[9]

In addition to establishing joint custody of their two sons, the separation agreement between Nora and Bernstein, which was signed in 1985, contains several unique provisions and clauses:

1. Nora and Paramount Pictures permitted Bernstein to read the screenplay before filming and see any rewrites.

2. Bernstein could view the film's first cut.

3. Bernstein could meet with director Nichols, a signatory to the agreement, to propose changes.

4. Nora could not write about Bernstein or the family.

5. Nora's name would not appear on any subsequent versions of the story, including any prospective television series.

6. A percentage of the film's profits would be placed in a trust for their children.[10]

These terms, the result of several years of expensive lawyering, meant changes were going to take place to soft-peddle the story when it finally reached the screen. Bernstein insisted that the character of the husband be depicted "at all times as a caring, loving and conscientious father."[11] The Mark depicted in the movie would not be the complete cad that he is made out to be in the novel.

I highly recommend having Meryl Streep play you. If your husband is cheating on you with a car hop get Meryl to play you. You will feel much better.

—Nora Ephron at the *American Film Institute Salute to Meryl Streep (2004)*

The film version of *Heartburn* premiered in 1986 with Streep playing Rachel and Jack Nicholson playing Mark Foreman.[12] In spite of its stellar cast and Nichols' direction, it is Nora's screenplay that falls somewhat flat. The grist of her original story was sacrificed to meet the conditions set forth in the separation agreement.

Bernstein had won the battle, for absent the compromises agreed to the movie could never have been made. But Nora, who made her case in the book, won the war. At last free of Carl Bernstein, she embarked on a fabulous second career in the movies. A latter-day Ernst Lubitsch, her films are treasured and loved. And so was she.

As Meryl Streep[13] observed: *"Nora just looked at every situation and cocked her head and thought, 'Hmmmm, how can I make this more fun?' You could call on her for anything: doctors, restaurants, recipes, speeches, or just a few jokes, and we all did it, constantly. She was an expert in all the departments of living well."*[14]

Living well is ultimately the best revenge. And Nora found marital bliss in her twenty-five-year third marriage to Nick Pileggi, who wrote the book *Wise Guy* from which Martin Scorsese's film *Goodfellas* is derived. She also became a guru of sorts on the topic of divorce, blogging for the *Huffington Post*.

Nora Ephron died from leukemia in 2012 at the age of seventy-one. She had a remarkable gift for finding the humor in life regardless of the circumstances. Nora was able to express herself in any medium, after all '*everything is copy*.' Her voice is now silent, but her work in print and on film will live on amusing audiences.

1. Nora Ephron interview, *'I Remember Nothing': Nora, Ephron, Aging Gratefully*, November 9, 2010 at www.npr.org.
2. *Id.*
3. Nora's first husband was humorist Dan Greenburg, he was followed by Carl Bernstein (the father of her two boys), and then she married Nick Pileggi.
4. *Nora Ephron '62 addressed the graduates in 1996.* at www.Wellesley.edu.
5. Dolly Langdon and Martha Smilgis, *Can Carl Bernstein Handle Deep Troth? Nora Ephron Leaves Him Over An Ex-P.M.'s Daughter*, People Magazine, January 14, 1980, at https://people.com.
6. Jan Moir, *He'd have sex with a Venetian blind... That was Nora Ephron's typically withering response to her husband's affair*, Daily Mail, June 27, 2012 at www.dailymail.co.uk.
7. *Id.*
8. *Remembering Syndicated Gossip Columnist Liz Smith*, November 17, 2011 at www.npr.org.
9. Ariel Levy, *Nora Knows What To Do*, New Yorker, June 29, 2009 at www.newyorker.com.
10. Chuck Conconi, *Divorce With a Heartburn Clause*, Washington Post, June 28, 1985 at www.washingtonpost.com.
11. *Id.*
12. The change in the character's surname came about with the casting of Nicholson. Another reason may have been that 'Mark Feldman' too closely resembles the name Mark Felt. Felt would later be revealed as "*Deep Throat*", the anonymous source tapped by Bernstein and Carl Woodward during Watergate.
13. Ephron and Streep collaborated on three films: *Silkwood, Heartburn,* and *Julie & Julia*.
14. Andrew Pulver, *Nora Ephron: Hollywood colleagues pay tribute to her work*, The Guardian, June 27, 2012 at www.theguardian.com.

Rudy Carmenaty is the Deputy Commissioner of the Nassau County Department of Social Services. He also serves as Co-Chair of the NCBA Publications Committee and Chair of the Diversity & Inclusion Committee.

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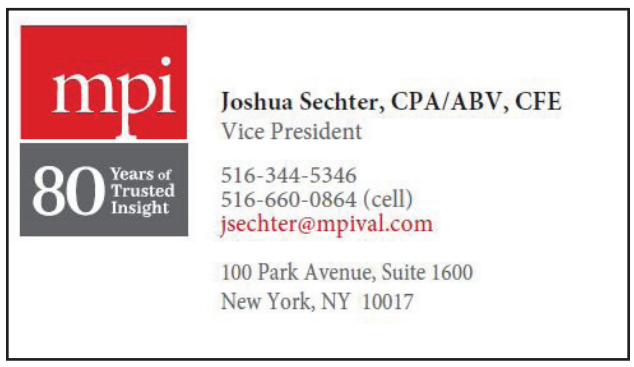

NCBA Corporate Partner Spotlight

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Karen Keating
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In Brief

Jeremy S. Rosof has been promoted to partner at Lake Success headquartered law firm Shaub, Ahmuty, Citrin & Spratt, LLP, where he is a member of the Litigation/Appellate Strategy and Advocacy Group. He was previously a counsel at the international law firm of Dewey & LeBoeuf LLP in New York City.

Michael Cardello III, a Partner of the firm Moritt Hock & Hamroff LLP, has been elected to serve as Vice Chair of the Commercial & Federal Litigation Section of the New York State Bar Association.

Jay M. Herman, Senior Partner of Herman Katz is proud to announce the promotion of **Jacquelyn L. Mascetti** to Partner.

Partner **Robert Barnett** of Capell Barnett Matalon & Schoenfeld LLP is pleased to announce the expansion and relocation of its Long Island office to 487 Jericho Turnpike in Syosset. In other news, Partner **Robert Barnett's** article, "Material Participation as Significant Participation Activity," was featured in *The CPA Journal*. The article discussed passive activities in connection with a recent U.S. Tax Court decision. Partner **Gregory Matalon** was interviewed by Better Homes and Gardens and quoted in the article, "Why You Should Put Your House in a Living Trust." Partner Yvonne Cort was the invited guest on *The Jabot Podcast* at Above the Law, for the episode, "Small Law Can Be Just the Right Size For You."

John Dalli, partner at Dalli & Marino, LLP has been named Chair of the Nursing Home Litigation Group of the New York State Trial Lawyers Association and has been chosen as a New York Metro Super Lawyer for the eighth consecutive year.

Michael H. Sahn, Managing Member of Sahn Ward Braff Koblenz PLLC and **Robert N. Cohen**, President and Managing Partner of Weinstein, Kaplan & Cohen, P.C. take great pride in announcing that the firms have merged, and will continue to practice as Sahn Ward Braff Koblenz PLLC.

Ronald Fatoullah of Ronald Fatoullah & Associates presented several educational Zoom webinars in February, including a panel discussion entitled "Heart to Heart: An Analysis of Social Isolation with Older Adults," "Understanding Probate and Probate Litigation," and the panel discussion "Moving Ahead in 2022—Taking Good Care of Yourself and Loved Ones."

Karen Tenenbaum, LL.M. (Tax), CPA, tax attorney, was recently included in "The Book of Power Lists" by *Long Island Business News*, which features Long Island's most influential industry leaders. Karen was the Special Section Editor for the Taxation Law edition of the *Suffolk Lawyer*. This edition of *Suffolk Lawyer* included Karen's article discussing New York's voluntary disclosure

Marian C. Rice

program, "Should Taxpayers Confess to Owing Back Taxes?" As Chair, Karen moderated "Choice of Entity" at the Suffolk County Bar Association Tax Law Committee. She also moderated "Mergers and Acquisitions" at the Suffolk County Bar Association Academy of Law.

Bernard Vishnick of Vishnick McGovern Milizio LLP (VMM) congratulates partner **Avrohom Gefen**, head of the firm's Employment Law and Commercial Litigation practices and key member of the Alternative Dispute Resolution practice, for his appointment to the Queens County Bar Association Grievance Committee. VMM senior partner Bernard Vishnick, heads of the firm's Trust and Estate Litigation practice, also serves as the committee's Vice Chair. VMM managing partner **Joseph Milizio**, head of the firm's Business & Transactional Law, Real Estate, Exit Planning for Business Owners, LGBTQ Representation, and Surrogacy, Adoption, and Assisted Reproduction practices, and partner **Joseph Trotti**, head of the firm's Litigation Department and Matrimonial and Family Law practice, were published in *Best Lawyers: The Family Law Issue 2022*. Mr. Trotti's article was "Crossing the Line," discussing the complexity of divorce and custody matters across state lines. Mr. Milizio's article, "A Balancing Act," discussed the landmark NYS Child-Parent Security Act and how it expands LGBTQ family rights while protecting surrogate rights. Mr. Milizio also led a webinar on exit and succession planning for members of the New York Association of Business Brokers (NYBB) on January 26. Partner **Constantina Papageorgiou**, a member of the firm's Wills, Trusts, and Estates and Elder Law practices, led a hybrid seminar on estate planning, asset and estate tax protection, and Medicaid eligibility for members of the Greek Orthodox Ladies Philoptochos Society and congregants of The Archangel Michael Church on February 1.

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

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

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

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

LAWYER WELLNESS CORNER
Reflect and Connect

Burnout: What to Do About It and How to Avoid It

Lawyer burnout is a serious problem, however, isn't inevitable—especially if you can manage it before it wears you too far down.

Why Lawyers Are Vulnerable to Burnout
·Maladaptive perfectionism
·Excessive hours
·Professional culture: competitive environment, praise for "toughing it out" and working long hours
·Lack of support personally and professionally
·Difficulty asking for help. Lawyers are the problem solvers, not the ones with the problems

Signs of Burnout
·Chronic exhaustion
·Feelings of detachment from work (frequently calling in or arriving late)
·Difficulty concentrating
·Self-medicating
·Personal and professional relationships are suffering due to isolation, irritability, detachment
·Feeling stuck
·Constantly feeling stressed out

How to Avoid Burnout
·Recharge and get enough sleep—at least seven to eight hours each night.
·Do things you enjoy outside of being an attorney.
·Set boundaries. Know your limits, learn to say no, and let go of the belief that you can handle more than you actually can.
·Redefine your relationship with time. Setting boundaries can help you get time back and provide space to make necessary changes.
·Be true to your values. Continuing down an unsustainable path is like a roadmap to lawyer burnout.
·Automate aspects of your legal practice. Explore tech options that streamline workflows, save time, and make work easier can support a better work-life balance and help relieve the time pressures of getting work done.

What to Do About Burnout
·Acknowledge the situation. If you can admit when you're getting burned out, you'll be able to take better care of yourself and your clients in the long run.
·Ask for help. The Lawyer Assistance Program can provide professional and peer support. Utilize existing supports like friends, family, supportive colleagues. Call Beth Eckhardt, LAP Director at 516-512-2618 or email eeckhardt@nassaubar.org.
·Take breaks. This may mean a vacation (without checking emails!) or more frequent breaks during the work day.
·Identify what needs to change. Ask yourself: What is causing the heaviness? What needs to change to ease the work load?
·Reconnect with the why. Why did you choose law in the first place? What things can you do to reignite the passion? Join a Bar Association and a committee, start a well-being activity at your firm.

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

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Nassau County Bar Association
Lawyer Assistance Program

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

NCBA Committee Meeting Calendar
Feb. 28, 2022 – April 8, 2022

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

MONDAY, FEBRUARY 28
LGBTQ
9:00 A.M.
Charlie Arrowood/Byron Chou

MONDAY, FEBRUARY 28
SURROGATES COURT ESTATES & TRUSTS
12:30 P.M.
Brian P. Corrigan/ Stephanie M. Alberts

TUESDAY, MARCH 1
IN-HOUSE COUNSEL
12:30 P.M.
Michael DiBello

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

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

WEDNESDAY, MARCH 2
GENERAL SOLO AND SMALL LAW PRACTICE MANAGEMENT
12:30 P.M.
Scott J. Limmer/Oscar Michelen

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

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

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

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

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

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

FRIDAY, MARCH 11
DISTRICT COURT
12:30 P.M.
Roberta D. Scoll

TUESDAY, MARCH 15
ALTERNATIVE DISPUTE RESOLUTION
8:00 A.M.
Michael A. Markowitz/ Suzanne Levy

TUESDAY, MARCH 15
ETHICS
4:30 P.M.
Avigael C. Fyman

THURSDAY, MARCH 17
INTELLECTUAL PROPERTY
12:30 P.M.
Frederick J. Dorchak

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

THURSDAY, MARCH 17
DIVERSITY AND INCLUSION6:00 P.M.
Rudolph Carmenaty

THURSDAY, MARCH 24
SURROGATES COURT ESTATES AND TRUSTS
5:30 P.M.
Brian P. Corrigan/ Stephanie M. Alberts

TUESDAY, MARCH 29
ANIMAL LAW
6:00 P.M.
Florence M. Fass

WEDNESDAY, MARCH 30
ELDER LAW SOCIAL SERVICES HEATH ADVOCACY
8:30 A.M.
Ariella T. Gasner/Suzanne Levy

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

WEDNESDAY, APRIL 6
REAL PROPERTY LAW
12:30 P.M.
Alan J. Schwartz

WEDNESDAY, APRIL 6
GENERAL SOLO AND SMALL LAW PRACTICE MANAGEMENT
12:30 P.M.
Scott J. Limmer/ Oscar Michelen

THURSDAY, APRIL 7
PUBLICATIONS
12:45 P.M.
Andrea M. DiGregorio/ Rudolph Carmenaty

THURSDAY, APRIL 7
COMMUNITY RELATIONS AND PUBLIC EDUCATION
12:45 P.M.
Ira S. Slavit

THURSDAY, APRIL 7
DIVERSITY & INCLUSION
6:00 P.M.
Rudolph Carmenaty

FRIDAY, APRIL 8
DISTRICT COURT
12:30 P.M.
Robert D. Scoll

New Members

We Welcome the Following New Members Attorneys

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Madison Einhorn
Tom Flesher
Emily Fontanetta
Shahreen Zinat Hussain
Carmen Elena Jule
Garfunkel Wild, P.C.
Michelle Katz
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Nassau County Bar Association and Suffolk County Bar Association Joint Board of Directors Meeting

2022 Nassau County Judicial Induction Ceremonies




On January 19 and 20, the Nassau County Judicial Induction Ceremonies were held to honor and induct Hon. Eileen Daly-Sapraicone, Hon. Elizabeth Fox-McDonough, Hon. Conrad Singer, Hon. Darlene Harris, Hon. David Levine, and Hon. Vincent Muscarella. The ceremonies were presided over by the Hon. Vito M. DeStefano, Nassau County Administrative Judge. Guests were invited to view the inductions virtually.

Photos by: Hector Herrera

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