Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

October 2022 www.nassaubar.org Vol. 72, No. 2

Follow us on Facebook

WHAT'S INSIDE

SAVE THE DATES

JUDICIARY NIGHT
THURSDAY, OCTOBER 20
pg. 3

OPEN HOUSE
MONDAY, OCTOBER 24
pg.12

NCBA to Recognize Hon. Anthony F. Marano at Judiciary Night

Judiciary Night—a celebratory evening to honor the esteemed Judiciary of Nassau County—will be held this year on Thursday, October 20 at the Nassau County Bar Association (NCBA). In keeping with a fall theme, the event will once again be held outdoors under a tent.

At this year's event, the NCBA will bestow the Hon. Marie G. Santagata Gold Gavel Award, established in 2021, to Hon. Anthony F. Marano (Ret.), former Presiding Justice of the Supreme Court of the State of New York, Appellate Term, Second Judicial Department for the Ninth and Tenth Judicial Districts.

"As we approach the season of giving thanks, on October 20, NCBA will host its annual Judiciary Night to honor the esteemed Judiciary of all courts in Nassau County. This year, we are very pleased to present Hon. Anthony F. Marano (Ret.) with the Gold Gavel Award in honor of his outstanding mentorship of other judges in pursuit of law and justice," said NCBA President Rosalia Baiamonte.

In May 2020, Judge Santagata presented the Gold Gavel to the Nassau County Bar Association to create this Award to honor judges from any of our courts for outstanding mentorship of other judges in pursuit of the law and justice.

Judiciary Night is open to members and non-members of the NCBA. For additional information regarding the event and how to register, see page three of this issue.

Fireside Chat with Judges Norman St. George and George Silver Provided an Open Dialogue About the Court System's Future

Oscar Michelen

On August 25, 2022, Justice Norman St. George, Deputy Chief Administrative Judge for the Courts Outside the City of New York (formerly the Chief Administrative Judge of the courts in Nassau County), and Justice George Silver (Ret.), the former Deputy Chief Administrative Judge for the New York City Courts, held court in a fireside chat co-sponsored by the Long Island Hispanic Bar Association (LIHBA) and the Nassau County Bar Association (NCBA).

This hybrid event was well-attended both in person and via Zoom and allowed attendees to ask these two seasoned jurists about their careers and the future of the court system following the impact of the COVID-19 pandemic. The talk was moderated by Veronica Renta Irwin, President of LIHBA, and Oscar Michelen, the President-Elect of LIHBA and a member of the NCBA Board of Directors.

The fireside chat was held in the north dining room and offered an intimate setting which permitted an open exchange between the participants and the audience. The program began with the judges speaking about their experience as litigators before deciding to go on the bench. They spoke of their work as trial judges, with Judge St. George starting in the Nassau County District Court and Judge Silver beginning his judicial career in the Bronx County Civil Court.

The judges were also open about their individual roles in diversifying the bench, Judge St. George as person of color and Judge Silver as one of the first judges who was an open member of the LGBTQ community. They addressed the progress the court system has made thus far in diversifying the judiciary and spoke of the need for and importance of having such efforts continue.

The discussion then shifted to how both men when serving as administrative judges, under the direction of former Chief Judge of the New York State Court of Appeals Janet DiFiore, managed to get the court system up and running when COVID-19 forced courthouses throughout New York State to be shut down in 2020. It was an unprecedented crisis, but these efforts resulted in courts being back up and actually hearing cases—albeit virtually—in a matter of only a few months.

The judges discussed the difficulties they encountered in balancing the need to get the courts open, while keeping court personnel and the public safe. Instrumental in these efforts was the integrating of new technology. So, at the same time that the pandemic presented its own complications, there was also the pressing challenge presented first by the use of Skype for Business before the courts transitioned to Microsoft Teams for conferencing and holding proceedings.

But the evening's primary purpose was to allow those in attendance to ask the speakers questions and to present an open dialogue. Questions came from the audience present at Domus and the video attendees and questions covered a wide variety of topics. Queries ranged from advice on how to become a judge to what's in store for state courts going forward. On all issues asked about, the judges were candid and thoughtful in their responses. Each one provided direct personal insight to the given topic being addressed.

They both acknowledged the value of having certain court appearances remain virtual as it provides an opportunity for practitioners to save valuable travel time and to work more efficiently

See FIRESIDE CHAT, Page 23

Judiciary Night

Join the Nassau County Bar Association as it honors the esteemed Judiciary of Nassau County.

Thursday, October 20, 2022
5:30 PM at Domus
To be held outdoors under a tent

$95 NCBA Members
$150 Non-members
$65 Magistrates

HONORING

Hon. Anthony F. Marano

Hon. Marie G. Santagata Gold Gavel Award

In the event of inclement weather, the event will be moved indoors.

Please send completed form with payment to events@nassaubar.org or mail to:
Nassau County Bar Association
Judiciary Night
15th & West Streets, Mineola, NY 11501

Attendees _____

Contact Email _____ **Phone** _____

☐ **Check enclosed (payable to NCBA)** ☐ **Charge my CC for $**

Name _____

CC No. _____

Exp. Date _____ **CVV (security code)** _____ **Billing Zip** _____

Questions? Contact Special Events at (516) 747-4070 ext. 1210 or events@nassaubar.org.

Spotlighting The WE CARE Fund and its History of Charitable Giving

FROM THE PRESIDENT

Rosalia Baiamonte

During the 1980's era of consumerism and conservatism, "lawyer-bashing" had become ubiquitous in media, television, and film. In fact, the President of the California State Bar Harvey Saferstein famously called for a "cease fire" on lawyer-bashing during a news conference in 1993 after a mass shooting in a San Francisco law office, contending "There's a point at which jokes and humor are acceptable and a point at which they become nothing more than hate speech."

In 1988, while serving as the 86th President of the Nassau County Bar Association, Stephen Gassman was inspired to create a charitable organization under the auspices of the bar association to counteract the prevalence of "lawyer-bashing." Believing that virtue should be its own reward, President Gassman proposed that in order for the image of lawyers to improve, it was important to give back to our community. To underscore the point, President Gassman aptly named the organization WE CARE. Next, he appointed a small board comprised of Past Presidents William ("Billy") Levine and Frank A. Gulotta, Jr.

The nascent organization held a few modest events to raise money for local charities which helped children in need—a children's festival on the Domus front lawn; boat rides around Manhattan and Brooklyn; outings at local theaters or Westbury Music Fair, just to name a few. In those early years, the fund-raising efforts yielded modest sums by today's standard. But it was clear that President Gassman's vision had struck a chord with Bar members and the community at large. It did not take long for the mission of WE CARE's charitable giving and the equally fierce commitment of its volunteers to take root.

As the Advisory Board of WE CARE began to slowly expand, so too did the creativity and success of its fundraising efforts. In 1996, Stephen W. Schlissel founded the first ever WE CARE Golf Outing, which raised $28,000 in its debut. Now the flagship of WE CARE's event cycle, the WE CARE Golf & Tennis Classic (as it was later renamed) elevated the fundraising efforts to a new crescendo. Prior to the global pandemic which suspended all in-person events, the donations to, and fundraising efforts of, the WE CARE Golf & Tennis Classic exceeded $300,000 in the year 2017 alone.

Over time, beloved events became fixtures which bloomed in the landscape of WE CARE's fundraising calendar and community outreach: ***The Children's Festival*** (February's favorite event which treats deserving and challenging youngsters and disadvantaged children to a fun-filled afternoon, including hot dogs, popcorn, ice cream, gifts and other entertainment); ***Dressed to a Tea*** (the annual Spring fashion show made possible through collaboration with the Women's Bar Association and Nassau County's court personnel where donations of new and gently used men and women's business clothing and children's clothing and prom attire are collected to benefit local charities and those re-entering the workforce); ***Re-Building Together Long Island*** (a summertime community effort of performing home repairs, plumbing, electrical, carpentry and home modifications, including wheelchair ramps for the physically challenged, for income-qualified homeowners to improve the safety of their homes); ***Mets v. Yankees*** (a summer favorite of the Subway Series rivalry); September's ***Tunnel to Towers 5K Run & Walk in NYC*** (the event symbolizes Stephen Siller's final footsteps from the foot of the Battery Tunnel to the Twin Towers and pays homage to the 343 FDNY firefighters, law enforcement officers, and thousands of civilians who lost their lives on September 11, 2001. Proceeds from the event benefit first responders and catastrophically injured service members and their families); October's ***Las Vegas Night*** (an evening of fabulous Las Vegas style entertainment, featuring comedy, games of Poker, Blackjack, Baccarat, Roulette, and Craps, and a Vegas style buffet) and ***Light the Nigh***t (proceeds fund life-saving research and support for blood cancer patients and their families); November's ***Thanksgiving Luncheon*** (a 9-course luncheon for senior citizens) and ***Thanksgiving Basket*** deliveries to impoverished families (200 baskets each filled with a complete cooked turkey dinner for a family of six with all the trimmings, including stuffing, mashed potatoes, sweet potatoes, vegetables, cranberry sauce, dinner rolls, and apple pie, accompanied by heating instructions in Spanish and English); and December's endearing ***Gingerbread University*** (where children of all ages delight in the fun and creativity of decorating their own gingerbread houses).

The thread that binds the past, present and future members of the WE CARE Advisory Board and its committee volunteers is the simple but profound joy of helping those in need.

In recalling the extraordinary accomplishments of WE CARE, Stephen Gassman highlights the construction of a mock courtroom in a middle school in Hempstead which was quite literally painted, carpeted and furnished with the sweat equity of its volunteers, thereby enabling its students for the first time to be able to participate in mock trial competitions. There were the individual grants made to several Court Officers of our Nassau County courts whose homes were devastated by Superstorm Sandy to aid in the re-build of their homes and their lives. In 2018, WE CARE partnered with the North Shore Child & Family Guidance Center to raise funds for the creation of the Burton S. Joseph Children's Center in Nassau County Family Court. Gassman remarks, "Helping others is always the right thing to do. To improve the life of a child is the greatest impact you can make."

Stephen Schlissel remembers fondly the annual holiday party held for needy children and the joy of seeing them open what would likely be their only presents. His two favorite days each year were the days that WE CARE made their spring and fall grants to worthy Long Island charities. Schlissel notes, "The single goal of those working for the WE CARE Fund was to help others. There is no way to calculate the value of the extraordinary amount of time spent on raising funds for WE CARE. It was simply one of the most important things I did in my life, and I know the other WE CARE supporters felt that way also."

Each Thanksgiving, District Court Judge Andrea Phoenix, along with other Thanksgiving Committee volunteers and community organizations, devote countless hours driving around Nassau County communities to deliver Thanksgiving baskets with turkey dinners to families in need. There are certain indelible memories that remain with her and the volunteers still, like looking up to the window of a store front apartment at the sight of children huddled under blankets and knowing that but for her delivery of a turkey dinner, this family would have nothing to eat. There was the delivery of a Thanksgiving basket to a family whose only English-speaking member was a 6-year-old boy who asked in wonder whether it was someone's birthday because he had no idea it was Thanksgiving. There was the delivery of a turkey dinner to what should have been a family of four who occupied a two-room apartment whose only visible piece of furniture was a bureau. They were crying because three days previously one of the children had lost his life to gun violence and the mother was so grief stricken that she did not have the strength to think about Thanksgiving much less prepare a meal. And then Judge Phoenix proceeds to say something that brings tears to both of us, "NCBA thought about this family when no one else did. These are the

Nassau Lawyer

The Official Publication
of the Nassau County Bar Association
15th & West Streets, Mineola, N.Y. 11501
Phone (516)747-4070 • Fax (516)747-4147
www.nassaubar.org
E-mail: info@nassaubar.org

Printed by Richner Printing, LLC
(516) 569-4000

Nassau Lawyer (USPS No. 007-505) is published monthly, except combined issue of July and August, by Richner Printing, LLC 2 Endo Blvd., Garden City, NY 11530, under the auspices of the Nassau County Bar Association. Periodicals postage paid at Mineola, NY 11501 and at additional entries. Contents copyright ©2022. Postmaster: Send address changes to the Nassau County Bar Association, 15th and West Streets, Mineola, NY 11501.

stories that stay with you forever." Judge Phoenix says, "Through WE CARE, my colleagues and I have the amazing opportunity to foster and advance parity, good will, and blessings across Nassau County."

Christopher McGrath recalls the smile on the faces of deserving students who receive law school scholarships to attend Hofstra, St. John's or Touro; or the unforgettable look on the face of a WWII veteran and double amputee who was able to finally emerge from his home with the help of a wheelchair ramp built by volunteers of Rebuilding Together; or the relief on the faces of children who receive the most basic of necessities like underwear and socks which enable them to shed the embarrassment and shame they felt for being unable to participate in gym. There was the time he was at NCBA when a young boy accompanied by his father walked into Domus. The older gentleman wanted his son to give thanks to the Nassau County Bar Association because their donations of clothing enabled him to secure a job as a custodian in a Long Island school which allowed him the means to support his two young children and keep his family together after the recent loss of his wife. McGrath's favorite program is Christmas Dream, and the joy it brings to the children who receive backpacks filled with coloring books, crayons, paper, pencils, pens, ruler, Elmer's glue, erasers, shampoo, soap, toothbrush, hairbrush, laundry detergent, and blankets. He says, "Every single thing we do through WE CARE, either donations of time or money, has a direct and positive impact on the lives of people."

With the financial support and personal effort of so many, WE CARE has been able to serve the community in a myriad of ways. Court of Claims Judge, Honorable Denise Sher notes, "WE CARE speaks to the essential part of all of us who support charitable giving."

Since its formation 34 years ago, WE CARE has raised and distributed more than $5 million in charitable grants to improve the quality of life for children, the elderly, and others in need throughout Nassau County. Nurtured by the tireless efforts of attorneys and judges—and strengthened by donations raised by the legal profession and community at large—WE CARE has matured into a nationally recognized model for similar programs instituted by other bar groups across the country. Because all administrative costs are generously absorbed by the Nassau County Bar Association, 100% of donations to and funds raised by WE CARE benefit those in need. In some years, the total annual grants to those in need in Nassau County exceeded $250,000. Although the recent COVID-19 global health crisis severely impacted its fundraising abilities, WE CARE's spring 2022 grant cycle had returned to pre-pandemic levels.

On June 29, 2022, I had the great privilege of accompanying Deanne Caputo, a Co-Chair of the WE CARE Fund, to present $104,000 in total grants to the following organizations:

• **Camp HorseAbility** (a day camp for children and adults with special needs whose mission is to improve lives through facilitated interaction with horses)

• **Christmas Dream** (an Inwood based program which provides English language tapes, books and school supplies for children who have difficulties with schoolwork due to a language barrier)

• **Long Beach Reach** (provides social, psychological, educational, and legal assistance to individuals and families)

• **Long Island Sled Hockey** (promotes sportsmanship, teamwork, and camaraderie through sport for the juvenile and adolescent population of physically and/or mentally challenged athletes)

• **Safe Center LI** (provides resources that assist in saving and changing the lives of the victims of domestic or dating abuse, child abuse, and rape and sexual assault)

• **Big Brothers Big Sisters of LI** (supports one-to-one mentoring relationships for children ages 7 to 16)

• **Hicksville Boys & Girls Club** (youth development, sports and leisure time activity which also provides one on one tutoring, homework help, employment counseling and training)

• **Long Island Council of Churches** (the coordinating body for the ecumenical work of churches throughout Nassau and Suffolk Counties which includes providing emergency food through food pantries and community centers, building community resources, and workplace training)

• **Maurer Foundation for Breast Health Education** (whose mission is to save lives through breast health education that focuses on breast cancer prevention, healthy lifestyle choices, early detection, and risk reduction)

• **Port Washington Parent Resource Center** (provides parenting workshops, social events, recreational outings, summer enrichment programs, and a myriad of developmental classes geared toward infants and toddlers)

• **Sarah Grace Foundation for Children with Cancer, Inc.** (dedicated to improving the quality of life of children with cancer and to provide comfort and support to the families of children suffering from cancer)

• **Scott J. Beigel Memorial Fund** (mission is to help and provide at-risk children touched by gun violence the opportunity to go to summer sleep away camp)

• **Bethany House** (supports women, and women with children, experiencing homelessness with emergency shelter and basic necessities of life, and offers programs which provide a continuum of care through transitional housing, and culminating in permanent housing and stability)

• **ERASE Racism** (whose research on racial inequities on Long Island in housing and public school education has been used to identify discriminatory public policies and practices and deficient civil rights laws to enact appropriate change)

• **The INN** (provides a broad variety of essential services to assist those challenged by hunger, homelessness, and profound poverty)

• **LICADD:** Long Island Council on Alcoholism and Drug Dependence, Inc. (its mission is to address the addictive climate of our time by providing initial attention and referral services to individuals, families, and children, through intervention, education, and professional guidance to overcome the ravages of alcohol and other drug related problems)

• **RotaCare** (clinics which provide free medical care to those who have the most need and the least access to medical services)

• **Mineola High School Student Service Center** (provides students the opportunity to engage in meaningful community service through work with senior citizens, as well as the hungry and the homeless)

• **Momma's House** (serving young mothers ages 18-24 who are pregnant and/or parenting, and their children (ages 0-5) in a caring and supporting environment which encourages healthy birth outcomes and fosters healthy lifestyles)

• **Port Washington Senior Center** (provides seniors with a variety of activities such as socialization, recreation, health promotion, educations programs, and congregate meals)

This year the WE CARE Endowment was established to raise capital for the health and longevity of WE CARE. The Endowment allows WE CARE to diversify the organization's income, become better prepared to weather economic downturn, better support planned giving, and create a solid foundation for WE CARE's future. The Endowment earns investment income by investing the capital it raises. Part of the investment income is used to fund the purpose of WE CARE, and the rest is reinvested to provide for the stability of WE CARE's future giving. By making a planned gift to The WE CARE Endowment, you are helping to ensure a solid foundation for the future of WE CARE, as well as establishing your legacy.

Anyone, regardless of income or age, is able to make a planned gift to The WE CARE Endowment. There are many ways to give, including outright gifts which may be offered by an individual, corporation, or foundation (including cash, cash equivalent, written cash pledge, securities, bonds, mutuals funds, and real estate) and estate/planned gifts (including bequests contained in Wills and Living Trusts, retirement plans, charitable remainder trusts, charitable lead trusts, remainder interest in residence, pooled income funds, and life insurance).

In a touching tribute to the organization she loved so deeply and in honor of the countless lives she impacted through her tireless dedication and efforts as a Past Chair of WE CARE, the estate of the Honorable Elaine Jackson Stack was the first to bestow a $10,000 gift into The WE CARE Endowment.

To learn more about The WE CARE Endowment, please visit **www.thewecarefund.com** or email **wecareendowment@nassaubar.org.**

In February 2017, Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States, delivered the Rathbun Lecture on a Meaningful Life at Stanford Memorial Church:

> "I tell the law students I address now and then, if you're going to be a lawyer and just practice your profession, well, you have a skill, so you're very much like a plumber. If you want to be a true professional, you will do something outside yourself. Something to repair tears in your community. Something to make life a little better for people less fortunate than you. That's what I think a meaningful life is—living not for oneself, but for one's community."

There are many ways to give to WE CARE:

• Donate online at www.thewecarefund.com

• Choose "Nassau Bar Foundation, Inc." using your Amazon Smile account, and Amazon will donate 0.5% of all eligible purchases to the WE CARE fund.

• Make a donation in memory of a loved one, or to honor a special person or occasion.

• Volunteer at a WE CARE event.

FOCUS: CRIMINAL DEFENSE

Locked Up and Served: Defending an Incarcerated Client

Brian Gibbons and Gianna Crespo

Many civil trial attorneys have encountered situations where another party—or their own client— is incarcerated for reasons unrelated to the case. How can a civil case move forward with an incarcerated party, who is largely unable to participate in discovery, depositions, or trial? This article will explore obligations and logistics for the production of incarcerated clients in New York State courts, the probability of prevailing on a motion to stay proceedings in such circumstances, and the potential costs associated with producing an incarcerated client.

New York State Prisoners

Physical Appearance of an Incarcerated Client

While incarcerated civil defendants maintain a right to defend themselves, New York courts have held that the right of an incarcerated civil defendant to personally appear in civil proceedings is not absolute.[1] In *Bagley*, the court clarified that the due process rights of an incarcerated civil defendant are not violated by that defendant's absence from court, unless that defendant demonstrates an inability to establish their defense without their physical presence in court. The presence of counsel on behalf of the incarcerated defendant is sufficient to maintain an incarcerated defendant's due process rights, thus weakening any necessity of producing the incarcerated defendant at trial.[2] [3]

Where one's civil client is incarcerated, the ability to produce that client to appear and testify in-person hinges partly on the location of incarceration in relation to the court. For example, where the incarcerated individual is held in a facility located within New York State, and within one hundred miles of the court where the proceeding is to take place, the court may allow the incarcerated individual to appear in person. Pursuant to N.Y. CPLR 3117(a)(3)(ii), if a witness is located more than 100 miles away from the court where the proceedings are to take place, or is located out of state, the court may consider the witness to be unavailable for live testimony at trial. In this situation, the court will admit that witness's deposition testimony into evidence so long as the opposing party was represented at the deposition or had notice of such deposition.[4]

The presence of compelling interests or extenuating circumstances weigh in favor of requiring the physical presence of incarcerated civil parties. The most common of these scenarios occurs in cases held in family court, particularly those impacting one's constitutional rights. In *Starasia E. v. Leonora E.*,[5] the Appellate Division, Third Department, reversed and ordered a new custody hearing when the original hearing was held without the incarcerated father, who was confined to a Pennsylvania penitentiary. Specifically, the court stated that because parents have fundamental interests in parenting and caring for their children regardless of their incarcerated status, "an incarcerated parent has a right to be heard on matters concerning [their] child, where there is neither a willful refusal to appear nor a waiver of appearance."[6]

In the absence of any such compelling interests, however, New York courts are consistent in rejecting petitions by incarcerated parties to appear at trial. The court's consideration for these petitions are discretionary, and as such, they are subject to a higher standard of review upon appeal.[7]

Virtual Appearance of an Incarcerated Client

The New York State Constitution provides civil parties the right to personally appear and confront witnesses. Prior to the COVID-19 pandemic, this prevented virtual appearances of incarcerated parties "absent a showing of high risk of unrealistic cost involved with transporting the [incarcerated party]."[8] The court expressed concern for the lack of adequate technology for virtual appearances, including the ability to view the incarcerated defendant or his counsel close up.

In our current environment, however, use of virtual platforms, such as Zoom, Skype, or Microsoft Teams, has become more prevalent, particularly in taking depositions. As a result, courts are more likely to allow virtual appearances of incarcerated civil parties, primarily to reduce potential logistical delays associated with physical appearances. A jury's

view of the incarcerated client's testimony is a serious issue for counsel to consider.

Motion to Stay to Avoid Production of an Incarcerated Client

In deciding whether to petition the court for a stay of proceedings while a client is incarcerated, one must weigh compelling interests or extenuating circumstances that exist to support a stay. For example, in *Matter of James Carton K., III*,[9] a case involving the termination of an incarcerated father's parental rights, the Appellate Division affirmed the Family Court's decisions to grant the father's motions to stay proceedings over the course of two years to ensure his participation.

The Appellate Division has also stated that trial courts should consider the timing of a motion to stay proceedings in deciding whether to grant such motions. In *Pope*, the Appellate Division, Second Department, affirmed the lower court's denial of an incarcerated defendant's motion for a continuance, particularly because the motion was filed as trial was scheduled to begin. It appears the *Pope* court viewed the request for a stay as more of an "excuse" than a compelling interest to support a stay.[10]

Another important factor to weigh is the landscape of New York courts as the COVID-19 pandemic winds down. The pandemic has had several trickle-down effects into the current state of New York's courts. In particular, the pandemic has led to increased use of remote technologies by the courts. Meanwhile, the pandemic also created an increased backlog of cases. In an effort to hold time-efficient hearings, courts are likely to continue leaning into the use of remote technologies, in order to assist is the reducing of backlog.

The Cost of Producing an Incarcerated Client

In *Price v. State*,[11] the Court of Claims stated that "the responsibility for paying the expenses incurred in conducting depositions of incarcerated persons rests with the party requesting the examination, even if that party is an inmate himself and that inmate qualifies for poor person's status pursuant to CPLR 1101." The cost may include the transport and lodging not only for the client, but also for the corrections personnel that would need to accompany the incarcerated client.

Federal Prisoners

Producing a federal prisoner for live testimony is similarly fraught with challenges. However, the rules regarding such production are codified and the steps to accomplish the proper outcome are streamlined, more clearly than the state procedures.

Physical Appearance of an Incarcerated Client

If provided with a court order, the U.S. Marshal may honor requests for producing federal prisoners in state civil cases, but this is also contingent on a balancing act between the security requirements, the expenses attributed to such a transfer and other available modalities for capturing the requested testimony. For example, a prisoner-plaintiff is responsible for the cost of his or her production. If the prisoner is indigent, the U.S. Marshals will seek to have the state court provide that the cost of production will be paid from any monetary awards issued to the prisoner from that action. However, if the plaintiff or defendant in a civil action seeks the production of a federal prisoner as a witness, the requesting party is responsible for the cost of production.[12]

The Cost of Producing an Incarcerated Client

In regard to the reimbursement of costs, the state governments are responsible for all expenses incurred when a federal prisoner must be produced by U.S. Marshals in state courts under a writ of habeas corpus. Expenses include deputies' salaries, mileage, per diem, or other expenses incurred. In this way, the federal requirements mirror the requirement of the state production of a prisoner.

Prior to an inmate's transfer to state or local courts, the warden of the facility will authorize transfer only when satisfied that the inmate's appearance is necessary, that state and local arrangements are satisfactory, that the safety or other interests of the inmate (such as an imminent parole hearing) are not seriously jeopardized, and that federal interests, which include those of the public, will not be interfered with or harmed.[13]

In civil cases, the request must include the reason that production on writ is necessary and that no other alternative is available. The applying authority must provide either at the time of application or with the agent assuming custody, a statement signed by an authorized official that state or local officials with custody will provide for the safekeeping, custody, and care of assuring the inmate; will assume full responsibility for that custody; and will return the inmate to Bureau of Prisons' custody promptly on conclusion of the inmate's appearance in the state or local proceedings for which the writ is issued.[14] The facility staff must maintain contact with the state or local law enforcement agency with responsibility for transfer of the inmate to determine the exact date and time for transfer of custody.

Transfer of an incarcerated person in civil cases pursuant to a writ of habeas corpus *ad testificandum* must be cleared through both the Regional Counsel for the particular geographical area and the warden of the prison. Transfer ordinarily must be recommended only where testimony cannot be obtained through alternative means, such as depositions or interrogatories, and where security arrangements permit. Postponement of the production until after the inmate's release from federal custody will always be considered, particularly if the inmate's release is within twelve months.[15]

The decision to issue a writ of habeas corpus *ad testificandum* is committed to the sound discretion of the District Court.[16] Even when the opposing party does not oppose the motion, the court may still deny the issuance of the writ. Factors that the court should consider in exercising discretion as to whether to issue the writ of habeas corpus *ad testificandum* include whether the prisoner's presence will substantially further the resolution of the case; security risks presented by the prisoner's transportation and safekeeping; whether the suit can be stayed until the prisoner is released; and any jurisdictional limitations arising from the prisoner's incarceration in the prison.[17]

Conclusion

Civil attorneys representing an incarcerated client face numerous obstacles. First, attorneys must consider whether physical appearance is necessary, or whether a court is likely to consider the incarcerated client unavailable for live testimony. If unavailable for live testimony at the courthouse, attorneys must next weigh the possibility of a virtual appearance, and how such an appearance would impact the case. A motion to stay the proceedings is an option, but also an uphill battle—especially given the court's interest in reducing the current backlog prompted by the pandemic.

Also, important to consider are the costs and expenses associated with producing an incarcerated client in court and the safety measures that must be secured before such a transfer is approved. The procedures outlined here are not exclusive in that the courts remain open to other options which may be available to counsel to accomplish the goal of fair and just inmate participation in their civil proceedings.

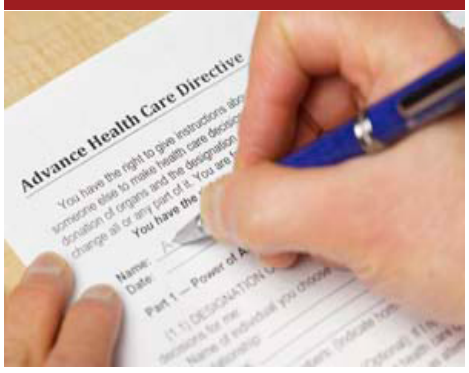
1. *Bagley v. Bagley*, 292 N.Y.S.2d 796, 798 (Sup. Ct. Kings Co. 1968).
2. *Brounsky v. Brounsky*, 33 A.D.2d 1028 (2d Dep't 1970).
3. *Nussbaum v. Steinberg*, 269 A.D.2d 192 (1st Dep't 2000).
4. *See* CPLR 3117(a)(3); *see also Rubino v. G. D. Searle & Co.*, 340 N.Y.S.2d 574 (Sup.Ct. Nassau Co. 1973).
5. 179 A.D.3d 1328 (3d Dep't 2020).
6. *Id.*
7. *Pope v. Pope*, 198 A.D.2d 406 (2d Dep't 1993).
8. *See In re Sawyer*, 823 N.Y.S.2d 641 (Sup.Ct., Oneida Co., 2006).
9. 245 A.D.2d 374 (2d Dep's 1997).
10. *Id.*
11. 791 N.Y.S.2d 873 (2004).
12. See 28 USC 2254.
13. See 28 C.F.R. §527.31.
14. *Id.*
15. *Id.*
16. 28 U.S.C.A. §§1651(a), 2241(c)(5).
17. *Id.*

Brian Gibbons is a partner and defense trial attorney at Wade Clark Mulcahy LLP, where he works out of the New York City and Long Island offices. He can be reached at bgibbons@wcmlaw.com.

Gianna Crespo Gianna Crespo is a Senior Associate within the General Liability Defense and Medical Malpractice Defense Practice Groups at Rubin, Paterniti, Gonzalez, Rizzo and Kaufman in Garden City.

FOCUS: MEDICAL MALPRACTICE

Advance Directives: Do Your Wishes Matter?



Giulia R. Marino

As no one lives forever, one can consider during their lifetime their end-of-life care and what interventions they may or may not wish to receive. Advance directives grant an opportunity to express these end-of-life wishes.[1]

These documents include a Do Not Resuscitate Order, a Do Not Intubate Order, and/or a Medical Order for Life-Sustaining Treatment form.

What happens, however, if these documents are ignored by healthcare providers in New York State? What happens if these documents—although duly provided to healthcare providers—are completely ignored, and a patient is resuscitated, intubated, and/or medication is administered against their wishes? What happens if, as a result, that patient lives the next few months, or years, in a persistent vegetative state, or in pain and unable to live a fulfilling life?

What is their path of recourse in our legal system?

Until recently in New York-none.

Advance Directives

An out-of-hospital Do Not Resuscitate order (DNR) is a document that directs a healthcare provider not to perform cardiopulmonary resuscitation in the event of a life-threatening situation, such as cardiac arrest.[2]

A Do Not Intubate Order (DNI) is a document that directs a healthcare provider not to perform endotracheal intubation if indicated in a life-threatening situation, such as respiratory arrest, but to still perform CPR and other life-saving interventions, such as medication administration.

The DNI form has been largely replaced by the Medical Order for Life-Sustaining Treatment (MOSLT) form, which is used mostly in a healthcare facility and contains more specified treatment instructions.[3] On a MOLST form, a patient may detail if they would like to be intubated for a limited amount of time, and they can indicate that they would like to be extubated after this time has elapsed.[4] Additionally, a patient may specify if they would like a feeding tube or intravenous hydration, and they may particularize a period of time for which they would like these treatments administered.[5] When executed, these documents should be provided to all of a patient's healthcare providers, including hospitals and nursing homes, as needed.

Precedent Set Forth in *BECKER* AND *ALQUIJAY*

In 1978, in *Becker v. Schwartz*, the Court of Appeals established that there is no cause of action for "wrongful life" in the state of New York.[6] The court addressed two separate cases involving defendant physicians whose alleged negligence affected the parents' decisions to conceive and/or terminate their pregnancies, resulting in the birth of children with lifelong developmental deficits.[7] Both cases sought pecuniary damages for the care of the infants, and damages for emotional injuries suffered by the parents.[8] The court determined that a cause of action for "wrongful life" is against public policy, and that emotional damages are not ascertainable due to the conflict between a parent's unconditional love for a child versus a parent's anguish at having a disabled child.[9]

In 1984, in *Alquijay v. St. Luke's-Roosevelt Hospital Center*, the Court of Appeals heard a case in which the parents of a disabled infant brought an action to recover expenses for future care and services from defendant medical providers.[10] The court held that the cause of action was essentially a claim for "wrongful life," and plaintiffs are not entitled to damages under such a claim. The court stated that recovering for such damages is a "matter of public policy," and therefore a question for the Legislature, and not for the court.[11]

In 2009, the Second Department heard *Cronin v. Jamaica Hospital Center* on appeal from the Queens County Supreme Court.[12] In this case, Jamaica Hospital Medical Center violated the plaintiff-decedent's DNR twice by resuscitating him.[13] The Supreme Court dismissed the complaint, holding that plaintiff was asserting a claim for "wrongful life," which is not recognized in New York.[14] The Appellate Division affirmed the holding, stating the "status of being alive does not constitute an injury in New York," and cited to the reasoning set forth in *Becker* and *Alquijay*.[15]

Greenberg v. Montefiore New Rochelle Hospital

More recently, in March 2022, the First Department heard *Greenberg v. Montefiore New Rochelle Hospital* on appeal from the Bronx County Supreme Court.[16] In this medical malpractice case, it was alleged that Montefiore Hospital and associated physicians at the hospital departed from the standard of care by failing to follow the plaintiff-decedent's advance directives and MOLST form.[17]

At the hospital, a MOLST form was duly executed by plaintiff-decedent's Health Care Proxy in accordance with plaintiff-decedent's wishes.[18] The MOLST provided that plaintiff-decedent was to receive comfort measures only, and no intravenous fluids or antibiotic administration.[19] The treating doctor, although noting that there was a duly executed MOLST in place in his notes, ordered intravenous antibiotics and medication administration to treat plaintiff-decedent's conditions.[20] Subsequently, plaintiff-decedent endured pain and suffering for approximately thirty (30) days until he passed away.[21] According to plaintiff-decedent's expert, if plaintiff-decedent had not received these interventions, plaintiff-decedent would have died from sepsis within a few days.[22]

At the trial court level, defendants made a motion to dismiss for failure to state a claim, and it was granted on the grounds that plaintiff's claim was for "wrongful life."[23] The defendants, and the trial court, largely relied on the arguments and decision set forth in *Cronin*.[24]

The Appellate Division, however, contended that *Cronin* differed from *Greenberg*. The plaintiff in *Cronin* sought damages based upon a wrongful prolongation of life argument, but in *Greenberg*, plaintiff was seeking damages for plaintiff-decedent's pain and suffering as a result of alleged medical malpractice.[25] The Appellate Division also did not determine that *Becker* or *Alquijay* applied in this matter, because these causes focused on the issues of considering "being alive" an injury in the state of New York.[26] The Appellate Division instead focused on a competent adult's right to refuse medical treatment, which is a well-established right in New York case law, and determined that plaintiff-decedent's medical malpractice claim that defendants' failure to follow the standard of care by failing to follow the decedent's advance directive and a MOLST form *was* a valid cause of action.[27]

Conclusion

While a small step in the right direction, the decision in *Greenberg* is a positive step in the right direction. The decision opens the door for the family members of those who have not had their end-of-life wishes honored to seek legal recourse for their loved ones—including by being able to commence a valid cause of action against responsible tortfeasors. It will be interesting to see what the other Appellate Division Departments, and/or the Court of Appeals, do regarding similar cases as time goes on.

1. 10 NYC 400.21.
2. https://www.health.ny.gov/forms/doh-3474.pdf.
3. https://www.health.ny.gov/forms/doh-5003.pdf.
4. *Id.*
5. *Id.*
6. *Becker v. Schwartz*, 46 N.Y.2d 401 (Ct. App. 1978).
7. *Id.*
8. *Id.*
9. *Id.* at 402, 403.
10. *Alquijay v. St. Luke's-Roosevelt Hosp. Cnt.*, 63 N.Y.2d 978 (Ct. App. 1984).
11. *Id.* at 979.
12. *Cronin v. Jamaica Hosp. Med. Ctr,* 60 A.D.3d 803 (2d Dept' 2009). 13. Id. at 804.
14. *Id.*
15. *Id.*
16. *Greenberg v. Montefiore New Rochelle Hosp.*, 203 A.D.3d 47 (2022).
17. *Id.*
18. *Id.* at 49.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 50.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 51.
27. *Id.* at 52, see also *Cruzan v. Director, Mo. Dept. of Health*, 497 US 261 (1990); 10 NYCRR 400.21.

Giulia R. Marino is a Partner at Marino & Marino, P.C., located in Great Neck, which is a firm that specializes in plaintiff's personal injury law and negligence. Ms. Marino is currently the Vice-Chair of the Plaintiff's Personal Injury Committee of the NCBA.

FOCUS: FAMILY LAW

Proposed Changes to Federal Child Support Laws May Punish Poor Dads

Cathy M. Middleton

On July 20, 2022, several members of the United States Congress, including Senators Marco Rubio, Marsha Blackburn, Kevin Kramer, and Representative Mike Johnson, filed a bill that would establish the entitlement of expectant mothers to receive child support. The "Unborn Child Support Act" would amend Part D Title IV of the Social Security Act, which governs the enforcement of child support, by requiring states to include the unborn in the definition of "children" who are covered under this law.

It would also require them to make "the start date" for child support obligations retroactive to "the first month in which the child was conceived, as determined by a physician (and shall begin with that month if the mother so requests)."[1] Additionally, in cases "where paternity is established subsequent to the birth of the child," the Unborn Child Support Act would make child support retroactive to the date of conception.[2]

These proposed changes to the federal support provisions differ starkly from current New York State legislation. Indeed, the only law that is even remotely similar is §514 of the Family Court Act, which requires a father to pay the reasonable expenses in connection with a mother's pregnancy, as the court, in its discretion, may deem proper."[3] The financial obligation to the child(ren) who result from said pregnancy, however, is limited in retroactivity to either the date of the filing of a petition for support, or, "if the children for whom support is sought are in receipt of public assistance, the date for which their eligibility for public assistance was effective."[4]

Given the current makeup of Congress—Democrats possess a majority in the House, and the Senate is equally divided between Democrats and Republicans—the Unborn Child Support Act is unlikely to pass in either house. Even if it does pass, President Biden will probably in all likelihood veto the legislation.

Nevertheless, its filing should not be ignored by matrimonial and family law practitioners and the judges and support magistrates before whom they practice. As it offers us a crystal ball view of the future of federal child support legislation if the push to recognize fetal personhood finds success with a new presidential administration and a new Congress. It is, therefore, a worthwhile exercise to examine the potential impact that such legislation will have upon millions of low-income men whose paternity and child support cases could be decided based on this proposed bill.

The Unborn Child Support Act Will Harm Poor Fathers

According to a 2019 report from the Administration for Children and Families, most of the 70% of the $115 billion dollars that is collectively owed in child support arrears in America belongs to fathers who are defined as low income.[5] These men are expected to pay, on average, 83 percent of their earnings in child support and arrearages—a percentage which is much smaller for higher income individuals.[6] Most of the men who find themselves in this situation lack the job skills or college education that would allow them to secure anything beyond low-wage temporary employment which keeps them perpetually trapped in poverty.

Many of them also have criminal records which further limit their employment prospects. If millions of marginalized low income men can't pay the billions of dollars they owe in child support arrears that are retroactive to the date of the filing of a petition for support, as they are right now, it is unlikely—absent some unforeseeable boom to their job prospects and economic resources—that they will be able to pay if the retroactivity date for arrears is pushed back months or even years earlier, to the date of conception, as prescribed by of the Unborn Child Support Act.

The Unborn Child Support Act May Weaken Already Vulnerable Families

Furthermore, many experts believe that, instead of strengthening families, unaffordable child support arrears often have the unintended consequence of pushing poor fathers into the underground economy and away from their children. "What the current system does is accumulate this unrealistic debt that will cause a certain number of poor fathers to just hide."[7] This is what Geraldine Hensen, president of The Association

for Children for Enforcement Support, an organization of 50,000 parents whose children are owed support, told New York Times reporter Blaine Harden.

The quote was included in an article that the paper published on January 29, 2002, entitled '*Dead Broke' Dads' Child Support Struggle.*[8] Pushing retroactivity back to the date of conception, as the Unborn Child Support Act proposes, will plunge poor fathers into debt before the child has even exited the womb. This is likely to result in greater friction between pregnant couples and may lessen any chances that they might have had to bond during either the pregnancy or the first weeks after the child is born.

The Unborn Child Support Act Is Likely to Increase Incarceration Rates for Non-payment

Information on the number of parents, both statewide and nationally, who are incarcerated for nonpayment of child support is scarce, as most jurisdictions have failed to record such statistics. Some experts, however, have estimated that as many as 50,000 people nationwide were jailed in 2011 and suspect that the actual number might be as high as 90,000.[9]

In many states, arrears must hit a minimum number in order for there to be a violation of criminal non-support laws that prescribe incarceration as a punishment. In Alaska, for example, it is a Class C Felony to owe $20,000 in arrears[10] New York's Penal Code does not prescribe a minimum dollar amount for a finding of non-support. Additionally, under federal law the failure to pay even a prescribed amount does not, in and of itself, justify incarceration; there must also be a finding of intent to not pay despite the ability to do so.[11]

Still, willfulness hearings are not fail-proof, and there are times when fathers who face systemic issues which negatively impact them economically, like employment discrimination, can be wrongfully held in willful violation of an order for child support. Making child support retroactive to the date of conception will substantially increase the amount of past due and basic child support that these low-income fathers owe and will shorten the window of time that is allotted to them to try to comply with their state penal laws and avoid incarceration.

While the well-being of low-income fathers should not be the sole factor that lawmakers look to in determining the role that fetal personhood plays in future child support and paternity laws, justice and fairness requires that it at least be given serious consideration.

1. S. 4512: Unborn Child Support Act p.3 (117th).
2. Ibid.
3. N.Y.S. Family Court Act §514.
4. N.Y.S. Family Court Act §449 (2).
5. *Negotiating Race and Inequality In Family Court* by Tonya L. Brito, David J. Pate, Jr., Jia-Hui Stephanie Wong 1, I. R. P. focus, December 2020–Vol. 36, No. 4.
6. *Child Support Arrears A Heavy Burden For Poorest Parents*, The Urban Institute, Credit: Kaite Parker/ NPR.
7. *Dead Broke Dads' Child Support Struggle*, New York Times, 19, January 29, 2002, Blaine Harden.
8. Ibid.
9. *Poor Parents Fail To Pay Child Support, Go To Jail*, by Matthew Clarke, p.1 Prison Legal News, September 2016.
10. *Criminal Nonsupport Laws*, National Conference of State Legislatures, December 11, 2020.
11. *Turner v. Rogers*, 131, S.Ct. 2507 (2011).

Cathy M. Middleton is the author of two books on child support and paternity law. She is also the on-air family law expert for the nationally syndicated Mornings With De De radio show which is broadcast daily on K104 FM. Middleton is the co-founder of the Law Offices of Middleton & Middleton.

FOCUS: NEW YORK'S NEW GUN LAW

Understanding New York's Red Flag Law

Christopher M. Casa and Allison Schmidt

Gun violence is a fixture of modern American life. In 2020, 45,222 Americans died from gun-related injuries, including those resulting from murder and suicide.[1] Since 2009, there have been 279 mass shootings in the United States, resulting in 1,576 people shot and killed and 1,046 people shot and wounded.[2] Some of the nation's deadliest shootings have occurred in New York. On April 3, 2009, a heavily armed gunman killed fourteen people, including himself, and injured four others at the American Civic Association in Binghamton.[3] Persons who knew the gunman later reported to police that his actions were "not a surprise to them."[4] On May 14, 2022, a gunman armed with an assault rifle and wearing body armor fatally shot ten people and injured three others in a grocery store in Buffalo.[5] For months prior to that incident, the gunman had posted hundreds of messages online detailing his racist ideology and his plans to commit acts of violence.[6]

New York's "Red Flag Law" may help prevent similar tragedies in the future by enabling judges to issue Extreme Risk Protection Orders ("ERPOs") to prevent persons likely to engage in conduct that would result in serious harm to themselves or others from possessing or purchasing any firearms, rifles, or shotguns.[7]

What Is An ERPO?

An ERPO is a court-issued order prohibiting a person from "purchasing, possessing or attempting to purchase or possess a firearm, rifle or shotgun."[8] The procedures for the issuance of an ERPO are set forth in Article 63-A of the Civil Practice Law and Rules. Article 63-A repeatedly uses the terms "firearm, rifle or shotgun,"[9] and at least one court has held that the plain language of the statute suggests that an ERPO is limited to firearms, rifles, and shotguns, and does not extend to other dangerous or deadly weapons, such as a crossbow.[10] The person or agency applying for the ERPO is the "petitioner," and the subject person is the "respondent."[11] A petition for an ERPO must be filed in the supreme court in the county in which the respondent resides.[12] A police officer or district attorney can petition for an ERPO,[13] and must do so if they have "credible information" that the respondent is likely to engage in conduct that would result in serious harm to himself or others.[14] Although law enforcement officers may petition for an ERPO, the proceedings are civil, not criminal, in nature.[15] An ERPO petition may also be filed by a member of the respondent's family or household, an administrator of a school attended by the subject person, and certain health care practitioners who have recently examined the respondent.[16]

When Can a Court Issue An ERPO?

When a petitioner applies for an ERPO, the court must first determine whether to issue a temporary order, and then must subsequently determine whether to issue a final order.[17] A court may issue a temporary ERPO "upon a finding that there is probable cause to believe the respondent is likely to engage in conduct that would result in serious harm to himself, herself or others."[18] A likelihood of serious harm means "a substantial risk of physical harm to the person as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that the person is dangerous to him/herself," or "a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm."[19] In deciding whether probable cause exists, the court must consider "any relevant factors," including but not limited to whether the respondent: committed or threatened any acts of violence towards respondent or another person; violated an order of protection; is charged with or convicted of any offenses involving the use of a weapon; recklessly used or displayed a firearm, rifle or shotgun; previously violated an ERPO; has recently abused controlled substances or alcohol; or has recently acquired a firearm, rifle, or shotgun, or any ammunition therefore.[20] The court may also conduct an examination under oath of the petitioner and any witness produced by the petitioner, as well as any supporting documentation.[21] The court may conduct the temporary ERPO hearing "ex parte or otherwise,"[22] so a respondent may be unaware of the application at this stage.

What Happens When the Court Issues a Temporary ERPO?

If the court issues a temporary ERPO preventing the respondent from possessing or purchasing any firearms, rifles, or shotguns, a law enforcement agency serves the order on the respondent, the respondent must surrender any such weapons to law enforcement, and the ERPO is reported to law enforcement agencies so that the respondent cannot purchase such weapons while the ERPO is in effect.[23] In addition to requiring respondent to surrender any firearms, rifles, and shotguns, the court may also authorize law enforcement to conduct a search for such weapons in respondent's possession.[24]

Notably, if law enforcement conducts a search pursuant to an ERPO, and finds firearms, rifles, or shotguns, they may seize them even if they belong to another person.[25] For example, if the court issues an ERPO against a person who lives with family members, and the court authorizes a search of their home, law enforcement may seize any firearms, rifles, or shotguns at the home, even if those weapons belong to a family member and not to respondent.[26] However, if there is no legal impediment to those weapons being possessed by their lawful owner—for example, if their possession would violate Articles 265 or 400 of the Penal Law[27]—the court must order that such weapons be returned and properly secured.[28]

If the court issues a temporary ERPO, the court must then hold a hearing, within six business days, to determine whether it should issue a final ERPO,[29] which can be in effect for up to one year.[30] The court may grant a respondent's request to adjourn such hearing, during which time the temporary ERPO may remain in effect.[31] Even if the court declines to issue a temporary ERPO, unless the petitioner withdraws the application, the court must still hold a hearing to determine whether it should issue a final ERPO.[32] When such a hearing is scheduled a law enforcement agency must conduct a background investigation into respondent and report its findings to the court.[33]

At the hearing to determine whether the court should issue a final ERPO, the petitioner has the burden of proving, by "clear and convincing evidence,"—a higher standard[34] than the probable cause standard for a temporary ERPO—that the respondent is likely to engage in conduct that would result in serious harm to respondent or others.[35] In making its determination the court must rely on the same factors as for the issuance of a temporary ERPO, and may also consider any evidence submitted by either petitioner or respondent and the background investigation report.[36] At the conclusion of the hearing the court must issue a written order explaining its reasons for granting or denying the petition.[37] Unlike the temporary ERPO hearing, which the court may conduct ex parte, a respondent has the opportunity to be heard at a final ERPO hearing.[38]

What Happens After a Final ERPO Hearing?

If the court finds that petitioner has not met the burden of proof and declines to issue a final ERPO, any firearms, rifles, or shotguns seized from the respondent must be returned, unless it is otherwise unlawful for respondent to possess such weapons.[39] If the court issues a final ERPO, the respondent must surrender any firearms, rifles, or shotguns, and cannot purchase or possess such weapons for the duration of the order.[40] As with a temporary ERPO, the court may also authorize a police officer to conduct a search for any firearms, rifles, and shotguns in respondent's possession.[41] If a final ERPO is in effect, a respondent may apply to the court to modify the order, but may only do so once, and must prove by clear and convincing evidence "any change of circumstances that may justify a change to the order."[42]

A petitioner may apply to the court for an extension of a final ERPO if respondent "continues to be likely" to engage in conduct that would result in serious harm to himself or others.[43] In determining such application, the court must conduct a hearing in accordance with the same standards for the issuance of a final ERPO.[44] The court may issue a temporary ERPO during the period that a request for renewal is being considered.[45] Upon the expiration of an ERPO, the order and "all records of any proceedings" pursuant thereto are

sealed and the court must notify the appropriate law enforcement agencies that the ERPO has expired.[46] Such records may only be made available to the respondent or respondent's agent, the courts, police, any state or local officer or agency with the responsibility for the issuance of licenses to possess a gun, and any prospective employer of a police officer.[47] When an ERPO expires, if there is no legal impediment to the respondent's possession of any seized firearms, rifles, or shotguns, the court must order the return of such weapons.[48]

The Legality of the Red Flag Law

Courts are increasingly hearing more ERPO applications following recent mass shootings.[49] At least one court has rejected various constitutional challenges to the Red Flag Law.[50] In New York State *Rifle & Pistol Association v Bruen*—in which the U.S. Supreme Court struck down New York's "proper-cause requirement" for an unrestricted license to carry a handgun in public—does not suggest otherwise, since the court expressly stated that the state was not powerless to regulate the possession of firearms.[51] Indeed, in both *DC v Heller*,[52] and *McDonald v Chicago*,[53] the US Supreme Court held that the government may, among other reasonable limitations on gun rights, prohibit the possession of firearms by the mentally ill. As one judge recently wrote, in a decision rejecting a constitutional challenge to the criminal possession of a weapon statutes in the wake of *Bruen*, "[t]he Constitution is not a suicide pact."[54] Accordingly, although more issues may be litigated as more applications are filed, the law appears likely to survive any existential challenges.

1. John Gramlich, What the Data Says About Gun Deaths in the U.S., Pew Research Center, February 3, 2022 (https://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/).
2. Everytown for Gun Safety, https://everytownresearch.org/maps/mass-shootings-in-america/ (last accessed July 25, 2022).
3. Robert D. McFadden, *13 Shot Dead During a Class on Citizenship,* The New York Times, April 3, 2009 (https://www.nytimes.com/2009/04/04/nyregion/04hostage.html).
4. *Police say N.Y. Immigrant Shooter's Act No Surprise*, Reuters, April 4, 2009 (https://www.reuters.com/article/topNews/idUSTRE5324JP20090404).
5. Jesse McKinley, Alex Trub, and Troy Closson, *10 People are Killed and 3 are Wounded in a Mass Shooting at a Buffalo Grocery Store*, The New York Times, May 17, 2022 (https://www.nytimes.com/live/2022/05/14/nyregion/buffalo-shooting).
6. Jon Swaine and Dalton Bennett, *Buffalo Shooting Suspect Wrote of Plans 5 Months Ago*, Messages Show, The Washington Post, May 16, 2022 (https://www.washingtonpost.com/investigations/2022/05/16/buffalo-shooting-previous-supermarket-confrontation/).
7. Sponsor's Mem, Bill Jacket, L 2019, S 2541 (https://www.nysenate.gov/legislation/bills/2019/S2451); Red Flag Gun Protection Law: Pursuing Court Intervention to Save Lives. https://www.ny.gov/programs/red-flag-gun-protection-law; *see also Anonymous Detective at Westchester County Police* v. AA, 71 Misc. 3d. 810, 814 (Sup. Ct. Westchester County 2021).
8. CPLR 6340 (1).
9. *See generally* CPLR Article 63-A.
10. *See Village of Depew Police Department v. Lloyd*, 70 Misc. 3d. 464, 465-466 (Sup. Ct. Erie County 2020).
11. *See generally* CPLR Article 63-A.
12. CPLR 6341.
13. CPLR 6340 (2).
14. CPLR 6341; *see also* Executive Order (Hochul) No. 19 (https://www.governor.ny.gov/sites/default/files/2022-05/EO_19.pdf).
15. *See generally* CPLR Article 63-A.
16. CPLR 6340 (2).
17. *See generally* CPLR 6342, 6343.
18. CPLR 6342 (2).
19. MHL 9.39(a)(1)-(2).
20. CPLR 6342 (2).
21. CPLR 6342(3).
22. CPLR 6342(1).
23. CLPR 6342 (7)(a)-(b).
24. CPLR 6342(8).
25. *See* CPLR 6344(2).
26. *See* CPLR 6344(2).
27. *See generally* PL Articles 265, 400.
28. CPLR 6344(2).
29. CPLR 6342(4)(d)(ii); 6343(1).
30. CPLR 6343(3)(c).
31. *See* CPLR 6342(5); 6343(1).
32. CPLR 6342(5); 6343(1).
33. CPLR 6342(9).
34. *Compare Brinegar v. United States*, 338 U.S. 160, 175-176 (1949) ("Probable cause exists where the facts and circumstances within [the person's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed.") (internal quotations and citation omitted), *with Colorado v. New Mexico*, 467 U.S. 310, 316-317 (defining "clear and convincing" as something that is "highly probable").
35. CPLR 6343(2).
36. CPLR 6343 (2).
37. CPLR 6343(3)(a).
38. *Compare* CPLR 6342(1) *with* CPLR 6343(1).
39. *See* CPLR 6343(5); *see generally* PL Articles 265, 400.
40. CPLR 6343(3)(b); 6344.
41. CPLR 6343(3)(d).
42. CPLR 6343(6).
43. CPLR 6345 (1).
44. CPLR 6345(2).
45. CPLR 6345(1).
46. CPLR 6346 (1).
47. CPLR 6346 (1).
48. CPLR 6346 (2).
49. *See* Brendan Lyons, '*Extreme risk' orders to seize guns surge, but lack of legal resources lead to dismissals.*
50. *See Westchester County Police*, 71 Misc. 3d. 810.
51. 597 US at __, 142 S Ct at 2156 (2022).
52. 554 US 570, 626-627 (2008).
53. 561 US 742, 781-782 (2010).
54. *People v. Rodriguez*, 2022 NY Slip OP 22217 (Sup. Ct. N.Y. County 2022).

Christopher M. Casa is the Principal Law Clerk to Hon. Robert A. Schwartz. Chris was previously an Assistant District Attorney in Nassau County, and an Associate at Rivkin Radler LLP.

Allison Schmidt is a student at Hofstra Law School and previously served as a member of the NCBA Publication Committee.

FOCUS: MUNICIPAL LAW

Late Notice of Claim and General Municipal Law §50-e

Adam Zabary

General Municipal Law ("GML") §50-e governs tort claims against municipalities, including the oft-litigated ninety-day "notice of claim" requirement. On August 3, 2022, the Second Department issued two rulings on the viability of late notices, with critically different outcomes.

General Authority on Untimely Notices of Claim

GML §50-e's notice requirement is "elastic," as a court can extend an individual's time to assert a late claim under certain compelling circumstances, at its discretion.[1] Absent that showing, the notice deadline is strictly construed.[2]

To succeed on an application for a late notice of claim, the municipality must have prior "actual knowledge of the essential facts constituting the claim."[3] A court will also look to whether there is a "reasonable excuse" for the late notice, and that same will not "substantially prejudice the public corporation in maintaining its defense on the merits."[4]

The Second Department has held that the actual knowledge prong is the most critical.[5] Mere knowledge of the *occurrence of an incident and resulting injuries* is insufficient to meet a claimant's burden.[6] Instead, a claimant must prove that the municipal party had "knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim."[7]

In other words, a claimant must prove that the municipality had knowledge of a "connection between the happening of the accident and any negligence on the part of the municipality," not simply "some general knowledge that a wrong has been committed."[8] Notably, the municipal entity does not need "specific notice of the theory or theories themselves."[9]

The issue of prior notice was paramount in the Second Department's consideration of the following appeals.

Ortiz and the Danger of Police Reports

Matter of Ortiz v. Westchester County[10] highlights GML §50-e's stringency and serves as a warning to late claimants in several respects.

The *Ortiz* claimant slipped on icy/snowy conditions on an entrance/exit ramp of a building owned and occupied by municipal entities.[11] The claimant served a days-late notice of claim with photographs of the accident site, which the respondents rejected as untimely.[12]

Nine months later, claimant petitioned to deem the late notice of claim timely served.[13] Claimant argued, inter alia, that she should be granted relief based on her reasonable excuse for the late notice (law office failure due to a calendaring issue) and failure to timely receive necessary responses to Freedom of Information Law inquiries.[14] Claimant further alleged respondents' prior actual knowledge of the claim and the lack of substantial prejudice if the petition was granted.[15]

Claimant additionally argued that respondents gained knowledge when she told a responding officer that she slipped on the ramp and required an ambulance for her injuries.[16] Claimant also claimed actual notice based on a police report of the incident, a responding officer's photographs of the accident site, and the officer's notation of a lack of video surveillance.[17]

Respondents argued that law office failure does not constitute a reasonable excuse,[18] the late notice caused prejudice due to potential witness unavailability and other issues associated with delay,[19] and the police report merely stated facts of the incident, and in no way implied a possible claim.[20]

Focusing primarily on the actual knowledge factor,[21] respondents posited that the police report did not identify a potential claim.[22] The report simply noted claimant fell and became injured on municipal property.[23] Notably, the report lacked reference to specific defects or a municipal employee's involvement in the accident, two indicia of prior knowledge.[24]

The court granted claimant's petition and deemed the notice of claim timely served, and respondents appealed the brief order.[25] Respondents conceded prior knowledge of the incident, highlighting the difference between that and knowledge of the claim.[26]

In opposition, claimant argued its reasonable excuse for the delay and the lack of prejudice.[27] Claimant maintained that the police report and photographs provided notice of the claim, not simply the incident facts,[28]

The Second Department reversed, citing the lack of a reasonable excuse for late notice and lack of actual knowledge of the essential facts giving rise to the claim.[29] The court held the claimant failed to identify the cause of her fall "from which negligence on the part of the appellants could be inferred" to the responding officers, and therefore did not prove prior notice.[30]

The court further found that even if the notice of claim's lateness was excusable, there was no justification for the nine-month delay in petitioning the lower court.[31] Interestingly, the court found that the municipality's reliance on a speculative attorney affirmation could not support a finding of prejudice.[32] The *Ortiz* decision demonstrates that prejudice, which is often a critical factor in judicial determinations, takes a backseat when it comes to late notices of claim.

Dautaj and Claim Preservation

The Second Department decided *Matter of Dautaj v. City of New York*[33] the very same day as *Ortiz*, but instead allowed a claimant's late notice of claim. The Dautaj claimant was an NYPD Lieutenant that sustained injuries as a passenger in a patrol car that collided with another vehicle.[34] The patrol car was owned by the city and operated by another police officer.[35]

After the city rejected claimant's late notice of claim, he petitioned to deem it timely served.[36] The Supreme Court denied the petition[37] and his subsequent motion to reargue.[38] Both orders were brief, lacking a discussion of how the determinations were reached.

Claimant had argued, inter alia, that the city acquired actual knowledge of the claim details from the accident report, thereby defeating a prejudice finding, and a reasonable excuse for the late notice was unnecessary.[39]

Claimant's the post-incident reports themselves created actual knowledge of his claim. Unlike in *Ortiz*, claimant cited a police report and a "line-of-duty injury report" that referenced the accident manner and nature of his injuries.[40] The report, which was the focal point of claimant's subsequent motion to reargue, contained witness statements that described the accident.[41] Claimant also argued that actual notice resulted from his status as an on-duty city employee at the time of the accident, which was witnessed by city employees.[42]

In opposition, the city argued the lack of reasonable excuse for the late filing and actual notice of a potential claim, which resulted in prejudice.[43] As in *Ortiz*, the municipality argued that the actual knowledge factor is the most critical and that the reports failed imply a theory of liability.[44]

In reply, claimant cited the detailed reports and argued his status as an on-duty city employee when the accident occurred.[45] Claimant further argued the reports were documented with the city contemporaneously after the accident, creating actual knowledge, and that the passage of time alone is not enough to show prejudice, as all witnesses were still available to testify.[46]

The Second Department reversed, deeming the notice timely served.[47] The court held that "it was readily inferable from [the reports] and witness statements taken on the day of the subject accident" that "a potentially actionable wrong had been committed by [an employee] of the [municipality]," constituting prior actual knowledge of the claim.[48] The court declined to discuss the excuse for the delay, and found that the city was only minimally prejudiced and must therefore defend the claim.[49]

Advancing or Defending Municipal Claims Considering *Ortiz* and *Dautaj*

Considering the courts' stringency, a claimant's attorney must avoid delays in filing the notice of claim and, if necessary, a GML §50-e petition. If a late filing is unavoidable, a claimant's attorney should emphasize the lack of prejudice by arguing witness availability and reviewability of the defect or accident.

A claimant must glean prior knowledge of the facts constituting a claim from any source possible. *Ortiz* warns that barebones incident reports will not justify late notice. A claimant should therefore obtain witness statements to municipal entities, internal reports, surveillance, information about prior relevant incidents, and any other available evidence through FOIL requests. Absent further evidence, the claim against a municipality will likely fail.

A defending municipality cannot solely focus on a claimant's lack of reasonable excuse for late notice. Instead, it should focus on proving prejudice through affidavits of those conducting the investigation and witnesses that fear losing their ability to meaningfully testify with the passage of time. A defending attorney's affirmation, alone, cannot be relied on.

The municipality must minimize prior knowledge of the claim by showing the lack of nexus between an incident report and potentially negligent acts. The mere existence of claimant's injuries and a description of the accident cannot impute knowledge. However, if a theory of liability can be discerned, it may be best to accept late notice and avoid unnecessary defense costs.

Unfortunately, no matter how diligently a practitioner investigates a potential claim, they are limited by reports and other investigatory devices that are generally prepared by potential claimants and the defending municipality prior to attorney involvement in the matter.

This undoubtedly affects the viability of certain claims, as plaintiffs' attorneys must consider the risks involved in fighting for the ability to file a late notice. Decisions such as *Ortiz* and *Dautaj* are the latest in a long line of cases that will continue to guide practitioners in similar situations.

1. *Phillips v. Citv of New York*, 98 Misc.2d 1124, 1126(Civ. Ct. N.Y. Co. 1979); *Williams v. Nassau County Med. Ctr.*, 6 N.Y.3d 531, 535 (2006).
2. *Id.*
3. GML §50-e(5).
4. *Felice v. Eastport/South Manor Cent. School Dist.*, 50 A.D.3d 138, 152 (2d Dept. 2008).
5. *Matter of Carpenter v. City of New York*, 30 A.D.3d 594, 595-596 (2d Dept. 2006).
6. *Lenoir v. New York City Housing Authority*, 240 A.D.2d 497 (2d Dept. 1997).
7. *Felice, supra* note 4, at 148.
8. *Matter of Placido v. County of Orange*, 112 A.D.3d 722, 723 (2d Dept. 2013).
9. *Felice, supra* note 4, at 148.
10. *Matter of Ortiz v. Westchester County*, No. 2021-02820, NYSCEF at 14.
11. *Id.*, NYSCEF 14 at 1.
12. *Id.*
13. *Id.* at 1-2.
14. Matter of Ortiz v. Westchester County, No. 66476/20, NYSCEF 2 at 8-9.
15. *Id.*, NYSCEF 2 at 8-9.
16. *Id.*, NYSCEF 2 at 12-13. External citations omitted.
17. *Id.*
18. *Id.* , NYSCEF 15 at 2-3. External citations omitted.
19. *Id.*, NYSCEF 15 at 8-10.
20. *Id.*, NYSCEF 15 at 4-8.
21. *Carpenter, supra* note 5 at 595-596.
22. *Ortiz, supra* note 14, NYSCEF 15 at 5.
23. *Id.*, NYSCEF 15 at 5. *See also, Felice, Lenoir, supra.*
24. *Id.*, NYSCEF 15 at 5.
25. *Id.*, NYSCEF 10; *Matter of Ortiz*, n.10 NYSCEF 10.
26. *Ortiz, supra* note 10, NYSCEF 10 at 10. External citations omitted.
27. *Id.*, NYSCEF 12 at 13-15.
28. *Id.*, NYSCEF 12 at 11-13.
29. *Ortiz*, NYSCEF 14. See also, *Matter of Cruz v. Transdev Servs., Inc.*, 160 A.D.3d 729, 730 (2d Dept. 2018)("[w]hile the presence or the absence of any one of the factors is not necessarily determinative, whether the municipality had actual knowledge of the essential facts constituting the claim is of great importance.").
30. *Id.*, NYSCEF 14 at 2-3.
31. *Id.*, NYSCEF 14 at 2.
32. *Id.*, NYSCEF 14 at 3, citing *Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455 (2016).
33. *Matter of Dautaj v. City of New York*, No. 524505/19, NYSCEF 26.
34. *Id.*, NYSCEF 1 at 2.
35. *Id.*
36. *Id.*, NYSCEF 1.
37. *Id.*, NYSCEF 11.
38. *Id.*, NYSCEF 22.
39. *Id.*, NYSCEF 2. External citations omitted. See, generally, *Pearson v. NYCHH*, 43 A.D.3d 92, 94 (1st Dept. 2007), *aff'd*, 10 N.Y.3d 852 (2008).
40. *Id.*, NYSCEF 3 at 6-9.
41. *Id.*, NYSCEF 6.
42. *Id.*, NYSCEF 3 at 6-9. External citations omitted.
43. *Id.*, NYSCEF 9. See also, *Matter of Newcomb v. Middle County Cent. Sch. Dist.*, 28 N.Y.3d 455 (2016) (placing the burden on proving prejudice with the movant).
44. *Id.*, citing *Felice, supra* note 4.
45. *Id.*, NYSCEF 10 at 8, citing *Buono v. City of New York*, 133 A.D.2d 685 (2d Dept. 1987).
46. Id., NYSCEF 10 at 3-7, 8. *See also Evers v. City of New York*, 80 A.D.2d 799 (1st Dept. 1981).
47. *Id.*, NYSCEF 26 at 2, citing *Etienne v. City of New York*, 189 A.D.3d 1400, 1401 (2d Dept. 2020).
48. *Id.*, citing Matter of Thill v. North Shore Cent. Sch. Dist., 128 A.D.3d 976, 977 (2d Dept. 2015); *Buono, supra note* 45.
49. *Id.*

Adam Zabary is a civil litigation attorney at Kohan Law Group, P.C. and can be reached at adam@kohanlawgroup.com.

NAL PROGRAM CALENDAR

OCTOBER 6, 2022 (ZOOM ONLY)
Unfolding the Preferred Freeze Partnership
Program presented by NCBA Corporate Partner MPI Business Valuation and Advisory
5:00 PM – 6:00 PM
1 credit in professional practice. Skills credits available for newly admitted attorneys

OCTOBER 12, 2022 (HYBRID)
Dean's Hour: Getting the Edge Over Your Competition—How to Create a Strategic Plan that Wins for Your Law Practice
Part 2—Building and Developing the Strategic Plan
Program presented by NCBA Corporate Partner Opal Wealth Advisors, LLC
12:30 PM – 1:30 PM
1 credit in professional practice

OCTOBER 13, 2022 (HYBRID)
Dean's Hour: Wild Bill Donovan and the Origins of American Intelligence (Law and American Culture Lecture Series)
12:30 PM – 1:30 PM
1 credit in professional practice

OCTOBER 13, 2022 (ZOOM ONLY)
Small Claims Arbitrator Training
With the NCBA Alternative Dispute Resolution Committee
5:30 PM – 7:30PM
1.5 credits in professional practice, .5 in ethics

If you are an attorney admitted to the Bar for at least 5 years (2 years for court attorneys) and would like to serve as a pro bono arbitrator in the Small Claims Part of Nassau County District Court, join us for our first Small Claims Arbitrator training. Applicants to serve as a Small Claims Arbitrator will be required to be screened by the NCBA Judicial Screening Panel. The Small Claims Part of District Court hears civil and commercial matters with a monetary threshold of less than $5,000. Litigants need not be represented by counsel and the cases shall be heard "in such manner as to do substantial justice between the parties according to the rules of substantive law." Serving as a Small Claims Arbitrator provides attorneys with a unique opportunity to serve their community by providing expeditious and just resolutions to a variety of conflicts. Attorneys of diverse backgrounds are strongly encouraged to apply.

Program is free to attend for current NCBA Members; $40 for NCBA Non-Members. Program size is limited to 40 attendees.

OCTOBER 14, 2022 (LIVE ONLY)
LexisNexis Fact and Issue Finder Product Demonstration
With NCBA Corporate Partner LexisNexis
Enjoy free lunch on LexisNexis! See insert flyer for more information.
12:30 PM – 1:30 PM at the Nassau County Bar Association
FOR INFORMATIONAL PURPOSES ONLY – NOT FOR CLE CREDIT

OCTOBER 18, 2022 (HYBRID)
Dean's Hour: Addressing Implicit Bias in Jury Selection
Program sponsored by NCBA Corporate Partner PHP
With the Nassau County Assigned Counsel Defender Plan
12:30 PM – 1:45 PM
1.5 credits in diversity, inclusion, and elimination of bias

OCTOBER 18, 2022 (LIVE ONLY)
An Evening with the Family Court Judges and Referees
Program sponsored by NCBA Corporate Partners Legal Hero Marketing and LexisNexis
With the NCBA Family Court Law and Procedure Committee and Nassau County Assigned Counsel Defender Plan
Sign-in and Networking 5:00 PM – 6:00 PM; Program 6:00 PM – 7:30 PM
1.5 credits in professional practice

OCTOBER 19, 2022 (HYBRID)
Dean's Hour: When Hackers Attack Your Practice, Will You Be Prepared?
Program presented by NCBA Corporate Partner AssuredPartners
With the Nassau County Assigned Counsel Defender Plan
12:30 PM – 1:30 PM
1 credit in professional practice

NAL PROGRAM CALENDAR

OCTOBER 19, 2022 (ZOOM ONLY)

Myths, Facts and Resources on Domestic Violence
With the NCBA Community Relations and Public Education Committee, the Safe Center LI, and the Central American Refugee Center (CARECEN-NY)
5:30 PM – 7:30 PM
2 credits in professional practice. Skills credits available for newly admitted attorneys Program is free to attend for informational purposes. CLE credit free to NCBA members; $50 for non-member attorneys. Program will be simultaneously translated in Spanish.

OCTOBER 25, 2022 (HYBRID)

Criminal Law and Procedure Update 2022
Program sponsored by NCBA Corporate Partner PHP
With the Nassau County Assigned Counsel Defender Plan and the NCBA Criminal Courts Law and Procedure Committee
12:30 PM – 3:30 PM
2.5 credits in professional practice; .5 in ethics
Program will be held at the Nassau County Bar Association

OCTOBER 25, 2022 (LIVE ONLY)

Matrimonial Law Update: Cases, Cases, Cases
Presented by Stephen Gassman, Esq.
Program sponsored by NCBA Corporate Partner MPI Business Valuation and Advisory
With the NCBA Matrimonial Law Committee
****Light supper for attendees generously provided by program sponsor****
5:30 PM – 7:00 PM
1.5 credits in professional practice

OCTOBER 26, 2022 (HYBRID)

Dean's Hour: Remote Residency Here to Stay? The Fight Continues to Pay Tax Where a Taxpayer Actually Resides
Program sponsored by NCBA Corporate Partner Legal Hero Marketing, Inc.
With the NCBA Business Law, Tax, and Accounting Committee
12:30 PM – 1:30 PM
1 credit in professional practice

NOVEMBER 2, 2022 (HYBRID)

Dean's Hour: Aging and Wealth—Strategies for Protecting Wealth
Program presented by NCBA Corporate Partner Opal Wealth Advisors
12:30 PM – 1:30 PM
1 credit in professional practice

NOVEMBER 2, 2022 (ZOOM ONLY)

Auto Insurance Update
With the NCBA Insurance Law Committee
6:00 PM – 8:00 PM
1.5 credits in professional practice; .5 in ethics Skills credits available for newly admitted attorneys

FOCUS: ROYALTY AND THE ENGLISH CONSTITUTION

The Queen is Dead. Long Live the Monarchy

Rudy Carmenaty

I cannot lead you into battle, I do not give you laws or administer justice but I can do something else, I can give you my heart and my devotion to these old islands and to all the peoples of our brotherhood of nations. I believe in our qualities and in our strength, I believe that together we can set an example to the world which will encourage upright people everywhere.

— Queen Elizabeth II, Christmas Message 1957[1]

While very young, Her Late Majesty pledged herself to serve her country and her people and to maintain the precious principles of constitutional government which lie at the heart of our nation. This vow she kept with unsurpassed devotion. She set an example of selfless duty which, with God's help and your counsels, I am resolved faithfully to follow.

— King Charles III, address before Parliament September 12, 2022[2]

At 6:30 pm London time on September 8, Buckingham Palace announced, both in a written notice posted on an easel on the palace gates and, in a bow to the cyber age, by tweeting, the following:

> The Queen died peacefully at Balmoral this afternoon.
>
> The King and The Queen Consort will remain at Balmoral this evening and will return to London tomorrow.[3]

With these two lines, the world learned that Elizabeth II, whose long reign began in 1952, had passed at age ninety-six.[4] The Queen's death and the ascension of her son Charles III means the end of one era, and the beginning of an age of some uncertainty for Britain's long-standing constitutional monarchy.

The Queen was born Elizabeth Alexandra Mary Windsor. The Daughter of Prince Albert, then the Duke of York, and his wife the Scottish-born Lady Elizabeth Bowes Lyon. Neither Elizabeth II nor her father, at the time of her birth, were destined for the throne.

That distinction belonged to her uncle the Prince of Wales, later King Edward VIII. In 1936, to the world's astonishment and the dismay of the Royal Family, Edward abdicated so he could be free to marry Wallis Warfield Simpson, an American twice divorced. Edward's brother, Elizabeth's father, became King George VI.

When her father died in January 1952, Elizabeth became Queen. Five years earlier, as Princess Elizabeth, at the tender age of twenty-one, she pledged *that my whole life whether it be long or short shall be devoted to your service and the service of our great imperial family to which we all belong.*[5]

It was a promise she would keep as her nation and the world where considerably different places at the end of her reign than they were at the outset. Elizabeth II nevertheless managed to preserve the monarchy at a time when its very existence often came into question amidst ever-constant change.

The British once held dominion over a quarter of the Earth's land surface. It was an empire which, at its zenith, it was said 'the sun never sets.' The former colonies gained their independence under the process of 'decolonisation.' The empire was transfigured into the Commonwealth, a voluntary association for which Elizabeth II served as its titular head.

The loss of empire was keenly felt, engendering a profound loss of self-confidence. If it was not always a second 'Elizabethan Age' as was first advertised, there can be no doubt the Queen, by her devotion to duty, served as an anchor of stability. She provided a balm of continuity in a more ambiguous world.

The Queen was in the words of the Prime Minister *the rock on which modern Britain was built*.[6] She was a tangible presence thru the Cold War, Suez, Northern Ireland, Scottish devolution, Brexit, Covid and the present-day energy crisis. Through it all, her subjects' admiration and affection never faltered.

This reservoir of good will enabled the monarchy to endure various self-inflicted scandals. The indiscretions of the Queen's sister Princess Margaret, the disgrace of her second son Prince Andrew, the 'Megxit' saga (her grandson Prince Harry and his wife Megan Markle renouncing their royal duties), have all taken their toll.

1992 was the Queen's self-proclaimed 'annus horribilis.' That year saw the marriages of her three oldest children disintegrate. A devastating fire at Windsor Castle would lead the Queen to voluntarily pay personal income taxes for the first time. She also weathered the public's displeasure with her initial response to the death of Princess Diana in 1997.

Most people alive today have never known another Sovereign. Presidents and prime minister came and went with increasing regularity, still she remained above the fray. Elizabeth II knew thirteen American presidents and worked with fifteen Prime Ministers.[7]

The first Prime Minister to serve her Majesty was Winston Churchill. Her last was Liz Truss. Churchill was born in 1874, Truss in 1975. The Queen had invited Truss to Balmoral to form a new administration only two days before her death. The Queen was on the job until the very end.

The passing of Elizabeth II means more than the loss of the head of the Royal Family. It means the loss of a Head of State, not only in the United Kingdom of Great Britain and Northern Ireland but also of the Commonwealth countries who recognized her as their queen.[8]

Elizabeth wielded considerable influence the world over. Under Britain's unwritten constitutional conventions, she was the ultimate practitioner of what is called 'soft power.' The Sovereign occupies mostly a ceremonial role, having no actual governmental authority. The monarch reigns but doesn't rule.

There is an element of calculation and self-interest in this arrangement. Beginning with Magna Carta in 1215, English kings have adapted in order to survive. The late Queen was no exception. As all real decision-making is conducted in the House of Commons by the government of the day.

The Queen, now King, is head of state. The Prime Minister is head of government. All executive authority is vested in the Prime Minister and Cabinet, which govern in the Sovereign's name. Parliament was recalled in a special session on September 10 so that its members could swear allegiance to their new King.

It is the monarch who 'invites' a member of Parliament to a private audience to form a government. Known as 'kissing hands,' power is conferred by the Sovereign upon the leader of the political party or coalition of parties that commands the majority of seats in the Commons. The Prime Minister meets weekly with the Monarch at the palace.

The Sovereign does have the prerogative to dismiss the prime minister. The last time this occurred however was in 1834.[9] In modern times, prime ministers only leave No. 10 involuntarily upon their resignation. This is most likely due to the loss of a parliamentary majority after an election, a vote of no confidence by the House, or because they lose support within their own party.

Legislative authority is exercised by Parliament, with a bill passed by both the House of Commons and the House of Lords becoming law after Royal Ascent. All laws require the monarch's approval. If ascent is withheld, the bill would effectively be vetoed. The last time Royal Assent was denied was in 1707.[10]

One of Queen Elizabeth's great virtues was that she never expressed an opinion on questions of policy or politics. She observed a strict neutrality and maintained an undecipherable demeanor in public. Tradition dictates that the sovereign never weighs in openly on any controversy.

The Queen was schooled in Walter Bagehot's *The English Constitution* (1867). She disciplined herself to observe that a *Sovereign has, under a constitutional monarchy such as ours, three rights—the right to be consulted, the right to encourage, the right to warn*.[11]

Charles as Prince of Wales has not always been so circumspect. He has expressed his views on the environment, modern architecture, and religious faith. The so-called 'black spider' memos, wherein Charles in his private capacity wrote to influence government ministers, were quite a faux pas.

Charles stated he would refrain from such activities going forward. And it should be noted that the title of Prince of Wales is not formally recognized, nor its duties delineated as a constitutional position subject to the same restrictions imposed on the monarch.

On September 10, Charles was formally proclaimed King at St. James Palace in London by the Ascension Council. Two days later he went before Parliament with the

new Queen Consort, his second wife Camilla, to affirm he would follow the path carefully charted by his late mother.

King Farouk of Egypt, after being deposed, ironically in 1952—the same year Elizabeth II became Queen—observed that *the whole world is in revolt. Soon there will be only five Kings left—the King of England, the King of Spades, The King of Clubs, the King of Hearts, and the King of Diamonds.*[12]

After seven decades, Farouk's words again ring true. There is now a new King in England. And such will be the case for the foreseeable future. The current line of succession is led by his son Prince William, whom Charles named Prince of Wales on his first day as king, followed by William's son Prince George.

Nonetheless, the Charles III faces several perils. The affection showed Elizabeth may not necessarily transfer to him. Australia has long been a hotbed of republican sentiment, even holding a referendum in 1999. Other members of the Commonwealth, particularly in the Caribbean, have expressed a similar desire.

With the Queen gone, could Britain itself succumb to republicanism? Charles, the first king to take that name in four centuries, would do well remember the fate of his two namesakes. Charles I was beheaded in 1649 for treason during the English Civil War. This led to England's only period as a republic from 1649 to 1660.

The military dictatorship of Oliver Cromwell that ruled in 1650's led to the restoration of the monarchy. Charles II, son of Charles I, became king. A bon-vivant, Charles II was the 'Merry Monarch.' He left no legitimate heir but had an awfully good time with his many mistresses.

Charles II, as his father Charles I did in 1629, dissolved Parliament in 1681. His brother and successor James II abdicated amidst the Glorious Revolution of 1688. William of Orange and Mary II, in turn gave their ascent to the English Bill of Rights in 1689 further diminishing the monarch's position.[13]

But the real shadow that trails Charles III is that of his first wife. Diana, the late Princess of Wales, has been an icon and royal martyr for the last quarter century. Even those who were not born when she was killed in Paris, resent Charles thanks to the portrayal of the royal couple in the Netflix series *The Crown*.

Charles must tread carefully as it was his extramarital relationship with his current wife Camilla that undermined the marriage to Diana. Camilla was at one time the most hated woman in Britain. Since the couple married in 2005, she has undergone a significant rehabilitation. It was the late Queen's wish that Camilla be acknowledged her son's Queen Consort.

Charles III automatically became King with the passing of his mother. In a heartbeat, the anthem changed from *God Save the Queen* to *God Save the King*. At seventy-three, he has waited a lifetime and made a strong start. Will his eccentricities get the better of him? As Shakespeare reminds us, *uneasy lies the head that wears a crown.*[14]

As the nation mourns Elizabeth II, Britain's constitutional monarchy continues without its much-revered exemplar. The Queen has died, and with some grace the monarchy will live on as well. So long live the King.

1. Queen Elizabeth II, *Christmas Broadcast 1957* at https://www.royal.uk.
2. James Gregory, *King Charles III promises to follow Queen's selfless duty*, BBC September 12, 2022, at https://www.bbc.com.
3. *Announcement of the death of the Queen* at https://www.royal.uk.
4. The Queen saw her Silver Jubilee in 1977, her Ruby Jubilee in 1992, her Golden Jubilee in 2002, her Diamond Jubilee in 2012, her Sapphire Jubilee in 2017, and her Platinum Jubilee in 2022.
5. Queen Elizabeth II, *A speech by the Queen on her 21st Birthday,* 1947 at https://www.royal.uk.
6. *Queen Elizabeth was the rock on which modern Britain was built, says PM Truss*, Reuters September 9, 2022, at https://www.reuters.com.
7. Queen Elizabeth II met every American president from Harry Truman to Joe Biden, except for Lyndon Johnson. Her Prime Ministers include Winston Churchill, Anthony Eden, Harold MacMillan, Alec Douglas-Home, Harold Wilson, Edward Heath, James Callaghan, Margaret Thatcher, John Major, Tony Blair, Gordon Brown, David Cameron, Theresa May, Boris Johnson, Liz Truss.
8. The United Kingdom encompasses the four nations of England, Scotland, Wales, and Northern Ireland. The other countries which recognized Elizabeth II as their Queen at the time of her death are Antigua and Barbuda, Australia, the Bahamas, Barbados, Belize, Canada, Grenada, Jamaica, New Zealand, Papua New Guinea, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, the Solomon Islands, and Tuvalu.
9. The last time this Royal prerogative was asserted was when William IV dismissed Lord Melbourne in favor of Robert Peel.
10. *What powers does King Charles III have?* The Week September 9, 2022, at https://www.theweek.co.uk.
11. Walter Bagehot, *The English Constitution* at https://socialsciences.mcmaster.ca.
12. QUOTES BY FAROUK OF EGYPT at hhtps://www.azquotes.
13. The English Bill of Rights recognized civil liberties, determined the line of succession, and assured the rights of Parliament vis-a-vis the Crown.
14. *Henry IV, Part II* Act 2, Scene 1, 31.

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 and Inclusion Committee.

FOCUS: PLAINTIFF'S PERSONAL INJURY

Nuances in the Homeowner's Exemption to Labor Law's Absolute Liability

Ira S. Slavit

Labor Law §240, known as the "scaffold law," makes contractors and property owners engaging in renovation or construction work responsible for providing safety devices and equipment to workers to prevent them from falls or being struck by falling objects. These duties are nondelegable. Liability is absolute without regard to whether the owner or contractor controlled or directed the work or was themself negligent.

Labor Law §241(6) similarly imposes a nondelegable duty on contractors and owners having construction, excavation, and demolition activities performed to provide reasonable and adequate protection and safety to workers and to comply with specific safety rules contained in the Industrial Code.[1]

In 1980, both sections 240(1) and 241 were amended to state that they do not apply to "owners of one and two-family dwellings who contract for but do not direct or control the work." This is known as the "homeowner's exemption." The party seeking the benefit of the statutory exemption bears the burden of establishing that the exemption applies.[2] The amendments reflect the legislative determination that the typical homeowner is no better situated than the hired worker to know what safety devices are required and to provide them to the worker, and to know about and to procure suitable insurance protection for absolute liability.[3]

Courts have avoided an overly rigid interpretation of the homeowner exemption and have employed a flexible "site and purpose" test to determine whether the exemption applies.[4] Thus the exemption was held to apply when the plaintiff was injured while repairing the roof of a detached garage situated on one of two adjacent lots the defendants owned.[5] The defendants' home was located on the second lot. Each lot was taxed separately and had two separate addresses. The court observed that the garage functioned as an extension of the dwelling, the repairs had a substantially residential purpose, and the defendant treated the two lots as one property.

Who Is A Protected Homeowner?

Although it may intuitively seem that the homeowner's exemption, given its purposes, applies only to individuals who own and reside in one and two-family dwellings, several Appellate Division decisions in 2022 highlight that the homeowner's exemption protects more than just such individuals. The exemption can apply to religious organizations, corporations, and even to municipalities.

In *Nucci v. County of Suffolk*, the plaintiff was injured while boarding up a one-family house that Suffolk County owned, having acquired title by tax deed for non-payment of real estate taxes.[6] The house was being boarded up pursuant to a resolution of the Town of Babylon authorizing an emergency board up of the house, which had no running water and was deemed a nuisance and imminent danger. The plaintiff's supervisor instructed him to board up the house. While the plaintiff was boarding up a window on the second floor, a strong gust of wind allegedly caused the ladder on which the plaintiff was standing to shift. The plaintiff fell and was injured.

Both the county and the town moved for summary judgment on grounds including that the homeowner's exemption applied. The court granted the county's motion and denied the town's. As to the county, the court explicitly rejected the plaintiff's contention that the county cannot rely upon the homeowner's exemption because it is a municipality, and also held it had no control over the work.

Regarding the town, however, the plaintiff submitted evidence that the town had the authority to choose the contractor who did the work and had entered into the contract with plaintiff's non-party employer, and that representatives of the town were present while the plaintiff performed the work. Noting that a party that has the authority to enforce safety standards and choose responsible subcontractors is considered a contractor under Labor Law §§240(1) and 241(6), the court found that the town was a contractor regardless of whether it exercised its authority.

In *Reinoso v. Han Ma Um Zen Center of New York, Inc.*, the plaintiff, who was employed by a nonparty, allegedly was injured when he fell from the defendant's ladder while painting the exterior of a detached garage the defendant owned that had been converted into a meditation room.[7] The defendant was a religious organization which owned adjoining properties. The building that the plaintiff was painting was located on one property, which also contained a one-family dwelling that was used by monks as a residence. The other property contained a Buddhist Temple.

The court found that the evidence established that the meditation room was an accessory to the dwelling and held that the homeowner's exemption applied: "[C]ontrary to the plaintiff's contention, the defendant is entitled to the protections of this exemption even though it is a religious organization."

Caveats to Homeowners

To be entitled to the protection of the homeowner's exemption, the homeowner must demonstrate (1) that the work was conducted at a dwelling that is a residence for only one or two families, and (2) that the homeowner did not direct or control the work.[8] The dwelling does not have to be the homeowner's primary residence.[9]

The phrase "directed or controlled" is construed strictly and refers to the situation where the owner supervises the method and manner of the work. Discussion of the results the homeowner wished to see, instructions about aesthetic design matters, inspecting the work to assess progress, or retention of the limited power of general supervision are insufficient to meet the requisite direction or control necessary to fall outside the protections of the homeowners' exemption.[10]

Nor does hiring separate contractors to perform different aspects of the work disqualify the homeowner from enjoying the benefit of the exemption. These actions have been characterized as being "no more extensive than would be expected of the typical homeowner who hired a contractor to renovate his or her home."[11]

A plaintiff's deposition testimony alone can be sufficient to raise an issue of fact regarding whether the owner directed and controlled the work sufficient to lose the exemption. In *Venter v. Cherkasky*, the plaintiff was applying lacquer thinner to the kitchen island, as opposed to sanding off the paint as he had previously done to kitchen cabinets.[12] He testified at his deposition that he used the lacquer thinner because the homeowner told him to since she did not want any more dust. The court held that the defendants failed to eliminate all triable issues of fact regarding whether they directed or controlled the injury-producing method of work.

Similarly, in *Wadlowski v. Cohen*, the plaintiff testified at his deposition that the defendant personally directed the workers not to throw the debris out of a window and, instead, to throw the debris from the balcony that lacked a railing.[13]

Mixed Use Dwellings

It is not necessary that a dwelling be used exclusively for residential purposes for the homeowner's exemption to apply. However, the exemption does not apply to dwellings used exclusively for commercial purposes.

Where an owner uses a property for both commercial and residential purposes, whether the exemption applies is based on the owner's intentions at the time of the injury and turns on whether the site and purpose of the work were connected to the owner's residential use of the property.[14] Where the work directly relates to the residential use of the home, that owner is shielded by the homeowner exemption even if it also serves a commercial purpose.

In *Parrino v. Rauert*, the defendant testified at his deposition that, at the time of the accident, he was "up in the air" as to whether he intended to live at the property or use it as a rental property once the restoration work was completed.[15] This testimony was held to raise triable issues of fact regarding the purpose of the work performed and the owner's intentions at the time of the injury.

In *Hawver v. Steele*, the defendant testified that he is a professional musician and that the structure was being altered to use as a music studio and a photography workspace.[16] The defendants did not submit an affidavit addressing whether they intended to use the structure for commercial or noncommercial purposes. The court held that the defendants failed to demonstrate their entitlement to the homeowner's exemption as a matter of law.

The defendants fared better in *Bates v. Porter.*[17] The defendants, retired art professors, owned property upon which were situated a one-family house and a two-story barn. The defendants used the barn, which contained a kitchen, bathroom, and sleeping area, as a studio for creating art, as a garage when they travel, as a storage area for art supplies and household tools, and as a place to entertain and house guests. They sold some of their art through galleries, but did not use the barn to show or sell art.

The plaintiff's employer was hired by the defendants to paint the exterior of both the house and the barn. While painting the barn, the plaintiff allegedly fell from a ladder and was injured.

The court held that the defendants' evidence established, prima facie, that the work being performed was directly related to the residential uses of their property and dismissed the Labor Law §240(1) and §241(6) causes of action based upon the homeowners' exemption.

Plaintiff's counsel has latitude to pursue evidence that would show whether the property is being used for a commercial purpose. In *Nunez v. Peikarian*, the plaintiff was injured working on a one-family house the defendants were building.[18] The defendants testified at their depositions that they intended to reside in the house and denied they were building it for the purpose of selling it. Plaintiff's counsel conducted a computer aided search that revealed multiple listings for the sale of the property, with one real estate broker on the listings.

Plaintiff served a subpoena to take the non-party deposition of the broker. The Supreme Court granted the broker's motion to quash the subpoena. Plaintiff appealed and the Appellate Division reversed, holding that the broker's listing of the property and her knowledge of the owners' situation are relevant to the defendants' intent regarding the property and the applicability of the homeowner's exemption.

The foregoing cases demonstrate that the applicability of the homeowner's exemption may not be as straightforward as it seems. Attorneys need to consider the various factors prior to producing their clients for deposition and deposing adverse parties. Homeowners, including readers of this article who to may practice law in their homes, might want to consider the issues the next time they decide to have renovation work done in their home.

1. 12 NYCRR Part 23.
2. *Hawver v. Steele*, 204 A.D.3d 1125, 1129 (3d Dep't 2022).
3. *Bartoo v. Buell*, 87 NY2d 362, 367 (1996); *Cannon v. Putnam*, 76 NY2d 644, 649-50 (1990).
4. *Bartoo*, supra n.3.
5. *Rendon v. Callaghan*, 206 A.D.3d 945, 947 (2d Dep't 2022).
6. 204 A.D.3d 817 (2d Dep't 2022).
7. 206 A.D.3d 772 (2d Dep't 2022).
8. *Affri v. Basch*, 13 NY3d 592 (2009); *Ramirez v. Hansum*, 202 A.D.3d 605 (1st Dep't 2022); *Navarra v. Hannon*, 197 A.D.3d 474 (2d Dep't 2021).
9. *Parrino v. Rauert*, 2019-12056, 2022 WL 3395873, at *2-3 (2d Dep't Aug. 17, 2022).
10. *Id., Santibanez v. N. Shore Land All., Inc.,* 197 A.D.3d 1123, 1125-26 (2d Dep't 2021).
11. *Navarra,* supra n.8.
12. 200 A.D.3d 932 (2d Dep't 2021).
13. 150 A.D.3d 930, 931 (2d Dep't 2017).
14. *Khela v. Neiger,* 85 N.Y.2d 333, 337–338 (1995).
15. *Parrino*, supra n.9 at *2-3.
16. 204 A.D.3d 1125, 1129 (3d Dep't 2022).
17. 203 A.D.3d 792 (2d Dep't 2022).
18. 2020-08566, 2022 WL 3395482, at *1 (2d Dep't Aug. 17, 2022).

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

FOCUS: JUDICIAL REMEDIES

The Art of Mandamus: Volume One

Ian Bergström

Litigants misuse the mandamus doctrine. The mere demand for mandamus relief is insufficient to acquire same because the doctrine entails nuance. After review of the legal standards and judicial decisions, litigants should have the tools to circumvent the trap of setting forth meritless demands for mandamus relief within the context of special proceedings commenced under CPLR article 78.

The Structure of Pleadings

The movant should file and serve a notice of petition or order to show cause and verified petition asserting a demand for mandamus relief pursuant to CPLR article 4 and CPLR article 78.[1] The commencement of "[a] proceeding under [CPLR article 78] is a special proceeding."[2] "CPLR Article 78 proceedings serve three [3] primary functions: (1) to compel an administrative act (mandamus), (2) to prohibit an administrative act (prohibition), and (3) to review an administrative act (certiorari or mandamus to review). The range of issues that may be addressed by CPLR Article 78 proceedings are limited and the scope of judicial review thereof is narrow."[3] The demand for relief outside the purview of CPLR article 78 should be subject to a "plenary action."[4] The filing of a notice of petition or order to show cause and verified petition is motion sequence number 001.[5] Supreme Court of Nassau County declared, "the service of affidavits from petitioner (erroneously labeled 'Plaintiff')," another individual, and "attorney's affirmation" lacking service of a "summons, complaint or petition" therewith renders the "application [to be] both procedurally and substantively flawed."[6]

The Mandamus Doctrine

The statutory bases of the mandamus doctrine are founded under CPLR §7803(1) and CPLR §7803(3).[7] The doctrine is distinguished as "mandamus to compel" and "mandamus to review."[8] "Mandamus may be used to compel the performance of an act required to be done by provision of law where the act sought to be compelled is ministerial, nondiscretionary and nonjudgmental, and is premised upon specific statutory authority mandating performance in a specified manner and where there is inordinate delay in acting."[9] "A discretionary act involves the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result."[10] The purpose of the doctrine is to force an "officia[l]" to effectuate their legal obligation,[11] "regardless of whether they may exercise their discretion in doing so."[12] "A body can be directed to act, but not how to act, in a manner as to which it has the right to exercise its judgment."[13]

The Second Department characterizes the mandamus doctrine as an "extraordinary remedy," whereby "a clear legal right to the relief has been demonstrated."[14] An application for mandamus relief "may also lie to review an agency or administrative decision where it is alleged that the decision was arbitrary or capricious."[15] The commencement of a special proceeding under CPLR article 78 is not "an appropriate remedy" to force an official or entity to effectuate a "statutory duty" who "may exercise judgment or discretion unless such judgment or discretion has been abused by arbitrary or illegal action."[16] Typically, mandamus relief "is usually deemed not available in arguable circumstances of legal right…."[17] The First Department declared, "an officer cannot be compelled by mandamus to perform an act beyond his power."[18]

A litigant should not demand mandamus relief to enforce "a purely legislative function."[19] The appellate division warns the judiciary to evade rendering determinations that contravene or "interfere" with the "legislative and executive branches."[20] The doctrine should be utilized to direct specific behavior as to the respondent(s) within the boundaries of their "lega[l]" obligation.[21]

The procedural due process doctrine does not require that a "quasi-judicial hearing" be afforded, but rather the petitioner be afforded "an opportunity to be heard and to submit whatever evidence he or she chooses" regarding the mandamus to review standard.[22] New York State Court of Appeals further declared, "the agency may consider whatever evidence is at hand, whether obtained through a hearing or otherwise."[23] "The standard of review … is whether the agency determination was arbitrary and capricious or affected by an error of law."[24]

The Timeliness of Mandamus Relief

Basically, the statutory time frame

STATEMENT OF OWNERSHIP MANAGEMENT AND CIRCULATION

Nassau Lawyer; Publication number 7505; Complete Mailing Address of Known Office of Publication: 15th & West Streets, Mineola, NY 11501; the mailing address of Headquarters or General Business Offices of the Publisher (Not printer), 15th & West Streets, Mineola, NY 11501; Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor: Publisher, Nassau County Bar Association, 15th & West Streets, Mineola, NY 11501; Editor, Ann Burkowsky, 15th & West Streets, Mineola, NY 11501. Nassau Lawyer is owned by The Nassau County Bar Association, 15th & West Streets, Mineola, NY 11501.

Issue Date for Circulation Data Below, July/August, 2022; the average number of copies of each issue during the preceding 12 months Box 15 is: (A) total copies printed 5753; (B1) Paid/Requested Outside-County Mail Subscriptions 3696. (B2) Paid In-County Subscriptions: 0. (B3) Sales through dealers and carriers, street vendors, counter sales: 0. (15B4) Other classes mailed USPS: 0; (C) Total Paid and /or Requested Circulation: 3696; (D1) Free Distribution by mail, samples complimentary and other free copies: 1832; (D2) In-county free distribution: 0; (D3) Other classes mailed Free Distribution: 0; (D4) Free distribution outside the mail: 200; (E) Total Free distribution: 2032; (F) Total Distribution: 5728; (G) Copies not Distributed: 25; (H) Total: 5753; (I) Percent of Paid: 64.52%.

The actual number of copies of a single issue published nearest to the filing date is: (A) Total number of copies printed 4070; (B1) Paid/ Requested Outside-County Mail Subscriptions: 3845; (B2) Paid In-County Subscriptions: 0. (B3) Sales through dealers and carriers, street vendors, counter sales: 0; (B4) Other classes mailed USPS: 0; (C) Total Paid and /or Requested Circulation: 3845; (D1) Free Distribution by mail, samples complimentary and other free copies: 0; (D2) In county free distribution: 0; (D3) Other classes mailed Free Distribution: 0; (D4) Free distribution outside the mail: 200; (E) Total Free distribution: 200; (F) Total Distribution: 4045; (G) Copies not Distributed: 25; (H) Total: 4070; (I) Percent of Paid: 95.06% Electronic Copy Circulation; The Average number of copies in the last 12 months was: (16A) Paid Electronic Copies, 0; (B) The Average Paid Print and Paid Digital Copies were 3696; (C) The Average Total Print and Paid Digital Distribution was 5728; (D) Percent Paid of Both Print & Paid Digital was 64.52%.

Electronic Copy Circulation; The Actual Number of Copies of a Single Issue (16A) Paid Electronic Copies, 0; (16B) The Average Paid Print and Paid Digital Copies were 3845; (C) The Average Total Print and Paid Digital Distribution was 4045; (D) Percent Paid of Both Print & Paid Digital was 95.06%.

I certify that all information furnished on this form is true and complete:
Ann Burkowsky, Editor

REQUIRED BY TITLE 39 U.S.C. 3685 STATEMENT SHOWING OWNERSHIP, MANAGEMENT AND CIRCULATION OF Nassau Lawyer, publication number 7505, filed October 1, 2020, Published monthly except July/August are combined issue, Annual subscription is a part of membership annually at 15th & West Streets, Mineola, NY 11501. The General Business offices of the Publishers are at 15th & West Streets, Mineola, NY 11501

to demand mandamus relief is 4-months "after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty …."[25] The movant must "await refusal" of the "demand," and the statute of limitations "begins to run on the date of the refusal …."[26] Alternatively, "[a]n administrative determination is considered 'final and binding' when an agency … reached a definitive position on the issue that inflicts actual, concrete injury and administrative remedies have been exhausted."[27] Further, "the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party."[28] "A strong public policy underlies the abbreviated statutory time frame; the operation of government agencies should not be unnecessarily clouded by potential litigation."[29] The "filing of [a] petition" can be deemed a "demand" potentially avoiding contravention of CPLR §217(1).[30] The appellate division does not tolerate a litigant's devious litigation tactic of "indefinitely postpon[ing]" the requisite "demand" to avoid contravening CPLR §217(1).[31] Notably, the movant is mandated to serve the "demand within a reasonable time after the right to make it occurs, or after the [movant] knows or should know of the facts which give him or her a clear right to relief …."[32]

Judicial Review of Demands for Mandamus Relief

New York State courts should assess the mandamus doctrine within the context of special proceedings commenced under CPLR article 78, regardless of whether the movant characterizes the litigation "as a hybrid proceeding and action …."[33] The mandamus doctrine is not a permissible vehicle to challenge or "review" a trial court decision, rather than filing an appeal with the appellate division.[34] The judiciary views a demand for mandamus relief to challenge trial court determinations as an improper collateral attack.[35] New York State Court of Appeals declared that the mandamus doctrine is not an available vehicle "for interlocutory relief" to undermine criminal prosecutions.[36] The scope of interlocutory relief pertains to "very limited procedural question[s]" that are not subject to "a final determination on the matters" to be adjudicated.[37] The mandamus doctrine is not a vehicle to rectify "trial errors."[38] Rather, litigants must pursue "appellate review."[39] New York State Court of Appeals believed that challenging trial court determinations by means of mandamus is creative, yet cripples "jurisprudence."[40] The determination as to whether mandamus relief shall be granted is within "the sound discretion of the [trial] court."[41]

1. *See generally* CPLR §402; *see generally* CPLR §403(a)-(d); *see generally* CPLR §7804(c)-(d); *see generally Stuyvesant Owners, Inc. v. Division of Human Rights*, 60 Misc. 3d 1209(A), 2018 N.Y. Slip. Op. 51030(U), *1 (Sup. Ct., N.Y. County 2018); *see generally Murray v. James Hudson*, 43 A.D.3d 936, 937 (2d Dept. 2007); *see generally People ex rel. Ferris v. Harnett*, 249 A.D. 916 (3d Dept. 1937); *see generally In re Salisbury*, 138 Misc. 2d 361 (Sup. Ct., Albany County 1988).
2. *See* CPLR §7804(a).
3. *See Abdur-Rahim v. Dept. of Housing Preservation & Development*, 2010 N.Y. Slip. Op. 30264(U), *6 (Sup. Ct., N.Y. County 2010).
4. *See id.*
5. *See id.; see generally* CPLR §402; *see generally* CPLR §403(a)-(d); *see generally* CPLR §7801; *see generally* CPLR §7804(c)-(d).
6. *See Morales v. Kellenberg*, 1992 N.Y. Misc. LEXIS 724, *1 (Sup. Ct., Nassau County 1992) (J. McCaffrey).
7. *See generally* CPLR §7803(1); *see generally* CPLR §7803(3); *see generally Jurnove v. Nassau County Police Department*, 2005 N.Y. Misc. LEXIS 3494, *2-3, Index No.: 015882/2004 (Sup. Ct., Nassau County 2005) (*citing* CPLR §7803(3)) (J. Dunne); *see generally Bonnano v. Town Bd. Of Babylon*, 148 A.D.2d 532 (2d Dept. 1989); *see generally Crescent Group Realty, Inc. v. Kennedy*, 175 A.D.3d 1531, 1532 (2d Dept. 2019) (*citing* CPLR §7803(1)); *see generally King v. Kay*, 39 Misc. 3d 995, 998 (Sup. Ct., Suffolk County 2013).
8. Kay, 39 Misc. 3d at 998; *ABN AMRO Bank N.V. v. Dinallo*, 40 Misc. 3d 180, 195 (Sup. Ct., N.Y. County 2013); CPLR §7803(1); CPLR §7803(3).
9. *See Bonnano*, 148 A.D.2d 532; *see also Mount Builders, LLC v. Oddo*, 152 A.D.3d 694, 695 (2d Dept. 2017).
10. *See Gonzalez v. Village of Port Chester*, 109 A.D.3d 614, 615 (2d Dept. 2013).
11. *See id.* at 615.
12. *See Bonnano*, 148 A.D.2d at 532-3.
13. *See id.* at 533.
14. *See Kennedy*, 175 A.D.3d at 1532 (citing CPLR §7803(1)); see also Alltow, Inc., 94 A.D.3d at 880.
15. *See Jurnove*, 2005 N.Y. Misc. LEXIS 3494, *2-3, Index No.: 015882/2004 (citing CPLR §7803(3)).
16. See Fehlhaber Corp. v. O'Hara, 53 A.D.2d 746 (3d Dept. 1976).
17. *See Alweis v. Wagner*, 14 N.Y.2d 923, 924 (1964).
18. *See Economy Holding Corp. v. Berry*, 234 A.D. 214, 217 (1st Dept. 1932).
19. *See id.* at 615.
20. *See id.* at 615; *see also Community Action against Lead Poisoning v. Lyons*, 43 A.D.2d 201, 202-3 (3d Dept. 1974).
21. *See Lyons*, 43 A.D. 2d at 202-3.
22. *Niagara Frontier Transportation Authority v. DiNapoli*, 69 A.D.3d 1209, 1211 (3d Dept. 2010); *Scherbyn v. Wayne-Finger Lakes Bd. Of Coop. Educ. Servs.*, 77 N.Y.2d 753, 757 (1991); CPLR §7803(3).
23. *See Scherbyn*, 77 N.Y.2d at 757-8.
24. *See id.* at 758; see also CPLR §7803(3).
25. *Montpay Realty Corp. v. Laveman*, 202 A.D.3d 687, 688 (2d Dept. 2022); *Whitted v. City of Newburgh*, 65 A.D.3d 1365, 1367 (2d Dept. 2009); CPLR §217(1).
26. *Laveman*, 202 A.D.3d at 688; *Whitted*, 65 A.D.3d at 1367; *Vestal Teacher's Association v. Vestal Central School District*, 5 A.D.3d 922, 923 (3d Dept. 2004); *Town of Hempstead Democrative Committee v. Nassau County Police Department*, 37 Misc. 3d 1208(A), 2012 N.Y. Slip. Op. 51932(U), *2 (Sup. Ct., Nassau County 2012); CPLR §217(1).
27. *See Selective Ins. Co. v. NYS Workers' Compensation Bd.*, 102 A.D.3d 72, 76 (3d Dept. 2012); *see also* CPLR §217(1).
28. *See Best Payphones, Inc. v Dept. of Info. Tech. & Telecom*, 5 N.Y.3d 30, 34 (2005); *see also* CPLR §217(1).
29. See Best Payphones, Inc., 5 N.Y.3d at 34; *see also* CPLR §217(1).
30. *See Speis v. Penfield Central Schools*, 114 A.D.3d 1181, 1183 (4th Dept. 2014); *see also* CPLR §217(1).
31. *See Granto v. City of Niagara Falls*, 148 A.D.3d 1694, 1695 (4th Dept. 2017); *see also* CPLR §217(1).
32. *See Granto*, 148 A.D.3d at 1695; *see also* CPLR §217(1).
33. *See Star Prop. Holding, LLC v. Town of Islip*, 164 A.D.3d 799, 800 (2d Dept 2018).
34. *See Branciforte v. Spanish Naturopath Society*. 217 A.D.2d 619 (2d Dept. 1995).
35. *See id.*
36. *See Legal Aid Society of Sullivan County, Inc. v. Scheinman*, 53 N.Y.2d 12, 16 (1981).
37. *See Mobil Oil Indonesia v. Asamera*, 43 N.Y.2d 276, 281 (1977).
38. *See id.*
39. *See id.*
40. *See id.* at 17.
41. *See In re Brooklyn Improv. Co.*, 174 A.D. 448, 451 (2d Dept. 1916).

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

FOCUS: LABOR AND EMPLOYMENT LAW

Outside Sales Exemption

Michael Berger and Alexander Leong

The COVID-19 pandemic has changed the way that work is being performed. Adjustments made by employers to the duties performed by employees during the pandemic may unwittingly have exposed employers to significant liability. For example, the performance of work remotely during the pandemic may lead to severe consequences for employers who classify any employees as exempt outside sales employees.

Under the New York Labor Law ("NYLL"), an "outside salesman" is excluded from the definition of "employee."[1] Similarly, an "outside salesman" is excluded from the minimum wage and overtime requirements under the Fair Labor Standards Act ("FLSA").[2] As a result, employers need not pay an employee who qualifies as an outside salesperson under the NYLL and FLSA minimum wage or overtime when the employee works in excess of forty hours in a work week. It must be noted that the exemptions are narrowly construed and the employer bears the burden of establishing that an employee is exempt from minimum wage and/or overtime requirements.[3]

Under the FLSA, an outside sales employee is: (1) an employee whose primary duty[4] is making sales within the meaning of Section 3(k) of the FLSA or "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer"[5]; and (2) "who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty."[6] Unlike other exemptions, the outside sales exemption does not have a minimum salary requirement.

Similarly, under the NYLL, an outside salesperson is an individual "who is customarily and predominantly engaged away from the premises of the employer and not at any fixed site and location for the purpose of: (1) making sales; (2) selling and delivering articles or goods; or (3) obtaining orders or contracts for services or for the use of facilities."[7]

During the height of the pandemic, and still presently, sales employees routinely worked from home and were unable to go door-to-door to make sales or visit the customer's place of business. With sales employees working from home, the question became, do they still qualify for the exemption?

The answer to this question will be determined on a case-by-case basis, depending on each employee's particular circumstances, and employers who seek to avail themselves of the outside sales employee exemption must ensure that all prongs of said exemption are satisfied.

Barring any significant changes to the duties performed and/or terms and conditions of employment, sales employees who satisfied the "primary duty" test prior to the COVID-19 pandemic, should be able to continue to satisfy this test today. In *Gold v. New York Life Insurance Co.*, the Second Circuit noted that the "determination of an employee's primary duty must be based on all facts in a particular case, with the major emphasis on the character of the employee's job as a whole."[8] This means the duties the employee actually performs, not the employee's title or position.[9] Courts will consider several factors including, but not limited to, "[1] the relative importance of the exempt duties as compared with other types of duties; [2] the amount of time spent performing exempt work; [3] the employee's relative freedom from direct supervision; and [4] the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee."[10]

The determination of whether an employee meets the outside salesperson exemption will also depend on whether the sales employee is "customarily and regularly engaged away from the employer's place or places of business" in performing such primary duty.[11] The Federal Regulations define "customarily and regularly" as greater than occasional, but less than constant.[12] It further states that "[o]utside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business."[13]

A recent case in the Eastern District of New York, *Veracka v. MLD Mortgage Inc.*[14] addressed this issue. In *Veracka*, the Court denied the defendants' motion for summary judgment, finding that the employer failed to satisfy its affirmative defense that the plaintiffs were subject to the outside sales exemption.

With respect to the second element, the *Veracka* court stated that sales calls made from home "do not constitute work 'away from' the office." Indeed, to meet the exemption, the employee must regularly be away from the place of business, meeting with customers outside of work, an employee's home does not satisfy the requirement.[15]

Based on the foregoing, employers who classify any employees as exempt outside sales employees need to carefully examine whether each individual employee satisfies the FLSA and NYLL. In the post-pandemic world, where some customers may still be unwilling to allow visits by salespeople to said customers' business locations and employees request to work from home, employers hoping to avoid liability for misclassifying employees will have to stay vigilant and routinely assess whether an individual employee is exempt as an outside sales employee. Employers who classify their employees as exempt outside salespeople should also be reminded to keep records and documentary evidence that support such classification. Such documentary evidence may include, but not be limited to, any agreement establishing terms of employment including, without limitation, job duties and compensation,[16] expense receipts for travel to meet with clients, copies of sales presentations, travel logs and itineraries, reports filed by salespeople relating to sales activity, and records referencing where sales are made.

However, employees who do not satisfy the requirements for the outside sales exemption, may qualify for another exemption under the NYLL and FLSA. As with the outside sales exemption, employers will have to carefully examine whether each employee satisfies all the requirements for any other exemption.

The COVID-19 pandemic brought sweeping changes to the way employers operate their business. Sales employees who were previously exempt from minimum wage and overtime requirements may no longer qualify for the outside sales exemption. Employers who currently classify employees as exempt outside salespersons should review the circumstances surrounding each employee's duties and determine whether that employee still qualifies for the exemption or another exemption. Employers should perform the same analysis for each new hire. Failing to properly classify and compensate employees can expose employers to significant liability and employers should consult with employment law attorneys regarding their wage and hour practices to avoid costly litigation.

1. NYLL §651(5)(c).
2. 29 U.S.C. §213(a)(1); *see also https://www.dol.gov/agencies/whd/fact-sheets/17f-overtime-outside-sales.*
3. *Fernandez v. Zoni Language Centers, Inc.*, 858 F.3d 45, 48 (2d Cir. 2017) ("Because the FLSA is remedial litigation, we construe its exemptions narrowly and place the burden on the employer to show that his establishment is 'plainly and unmistakably within the [] terms and spirit' of the exemption.").
4. "Primary duty" means "the principal, main, major or most important duty that the employee performs." 29 C.F.R. §541.700.
5. 29 C.F.R. §541.500.
6. 29 C.F.R. §541.500.
7. 12 N.Y.C.R.R. § 142-2.14(c)(5). The New York regulations follow the FLSA exemption. *See* 12 N.Y.C.R.R. §142-2.2 ("An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate in the manner and methods provided in and **subject to the exemptions of sections 7 and 13 of 29 USC 201**"); *see also Sydney v. Time Warner Entertainment-Advance/Newhouse Partnership*, 751 Fed. App'x 90, 92 (2d Cir. 2018).
8. *Gold v. New York Life Insurance Co.*, 730 F.3d 137 (2d Cir. 2013).
9. *Gold*, 730 F.3d at 145.
10. *Sydney v. Time Warner Entertainment-Advance/Newhouse Partnership*, 751 Fed. App'x 90, 92 (2d Cir. 2018).
11. 29 C.F.R. §541.500.
12. 29 C.F.R. §541.701.
13. 29 C.F.R. §541.502.
14. *Veracka v. MLD Mortgage Inc.*, Case No. 16-CV-7152 (WFK) (AYS), 2021 WL 2662007 (E.D.N.Y. Apr. 1, 2021).
15. *Veracka, supra* at *5.
16. Although outside the scope of this article, employers should be aware that NYLL §191(1)(c) requires that terms of employment with a "commission salesperson" must be memorialized in a written agreement signed by the employer and the "commission salesperson." Such written agreement must contain, among other things, a "description of how wages, salary, drawing account, commissions and all other monies earned and payable shall be calculated" and "the details pertinent to payment of wages, salary, drawing account, commissions and all other monies earned and payable in the case of termination of employment by either party." *See* NYLL §191(1)(c). For the definition of "commission salesperson," see NYLL §190(6). Employers should also note that a commission salesperson is subject to overtime pay requirements, unless an exemption is applicable.

Alexander Leong, Of Counsel, and **Michael A. Berger**, are attorneys at Forchelli Deegan & Terrana, LLP in Uniondale. Both attorneys are members of the firm's Employment & Labor practice group. Mr. Leong can be reached at aleong@forchellilaw.com or (516) 248-1700. Mr. Berger can be reached at mberger@forchellilaw.com or (516) 248-1700.

In Brief

Former NCBA Matrimonial Law Committee Chair and current Grievance Committee Chair, **Lee Rosenberg**, has again been selected among the "Best Lawyers in America" in Family Law by Woodward-White.

Carol M. Hoffman is pleased to announce the opening of her new offices at 300 Old Country Road, Suite 341, Mineola, NY 11501. The office can be contacted at cmh@cmhadr.com or (516) 818-8804.

Marc L. Hamroff of Moritt Hock & Hamroff is pleased to announce that the firm has been named a Top 3 Winner for Best Financial Law Firm for its financial services practice in *Long Island Business News*' 2022 Annual Reader Rankings List.

Hon. Stephen L. Ukeiley, an Acting Suffolk County and District Court Judge, published the Fifth Edition of *The Bench Guide to Landlord & Tenant Disputes in New York*© (ISBN # 97809840432-5-5).

Joseph A. Quatela, Managing Partner of Quatela Chimeri PLLC, is proud to announce that **Andrew K. Martingale** will be joining the firm as a Partner, where he will focus on the firm's expanding labor and employment, municipal and commercial law practice, and **Whitney F. Punzone** to the firm's matrimonial and family law practice group as an Associate.

Kara K. Miller has joined Jaspan Schlesinger LLP in Garden City as a partner in the matrimonial and family law practice group. Partner **Simone M. Freeman** has joined the Advisory Board of Girls Inc. of Long Island. Associate **Maria Girardi** was named a Top Lawyer of Long Island—Rising Star by *The Herald Newspapers*. Partner **Hanna E. Kirkpatrick** was recognized by the *Long Island Business News* as a Who's Who in Women in Professional Services.

Ronald Fatoullah of Ronald Fatoullah & Associates is honored to be recognized again by *Best Lawyers*® for 2023. Mr. Fatoullah is recognized in the categories of Elder Law, Litigation-Trusts & Estates, and Trusts & Estates.

Marian C. Rice

Jeffrey D. Forchelli, Managing Partner of Forchelli Deegan Terrana LLP (FDT) was selected by his peers for inclusion in the 29th Edition of *The Best Lawyers in America*® for Land Use & Zoning Law. Jeffrey D. Forchelli is proud to announce that **Linda Tierney**, the firm's Director of Office Management, was appointed President of the Association of Legal Administrators (ALA) Long Island Chapter.

Daniel J. Baker has joined Greenberg Traurig in Garden City, expanding the firm's Global Land Use Practice.

Five Pegalis Law Group attorneys have once again been selected for the highly regarded list, *The Best Lawyers in America*© for 2023. The six attorneys recognized are: **Steven Pegalis**, a Great Neck resident; **Annamarie Bondi-Stoddard**, a Port Washington resident; **Sanford Nagrotsky**, a Mineola resident; **James Baydar**, a Manhasset resident; and **Robert Fallarino**, an East Williston resident.

Donna-Marie Korth, Partner in the Coop/Condo and Litigation Practice Groups at Certilman Balin Adler & Hyman, LLP, will be recognized as one of the Top Lawyers of Long Island by *RichnerLIVE* and *Herald Community* Newspapers.

Nancy E. Gianakos is pleased to announce the opening of Gianakos Law, matrimonial and mediation services, at 1122 Franklin Avenue, Suite 400, Garden City, with additional locations in Melville and New York City. She may be reached at (516) 206-1580 or nancy@gianakoslaw.com.

Karen Tenenbaum, LL.M. (Tax), CPA, tax attorney, was recently featured in the *Long Island Business News* special section entitled: "Who's Who in Women in Professional Services." Karen and her legal team spoke about NYS tax collection at a HalfMoon Education webinar and were on a "Trust Fund Recovery Penalties" panel for a CPA academy webinar. Additionally, Karen appeared on Bonnie Graham's "Technology Revolution" podcast where they discussed the importance of teaching children about money and financial literacy.

James P. Joseph of Joseph Law Group, P.C. is proud to announce a new addition to the team, **Jacqueline M. Caputo** who will focus in the areas of mediation and collaborative practice.

Ellen G. Makofsky of Makofsky Law Group, P.C. was named a 2022 Super Lawyer and received recognition for the eighth time as one of the Top 50 Women Super Lawyers in the New York Metropolitan area. Partner, **Lisa R. Valente** along with **Deidre M. Baker** and **Christina Lamm**, who are associates at Makofsky Law Group, P.C., were each named on the Super Lawyers Rising Stars list in the Elder Law category. Additionally, the firm was voted the Best Law Firm/Lawyer in Nassau County in *Blank Slate Media's* 2022 Best of Nassau County contest.

Three Vishnick McGovern Milizio LLP (VMM) attorneys were named to the *LI Herald* 2022 "Top Lawyers of Long Island." The firm was named Top Law Firm in its size category, for the fourth consecutive year. Partner **Bernard McGovern** received the Lifetime Achievement Award and managing partner **Joseph Milizio** was named in the Pro Bono Project category, also for the fourth consecutive year. Mr. Milizio, who heads VMM's LGBTQ Representation practice, published an article in *Gay City News* titled "What the Roe v. Wade Overturn Means for Us and What We Can Do About It," as well as a related article in *Gay Parent Magazine*, titled "How the Roe v. Wade Overturn Impacts Gay Parents." Partner **Joseph Trotti**, head of VMM's Litigation Department and Matrimonial and Family Law practice, published a satire piece on the Marvel superhero show *She-Hulk: Attorney at Law in Attorney at Law Magazine*. VMM sponsored the Long Island Crisis Center "Let's Walk, Let's Talk...Stepping Together to Prevent Suicide" fundraiser walk. The firm was also a tee sponsor at the WE CARE Annual Golf and Tennis Classic.

Capell Barnett Matalon & Schoenfeld LLP Partner **Robert S. Barnett** and Partner **Gregory Matalon**'s article "Late Portability Election: New Relief Available" has been published in the *New York Law Journal*. In other current news, Robert will be presenting on the topics of Passive Activity Rules and Real Estate Professional Standards for Strafford. Partner **Yvonne Cort** presented the webinar "How to Prove Florida Residency to NY Tax Collectors."

A. Thomas Levin of Meyer Suozzi was named among the esteemed attorneys honored by *The Herald* newspaper as a Top Lawyer of Long Island. **Richard G. Fromewick** was re-elected to the Executive Board of the Friedberg JCC and elected as Past President Board Member of Temple Avodah.

The IN BRIEF column is compiled by Marian C. Rice, a partner at the Garden City law firm L'Abbate Balkan Colavita & Contini, LLP, where she chairs the Attorney Professional Liability Practice Group. In addition to representing attorneys for 40 years, Ms. Rice is a Past President of NCBA.

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

Fireside Chat with Judges Norman St. George and George Silver...

Continued from Cover

in general terms. Both judges, for example, foresee that some conferences and other basic appearances should and will in many instances remain virtual. It was Judge Silver, for example, who developed the current on-line system for preliminary conferences and that program is likely to remain a permanent fixture of litigation practice. Judge St. George even spoke of a pilot project testing the viability of virtual jury trials.

On a more personal topic, the judges spoke of the value of networking and bar association involvement for those who are interested in a career on the bench. Both acknowledged, of course, the political component of any desired judicial career, and the need to find the right balance of all the efforts necessary to get on the bench. Judge St. George and Judge Silver were open and forthcoming about their own paths to the bench and that presented refreshing insight not often heard in similar talks.

The event overall had a very informal feel to it. This informality resulted in a refreshing experience that presented attendees with a window to the human side of the judiciary. Both judges possess a sharp sense of humor and that was certainly present during the discussion and in their interactions with the audience. The evening's program offered a unique opportunity to learn about the inner workings of the New York court system and to pick the brains of the two jurists who between them for a time ran every single courthouse in the State.

Also of note, is that the event was presented by LIHBA in association with the NCBA. LIHBA provided the food and refreshments for the attendees, while the NCBA provided the space in Domus as well as the Zoom link. The NCBA's Hector Herrera provided the technical assistance for the program.

This event was part of a broader effort initiated by NCBA President Rosalia Baiamonte to foster greater collaboration with local affinity bars. The intention of this initiative is to have affinity bar associations and their members become more involved with the programs at the Nassau Bar. It is hoped that these collaborations will help diversify the NCBA's membership and leadership. The entire executive board of LIHBA and many of its board were in attendance providing them an opportunity to learn more about the NCBA and network with their fellow bar leaders.

Overall, the event was a pleasant and insightful night that was enjoyed by all who attended. It is hoped that this experience will foster more joint programs between the NCBA and affinity bar associations. Such partnerships will continue to bring fresh voices and varied topics to Domus.

NCBA 2022-2023 Corporate Partners

Nassau County Bar Association Corporate Partners are committed to provide members with the professional products and services they need to succeed. Contact the Corporate Partner representatives directly for personalized service.

APPELLATE SERVICES PROVIDERS

PHP PrintingHouse Press
John Farrell
(212) 624-9985
jfarrell@phpny.com

Since 1970, PHP has worked diligently to be the industry's leading appellate services provider delivering innovative solutions that address the needs of clients as well as the appellate industry at large.

PHP is a proud corporate partner of WE CARE, the nationally recognized fund of the Nassau Bar Foundation, the charitable arm of the Nassau County Bar Association.

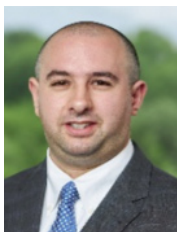
BANKING SERVICES

Webster Bank
Jeffrey Mercado
(212) 575-2887
jemercado@websterbank.com

Webster Bank
Monica Vazquez
(212) 309-7649
mvazquez@websterbank.com

Webster's Law Firm Banking group provides products and services designed for the legal community based on their practice size and specialties. Solutions include **Bank Check Xpress**—for firms that routinely utilize certified bank checks, it provides law firms an edge with in-office cashier check printing solutions—and **Virtual Account Manager**, a web-based self-service platform to create virtual sub-accounts and automate routing processes. Sub-account holders receive FDIC coverage pursuant to FDIC insurance rules.

BUSINESS VALUATION



MPI Business Valuation & Advisory
Joshua S. Sechter, CPA/ABV, CFE
(516) 660-0864
jsechter@mpival.com

MPI Business Valuation & Advisory
Joseph Ammirati, CPA, ABV, CFF
(631) 629-1048
jammirati@mpival.com

MPI, founded in 1939, is a prestigious national business valuation and advisory firm, providing valuations for a variety of tax, financial reporting, litigation support, and other business applications, as well as corporate advisory services to business owners and their representatives. With over 25 valuation professionals across seven major cities, MPI is proud to be the choice of leading attorneys across the country.

MPI has 80 years of experience of helping attorneys and their clients prepare to prevail in court. MPI's senior professionals have appeared as expert witnesses in the U.S. Tax Court, U.S. District Court, U.S. Claims Court, state courts, domestic relations courts, and before government agencies. MPI's services include valuations for income and gift tax purposes, matrimonial disputes, shareholder disputes, IRC Section 409a, purchase price allocations, sale-leasebacks, valuations supporting C to S corporation valuations, intangible assets, stock options, phantom stock, early-stage companies, complex capital structures, among others. MPI also provides forensic accounting, lifestyle analyses, separate property analyses, damage calculations, impairment testing, fairness opinions, succession planning, solvency opinions, joint-venture and divestiture modeling, and M&A services.

COURT REPORTING SERVICES

Realtime Reporting
Ellen Birch
(516) 938-4000
ebirch@realtimereporting.com

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

Realtime Reporting prides itself on its exclusive Three-Point Quality Control System. Each transcript is reviewed three different times, meeting specific criteria before it is declared final and ready for shipment. Realtime has brought back old-time, personal service that allows all clients to feel confident that their specific and unique needs will be met. Realtime Reporting has been voted Best Court Reporting Firm on Long Island for two years in a row. Realtime Reporting works with PrintingHouse Press to provide full appellate services.

Scheduling court reporters, videographers, interpreters, and conference rooms is made easy by submitting your request through realtimereporting.com or a quick phone call to owner Ellen Birch at (516) 938-4000. Ellen is a recipient of the WE CARE Stephen Gassman Award.

FINANICAL ADVISORY SERVICES

Opal Wealth Management
Jesse Giordano, CFP
(516) 388-7975
jesse.giordano@opalwealthadvisors.com

Lee Korn
Financial Advisor, Principal
(516) 388-7980
lee.korn@opalwealthadvisors.com

Opal Wealth Advisors is a registered investment advisor dedicated to helping you create and use wealth to accomplish goals that are meaningful to you. Looking beyond stocks and bonds, we evaluate a full range of investment opportunities.

We work to structure a personalized portfolio to support you in reaching your dreams. Our asset allocation strategies are designed to keep your money working actively for generations—so you don't have to.

INSURANCE FOR LAWYERS

AssuredPartners Northeast, LLC
Regina Vetere
(631) 844-5195
regina.vetere@assuredpartners.com

AssuredPartners Northeast provides guidance and expertise in lawyers professional liability and other business and personal insurance to NCBA members. AssuredPartners' long-standing proficiencies in health benefits, life insurance, disability insurance, long-term care, cyber liability, employment practices liability, 401(k) and retirement planning are now being offered to the Nassau County Bar Association and all of its members.

AssuredPartners Northeast is a full-service insurance agency offering comprehensive asset protection solutions for businesses and individuals. Headquartered on Long Island in Melville, with offices nationally and internationally, AssuredPartners offers the market clout of a large national agency–with the local level of service that the members of the Nassau County Bar Association expect and deserve.

LEGAL RESEARCH

LexisNexis
Raj Wakhale
631-827-9661
raj.wakhale@lexisnexis.com

LexisNexis® Legal & Professional is a leading global provider of legal, regulatory, and business information and analytics that help legal professionals increase productivity, improve decision-making and outcomes, and advance the rule of law around the world. As a digital pioneer, the company was the first to bring legal and business information online with its Lexis® and Nexis® services. LexisNexis Legal & Professional, which serves legal professionals in more than 130 countries with 10,000 employees worldwide, is part of RELX Group, a global provider of information and analytics for professional and business customers across industries.

MARKETING FOR LAWYERS

Legal Hero Marketing, Inc.
Bryan Osima
(347) 378-7886
bryan@legalheromarketing.com

Legal Hero Marketing Inc. is a full-service digital marketing company that helps busy Attorneys and Law Firms that are overwhelmed with the challenges of successfully marketing their legal practice in a digital world, consistently find their ideal clients and GROW with a concierge digital marketing partnership.

TITLE SEARCHES, DEEDS AND TRANSFERS

Maximus Title
Patricia M. Lemanski
O. (212) 695-1212
F. (516) 877-7603
C. (973) 809-3834
tlemanski@maximustitle.com

Maximus Title offers exclusive services at the highest level of excellence. Its flexible business model lets Maximus Title serve dozens of industries including financial institutions, real estate developers, agents and brokers, attorneys, credit unions, and many more.

FDT®

FORCHELLI DEEGAN TERRANA

GREGORY S. LISI
Chair, Employment & Labor Practice Group

MEET THE EMPLOYMENT & LABOR PRACTICE GROUP

Forchelli Deegan Terrana LLP's Employment and Labor practice has two principle components: counseling and litigation. Our attorneys work with management, human resources, and personnel professionals in connection with various employment decisions—such as terminations and discipline, reductions in force and restructuring, acquisitions and divestitures, restrictive covenants, wage and hour laws, union issues, negotiating collective bargaining agreements and grievances, compliance issues, and preparation of policies, employee handbooks, and employment contracts. We conduct audits of employment practices and policies, and provide employer-sponsored training concerning equal employment opportunity obligations.

Founded in 1976, Forchelli Deegan Terrana LLP is one of Long Island's largest and most distinguished law firms. Headquartered in Uniondale, NY, the firm employs over sixty-five attorneys collaborating across more than a dozen practice groups. FDT is committed to providing exceptional service to a broad range of national, regional and local clients.

EMPLOYMENT & LABOR • LAND USE & ZONING • TAX CERTIORARI • REAL ESTATE • IDA
BANKING & FINANCE • BANKRUPTCY • CANNABIS • CONDOMINIUM, COOPERATIVE & HOA
CONSTRUCTION • CORPORATE AND M&A • ENVIRONMENTAL • LITIGATION
TAX, TRUSTS & ESTATES • RESTAURANT & HOSPITALITY • VETERINARY

333 Earle Ovington Blvd., Suite 1010 | Uniondale, NY 11553
516.248.1700 | forchellilaw.com

NCBA Committee Meeting Calendar October 3, 2022– November 3, 2022

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

MONDAY, OCTOBER 3
SURROGATES COURT ESTATES & TRUSTS
5:30 PM
Stephanie Alberts/Michael Calcagni

TUESDAY, OCTOBER 4
APPELLATE PRACTICE
12:30 PM
Amy E. Abbandondelo/Melissa Danowski

THURSDAY, OCTOBER 6
PUBLICATIONS
12:45 PM
Rudolph Carmenaty/Cynthia A. Augello

THURSDAY, OCTOBER 6
COMMUNITY RELATIONS & PUBLIC EDUCATION
12:45 PM
Ira S. Slavit

THURSDAY, OCTOBER 6
IMMIGRATION LAW
5:30 PM
Patricia M. Pastor/Pallvi Babbar

TUESDAY, OCTOBER 11
LABOR & EMPLOYMENT LAW
12:30 PM
Michael H. Masri

WEDNESDAY, OCTOBER 12
ASSOCIATION MEMBERSHIP
12:30 PM
Jennifer L. Koo

WEDNESDAY, OCTOBER 12
MEDICAL-LEGAL
12:30 PM
Christopher J. DelliCarpini

WEDNESDAY, OCTOBER 12
REAL PROPERTY LAW
12:30 PM
Alan J. Schwartz

WEDNESDAY, OCTOBER 12
MATRIMONIAL LAW
5:30 PM
Jeffrey L. Catterson

THURSDAY, OCTOBER 13
LGBTQ
9:00 AM
Jessika Pineda

THURSDAY, OCTOBER 13
GENERAL SOLO SMALL MANAGEMENT PRACTICE
12:30 PM
Scott J. Limmer/Oscar Michelen

TUESDAY, OCTOBER 18
ACCESS TO JUSTICE
12:30 PM
Daniel W. Russo/Hon. Conrad D. Singer

TUESDAY, OCTOBER 18
PLAINTIFF'S PERSONAL INJURY
12:30 PM
David J. Barry

TUESDAY, OCTOBER 18
SENIOR ATTORNEYS
12:30 PM
Stanley P. Amelkin

TUESDAY, OCTOBER 18
DIVERSITY & INCLUSION
6:00 PM
Rudolph Carmenaty

WEDNESDAY, OCTOBER 19
CONSTRUCTION LAW
12:30 PM
Anthony DeCapua

WEDNESDAY, OCTOBER 19
ETHICS
5:30 PM
Avigael C. Fyman

THURSDAY, OCTOBER 20
INTELLECTUAL PROPERTY
12:30 PM
Frederick J. Dorchak

TUESDAY, OCTOBER 25
DISTRICT COURT
12:30 PM
Bradley N. Schnur

WEDNESDAY, OCTOBER 26
EDUCATION LAW
12:30 PM
Syed Fahad Qamer/Joseph Lilly

WEDNESDAY, OCTOBER 26
BUSINESS LAW, TAX & ACCOUNTING
12:30 PM
Varun Kathait

THURSDAY, OCTOBER 27
NEW LAWYERS
12:30 PM
Byron Chou/Michael A. Berger

TUESDAY, NOVEMBER 1
WOMEN IN THE LAW
12:30 PM
Melissa P. Corrado/Ariel E. Ronneburger

WEDNESDAY, NOVEMBER 2
REAL PROPERTY LAW
12:30 PM
Alan J. Schwartz

WEDNESDAY, NOVEMBER 2
APPELLATE PRACTICE
12:30 PM
Amy E. Abbandondelo/Melissa Danowski

WEDNESDAY, NOVEMBER 2
SENIOR ATTORNEYS
4:00 PM
Stanley P. Amelkin

WEDNESDAY, NOVEMBER 2
SURROGATES COURT ESTATES &TRUSTS
5:30 PM
Stephanie Alberts/Michael Calcagni

THURSDAY, NOVEMBER 3
INSURANCE LAW
12:30 PM
Jason B. Gurdus

THURSDAY, NOVEMBER 3
PUBLICATIONS
12:45 PM
Rudolph Carmenaty/Cynthia A. Augello

THURSDAY, NOVEMBER 3
COMMUNITY RELATIONS & PUBLIC EDUCATION
12:45 PM
Ira S. Slavit

New Members

We Welcome the Following New Member Attorneys

Zoe Avdar
Reisa G. Brafman
Grace Marie Braider
Elizabeth Grace Conklin
Nicholas Constantinidis
Nicole Marie Cummins
Matthew Lee DeMestrio
Sarah Nicole Evleth
Susan Gail Friedland
Kelly Gans
Giuseppina Girardi
Ishra Glasswala
Daniel Connor Golden
Alexis Gooding
Christopher Michael Griffin
Jacob Ryan Grossman
Ezra Hagler
Ashley Hall
Gillian Kathryn Joyce
Bridget Marie Kelly
Emili Kilom
Amy Largacha Cedeno
Cody Luong
Abigail Laura Malone
Jaden Anthony Martin
Kyle Martingale
Quatela Chimeri, PLLC-Suffolk
Taylor Mavica
Alissa Nicole Popeck
Veronica Marie Ruiz
Lucsa P. Sabbagh
Irene Rose Satchwell
Brian Schlosser
Maria Shaikh
Kevin John Smith Jr.
Matthew Ryan Solomon
Mary Etta Tonna
Angelina Vasilevsky
Bethann Wolfe

We Care

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

DONOR	IN MEMORY OF
DiMascio & Associates, LLP	Stuart Milgrim, father of Eric Milgrim, Esq. and father-in-law of Randi Milgrim, Esq.
Dana J. Finkelstein	Yolanda Alvarado, mother of Miguel Alvarado
Hon. Andrea Phoenix	Charlotte Burkowsky, grandmother of Ann Burkowsky
Hon. Andrea Phoenix	Rev. Joycelyn Bonner Waugh, Godmother of Alicia Ray
Gregory S. Lisi	Paul Forchelli, brother of Jeff Forchelli and uncle of Nicole Forchelli
Hon. Andrea Phoenix	Fitz Webley, father of Toni Webley-Wilkerson
Hon. Andrea Phoenix	Joan Ann Franklin, mother of Daphne Franklin and Jackie Nivet
Hon. Andrea Phoenix	Calvin M. Harvey, father of Dr. Monique Harvey
Hon. Andrea Phoenix	William Andrews, husband of Gladys Andrews
Hon. Andrea Phoenix	The Loved One of Rev. Sharon Gordon
Samuel J. Ferrara	Nathaniel (Nate) Weisel, son of Assoc. Prof. Emeritus Martha Weisel of Hofstra

DONOR	SPEEDY RECOVERY TO
Hon. Andrea Phoenix	Jill Stone

WE CARE THANKSGIVING BASKET DONATIONS

Please consider donating $100 to help WE CARE provide a boxed dinner with all the trimmings to be delivered to local families in need on Thanksgiving this year.

SAVE THE DATE!

Join team WE CARE at the Leukemia & Lymphoma Society Light the Night Walk to help raise the funds to cure blood cancer.

LEUKEMIA & LYMPHOMA SOCIETY® | LIGHT THE NIGHT®

Saturday, October 22, 2022 I 5:30 PM I Eisenhower Park, East Meadow

If you would like to participate, contact WE CARE Coordinator Bridget Ryan at bryan@nassaubar.org or (516) 747-1361.

LAWYER TO LAWYER

CONSTRUCTION LAW

- Construction Contract preparation, review and negotiation
- Defective / Incomplete construction
- Post-Sandy House Raisings
- Non payment – Lien filings – Bond Claims
- Lien Foreclosures
- Union Hearings
- Construction Arbitrations, Mediation, Litigation

THE LAW OFFICES OF JOHN CARAVELLA, P.C.
A CONSTRUCTION LITIGATION AND ARBITRATION FIRM
Member FL and NY Bars: Assoc. AIA

www.LIConstructionLaw.com
(516) 462-7051
Offices Uniondale, Melville, Ft Lauderdale

DISABILITY INSURANCE LAW

FRANKEL & NEWFIELD, PC
Practice Exclusive to Disability Insurance Matters

- Pre-Disability Filing Strategy
- Disability Claim Management
- Appeals for Denied or Terminated Disability Claims
- Disability and ERISA Litigation
- Lump Sum Settlements

Martindale-Hubbell AV PEER RATED Peer Rated for Highest Level of Professional Excellence 2022
Avvo
Super Lawyers Jason A. Newfield 10 YEARS
Super Lawyers Justin C. Frankel 10 YEARS

516.222.1600 • www.frankelnewfield.com
ATTORNEY ADVERTISING

IRS AND NYS TAX ATTORNEY

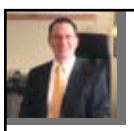
Tenenbaum Law, P.C.
Representing Taxpayers in IRS and New York State Tax Matters
We Make Taxes Less Taxing!

For over 25 years, our attorneys have been assisting taxpayers with:

- IRS & NYS TAX MATTERS
- NYS & NYC RESIDENCY AUDITS
- NYS DRIVER'S LICENSE SUSPENSIONS
- SALES AND USE TAX
- LIENS, LEVIES, & SEIZURES
- NON-FILERS
- INSTALLMENT AGREEMENTS
- OFFERS IN COMPROMISE

631-465-5000
taxhelpline@litaxattorney.com
Learn more: www.litaxattorney.com

GRIEVANCE AND DISCIPLINARY DEFENSE



Law Offices of Mitchell T. Borkowsky

Former Chief Counsel Tenth Judicial District Grievance Committee
25 Years of Experience in the Disciplinary Field
Member Ethics Committees - NYSBA, Nassau Bar, Suffolk Bar

- Grievance and Disciplinary Defense
- Ethics Opinions and Guidance
- Reinstatements

516.855.3777 • mitch@myethicslawyer.com • myethicslawyer.com

APPELLATE COUNSEL

NEIL R. FINKSTON, ESQ.

Benefit From a Reliable and Knowledgeable Appellate Specialist

Former Member of Prominent Manhattan Firm
Available for Appeals, Motions and Trial Briefs
Experienced in Developing Litigation Strategies

Free Initial Consultation • Reasonable Rates

Law Office of Neil R. Finkston
8 Bond Street Suite 401 Great Neck, NY 11021
(516) 441-5230
Neil@FinkstonLaw.com **www.FinkstonLaw.com**

NCBA MEMBER BENEFIT

JOIN THE LAWYER REFERRAL SERVICE INFORMATION PANEL

The Nassau County Bar Association Lawyer Referral Information Service (LRIS) is an effective means of introducing people with legal problems to attorneys experienced in the area of law in which they need assistance. In addition, potential new clients are introduced to members of the Service Panel. Membership on the Panel is open exclusively as a benefit to active members of the Nassau County Bar Association.

LRIS Nassau County Bar Association

(516) 747-4070
info@nassaubar.org
www.nassaubar.org

NO-FAULT ARBITRATION

NEW YORK'S #1 NO FAULT ARBITRATION ATTORNEY

ANDREW J. COSTELLA, JR., ESQ.

CONCENTRATING IN NO-FAULT ARBITRATION FOR YOUR CLIENTS' OUTSTANDING MEDICAL BILLS AND LOST WAGE CLAIMS

SUCCESSFULLY HANDLING THOUSANDS OF NO-FAULT CLAIMS

Proud to serve and honored that NY's most prominent personal injury law firms have entrusted us with their no-fault arbitration matters

Law Offices of Andrew Costella Jr., Esq., PC
600 Old Country Road, Suite 307
Garden City, NY 11530
(516) 747-0377 I arbmail@costellalaw.com

NCBA RESOURCES

FREE CONFIDENTIAL* HELP IS AVAILABLE

The NCBA Lawyer Assistance Program offers professional and peer support to lawyers, judges, law students, and their immediate family members who are struggling with:

Alcohol • Drugs • Gambling • Mental Health Problems

YOU ARE NOT ALONE

(888) 408-6222
LAP@NASSAUBAR.ORG

NCBA RESOURCES

LOOKING FOR

EXPEDITIOUS, TIMESAVING, AND COST-EFFECTIVE SOLUTIONS TO RESOLVE DISPUTES?

LOW-COST MEDIATION AND ARBITRATION THROUGH HIGHLY-SKILLED MEDIATORS AND ARBITRATORS IS AVAILABLE THROUGH THE NCBA ADR PROGRAM!

CONTACT (516) 747-4126 TODAY.

EMPIRE VALUATION CONSULTANTS

Since our founding in 1988, EmpireValuation Consultants has grown into one of the nation's leading and most respected independent valuation consulting firms. With over 85 valuation and forensic experts we are committed to providing personalized attention and delivering timely results to every engagement.

Our engagements encompass a wide variety of purposes and business/financial assets, including but not limited to:

Transactions Fairness & Solvency Opinions
Acquisitions/Sales/ Merger Advisory
ESOP Transactions
Related Party Transactions
Redemptions and Exchanges

Financial Reporting
Goodwill Impairment Testing (ASC 350/360)
Option Grant Valuations (IRC 409a/ASC 718)
Intellectual Property Transfers
Purchase Price Allocations (ASC 805)
Contingent/Earn-Out Valuations

Hedge Fund & Private Equity Fair Value
Fair Value Reporting (ASC 820)
Point Estimates
Positive Assurance
Negative Assurance
Consulting Re: Client Valuation Processes

Employee Stock Ownership Plans (ESOPs)
Annual ESOP Valuations
Feasibility Studies
Transaction Structuring
Profit Sharing & Stock Benefit Plans

Litigation Matrimonial and Business Divorce Valuations
Expert Witness Testimony
Economic Damages
Forensic Accounting
Estate Litigation and Disputes
Mergers and Acquisitions
Collaborative Dispute Resolution
Intellectual Property
Mediation Assistance

Estate, Gift & Tax Reporting
Estate Planning
Literary, Entertainment & Sports Assets
S-Elections
Insurance Funding
Buy/Sell Agreements
Charitable Contributions

Other
Corporate Work
Thinly Traded or Large Blocks of Stock
Recapitalizations
Transfer Pricing
Pre-Deal Advisory

Experience Excellence
www.empireval.com

Scott Brace - Senior Managing Director
Chuck Coyne - Senior Managing Director
Harold L. Deiters III - Senior Managing Director
Terry Griswold - Senior Managing Director
William Johnston - CEO
Kevin Kane - Senior Managing Director
Scott Nammacher - Senior Managing Director
Mark Shayne - Senior Managing Director
Greg Sullivan - Senior Managing Director
Hugh Woodside - Senior Managing Director

New York | Long Island | Rochester | Boston | West Hartford | San Francisco