Stephen Gassman, Esq.
2019 NCBA Distinguished Service Medallion Recipient

Stephen Gassman will be honored as the seventy-sixth recipient of the Association’s Distinguished Service Medallion, to be presented at the annual Annual Dinner Dance on Saturday, May 11, 2019. The Distinguished Service Medallion, the Nassau County Bar Association’s highest honor, is awarded to an individual, either attorney or non-attorney, for service that has enhanced the reputation and dignity of the legal profession.

Gassman is a past president of the Nassau County Bar Association (1988-89) and has served in numerous other capacities for the NCBA, including as a member of the Board of Directors, Chair of the Budget Committee, and Chair of the Matrimonial and Family Law Committee.

His presidency brought many innovations to the NCBA, the most notable being the establishment of the We Care Fund, part of the Nassau Bar Foundation, the charitable arm of the NCBA. The We Care Fund has raised millions of dollars to help those in need, principally in Nassau County, and has served as a model for similar bar association charitable programs throughout the country.

Gassman has also served as chair of the Family Law Section of the New York State Bar Association (1992-1994) and as a member of the office of Court Administration’s Matrimonial Practice and Rules Committee, the Judicial Hearing Officers’ Screening Committee (1991-2010), the 10th Judicial District’s Law Guardian Advisory Committee, and the New York State Bar Association’s Task Force on Family Law. He has also served as an adjunct professor of law at Touro Law School, and as a member of the Board of Editors of Fairshare Journal.

Stephen Gassman has been awarded the Distinguished Past President Award by the NCBA, been lauded as 2014 Lawyer of the Year in NY Family Law by Best Lawyers in America, and

See RECIPIENT, Page 26
CHOOSING YOUR ARBITRATION PROVIDER SHOULDN’T BE ARBITRARY.

NAM voted #1 ADR Firm. Again.

The parties agree that any dispute or controversy arising out of, or in connection with, this Agreement or any alleged breach thereof, shall be resolved by final and binding arbitration administered by the American Arbitration Association NAM (National Arbitration and Mediation) in accordance with NAM’s Comprehensive Dispute Resolution Rules and Procedures...
An examination under oath (EUO) is an essential tool for insurers to identify possible fraudulent claims. Under section § 65-1.1(d) of the New York Codes, Rules and Regulations for Insurance Law, “[u]pon request by the Company, the eligible injured person (EIP) or that person’s assignee or representative shall: (a) submit to examinations under oath by any person named by the Company and subscribe the same.” If properly conducted, an EUO can give a solid foundation for an insurer’s denial of a no-fault benefits claim. The focus of this article will be three of the most common types of fraud discovered through an EUO, which include: false statements regarding prior injuries, staged accidents, and excessive or unnecessary treatment.

Before discussing insurance fraud as a basis of a denial, it is imperative to understand that the no-fault regulations allow only for a denial based on: (1) no coverage on the date of the accident; (2) circumstances of the accident not covered by no-fault; or (3) statutory exclusions pursuant to § 5103(b) of the Insurance Law. In the context of fraud, an insurer would issue a denial based on 11 NYCRR 65-3.8(e)(2), and would have to prove that the accident is not covered by no-fault. Therefore, in this discussion, insurance fraud is not the same as common law fraud.

In order to substantiate a denial based on a false statement, it must be established that the insured “willfully made a false and material statement under oath with the intention to defraud the insurer.” The U.S. Court of Appeals for the Second Circuit defined a material statement in Fine v. Bellefonte Underwriters Ins. Co. as “relevant and germane to the insurer’s investigation as it was then proceeding.” This means that only a statement that directly effects the outcome of the investigation is considered to be material. Harmless omissions or unintentional errors do not rise to the level of fraud.

Another common type of fraud is the insured incident’. This case, however, alleged injury [did] not arise out of an insured incident. The court found that the EUO testimony of its insured driver, in script of its insured driver, in which he testified that he had submitted an EUO transcript of its insured driver, in which he testified that he had picked up three passengers and had been driving them to their destination when they repeatedly asked him to give them money. After refusing to do so, he was pulled over by the police, who advised him that the passengers had reported that the vehicle had been in an accident with another vehicle, which had fled from the scene. The insured driver testified in his EUO that the vehicle had not been in an accident while the passengers had been in the car. The court found that the EUO testimony by defendant’s insured was sufficient to demonstrate, prima facie, that ‘the alleged injury [did] not arise out of an insured incident’. This case, however, is interesting in that it touches on two types of fraud. The first, of course is the staged accident aspect of the claim. The second leads to the third type of fraud—unnecessary or excessive treatment with medical providers.

Unlike the previous two types of fraud, this third type implicates the medical provider rather than the EIP. To combat this, many insurers have employed Special Investigation Units (SIU). In fact, it is mandated that insurance companies must have SIUs in place for the express purpose of detecting and investigating insurance fraud. The National Insurance Crime Bureau has compiled the following list of factors used by these SIUs in detecting medical fraud:

1. Three or more occupants in the claimant’s vehicle, all of whom report similar injuries;
2. All injuries are subjectively diagnosed, such as headaches, muscle spasms, traumas, and inability to sleep;
3. Minor accident produces major injury.

See FRAUD, Page 21
**Make the Most of the Nassau Academy of Law**

Winter is in full swing and it is cold outside. What better way to spend a frigid evening than to join other members of the Nassau County Bar Association to fulfill your CLE requirements? The Nassau Academy of Law (NAL), the educational arm of the Bar, is doing great things. Recently, the NAL held its annual Bridge-the-Gap weekend, where both newly admitted and experienced attorneys can fulfill their required CLE credits during full-day live programs at the Bar Association.

One common misconception about the Bridge-the-Gap program is that it is intended solely for newly admitted attorneys. Not so! Our program attracts many experienced attorneys as well. It is a great opportunity for the even the most seasoned practitioner to catch up on CLE credits, learn something new and reconnect and network with colleagues.

This year’s Bridge-the-Gap weekend was particularly special, as it honored the late Honorable Joseph Goldstein, a respected jurist in Nassau County for 20 years. Justice Goldstein began his law career in 1956 as an attorney in private practice. He then dedicated himself over the next few decades to public service. Beginning in 1963, Justice Goldstein worked as a chief law assistant to the Board of Judges of Nassau County Court, and in 1972, he began serving as chief clerk of the County Court.

Justice Goldstein was elected to the Nassau County District Court in 1979, and then to the State Supreme Court in 1986. Upon his retirement from the bench in 1999, he worked at the firm of Dollinger, Gonski & Grossman.

Among his other affiliations and accomplishments, Justice Goldstein was the first jurist dean of the NCBAs Continuing Legal Education and Technology Task Force committees. He was also a past president of the Jewish Lawyers Association and had been an adjunct associate professor of criminal justice at Long Island University’s C.W. Post campus. Justice Goldstein was a recipient of the NCBAs President’s Award.

In his memory, Judge Goldsteins family has generously offered to sponsor our annual Bridge-the-Gap weekend. It is their hope that future generations of attorneys will benefit from the educational opportunities that this event provides. We are grateful for this generous gift, which will help support the annual program for years to come.

Each year, the Nassau Academy of Law organizes and presents more than 180 substantive legal seminars in dozens of practice areas to educate attorneys on the newest developments in the law and to provide the practical skills to enable attorneys to most effectively represent their clients.

The Academy offers frequent and varied programs. For example, you could attend a presentation on Medicaid by the Real Property Committee in the afternoon, and then come back the same evening for a program on Animal Law. The centerpiece of this year’s dual structure enables all NCBAs members to take advantage of free unlimited live CLE, whether presented at a committee meeting, an Academy luncheon, or by the NAL.

Can’t come to the Bar? Up to 12 CLE credits through CD/DVD rental are also included for free in the new dual package. Even the Bridge-the-Gap weekend is free! Free CLE is a true gift that we offer to our attorney members, and it is also extended to our new paralegal and law firm administrator members. There has never been a better or more exciting time to be an NCBAs member.

I do encourage you to please pre-register for programs so the Academy can ensure seating for all who wish to attend. Give Jen or Patti a call at (516) 747-4464 and they will be happy to help you. Even if you don’t need the credit, come learn or to network.

Have a meal while you are here. Our dining room is open daily from 12 noon to 2:00 p.m. Our in-house caterer, Esquire Fine Dining, offers a wonderful buffet and a la carte menu. Not only is their food tasty but they are so accommodating to our members.

I would also like to extend warm congratulations to our newly installed judges, who were sworn in on January 25, 2019: Honorable Norman St. George, Justice of the Supreme Court, who we are excited to have as our new Administrative Judge; Honorable Helen Voutsinas, Justice of the Supreme Court; and Honorable Catherine Rizzo, Judge of the County Court.

Justice St. George is well equipped to take over as the Administrative Judge for Nassau County, as he has served as the supervising judge of the Nassau County District Court since 2013, and prior to that he served as a County Court judge. Justice St. George was a prosecutor in Nassau County and also spent many years in private practice before joining the bench in 2004. He is a graduate of Hofstra Law School.

Justice Voutsinas joins the Supreme Court bench after having served as a District Court judge for seven years. Prior to her judicial career, she was a principal law clerk to Judge Steven Jaeger from 2005 to 2010, the deputy majority counsel for the Nassau County Legislature in 2004, and an assistant town attorney for the Town of North Hempstead from 2002 to 2003. From 1999 to 2001, she worked in private practice. Justice Voutsinas is a graduate of St. John’s Law School.

Judge Rizzo embarks on her judicial career after having been the principal law clerk for Supreme Court Justice Thomas Feinman for 14 years. Prior to joining the court system, she worked in private practice for 10 years, litigating in both the state and federal courts. Judge Rizzo is a graduate of Quinnipiac School of Law.

Finally, I would like to thank Justice Thomas A. Adams for his leadership and dedicated service as Administrative Judge for Nassau County, and congratulate him on his new appointment as Presiding Justice of the Appellate Term, Ninth and Tenth Judicial Districts.

The Nassau County Bar Association is off to a great start in 2019. Stay warm in the cold weather!
Focus on FOIL: Informal and Integral Fact Finding

New York's Freedom of Information Law (FOIL), codified in the Public Officers Law, should become a device in one's litigation toolbelt. A FOIL request can be made to an agency before any litigation is commenced. Similar to the utility of the Federal HITECH Act, FOIL provides negligence attorneys, as well as any member of the public, standing to request agency records, whether it be records relating to police body cameras, sidewalks, wrongful convictions, traffic cameras or municipal violations, and, the attorney who represents a spurned FOIL petitioner in an Article 78 proceeding is allowed to request reasonable attorney's fees.

Negligence firms should create and utilize FOIL forms to expedite this informal discovery process. Forty years ago, the Court of Appeals set forth the approximate date when the FOIL rests on the premise that the "public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." The statute "imposes a broad duty on government to make its records available to the public." Significant remedies now exist for this tool that, usually without the need to litigate, provides the personal injury practitioner ample records and discovery.

The New York Public Officers Law mandates that within five business days of receiving a request for a record, an agency shall either (1) make the record available to the requestor; (2) deny the request in writing; or (3) furnish a written acknowledgment of the receipt of the request with a statement setting forth the approximate date when the request will be granted or denied. The New York State Legislature enacted FOIL to promote an open government and public accountability. FOIL rests on the premise that the "public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." The statute "imposes a broad duty on government to make its records available to the public." Significant remedies now exist for this tool that, usually without the need to litigate, provides the personal injury practitioner ample records and discovery.

The Public Officers Law generally mandates all agencies to make records available to the public, unless the material being sought falls within a statutory exemption. The agency bears the burden of withholding material responsive to a FOIL request. As such, "all government records are presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2)." To ensure maximum access to government records, courts are to narrowly construe the exemptions, and the agency retains the burden to demonstrate that the requested materials are actually exempt. Disclosure may be withheld "[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions." This incredible tool operates at all levels of agencies as defined by Public Officers Law § 86(3) and, especially on Long Island, can serve as a prelitigation discovery device when the lawsuit is not against the municipality.

Even when your personal injury lawsuit does not involve a municipal entity, novel uses of FOIL can result in discovery of otherwise privileged or protected material. Agency photographs and video may be obtained even if it was provided by private actors who wish to remain confidential or are not a party to the litigation. A police or municipal entity may obtain private surveillance video that can be the subject of a FOIL request and then certified by that entity. In some cases, one agency may be willing to provide agency records that would not otherwise be subject to disclosure under FOIL due to a statutory exemption. For example, if you are denied school video in a federal lawsuit, you may be able to avoid the FERPA issue by simply demanding the records from the police department.
Personal Injury/Workers’ Compensation Law

Nassau County Expedited Jury Trial

By Hon. R. Bruce Cozzens and Hon. Sharon M.J. Gianelli

The Nassau County Expedited Jury Trial (EJT) is an alternative way to provide parties with a jury trial in an accelerated time frame and without the expense of expert witnesses. The trials in a vast majority of cases are completed from jury selection until verdict in one day. Motor vehicle serious injury cases make up the primary source for these trials, although other tort cases have gone to trial. The process to proceed to an EJT begins with an agreement between plaintiff’s counsel, defendant’s counsel, and the insurance carrier. The parties will agree to a high-low contract. The defendant may also agree to a concession of liability in the appropriate case.

The trial proceeds in the normal manner; jury selection, opening statements, evidence, summations and jury charge. The parties are allocated on the record prior to the commencement of the trial as to the parameters of the trial. This process is not an arbitration and the rules of evidence apply. There are no motions for a directed verdict. Only the parties testify. Counsel shall submit their requests to charge at least two (2) days before trial. If requested, a settlement conference can be held before the commencement of trial. The parties shall provide six (6) packets consisting of their documentary evidence for the jury. They shall also provide a copy to their adversary prior to trial.

Upon scheduling of the EJT, counsel shall sign a stipulation stating the date for the trial (there are no adjournments), the parameters of the trial (concession of liability, high-low amounts), agreeing to waive medical testimony, and that the verdict is final.

The Rules for the Expedited Jury Trial are as follows:

1. There are no appeals or motions to set aside the verdict nor any other trial proceedings. All verdicts are final.
2. The plaintiff(s) will be allocated before trial to assure that the plaintiff(s) understands that he/she is entitled to a full trial but waives the right to present medical or any other expert witnesses and wishes to proceed in an expedited jury trial.
3. If the verdict is not capped within the insurance policy limits and there is no high-low agreement, the defendant(s) shall also be so allocated.
4. If the issue of the negligence of the defendant(s) is not conceded, all issues shall be determined in a full trial. There shall be no bifurcation.
5. Prior to trial, the parties shall each prepare trial exhibit books. These books shall include any documents the parties wish the jury to review during deliberations. Each party will present the book to the adversary prior to jury selection. Any objections to proposed exhibits shall be made to the Court prior to commencement of trial (either before or after jury selection). The books shall be given to the jury when deliberations commence. Any documents found inadmissible by the court shall be removed prior to the books being submitted to the jury.
6. Requests to charge shall be given to the Court on the business day prior to trial (Cozzens- via fax at 516-493-3056) and (Gianelli – via fax at 516-493-3366).
7. Jury selection shall commence on the morning of trial and be completed within ninety (90) minutes of commencement, subject to application to the Court for additional time prior to commencement of jury selection. Each side shall have three (3) peremptory challenges.
8. The parties may request one pre-trial conference to discuss admissibility of trial documents. Upon such request, the Court may assign the conference to a Court Referee.
9. If a verdict is not reached by 4:30 p.m., the deliberations shall be adjourned to the following business day.
10. If your client needs an interpreter, please notify the Court at least five (5) days prior to the trial date so that we may make the necessary arrangements.
11. Neither party shall enter judgment on the verdict.

If you wish to schedule an Expedited Jury Trial please contact Justice Cozzens in the Calendar Control Part (CCCP). The EJTs are conducted before Justices Cozzens and Gianelli.
In the State of New York, the law is unsettled as to whether a defense based on the failure of an eligible injured person and/or their assignee to appear at an Examination Under Oath (EUO) (or Independent Medical Examination [IME]), which is a violation of a condition precedent to coverage, has preclusive effect. The First Department caselaw holds that preclusion does not apply to such a defense, while the Second Department holds that it does. The Fourth Department recently sided with the Second Department, continuing the trend of narrowly interpreting the no-fault regulation. This narrow interpretation hinders the ability of insurance companies to curtail the ever-growing crime that is insurance fraud and places into question the meaning of what constitutes a “condition precedent to coverage” by mischaracterizing the issue as an “exception to coverage.”

On November 16, 2018, the Fourth Department held in Nationwide Affinity Ins. Co. of Am. v. Jamaica Wellness Med., P.C.1 that a defense based upon an eligible injured person and/or their assignee’s failure to appear for an EUO is subject to preclusion. Although the court conceded that Nationwide properly and timely noticed the EUO of the defendant and that the defendant failed to appear for the EUO, the court expanded Nationwide’s burden by requiring a showing that it timely denied the defendant’s claim. The court reasoned that a violation of a condition precedent to coverage, i.e., a failure to appear at an EUO, is akin to a policy exclusion, and thus falling out of the gambit of the exception to coverage as carved out in Central Gen. Hosp. v. Chubb Group of Ins. Cos.2 In determining whether a certain defense is subject to preclusion, New York courts must determine whether the defense is a “no-coverage” defense or whether it is an exception to coverage.3

It is commonly known that the purpose of the no-fault regulation is to provide a mechanism to ensure that individuals involved in motor vehicle accidents can pay for certain necessary expenses incurred as a result of the accident, regardless of fault.4 However, what might not be known is that the no-fault regulation was also established as part of an attempt to curtail the rampant insurance fraud which plagues New York State.5 For instance, the no-fault regulation requires insurance companies to maintain a Special Investigative Unit (SIU) in order to investigate claims for potential fraudulent activity.6 One of the most effective mechanisms utilized by SIU investigators to investigate and detect fraudulent claims is requesting that an eligible injured person or their assignee appear for an EUO.7

Under the no-fault regulations, as a condition precedent to coverage, an insurance company has the right to request additional verification of a claim in the form of an EUO.8 An insurance company will often request an EUO of an eligible injured person or their assignee when fraud is suspected.9 However, there are strict guidelines which an insurance company must follow when noticing the EUO, such as providing a venue that is most convenient to the party being examined and reimbursing necessary travel expenses incurred in complying with the request.10 Oftentimes an insurance company relies on the party notified for the EUO to comply with the request so that the insurance company may finalize its determination of whether coverage should be afforded. After notice has been given and prior to the EUO being held, the eligible injured person continues to receive treatment and the health care providers continue to submit claims seeking no-fault reimbursements for those services. The failure of an eligible injured party or their assignee to appear for an EUO often hinders the ability of the SIU investigator to distinguish between fraudulent claims from legitimate claims and results in a presumption of fraud. The issue then becomes a “no coverage” matter, thereby falling within the purview of Central Gen. Hosp. In other words, the failure of the party to appear renders the policy void, i.e., no coverage.11

The balance between expeditiously processing no-fault claims and preventing insurance fraud is a difficult one. A narrow interpretation of the no-fault regulation is important in maintaining the legislative intent to the prompt resolution of claims. However, as an EUO is a condition precedent to coverage, an insurance company should not be obligated to afford coverage where a party notified for an EUO fails to appear, raising the presumption of fraud, regardless of whether the insurance company timely denied the claims.

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3. Ins. Law §5101 et. seq.; 11 NYCRR §65 (Regulation 68-C).
5. Ins. Law §5101 et. seq.; 11 NYCRR §65 (Regulation 68-C).
6. See https://www.dls.ny.gov/insurance/e88_link.h.
7. Id. at 199.
8. Ins. Law §5101 et. seq.; 11 NYCRR §65 (Regulation 68-C).
10. Id. at 199.
11. Id. at 199.
One of the more confusing issues facing personal injury attorneys concerns what to do when it is time to settle the case and the action arises out of a work injury. Every personal injury attorney has heard the terms “Kelly” credit and “Burns” credit—but what do they really mean? And when do they apply?

Section 29 of the Workers’ Compensation Law governs the rights and obligations of injured workers and insurance carriers with respect to actions arising out of injuries caused by third party negligence. That section was meant to prevent a double recovery to the plaintiff by granting the workers compensation carrier a lien on the proceeds equal to the compensation benefits it has paid. The lien, however, is subordinate to a deduction for costs and attorney’s fees incurred by the plaintiff in effecting such recovery. By reducing its lien by the proportionate share of the litigation costs, the carrier has shared in the cost of the lawsuit, with the result that it has benefited by recovering that very lien. There is often, however, a secondary benefit to the workers compensation carrier. When an injured worker brings a personal injury action and recovers an amount greater than the amount of his or her workers’ compensation benefits, the compensation carrier also is entitled to a credit in the amount of the worker’s net recovery. In this way, the carrier has benefitted not only by recovering a lien for its past payments, but it also receives the value of future compensation payments that it otherwise would have been obligated to make.

The issue of this future benefit was addressed by the courts in Kelly vs. State Insurance Fund.1

Kelly
In Kelly, it was established that the carrier’s equitable share of the cost of litigation should be assessed as a percentage of the value of present as well as the value of estimated future benefits to the plaintiff, provided that amount is not so speculative that it cannot be estimated. In Kelly, the plaintiff was a widow whose husband had been killed in a work accident. The compensation benefit to her for the husband had been killed in a work accident. The compensation benefit to her for the husband’s death was determined to be a weekly payment to be made for the rest of her own life. The amount of her future compensation benefits could thus be reasonably determined, without speculation, with the use of left expectancy tables. The carrier, in calculating a lien reduction, would thus consider not only a percentage of the past payments made but that same percentage of the future payments it was no longer obligated to make. In this way, the “Kelly credit” was born, with the compensation carrier reducing its lien in contemplation of the future compensation benefits and thereafter receiving a full and immediate credit for the claimant’s net recovery. Should the amount of the future compensation exceed the third party proceeds, compensation would resume once the credit is exhausted.

Much has been made over the years about which future compensation benefits can be estimated and which are so speculative that they cannot. Certainly, death benefits, as in Kelly, are reasonably calculated with the use of life expectancy and actuarial tables. Similarly, a worker who is permanently and totally disabled has an expectation of receiving a certain amount every week for his or her life, the duration of which can be predicted. Challenges arose, however, as to the speculative nature of other forms of future compensation including cases of permanent but partial disability.

Burns
In Burns v Varriale,2 the workers’ compensation carrier suggested that since the workers’ compensation benefits arise. This disabled nor deceased the amount of his future benefits was not readily predictable. It was argued that the awards of a worker who is found to be permanently partially disabled were subject to change based upon factors including a fluctuation in that worker’s actual earnings should he return to employment within his partial disability restrictions. In the absence of a reliable method to calculate the present value of this future benefit the carrier’s equitable share of the litigation costs were not ascertainable at the time of settlement.

However, this did not mean that the plaintiff must wait indefinately for the carrier to pay its equitable share; another means of apportioning litigation costs was fashioned. Rather than consider the future benefit at the time of calculating the lien reduction, the court suggested that the carrier should be required to periodically pay its equitable share of attorney’s fees and costs incurred by the plaintiff as requiring that litigation costs be apportioned against all schedule loss of use awards as requiring that litigation costs apportioned against all schedule loss of use awards be either assigned at the time of the third-party settlement or not at all. When a schedule loss of use award has been determined prior to the resolution of the third-party action there is a fixed value upon which the litigation costs can be apportioned. However, the Court of Appeals determined that when, as in this situation, the present value of the schedule loss of use benefits is not finalized until after the time of the claimant’s third party settlement, the carrier must pay its fair share once the present value is determined.

What is finally clear is that whether “Kelly” or “Burns,” whether indemnity or medical, whether fixed benefits or speculative, Workers’ Compensation Law § 29 requires compensation carriers to bear their fair share of the litigation expenses. Even when it comes to “schedule loss awards.”

Terranova
That brings us to Terranova v. Lehr Constr. Co.3 In that case, Joseph Terranova, a construction foreman, injured his right knee on a raised floor tile on job site. He sought both workers’ compensation benefits and damages from the third-party contractor responsible for the defective tile. The compensation carrier provided consent to his third-party settlement and had, at the time, paid $21,495.99 in workers’ compensation payments. An issue still existed as to his permanent loss of function (schedule loss of use) which was being litigated by the Workers’ Compensation Board. Mr. Terranova was ultimately found to have a 10% schedule loss of use of the right leg that entitled him to 28.8 weeks of benefits, or an additional $9,960. The carrier argued that because his ultimate award was of a type that had an ascertainable present value, he was not entitled to the post-settlement apportionment of the litigation expenses contemplated for other types of awards.

Neither Kelly nor Burns contemplated the fact pattern in Terranova in which a third-party action was settled prior to a workers’ compensation award for “schedule loss of use.” A schedule loss award is a form of permanent partial disability, representing potential future loss of earnings based upon a loss of function from an extremity injury. The award is a fixed payment though it is premised upon a speculative future function. The Workers’ Compensation Board initially interpreted Kelly and Burns as requiring that litigation costs apportioned against all schedule loss of use awards be either assigned at the time of the third-party settlement or not at all. When a schedule loss of use award has been determined prior to the resolution of the third-party action there is a fixed value upon which the litigation costs can be apportioned. However, the Court of Appeals determined that when, as in this situation, the present value of the schedule loss of use benefits is not finalized until after the time of the claimant’s third party settlement, the carrier must pay its fair share once the present value is determined.

What is finally clear is that whether “Kelly” or “Burns,” whether indemnity or medical, whether fixed benefits or speculative, Workers’ Compensation Law § 29 requires compensation carriers to bear their fair share of the litigation expenses. Even when it comes to “schedule loss awards.”

2. 9 N.Y.3d 207 (2007).
Wearable Technologies: The New Discovery Tool

To successfully litigate or defend a case, it is imperative that attorneys keep up with the times and apprise themselves of all possible ways to obtain information. In the past, the trend has been to acquire social media records to uncover facts about the parties or the accident at issue. This had led attorneys to seek information that they previously would not have gotten through a deposition or paper discovery.

Recently, a new trend is on the rise as wearable technologies are making their way into the courtroom. Wearable technologies are electronic devices worn by individuals that essentially track their activities. This may include the number of steps taken, activity levels, time spent exercising or asleep, location, and changes in weight, heart rate, blood pressure or food intake throughout the day. These devices measure a host of other information that essentially provide a person’s mood.

Many individuals wear these devices in the form of a wrist watch that is often linked or synced to their cell phones. In understanding just how these devices work and the amount of information they collect, it is imperative an attorney use this information advantageously and become familiar with the data contained on any device owned by their client. Attorneys should be prepared if they receive a demand or a motion to compel production of data from such a device. Without question, the trend to use this information will become more and more prevalent.

One of the earliest documented personal injury cases where wearable technologies was used to show the impact of an accident occurred in Canada. In this instance, a young, female personal trainer was injured. Her attorneys used her Fitbit to show that her activity levels were less than average for someone her age and with her profession. The raw data from the device was analyzed by a third-party analytics company (i.e. Vivametric) that basically took the data from the individual’s device and compared it to that of the general population which also stored in a massive database. There are datasets used when performing the analytics on an individual’s wearable technologies that are weighted by age, gender, body mass index and waist circumference.

Previously, attorneys have been limited to the testimony of the plaintiffs themselves to prove that their subjective complaints and residuals were emanating from an accident. As such, very little counsel could do to support this testimony, besides notations in medical records, without creating day-in-the-life videos, surveilling the plaintiff or calling in additional witnesses. However, the increased popularity and use of these devices could make it easier to support one’s claims and will enable an attorney to generate a picture of what an individual’s day actually looks like following an accident or incident.

The question now becomes whether the courts will permit the data collected to be presented as evidence. Given the case law in this state, it is not clear how the courts will come down on this issue. Over the years, there has been an increase in cases where cellphone records and text messages have been deemed discoverable (or, at least subject to an in-camera review). Ironically, although cell phones have been in existence for quite some time, there still is no clear-cut rule regarding whether records pertaining to them are admissible or discoverable. An analysis of the case law shows that they are generally discoverable/admissible where there is a good-faith basis for believing a driver was using his or her cell phone at the time of or in close proximity to an accident. The same issues are bound to arise with wearable technologies. It certainly will take years of motion practice and the issue repeatedly being presented to the court for there to be any real guidance on whether the data from these devices will be deemed discoverable.

On January 25, 2019, the First Department, in the matter of Vasquez-Santos v. Matthew, in Manhattan, ruled that “data mining expert may scour a plaintiff's electronic device and email and social media accounts for evidence of physical activity following a motor vehicle accident,” giving us a little more insight as to how courts will handle these discovery issues. In Vasquez-Santos, the Court granted defendants’ motion to compel an expert to cast a wider dragnet through the plaintiff's electronic devices, which included not only social media accounts and emails but also tags, documents and deleted materials. In the Vasquez-Santo matter, the defense saw this as a victory but this may not always be the case. In fact, in many cases, a plaintiff’s attorney may look to use this information to substantiate the claims and injuries pled and to bolster the credibility of an injured plaintiff. Just as with any discovery tool, whether information from these devices should be used by a practitioner should be addressed on a case-by-case basis and both plaintiffs and defendants should educate themselves on how these platforms and devices work.

As a plaintiff’s attorney, if one is interested in using this data to show how a client has been affected, it certainly is best to treat this the same as any video, photograph or expert intended for use at the time of trial. First, it is important to advise your adversary of any intention to use this data, such as by exchanging it or doing a notice of intention to introduce it at trial. In addition, it is good practice to hire and consult with an analytics company early on so as to discuss what they need the attorney and the client to do. In addition, this will offer the opportunity to do an expert exchange and provide reasonable notice to the other side of your intention to present expert testimony from your client’s device.

Similarly, as defense counsel, there is an interest in obtaining this information from the plaintiff or claimant. A demand for same should be made done early on so that any objection or refusal to provide can be dealt with in a timely fashion. Further, obtaining same early on permits defendants to also consult with an analytics company and provide notice to their adversary of any experts they intend to call and to serve any necessary expert exchanges regarding the device.

Based on history with other types of electronic discovery/evidence, such as emails, laptops, iPads, cell phones, etc., accuracy and privacy will be the biggest concern with these wearable technologies. In response to this growing database of new evidence, changes have been made to various Rules that govern litigation.

For example, “Rule 34 now states that a party may request within the scope of Rule 26(b), any other party to produce ‘any designated documents or electronically stored information – including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations – stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into usable form.’” However, as set forth by Katherine E. Vinez, in an article written on this very issue, she appropriately points out, “issues of relevancy, accessibility, privacy, collecting/processing and costs will prevent a significant number of cases from using data as evidence.”

State Technology Law defines, “Electronic record” to mean “information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities.” Further Rule 4518 of the Civil Practice Law and Rules.

An electronic record, as defined in section three hundred two of state technology law, used or stored as such a memorandum or record shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility.

Based on this history, it is evident that the wearer of the device will have to authenticate the device and data and would have to testify that the data belongs to them, that device was worn by them, etc. In addition, it also seems necessary to have an expert from an analytics company testify as to the process of analyzing the data in order to have it properly admitted as evidence. Regardless of what side of the “v” one is on, there will certainly be challenges on the way to what may come to be an extremely useful discovery tool.

Deanne M. Caputo is a partner of the firm Sullivan Papain Block McGrath, Cannavo P.C., and handles personal injury matters including motor vehicle accidents, trip and slip, falls and dog bites, personal injury, construction accidents, etc.

2. Sarah Griffiths, Fitbit data is now being used in COURT. Wearable technology is set to revolutionize personal injury and accident claims, Mail Online, November 17, 2014.
3. Id.
4. Id.
7. See id.
8. See id.
10. Id.
11. CPLR 4518(a).

Personal Injury/Workers’ Compensation Law
The Electronic Health Record: How to Get It and What to Pay

Mary Anne Walling

In 2009 Congress passed the HITECH Act, which sought to promote the meaningful use of medical records in electronic format. This statute has not only impacted the format of the record (that is, an electronic or digital record as opposed to a paper record) but has significantly changed the nature of the record, the way it is created, its contents and volume. It also presents opportunities for attorneys seeking their clients’ records to save time and money—if they know how to use the statute’s provisions.

The Bad Old Days of Paper Medical Records

Before the advent of electronic health care records (EHR), the medical records, and in particular hospital records, were organized according to topic—progress notes, nursing notes, medication administration records, laboratory results, operative notes, radiology, etc. The record typically did not have redundancies of information, which impacted on the size of the record.

Access to the record and the cost of providing same in New York was governed by Public Health Law Sections 17 and 18. Before 1991 there was no maximum allowable cost. In 1991, the law was amended and stated that a health care provider was required to furnish a patient’s medical records upon an appropriate and authorized request, with certain exceptions, and that the cost could not exceed 75 cents per page when the request was made by a “qualified person.”

“Qualified person” under the statute includes the patient and their attorney, health care proxy, and the estate representative. If the patient has died and no estate representative has been appointed, then PHLL Section 18(3)(g) allows a distributee of the deceased patient to obtain the medical records upon presentation of a death certificate.

The statute set a maximum cost, but not a minimum. Until recently the standard charge assessed by most health care providers was 75 cents per page without consideration of the actual cost of the process.

A New Era of Medical Records— and Requests

The EHR, unlike the old paper record, is not a static document that it changes every time it is reviewed, even if nothing is added or removed from the contents. The same record printed out on one day can appear different the next time it is printed, with different page numbers and page breaks. The EHR can even be printed and copied digitally in different versions, depending on what is selected to print and the format of printing. In contrast, the old written medical record would not change in appearance or number of pages however many times it was copied.

The EHR now is many times larger in size, due to the features of the EHR program used. It may produce multiple records of the same note, and automatically populate into each note all prior laboratory and radiology results, vital signs, medications, and other history. As the record increases in size, there has actually been a resulting increase in the cost of obtaining the record—when billed by the page.

Records Retrievable Under the HITECH Act

The HITECH Act sets forth the rights of a patient (“the individual”) seeking their own records, and aims to remove barriers to such requests. The Act considers the medical record to be protected health information (PHI), and the health care provider to be the covered entity. The patient can request the records from a covered entity in one or more “designated record sets.”

A “designated record set” is a group of records maintained by or for a covered entity regarding the individual. It includes such information as: the medical and billing records about individuals; enrollment; payment; claims adjudication: case or medical management record systems maintained by or for a health plan; and information used in administrative action or proceeding.3

The regulations applying the Act allow covered entities to withhold certain types of records, including quality assessment or improvement records, patient safety activity records, and business planning. Also excluded from the Act are psychotherapy notes that are personal to the provider and maintained separate and apart from the rest of the patient’s records,2 and information that is compiled in reasonable anticipation of, or in the course of civil, criminal or administrative action or proceeding.2

Requesting Records Under the HITECH Act

The Act allows the patient and their personal representative to obtain the PHI. A personal representative includes a person with authority under State law to make health care decisions for the individual, such as a designated health care proxy, the individual’s guardian, or the estate representative.

The individual may, in lieu of receiving a copy of the record, seek a summary or explanation of their records. In that case, the individual must inform the provider in advance of the request to receive a summary or explanation, and agree to any fees that might be charged for same.

The covered entity may require that the request be in writing and supply its own release form, but only if the form does not create a barrier or unreasonably delay the individual in obtaining his PHI. Such barriers have been described by the DHHS as the doctor’s office requiring that the patient come to the office with proof of identity when the patient requests the records sent to the home, or to access the records via an online portal, or to mail the request. The Act encourages the covered entities to offer individuals multiple options for requesting access to records.

A HIPAA authorization is not required, nor is notation or verification of the individual’s signature. A letter by the patient stating the specific records requested, the format in which they should be provided, to whom they should be sent and in what form (e-mail, paper, CD or USB drive). It is best that the letter be simple. It should not be an attorney letterhead or sent with an attorney’s cover letter. It may be faxed by the attorney, however, on behalf of a client.

The patient may request the records in paper or electronic format. If an individual requests records already maintained in an electronic format, the provider must give access in that format; only if the individual declines the electronic format can the provider satisfy the request with a readable hard copy. Where the record is maintained only on paper, the covered entity is still required to provide it as an electronic copy but only if it is readily producible electronically, that is, it can be scanned into an electronic form. If not, then a readable alternative electronic or hard-copy format can be agreed upon.

Transmission or transfer can be done by a digital method when requested. A covered entity is not required or expected to tolerate unacceptable risks to the security of the record when it has left its system. However, e-mail and mail

Sample Letter: Records to Attorney

[Date] [Provider Name] [Address]

Re: [Patient Name] [Patient Address] DOB:

Date of Admissions: ENTIRE RECORD

Dear Sir/Madam:

I am the above-named person (or wife, next of kin for the deceased, representative of the estate or attorney-in-fact of the identified above person). Pursuant to the HITECH Act, I am requesting, in an electronic format only, a copy of my (or the above person’s) records maintained by your facility. Please provide ALL records maintained.

I am not requesting paper copies. Do not bill me for paper copies. The HITECH Act and its regulations do not allow you to bill for paper copies when an electronic copy has been requested. According to the Federal Office of Civil Rights website (Frequently Asked Questions), the HITECH Act permits me to direct you to send the records to a third party, including any attorney’s office.

Please forward the records directly to me: c/o [Attorney Name & Address]

Any attorney’s office.

As you are aware, the HITECH Act requires you to act on my request within 30 days. Thank you for your anticipated compliance, prompt attention and cooperation.

Very truly yours,

[Signature]

Sample Letter: Records to Client

[Date] [Provider Name] [Address]

Re: [Patient Name] [Patient Address] DOB:

Date of Admissions: ENTIRE RECORD

Dear Sir/Madam:

I am the above named person. Pursuant to the HITECH Act, I am requesting, in an electronic format only, a color copy of the entirety of my records maintained by your facility. I am not requesting paper copies. Do not bill me for paper copies. The HITECH Act and its regulations do not allow you to bill for paper copies when an electronic copy has been requested. Please contact me with the amount you intend to charge before sending the records. You can contact me by telephone at ________ and e-mail at ________.

As you are aware, the HITECH Act requires you to act on my request within 30 days. Thank you for your anticipated compliance, prompt attention and cooperation.

Very truly yours,

[Signature]
Companies such as Uber, Lyft, Via, and Juno, just to name a few, are taking over the transportation world. Just by sheer numbers, and the numerous family and friends using rideshare applications, it was clear that taxi and cab companies are becoming a thing of the past, not too far behind cassette tapes and CDs. Now the issue becomes how has our legal world, mainly in personal injury and workers’ compensation, changed with the rise of these applications.

To start at the basics, what is a ride-share application? Essentially, it is the 21st Century’s version of the taxi company, driven by a smart phone or computer program. A consumer can create an account with the company on their specific app, and using GPS on their smart phone can book a ride. With a few clicks, your ride is on its way to pick you up to take you to your destination. The whole transaction—booking the ride, mapping the route, payment, and now tipping the driver—is handled on the phone application. There is practically no exchange with the driver at all.

To appreciate the legal ramifications of this type of business, it is important to understand the basics of being a driver for a ridesharing company. Unlike many other states, New York has taken some affirmative steps to protect drivers. The State requires that rideshare applications provide workers compensation coverage to drivers through the Black Car Fund. While the cost of the coverage is taken out of the trip fare, the coverage begins when the driver logs into the application, thus becoming available for rides. The oddity of this situation is that drivers are considered independent contractors and receive 1099 forms, but are covered as employees for workers’ compensation purposes. Further confusing matters is that drivers traditionally use their own cars and control their hours and schedule, but the rideshare platform controls hiring, pricing and labor standards.

Once the application is activated, workers’ compensation coverage is as well, whether on a ride or waiting for one. Thus, no-fault coverage is now a third-party benefit, and workers’ compensation becomes primary. When the driver de-activates or logs off the application, their workers compensation benefits cease and no-fault becomes primary again. Thus, when a driver is involved in an accident and seeks legal advice, it is important to have a thorough understanding of whether or not they were logged on to the rideshare application at the time of the accident.

Now there are some pretty confusing circumstances that can arise when it comes to rideshare drivers. For instance, consider a livery car leased to a driver who operates for an independent livery base during certain hours (for this example we will assume the base is covered the Independent Livery Drivers Benefit Fund, which is not covered by workers’ compensation). When not logged into the independent livery base, that driver can log on to a rideshare app and do rides for the rideshare company. At that point, the driver is covered by workers’ compensation. Thus, the same driver could possibly be covered by workers’ compensation for certain hours of their day, but not others.

I just want to briefly touch upon the aforementioned Independent Livery Drivers Benefit Fund. Established in 2016 and codified at 12 NYCRR Part 309, the ILDBF aims to protect livery car drivers should they suffer grave injury or death in the course of employment. The ILDBF does not provide medical or indemnity benefits like those of workers’ compensation, unless a driver falls into one of these circumstances:

1. Death in the course of providing covered services;
2. Injuries resulting from a crime committed against the driver (as documented on a police report);
3. Injuries resulting in:
   a. amputation or physical loss of an arm, leg, hand, foot, multiple fingers, index finger, multiple toes, ear or nose;
   b. paraplegia or quadriplegia; or
   c. total and permanent blindness or deafness.

Thus, it is plausible to have drivers driving certain hours for an independent livery base and then using the same vehicle when they are off that base to work for a rideshare company. The entitlement to benefits in these two situations is greatly different, and as such a determination of who the driver is working...
When the U.S. Supreme Court issued its 2017 decision in Endrew F., it was hailed as an important step forward for students receiving special education. In fact, however, at least in New York, Endrew F. appears to have had little effect on the courts’ analysis as to whether a school district has provided a special education student with a free, appropriate public education (FAPE), as required by the applicable federal statute, the Individuals with Disabilities Education Act (IDEA).2

Before Endrew F., it was well established that a school district had to provide a special education student with an individualized educational program (IEP) that was “appropriate,” meaning that it was “reasonably calculated to enable the child to receive educational benefits.”3 In Endrew F., the U.S. Supreme Court purported to give some guidance on what that meant, holding that “[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.”4 IEP turns on the unique circumstances holding that “[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.”5 Hence, the Court found that “it cannot be the case that the [IDEA] typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than de minimis progress for those who cannot.”6 Rather, the Court held, “the IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”7 Still, however, the IEP must only be “reasonable,” not “ideal.”8 Further, an educational program need not include “grade level advancement” if such progress is not “a reasonable prospect” for the particular student. Moreover, in making the assessment as to whether an IEP passes muster, the U.S. Supreme Court reminded the lower courts that they are not permitted “to substitute their own notions of sound educational policy for those of the school authorities which they review.”9

While the decision in Endrew F. was lauded as a watershed moment for special education students, in fact, it failed to change the rules applicable to school districts when crafting an IEP, and, therefore, did nothing to change the rules applicable to school districts. As a practical matter, this means that the courts remain deferential to school districts' Committee on Special Education (CSE), independent hearing officers (IHOs) and the New York State Commissioner of Education (sometimes referred to as the “State Review Officer” or “SRO”) despite the U.S. Supreme Court's decision in Endrew F. Although parents have relied on Endrew F. to claim that IEPs designed for their special education children are not “appropriate” as their children have not made the necessary advancement, since Endrew F., the courts in the Second Circuit still remain reluctant to find IEPs deficient on that basis.10 These and other cases decided after Endrew F. demonstrate that it remains an uphill battle for parents to demonstrate that a school district has denied a child FAPE. An IEP is likely to be deemed to provide FAPE as long as the school district can show that it was created after due consideration of all relevant evidence concerning the student's functioning and needs. Furthermore, because IEPs continue to be judged prospectively, i.e., on the basis of what is known about the student at the time it is crafted, a parent may not challenge an IEP based upon speculation that, once implemented, an IEP may not, in fact, meet a student’s needs. Rather, it remains the case that an IEP may have to be implemented, and actually shown to be inappropriate (meaning that a child fails to progress, or even keep up with the curriculum) before a court is willing to find that an IEP deprived a student of FAPE.11 Thus, while under Endrew F. more than de minimis progress must be the goal of an IEP, that case seems to have had no practical effect in New York. Accordingly, a parent who has concerns that the IEP developed for his child at the CSE meeting will not provide FAPE should ensure that a record is made at the CSE meeting regarding (a) what evaluations were performed, (b) whether the CSE has considered a student’s current level of functioning and needs, and (c) what evidence the CSE considered (or failed to consider) when developing the IEP. Only if the parent can demonstrate that the CSE, IHO and/or SRO was less than thorough in determining what is “appropriate” for the student is that parent likely to be successful in any court challenge to an IEP.12

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2. 20 U.S.C. § 1400 et seq.
4. 137 S. Ct. at 1001.
5. Id. at 1001.
6. Id. at 1000-1001.
7. Id. at 1001.
8. Id. at 999.
9. Id. at 1001 (citation omitted).
11. See, e.g., J.R. v. New York City Dep’t of Educ., 2018 WL 4644086 (2d Cir. Sept. 27, 2018) (summary order) (although parents claimed that IEP was not reasonably calculated to confer educational benefits, the Second Circuit rejected that contention, finding it owed the state deference in that regard and found student with speech and language impairments received FAPE), G.E., 2018 WL 4656983, at *4 (rejecting parents’ claim that school district denied student with autism FAPE by failing to conduct a functional behavioral analysis, implement a behavior intervention plan, or identify temporary transitional support services to new classroom teacher, and allegedly predetermined what was in the IEP, developed an IEP that recommended an inappropriate program and goals, failed to provide a 1:1 aide, prescribe the appropriate teaching methodology, or adequately address the student’s sensory and management needs; impartial hearing officer and SRO applied the proper legal standard).
12. See, e.g., M.E. and T.E., individually and on behalf of J.E. v. New York City Dep’t of Educ., 2018 WL 582601 (S.D.N.Y. Jan. 26, 2018) (parents failed to demonstrate that the IEP developed by the CSE was inadequate and the district’s proposed placement was insufficient to meet their child’s sensory needs; SRO’s decision was thorough and well-reasoned); J.P., on behalf of their Son, J.P. v. City of New York Dep’t of Educ., 717 Fed. Appx. 50, 52 (2d Cir. 2017) (parents did not establish that IEP was procedurally or substantively inadequate; at the SRO considered the record as a whole and explicitly referred to materials that J.P.’s parents now suggest were ignored; “and the CSE heard [the parents’] objections, considered materials they submitted, and convened a second meeting to address their objections and explain its reasoning”).
13. See S.B. and S.B., Individually and on Behalf of C.B. v. New York City Dep’t of Educ., 2017 WL 4326902, at *15 (E.D.N.Y., Sept. 28, 2017) (parents demonstrated that school district failed to timely reevaluate student in her areas of need and failed to review her most recent evaluations during the IEP meeting; decisions of the CSE and SRO were relied by a preponderance of the objective evidence and neither reconciled inconsistencies nor acknowledged their existence, and, thus, “[t]he IEP was not designed to enable C.B. to make progress in light of her educational needs”).
If you are a young attorney (and at my age, that comes about 90% of the lawyer population I come across) and you are about to try a personal injury case, the likelihood is that at some point in the trial, typically during the damages phase, you will be calling an expert witness to establish an important element of your case. This column will discuss what I call the "Big Three" of expert testimony — cases that every trial lawyer must be familiar with before attempting to introduce such testimony.

Before we get into the cases, there are a few practical tips to keep in mind. First, always remember that if you think you are going to have a problem getting any testimony into evidence, I strongly recommend that you request a conference with the court before the jury is picked to resolve the issue. A written motion in limine may ultimately be required, but if you do it for a conference first, I strongly suggest that when you come into court to argue an evidentiary issue, do not just be familiar with the holding of a case; you must come prepared with the facts of the case as well.

People v. Sugden

The first case is People v. Sugden, which created what has come to be known as the "professional liability rule." This case was an appeal from a conviction for murder after a jury trial in Suffolk County. The primary issue on appeal was whether expert testimony may be allowed which places the witness on an out-of-court written statement of a witness who had testified at the trial. The facts in the case are as follows.

The defendant, who was twenty years old at the time of trial, was a member of a group that called themselves "God's Gifts" and were known for hanging around a certain Huntington-aton-area shopping center. Defendant and another individual named Mace were planning on robbing an acquaintance, Lawrence Fitzgerald, who was thirteen years old and was home at the time, having been suspended from school. After arriving at the home, the three males discussed getting high on glue and Fitzgerald was dispatched to go make the purchase.

Meanwhile, defendant called another friend, Patricia Berglund, and asked her to come to Fitzgerald's home with her car. Berglund did so and brought along her daughter and another friend, Rosemary Knox. She then picked up defendant, Mace, Fitzgerald, and another boy, Clifford Graebe, and proceeded to drive all of them to a partially wooded area in Huntington. When they arrived at the location, defendant and Berglund walked Fitzgerald down a path where defendant struck Fitzgerald in the head with a cement block. Although Fitzgerald was hurt, he was actively resisting, which led defendant to stab him several times before hitting him again on the head with the cement block. Defendant, Berglund, and Graebe covered the body with brush and returned to the car where defendant told the others he had killed Fitzgerald. They then left in Berglund's vehicle and eventually went their separate ways.

A police officer that was subsequently developed for this crime was that defendant wanted to find out if he was capable of killing another human being, as he was contemplating a criminal future and the release of Berglund run to see if he was up to it. The body was found soon after the investigation, which led to Knox, who identified the victim as being the defendant, who was in jail on an unrelated charge at that point in time, was questioned, and gave a full confession.

At trial, legal insanity was the only defense proffered. The prosecution offered that the time that he killed Fitzgerald, he was high on mescaline and believed that he was killing a giant grasshopper. A defense psychiatrist testified that the defendant lacked responsibility. The People then offered the testimony of psychiatrist Dr. Harold Zolan in response, who stated that defendant was legally sane. Dr. Zolan based his opinion, in part, on the written statement that Berglund had given to police; however, he had never interviewed her personally. In addition, it is crucial to also understand that of the four involved (Berglund, Knox, Graebe, and Mace), only Mace did not testify.

Dr. Zolan testified at trial that he interviewed defendant for three hours, reviewed a psychologist's report of him from an elevated psychiatric hospital, read medical reports, his written confession, and the written confessions of the other four involved. He also admitted that he had relied on Berglund's written statement that she gave to police. However, it is worth noting that Berglund did testify at trial and was cross-examined extensively. Defense counsel moved to strike Dr. Zolan's testimony because of the reliance on the out-of-court statement.

On appeal, the Court of Appeals held that allowing an expert to base, in part, his opinion on otherwise legally incompetent hearsay of a person he has not interviewed is conditioned on the hearsay declarant testifying at trial. The court went on further to state that if "[t]he expert's opinion is limited to that of the expert, his testimony, albeit of out-of-court origin, if it is of a kind accepted in the profession as reliable in forming a professional opinion." Following the aftermath of the Sugden decision in People v. Goldstein, which was New York's first reversal based upon the eponymous Crawford v. Washington decision by the United States Supreme Court, Goldstein, for those not familiar, was the man who threw Kendra Webdale under a New York City subway train, killing her. While his first trial ended in a hung jury, at his second trial, the People called a psychiatrist in opposition to Goldstein's plea of insanity. That psychiatrist testified that, in forming his opinion, she interviewed several of his co-workers and other professionals, and she testified as to what some of those individuals told her during those interviews. The trial judge admitted this testimony as being of a kind accepted in the profession. However, contrary to Crawford in violation of Crawford, some of those individuals interviewed by the psychiatrist did not testify and thus could not offer any testimony into evidence. The Court of Appeals reversed his conviction and ordered a new trial.

Hambusch v. New York City Transit Authority

The second case of my Big Three is Hambusch v. New York City Transit Authority. This case has been used as an example beyond the threshold for expert opinion evidence. The case involved a profession where the expert had explained the professional methodology by which a life care plan is developed, including a review of the medical records, the recommendations made by the expert, the preparation of cost figures, the patient's identity, and the individual's injuries and treatment, the recommendations of his treatment providers, and assessing his level of independence in light of his injuries. She also reviewed the life care plan with plaintiff's treating physician. The expert also testified that the information upon which she relied was of the type commonly relied on in her profession and that no one part of any of the information she gathered determined her conclusion.

The Fourth Department ultimately held that although the expert's discussion with the treating physician provided a basis for several components of plaintiff's future medical needs and the expert acknowledged the extent of her reliance upon those hearsay statements, the record established that the expert had a sufficient basis for her opinion of which the hearsay statements of the treating physician were “but a link in the chain of the data upon which [she] relied.”

There is a lot to consider and a lot to be aware of. There are, of course, many other landmark cases on this topic that a personal injury attorney needs to be aware of. If you have any questions about this subject, Bradshaw comes to mind. Nonetheless, I think one would do well to use the above three cases as a starting-off point. Read them, Shepardize them, and begin to build a file of these types of cases that you can go to when you come across a professional reliability issue. As always, Professor Hutter's two columns on this topic in the New York Law Journal in August and October of this year are very instructive. My personal go-to evi-
**Program Calendar**

**February 13, 2019**
Dean's Hour: Getting Your Name out There: Writing for Bar Journals
*With the NCBA Publications Committee*
Sign-in begins 12:30 p.m.; Program 1:00-2:00 p.m.
Credits offered: 1 credit in professional practice or skills

**February 14, 2019**
Dean’s Hour: Breaking Up is Hard to Do — An Examination of Recent Matrimonial Law Cases
*With the NCBA Matrimonial Law Committee*
Sign-in begins 12:30 p.m.; Program 1:00-2:00 p.m.
Credits offered: 1 credit in professional practice

**February 26, 2019**
Creating and Maintaining a Successful Practice
*With the NCBA Lawyers Assistance Program and the NCBA General, Solo and Small Practice Law Committee*
Program sponsored by NCBA Corporate Partners
Dime Community Bank, Tradition Title Agency, Inc., and Champion Office Suites
Sign-in begins at 5:00 p.m.; Program 5:30-8:30 p.m.
Credits offered: 3 credits in ethics

**February 27, 2019**
Dean’s Hour: Ethics Challenges in the Courtroom
*With the NCBA Ethics Committee and Nassau County Assigned Counsel Defenders Plan, Inc.*
Program sponsored by NCBA Corporate Partner Champion Office Suites
Sign-in begins 12:30 p.m.; Program 1:00-2:00 p.m.
Credits offered: 1 credit in ethics

**February 28, 2019**
Mediation Matters: Trends, Successes and Disappointments in Court-Sanctioned Matters
*With the NCBA Federal Courts Committee, NCBA Commercial Litigation Committee and NCBA Alternative Dispute Resolution Committee*
Sign-in begins at 5:30 p.m.; Program 6:00-8:00 p.m.
Credits offered: 2 credits in professional practice

**February 28, 2019**
Dean’s Hour: The Life and Work of Hon. Robert L. Carter and U.S. District Court Judge, Southern District of New York
*With the NCBA Diversity and Inclusion Committee*
Program sponsored by NCBA Corporate Partner Dime Community Bank, Tradition Title Agency, Inc., and Champion Office Suites
Sign-in begins 12:30 p.m.; Program 1:00-2:00 p.m.
Credits offered: 1 credit in professional practice or skills

**March 4, 2019**
Dean's Hour: Federal Sentencing, Prosecutorial Power and My Cousin Vinny
*With the NCBA Criminal Court Law and Procedure Committee*
Program sponsored by NCBA Corporate Partner Dime Community Bank, Tradition Title Agency, Inc., and Champion Office Suites
Sign-in begins 12:30 p.m.; Program 1:00-2:00 p.m.
Credits offered: 1 credit in professional practice

**March 5, 2019**
Life and Estate Planning for the Modern Family
*With the NCBA LGBTQ Committee*
Program sponsored by NCBA Corporate Partner Tradition Title Agency, Inc.
Sign-in begins 5:00 p.m.; Program 5:30-7:30 p.m.
Credits offered: 1 credit in professional practice and 1 credit in diversity, inclusion and elimination of bias

**March 7, 2019**
Dean’s Hour: The Domino Theory — Proving Proximate Cause at Trial
*With the NCBA Plaintiff’s Personal Injury Committee*
Program sponsored by NCBA Corporate Partner Dime Community Bank, Tradition Title Agency, Inc., and Champion Office Suites
Sign-in begins 12:30 p.m.; Program 1:00 p.m.-2:00 p.m.
Credits offered: 1 credit in professional practice or skills
**Program is free to Nassau 18B panelists**

Credits offered: 1 credit in ethics

Sign-in begins 12:30 p.m.; Program 1:00-2:00 p.m.

**Champion Office Suites**

Program sponsored by NCBA Corporate Partner County Assigned Counsel Defenders Plan, Inc.

February 27, 2019

Sign-in begins at 5:00 p.m.; Program 5:30-8:30 p.m.

Program sponsored by NCBA Corporate Partners Dime Community Bank, Tradition Title Agency, Inc., and Champion Office Suites

NCBA General, Solo and Small Practice Law Committee

With the NCBA Lawyers Assistance Program and the NCBA Matrimonial Law Committee

Examination of Recent Matrimonial Law Cases

February 14, 2019

Dean’s Hour: Breaking Up is Hard to Do —

An Examination of Recent Matrimonial Law Cases

Dean’s Hour: Getting Your Name out There:

February 13, 2019

Writing for Bar Journals

Dean’s Hour: The Life and Work of Hon. Robert L. Carter, Civil Rights Activist

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Dean’s Hour: Breaking Up is Hard to Do —

An Examination of Recent Matrimonial Law Cases

Dean’s Hour: The Life and Work of Hon. Robert L. Carter, Civil Rights Activist

NCBA General and Solo Practice Law Committee

With the NCBA Diversity and Inclusion Committee

February 26, 2019

Creating and Maintaining a Successful Practice

March 4, 2019

Federal Sentencing, Prosecutorial Power and Some Wisdom from Alan Jenkins, President and Co-Founder of The Opportunity Agenda and former Federal Prosecutor

NCBA General and Solo Practice Law Committee

With the NCBA Prosecutorial Power and Accountability Committee

February 28, 2019

Life and Estate Planning for the Modern Family

March 5, 2019

Life and Estate Planning for the Modern Family

March 7, 2019

Domino Theory

CD/DVD ORDER FORM THOSE WISHING TO PURCHASE TITLES

CD/DVD ORDER TOTAL:

TOTAL ENCLOSED

Name: 

Address: 

City/State/Zip: 

Credit Card Acct. #: 

Billing zip for credit card: 

Security Code: 

Exp. Date: 

Signature: 

PLEASE ALLOW 3-4 WEEKS FOR ORDER PROCESSING
Jazz, Jimmy and Jurisprudence

Anatomy of a Murder (1959)

Review by Rudy Carmenaty

Long before Law & Order became addictive viewing, Otto Preminger’s Anatomy of a Murder (1959) set the standard for film portrayals of the American legal system. Starring James Stewart, the film was adapted from the best-selling novel by Michigan Supreme Court Justice John Voelker.1

Movie Based on a Real Trial

People v. Peterson (1952),2 in which Justice Voelker had served as defense counsel, is the basis for both novel and film. Voelker claimed Army Lt. Coleman’s “insanity” was an “irresistible impulse” to kill bar owner Mike Chenowith. Coleman’s “insanity” was apparently triggered after learning Chenowith had raped his wife. Acquitted by the jury, Peterson was a free man after spending a month in the state asylum.4

Authentic Characters

Watching the movie, what first catches the eye, or rather the ear, is Duke Ellington’s pulsating jazz sound track. The sound track perfectly accentuates the total absence of moral clarity that permeates the story being told. The album earned Ellington three Grammy’s and the score was the first by an African-American composer in a major American film.6

During filming, Ellington joined director Otto Preminger on location in Michigan’s Upper Peninsula. He even acts as “Pie-Eye,” a jazz musician who is Jimmy Stewart’s buddy. But Ellington wasn’t the only non-professional actor in the cast. Playing the role of Judge Weaver, the presiding judge, was Joseph Welsh. The famed Boston attorney had come to public prominence during the Army-McCarthy hearings five years earlier. It was Welsh, who having skillfully cross-examined Roy Cohn, uttered the immortal line, “[h]ave you no sense of decency, sir, at long last?” when Senator Joe McCarthy rushed to Cohn’s defense.7

Anatomy of a Murder has an air of authenticity that imbues every scene, informs virtually every line of dialogue and initiates every action taken by the characters.8 Preminger shot the film using local townpeople as extras and real locales, including the Marquette County Court House where Peterson stood trial.

A Lawyer and a Maverick

Preminger himself had studied law in his native Vienna and his father at one time was the Attorney General for the Austro-Hungarian Empire.9 Preminger always acknowledged the law’s profound impact: “I feel very grateful to my father, because the philosophy of law gives you a certain outlook on life.” A maverick movie-maker, he made a name for himself by challenging the motion picture production code which then strictly regulated film content. Preminger felt controversy would generate box-office receipts, but he was never vulgar or exploitative with his material.

A Legal Challenge to Censorship

Frank for its time, Anatomy of a Murder was considered quite risqué. The script includes such provocative terms as “parties,” “rape,” “sperm,” “spermato genesis,” “sexual climax,” “intercourse,” “completion” and “contraceptive.” These words were rendered even more shocking since they were being spoken by America’s most beloved actor Jimmy Stewart.10

Preminger not only courted controversy, but also frequently found himself in court. Upon Anatomy of a Murder’s initial release, Preminger and Columbia Pictures successfully sued the City of Chicago resulting in a court overturning a determination by the local police censor board. The authorities had complained about the use of these then risqué words in the film.11

Chapter 155 of the City’s Municipal Code required the commissioner of police to issue a permit prior to a motion picture’s exhibition.12 The statute specifically provided for refusal if a film “is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens.”13 The permit was denied.

U.S. District Judge Julius Minor, after screening the film, ruled that the movie didn’t depict “anything that could reasonably be termed obscene or corruptive to public morals.”14 The judge ordered the permit to be issued, enjoining the authorities “from preventing exhibition of Anatomy of a Murder in the City of Chicago.”15

Another Litigation

Ever litigious, Preminger later brought an action to stop Columbia Pictures and Screen Gems, the studio’s television subsidiary, from distributing Anatomy of a Murder over broadcast television. Preminger objected to scenes being deleted from the TV presentation and the interruption of the movie for commercials.

Preminger claimed that Screen Gems detracted from the film’s artistic merit, damaged his reputation as a film-maker, cheapened if not destroyed the film’s commercial value, and falsely represented to the public that the movie was a “Preminger film.”16 Citing industry practice and the terms of the contract between the parties, the judge ruled against him on all counts.

A Man of Principles

Often referred to as “Otto the Terrible,” Preminger had a well-deserved reputation for being autocratic and overbearing.17 Yet Preminger’s pursuit of principle had broader ramifications. For instance, he refused to have the film shown in South Africa because an objection was raised to a scene where Jimmy Stewart and Duke Ellington are playing piano side-by-side.18

Such camaraderie between individuals of different races was forbidden under Apartheid. A South African film agent wanted the scene cut so the film could be shown theatrically.19 Preminger was adamant: “[m]y movie is not a South African film. It’s an American one. You either run the picture as it is, or you don’t run it all.”20

The Story

Jimmy Stewart’s Paul Beigler is a small-town prosecutor who has recently been voted out of office. Not content with his neighbors having shown him...
drives over to the Thunder Bay Inn and tells him she was beaten and raped by bar
sively possessive of his wife Laura (Lee Beigler) is ever so careful with his and coaching him into a story that will get
(last name) Beigler navigates a fine with Frank Capra.
the self-sacrificing George Bailey that the cry from the idealistic Jefferson Smith or
instinct for the jugular ways belie a razor-sharp mind with an
the big city of Lansing.” But his folksy can against this brilliant prosecutor from
country lawyer trying to do the best I 

Continued From Page 16

ANATOMY ...

Beigler stands in stark contrast to his slick adversary Claude Dancer (George C. Scott), an assistant attorney general sent from the state capital. At one point, Beigler wryly describes himself as “a humble country lawyer trying to do the best I can against this brilliant prosecutor from the big city of Lansing.” But his folksy ways belie a razor-sharp mind with an instinct for the jugular. Beigler is a far cry from the idealistic Jefferson Smith or the self-sacrificing George Bailey that the public fondly recalls from Stewart’s films with Frank Capra.

Upon meeting Lt. Fredrick Manion (Ben Gazzara), Beigler navigates a fine line between preparing his client’s defense and coaching him into a story that will get him off. Beigler is ever so careful with his words as he is dealing with an unsympathetic client who could well be guilty. Manion is surly in his demeanor, excessively possessive of his wife Laura (Lee Remick) and prone to violence. After she tells him she was beaten and raped by bar owner Barney Quill, he loads his Luger, drives over to the Thunder Bay Inn and shoots him repeatedly.

Laura, for her part, is beguiling and flirtatious. Laura was drinking with Quill on the fateful night and willingly accepted a ride home in his car. While Manion sits in jail, Beigler catches her partying with some soldiers at a jazz club. In the context of 1940’s America, Laura’s actions cast some doubt on her veracity which Dancer will exploit during cross-examination.

Laura claims she loves Manion but she is also very much afraid of him. A police administrator polygraph supports her story about the rape, but she is, by every indication, a woman trapped in an abusive relationship. Is she lying? Was she seeing Quill on the side? Was she trying to fix Manion in a jealous rage? The psychiatrist who evaluates Manion concludes when he shot Quill, he was temporarily insane being in the grip of dissociative reaction or irresistible impulse. Beigler is uncertain if a Michigan court will accept this defense. Then he finds an obscure 1886 precedent, People v. Darfeur.22 In this case, the Michigan Supreme Court ruled that “the fact that the one accused of committing a crime may have been able to comprehend the nature and consequences of his act, and to know that it was wrong, nevertheless if he was forced to its execution by an impulse which he was powerless control … he will be excused.”

The Trial

Beigler, as Voelker did in real-life, pleads temporary insanity on behalf of his client. Both sides take nothing for granted during the trial, employing just about every trick a lawyer can get away with. The audience, never sure just who or what to believe, is taken step-by-step through the paces of a first-degree murder case from the qualification of the jurors to the final verdict.

The trial’s pivotal scene takes place when Dancer cross-examines last-minute defense witness Mary Pilant (Kathryn Grant). Dancer, an experienced though overly aggressive court-room advocate, then breaks the cardinal rule of trial practice: never ask a question unless you’re absolutely certain you know the answer. Not to give away too much, but the jury’s verdict seems to turn on Mary’s answer. But the question remains, will Manion get away with murder because of Beigler’s theatrics or Dancer’s shortcomings or Mary’s last-minute revelation? The movie has one more twist, which suggests a possible answer. If you want to find out what it is, then you will have to see the movie. But keep in mind, as a practitioner, it would serve you well to always get your fee upfront.

The ambiguities inherent in proving “guilt beyond a reasonable doubt” are Preminger’s true theme. “Trial by jury, the “system,” if you will, is his real star. Sixty years after its premier, Anatomy of a Murder remains the benchmark for on-screen court room procedures. It is also a primer for aspiring lawyers itching to get inside a courtroom. On a personal note, it played a big role in my own youthful aspirations. To this day, I still have a passion for jazz, Jimmy Stewart and jurisprudence.

Rudy Carmenatey is a Deputy County Attorney and is the Director of Legal Services for the Nassau County Department of Social Services.

1. Voelker wrote the novel under the name “Robert Traver.”
2. This case could not be located.
6. From Special Investigation, 63rd Congress, Joseph Welch Cross-Examines Roy Cohn, from A Treasury of Art & Literature, 309 (1st ed. 1995)
7. The one false note takes place when Beigler and his side-kick Parrwell spend the night reading U.S. Supreme Court opinions by ‘Chief Justice Holmes.” Oliver Wendell Holmes, however, was an Associate Justice of the US Supreme Court.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
19. Id.
20. Id.

Nassau Lawyer ■ February 2019 ■ 17
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NYSBA 10th Judicial District Report
January 2019

NYSBA came to Manhattan. The New York State Bar Association held its Annual Meeting during the week of January 14 to 21, 2019 at the New York Hilton Midtown and various sites throughout the borough. For many, the highlight of the annual gathering of NYS lawyers is the quarterly meeting of the House of Delegates. Just prior to the House meeting, the Annual Meeting of the New York Bar Foundation and the Annual Meeting of the Association were held. Some highlights:

The Nominating Committee report was presented by Past President David P. Miranda. Mr. Miranda placed in nomination the name of Scott M. Karson to be the next President-Elect of the New York State Bar Association. We all know Scott as the current Treasurer of NYSBA and Past President of the Suffolk County Bar Association. Scott preceded me as Vice President for the 10th Judicial District. More importantly, Scott is a friend of all lawyers and a fierce advocate for our profession. NYSBA will be in excellent hands for many years to come as Scott chairs the House of Delegates and various sites throughout the borough. Scott is the current Treasurer of NYSBA and is President-Elect for the New York State Bar Association. We all know Scott as a past President of the Suffolk County Bar Association. Scott preceded me as Vice President for the 10th Judicial District. More importantly, Scott is a friend of all lawyers and a fierce advocate for our profession. NYSBA will be in excellent hands for many years to come as Scott chairs the House of Delegates and various sites throughout the borough.

Pamela McDevitt, has turned the corner in its financial outlook. Membership will always be a top priority for NYSBA, but as Treasurer, Scott has reported, current membership is back over the 70,000 number and is increasing every day.

The Bylaws Committee presented a change in the NYSBA bylaws that will increase the pool of candidates who can seek a position of the NYSBA Executive Committee. This amendment was overwhelmingly approved.

The delegates were addressed by our Chief Judge, Janet DiFiore. Judge DiFiore spoke of the many initiatives Mr. Hassett put into place while serving the lawyers of our state. This giant of our profession will leave his position to be the Chief Judge, Jan Detj. Judge DiFiore spoke of the continued Excellence Initiative that she has brought to our court system. She said, “when capacity gets expanded, cases get resolved.” The Chief Judge reported that cases over standards and goals on both the criminal and civil side of the system are decreasing in significant numbers. She thanked the lawyers, litigants, non-judicial personnel and judges for their part in making improvements. The Chief Judge further discussed the increased use of ADR (Alternative Dispute Resolution) to resolve cases in NYS.

NYSBA President Michael Miller gave his presidential report. He called on both the President and Congress to ensure that the federal courts remain open to serve the needs of our country. He said “it is truly a dereliction of duty to have allowed a political fight to escalate to the point that essential parts of our judicial system—under the Constitution, a co-equal branch of government—are unable to serve the American people.” Mr. Miller informed those gathered that the NYS budget recently proposed by Governor Andrew Cuomo includes a $50 increase in attorney registration fees. It remains the position of NYSBA that any such increase cannot be accepted and vowed to fight it throughout the budget process. President Miller concluded with this thought—“Whatever is wrong with America can be fixed by what is right with America.”

A report was issued by the Working Group on NYS Judiciary Law Section 470. It called for the repeal of the law. This recommendation was unanimously approved by the House of Delegates. This law was enacted in 1909 and required that non-resident attorneys maintain a physical office in New York State in order to practice in New York State. In 2009, a New Jersey attorney challenged the constitutionality of the law in federal court. The District Court found the law to violate the Privileges and Immunities Clause of the U.S. Constitution. However, the Second Circuit upheld the law and the Supreme Court denied certiorari in 2017. The report of the Working Group found that the original basis of the law—to ensure that nonresident lawyers can be served with process—no longer is a valid justification in today’s times.

A number of other reports were issued for information purposes and will be voted on at the April meeting of the House. These include reports from the Task Force on Evaluating Candidates for Election to Judicial Office, Task Force on Wrongful Convictions, Task Force on Incarceration Release Planning and Programs, and Task Force on School to Prison Pipeline. I will report on each of these in my next presentation.

These are just some of the impactful items that came before your Association’s delegates to the House in January. If you have any questions or concerns in regard to these issues or others involving the New York State Bar Association, I can be reached at (516) 822-5800 or phlatty.lajuno.com. I look forward to communicating with you in the future.
for at the time of an accident is crucial. The same accident in each of these two situations could result in different parties being responsible: in the rideshare situation workers’ compensation would be primary, while if they are driving for an ILDBF base then no-fault would primary.

Typically, rideshare companies tend to initially deny workers’ compensable claims. In some cases, however, such as where the passenger contacted the company about the accident, they will accept the case. One would think it would be easy for a company to access information of whether a driver was active on their application at the time of an accident, but the opposite tends to be the case. Companies rarely provide information, let alone witness information, let alone witness information. Usually it is a representative of an insurance provider, typically The Black Car Fund, who has been provided with the information second-hand. Given the initial denial and the time to adjudicate the merits of the case, it would be prudent to file a protective application for no-fault benefits, in the event that it is later found that the case is not compensable under workers’ compensation.

Also, the no-fault carrier will likely be the primary. While still pending appeal, food delivery drivers are required to pay workers’ compensation benefits and in any motor vehicle accident while on the job no-fault would be primary. These delivery drivers are not required to have workers’ compensation coverage, and do not pay into it like their counterparts. These matters are no easy task and time-consuming. They often require multiple hearings and a trial before the Workers’ Compensation Board before they are established, thus a delay in payment of medical bills to providers and of lost time compensation for the injured client.

Justin B. Lieberman is an associate with the Rockville Centre firm of Polsky, Shouldice and Rosen, PC, concentrating his practice in workers compensation claims. Mr. Lieberman can be reached at jlieberman@lawpsr.com.

are considered to be readily producible methods of transfer by a covered entity.

The time for providing the records is 30 days from the date of receipt of the request, which is an outer limit. If the covered entity is unable to comply in the 30-day period then it may extend that time, but not greater than an additional 30 days, and it must inform the individual of the extent within the initial 30 days. The individual’s attorney may write to complain about this failure, and make a complaint to the DHHS. The original record request, however, must come from the patient, even if the attorney is designated as the third party to whom the record is to be sent.

Reasonable Costs Under the HITECH Act

The Act includes provisions regarding the cost that covered entities may charge individuals seeking their medical records. These provisions significantly reduce the costs when the records are provided in an electronic format. This is particularly valuable when considering, that in this era of electronic records and the manner in which they are created, patient records often span thousands of pages. The Act allows a covered entity to charge a fee for records, but the fee must be based on certain facts. DHHS has allowed the covered entity to impose a reasonable, cost-based fee based on the following:

- labor for copying the record requested, whether in paper or electronic format;
- the supplies for creating the paper copy or electronic media such as CD or USB drive;
- the postage when requested that the copy be mailed; and
- preparation of an explanation or summary of the copy of the PHI or the summary requested.

If the covered entity maintains a certified electronic record (known as a CHERT—certified electronic health record technology) as required by the statute, the individual may request that the record be transmitted or accessed through the system that maintains the electronic access, such as an online patient portal. In that case, no fee may be charged.

DHHS has stated that, for electronic records being digital in a format to a covered entity may charge an individual a flat fee, not to exceed $6.50, which is all-inclusive, covering labor, supplies, and postage.2 So covered entities can dispense with the process of calculating actual or allowable reasonable costs when producing such records. If the records are not maintained electronically, however, this cost limit does not apply.

The limitations on the cost that may be charged are only available when the individual (the patient or a qualified person, but not their attorney) requests the records. The individual may direct that the records be sent to a third party, including a law firm, but this request must be made in writing. When a third party requests the records with a HIPAA authorization the Act and its cost limits do not apply. Individuals can also request to inspect their records at a provider’s facility, and no charge can be assessed for same.2

Fight for Your Rights

The Act benefits individuals and their counsel only if they strictly follow the Act’s provisions in making the written request. Third parties, including defense attorneys representing claimants, cannot and still are subject the provisions of the Public Health Law. However, this does not and should not be interpreted to mean that a charge of $75 must be imposed, and there should be accounted for a document or the document is not in a digital format. It behooves the requesting attorney to intervene if faced with unreasonable and excessive per page charges for records that are clearly created and maintained in an electronic format and which are sought in a digital format. The request accompanying the patient’s HIPAA authorization should be explicit as to what is sought, in what format and by what means of transmission.

Although the HITECH Act may not limit the fees charged to third parties, the Public Health Law still requires reasonable costs, with a limit per page cost for records produced in paper form. In most cases the individuals, their attorneys, and defense attorneys are dealing with record access companies such as hospitals and health care systems to process medical records requests. Their staff likely have no knowledge of the HIPAA statute and their limited definition. Nevertheless, they are agents of the covered entity, and in the event of a problem in getting a record for the cost allowed, the requestor should demand to discuss the request with not only the supervisor of the record access company, but also the covered entity’s administrative personnel. If there is no resolution to the dispute, then the requestor should ask the court issue a so-ordered subpoena when the case is in suit, or bring an Order to Show Cause when the issue is occurring in the pre-suit phase of the litigation. Multisite record access companies such as Verisma and Ciox have their own corporate counsel, and it has been this writer’s experience that once involved their counsel will assist in getting the records released at a reasonable and proper cost.

A copy of a sample request for an individual to request their records, and a sample complaint letter, are provided courtesy of Michael Glass, Esq., of Rappaport, Glass, Levine & Zullo, LLP.

Mary Anne Wallying is a partner in the firm of Sullivan Papain Block McGrath & Cannavo, P.C. She currently represents plaintiffs in the litigation of medical malpractice actions against physicians, hospital, nursing homes, dentists, and other health care professionals. She may be reached at mwallying@triallaw1.com.

1. 42 USC § 17931 et seq.
3. 45 CFR § 164.524(a)(1)(ii).
4. 45 CFR § 164.524(b)(2).
5. Clarification of Permissible Fees for HIPAA Right of Access – Flat Rate Options of Up to $6.50 is Not a Cap on All Fees for Copies of PHI, available at https://go.gov/0PqPq.

Naela Hasan is an Associate Attorney at Hollander Legal Group, P.C., and has prior experience as in-house counsel at an insurance company. She is a recent graduate of St. John’s University School of Law, Class of 2017.

1. 11 NYCRR §65-1.1(d) (2002).
2. 11 NYCRR §65-3.5(c)(2).
7. Id.
8. Ins. Law § 409, see also 11 NYCRR § 86.5.
11. Id.
Whether one FOILs for discovery, FOILs for fees, or FOILs because of injuries, the FOIL request, consent form, and Article 78 litigation should become part of the regular forms utilized by negligence attorneys.

In Trawinski, “The plaintiff contended that on or about December 8, 2014, she had filed a [FOIL] request for documents...pertaining to the subject sidewalk but had not yet received any documents.” The receipt was enough to preclude the award of summary judgment.

Attorneys who utilize contingency-fee retainers would be wise to amend such retainers for the assignment of an award of reasonable attorney’s fees with the amendments in the Public Officers Law. Appellate Courts in the First and Third Departments, and now at least one Supreme Court in Nassau County, granted attorney’s fees to a lawyer who represented the law firm of which he or she was a member. Whether one FOILs for discovery, FOILs for fees, or FOILs because of injuries, the FOIL request, consent form, and Article 78 litigation should become part of the regular forms utilized by negligence attorneys.


FOIL...
Continued From Page 5

that was called in to investigate.

Ordinary litigation may rely on agency records, from permits to broken sidewalks. A case example from the Second Department, Trawinski, shows how records produced from FOIL can change the outcome of a litigation. The plaintiff in Trawinski sought to recover for personal injuries for falling on a sidewalk. After a complaint was filed and discovery conducted, a motion for summary judgment was filed by the defendants. It was granted. On a motion to renew, filed after Trawinski’s receipt of new facts from a FOIL request, the lower court affirmed the award of summary judgment.

Attorneys who utilize contingency-fee retainers would be wise to amend such retainers for the assignment of an award of reasonable attorney’s fees with the amendments in the Public Officers Law. Appellate Courts in the First and Third Departments, and now at least one Supreme Court in Nassau County, granted attorney’s fees to a lawyer who represented the law firm of which he or she was a member. Whether one FOILs for discovery, FOILs for fees, or FOILs because of injuries, the FOIL request, consent form, and Article 78 litigation should become part of the regular forms utilized by negligence attorneys.


4. See also CPL § 160.50; example available at: https://www11.nyc.gov/assets/foils/downloads/pdf/CPL_160_50_Unsealing.pdf.
IN BRIEF

Administrative Judge Hon. Norman St. George has announced that the Hon. Elizabeth Fox-McDonough has been selected as the new Supervising Judge of the Nassau County District Court. Prior to her appointment, Judge Fox-McDonough was the President of the Nassau District Court Board of Judges, and replaces Judge St. George as Supervisor.

Forschelli Deegan Terrana LLP has announced that Jay Hellman has joined the Firm as Partner in the Construction practice group. Brian Sahn was featured in the New York Real Estate Journal’s “Year in Review Spotlight,” and Who’s Who in Real Estate by the Long Island Business News while Andrea Tsoukalas, Jessica Leis and Erik Snips participated in a Nassau County Bar Association CLE titled, “Presenting a Case to a Zoning Board.” The firm and Steve Gaebler donated laptops to MOMS, a project that collects new and gently-used laptops and donates them to stay-at-home moms seeking to reenter the workforce and women starting home-based businesses on LI and in NYC.

L’Abbate Balkan Colavita & Contini, LLP proudly announces that three partners have been elevated to the partnership, including James D. Spighianni (Business Professional Liability Group), Keith J. Stevens (Design Professional Group) and Todd M. Alderman (Insurance & Industry Group). Candice B. Ratner has been promoted to Of Counsel in the Attorney Professional Liability Group.

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Committee Reports

Elder Law, Social Services & Health Advocacy
Meeting Date: 1/16/2019
Co-Chairs: Kathleen Wright and Danielle Viivader

The topic for the January meeting was A View from the Guardianship Bench-Part 2: A Tri-County Question and Answer Session. The panelists included Hon. Anna R. Anzalone, Hon. Arthur M. Diamond, Hon. Richard I. Horowitz, Hon. Bernice Siegal and Hon. Lee A. Mayerzon. Also on the panel were the following law secretaries: Margaret M. Daly, Esq., Ronald J. Ferraro, Esq., Marissa Relyea, Esq. and Mary Buonno, Esq.

There were over one hundred attendees. The evening began with a cocktail hour affording the attendees an opportunity to meet and greet with the panelists. Before the question and answer session began, the panel was given an opportunity to comment, similar to an opening statement. Thereafter, presubmitted questions were presented to a specific judge, with everyone on the panel being given an opportunity to comment. There were no questions from the audience.

The next meeting is scheduled for February 26, 2019, at 12:30 p.m.

Women in Law
Meeting Date: 1/30/2019
Chair: Christie Jacobson

The NCBA Women in the Law Committee held its first meeting of the new year on January 30 at 12:30 p.m. in the Founders Room. The meeting featured a joint presentation entitled Topics in Self Defense for Women by Matthew Fusco and Barry Levine. Both speakers provided attendees with empowering insights on how to stay strong, confident and safe.

Medical Legal
Meeting Date: 1/28/2019
Chair: Mary Anne Walling

Mary Anne Walling presented on the topic of the cost of medical records and the HITECH Act. There was a vigorous discussion by all attending. Future topics include the theory of agency by estoppel and the case of M’duba v. Benedictine Hospital.

There was discussion on the topic of electronic medical records and a future evening program regarding this topic in coordination with other committees.

The next meeting is scheduled for March 8, 2019 at 12:30 p.m.

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

NCBA New Members

We welcome the following new members

Attorneys
Jonathan Bellezza
Matthew Capobianco
Kaufman Dolowich & Voluck, LLP
Jillian M. Enright
Cheryl L. Erato
Farrell Fritz, P.C.
Joshua P. Frank
Katrina Louise Lento
Diamond Law Group
Elbert Nasis
Forchelli Deegan Terrana LLP
Jeannie Sha
Nixon Peabody, LLP-LI

Students
Paulo Martins Coelho
Jillian L. Diaz-Panzella
Karena Ioannou
John A. Lonigro
Marc Nicoletta

In Memoriam
Martin P. Abruzzo
Pro Bono Attorney of the Month

BY SUSAN BILLER

Dennis Buchanan, Esq.

Nassau Suffolk Law Services’ Volunteer Lawyers Project (VLP) and the Nassau County Bar Association (NCBA) are pleased to honor Dennis Buchanan as our most recent Pro Bono Attorney of the Month. This month’s award recognizes an attorney who has demonstrated tremendous dedication to the clients he represents in Landlord-Tenant Court through the VLP’s Attorney of the Day Project. Since joining the program in October of 2017, Buchanan has assisted 177 low-income clients, volunteering more than 286 hours of his time to date. His zealous representation has allowed many tenants to remain in their residences, avoiding eviction and possible homelessness.

The Attorney of the Day Project, supervised by VLP Staff Attorney Roberta Scoll, assists hundreds of indigent and disabled men, women, and children in housing court to prevent homelessness. Many of the cases are holdover or nonpayment matters. Most tenants must appear pro se, and are severely disadvantaged by lack of counsel. The courts are overburdened trying to administer justice. Given the lack of affordable housing in this region, eviction may place families at a severe risk of becoming homeless.

This project allows attorneys to volunteer to represent these individuals for a four hour session once a week, a month or as frequently as they choose. The goal is to preserve housing or at least give the tenants sufficient time to secure alternative housing and avoid the trauma of shelter placement or homelessness. Attorneys interested in becoming involved with this and other vital work should contact Susan Biller at sbiller@nsls.legal, or Roberta Scoll at RScoll@nsls.legal.

Buchanan came to the VLP after two successful previous careers. He grew up in Portugal; his father was a U.S. government employee stationed in the Azores. Buchanan returned to New York to attend SUNY Downstate University and became a nurse. His involvement in labor relations and risk management in that career sparked an interest in law. In 1995, he graduated from St. John’s University School of Law, and was admitted to the New York State Bar and the U.S. District Courts for the Eastern and Southern Districts of New York. Buchanan enjoyed a twenty-five year career in corporate compliance and human resources at NY Presbyterian Hospital before his retirement.

Always looking for a challenge, Buchanan decided that his retirement from full-time transactional work was the perfect time to garner experience in the courtroom while helping those less fortunate. He pursued volunteer opportunities through the VLP, which led him to the VLP Attorney of the Day Project. There he was given training materials and the opportunity to work under the direct oversight of Roberta Scoll and her team of experienced volunteer Landlord-Tenant attorneys.

“The structured environment of the Attorney of the Day Project was an excellent place for me to develop my litigation skills, and I am grateful for the chance to shadow and gain steady feedback from the other volunteers,” states Buchanan. “Working on a pro bono basis allows me to focus purely on the goal of helping a client get the best deal possible and avoid putting on the street. It is truly rewarding to roll up my sleeves and deal with the essence of peoples’ basic needs.”

As a result of growing up a minority in a different culture, Buchanan is able to reflect upon what it means to feel marginalized and struggle to make sense of an alien system. He recalls a rewarding case where he represented a tenant being evicted by her stepfather/landlord. The mother of the tenant, who was the wife of the landlord, had died several months prior. The tenant had lived in the house since her mother had purchased it approximately ten years prior. The volunteer attorneys were able to ascertain that a co-owner of the property was the sister of the tenant, and received her assurance not to evict the tenant. They were able to get the case dismissed. Without the VLP’s representation, the tenant may not have been able to successfully navigate the system and likely would have been evicted.

Attorney of the Day Coordinator Roberta Scoll notes, “We are very fortunate to have Dennis as a volunteer. Twice a week Dennis consistently devotes his energies representing tenants through the Volunteer Lawyers Project. He is a tremendous help to the program.”

In addition to his work with the VLP, Buchanan also volunteers with the NCBA Mortgage Foreclosure Project. He enjoys sailing, bicycle riding, travel and spending time with his wife, grown children and young grandchildren. In light of his dedication and commitment to serving low income Nassau County residents, we are proud to honor him as our most recent Pro Bono Attorney of the Month.

The Volunteer Lawyers Project is a joint effort of Nassau Suffolk Law Services and the Nassau County Bar Association, which, for many years, have joined resources toward the goal of providing free legal assistance to Nassau County residents who are dealing with economic hardship. Nassau Suffolk Law Services is a member of the Legal Services agency, receiving federal, state and local funding to provide free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care, and services to special populations such as domestic violence victims, disabled, and adult home residents. The provision of free services is prioritized based on financial need and funding is often inadequate in these areas. Furthermore, there is no funding for the general provision of matrimonial or bankruptcy representation, therefore the demand for pro bono assistance is the greatest in these areas. If you would like to volunteer, please contact Susan Biller, Esq. at 516-292-8100, ext. 3136.

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27
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