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David H. Besso, past Chairman of the Grievance Committee for the 10th Judicial District and past President of the Suffolk County Bar Association, has been representing attorneys for more than twenty years.

Michelle Aulivola has defended attorneys involved in attorney disciplinary matters and grievance investigations for the past fifteen years.

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Many real estate deals have collapsed as a result of the COVID-19 pandemic, and much has been written about impossibility or frustration of purpose in the context of disputes between sellers and purchasers. But nearly every real estate deal includes a third party—the real estate broker. When a deal fails because of COVID-19, should the broker still get a commission from the seller? The general rule in New York is that a real estate broker earns a commission when he or she “procures a buyer who meets the requirements established by the seller.” This type of broker is characterized as “ready, willing, and able.” When a broker produces a ready, willing, and able buyer, his or her right to commission becomes enforceable. Barring any exceptions, the right of the broker to a commission does not depend upon the performance of the real estate deal. The broker’s agreement constitutes a contract of adhesion “contains terms that are unfair and nonnegotiable and arises from a disparity of bargaining power or oppressive tactics.” A court is more likely to find contract of adhesion exists where the party seeking to enforce the contract has used high pressure tactics. In case of doubt, the court must hold an evidentiary hearing.

An unrepresented seller negotiating with a large real estate agency unquestionably has far less bargaining power than the broker. It is the brokerage agency that has prepared the form contract with pages of fine print difficult for a layman to comprehend. The seller may feel, and the agent may even say, that the seller is in a position of “sign or else.” The seller may thus have a strong argument that the broker in that circumstance should not receive a commission especially where COVID-19 has wrecked the deal. Important public policy concerns weigh in favor of not requiring a seller to pay a commission on a sale that never happened because COVID-19 prevented it.

Lastly, certain sellers may possess evidence supporting a claim for equitable reformation of the terms of the brokerage agreement. A party seeking reformation of a contract by reason of mistake must establish, with clear and convincing evidence, that the contract was executed under mutual mistake of fact and that a new contract was induced by the other party’s fraudulent misrepresentation.

In cases of mutual mistake, “[t]he remedy of reformation of a contract is available when...the parties reached an oral agreement and, unknown to either, the signed writing does not express that agreement.” A party may therefore introduce parol evidence, i.e., evidence outside the four corners of the document, to support its claim for reformation of contract. This is true even where an agreement contains the standard disavowal clause providing that the signed contract supersedes any prior terms, representations, or agreements whether made orally or in writing. Courts have shown a high degree of sympathy to unsophisticated homeowners alleging claims of mutual mistake, even when they were represented by counsel at the time.

Many sellers, represented or unrepresented, have been asking questions about how COVID-19 will impact the sale of their homes. A telephone conversation or email chain between a broker and seller discussing what will happen if COVID-19 wrecks the sale may show that the agreement between the individual seller and real estate agent was very different from the one reflected in the form from the real estate company—a form that neither

Katherine Santos

of them may have examined closely. In this case, the seller may have a valid claim for equitable reformation of the brokerage agreement. It is impossible to predict how many sellers will be sued by brokers attempting to collect commissions when the parties never made it to closing. Some brokers may choose not to file suit because of public relations concerns, especially if they do business in tight-knit residential communities where competition between agents is fierce and news travels fast. On the other hand, times have been tight for brokers lately as well. The good news for sellers is if they do have to face suit, they have numerous potential defenses.

Katherine Santos has represented landlords and other real property owners in settings as varied as a three-day jury trial over a breach of contract of sale and a multimillion-dollar land deal. She is a senior associate at Lynn Gartner Dunne, LLP.
As I pen this column, I am preparing to attend the March on Washington on Friday, August 28. As one who marched on Selma, Alabama on its 20th Anniversary in 1985 and worked on the campaign of the late civil rights leader John Lewis’ campaign for Georgia’s 5th Congressional District in 1987, I personally feel incumbent to answer the call for action. This call was inspired by the programs I participated at our Bar Association this summer following the death of George Floyd in Minneapolis.

Programs this summer included: “Dreams Deferred Amongst Racial Covenants, The U.S. Supreme Court Case which Inspires Love, Longing and Hansberry’s A Raisin in the Sun led by Rudy Carmenate; our Diversity & Inclusion Committee Chair Maxine Broderick’s Social Justice Book Club’s reading of The New York Times’ bestseller Between the World and Me, by Ta-Nahesi Coates; our Civil Rights Committee Chair Bernadette Ford’s invitation to Frederick K. Brevington to speak on “Race, A Factor in the Law, and Why We Need To Discuss It?” The discussions that I participated in were awakening.

I addressed the same formula with my fall students at Touro Law School in my course, Current Issues of Racism in American Law. Outlining the majority opinion written by Chief Justice Roger B. Taney in Dred Scott v. John F. A. Sandford, change was around the corner. As you may recall, the Supreme Court in 1857, 60 U.S. 393, held “A free negro of the African race, whose ancestors were brought to this country and sold as slave, is not a ‘citizen’ within the meaning of the Constitution of the United States.”

For my facts were Mr. Scott, his wife and children, slaves belonging to Dr. Emerson, were taken from the State of Missouri to Rock Island in the State of Illinois, a territory governed by the Missouri Compromise of 1820, which prohibited slavery. Mr. Dred argued that because he and his family were entitled to freedom by being taken to Rock Island, in the State of Illinois. The Court disagreed. It is recorded that even Northerners, who were not abolitionist, or even necessarily anti-slavery, protested the pro-Confederacy bias of the decision. Six years later, Abraham Lincoln, for numerous reasons, including the actual rebellion against the authority and government of the United States, signed the Emancipation Proclamation granted freedom to the slaves within any state. To make systemic change will involve all branch-es, from executive, judicial and legislative branches of government.

Our Bar Association has publicly stated we will work with our justice partners—community leaders, government officials, law enforcement and the judiciary—to bring change. Good intention is not enough. We need leaders who can bring change. As an educator, I have been fortunate to have the opportunity to teach the course, Current Issues of Racism in American Law, which I have designed to address the present day challenges in this country.

We are pleased to announce that WE CARE, our charitable arm, will offer its traditional Thanksgiving dinners to families in need. We are not serving dinners at the Bar, for health and safety purposes, but will be delivering prepared meals to needy families. Members may participate by contacting our WE CARE Advisory Board, as well as submitting a donation online at the link provided on our website.

Our Response to Coronavirus, COVID-19 Pandemic
NCBA pro bono services are at a peak! We have received acclaimed press coverage in connection with our volunteer law students and attorneys who help residents and businesses who reach out to covidhelp@nassaubar.org. Our NCBA staff review each email and assign it to one of the NCBA volunteers; the Member volunteers provide consultations in their areas of expertise and are assigned residents or businesses who have sought assistance, along with referrals for those facing family violence (The Safe Center of Long Island) or certain legal issues (Nassau Suffolk Law Services).

Taking the next step, on August 27, dozens of homeowners and renters came to the Bar for a free open house under a tent in our parking lot and met with housing counselors. Wearing masks and socially distanced, housing counselors and attorneys offered information about programs such as COVID-19 mortgage forbearance, hardship programs, loan modifications and payment options. Services were offered in English and Spanish.

Special thanks to Past President Martha Krisel, our staff and member volunteers for their dedication.
On March 11, 2020, in an action seeking summary judgment and concluding that the fee was excessive, an unlawful, unconstitutional tax. Mr. Falk had established as a matter of law that “the revenue derived from the TMCL is used for general administration purposes and unrelated and disproportionate to the cost associated with its issuance.” He then stated that Mr. Falk had established as a matter of law that “the revenue derived from the TMCL is used for general administration purposes and unrelated and disproportionate to the cost associated with its issuance.”

Consequences in the COVID-19 Era

The COVID-19 worldwide pandemic struck with a ferocity and velocity previously unseen by almost every living soul. It has shown a perfect storm of financial core business budgets at the national, state, and local levels. The recent decision in Falk v. Nassau County rippled away the cloak of an impermissible tax masquerading as a fee. If the decision in Falk is affirmed on appeal, and if a decision based on similar reasoning flows from the Suffolk County case described below, politicians across Long Island will face severe and unpalatable options.

An action seeking comparable relief was brought against Suffolk County in 2017 by the Government Justice Center, an Albany nonprofit, on behalf of several Suffolk home owners. That case seeks to strike down as unlawful, invalid and unenforceable Suffolk’s $200 tax map verification fee (increased from $150 in 2015) and Suffolk’s $300 mortgage recording fee created in 2016. The complaint in that case alleges in part that for 2017 Suffolk County budgeted the Real Property Tax Service Agency’s operating expenses to be $1.2 million, which were $2 million greater than the fees generated by that agency to exceed $66 million. Three Suffolk County judges previously recused or disqualified themselves from that case; oral argument on that plaintiff’s motion for a declaratory judgment occurred in March 2020. Post-argument letter briefs were filed by June 30, and the court set an early August control date.

Counsel for Suffolk County contend that the parties’ respective motions and cross motions were fully submitted in 2018; that the Suffolk County Legislature passed amendments to CPLR Sections 8019 and 8021 in April 2019 which specifically authorized the challenged fees pursuant to Suffolk County Code A18-3(G). Thus, Suffolk contends that the Falk decision is inapplicable, since the Falk court was not presented with a challenge to fees which were expressly authorized by the State Legislature. Suffolk’s counsel also argued that, unlike Falk, no discovery had occurred in the Suffolk case.

Mark S. Borten is principal of the Law Offices of Mark S. Borten in Merrick, representing clients in residential and commercial real estate matters. 1. Falk v. Nassau County, Index No. 600868-17 (Mar. 11, 2020); Brown, J. Preliminarily, by decision dated September 27, 2017, Justice Brown dismissed three of the plaintiff’s four causes of action and granted the defendant’s motion to dismiss the cause of action for injunctive relief in the form of disgorgement, while denying the portion of that motion seeking to dismiss the claim for declaratory relief. Falk v. County of Suffolk, Supreme Court, New York County, Nov. 3, 2017.


3. Id.


5. Falk, supra n.1, Complaint Exh. A.

6. Falk, supra n.1, Complaint Exh. B.

7. Citing Matter of Baldwin UFSD v. County of Nassau, 22 N.Y.3d 606, 628 (2014). In 1939, via Chapter 272 of the Laws of 1939, the New York State Legislature enacted the Nassau County Administrative Code as a supplement to the Nassau County Charter. Subsequently, pursuant to chapter 851 of the Laws of 1948, the Legislature amended the Nassau County Administrative Code, adding Section 6-26(E)(3)(c), which includes what has come to be known as the “County Guaranty.” 8. Celle v. County of Suffolk, Index No. 620580/17.
The Role of the Executive: Unilateral Emergency Powers of the Governor, Town Supervisors, and Village Mayors in Times of Public Crisis

The Coronavirus (COVID-19) created a pandemic unprecedented in modern times. Life in New York changed dramatically, and albeit, consequentially on March 7, 2020, when Governor Andrew Cuomo issued Executive Order 202.1, reducing business, professional, leisure and just about all commercial activity in New York to stop the spread of (COVID-19). This executive action was arguably unprecedented in our State’s history,2 altering the ability of nineteen million citizens to engage in some of life’s most cherished events such as weddings, graduations, births, and sadly deaths.2 However, the pandemic gave the public, for the first time, a true sense of the scope, depth and breath of the power of an elected executive.

Our form of government, whether at the federal, state or local level, derived from the founding fathers’ understanding of the separation of powers theorists—Polybius, Montesquieu and Locke, who had conceived executive power as a separate and distinct species of power.3 They understood the executive to handle certain “sovereign functions.” However, they also understood that unfettered power, exercised without the consent of the governed—or in local cases, the sanction of the legislature, would lead to abuse. The courts have generally affirmed the deprivation of individual liberties by executives so long as necessary to meet the needs of the collective societal whole, that “over the long run preserves the proper balance of freedom and order necessary for the healthy development of natural civil society and individual human flourishing.” State Level Executive Authority

The New York State Constitution vests the Governor with the executive power and places upon him the responsibility to “take care that the laws are faithfully executed.” This vests authority within the Governor to take measures to faithfully enforce the law not to expend on existing parameters or create law. “The power to make laws is a legislative function.”5 The limiting principle, therefore, of the executive order is its encroachment into the legislative prerogative. Executives cannot make law, or ignore law, or re-write law; they simply can only execute or enforce the existing law. But, under emergency circumstances, like the current pandemic, those power lines become blurred.

Since March 7, 2020, New York State Governor Andrew Cuomo has issued 48 Executive Orders.6 The Governor has essentially become a unitary executive, not just of the executive branch, but of the entire state government apparatus. Is this a permissible execution of authority? Whether executive action crosses the line and constitutes an inappropriate assumption of legislative power, the Court of Appeals has looked to whether the executive action ‘creates a different policy, not embraced in the legislation’ or whether the executive action is in fact inconsistent with existing State law.7 On May 27, 2020, in the case of Dao Yin v. Cuomo,8 petitioners claimed that Governor Cuomo lacked the statutory authority to issue Executive Order 202.1. The Governor opposed the petition and argued, inter alia, that in response to the concerns presented by COVID-19, the canceling of the special election was a valid exercise of his authority under Executive Law § 29-a.

This rule endows the Governor with the authority to exceed his executive authority in times of disaster, such as during the COVID-19 pandemic, which has been classified as a “disease outbreak.” Under the rule, the Governor is granted powers to promulgate temporary rules by executive order. However, this executive authority is not absolute. With the delicate balance between handling crises and the intrusion in the traditionally legislative prerogative, the limitations imposed upon the Governor attempt to regulate this separation of powers as best as possible, while allowing the branch of the government best suited to handle crises quickly and efficiently to do so.

Municipal-Village Mayor Executive Authority

The executive authority of a Village Mayor has long been a topic of debate among municipal attorneys. The idea of a Village Mayor exercising unilateral, consequential power escapes the local village resident. But no mistake should be made, Mayors are chief executives, and in the case of extreme emergency, are more powerful than a Town Supervisor. In fact, the power of a Mayor rivals that of the County Executive.

The New York Executive Law devotes an entire article to state and local natural and man-made disaster preparedness, particularly with regard to emergency powers granted to the lower chief executives within the state, including Village Mayors. Section 24 governs local states of emergency and local emergency orders by chief executives. Chief executives are defined as “(1) a county executive or manager of a county; (2) in a county not having a county executive or manager, the chairman or other presiding officer of the county legislative body; (3) a mayor of a city or village, except where a city or village has a manager, it shall mean such manager; and (4) a supervisor of a town, except where a town has a manager, it shall mean such manager.”9

See EXECUTIVE, Page 17
Law Students in Government Offices: Responsibilities and Rights

After my first year of law school, I spent the summer of 1978 at the Buffalo Regional Office of the New York State Attorney General. Summer jobs were hard to come by for rising 2Ls, but a relative who worked closely with Attorney General Louis Lefkowitz, recommended me.1 I worked with three other law students; the pay was five dollars per day. That compensation—paid in one check at the end of the eight-week assignment—was allotted to cover daily expenses. In fact, in 1978, five dollars in Buffalo covered round-trip bus fare and lunch. I still remember the jacket that I bought with part of that $200 check; it was tan with a fuzzy lining and a hood.

Although I cannot recall the last name of my supervisor Mike, I do remember my first assignment. The Attorney General had subpoenaed a car dealership’s records; using my INS research and writing course skills, I worked with the supervising attorney against the dealership’s motion to quash. It was very exciting when that motion was denied.

Properly mentored and supervised law students are the lifelines for attorneys with heavy caseloads, and are essential for encouraging public sector career paths. The best internships provide opportunities to contribute while protecting interns’ rights and promoting their professional development.

Internships Under the Law

Civil service titles also do include law interns, who do not test competitively for Nassau County’s Villages, for example, have a non-compensable title for law interns currently enrolled in law school.2 Designed in 1972, the duties are basically still relevant to a government law office internship experience. Supervision is mandatory, and the duties are specifically focused on legal research, drafting opinions on legal matters, assisting in preparing local ordinances and drafting memoranda for a legislative body. To qualify for appointment under the law title, a law student is required to know how to perform legal research to prepare basic legal documents; the student is required to know how to perform legal research to prepare basic legal documents; each student must always have a “big picture” approach to the work that they are performing.

Since a government office generally has unionized support staff, with clerical and paralegal/attorney assistant competitive titles, law students should never displace paid employees; rather, law students should “complement” the government attorney’s accomplishments.3 Because of this, the Glatt displacement factor is a useful barometer even in a government setting, because it emphasizes that an intern’s work should complement but not supplant the work of paid employees.

An intern’s work is complementary only if it requires some level of oversight or involvement by an attorney, who still bears primary responsibility. While a bit of overlap may be inevitable to meet an all-hands-on-deck court docket, the intern should always be acquiring skills directly related to proficiency in the practice of law. In Glatt, a private sec- tor decision, the court analyzed the primary beneficiary test and held:

…the proper question is whether the intern or the employer is the primary beneficiary of the relationship. The primary beneficiary test has three salient features. First, it focuses on what the intern receives in exchange for his work. Second, it also accords the courts flexibility to examine the economic reality as it exists between the intern and the employer. Third, it acknowledges that the intern-employer relationship should not be analyzed in the same manner as the standard employer-employee relationship because the intern enters into the relationship with the expectation of receiving edu- cational or vocational benefits that are not necessarily expected with all forms of employment (though such benefits may be a product of experience on the job).4 This factor alone is not dispositive. An intern may perform complementary tasks and in doing so confer tangible benefits on supervisors. The Glatt factors intentionally omitted a criteria that had been advanced by the Department of Labor that the alleged employer derive no immediate advantage from the activities of the intern.5

Maximizing Benefits for Interns and Employers

Appropriately designed assignments in advance of the law students’ arrival are crucial; each student must always have a “big project” to research when there is a need in the ability of the supervising attorney to provide daily interaction and feedback. Law students should never feel that they are in the way or that they are a burden. Proper preparation of appropriate assignments allows the supervising attorney as well as the law student latitude in adjusting to an emergency to which the supervising attorney must attend.

A good guideline for unpaid internships is ensuring hands-on training that a student might experience in a clinical law school forum. In addition to legal research, law stu- dents, under the supervision of a government attorney, can review police/incident reports, interview witnesses, digest depositions and draft pleadings. The government attorney should ensure that law students attend court hearings and trials even when the courts are operating virtually.

Although the duration of an internship is predictable, it is not realistic to promise or to spend time designing a start-to-finish semester or summer-long project. Since litigation and transactional work rarely break down neatly into semesters or summers, a pivotal component of the internship experience is instruction on a transition memo where law students concisely document the status of their files. This simultaneously serves as preparation for the next intern, who should already have been selected and who can piggyback on to the work in progress. This is also excellent preparation for an often-overlooked attorney responsibility: maintaining each file with specificity to allow an attorney to take over in the event of the departure or unavailability of an attorney for any reason.

In short, a government law student intern should enter the workplace with legal research and writing skills that are appropri- ately utilized under attorney supervision to expand that intern’s interest in and knowledge of the law. Useful to the design of the government internship experience are the FLSA and court decisions that protect law students from busy work and protect the integrity of the municipal workplace from a subterfuge of addressing staffing deficits.

Martha Krisel is the Executive Director of the Nassau County Civil Service Commission. She also has served as NCBA President and is Co-Chair of the NCBA Adoption Law Committee.

3. 3 U.S.C. § 413.
7. 7 M. at 533.

Martha Krisel
Limited Homeowner Accountability for Defective Sidewalks in Long Island Towns and Villages

Some Long Island Town and Village ordinances that direct homeowners to keep sidewalks in good repair leave residents with little legal incentive to comply resulting in limited recourse for Plaintiffs who sustain injuries. The governing case law absolves homeowners from liability for trips and falls occurring on a defective sidewalk absent a clause that specifically states that the homeowner or occupant will be liable for any personal injury that results from failure to make repairs. Courts do not consider basic negligence principles such as the requirement of actual or constructive notice of a defect and a failure to correct it despite ample time passage. They do not assign strict liability for a homeowner’s willful disobedience of the ordinance in a manner requiring repairs in their rulings either. Furthermore, undertaking to make repairs could subject homeowners in such municipalities to liability thereby discouraging compliance with local ordinances.

Homeowner liability varies from one town or village to another. Several Long Island town and village ordinances impose a duty on landowners to maintain the sidewalks. However, owners of land abutting sidewalks are not liable for personal injury sustained on a defective sidewalk absent an additional clause that expressly deems them such. Generally, in the unaverted sidewalk absent a clause that specifically states that the homeowner or occupant will be liable for any personal injury sustained thereon. The Villages of Hempstead and North Hempstead require homeowners therein to keep abutting sidewalks in good and safe repair but are silent on liability for personal injury sustained thereon. The Villages of Garden City and Valley Stream do not impose liability on a homeowner for their failure to repair sidewalks either. The Village of Garden City Code Section 178-17 states that it is the responsibility of homeowners in the village to keep sidewalks abutting their property in “good and safe repair” for pedestrians. When a sidewalk is in disrepair, Garden City may send the abutting landowner a notice to make the repair as with suits against homeowners pursuant to 178-20. If they fail to comply within 30 days, the Village may pursue a remedy pursuant to 178-21 to repair the sidewalk and assess the cost against the non-compliant homeowner’s property. There is no personal injury clause against the homeowner. Likewise, Article 11, Section 80-44 of the Code of the Village of Valley Stream directs owners, occupants, and lessees to keep sidewalks in “good and safe repair.” The consequence for failure to comply is a written notice followed by a $1,000 fine or a few days in jail. This is not a large expense.

Suits against homeowners in Nassau County villages such as Valley Stream have been dismissed on summary judgment. If the landowner created the condition or caused the condition to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner or the lessee and expressly makes the owner...liable for injuries caused by a breach of that duty...” Homeowners would have had recourse had the unevenness of the fourth slab been caused by a shift made during the repair of the other three slabs under the cause and create exception, but this was not the case as the fourth slab had been untouched the whole time.

Unless the aforementioned Villages enforce these clauses to perform repair universally,

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Expansion of New York’s Prevailing Wage Requirements Are Coming

Amid an unprecedented public health crisis, in the middle of the night on April 3, 2020, the New York State Legislature passed the 2021 fiscal year budget which was signed by Governor Andrew M. Cuomo later that same day. In addition to fiscal spending, the $170 billion plus budget includes a panopoly of education, public health, environmental, and economic development legislation.

One very important piece of legislation is an amendment to New York Labor Law which expands prevailing wage requirements under the New York State Constitution to apply, for the first time ever, to private projects that receive a certain threshold of public funds relative to total project costs.

Organized labor, which had been lobbying Albany for the expansion of prevailing wage requirements for years, hailed the legislation as a hard-fought victory for workers’ rights. Business leaders and developers however, say that the legislation will make many projects cost prohibitive to undertake, hindering new development. Various nonprofit groups, concerned about the economic impacts of the legislation, say that the new requirements will create unnecessary costs for affordable housing projects.

New Definition for “Public Work”

By way of background, Article I, Section 7 of the New York State Constitution was adopted in 1938 and requires that workers engaged in the performance of any “public work” shall be paid in accordance with the prevailing wage in the same trade or occupation in the locality within the state where such public work is situated. The definition of “public work” is not specifically defined in the constitution and was traditionally interpreted to apply to any project undertaken by state and local municipal agencies, school districts, public authorities, or any other public subdivision of the State.

The new legislation, embodied deep within the recently adopted budget, expands the definition of public work and thereby the application of prevailing wage requirements to any privately funded project “where the amount of all such public funds, when aggregated, is at least thirty percent of the total construction project costs and where such project costs are over five million dollars.”

The legislative changes are codified in newly created Sections 224-a, 224-b and 224-c of the New York Labor Law, which are slated to go into effect January 1, 2022.

The general framework for this new legislation is that “covered projects,” that is projects that are over five million dollars in total “project costs” that receive at least thirty percent of “public funding” relative to total “construction project costs,” must comply with prevailing wage requirements for all work performed on the project. The legislation defines two of the highlighted terms in the previous sentence. “Covered project” and “public funding” are each defined in Section 224-a. However, there are no definitions provided for “project costs” or “construction project costs.” Instead, this task and many others have been delegated to the “Public Subsidy Board,” a newly established state agency with broadly defined powers and discretion which include establishing definitions for terms left undefined in the legislation, making determinations on the minimum thresholds for covered projects and issuing binding determinations affecting covered projects.

“Public Funds” Defined

One term that has a clear definition in the legislation is “public funds,” which is specified in Section 224-a.2 and includes any of the following: (a) payments made by public entities directly to a developer or owner that are not subject to repayment; (b) savings achieved from fees, rents, interest rates, loan costs or insurance costs that are lower than the market rate costs; savings from payments in lieu of taxes; credits applied by the public entity against repayment of obligations to the public entity; (c) money loaned by a public entity that is to be repaid on a contingent basis; or (d) credits applied by the public entity against repayment of obligations to the public entity. Specifically excluded from the definition of “public funds” are RPL Section 421a benefits, funds used to incentivize or ensure development of comprehensive sewage systems, tax benefits related to brownfield remediation redevelopment, or any other public monies determined by the Public Subsidy Board to be exempt from the definition.

“Covered Projects” Formula

The legislation also specifically exempts certain types of projects from the definition of “covered projects,” including among other things work on owner occupied one and two family dwellings, work performed under a contract with a not-for-profit corporation, work performed on certain multiple residential projects where at least 25% of the units are affordable or at least 35% of units are designated for supportive housing services for vulnerable populations or any newly created programs for affordable or subsidized housing determined by the Public Subsidy Board.

The legislature’s failure to clearly define other key terms in this legislation essentially leaves a gaping hole in the formula it attempts to create for determining which projects are...
A contract signed in 1965 between Sonny Werblin of the New York Jets and University of Alabama Quarterback Joe Namath launched the ‘sports as entertainment’ industry, ultimately making the NFL a multi-billion-dollar industry. A mixture of sports law, entertainment law, and negotiation strategy, this CLE will explore how television transformed football establishing the show business inspired paradigm that governs the legal and business landscape of professional sports today.
September 17, 2020

**CPLR Update 2020 with Professor Patrick Connors**

5:00—8:00PM via ZOOM

3 credits in professional practice

A comprehensive overview of amendments and updates to the CPLR and decisions affecting civil practice over the past year.

**Professor Patrick M. Connors**

Albert and Angela Farone Distinguished Professor at Albany Law School; Author: Siegel & Connors, New York Civil Practice

**Program sponsored by**

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September 24, 2020

**Dean’s Hour:**

**Fighting Back: Using the Law to Fight Anti-Semitism**

*With the NCBA Civil Rights Committee and the Jewish Lawyers Association of Nassau County*

12:45—1:45PM via ZOOM

1 credit in professional practice

Skills credits are also available for newly admitted attorneys

Program presented by Ilann M. Maazel, Esq., Emery Celli et al LLP, New York; Hon. Gary Knobel, President, Jewish Lawyers’ Association of Nassau County, Inc.

This program is presented by a prominent civil rights attorney who successfully litigated a case against a school district that did not take steps to combat anti-semitic actions taken against a Jewish student. The presentation will generally discuss strategies for litigating against a government or company that directly engages in or ignores anti-semitic actions.

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September 30, 2020

**Business of Law Lecture Series Presents: Dean’s Hour: Law Firm Management Lessons Learned During the COVID Crisis**

*Program sponsored by NCBA Corporate Partner Sterling Bank*

12:30—1:30PM via ZOOM

1 credit in professional practice

Skills credits are available for newly admitted attorneys

Program presented by Thomas J. Foley, Esq., Past Dean, Nassau Academy of Law, Foley Griffin LLP, Garden City; Frederick J. Esposito, MBA, CLM, Chief Operating Officer, Rivkin Radler LLP, Uniondale

By popular demand, we are resurrecting our Business of Law Lecture Series that was created by Past Dean of the Nassau Academy of Law, Thomas J. Foley.

The goal of this lecture series is focused on teaching attorneys how to think and act like business people, as well as attorneys. We also hope to incorporate a half-hour of virtual networking preceding the program. Networking should be a fully integrated component in the life of every attorney, regardless of years of experience. It will lead to stronger contacts and friendships that can help in every aspect of your practice.
Now Is the Time for Estate Planning: How to Leverage Low Interest Rates and a Temporarily Favorable Tax Landscape

The COVID-19 pandemic has brought interest rates to historic lows which, when combined with historically high federal gift tax exemption, provides an unprecedented window of opportunity for estate planning. Key rates in estate planning include the applicable federal rate (AFR) and the Internal Revenue Code Section 7520 rate. The AFR is the lowest interest rate that can be charged on a loan between related parties without gift tax consequences or imputed income. The 7520 rate is the rate for determining the present value of an annuity, life interest for a term of years, or remainder or reversionary interest.

In response to fears of a pandemic-driven recession, the Federal Reserve reduced interest rates to historic lows. As of August 2020, the AFRs are just 0.17% for short-term loans (<3 years), 0.41% for mid-term loans (3-9 years), and 1.12% for long-term loans (>9 years), and the 7520 rate is only 0.4%. To put this in perspective, in August 2007 (before the recession), the AFRs were 5.0% short-term, 5.0% mid-term, and 5.31% long-term and the 7520 rate was 6.2%.2

At the same time, the highest-ever federal gift and estate tax exemption took effect. The Tax Cuts and Jobs Act of 2017 doubled the gift, estate and generation-skipping transfer tax exemption to $10 million per individual, indexed for inflation, and is now $11,850,000 (a combined $23,160,000 for married couples).3 This is scheduled to sunset on December 31, 2025, when the exemption is scheduled to revert to the previous exemption of $5,000,000, indexed for inflation.

Taking advantage of this high exemption now is crucial, given the unpredictability of the November elections and the mounting of federal deficits, each of which could lead to an earlier reduction in the exemption and to further tax law changes that may limit the estate planning techniques discussed in this article.

Gifting

Clients who have available exemption amounts should consider making current gifts, particularly of depressed assets that are likely to appreciate. Gifts can be further leveraged with assets that can be discounted for lack of control and for lack of marketability, as with gifts of minority interests in closely held family businesses, further reducing the value of the gift and, accordingly, the use of the exemption.

The current New York estate tax exemption is $5,850,000 and is indexed for inflation. Unlike federal tax law, however, New York has no gift tax (but adds back to the gross estate of a resident decedent gifts made within three years of death). The benefits that New York residents derive from making gifts now include the insulation of the gifted property from New York estate tax, and the possibility of lowering the taxable estate below the $5,850,000 exemption amount (provided the donor survives three years).

Non-Gifting Strategies

Two strategies for high-net-worth clients and those who have already exhausted their federal gift tax exemption are (i) the creation of a grantor retained annuity trust (GRAT), and (ii) the sale of assets to an intentionally defective grantor trust (IDGT). For high-net-worth clients, the lifetime gift tax exemption will cover only a fraction of the assets that will eventually be transferred, and these strategies can be structured to reduce the taxable estate with minimal or no use of the exemption.

IDGTs and GRATs are essentially estate freeze techniques that exploit the difference between the AFR rates used in estate planning calculations and the actual rate of performance of the transferred assets. Although both GRATs and sales to IDGTs have many factors in common, there are differences, and often one strategy is superior to the other. Ultimately, which technique to use must be evaluated on a case-by-case basis, with a view to the mathematics in each situation.

Grantor Trusts

Both GRATs and IDGTs utilize grantor trusts. The tax laws governing grantor trusts treat the grantor (i.e., the creator of the trust) as the owner of the trust assets for income tax purposes.4 This has several important implications.

First, because the grantor must pay the income taxes on the trust income, as he is considered to be the owner of the trust property, the trust assets will grow free of income tax. The grantor is, in effect, making a gift of the income tax that would otherwise be borne by the trust (or its beneficiaries), but without utilizing any gift tax exemption.

Second, as discussed below, assets can be sold by the grantor to the trust, often at a discounted value, without the imposition of income tax or use of the exemption, even if the assets sold have appreciated.

Finally, if the trust includes a power allowing the grantor to reacquire trust corpus by substituting property of equivalent value, i.e., a “swap power,” the grantor can exchange low-basis assets held in the trust for cash or high-basis assets held by the grantor without the imposition of income tax. This allows a step-up in basis on the assets transferred back to the grantor when later inherited by the grantor’s heirs as part of the grantor’s estate.

Sales to Intentionally Defective Grantor Trusts

One planning technique that works well with low interest rates is an installment sale by a grantor of an Identifiable Property Interest for the IDGT’s promissory note with interest payable at the AFR. Depending on the expected cash flow of the assets sold, the note may be structured with a balloon payment. Since the IDGT is a grantor trust, there is no recognition of tax when the assets are sold by the grantor to the IDGT because the grantor is effectively viewed as selling the assets to herself.

The IDGT with income-producing assets is ideal since such income will allow the IDGT to service the promissory note without needing to make note payments to the grantor in kind. A portion of the assets originally sold to the IDGT. Making note payments in-kind would require obtaining an appraisal each time in-kind assets are used for payment.

In a sale to an IDGT, the assets sold are removed from the grantor’s estate and frozen in value at the fair market value of the promissory note. To the extent that the income earned on the IDGT assets plus all post-sale appreciation (including the amount of the discount) exceeds the AFR, all such income and appreciation will remain in the IDGT and pass to the beneficiaries free of estate tax. This strategy is particularly effective with closely held family business interests and real estate.

Typically, a grantor creates an IDGT and funds it with a gift of cash or other assets equivalent to approximately 10% of the value of the assets to be sold to the IDGT. This “seed” funding is often recommended to substantiate that the sale is an arms-length sale. The seed money paid will be considered part of the gift exemption. For clients with no exemption remaining, the grantor can obtain personal guarantees in lieu of seed funding. The grantor can allocate a portion of his generation-skipping transfer tax (“GSTT”) exemption to the seed money gifted to the trust, thereby shielding any future appreciation from generation-skipping transfers. For this reason, IDGTs are often structured as multi-generational dynasty trusts. Dynasty trusts take advantage of the federal GSTT exemption by giving long-term 7520 rate tax-free growth and income on the assets transferred to the IDGT for as long as the trust is in existence.

Grantor Retained Annuity Trusts

A GRAT is an irrevocable trust under which a grantor transfers assets while retaining the right to receive fixed annuity payments for a specified term. GRATs are generally used when interest rates are low. The gift is computed by subtracting the actuarial value of the retained annuity payment from the fair market value of the assets transferred to the trust. In order to determine the value of the retained annuity, the IRS assumes that the rate of return will equal the 7520 rate. Thus, if income growth and income on the assets transferred to the GRAT outperforms the 7520 rate (currently just 0.4%), the increase above the 7520 rate passes to the beneficiaries (or trusts for their benefit) free of gift and estate tax.

GRATs can be structured to provide for increasing annuity payments of up to 20% per year, allowing the grantor to receive smaller and smaller payments in the early years of the GRAT term, leaving more assets in the GRAT to appreciate.6

If the grantor dies during the GRAT trust term, the lesser of the value of the trust corpus or the value of that portion of the corpus necessary to satisfy the retained annuity must be included in the grantor’s gross estate. Practically, however, the assets will likely be included in the grantor’s estate.

Rolling GRATs and Zeroed-Out GRATs

A common type of GRAT is a “zeroed-out” GRAT, for which the annuity is structured to produce no gift or a nominal gift. In order to “zero out” a GRAT, the annuity payment is calculated so that the present value of the annuity payments is nearly equal to the fair market value of the contributed assets. If the assets transferred to the GRAT outperform the 7520 rate, this excess growth and income is transferred estate tax free to the remainder beneficiaries, but if the assets do not outperform the 7520 rate, there is little downside.

Clients can also use rolling GRATs which are a series of short-term GRATs intended to increase the annual exclusion as the risk of the assets being included in a grantor’s estate if the grantor does not survive the term. For example, rather than funding a six-year GRAT, the rolling GRAT strategy would replace this with a series of three-two year GRATs. This technique is best at capturing the upside in a volatile market.

Short-term rolling GRATs work especially well with marketable securities. Because marketable securities are publicly traded, the fair market value is readily determined. Accordingly, the annual annuity payments can be paid to the grantor in-kind, i.e., with marketable securities, without the need for an annual 7520 rate. This preserves income on account to meet the annuity payments.

Now is the Time to Plan

In addition to the very real possibility that the federal gift tax exemption may be decreased before 2025, other changes may be on the horizon, especially in light of the $2 trillion stimulus package. Numerous proposals have been set forth to limit the estate planning techniques discussed in this article. Among others, there have been proposals to limit the benefits GRATs can provide by prohibiting short-term and zeroed-out GRATS; to eliminate discounts for closely-held business and real estate interests; and to limit the benefits of IDGTs and dynasty trusts.

With historically low interest rates, depressed asset values, and a record high federal gift tax exemption with no certainty as to how long the exemption will remain in place, now is the optimal time for estate planning.

Lorraine S. Boss
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4. The grantor trust rules are set forth in sections 671-718 of the Internal Revenue Code and were originally enacted in order to prevent abuses by taxpayers who were shifting income to taxpayers in lower income tax brackets.

For Information on LAWYERS’ AA MEETINGS Call: (516) 512-2618

Lorraine S. Boss
The Basics for Virtual Public Hearings—How to Be Successful and Efficient

The current pandemic is changing every aspect of life and in response, the legal community is adapting accordingly. One tenet of municipal governance is the requirement to hold public hearings and meetings. Traditionally, such meetings are held in person.

Although, New York State law has allowed video meetings for a long time, agencies rarely utilized this option. Under the Public Officers Law, board members can attend a public meeting via videoconference as long as the public notice of the meeting states that video conferencing will be utilized. The notice must identify the location of the meeting and that the public has the right to attend the meeting at any of the meeting locations.

However since the COVID-19 pandemic, virtual meetings have become the norm, and may well become the method of choice for hearings in the months ahead. In response to the health crisis, Governor Cuomo has issued Executive Orders which temporarily dispense with the requirement for the public to physically be present at a meeting or public hearing. The Governor’s Executive Orders have also allowed for teleconference hearings that aren’t otherwise allowed under the applicable statute.

Proper notice has always been, and will remain, a strict requirement under the law. Municipalities conducting a virtual public hearing would be well advised to continue strict adherence to this requirement. Further, notice of virtual hearings require additional information not ordinarily included in a notice for in-person hearings. Notice for a virtual hearing should contain:

- The name of the public body holding the hearing;
- The date and time of the hearing;
- The method that the public body will be utilizing to conduct the hearing, i.e., videoconference or teleconference;
- Means by which the public can view or listen to the hearing (i.e., conference call number, Zoom Meeting ID and Password); and
- The manner in which an individual may submit comment, for example via e-mail, with the deadline to receive such comments, or whether the hearing will be held open for a specific number of days to receive such comment, and that the written comments will be made part of the record.

Meeting minutes are still required, and it is best practice to have a stenographer present during the hearing as meetings must be recorded and transcribed.

Regardless of which platform (Zoom, Microsoft Teams, conference call, etc.) the public body utilizes to conduct a virtual hearing, it may be a worthwhile investment to hold a “test meeting”, especially if that meeting will be the first virtual meeting. A “test meeting” will allow municipal staff and public body members to practice and gain familiarity with the platform being used. It can also serve to formulate a plan of contingencies based on technological problems which arise during the test.

From a practical standpoint, it can help board members practice identifying themselves before speaking so that the record is clear. Holding a test meeting will help ensure that every board member can connect to the platform and use the microphone and camera to guard against any potential quarantine issues that can arise due to not being able to log on.

Furthermore, a test can ensure that the host of the meeting can control the microphones of participants, so as to help keep the lines of communication open and the record clear.

In addition, it will allow the board members and staff to practice sharing the screen when displaying exhibits, documents, or plans should the need arise during the actual meeting. Even more importantly, it will allow for practice in addressing public comments during the hearing, such as having members of the public sign up to speak so that individuals are not speaking over each other.

This will also ensure that the public has the opportunity to voice any opposition, support, or concern for any proposed project or issue contemplated by the hearing, thus ensuring a “meaningful opportunity” to be heard. In turn, the Board will be fully aware of the public sentiment around the issue they are tasked with considering.

The importance of getting the necessary documents, such as exhibits and plans, prepared and submitted to the public body, i.e., the Village Clerk or Secretary to the Zoning Board, well in advance of the hearing date is vitally important. A practice hearing will allow the Clerk or Secretary of the Board to ensure that these documents are readily available for display and review by the public during the hearing.

Finally, applicants should have their presentations prepared in advance. Virtual meetings tend to take longer than in-person meetings, technical issues inevitably arise, participants talk over each other, and it is easy for a record to get muddled. Prepared presentations will allow an applicant to stay on track and not inadvertently miss any of the presentation’s key points or standards of law.

It will allow an applicant to make sure the record is complete so that the Board has all the information needed to render a decision. A clear and complete record will also prove helpful to the applicant should an appeal be necessary.

The Statute of Limitations for an Article 78 petition challenging a Board’s decision, regardless of how the hearing was conducted, is thirty days and failure to comply will be fatal to any challenge regardless of the merits. Governor Cuomo’s Executive Order 202.8 and subsequent orders have tolled this Statute. So, although a municipal board may conduct virtual hearings and render decisions, currently an aggrieved applicant has a longer window to appeal.

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2. Governor Cuomo’s Executive Order No. 202.1 suspends this requirement of the Open Meetings Law, to allow a public body to hold meetings and hearings without allowing the public to be physically present at the meeting. The order also authorizes public bodies to meet remotely by conference call or similar service.
3. Once the Executive Order expires, public notice of a virtual hearing will have to include the locations from which the board members will be participating and state that the public has the right to attend the meeting at any of the meeting locations.
6. Zoning Board decisions on variance applications, determinations, and appeals are subject to a 30-day statute of limitations. Town Law § 267-c; Gen. City Law § 61-c; Village Law § 7-712-c. The time period of a site plan application is also subject to a 30-day statute of limitations. Town Law § 27-b-a(1); Gen. City Law § 27-b-a(1); Village Law § 7-725-a(1). Similarly, the statute of limitations on the grant or denial of a subdivision application is 30 days. Town Law § 282; Gen. City Law § 3-56. Village Law § 7-740.
An Old Bailey Hack and His Golden Thread

My creed included a simple faith in trial by jury and the presumption of innocence. The eleventh commandment was, “Thou Shalt Not Plead Guilty.”

—Horace Rumpole

At the crossroads where the bar and the criminal world meet, there are certain fictional lawyers who live on in the imagination of many. For most Americans, Atticus Finch, the fictional lawyer, or rather barrister, is Horace Rumpole of Rumpole of the Bailey fame. The inspired concoction of author and barrister John Mortimer, QC, Rumpole has entertained audiences on television and subsequently in print since 1975. At the same time, “He embodied the independence of the Bar, infuriating govern- ments, judges, policemen and all persons in authority. Rumpole was televisions first and perhaps only truly Jewish barrister.”

Rumpole was brought to life on television by Leo McKern, who vividly portrayed the role with a “dissipate for the community, self-re- gard and the soulless application of the law without regard for human values.” A perfect meld of character and actor, in the public’s mind McKern became synonymous with Rumpole. As Geoffrey Robertson, QC noted at the time of McKern’s passing: “His great achievement was creating a lawyer the world could love.”

Judge Graves: Mr. Rumpole, may I ask where these questions are leading? Rumpole: I hope, my lord, to the truth.

Rumpole proudly refers to himself as an “Old Bailey Hack.” His stage is the Old Bailey, the central criminal court in London. By profession he is a “barrister” as opposed to a “solicitor.” When asked where these questions are leading, Rumpole responds, “I hope, my lord, to the truth.”

Rumpole is the antithesis of the Hollywood image of the high-powered criminal defense attorney. His clothes are not stylish, nor his offices impressive. His clients are sel- dom fashionable, his cases often pedestrian. His practice could never even remotely be described as “sexy.” But the poetry as well as the prose of the char- acter lies in this very absence of glamour.

Mortimer, who wrote every script, took his stories from actual cases he had litigated or whose details he had intemperate. As such, Rumpole has more than a whiff of realism. He exempli- fies everything a criminal defense counsel could and should be. He is an advocate who plays his role with unwavering dedication to his client, independence of mind and a bit of subversive naughtiness which shows itself readily before any court.

Rumpole: I happen to have a good deal of faith.

Samuel Ballard, QC: Yes, in what precisely?

Rumpole: The health-giving qualities of claret, of course, the presumption of innocence, and not having to clock into chambers in the morning.

But what makes Rumpole a genuine delight lies in the many distinctive touches that Mortimer and McKern have layered on the canvas of the character that makes him seem three-dimensional and quite human. He recites poetry, particularly Woodsworth, at the drop of his bowler hat. He drinks inexpensive wine and smokes cheap cigars at the local pub. His wife Hilda, who was modelled after Margaret Thatcher, is mischievously referred to as “she who must be obeyed.”

What also stands out, at least for most Americans, is the character’s relationship to the author himself. At the time of McKern’s passing: “His great achievement was creating a lawyer the world could love.”

In every facet of the presentation, Rumpole is the epitome of the British barrister as Sherlock Holmes is the epitome of the British detective. Both are symbols of a manly, manly man. Mortimer has crafted a figure much like himself: an Oxford-educated eccentric with a dry wit, a sharp intellect, and above all a passion for justice. But justice not in some cos- mic sense, but rather for each individual client arrived at literally one case at a time.

We don’t know much about the human conscience, except that it is soluble in alcohol.

—John Mortimer

The Old Bailey is not a place that lends itself to pleasant sentiments. Bigotry, hatred, envy, the recurring issue of class in Britain; but most of all crime, both great but most of all petty, are all ever-present. It is a world where “Crime doesn’t pay, but it’s a living.” In fact, Rumpole’s live- hood depends upon the criminal element and he is a sort of taxicab “committed to giving a ride to any- one who hails him.”

Mortimer puts it most suc- cinctly: “No brilliance is needed in the law. Nothing but common sense, and relatively clean finger- nails.” By extension, his most recognizable characteristic is his middle-class man who comes to the practice of criminal defense work with a skill belied by his less than par trial appearance.

He brings to every matter before him a wry, not quite cynical but certainly jaun- diced, view of human nature. After all, he is over fifty, overweight, and ever put-upon. Yet he retains a certain joie de vivre which makes him a very engaging personality. Rumpole, like Mortimer, enjoys good food, enjoys a bottle of claret before dinner, loves Dickens, and fights for liberal causes.

I had inherited what my father called the art of the advocate, or the irritating habit of looking for the flaw in any argument.

—John Mortimer

John Mortimer cut a noticeable figure in British literary and legal circles. He played an instrumental role in the passage of the 1968 Theatres Act, which abolished the office of the Lord Chamberlain, official censor of the English stage. And he has kept a devoted crimi- nal defense counsel, he campaigned vigorously for the abolition of capital punishment. In addition to Rumpole, he wrote plays, novels, and film scripts of appreciable quality. He was a recognized celebrity who lived life to its fullest and was applauded for his great charm. As he got on in years, he ruthlessly remarked, “I refuse to spend my life worrying about what I eat. There is no pleasure worth foregoing just for an extra three years in the gutter.”

A self-professed “Champagne Socialist,” Mortimer came of age politically with the Labour Party’s victory in the 1945 general election. He was far too radical in his views to be easily pigeonholed. He couldn’t possibly be described as ‘woke’ in today’s parlance. In many ways, Rumpole served as a useful persona for Mortimer: “If I were a lawyer we could love, dies at 82

Leo McKern, 82, Character Actor Brought Rumpole to Life, Los Angeles Times (July 24, 2002) at archive.laconline.lasgazette.com.

3. Louise Jury, Leo McKern, the actor who made Rumpole famous, has died at 83, The Independent (July 24, 2002) at https://www.independent.co.uk.


7. further embellished his reputation as a civil libertarian in a litany of censorship cases, which broadened the range of permissible expression in Britain. These matters ranged from upholding the publica- tion of Hubert Selby, It’s Last Exit to Brooklyn to defending a record store for displaying an album cover featuring the punk rock band The Sex Pistols, The Guardian (Jan. 22, 2009).


12. Id.


15. “Sir John Mortimer QC who took an liberal cause but found most fame as the creator of the fictional barrister Rumpole,” The Independent (Jan. 16, 2009) at https://independent.co.uk.

16. Rudy Carmenaty establishes a Bureau Chief in the Office of the Nassau County Attorney’s Office, is the Director of Legal Services for Nassau County Community Service Organizations, and as Language Access Coordinator to the Nassau County Executive. He is also Vice-Chair of the NCBA Publications Committee.

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Welcome to September 2020. Our world has been changed, turned upside down by COVID-19, we are doing things in ways thought unimaginable less than a year ago. However, what has not changed, and has in fact increased, is the need for representation for the underserved populations of our community. What also has not changed is the commitment of our Bar to serving this population.

To that end, it is with great pleasure that The Safe Center LI (TSCLI) recognizes Amarilda Brahim Fligstein as the Nassau Lawyer’s Pro Bono Attorney of the Month for September 2020.

The proud mother of two young children, in 2017 she was ready to return to practicing law, but was new in town, not knowing any attorneys or possible mentors. It was recommended that Fligstein start meeting members of the legal community by doing pro bono work. She took that advice and was looking for meaningful volunteer work when her husband, an executive with the United Way of Long Island and a source of strength, suggested she contact TSCLI. As a recipient of United Way grants, he correctly thought it would be a good fit. In her own words, “I reached out to Lois (Schwaizer) and after a few minutes it became apparent that there was a need and I was happy to help.”

While she had experience in different areas of law, Fligstein was relatively new to the practice of Matrimonial Law. Like other Pro Bono Project (PBP) volunteers, she attended a TSCLI training and took advantage of the PBP mentoring program, expressing her gratitude for her TSCLI mentor’s help. She has since represented a variety of clients and accepted her newest assignment shortly before the COVID quarantine began. Her enthusiasm and dedication to her clients is such that in 2018 she logged over 125 hours of pro bono representation making her the number one TSCLI PBP volunteer for 2018. Fligstein was to be honored for this achievement at the Pro Bono Recognition Reception (originally scheduled for July 22) and will be honored when it is held in 2021.

When asked if any particular case or client stood out, she replied, “[My] most memorable was the most recent case I had involving a mom and daughter trying to adjust to a new life. I had to navigate a delicate balance between motivating the client to pursue her goals while also letting her make her own choices. I learned that all I had to do was give her the tools she needed (the law) to have her voice heard. We worked well as a team, we got everything she asked for. And she deserved it.”

In addition to her work with TSCLI, Fligstein has also volunteered with the NCBA, NY CARES, NOW and the Gift of Life program. While performing volunteer work has helped her establish her own practice, she continues to serve, “Doing pro bono work humbles me. It reminds me that our income driven profession is more noble than we think if we only make a little time (easier said than done). I like making a difference in someone’s life, the kind of difference they may need, because a lot of people have made a lot of difference in mine, including the members of the Northport Tennis Club.”

Fligstein received a B.A. in Science from St. John’s University and her Juris Doctor from Pace University School of Law, where she also earned an international law certificate. She has experience in a variety of areas of law including immigration, compliance, real estate, wills, trusts and estates, criminal and matrimonial law. Now a solo practitioner, her primary focus is on family law and elder law, assisting her clients with multiple issues ranging from a struggling new family to a struggling aging family.

Fligstein’s family was one of the first Albanian families to come to the United States, where she attended college and became a lawyer. She believes that great achievement comes with the great responsibility to educate her community of the rights they have and to inspire younger generations to educate themselves and use that knowledge to help others. Leading by example is a powerful way of doing that.

Fligstein is a credit to the Albanian community, the legal community, and the diverse communities she so ably serves. Her fluency in Albanian and Greek helps to level the playing field for those who do not have a command of the English language. Her hard work paired with her kindness has helped countless individuals and families.

We are grateful for her unwavering dedication and ask that you join us in congratulating her being honored as the Nassau Lawyer Pro Bono Attorney of the Month.

Gail Broder Katz is the Pro Bono Project Coordinator for The Safe Center LI (formerly Nassau County Coalition Against Domestic Violence). She can be contacted at GBroderKatz@tscli.org or (516) 465-4700 for information about the Project and how you can help.

The In Brief column is compiled by Mariana G. Rice, a partner at the Garden City law firm Forchelli Deegan Terrana LLP’s (“FDT”) Managing Partner, Jeffrey D. Forchelli, was selected by his peers for inclusion in the 27th Edition of The Best Lawyers in America® for Land Use & Zoning Law. He has been recognized annually since 2018. FDT Partner Gregory S. Lisi was recognized for the first time in Litigation—Labor & Employment Law. In addition, the following FDT attorneys were included in the inaugural edition of The Best Lawyers: Ones to Watch: Lindsay Mesh Lottish for her work in Banking & Finance Law and Robert L. Renda for his work in Tax Law.

Managing Partner Joseph G. Milizio of Vlahnick McGovern Milizio LLP (VMM) is pleased to announce the establishment of four new practices: COVID-19 Legal Assistance (launched in March); Surrogacy, Adoption, and Assisted Reproduction; Real Estate Litigation; and Personal Injury. VMM is also pleased to welcome two new attorneys, counsel Richard H. Apat as head of the Real Estate Litigation and Personal Injury practices and associate Andrew S. Koenig in the Personal Injury practice. Joseph G. Milizio has also announced that the firm has been ranked in the 2020 New York Law Journal “New York’s Top-Rated Lawyers” list in three practice areas: Trusts and Estates, Real Estate Law, and LGBTQ Representation. The firm has also been named in the Global Law Experts Awards 2020 as “Trust & Estate Litigation Law Firm of the Year in New York.” In addition, the firm proudly congratulates three of its attorneys for being named to the Best Lawyers: Ones to Watch 2021 list: partner Constantina S. Papageorgiou in two practice areas, Elder Law and Trusts and Estates; counsel John P. Gordon in the practice area of Business Organizations (including LLCs and Partnerships); and associate Meredith Chesler in the practice area of Trusts and Estates.

A featured guest on News 12’s “The New Normal” on July 14, discussing COVID-19 and matrimonial and family law matters, Avrohom Gelen was also a featured guest on “The New Normal” on June 29, discussing COVID-19 and business and employment law matters. The prime-time morning show is broadcast across New York and New Jersey. Counsel Richard H. Apat was interviewed on CBS New York 5 o’clock news on August 6 about the legal responsibility for property damage and personal injuries caused by tropical storm Isaias. Andrew A. Klimler was a featured presenter at the New York Society of Association Executives (NYSAE) webinar on July 24, discussing current challenges facing the workplace. Richard H. Apat will be conducting a webinar about neighbor issues during COVID-19 and Isaias from the legal and insurance perspectives on August 26.

Ronald Fatoullah of Ronald Fatoullah & Associates presented several educational webinars throughout the month utilizing the virtual platform. He provided current updates regarding the changes in community Medicaid and collaborated with expert patient advocates in the medical and insurance arenas to address the needs of their members.

Karen Tenenbaum, LL.M. (Tax), CPA, tax attorney, and Marisa Friederich spoke for AAA-CPA discussing NYS residency tax issues. Throughout the pandemic, Karen and her firm were a resource to the community.

Karen was interviewed by News 12 discussing the COVID Tax Relief updates. The Melville-based firm represents taxpayers in IRS and NYS tax matters.

Stephen J. Silverberg, CELA, has been named as a member of the Executive Committee of the Estate Planning Council of Nassau County, an organization that promotes the exchange of ideas and information among estate planning professionals.

Founding Partners Daniel J. Hansen and Troy G. Rosasco of Hansen & Rosasco, LLP recently opened their new office at 1377 Motor Parkway, Suite 301, Islandia, NY 11749. They also have offices in midtown Manhattan. The firm is devoted exclusively to representing first responders and downtown Manhattan survivors before the 9/11 Victim Compensation Fund. The Firm, Administrator, located at the Islandia office, is Dede S. Unger.

In Brief

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

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

"covered." If a project’s eligibility it determined by a ratio of the public subsidies it receives versus total cost of the project, then the numerator for this formula is the public subsidies and the denominator is the total project costs. If dividing the total public subsidies by the total project costs equals 30% or more, then that project will be “covered” by this new prevailing wage legislation. A developer cannot make this calculation without knowing exactly what goes into the denominator, i.e., what constitutes total "construction project costs?" Do they include all material and labor costs? How should those labor costs be calculated? Should they be based on bids received in the open market as a private project, or based on a public bidding process that utilizes prevailing wage standards? Are soft costs such as architectural, engineering, environmental, legal fees and other due diligence costs included? What about land acquisition costs? How does the definition of "construction project costs" (of which public subsidies must be at least 30% to trigger prevailing wage requirements) differ from the definition of "project costs" (which must exceed five million dollars as a baseline threshold for the new legislation)? These are just a few of the questions that the Public Subsidy Board will need to opine on when its thirteen board members are appointed by the Governor. Going Forward

The legislation, which is set to go into effect on January 1, 2022, is ambiguous as to whether projects going through the entitlement process will be deemed exempt from the prevailing wage requirements on the date it becomes effective, which is a significant concern for projects on Long Island where the entitlement process can take years to complete. Another important power reserved to the Public Subsidy Board is the ability to temporarily delay the implementation of the legislation past January 1, 2022 “in the event that the board finds that there is or likely would be a significant negative economic impact.” The board may delay implementation on a statewide basis, or a region by region basis.

It is common knowledge that nearly all large-scale developments on Long Island would not be feasible but for the financial assistance afforded by local municipalities via a Vis-à-Vis Industrial Development Agencies. This assistance typically includes payment in lieu of tax agreements, sales and use tax exemptions and partial mortgage recording tax exemptions, among others. Going forward, a thorough financial assessment must be performed for all future projects seeking public subsidies in the wake of this legislation to determine whether the aggregate value of savings received for the project will trigger the prevailing wage thresholds established in the law.

Nicholas J. Cappadora is an associate at Sahn Ward Coschignano, PLLC, specializing in land use and zoning law and industrial development agency transactions.

1. NY Comst L. § 17.
6. Id. The 13 members of the Public Subsidy Board shall be appointed by the Governor as follows: one member upon the recommendation of the temporary President of the State Senate, one member upon the recommendation of the Speaker of the Assembly, the Commissioner of the Department of Labor, the President of the Empire State Development Corporation, the Director of the Department of the Budget, two members representing employees in the construction industry, of whom one shall be a representative of the largest statewide trade labor association representing building and construction workers, and one shall be a representative of the largest trade labor association representing building and construction workers with membership in New York City, and two members representing employers in the construction industry, of whom one shall be a representative of the largest statewide organization representing building owners and developers, either for-profit or not-for-profit, and one shall be a representative of a statewide representing building owners and developers, either for-profit or not-for-profit, representing a region different than the region primarily represented by the initial employer representative. The Commissioner shall act as the chair.
Executive ... Continued From Page 6

“[I]n the event of a disaster… and upon a finding by the chief executive thereof that the public safety is imperiled thereby, such chief executive may proclaim a local state of emergency within any part or all of the territorial limits of such local government. However, the one matter that is instructive as chief executive during national or state emergencies, such as COVID-19. Subsection 8 states that any executive order exceeded the Respondent’s [County Executive] authority as the level of a ‘disaster’ under Executive Law § 24. The Court, however, held that the issued executive order exceeded the Respondent’s [County Executive] authority as the level of a disaster did not “rise to the level of a pandemic.” Local Emergency declarations are permissible, but need to be limited in scope and duration.

Conclusion

COVID-19 created circumstances not seen before in our lifetimes. Confronted with unprecedented realities, the Governor and other elected chief executives were forced, through the use of the executive orders, to contour the lives of the citizens to fight this pandemic. However, the courts and legislatures have instructed that actions that are taken to surmount such challenges must be limited in scope and substance. Preservation of the collective whole is necessary, for certain, but the founding principles of this country must still be preserved.

Charles J. Casolaro is the principle of the Law Offices of Charles Casolaro of Garden City, and a village attorney for two Long Island villages, as well as special counsel to other. Mr. Casolaro wishes to thank Hofstra Law graduate Julia Evans for her research and assistance in the preparation of this Article. Mr. Casolaro can be reached at cjc@casolarolaw.com

4. See id.
5. See id.; see also Lee Edwards, What is Conservatism?, Heritage Foundation (Oct. 25, 2018).
7. See N.Y. Const., art. III, § 1, id.
11. See State Executive Law § 29-a(1).
12. See State Executive Law § 24(1).
14. See id.
15. See id.
16. See W.D. on behalf of A. v. County of Rockland, 63 Misc.3d 932 (Sup. Ct., Rockland Co. Apr. 5, 2019).
17. See id.
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Discusses issues related to the protection of the rights of minorities and the various civil rights legislation.
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Shares information and support to assist in-house counsel and new subject matter skills.
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Reviews insurance claim procedures, insurance policies, substantive insurance law and related issues.

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Provides a source of information to practicing attorneys whose interests relate to patents, trademarks, copyright and other intellectual property matters.
Vice Chair: Sara Dorchak

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Analyses proposed federal and state legislation, administrative regulations, and current judicial decisions relating to employer-employee relations, pension, health and other employee benefit plans. Social Security and other matters in the field of labor and employment law.
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Provides confidential assistance to attorneys struggling with alcohol, drug, gambling and other addictions & mental health issues that affect one’s professional conduct.
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Advises the NCBA Lawyer Referral Service; addresses policy questions regarding fees, law categories and membership.

LEGAL ADMINISTRATORS
Provides a forum for legal administrators to share information, learn about updates to HR and labor law, gain knowledge about topics relevant to their particular law firm and network with other administrators, while at the same time increasing visibility and understanding related to the administrator’s role within their law firms.
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Addresses equality in the law and the legal concerns of the LGBTQ community.
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Reviews trends and developments concerning zoning and planning, elections, employee relations, open meetings law, and preparation and enforcement of ordinances and local laws.
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Structured events and activities of benefit and interest to new attorneys (within ten years of admission) and law students, including social and professional activities that establishes support network for new lawyers.
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Discusses current legislation related to Workers’ Compensation regulations and benefits.
Chair: Adam L. Rosen
Vice Chair: Brian P. O’Keele
In response to the reprehensible acts of hatred and civil unrest that has devastated our nation, NCBA Members. Dates and times are for NCBA Members. Dates and times are subject to change. Check www.ncbaradio.com for updated information.

NEW BUSINESS LAW, TAX AND ACCOUNTING
Jennifer L. Koo/Scott L. Nelsenthaun
Wednesday, September 16 12:45 p.m.

NCBA Committee Meeting Calendar
Sept. 2—Oct. 7, 2020
Please Note: Committee Meetings are for NCBA Members. Dates and times are subject to change. Check www.ncbaradio.com for updated information.

REAL PROPERTY LAW
Alan J. Schwartz
Wednesday, September 2 12:30 p.m.

PROFESSIONS
Christopher J. DeCiripps/Andrea M. DiGregorio
Thursday, September 3 12:45 p.m.

COMMUNITY RELATIONS & PUBLIC EDUCATION
Joshua D. Brookstein
Thursday, September 3 12:30 p.m.

MATRIMONIAL LAW
Samantha J. Pereira
Wednesday, September 9 5:30 p.m.

CIVIL RIGHTS
Bernadette V. Ford
Thursday, September 10 12:30 p.m.

LGBTQ
Charlie Arwood/Bryan Chou
Tuesday, September 15 9:00 a.m.

PLAINTIFF’S PERSONAL INJURY
Ira S. Stav
Tuesday, September 15 12:30 p.m.

LABOR & EMPLOYMENT
Matthew B. Weisner
Tuesday, September 15 12:30 p.m.

ALTERNATIVE DISPUTE RESOLUTION
Marilyn K. Gencarelli-Dash
Tuesday, September 15 6:00 p.m.

DIVERSITY AND INCLUSION
Hon. Maxine S. Broderick
Tuesday, September 15 6:00 p.m.

In New York City, the Department of Transportation maintains multiple databases of street work permits, notices of violation pertaining to sidewalk and street defects and corrective action requests. This system allows Plaintiff’s attorneys to easily identify responsible parties. Some of whom may be contractors as opposed to property owners or the City and to determine prior written notice to the City about defects. Sections 19-152 and 16-123 of the New York City Administrative Code require property owners to keep the sidewalk in good repair to release the City from liability for injuries sustained on the sidewalk. However, the City is responsible for injuries sustained on sidewalks abutting one to three family residences according to Local Law 134 of 2003. For this reason, they require such landowners to carry homeowners’ insurance to allow them to indemnify the city for personal injury suits. City sidewalk suits are considerably more difficult and expensive than prospective ones where the venue is on Long Island.

More municipalities should shift liability away from local government and require Long Island homeowners to carry insurance. This would afford plaintiffs a greater chance at compensation for personal injury suits and encourage homeowners to make sidewalk repairs. In the meantime, Long Island plaintiffs’ personal injury attorneys should keep a list of towns available to defend the potential liability on abutting landowners for personal injury on defective sidewalks for when deciding what cases to take.

Frances Catapano is an attorney whose practice focuses on personal injury, civil rights and complex litigation. In her spare time, she is a parent and an autism rights advocate.


that I had a deeper understanding of the profound issues it raises. I am looking forward to the next meeting led by Gail Jacobs, former Dean of the Academy of Law at NCBA.

Among numerous suggestions and innovative ideas shared during the initial meeting of the Task Force, Judge Maxine S. Broderick, Chair of the NCBA Diversity and Inclusion Committee, proposed that NCBA establish a Social Justice Book Club. The Book Club, which would meet bi-monthly, would discuss and explore book selections with the objective of informing members on issues of diversity, injustices, and disparities, present in our nation.

On July 29, 2020, the Book Club held its first meeting virtually and welcomed 30 NCBA members to discuss the 2015 National Book Award winner, Ta-Nehisi Coates’ Between the World and Me. The American author and journalist. The book is a work of non-fiction that delves into the realities associated with being a person of color in the United States. Participants earned two Diversity: Inclusion and Elimination of Bias CLE credits.

Prior to the discussion, the Diversity & Inclusion Committee circulated guidelines for discussing sensitive issues of race and inequality:

- Approach the conversation with respect
- Set aside the need to be right and the need to win
- Embrace the discomfort of not knowing
- Consider committing to change
- Be authentic
- Maintain privacy
- Allow the moderators to moderate

In following these guidelines, Book Club members were able to approach these difficult topics with empathy and respect, while learning from one another. Discussion moderator, Hofstra Law Professor Jennifer Gundlach, insured that the Book Club members were encouraged to confront unsettling material without limitation. Questions specific to the book selection were disseminated prior to the meeting, and were utilized as a starting point for dialogue.

Among many Bar’s Diversity & Inclusion Committee is a vibrant and productive committee that is enhancing members’ relationships with the Bar Association and strengthening the Bar’s ties to the community. Our first discussion of the Book Club discussing Between the World And Me was so engaging and challenging for all of us participating. More than just a roundtable talk about the book, the meeting helped develop ideas and strategies to promote awareness about the racial inequity and disparities that exist. It opened the dialogue about what the Bar can do to address and remedy it.” said NCBA Member Oscar Michelen.

The first Book Club meeting can be considered a success in terms of participation and depth of conversation.

New members are welcome to join the Book Club and suggest works of fiction or non-fiction for future discussion. The selection of texts, while carried out by committee, are not endorsements of the views and perspectives expounded by the authors nor does the Book Club seek to advance any political or social agenda. One of the primary goals of the Book Club is to be intentionally inclusive. Book Club organizers are mindful that our members do not all share the same experiences and opinions and therefore welcome all perspectives to create a robust, though respectful, dialogue.

If you would like to join the Book Club or suggest a book, contact NCBA Diversity & Inclusion Committee Chair, Hon. Maxine S. Broderick at broderick.maxine@gmail.com or Vice Chair Rudy Carmenty at. Carmenty@hnsnassaucounty.us for more information.

New NCBA Social Justice Book Club Tackles Race, Discrimination and Inequality

Continued From Page 8

Homeowner ...

homeowners living there would be less inclined to take on the added expense of repairing the sidewalk. While they are supposed to keep sidewalks in safe repair, the average person will not see the urgency without a ticket from the municipality. Furthermore, homeowner’s insurance does not cover sidewalk maintenance, just the defense of lawsuits arising from an injury sustained from a defect. In addition, given the cause-and-create exception, a homeowner might not want to expose themselves to a potential lawsuit in the event that the contractor they hire to perform sidewalk repairs performs negligently and causes a pedestrian to trip.

Plaintiffs consequently have no recourse after sustaining an injury on a defective sidewalk in these towns and villages unless they file suit against the municipality. However, suits against towns and villages are subject to dismissal without prior written notice to the municipality of the defect unless one or both of the two exceptions exist: the municipality created the sidewalk condition or a special use from the sidewalk.2

Late last year Newsday reported that the insurance company for the Village of Bayville advised the municipality to revise its ordinance to explicitly shift liability for personal injury from sidewalk trip and falls from the Village to the owners of the land abutting the sidewalk. Their rationale was that most homeowners carry insurance to defend against such claims.3 And indeed, excess charges that homeowners pay with their monthly mortgage payments include homeowner’s insurance in addition to taxes.

Bayville’s counsel did not publish their likely intent to protect their clients from acting against their best interest in unwillingly fulfilling the prior written notice requirement for potential plaintiffs in personal injury suits.

If municipalities on Long Island fail to enforce currently enacted local codes that impose a duty without liability on homeowners, they open the town or village up to lawsuits that should plaintiffs trip and fall on the defective sidewalks in the time window between notice and compliance. They create a written record when they send a notice to the homeowner to correct sidewalk defects. This paper trial may serve as prior written notice in these cases.4

In New York City, the Department of Transportation maintains multiple databases of street work permits, notices of violation pertaining to sidewalk and street defects and
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