The Nassau County Bar Association is pleased to welcome Gregory S. Lisi, former Chair of the NCBA Labor and Employment Law Committee, as its 119th President. Mr. Lisi was installed on Tuesday, June 1, 2021 at Domus, the Home of the Association, with close family members, friends, and colleagues in the audience.

As the world begins to reopen, President Lisi is thrilled to welcome members back to the NCBA, and to resume Bar activities. Visit page four of this issue for a special message from President Lisi, including his exciting plans for the upcoming Bar year.

Education and Career

A graduate of the Georgetown University Law Center, Washington, D.C., J.D., in 1992 and University at Buffalo, the State University of New York, B.A. in 1989, and Lisi has represented defendants, plaintiffs, publicly traded and private companies, trade groups and associations, the United States government, and New York State government entities.

Once a Regional Counsel of the United States Customs Service, where he defended the U.S. government before the Equal Employment Opportunity Commission, Lisi now heads the Employment and Labor practice group at Forchelli Deegan Terrana LLP, one of Long Island’s largest law firms. He handles sexual harassment, discrimination, wage and hour, equal employment, labor relations, immigration, and federal litigation law topics.

Lisi’s professional admissions include the New York State Bar Association, District of Columbia Bar Association, Supreme Court of the United States of America, United States Court of Appeals for the Second Circuit, United States District Courts for the Eastern and Southern Districts of New York.

Publications


Most recently, Lisi has penned numerous articles for his firm’s website to help colleagues and individuals navigate the ever-changing landscape of legal updates related to the pandemic, as well as articles to the Nassau Lawyer.

Honors and Accomplishments

Lisi was selected by his peers for inclusion in the 27th Edition of The Best Lawyers in America® for the first time in Litigation – Labor & Employment Law. Lisi is also a recipient of the New York Metro Super Lawyers; Long Island’s Top Legal Eagle; Who’s Who in Labor Law; Martindale-Hubbell Client Distinction Award; Pro Bono Attorney of the Year; Access to Justice Champion; Pro Bono Attorney of the Month, and Nassau County Bar Association Distinguished Professional Achievement in Labor & Employment Law.
Elizabeth Post
Executive Director
epost@nassaubar.org
As Executive Director of the NCBA, Liz’s job is to support the Bar’s leadership and to turn their visions into reality. Her role is to make sure the organization runs as smoothly as possible and to provide the organization’s staff the necessary tools and direction. Additionally, she can provide exemplary services and programs to Members. As a longtime nonprofit executive, her motto is that you never ask someone else to do something that you aren’t willing to do yourself. That’s why Members will just as likely see Liz at Donus moving tables around for the next meeting as finding her in her back office preparing next year’s budget.

Patti Anderson
Executive Assistant
panderson@nassaubar.org
Patti joined the NCBA staff in November 2002. Patti works in the Nassau Academy of Law, the educational arm of the Bar Association, helping members to keep up with their CLE credits. Some of her other responsibilities are: Arbitration, Mediation, Judiciary Committee and working with the Board of Directors. Patti enjoys cooking, swapping recipes, and spending time with her family and friends.

Gale D. Berg, Esq.
Director of Pro Bono
lberg@nassaubar.org
Gale has been an attorney for over 40 years and since 2010 has been the Director of Attorney Pro Bono Activities for the Nassau County Bar Association Mortgage Foreclosure Project. As Director, she recruits attorneys to volunteer to counsel Nassau residents at either our twice monthly clinics or at Mandatory Conferences. Additionally, Gale locates and writes the grant proposals which have funded this project for the last ten years. What you may not know is that Gale is an Associate Magistrate for the Village of the Baxter Estates and recently retired as a float escort in the Macy’s Thanksgiving Day Parade! She has photos of the nine years in which she marched; stop by if you want to see the proof!

Carolyn Bonino
Lawyer Referral Service Coordinator
cbonino@nassaubar.org
Carolyn has worked at the NCBA since 2006 in the Lawyer Referral Service Program where she provides Long Island residents and local businesses referrals to the right lawyer for their legal inquiry. In her free time, Carolyn enjoys spending time with her grandchildren.

Ann Burkowsky
Communications Manager
aburkowsky@nassaubar.org
Ann is the NCBA Communications Manager and has been working at the Bar since March 2019. She works on special events like BBQ at the Bar, Judiciary Night, and the Dinner Gala, to name a few. She is also the Production Editor of the Nassau Lawyer, the official publication of the NCBA.

Pat Carbonaro
Lawyer Referral Service Coordinator
pcarbonaro@nassaubar.org
Pat has worked for the NCBA for 32 years. For the past 31 years, she has coordinated the NCBA Lawyer Referral Information Service (LRIS) program and Call-A-Colleague Mentor program. Pat’s objective for LRIS is to refer fee generating referrals to the LRIS panel members. Clients who take advantage of the service come from all walks of life and run the gamut of economic spectrum. Those who cannot afford the private fees of our members are referred to outside agencies.

Pat would like to thank her long standing LRIS colleague and coordinator, Carolyn Bonino, for her dedication, professionalism, and friendship.

Cheryl Cardona
Paralegal
ccardona@nassaubar.org
Cheryl has worked at Real Estate Paralegal over 25 years and is working with the Mortgage Foreclosure Project. She works closely with the volunteer attorneys, housing counselors, and homeowners. She loves helping people and this project is perfect for her as she gets a sense of gratitude when she can help a Nassau County resident save their home. She is also a member of the Advisory Board of the Paralegal Program at Hofstra. She is a mother to three teenage daughters. In her spare time, she likes to work in her garden and volunteer at various animal shelters and rescue organizations.

Barbara Decker
Office Manager/Controller
bdecker@nassaubar.org
Barbara is the bookkeeper/controller for the NCBA, Nassau Academy of Law, and Nassau Bar Foundation, which consists of Mortgage Foreclosure, Lawyer Assistance Program, and WE CARE.

She raised five children as a single parent while working as the controller of a $22 million a year textile firm in Manhattan. She also played tennis for many years and only stopped when her health forced her to, at which time she took up pickle ball. She is devoted to her family and is fortunate to have a wide circle of friends.

Dr. Beth Eckhardt
Director of Lawyer Assistance Program (LAP)
eckhardt@nassaubar.org
As Director of the Lawyer Assistance Program (LAP), Dr. Beth Eckhardt provides professional, confidential counseling services to lawyers, judges, law students and their families struggling with mental health and substance use issues. In addition, Dr. Eckhardt coordinates resources and makes treatment referrals.

The Lawyer Assistance Program provides early identification, peer support, stress management, motivation, treatment referrals, and monitoring services. LAP also conducts presentations and workshops at law firms and law schools regarding substance use and mental health issues among attorneys, suicide prevention, time management, stress management, and mindfulness.

Beth has a private psychotherapy practice where she works with individuals, couples, and families. She is also mom to 15-year-old twins, Sarah and Bobby. When she is not working, she enjoys hiking, outdoor activities and spending time with family and friends.

Donna Gerdik
Membership Coordinator
dgerdik@nassaubar.org
Donna has been working at the Bar Association for 25 years. She was the administrative assistant in the Nassau Academy of Law and was later transferred to a new position as Membership Coordinator. She is on the NCBA Membership Committee, oversees the Matrimonial Law Committee dinners, as well as the Lunch with the Judges Program. She also does grievance and conciliation.

Jennifer Groh
CLE Director
jgroh@nassaubar.org
Jen has been a part of the Bar Association since 2013 and is the Director of the Nassau Academy of Law, the educational arm of the Bar Association which is responsible for our CLE programming. In addition to her duties for the Academy, Jen is also responsible for coordinating sponsorships, administrating of the Mock Trial tournament for high school students through our Community Relations and Public Education outreach, and running the Elaine Jackson Stack Moot Court competition for law school students.

Jen comes from the legal world and has a 15+ year background as an intellectual property lawyer. She holds a Master’s Degree in Education from New York University and a Master’s Degree in Information and Library Science from Pratt Institute.

She is the proud mom of Andrew, currently a sophomore at Stony Brook University majoring in Geology, and Eagle Scout.

Hector Herrera
Building Manager
hherrera@nassaubar.org
Hector assists the NCBA staff with technological needs involving maintaining the network, upgrading servers and workstations, extracting and converting videos and uploading them to the website. He also takes care of the general maintenance of Domus and during normal times take photographs of all NCBA events, sets up rooms for CLE programs, events and committee meetings, and provides all audio-visual requirements.

Hector schedules the Zoom meetings for the Committees and Bar entities, while assisting the Chairs and speakers to manage them and monitor its security.

Madeline Mullane
Esq., Settlement Conference Coordinator
mmullane@nassaubar.com
Madeline is new to the Bar Association but has been working in mortgage foreclosure for over 10 years. After representing plaintiffs for much of her legal career, it is with great pleasure that she will now be assisting and advocating for Nassau residents facing foreclosure at clinics and in the mandatory conference part.

Outside of work, Madeline enjoys gardening and spending time with her husband, James, and their three children, with a fourth on the way in July 2021.

Stephanie Pagan
Membership Coordinator/ Committee Liaison
spagan@nassaubar.org
Stephanie has worked at the NCBA since 2007. She is a Membership Coordinator and is responsible for sending out the invoices and processing of payments as well as making all updates. As Committees Liaison, she is the one to ask about booking committee meetings and sending out meeting notices. Stephanie is literally the keeper of the Bar calendar and manages the calendar for not just committees but all other Bar events. She also handles the WE CARE grants, which has two grant cycles a year. Her voice is also one of the ones that you will hear if you should call the Bar Association for help.

She is a proud mom of three children. When not hard at work, she enjoys going to the beach, reading, traveling, and spending time with her kids.

Bridget Ryan
WE CARE Coordinator/Special Events Assistant
bryan@nassaubar.org
Bridget is the NCBA Special Events Assistant and WE CARE Coordinator, and has been working at the Bar since September 2019. She helps to plan NCBA events such as the Annual Dinner Dance Gala and Judiciary Night, as well as WE CARE events such as Las Vegas Night and Gingerbread University, among others. She graduated from Adelphi University Honors College in 2017 with a B.A. in Communications for Digital Media. A fun fact about Bridget is that she’s a former Walt Disney World Cast Member!
A

lternative Dispute Resolution, ADR, has opened the door for conflicting parties to resolve their differences through non-traditional forums. Over the past thirty years, ADR has brought to light alternatives to litigation. These alternatives purport to enable parties to resolve their differences without the high cost associated with litigation, while at the same time reducing court caseloads.

These alternatives include a spectrum that range from arbitration, which is mostly a traditional court-like process to resolve conflicts, to facilitative mediation, which is mostly a cooperative process. Unlike arbitration where parties are subject to an arbitrator’s ruling on the conflict, mediation is an alternative dispute process that allows parties to resolve their conflict through voluntary participation in an interest-based mechanism with a mediator acting in a non-judgmental role to facilitate the mediation process.

This article will address mandatory mediation programs available in New York. As the title suggests, mandatory mediation appears to be a glaring contradiction. Mediation is a balance of self-determination, collaboration and creative ways of resolving a dispute and addressing each party’s underlying concerns. Any attempts to impose a formal and involuntary process on a party may potentially undermine the raison d’être of mediation. In view of this danger, there must be compelling reasons to introduce mandatory mediation.

**History of Mandatory Mediation Programs**

Due to the heavy burden placed on the court systems by a seemingly unending docket of cases, mediation has been looked at as a favorable alternative to traditional litigation or as a way to resolve litigation at various stages in the process. In 1983, Rule 16 of the Federal Rules of Civil Procedure was amended to exhort courts to consider the “possibility of settlement” or “the use of extrajudicial procedures to resolve the dispute” at pretrial conferences.\(^1\)

The Civil Justice Reform Act of 1990 also requires every federal district court to consider court-sponsored ADR. In addition, the ADR Act of 1998 gave district courts the mandate to establish ADR programs and listed mediation as an appropriate ADR process.\(^2\) The courts’ increasing association with mediation programs begs the question of whether the courts should compel disputing parties to attempt mediation, especially in jurisdictions where mediation is not widely utilized.

A Department of Justice study on the benefits of ADR, conducted from 2013 to 2017, found huge percentages of referred and ordered cases actually settled in mediation.\(^3\) Specifically, the study found that thirteen session of referred cases, and half of cases brought to mediation by court order, had actually settled.\(^4\) The DOJ posited that in the final year of the study alone, the Department saved millions of dollars in litigation costs, and discovery expenses, as well as thousands of days of attorney time and litigation delays.\(^5\)

**Federal and New York State Mediation Programs**

New York has four district courts: the Western (WDNY), Northern (NDNY), Southern (SDNY), and Eastern (EDNY) Districts. Each of those courts maintain data relating to their court annexed mediation programs. The data shows that, where a court rule requires that cases be sent directly to mediation, fifty percent or more of those cases typically find resolution through the mediation process.

In 2006, the WDNY, largely through the efforts of then Chief Judge William Skretny, enacted a unique mediation program, whereby almost all civil cases went directly to mediation. The program was so successful that, in 2014, the NDNY adopted an almost identical program. The SDNY has had an automatic mediation program that, over the past several years, has steadily, and successfully, expanded.\(^6\)

The EDNY, by contrast, has not adopted an automatic mediation program. However, it offers a voluntary mediation program which is largely successful and has recently expanded to cover Civil \$1883 cases. Specifically, eighty-seven percent of cases referred to the EDNY mediation program were referred by Magistrate Judges.\(^7\) District Judges were responsible for thirteen percent of mediation referrals. Seventy-five percent of all cases referred to the mediation program\(^8\) were settled. Of those cases referred to the mediation program,\(^9\) a mediation session was completed in 89% cases.\(^10\) Mediation referrals increased by thirty-seven percent in comparison to the same reporting period the previous year.\(^11\)

After initial experimentation with several pilot programs, Chief Judge Janet DiFiore announced in May 2019 that there would be an in-depth approach to implement presumptive mediation across the New York State Court system. The announcement was the result of the findings of the state Advisory Committee for ADR who found that existing mediation programs that were court sponsored were severely underutilized, despite the provision of reduce fee and often completely free mediation services.

Unlike the pilot programs that were previously utilized in limited litigation areas such as labor and matters within the commercial division, and existing usage within the family court system, the new initiative serves a wide range of civil matters such as personal injury, trust and estate matters, and commercial disputes. Although local jurisdictions were given the freedom to make decisions on the timeline of implementation and operation, there is a taskforce dedicated to oversight over the entire program, composed of deputy chief administrative judges, their staff, the State ADR coordinator, administrative and trial court judges, and local bar associations.\(^12\)

Despite the implementation of presumptive mediation throughout the New York state court system, the question remains as to the effectiveness of Presumptive ADR. The question remains whether the extensive implementation of ADR throughout all civil actions in New York will accomplish its intended results.

**Components of a Successful Program**

A review of the various mandatory mediation programs reveals that there appear to be some features that make for a successful program. Among them are having well-trained mediators, providing for discovery, offering facilitation and follow-up, adequate compensation and guaranteeing confidentiality.

Providing well-trained mediators is essential to a successful court annexed mediation program. Each of the four District Court programs provide for training and all program mediators are interviewed and carefully vetted before entering the program. Additionally, new mediators observe mediations before they handle any mediations and are observed once they have moved on to mediating cases on their own.

Parties submit evaluation forms after a mediation, where they can comment on the quality of the mediation and the mediator. These evaluation forms are reviewed by the program administrators to ensure quality control. The programs also bring mediators together on a regular basis to discuss cases, new procedures, and

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**FOCUS: ADR**

Cynthia A. Augello and Joel Thomas

**Mandatory Mediation—You Will Attempt to Resolve the Case Whether or Not You Want To**

Christopher J. Chimeri is frequently sought by colleagues in the legal community to provide direct appellate representation for clients, as well as consulting services to fellow lawyers.

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The firm’s appellate team is highly equipped to navigate, or help you navigate, the complexities and nuances of appellate practice, including all aspects of matrimonial and family law in all departments in New York State and the Court of Appeals, as well as civil and commercial matters in the Federal Courts.

See MANDATORY MEDIATION, Page 25

Christopher J. Chimeri is the Principal of the law Offices of Cynthia A. Augello, PC handling primarily employment law defense matters. She is also a New York State certified mediator. Joel Thomas is a graduate of the Maurice A. Dein School of Law at Hofstra University.

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As the great legal scholar George Costanza said, “[We’re] back, baby.” As President, one of my jobs this year is to get our members back to Domus. To that end, I will propose to the Board of Directors several ideas to increase the participation of members here at Domus. I believe that the networking function of the Nassau County Bar Association will be the main catalyst to getting members back in our home. Zoom is great, and will still be available, but you cannot really network on a Zoom call. To that end, starting in August:

NCBA Committee meetings will once again be in person here at Domus. Zoom has been a great catalyst for many of the committees and for some, it is the only way they can be here. So, we will not end the Zoom committee meetings, but will combine in-person and Zoom. With that in mind, I have assembled a panel of technologically savvy members, led by Tom Foley and Hector Herrera, to recommend the hardware, software, bandwidth and procedures to allow us to have up to four in-person committee meetings during lunch, while still having those meetings on Zoom—this way, those of us who wish to meet here, network, and enjoy each other, as committees have done for decades, can, while those who are more comfortable on Zoom will still have that option. Is my hope that as members see more in-person, the in-person committees, they will venture back to Domus.

The Committee on Committees, which is normally a once-a-year meeting of all the committee chairs and vice-chairs, will now meet more often as a networking cocktail hour at Domus. This will allow attorneys to mingle with other attorneys who do not practice the same type of law as each other. Extensive networking can be done with attorneys who handle different aspects of the law. Further, this will be an additional perk for putting in the time and effort as a committee chair. It will kick off on August 18. We are planning some targeted networking events as well. For example, there are many affinity bar associations here in New York, such as Amstald, the Asian American Bar Association of New York, Jewish Lawyers Association, Long Island Hispanic Bar Association and Columbia Lawyers, just to name a few. I have asked two former Presidents of those associations, Hon. Maxine S. Brotherick and Margaret Ling—to form a panel to organize networking meetings with members of these associations here at Domus. Not only will this have the hoped-for effect of getting more people to attend events and meetings, but it will also help with another issue very important to me, increasing the diversity of the Nassau County Bar Association. Hopefully, when those Bars’ members see this beautiful building, meet our wonderful members, and hear about our cutting-edge programs and networking opportunities, they will consider becoming members here as well.

Our in-house caterer, The Esquire at the Nassau County Bar Association, is so excited to be reopenin for lunch in August and is already open for private events. To book an event, contact (516) 414-0879 or events@theesquireny.com.

I will create the “President’s Table” at lunch. Every Wednesday at 12:30 PM, I will have lunch at Domus and any member may come to Domus and have lunch with the President of the Bar. There will be no agenda. Just join me to discuss any or no topic. If you do not have a lunch companion, or even if you do, I would be honored to have you at the President’s Table. We will kick it all off with the Annual Dinner Gala and Honoree VIP Reception night at Domus on August 3 and 4 with former NCBA Officers President-elect Chris McGrath, “Mr. Everything” Hector Herrera, the Honorable Norman St. George, and the 50-, 60- and 70-year members being honored at these events.

BBQ at the Bar will be back on September 9, 2021. Additionally, I have asked a blue-ribbon panel of members led by Iris Slavit, Marcia Monteiro, Michael DeFalco to brainstorm ways to get members back into Domus and increase membership. They have some fun ideas planned already!

These are just some of the ideas I have had for networking, but this is not all that this Bar is about. WE CARE will be getting back to their wonderful work with the Met’s Nurses on September 11, the Golf Outing on September 20, the Tunnels to Towers Walk, and my personal favorite—Las Vegas Night in October—among many others too numerous to name all of them here.

Further, with the help of Adam D’Antonio and Pat Carbonaro, we will make the Lawyer Referral Information Service (LRIS) into the best referral service in the state. We have been in direct alignment with Judge St. George the possibility of adding signs at Nassau County courthouses to inform people that if they need a lawyer to call the Nassau County Bar Association. We will update our website to allow inquiries over the internet and are looking into raising our profile on Google. With the increase in inquiries this will bring, we will multiply the number of calls the members of the Lawyer Referral Information Service panelists will receive, thereby increasing our revenue and the Bar’s net worth to get on the lawyer referral panel for your areas of expertise as soon as possible. It will be the best $250 you will ever spend.

Do you know that we are one of only two bar associations in New York State that has a licensed clinical social worker on staff to help our members in time of need? That’s right—our Lawyers’ Assistance Program (LAP) is like no other, with Beth Eckhardt and others working so hard for the mental health of our members. As we come out of this crazy time, please do not feel like you are alone. Believe me, many of us are having the same feelings and emotions as we get back to normal. We are here to help and it’s all confidential. LAP will be back with its retreat and its other events. Look for them, but use the service if you need it.

There is so much more that your magnificent Bar Association does, but none of it can be done without you. The state is reopening, the country is reopening, and the Nassau County Bar Association is reopening. The caterer is ready, the Board is ready, the staff is ready, and I am ready. As Bob Barker has said, “Come on Down” to the Nassau Bar. See your colleagues, have lunch with your friends, and learn about the new developments in the law that being at home you may have missed. It is all right here, under this roof. I’ll leave you with this quote by Michael Jordan, “Always turn a negative situation into a positive situation.” We have an opportunity here to turn the negative last year into a real positive not only for this Bar, but for our profession and ourselves—but we can only do it together. Together, that is what this Bar Association is. Us working together. Be a part of it.

See you in August!
Virtual appearances have permitted appeals and conferences in the New York Appellate Division and Appellate Term to proceed despite the business interruptions that the Covid-19 Pandemic has caused. Although virtual argument is not new—the United States Court of Appeals, Second Circuit, for example, began experimenting with a remote virtual appearance option years before the Pandemic—its widespread use in state court has revealed various issues for both appellate practitioners and judges.

To explore those issues, the NCBA Appellate Practice Committee coordinated a continuing legal education program held on April 22, 2021, consisting of a question-and-answer session, moderated by Committee Chair Jackie Gross, Esq., with an esteemed panel of jurists: Justice Leonard B. Austin, Associate Justice of the Appellate Division, Second Department, Justice Thomas A. Adams, (Ret.), previously Presiding Justice of the Appellate Term, Second Department and current Judicial Hearing Officer for the Appellate Division, Second Department’s Civil Appeals Management Program (“CAMP”), and Paul Kenny, Chief Clerk of the Appellate Term, Second Department. This informal discussion provided practitioners with a special opportunity to get to know the panel and for the panel to provide insight as to proper virtual court etiquette. The program, titled “May It Please the Court . . . Remotely — Best Practices for Virtual Oral Arguments,” is available for NCBA members to view on demand for CLE credit.

In sharing their virtual Court experiences, the panel discussed two overarching concerns practitioners should be mindful of when appearing virtually: (1) reducing the loss of personal connection caused by virtual platform limitations, such as environmental distractions, technical glitches and transmission delays; and (2) maintaining the same level of professionalism, decorum and respect found in the traditional courtroom.

A key to improving the connection between the Court and the practitioner during virtual appearances is adequate preparation. The panel stressed that the Court needs to be able to clearly see and hear practitioners free of distractions. Practitioners can improve the efficacy of their appearances by resolving potential distractions to the Court ahead of time. For starters, practitioners must be familiar with Microsoft Teams—the virtual platform that the New York courts are currently using—including the camera, background, and audio features. Practitioners also need to be sure to test the technology in the planned location for the appearance. Doing so reduces the likelihood that practitioners will experience internet connection loss and other issues that could detract from their arguments. As a backup, attorneys should confirm they have provided the Court with a good telephone number to reach them in the event they experience technical difficulties, and, if applicable, have a call-in number available.

Another common distraction to the Court is insufficient lighting, which can prevent the Court from adequately seeing counsel. Practitioners need to be mindful of lighting when selecting a location for their virtual appearances. Due to sun movement, for example, a location that is sufficient in the morning may be unsuitable as the day progresses. Practitioners should also select a location that is private and quiet. Although home offices may be more prone to noise and other environment distractions, such as pets, children, doorbells, and construction, commercial offices are not immune. Phones and chatter can be distracting as well. If practitioners foresee an unavoidable issue, they should consider alerting the Court ahead of time. Justice Austin recalled a situation where a practitioner contacted the Court because she planned to conduct virtual argument from her home office but learned that extensive construction would commence later in the morning. In that instance, the Court was able to arrange to hear her client’s appeal first before the construction was scheduled to begin.

The panel reminded the bar that virtual argument and conferences, including CAMP conferences, are still formal court appearances and, therefore, require the same level of professionalism and decorum as in the traditional courtroom. To this end, attorneys must conduct themselves in the same manner as they would in a traditional courtroom. This includes, dressing in appropriate business attire, just as if they were attending Court in person. For example, practitioners should not take off their ties and jacket upon completing their argument. They should wait until the virtual appearance has terminated. Additionally, in advance of a virtual appearance, practitioners should also confirm that any surrounding space within the Court’s view is appropriately “dressed” as neat, business appropriate, and non-distracting. If practitioners opt to use a virtual background, select one that is simple and professional. A beach background, for example, is inappropriate.

The panel had no preference whether counsel stands or sits during argument. Either is acceptable to the panel, provided they can clearly see and hear counsel. To that end, the camera should be level with the speaker’s eyes and the speaker should look directly into the camera when speaking. However, Counsel, however, should also be mindful that the Court can see what they are doing even if they are not speaking. If it is an adversary’s or Court’s turn to speak, for example, counsel should not check their phones, step or look away from the camera, eat or drink (aside from water), or engage in any conversation. The panel recounted situations where attorneys, mistakenly believing their microphones were muted, made rude and inappropriate comments under their breaths or to others about Court personnel or their adversaries. Microphones can be very sensitive. Attorneys should proceed as though their microphones are always unmuted.

The panel had no issues with clients being in the same room as the presenting attorney, provided the Court is notified (if necessary), and clients

**Lawyer Assistance Program (LAP)**

**VIRTUAL EVENTS CALENDAR**

**UN/UNDEREMPLOYED GROUP**

**FIRST TUESDAY OF EVERY MONTH AT 6:00 PM**

Share professional struggles during this difficult time and receive guidance from colleagues in a safe space.

**MINDFULNESS MONDAYS**

**SECOND MONDAY OF EVERY MONTH AT 6:00 PM**

Mindfulness is a proven technique in the elimination of stress, anxiety, and depression. Join us as we explore a variety of mindfulness techniques.

**TO REGISTER, CONTACT BETH ECKHARDT AT ECKHARDT@NASSAUBAR.ORG OR (516) 294-6022.**
Loss of Legal Scholar: In Memoriam—Judge Paul G. Feinman

Concetta Spirio, Martha Krisel, Charlie Arrowood, Elizabeth Vaz, and Jess A. Bushaft

O riginally this article was planned as a tribute to Judge Feinman in recognition of his service and by his sudden retirement from the Court of Appeals. Needless to say, it was a tragic shock to hear of his unexpected passing, only eight (8) days after the announcement of his retirement for health reasons. This article, intended to be about his early retirement, is now an article in memoriam.

This is an incredible loss for the entire legal community and especially for the LGBTQ community, who has lost an avid advocate and voice, not only to the public, but from the bench. As many know, Judge Feinman was an incredible legal scholar, jurist, and LGBTQ voice from the Court of Appeals bench. It is critically important to have the perspectives and experiences of LGBTQ people represented at all levels of the legal profession, both so that they can bring additional context to the body of law we all rely on and so they can serve as role models for those considering and entering the profession.

We mourn the untimely passing of Judge Paul G. Feinman (only 61), one of the Associate Judges of the Court of Appeals, who ascended to the Court in June 2017, after being nominated by Governor Andrew Cuomo. Judge Feinman was the first openly gay Associate Judge of the N.Y.S. Court of Appeals.

Born and raised on Long Island, we were proud and fortunate to not only have had another Long Islander reach high levels in the judiciary, but for him to ascend to our Court of Appeals, not only as an esteemed jurist, but as the first openly gay and LGBTQ representative and voice has made us even more proud.

Chief Judge DiFiore said that, “Judge Feinman is an exceptional Judge and a magnificent human being, who has made extraordinary contributions to the Court of Appeals during his tenure and that he will be greatly missed.” We echo that sentiment and are sorry that his voice and a voice for the LGBTQ community will no longer be on the bench.

Suffolk County Supreme Court Justice Chris Ann Kelley shared that the “recall[s] watching the New York State Senate confirmation hearing when Judge Feinman was officially confirmed as an Associate Justice of the Court of Appeals. His humility, warmth, wit, and keen intellect are apparent in that presentation before the Senate.” She further commented that at his confirmation hearing before the State Senate, Justice Feinman was questioned about the appropriateness of his filling the vacancy caused by the death of Judge Sheila Abdus-Salaam. Judge Feinman responded: “Certainly my entire career has been about promoting equal access and equal justice for all, and I hope to add to the diversity of perspectives that the Court considers.” Judge Feinman never lost sight of the importance of adding diverse voices to the Bench.

Judge Kelley recounted how, after his appointment, she reached out to Judge Feinman on a whim to invite him to the Suffolk County Court Pride Event commemorating the 50th Anniversary of Stonewall. She was surprised that he answered his own phone in chambers. She related that he was personable, humble, and approachable, and that he did not hesitate in accepting the offer to speak. Judge Feinman graced the community with his presence, and attendees were able to hear his insightful review of the history of LGBT cases decided by the Court of Appeals. He was so friendly, approachable, and mentor to many lawyers and judges.

Judge Feinman was an active member and past president of the International Association of LGBTQ Judges, a unique association that supports LGBTQ judges, the organization that Judge Feinman so proudly represented. As a tribute to Judge Feinman, we would be remiss not to express how he touched our organization.

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A Venue to Arbitrate Attorney Fee Disputes

Henry E. Rakowski and Sanford Strenger

Preventing Fee Disputes

Generally, a client’s allegations of unethical conduct or malpractice are the result of the attorney’s failure to communicate effectively with the client, to return telephone calls and to write letters confirming advice given during meetings or telephone calls. Therefore, attorneys are strongly urged to communicate why their work is necessary to protect the client’s rights. Also, attorneys are strongly urged to write letters memorializing their advice and the client’s instructions. Often, the very subject of a client’s allegations of misconduct or “padded” bills were the topic of prior conversations, but the attorney failed to confirm the advice or the client’s instructions.

The Committee also sees situations created by attorneys who failed to send the client itemized statements of account.

Henry E. Rakowski is a partner in Salamon, Glazer, Blaymore, & Strenger, P.C., where he concentrates in commercial, corporate, and real estate law and litigation. Mr. Strenger is Vice President of the NCBA, a former chair of the NCBA Conciliation Committee, an arbitrator for the Supreme Court, Nassau County, Fee Dispute Part, and a Mediator for the New York State Unified Court System.

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Trade Secrets for the General Practitioner

Frederick J. Dorchak

The common law of the State of New York provides protection for trade secrets. Most states provide protection by statute under the Uniform Trade Secrets Act. In 2016, the Defend Trade Secrets Act of 2016 (DTSA) added, without preempting state law, federal protection for misappropriations of trade secrets that occur on or after May 11, 2016 or that began before May 11, 2016 and continued thereafter. Justification for providing trade secret protection is based on protection against unfair competition or enforcement of contractual obligations. Generally, a trade secret protects secret formulas, know-how, compilations, and techniques. The definition under the federal DTSA statute is broad and includes technical information, including “processes, procedures, programs, or codes” if “(A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value . . . from not being generally known . . . [or] readily ascertainable . . . to another person who can obtain economic value from the disclosure or use of the information.”

The definition under New York common law uses section 175, comment b, of the Restatement of Torts (1939): “any formula, pattern, device or compilation of information which is used in one’s business, and which gives the business an opportunity to obtain an advantage over competitors who do not know or use it.” In deciding a trade secret claim, the following factors are considered:

1. The extent to which the information is known outside of business;
2. The extent to which it is known by employees and others involved in business;
3. The extent of measures taken to guard the secrecy of the information;
4. The value of the information to competitors;
5. The amount of effort or money expended by in developing the information; and
6. The ease or difficulty with which the information could be properly acquired or duplicated by others.

Courts applying the federal DTSA generally look to state law, typically the law of the state law claim joined with the DTSA claim, in analyzing whether protection is available under DTSA.

Misappropriation of trade secrets pursuant to New York law requires the trade secret owner to establish that the defendant used the trade secret owner’s trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means.

Misappropriation of trade secrets pursuant to the federal DTSA requires the trade secret owner to establish an unconsented disclosure or use of the trade secret by one who (i) used improper means to acquire knowledge of the secret, or (ii) at the time of the disclosure or use, knew or had reason to know that the trade secret was acquired through improper means, under circumstances giving rise to a duty to maintain the secrecy of the trade secret, or derived from or through a person who owed such a duty.

The DTSA’s definition of “improper means” (A) includes “theft, bribery, misrepresentation, fraud, forgery, bribery, inducing a breach of a duty owed to a third person, or misappropriation of a trade secret; and (B) does not include “reverse engineering, independent derivation, or any other lawful means of acquisition.” Trade Secret Protection generally lasts until the secret becomes public knowledge.

Under New York law, a claim for misappropriation of trade secrets “accrues either when defendant discloses the trade secret or when he first makes use of plaintiff’s ideas.”

Under New York law, the statute of limitations lasts until the secret becomes public knowledge. Under the federal DTSA, a claim for misappropriation of trade secrets begins to accrue when the act of misappropriation “is discovered or by the exercise of reasonable diligence should have been discovered.”

Under New York law, the statute of limitations for a trade secret misappropriation claim is three years from misappropriation. Under the federal DTSA, the statute of limitations is three years from the date the misappropriation was discovered or should have been discovered. A continuing misappropriation constitutes a single claim of misappropriation.

The parties may agree to a shorter limitations period.

The federal DTSA includes a safe harbor for whistleblower employees that provides for immunity from any criminal or civil liability under any federal or state trade secret law for the disclosure of a trade secret that is made in confidence to an attorney or government official “solely for the purpose of reporting or investigating a suspected violation of law;” or is made in a complaint or other document filed under seal in a lawsuit or other proceeding.

Under New York law, the remedies available for a trade secret misappropriation claim are damages and an injunction. Under the federal DTSA, the remedies are damages, exemplary damages, attorney fees, injunctive, reasonable royalty, and civil seizure prior to a formal finding of misappropriation.

Damage under New York law must be measured by the losses incurred by the trade secret owner and includes the loss of competitive advantage over others by virtue of its exclusive access to the secret.

Where disclosure of a trade secret has destroyed the trade secret owner’s competitive edge by virtue of its exclusive access to the secret, the plaintiff’s cost of developing the product may be the best evidence of the value that the trade secret owner placed on the secret.

The trade secret misappropriator’s unjust gains or avoided costs are not recoverable as damages unless the trade secret owner’s actual losses cannot be traced with even approximate precision and some approximate causal relation of correspondence is established between the misappropriator’s gains and those diverted from the trade secret owner.

Under the federal DTSA, following a finding of misappropriation, a court may award: (i) damages for actual losses caused by the misappropriation of the trade secret; and (ii) damages for any unjust enrichment caused by the misappropriation of the trade secret that is not addressed in computing damages for actual loss.

Under New York law, the statutory vicarious liability is “willfully and maliciously misappropriated,” a court may award exemplary damages under the federal DTSA of not more than two times the damages amount already awarded. A court may also award attorney fees under the federal DTSA where the claim of misappropriation was made in bad faith, or where a motion to terminate an injunction is made or opposed in bad faith, or where the trade secret was willfully and maliciously misappropriated. The trade secret owner must have advised its employees of the existence of the whistleblower immunity in order to obtain exemplary damages and attorney fees.

The federal DTSA allows a court to grant an injunction to prevent any actual or threatened misappropriation, provided the injunction does not (i) “prohibit the disclosure of any information from employees in the course of an employment relationship,” and that conditions placed on employment are based on “evidence of threatened misappropriation and not merely on the information the person knows;” or (ii) otherwise conflict with applicable state law prohibiting restraints on the practice of a lawful profession, trade, or business. An injunction may require appropriate affirmative actions to protect the trade secret.

In lieu of damages measured by other methods, the court under the federal DTSA may award the damages caused by the misappropriation measured by a reasonable royalty for the misappropriator’s unauthorized disclosure or use of the trade secret.

In “exceptional circumstances that render an injunction inequitable,” the court may condition “future use of the trade secret upon payment of a reasonable royalty for the period that an injunction could have been prohibited.”

Civil seizure under the federal DTSA is a remedy prior to a formal finding of misappropriation in which the court, on ex parte application by a trade secret owner based on an affidavit or verified complaint, may “issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action.”

Civil seizure under the federal DTSA is not available upon a showing of probable cause that the evidence appears from specific facts that: (i) an order pursuant to Rule 65 of the Federal Rules of Civil Procedure or other equitable relief would be inadequate; (ii) Plaintiff will suffer an immediate and irreparable injury if seizure is not ordered; (iii) the harm to Plaintiff from denying the seizure order outweighs the harm the Defendant may suffer to its legitimate interests and substantially outweighs the harm to any third parties who may be harmed by such seizure; (iv) Plaintiff is likely to succeed in showing that Defendant took through improper means means for obtaining the seized or other equitable relief  would be adequate; (v) the value of the seizure must have advised its employees of the existence of the whistleblower immunity in order to obtain exemplary damages and attorney fees.

Defendant has issued actual possession of the trade secret and any property to be seized; (vi) the application describes with reasonable particularity the property to be seized; and (vii) the extent reasonable under the circumstances, the property’s location; (viii) if given notice prior to seizure, Defendant, or persons acting in concert with Defendant, would destroy, move, hide, or otherwise make such property inaccessible to the court; and (viii) Plaintiff has not publicized the

See TRADE SECRETS, Page 24

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here has been an undeniable change in the legal landscape over the past few decades. Notably, alternative dispute resolution (“ADR”) is gaining momentum as a means of resolving disputes both before and after litigation has commenced. The ascent of ADR is largely attributed to the overburdened court system and the perception that ADR imposes fewer costs than litigation. Further, parties prefer the confidentiality ADR provides as well as the ability to exercise more control over who will decide their dispute. The flexibility and speed of proceedings and potential fee savings, along with arguably a less stressful forum, all make ADR an attractive option for many.

Additionally, there has been a shift in the practice of law when it comes to the use of technology. Many lawyers have resisted using the many advancements in technology despite the pervasive role it plays in day-to-day life. However, the legal profession has been forced to rapidly modernize over the past year as courts and offices shut down in-person operations due to the pandemic. While transitioning to electronic courtrooms may have seemed foreign to many seasoned attorneys, in the ADR faction of the profession, face-to-face resolution had already begun to shift to online resolution prior to the pandemic. 1 ADR has remained ahead of the curve and there is no indication that it will decline in popularity moving forward. In fact, quite the opposite. As court dockets remain bogged down, litigation costs continue to rise, and electronic lawyering becomes the norm, the preference of ADR will likely continue to rise.

With any shift, regardless of the industry or profession, comes adaptation. While attorneys should become familiar with ADR practices and engage in appropriate training, newly admitted attorneys should strongly consider becoming mediators. Why Junior Lawyers Should Consider Becoming Mediators

**Remedying a Past Harm**

Mediation has become popular and attractive to parties because it is an economic and efficient resolution vehicle. Additionally, private sector litigators have been seeing less court time over the past several decades since parties enter mediation and often settle cases before trial. As a result, to gain trial experience and harness oral advocacy skills, aspiring litigators are being encouraged to enter the public sector. However, a courtroom should not be the only arena for new attorneys to obtain advocacy experience.

While a civil dispute is amenable to mediation, 2 personal injury resulting from automobile and other accidents, medical malpractice, product liability, partnership and corporation dissolutions, employment disputes, and domestic relations cases are just a few of the types of cases that can be resolved through mediation, illustrating just how viable of a resolution it is for many party disputes. The wide variety of cases that land in front of mediators provides exposure to many areas of the law, which itself should be noted as a benefit to attorney mediators. This exposure may also lend itself to developing a certain specialty within the law, either through mediator services or through a specific area of law in legal practice, or both.

ADR provides an additional and different platform for attorneys to advocate on behalf of their clients. Augmenting one’s professional training to better represent clients in a mediation setting needs to become part of legal education and should continue to be fostered at the outset of an associate’s career. As mediators, attorneys hone the same communication skills suited for oral advocacy, gain exposure to various areas of law, and interact with countless other attorneys. The rise in mediation has changed how law is practiced and the momentum of this change should motivate attorneys to become mediators early on to give themselves, and their clients, a greater advantage.

**Transferable Skills/Enhancing Emotional Intelligence**

Since a mediator does not decide the outcome of a dispute like a judge or jury, the mediator must create a space in which parties can come together, discuss the problem, and propose their own solutions. A good mediator can coax people out of corners and open lines of communication that seemed sealed a workplace dispute such as a discrimination case or a family conflict such as a divorce. 3 A skilled mediator can really make a difference in curbing the client experience on both sides of disputes such as these. Creating this space for parties to work together to come up with what they deem to be a fair solution is rewarding for mediators. The stress of litigation does not simply rest its weight on the client but can bog down the respective attorneys as well. Being a mediator then becomes a very emotionally rewarding experience for attorneys who are interested in the social justice aspects of the field.

In a field that routinely garners attention for poor mental health, emphasis should be put on opportunities that present positive mental and emotional outcomes. The balance that comes with being an attorney-mediator is a benefit that should not be overlooked.

**Mediation Benefits for Practitioners**

Aside from being potentially more memorable and less time-consuming than litigation, mediation is far less adversarial. The nature and structure of a traditional proceeding is organically more combative since at the end there is objectively a winner and a loser. Further, the litigation scope is arguably narrowly focused on

**Mediation Benefits for Participants**

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remedying a past harm. Conversely, mediation is forward focused on the big picture; the goal is to find a mutually beneficial outcome and leave the process with two “winners” moving on. Parties often select a mediator by reputation and through word-of-mouth. There is a difference between even a good and a great mediator that parties can recognize during and after their resolution experience. Talented mediators are rewarded by referrals, growing their professional networks. Becoming an attorney-mediator allows junior legal professionals to develop a reputation within the profession. Likewise, mediators meet and engage with many different attorneys across firms and practice groups. Developing a strong reputation and building professional connections is both an asset to the individual as well as his or her firm.

The contentious nature of litigation coupled with its lengthy process can be both emotionally and economically damaging for clients. Obvious examples include that in a discrimination case or a family conflict such as a divorce. 4 A skilled mediator can really make a difference in curbing the client experience on both sides of disputes such as these. Creating this space for parties to work together to come up with what they deem to be a fair solution is rewarding for mediators. The stress of litigation does not simply rest its weight on the client but can bog down the respective attorneys as well. Being a mediator then becomes a very emotionally rewarding experience for attorneys who are interested in the social justice aspects of the field.

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Failing to establish rapport with a party harder. 5 Mediators should try to imagine

the content of the information being conveyed to the parties. Not to mention, the varied types of locations, operational tempos, and operational environments. Mediators should try to imagine themselves in the party's position.

**Mediation**

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- June 2021
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See MEDIATION, this article.

James G. Ryan is the Chair of the Litigation Department at Cullen and Dykman LLP and has served as a mediator for over 20 years. Elizabeth Usinger, a commercial litigator, is a member of the firm’s Banking Department. Thank you, Jim and Elizabeth, for your assistance with this article.
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de effective December 1, 2020, amendments to several federal rules of procedure went into effect. These amendments were drafted by the Judicial Conference of the United States after public comment and then submitted to the United States Supreme Court for adoption. While some of the amendments may seem little more than housecleaning, others respond to important developments in civil and criminal litigation.

Appellate Procedure: Petition Responses

The amendments to the Rules of Appellate Procedure clarify filing limits on responses to certain petitions. Under amended Appellate Rule 35(e), responses to petitions for en banc determinations are limited to 3900 words, as are petitions themselves, under Rule 35(b)(2). Appellate Rule 40(b)(3) was amended to similarly limit responses to petitions for rehearing.

Unsurprisingly, the ambiguity about the word limit on these responses generated no case law. Nevertheless, the amendment will give counsel some clarification.

Bankruptcy Procedure: Notice, Subpoenas, Corporate Disclosures, Requests for Relief, and Brief Length

Bankruptcy Rule 2002 has been amended to extend to chapter 13 cases the notice requirements that apply to proceedings under chapter 9, 11, and 12. Also known as a wage earner’s plan, chapter 13 proceedings let individuals with regular income develop a plan to repay all or part of their debts. Amended Rule 2002(f)(7) requires the clerk to give notice of entry of an order confirming a chapter 13 plan.1 Amended Rule 2002(h) extends the notice exception with respect to creditors who fail to timely file a proof of claim, and amended Rule 2002(k) extends the requirement for transmitting notice to the United States Trustee.

Bankruptcy Rule 2004(c) has been amended to expressly permit the subpoenaing of electronically stored information, but imposes no express requirement of proportionality. Rather, the amendment references Rule 9016, which adopts the limits in Federal Civil Rule 45, which in subsection (d) protects responding parties from “undue burden.”

Bankruptcy Rule 8012, which governs corporate disclosure statements, has been amended to track recently amended Federal Appellate Rule 26.1. Subsection (a) requires a disclosure statement from parties, and as amended, from nongovernmental corporations who seek to intervene in a proceeding. A new subsection (b) requires the debtor, trustee, or appellant to file a statement identifying each debtor not named in the caption and, for each corporate debtor to disclose the information required by subsection (a).

Bankruptcy Rule 8013(a)(1) is amended to delete reference to proof of service. This reflects the recent amendment of Rule 801(d), which eliminated the requirement of proof of service in electronic filing. Indeed, one of the welcome changes with e-filing generally is the virtual elimination of the affidavit of service.2

Bankruptcy Rule 8015(g), which enumerates the sections of briefs excluded from the word limit for appellate briefs, is amended to bring the rule for bankruptcy appeals in line with Appellate Rule 32(f).

Bankruptcy Rule 8021(d), which covers costs in appeals, deletes reference to proof of service, again to conform with Rule 8011(d).

Civil Procedure: Confer in Good Faith on Corporate Depositions

Only Civil Rule 30(b)(6) has been amended, to require parties to confer in good faith over corporate depositions. This single amendment, however, could lead to significant changes in discovery, hopefully for the better.

The Judicial Conference considered a host of possible requirements to add to the rule, but in the end settled on a general duty to confer.3 The main amended language reads: “Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify.”

Note that the subpoena for such depositions must now include notice of this duty to confer.

The Judicial Conference hoped that this amendment would address the problem of “overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses.” Indeed, one court has already voiced similar hopes while resolving a dispute over the scope of 30(b)(6) witness testimony.4

But what must we do to “confer in good faith”? The amendment does not expressly require us to “meet and confer,” as local rules often direct under Federal Civil Rule 26.5 One local decision, however, gives us some guidance: “Confer” means to meet, in person or by telephone, and make a genuine effort to resolve the dispute by determining, without regard to technical interpretation of the language of a request, (a) what the requesting party is actually seeking, (b) what the discovering party reasonably believes will result from producing that which is responsive to the request, and (c) what specific genuine issues, if any, cannot be resolved without judicial intervention.6

The court was speaking in the context of Federal Civil Rule 37. If one would argue that Rule 30 requires something less, however, then it would be disregarding the purpose of the rules, “to secure the just, speedy, and inexpensive determination of every action and proceeding.”7

The committee note on this amendment further suggested what these conferences might accomplish. It contemplated “candid exchanges” about what the subpoenaing party seeks and who might best testify about those matters, as well as “process issues, such as the timing and location of the deposition, the number of witnesses and the matters on which each witness will testify.”8 The note even suggests serving a draft of topics for deposition, with counsel even going back-and-forth on the list. The note concedes, however, that “the amendment does not require the parties to reach agreement,” and that parties may ultimately need guidance from the court.

Rules of Evidence: Notice to Criminal Defendants of Bad Acts Evidence

Federal Evidence Rule 404(b) has returned to the title phrase “other crimes, wrongs, or acts,” and been amended in subsection (b)(3) to ensure notice to criminal defendants when prosecutors intend to use evidence of prior bad acts: “In a criminal case, the prosecutor must:"

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FOCUS: FEDERAL COURTS

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NASSAU COUNTY BAR ASSOCIATION

LOWER COST MEDIATION AND ARBITRATION
Everyone thinks they understand what a trademark is and what it protects. Phrases like “that’s my trademark” when referring to a repeated catch-phrase show how misunderstood this area of the law is, and it is no wonder that many people believe the stories or myths of trademark. Well, like Jamie and Adam from the Discovery Channel’s Mythbusters, I am here to bust some of the most common myths about trademark law!

“My trademark protects my idea, product, or business concept.”

It often happens that those who start a business come up with a unique or new product or company name, and may even be the first ones to come up with that item or business. These people also tend to think that owning a trademark means that no one else can sell those products and services. Unfortunately, that is not the case. A trademark signifies the origin or source of products and services, the reputation of that company, the quality of those products and services, the price, and other characteristics.

“A trademark only applies to logos.”

A logo can certainly be a trademark, but so can a word, a phrase, or even a sound, product configuration, or color. So long as something is recognized by sound, product configuration, or color, but so can a word, a phrase, or even a character. The criteria for whether a domain or a business name is available is not the same as whether a trademark is available. The requirement for a domain name is that it may not be exactly identical to another domain name, but a website entity may exist with the same name, but different endings. For example:—http://www.lincoln.com—leads to the Ford Motor Company’s website for Lincoln SUVs.—http://www.lincoln.org—leads to the website for the Lincoln Convention and Visitors Bureau in Lincoln, Nebraska.—http://www.lincoln.edu—leads to the site for Lincoln University in Pennsylvania.

When it comes to trademarks usage, it is not about what your domain name is, but how you use that domain. These three entities each are for completely different products and services, but they all clearly identify companies. They can coexist because their use of the domain is completely different from each other and consumers would never confuse a Convention Center for a University or a car manufacturer.

“The same is true when it comes to a business/rife mark has acquired distinctiveness.”

They all all clearly identify companies. They can coexist because their use of the domain is completely different from each other and consumers would never confuse a Convention Center for a University or a car manufacturer.

“Strength of the senior user’s mark.”

When a trademark is used so long as you use a domain name or corporation in New York, you can name your business anything you want, so long as your name is not identical to the name of another business. As an example, a search on the New York State Department of State Corporation & Business Entity Database for any company beginning with the phrase LONG ISLAND returns the following:—LONG ISLAND ALLERGY & ASTHMA CARE, PLLC—LONG ISLAND ALLERGY AND ASTHMA SOCIETY, INC.—LONG ISLAND ALLERGY AND ASTHMA PC Trademark law, however, is more nuanced. Trademark infringement (and whether a particular mark is available for use) is determined based on whether a consumer would likely be confused into believing that the products and services offered by one company come from the same source as the products and services of another.

Likelihood of confusion is determined by a variety of factors. The exact list varies slightly depending on the jurisdiction, and in New York, we refer to the Second Circuit decision, as the Polaroid Factors:

- Strength of the senior user’s mark.
- Similarity of the marks.
- Similarity of the products or services.
- Likelihood the senior user will enter the same market as the junior user.
- Evidence of actual confusion.
- Sophistication of the buyers.
- Quality of the junior user’s products or services.
- The junior user’s intent in adopting the mark.

It is a balancing of all these factors that helps to determine whether a likelihood of confusion exists, and, unfortunately, Polaroid does not provide much guidance on how to weigh each factor. Think of it as using a balance scale in science class, where you assign a weight to each factor and follow how likely confusion is in a scenario. Those weights are then placed on the balance and, if the balance tips, you have confusion.

“But my mark is different because I added an extra word!”

Adding an extra word, or some other relatively small difference, does not, in most cases, avoid confusion. That is because small differences rarely change the overall impression of a trademark.10 When a consumer speaks of a soup brand name DOVE and they call it “DOVE SOAP” you think they are referring to the same company, even though you added a whole new word to the trademark. There are some instances where small changes can have a bigger impact. For example, if a trademark is weak because it is descriptive, then smaller differences have greater effect because consumers tend to focus on the non-descriptive elements of a trademark, like a logo or a unique word or phrase.11 For example, all of the companies mentioned above (Long Island Asthma) all have very similar and weak names. If each of them has their own unique logos, consumers will focus on that element rather than on the common elements between the different business names.

“I am safe because a search on Google and the USPTO website found nothing.”

When a trademark is used so frequently that the trademark becomes the generic word for that item, the trademark owner will lose all rights to that mark.12 If your trademark becomes generic, then anyone can use it, including your competitors. Famous examples include ASPRIN, DRY ICE, ESCALATOR, TELEPROMPTER, and TRAMPOLINE. To avoid losing protection, trademark owners should educate their consumers so that they no longer use the trademark generically.
Remembering a Mentor and Role Model

I consider myself incredibly fortunate that my greatest mentor as a lawyer was also a role model, father figure, as well as my father-in-law.1 Long before I started dating my wife Celia, her father, the Honorable Arthur D. Spatt, loomed large in my life. Arthur and my mother-in-law Dee were close friends with my parents. Soon after Arthur learned that I was interested in attending law school, he invited me to intern in his chambers.

From that embryonic stage in my career, Arthur took me under his wing — a welcoming place that I never left. Since his passing, Arthur’s friends, colleagues on the bench, former law clerks, as well as counsel who appeared before him have come to my wife and me to recount stories of him and express how he made an impact on them. Thankfully, I can relate to all of it.

As we come upon the one-year anniversary of Arthur’s passing, and the courts are opening to more in-person proceedings as the pandemic appears to be subsiding, it seems fitting to reflect on just a few of the lessons that Arthur shared with those around him.

Hard Work Is the Key

The first lesson that those who worked with Arthur learned is that he believed strongly that, no matter how smart you are or think you are, the key for attorneys and judges alike to doing a good job is hard work. His interns learned this by toiling away photocopying judicial slip opinions and filing them in Arthur’s vast research room, so that he would be sure not to miss a single authority when he dove in to write a decision—something that he would typically do on Saturdays or after a full day on the bench preceding over trials and other proceedings.

As his many former law clerks (all of whom he loved dearly) can attest, with extremely limited exception, Arthur’s chambers operated six days a week, and long days at that. One conversation that his family members had with Arthur annually, when urging him to take a day off to relax, always ended with, “I will take the day off if you can tell me exactly what holiday is on the day after Thanksgiving.”

While Arthur could be a demanding judge to work for or appear before, he always worked just as hard as he demanded of anyone else—and his output reflected such. To this day, a good tip for attorneys researching an area of law they are unfamiliar with is to begin by locating a Spatt decision on the subject, for it will no doubt contain a weighty and thorough discussion of past precedent and a survey of the state of the law.

Law is a Most Noble Profession

Arthur believed strongly that the practice of law is a most honorable profession and that all lawyers should act and treat each other with integrity and respect. A lack of civility was something that only to find a man when counsel no more than he would a lack of preparedness. Where many practitioners, especially in federal practice, often believe and act as if they are an elite class among other lawyers, Arthur believed that all lawyers are members of the same elite profession, and expected all lawyers who came before him to act and to treat each other in such a manner.

Many can attest to Arthur’s engaging stories of the great lawyers from history or fiction, from Abraham Lincoln, to Atticus Finch, to Joseph Welch. And in the same sitting that he would tell young attorneys about the feats of these legends with whom they shared this noble profession, he would recount tales of the many “white shoe” law firms who had no interest in hiring him when he graduated from Brooklyn Law School off of his G.L.-Bill provided education. To Arthur, all lawyers deserved respect and owed a duty to protect and support our venerable legal system, no matter what their pedigree, area of specialization, or the name on their office door.

All People Deserve Respect

Arthur’s respect for others did not end with members of the bar. He treated everyone with respect. Many of his family members and friends could recount times when they introduced Arthur to someone who expected to meet an aloof federal judge, only to find a man who treated the busboy clearing his table with the same respect as the judge or scholar that he dined with the evening before. In fact, the only time I ever witnessed Arthur raise his voice at an attorney appearing before him was an incident in which word had gotten back to him that the attorney had spoken to his administrative assistant in a disrespectful manner when calling chambers earlier in the day. Anyone who knew Arthur would have known that such behavior would not be tolerated.

While Arthur never stopped being grateful for the esteemed position to which he was appointed, he also never for a second believed that it made him more important or elevated him to a status above anyone else. Humility was part of what made Arthur Spatt so special. By way of example, even as a senior judge well into his nineties, when asked why, with all his years of service and experience on the bench he continued to work such grueling hours, Arthur would respond, “I guess it just takes me longer than some of my colleagues to do the job.” Certainly untrue, but entirely reflective of the way Arthur viewed his role in the community.

His respect for all also permeated the way that Arthur approached his docket. While some judges will recount their most newsworthy or “sexy” cases, if you ever asked Arthur if he was working on an interesting case, he would respond that all of his cases were interesting. He would then go on about how blessed a life in law is because every case is different and fascinating.

And, of course, always on his mind as a judge, was that every case—no matter how seemingly unimportant or routine to a bystander—was extremely important to the parties in the case. It is difficult to believe that any litigant before him, even the recipients of an adversarial decision, ever felt that Arthur was uninterested in their case or unwilling to invest the time and energy necessary to master all the facts and law needed to reach what he believed to be the just result.

I miss Arthur every single day—both because of the hole that his passing left in my family and because I lost my greatest mentor. Whenever I am faced with a sticky situation in my legal practice, I ask myself, “what would Arthur do?” (or “WWAD” for short). But this is nothing new; I have been engaging in this exercise ever since I started practicing law.

The reach of Arthur’s impact was not limited to those nearest to him. Over the last year, it has been amazing how many attorneys have spoken about their close relationship with him and how he was a mentor to them as well. Nothing makes me happier than hearing this, both because it always brings me fond remembrances of Arthur, and because I truly believe that our noble profession would be better if all attorneys were to take a lesson or two from Judge Spatt.

1. Not to minimize the true and lasting impact that Judge Mishler, who I had the great honor to clerk for, has had on me, but my relationship with Arthur Spatt was much longer and different from that between a judge and law clerk.
Lyndon Johnson and the Paradox of Legislative Power

...it is John Kennedy who is warmly remembered with retrospectives, the reforms of the 1960’s, particularly in terms of civil rights, were the product of Johnson’s efforts. The media creates its own reality. In the public’s mind, LBJ came up short when contrasted with his glamorous predecessor. The television camera magnified Kennedy’s charm; it failed to capture Lyndon Johnson’s complexity. He could never shake the image that he was some shifty, Texas wheeler-dealer.

The quintessential Washington insider, Johnson had been a fixture at the Capitol since the 1930’s. Congressmen, Senator, and Vice-President, LBJ was a master parliamentary whose sole focus was politics. As President, he was extremely effective in getting his legislative agenda passed by Congress.

LBJ was known for the ‘Johnson treatment,’ his method of cajoling fellow politicians. Johnson made a study of each and every legislator. He knew their strengths and weaknesses, and did whatever it took to get their vote. The Johnson treatment revealed LBJ at his best, at his worst, at his most persuasive, all at the same time. As Senate Majority Leader, President, Johnson served as a de facto prime minister under President Eisenhower. In the annals of the Senate, no leader was more adroit at the wielding of political muscle. It was LBJ who achieved passage of the Civil Rights Act of 1964, the most comprehensive legislation of its kind in nearly a century.

But during his first twenty years in Washington, he worked assiduously against racial equality. He survived a near-fatal heart attack in 1955, an event which was life-altering. Certain sources say a young, handsome, healthy man was cheated by fate. He would make his mark by being elected the president who finished what Lincoln had started.

LBJ understood bigotry. Fresh from college, he taught in a segregated Mexican-American school in Cotulla, Texas. He perceived how racism damaged the lives of his students. On March 15, 1965 he recalled the experience before a joint session of Congress to proclaim his commitment to civil rights.

In 1949, as a newly minted US senator, LBJ arranged for World War II veteran Felix Longoria’s remains to be buried at Arlington National Cemetery. Longoria’s wife was unable to inter her husband in his native Three Rivers, Texas for the sole reason that he was a Mexican-American. Prejudice transcended death in those days.

The Cold War was the central theme of his presidency. Although JFK treated him with a modicum of respect, the same could not be said of his brother the Attorney General. The enmity between Robert Kennedy and Johnson was irrefutable. RFK did everything he could to undermine and humiliate the vice-president. LBJ had fallen into political oblivion.

But in one stroke, he became the President. LBJ took charge immediately, being sworn in aboard Air Force One. On landing, Johnson reached out to members of Congress, former President Eisenhower, and foreign dignitaries. Within a week, he set up the Warren Commission to investigate Kennedy’s assassination in Dallas.

On November 27, 1963, LBJ spoke before Congress with the theme of Let Us Continue. Johnson called for a civil rights bill as a tribute to the fallen president. JFK had previously submitted a bill that June, but it was languishing in committee. Johnson was determined to succeed where Kennedy had faltered.

LBJ rose through the ranks of the Senate carrying the favor of the powerful segregationist Richard Russell of Georgia. He now had to cross his old mentor. Russell cautioned “it will not only cost you the South, it will cost you the election.” The White House staff echoed the warning. Senate Johnson declared, “What the hell is the presidency for.”

Enacting the civil rights bill in the House required getting it through the Rules Committee. Johnson was on intimate terms with parliamentary procedures. LBJ used a discharge petition to put it onto the House floor. Fearing it would be sidestepped, the Rules Committee approved the bill. It passed the full House 290–110.

The filibuster made the Senate the key to getting things done. Johnson knew the political process provides only a narrow window, so he pushed through his legislation leaving the details for later.

Within a year LBJ found himself literally a prisoner in the White House. Faced with hostile demonstrations, the President could not appear in public other than at military bases. The reason — Vietnam. The most disquieting chasm of that era was: Hey, Hey, LBJ, How Many Kids Did You Kill Today?

Committed to the Cold War consensus, LBJ escalated US involvement. The objective, inherited from Eisenhower and Kennedy, was the preservation of the South Vietnamese regime. In August 1964, the White House received conflicting reports that American destroyers were attacked in the Gulf of Tonkin.

LBJ secured from Congress the Gulf of Tonkin Resolution. It gave the President a free hand to use military force without a declaration of war. 

Ambition is an uncomfortable companion many times. He creates a discontent with present surroundings and achievements; he is never satisfied but always pressing forward to better things in the future. Restless, energetic, purposeful, it is ambition that makes of the creature a real man.

-Lyndon Baines Johnson

Lyndon Baines Johnson was larger than life. He achieved more than most men, only to see his life’s work undone by the war in Vietnam. He was dynamic and base, inspiring and disappointing, iconic and tragic. LBJ’s story is the American story writ large.

By every measure, contemporary America is largely the product of the laws Johnson enacted. Any honest appraisal would place his presidency at the center of the American experience. With the exception of Franklin Roosevelt, no president had a greater impact.

Lyndon Johnson saw himself as Roosevelt’s political heir. His Great Society represents the zenith of twentieth-century American liberalism. LBJ sought to harness the power of government to transform people’s day-to-day lives. And transform the country he did.

Ronald Reagan often quipped that we declared war on poverty, and poverty won. As President, Reagan, who voted for Roosevelt four times, sought to curb the excesses of the Great Society. The New Deal, after all, consisted of work-relief measures that produced the Great Society. The New Deal, after all, was mostly symbolic. Seven years later, LBJ was determined to have a law with real teeth and willing to spend the political capital to attain it.

To do so, he cut a deal with Republican leader Everett Dirksen of Illinois to support the legislation, assuring twenty Republican votes for cloture. In March 1964, after eighty-two days of a contentious filibuster by Southern Democrats, the bill passed the Senate by a vote of 71–29.

LBJ not only outfoxed JFK, he had outdone FDR. No civil rights bill ever crossed Roosevelt’s desk. FDR was never willing to challenge his Southern political base or confront Southern Democratic powerbrokers. The interests of African-Americans for full citizenship were sacrificed during the New Deal.

The issue of race has historically been the Achilles Heel of American democracy. The 1960’s witnessed a resurgent Civil Rights Movement actively campaigning against discrimination, disenfranchisement, and deprivation. Equality before the law could no longer be denied, at least to proxy.

The Civil Rights Act of 1964 outlawed discrimination based on race, color, religion, sex, and national origin in public facilities, interstate commerce, and the workplace. Legend has it that the evening the law was signed, LBJ told an aide, “I think we just delivered the South to the Republican party for a long time to come.”

That fall Johnson won the presidency in his own right defeating Barry Goldwater with 61% of the popular vote, winning forty-four states.

Democrats saw their largest numbers in Congress since 1938; the Senate had a 68–32 majority and the House a 295–140 margin. LBJ could now bend Congress to his will.

The Civil Rights Act of 1964 would be followed by the Voting Rights Act of 1965, outlawing discriminatory practices that prevented blacks from voting. The Immigration and Nationality Act of 1965 restructured the nation’s immigration system, eliminating barriers to entry from Asia and Latin America. These laws were a considerable achievement.

The Eighty-ninth Congress, the Great Society Congress of 1965/1966, generated Medicare, Medicaid, federal aid to education, and a massive expansion of government transfer payments. Johnson knew the political process provides only a narrow window, so he pushed through his legislation leaving the details for later.

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Rudy Carmenaty is a Deputy County Attorney and the Director of Legal Services for the Nassau County Department of Social Services; he is the Chair of the Diversity, Inclusion Committee and the Co-Chair of the Publications Committee.
June 2, 2021
Dean’s Hour: Lyndon Johnson and the Paradox of Legislative Power
Program sponsored by NCBA Corporate Partner Champion Office Suites and Nota by M&T Bank
12:30-1:30PM
1 credit in professional practice

June 3, 2021
Practicing in My Court: An Evening with the Nassau County District Court Judges
5:30-7:30PM
2 credits in professional practice
**Program coordinated with Assigned Counsel Defenders Plan Inc of Nassau County and is free to attend for Nassau 18B panelists; must pre-register

June 9, 2021
Dean's Hour: Rediscovering and Redefining Your Professional Persona in the Pandemic Age
Program sponsored by NCBA Corporate Partner Champion Office Suites, Nota by M&T Bank, and Encore Luxury Living
12:30-1:30PM
1 credit in professional practice

June 14, 2021
Dean’s Hour: Having Difficult Conversations with Clients and Getting Paid
Program sponsored by NCBA Corporate Partner Champion Office Suites and Nota by M&T Bank
12:15-1:15PM
1 credit in professional practice
Skills credits are available for newly admitted attorneys

June 22, 2021
Dean's Hour: Developing Areas in Lawyers’ Ethics
With the Catholic Lawyers Guild of Nassau County
1:00-2:00PM
1 credit in ethics

June 24, 2021
Dean’s Hour: Everything You Need to Know About Becoming a Judge: Part 2
With the Franklin H. Williams Judicial Commission
12:00-2:00PM
1 credit in professional practice; 1 credit in ethics
Part 2 will cover Election Law Overview and Related Ethical Requirements; Making the Ballot in Village, County and Family Courts

It's Time to Renew Your Membership!
Receive FREE Unlimited Live CLE; FREE 12 Credits of CLE Bridge-the Gap Weekend,
June 30, 2021
Emergency Rental Assistance Programs and Post-Covid Evictions
With the NCBA Mortgage Foreclosure Project
5:00-6:30PM
1.5 credits in professional practice

*This program will only cover residential evictions and assistance for residential tenants/landlords.

**Program coordinated with Assigned Counsel Plan Inc of Nassau County and is free to attend for Nassau 18B panelists; must pre-register.

Nassau Lawyer June 2021

June 2, 2021
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Program sponsored by NCBA Corporate Partner Champion Office Suites, Nota by M&T Bank, and Encore Luxury Living
12:30-1:30PM
1 credit in professional practice

June 10, 2021
Dean's Hour: Importance of Intellectual Property Due Diligence in Mergers and Acquisitions
Program sponsored by NCBA Corporate Partner Champion Office Suites and Nota by M&T Bank
12:30-1:30PM
1 credit in professional practice
Skills credits are available for newly admitted attorneys

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GET A SNEAK PEAK AT UPCOMING CLE FOR THE NEW NCBA MEMBERSHIP YEAR
(Registration Opens July 1)

July 20: Dean's Hour: One Year In: Developments in COVID-19 Force Majeure Litigation
August 4: Dean's Hour: More than Just Notorious: The Remarkable Ruth Bader Ginsburg
September 9: Dean's Hour: Louis Brandeis: Keeper of the Flame
September 23: This Year's Most Significant Bankruptcy Decisions
October 6: Accounting for Attorneys
October 14: Mock Zoning Hearing
October 20: Float Like a Butterfly While Stung by the Bees: The Trials & Tribulations of Muhammed Ali
October 22: Criminal Law Update

Pre-registration is REQUIRED for all Academy programs. Go to nassaubar.org and click on CALENDAR OF EVENTS to register.

CLE material, forms, and zoom link will be sent to pre-registered attendees 24 hours before program.

All programs will be offered via ZOOM unless otherwise noted.
Memoriam...
Continued From Page 6

Village Law. He also analyzed the Water Department Rules and Regulations of the Village of Holtsville in rejecting personal liability of the plaintiff for water payments.

In 2021, Judge Feinman concurred with the majority in a “zone of danger” decision extending that zone to a grandmother who witnessed the death of her two-year-old granddaughter when a brick fell from a nearby building and killed that granddaughter.

Consistent with our historically circumspect approach expanding liability for emotional damages within our zone of danger jurisprudence, our increasing legal recognition of the special status of grandparents, shifting societal norms, and common sense, we conclude that plaintiff’s grandparents are “immediate family” for the purpose of applying the zone of danger rule.

Towards the end of his life, Judge Feinman literally left his hospital bed to appear and give testimony with respect to judges’ salaries. He was dedicated to our profession, to his fellow attorneys, and fellow jurors, and his voice and presence will be sorely missed. The LGBTQ community and the legal community at large have lost a warrior for justice in Judge Feinman, and we can only hope that his influence is felt and honored for years to come.

In a separate concurrence by Judge Rivera, the decision in Greene v. Esplanade Venture Partnership, 2021 WL 623832, April 2, 2021, is approved.

Joseph Milizio, Managing Partner of Vishnick McGovern Milizio (VMM) received a Special Congressional Recognition, awarded “for being a role model to others and for making a positive difference in the community.” The Recognition, signed by Representative Thomas R. Suozzi, was given in conjunction with Mr. Milizio’s New York Power Lawyer award for his trailblazing work in LGBTQ Representation. Mr. Milizio was also recently profiled in Gay City News. He also led VMM’s Wills, Trusts, and Estates and Elder Law services for the webinar “Careers in Tax Law.”

Marcus O’Toole-Gelo of Cona Elder Law has become a partner in the firm. The move was the latest in the continuing growth of the Melville-based elder law, trusts and estates and health care law firm.

Lew Meltzer of Meltzer, Lippe, Goldstein & Breitstone, LLP, headquartered in Mineola, is pleased to announce the opening of an office in Boca Raton, Florida. The Boca office will support the practices of two trusts and estates attorneys and one paralegal.

Ronald Fatoullah of Ronald Fatoullah & Associates welcomes Marilyn Quino Anderson as a member of the firm’s Estate Administration department. Marilyn brings to the firm a strong background in estate administration, planning and litigation, as well as residential real estate transactions.

Karen Tenenbaum, LL.M. (Tax), CPA, tax attorney was honored as a Power Lawyer by Schneps Media. In addition, Tenenbaum Law, P.C. was listed as one of the top 100 law firms by Long Island Business News. On Instagram, Karen was honored by Count Me In Revival and Maureen Burzachillo in celebration of Women’s History Month. Karen was recently honored by the Suffolk County Bar Association for her dedication and exemplary service for the Tax Law Committee. Karen was a panelist at Touro Law for the webinar “Careers in Tax Law.”

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Annual Meeting of the Nassau County Bar Association

The Annual Meeting of the Nassau County Bar Association was held on May 11, 2021. We thank and congratulate our outgoing Board of Directors, Committee Chairs/Co-Chairs, and Hon. Maxine S. Broderick on her receipt of the 2021 Director's Award. We would also like to sincerely thank and acknowledge our outgoing President Dorian R. Glover for outstanding leadership and guidance throughout his term.

Photos by Hector Herrera
ELDER LAW, SOCIAL SERVICES & HEALTH ADVOCACY
Co-Chairs: Katie A. Barbari, Patricia A. Craig

This committee addresses legal issues related to health, mental hygiene and social services for the public and special population groups, including the poor, the aged and the disabled.

On April 9, 2021, a meeting was held by videoconference. Topics discussed included the new Powers of Attorney, a personal and property needs guardian where the incapacitated person is being transitioned into a facility, the issue of continuous residence, the use of the Lawyers Assistance Program (LAP) to wrap up a solo attorney’s law practice, various aspects of the Medicaid fair hearing process, and the treatment of retirement assets and income for Medicaid purposes.

On April 27, 2021, the committee hosted guest speaker, Jamie A. Rosen, who delivered a CLE lecture regarding legal and clinical interventions available as proactive measures to prevent an incident of gun violence. Also discussed were challenges surrounding involuntary commitments of a mentally ill individuals, practical skills, and steps needed when dealing with a mobile crisis team, law enforcement or mental health hygiene warrants, the benefits and limitations of adult guardianship proceedings as they relate to individuals suffering from mental illness, and legal interventions that allow for the confiscation of firearms, such as the use of Extreme Risk Protection Orders and the NY SAFE Act.

The Committee Reports column is compiled by Michael J. Langer, a partner in the Law Offices of Michael J. Langer, P.C. 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. Langer’s practice focuses on matrimonial and family law, estate and commercial litigation, and criminal defense.

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

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LONG ISLAND BUSINESS NEWS

WE WELCOME THE FOLLOWING NEW MEMBERS
Kayla Maria Buzdeo
Sophia Dekhtyar
Samuel Alexander Gluzberg
Debra Isler
Karin Lemon
Lynne Sztulwark

In Memoriam:
Hon. F. Dana Winslow
Francis X. Kilgannon

Committee Meeting Report

Rudy Carmenaty
Hon. Tricia Ferrell
Hon. Eileen Daly Sapraicone

Peter H. Levy
Martha Krisel
Law Offices of Frank N. Schellace

Adam E. Small
Meyer Suozzi

Foley Griffin
Attorneys at Law
Tom, Brian and Don

Salamon, Gruber, Blaymore & Strenger, P.C.

Lenny Ambroso and the Supreme Court Team Honor Christopher Zanchelli
Healthy cheese biz taps into local dairies

July farm in Chester County

Mike Jones in Chester County
Jones produces the cheese using the CMA technology and plans to hire 10 people. The business has chosen to focus on quality over volume, which means it will be able to offer a variety of cheese products.

Many companies partner with an outsource provider to help them manage their day-to-day operations. This can be especially helpful for small businesses that don’t have the resources to handle everything in-house. 

Many people are excited about the venture, saying it’s great for the community and for the farm. 

One of the members of the community, John Corson, said, “It’s a huge benefit to us when a local business moves into our area.” 

From left, Sue Miller, Stefanie Angstadt and Alex Jones brought together their collective knowledge to launch the business. 

The business might lose the interest of its customers if it doesn’t continue to provide high-quality products. 

But a few things have changed in the past year, and what makes the business unique is what makes it attractive to customers. 

The business launched its first product, a cheese variety pack, in August. The pack includes five different types of cheese and has been well-received. 

The business has also expanded its offerings, including a line of cheese-based snacks. 

The business is on track to make a profit in the first year, but it will need to continue to work on marketing and sales to reach its goals. 

The business is located in Chester County, which is home to many dairies and other agricultural businesses. 

The business is also looking to expand its operations, including opening a retail store and a processing facility. 

The business has received support from the local community, including from the Chester County economic development agency. 

The business is also looking to partner with other businesses in the area to help promote its products. 

The business is owned and operated by Alex Jones, who is the CEO and president. 

The business has a small team of employees, including a marketing manager, a sales director, and a production manager. 

The business is located at 123 Main Street in Chester County.

The business is open Monday through Saturday from 9 a.m. to 5 p.m. 

The business can be reached at 1-800-555-1212 or on the website, www.cheesestore.com.
Tradition Title Agency, Inc. is a full-service title company committed to providing law firms with the highest quality of title and other services in a manner that exhibits the greatest standards of professionalism and dedication. Tradition takes great pride in providing title insurance for all residential and commercial real estate.

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SAVE THE DATE

Annual Dinner Gala of the Association

AUGUST 4, 2021
NASSAU COUNTY BAR ASSOCIATION
MINEOLA, NEW YORK

HONORING

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and time logs detailing their work, which can also provide proof that the attorney gave certain advice and communicated with a client on a date that the client vehemently denies. The attorney is strongly urged to provide the client with a regular statement of fees to avoid “sticker shock” attendant with heavily litigated matters.

NYCRR § 1215.1(a) requires all attorneys who represent a client and who will charge a fee to present a letter of engagement before the representation commences. The engagement letter must spell out the scope of the services and an explanation of the fees to be charged. 22 NYCRR § 1215.2 carves out an exception to this Part’s application for fees less than $3,000, or where the attorney has rendered similar services to the same client previously and which were paid for by the client.

A retainer is different from an engagement letter in that a retainer is signed by the client. The retainer should clearly explain the fee. For example, mixing flat fees and hourly fees may result in a confused client. The retainer should specify what is covered by the fee and should outline the scope of the attorney’s representation. For example, if an attorney agreed to a flat fee to make some basic inquiries or conduct some basic legal research, explaining that the scope is limited can avoid a client trying to convince the arbitration panel that the attorney agreed to represent the client for a protracted legal representation at that low rate. Equally important is to list what the fee does not cover and list those stages of the litigation that could arise. If the retainer is based upon a contingency, and appeals are not included because they are handled on an hourly basis, then the retainer should explain this. So, if the client has to hire counsel in New York for related matters or hire separate counsel in case of a bankruptcy filing, the retainer should specify that the fees a client pays another attorney will not be deducted from the fees due under the retainer.

However, the retainer or engagement letter is only part of the equation. The attorney should keep contemporaneous time logs. The time logs should be detailed and broken down to the greatest extent possible. To have an entry of simply “five hours,” “legal research,” or “telephone calls to client” will not suffice. The time log should specify what portion was devoted to legal research. The time log should identify the issues researched so as to provide a basis to defend a challenge as to why legal research was necessary at an early stage of the case or done on apparently basic legal issues. The time log should specify whether any portion was computer legal research. The time log should specify the length of the telephone call, who initiated it, and the matters discussed. An attorney, however, needs to be cognizant that attorney billing records are discoverable in matters where a legal fee is being sought as part of damages.

Therefore, more generic entries may be appropriate in circumstances where attorney-client confidential matters are the subject matter of the telephone call or meeting.

Keeping contemporaneous time logs is important even if the attorney is not billing on an hourly rate. Where an attorney fee is based upon a contingency, an attorney must still justify the reasonableness of the fee or seek quantum meruit after being discharged. It is rare for a court or a panel of arbitrators to merely rubber stamp a contingency fee request. The attorney must demonstrate the reasonableness of the fee based upon the lodestar method. In other words, the attorney must offer time logs.

Keeping the time logs but not sending regular statements to the client leads not only to sticker shock, as described above; it also, reduces the chances of being paid. A client can prevail at a hearing if he can demonstrate that he had no idea what the attorney was doing or that the attorney was even working on the case because the attorney never sent any time logs, updates or bills. This makes clients feel alienated and skeptical that the attorney did all that work detailed in the many pages of statements finally produced for the first time at the hearing. Creating a time log for the first time in preparation for a hearing based upon memory, many months after the fact, will often not be helpful in getting the attorney paid.

Serving as an Arbitrator

The NCBA Conciliation Committee offers an important service to both the legal community and to the public. Members of the NCBA who are interested in becoming arbitrators may sign up to receive training, sit on panels and hear cases.

Federal... Continued From Page 10

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose.
(C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

No longer will it suffice for prosecutors to provide notice “of the general nature of any such evidence.” Prosecutors also must now declare the purpose for introducing such evidence, and must give their notice in writing. Rule 404(b) does not require, however, that the Government “disclose directly or indirectly any names and addresses of its witnesses, something it is currently not required to do under [Fed. R. Crim. P.] 16.”

Historically, what constitutes “reasonable notice” has depended on “the circumstances and complexity of the prosecution.” In general, courts have found that what constitutes “reasonable notice” under Rule 404(b) is in the range of seven to ten days or one to two weeks prior to trial. Under the amended rule, however, the test of reasonableness is whether “the defendant has a fair opportunity to meet it.”

Spirit of the Amendments

The two themes that run through these amendments are consistency and conference. Many of the changes are minor, but harmonize requirements across similar procedures. Others encourage counsel to confer before depositions and trials to resolve issues that could arise. This encouragement to counsel to “work it out” appears in the recent amendments to New York’s Uniform Rules. All attorneys should carefully review and take advantage of these amendments, and use them to optimize telecommunications with opposing counsel. The sooner we can clear away ancillary disputes, the sooner we can focus on the material points of contention in each litigation.

Trademark... Continued From Page 11

BAND-NID brand bandages, KLEENEX tissues, XEROX copiers, etc.

“I want my trademark to protect everything!”

As a designation of the source, a trademark must be associated with particular products and services. A person who is selling a variety of clothing items is unlikely to be confused with a person who is selling tractors and trailers, even if those companies are using the same exact trademark. What the products are is important to the likelihood of confusion analysis, and it is often overlooked by people looking to monopolize a word on everything.

People also incorrectly assume that by placing a word or phrase on a t-shirt, coffee mug, hat, or similar item, they are protecting the name on these and other items. Unfortunately, simply placing a word, phrase, or logo on an item does not necessarily signify trademark usage. If you go into a large department store you will see dozens of graphically similar, all with various sayings and phrases on them. However, most consumers recognize these things as ornamentation on the item, not the brand or the source of the goods.

“An International Registration means I have worldwide rights.”

Although there is such a thing as an International Registration, the name is a bit misleading. An International Registration is a mechanism that allows you to extend your rights from one country into another with a single application. However, the individual countries will still determine whether you meet their specific requirements with obtaining a registration.

“I can file an application without an attorney.”

Technically, this is not a myth. You can file an application without an attorney, but many people who have filed on their own and, unfortunately, have made the types of errors that are fatal to application are forced to start over. For example, once an application is filed with a particular list of goods or services, an applicant may not add or expand that list, though they may delete, limit, or clarify, if necessary.

It is never a good feeling to have to start the entire process from scratch and pay another fee to the government because you did not fully understand the process. Hire a lawyer to help you and avoid these errors.

Trade Secrets... Continued From Page 8

requested seizure. Following issuance of a seizure order under the federal DTSA, the Court is required to hold a seizure hearing wherein the party who obtained the seizure order has the burden to prove the facts underlying the order. Civil seizure may be ordered only in “extraordinary circumstances.”

CONCLUSION

The expansive remedies provided by the federal DTSA make it worthwhile for practitioners to consider counseling their clients to take steps to maintain the secrecy of their patented proprietary technology developed in their business and to enforce any theft of that technology, if necessary.

Virtual... Continued From Page 5

do not distract the Court by speaking. Practitioners should also be sure to wait until the end of the virtual appearance before signing off. The panel recalled situations where judges had followed up questions at the end of the virtual arguments for attorneys who had left prematurely. Also, practitioners should be mindful that argument in the Appellate Division, Second Department is livestreamed and archived for public view so an attorney’s audience may extend well beyond the Court to include peers, clients and potential clients. Attorney preparedness and professionalism are crucial for that separate and independent reason.

As a final takeaway, virtual practice seems here to stay. The panel predicted that virtual appearances will continue in the Second Department for the foreseeable future. Justice Austin mentioned that, to the best of his knowledge, the Appellate Division, Second Department may transition to virtual arguments of others to get a feel for virtual courtroom professionalism and analyzing prior archived arguments. Practitioners who have argued, or plan to argue before the Appellate Division, Second Department, should consider watching their virtual appearances in “stream” or the virtual arguments of others to get a better sense of what the Court sees, as well as the practices that work and do not. By heeding the panels’ advice, and analyzing prior archived arguments, attorneys can improve their virtual practice proficiencies and assist the Court in seeing and hearing arguments more clearly and effectively.

4. Id. at 7-8.
6. See SDNY/EDNY Local Rule V (a).
8. See GR-P 1.
13. 18 USC § 1838.
14. 18 USC § 1839(6).
15. 18 USC § 1836(b)(2)(B).
16. 18 USC § 1836(b)(2)(F).
19. 18 USC § 1836(b)(3)(C).
23. Id. at 3.
25. Id. at 123-128.
26. Id. at 115-118, 166; Maltier v. Dooney & Bourke, Inc., 529 F.3d 558 (S.D.N.Y. 2008).
27. 18 USC § 1836(b)(3)(A)(i).
29. 18 USC § 1836(b)(3)(B).
30. 18 USC § 1836(b)(3)(C).
31. 18 USC § 1836(b)(3)(D).
32. 18 USC § 1836(b)(3)(A).
33. 18 USC § 1836(b)(3)(E).
34. 18 USC § 1836(b)(3)(F).
35. 18 USC § 1836(b)(3)(G).
36. 18 USC § 1836(b)(3)(H).
37. 18 USC § 1836(b)(3)(I).
38. 18 USC § 1836(b)(3)(J).
40. 18 USC § 1836(b)(3)(L).
41. 18 USC § 1836(b)(3)(M).
42. 18 USC § 1836(b)(3)(N).
43. 18 USC § 1836(b)(3)(O).
44. 18 USC § 1836(b)(3)(P).
45. Id. at 125.
46. Id. at 125-128.
47. 18 USC § 1836(b)(3)(E).
48. 18 USC § 1836(b)(3)(F).
49. Id. at 125.
50. Id. at 125.
51. Id. at 125.
52. Id. at 125.
Mediation… Continued From Page 9

Adaptability allows a mediator to smoothly shift his questioning and approach techniques according to the environment and personality of the parties. The combination of adaptability, patience, and tact allow a mediator to refrain from becoming easily discouraged by opposition, noncooperation, or other difficulties so that he can pursue a matter to a successful conclusion or capitalize on leads to other valuable information.

The skills and characteristics that define a strong mediator are coveted, transferable, and invaluable. While attorneys are zealous advocates for their clients by oath, attorneys must be their own advocates within the legal profession. An attorney-mediator is arguably a more marketable attorney because of the network and additional skills they can develop. Firms benefit from having well-known and well-trained attorney-mediators on board. Therefore, junior attorneys should seek out opportunities to become mediators, while law firms encourage and support that ambition.

Advocacy at its Best

There is conflict in almost any workplace and having the aptitude to resolve it is a valuable addition to your professional skill set. But the overarching ability to diffuse tension and facilitate an amicable solution requires critical thinking, problem-solving, strong communication, empathy, self-reflection, objectivity, alertness, and patience among others discussed in this article. While these skills are necessary to be a successful mediator, they bring value to the practice of law as well. Attorneys who practice in almost any area of law, can benefit greatly from honing these skills.

Similarly, the return on investment for law firms who employ attorney-mediators or support associates while they become mediators is apparent. Attorney-mediators can utilize these skills to better connect with clients, engage new clients, represent, and advocate for their clients, and communicate with their colleagues within their firm as well as opposing counsel. The reputation an attorney-mediator makes for him or herself also serves as a marketing tool for the law firm. The need to be empathetic as a mediator will encourage an attorney to be more personable in a professional setting when interacting with clients and colleagues. Additionally, being a mediator can serve as a welcome outlet and break from the traditional stresses of lawyering. Serving as a mediator and helping parties find swift, amicable solutions to their problems can be cathartic, possibly improving mental health and providing some clarity for lawyers. The promotion of mental health and wellness may result in better work product and morale within the firm. Lastly, as the legal landscape continues to evolve and move toward online services, mediation may serve to bridge the generational gap among attorneys in the profession as well as within law firms.

Mandatory Mediation… Continued From Page 3

new laws, and new ideas about mediation practices. This enables mediators to contact parties after initial sessions to question, cajole, and discuss ideas often plays a critical role in enabling a case to settle. 

Mediators often continue counseling with parties between sessions, through follow up phone calls, emails or Zoom calls that keep the parties communicating and developing new approaches to a resolution. It is sometimes the case that a party needs to sleep on it and reflect what they learned during a mediation session. A mediator will often ask the parties if they may reach out to the parties after the mediation has concluded.

Lawyers and judges expect to be paid for their work. Both the WDNY and NDNY rules require that mediators be paid, though they also require pro bono work so that parties who cannot afford to pay can also participate. The EDNY program provides for limited compensation. The SDNY program offers no compensation, and all mediators participating in the program work for free. It is beyond the scope of this article as to which programs are more successful, however, it could be argued that where the parties have some “skin in the game”, they are more likely to work to resolve the issues and come to a successful resolution.

Confidentiality is a critical element of successful mediation. In no case for the mediator, the attorneys, and the clients to understand the central issues, the motivations, the pressure points and the risks of litigation, the participants must be assured the discussions cannot and will not be disclosed to others so they can address issues openly. Frequently, some of the motivating forces behind lawsuits are legally irrelevant and yet exceptionally important to understanding the conflict and facilitating resolution.

Frequently, clients disclose private events, perceptions or issues in mediation they would not want disclosed to anyone. Explaining their concerns and fears is often critically important to them to resolve the conflict. If discussions with the mediator are not confidential and privileged, the mediation process or the mediator’s role and the potential for resolution are significantly diminished.

In preparing for mediation, attorneys typically explain to their clients that mediation is confidential. Stating things like: “[t]hese are settlement discussions that are not confidential and privileged, and [y]ou can feel free to talk to the mediator. She won’t disclose it to the other side if you tell her the information is confidential.” In the opening session of the mediation conference, the mediator typically explains that the discussions are and will be kept confidential.

All participants typically sign a confidentiality agreement stating they understand the mediation process, the mediator’s role, and the confidentiality of the discussions. Mediation proceeds based on an understanding that the mediation discussions are and will be kept confidential. Despite mediation confidentiality, courts are increasingly asked to enforce settlement agreements reached in mediation justifying confidential mediation discussions.

Conclusion

Due to the high success of the various programs in both the state and federal courts in New York, litigators and counsel should welcome the opportunity to utilize these often lower or free programs to resolve cases more quickly and cost-efficiently.

5. Id.
6. Id.
8. Id.
9. Id.
10. Id.
11. Id.
Lyndon…
Continued From Page 13
The same parliamentary prowess that guided Johnson’s domestic program would lead to his undoing in the realm of foreign affairs.

LBJ was confronted with two unpalatable alternatives in Vietnam: either commit ground forces or surrender to the communists. If he chose the former, he would be an imperialist. If he did the latter, he would be an appeaser. The shadow of Neville Chamberlain at Munich hung heavy over Johnson’s generation, so he sent in the troops.

American military personnel increased from 16,000 advisors under JFK to more than half-a-million combat troops by the time Johnson left office. Eventually, the war cost more than 58,000 American lives, bitterly dividing the nation. Divisions which continue to this day, Vietnam proved to be LBJ’s undoing, politically and personally.

In January 1968, Viet Cong and North Vietnamese forces launched the Tet Offensive. While the Tet Offensive failed militarily, it was a psychological victory. Tet turned the opinion of the American political establishment against the war. LBJ, defeated and deflated, was desperate for a way out.

On March 31, LBJ announced a bombing halt and his intention to pursue peace talks. At the end of his televised address, Johnson declared he would not seek reelection. It was an abdication in all but name. His presidency became one more casualty of the Vietnam war.

By then LBJ had put the country in a perpetually precarious position. The war Johnson wanted to fight was the War on Poverty. He tried to have both guns and butter, that such a situation is unsustainable is axiomatic. Like most Americans, he thought the United States was so rich and so powerful it could do anything and everything. It was pure hubris.

Failing to pay for military expenditures in Vietnam while simultaneously increasing domestic spending, LBJ’s policies resulted in the out-of-control inflation of the 1970’s. More pointedly, by enlarging the role and scope of the state, Johnson unleashed a dynamic that could ultimately result in the nation’s fiscal undoing.

Lyndon Johnson died on January 22, 1973 a forlorn figure. He was a complicated man who needs to be assessed warts and all. He believed that by passing a law and allocating money any problem could be remedied. Fifty years later, the problems still persist, and Americans are far less sanguine about the efficacy of government.

Still, the ramifications of the Johnson presidency have left their imprint. LBJ remains a consequential if controversial figure from our history. Under his stewardship, halting progress was made toward that more perfect union long promised. Lyndon Johnson’s legacy endures, even if his name is half-forgotten.

5. Id.
10. The 1964 Congress at acs.lhs.udel.edu.
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