Marking the return to an in-person format for the first time since prior to the pandemic, the NCBA Access to Justice Committee hosted its Pro Bono Open House at Domus on October 24, 2022. The Committee—in conjunction with The Safe Center Long Island and Nassau Suffolk Law Services—held a successful and well-attended event, with over 110 people from the community able to receive one-on-one general legal consultations regarding a myriad of legal issues.

Over 50 attorneys, paralegals, and support staff joined together with representatives from Nassau County Supreme Court and the Appellate Division, Second Department to provide general guidance, consultations, and information on how to procedurally navigate the court system as a pro se litigant. Traditionally held during National Pro Bono Week, the Open House allows the public to have direct, free access to attorneys who can often provide transformative help after only a short meeting. For those who do not have the means or the understanding of the legal system, the consultation may be the catalyst to improve their situation or alleviate a source of stress and unease in their life.

While awaiting their consultation, representatives from the Nassau County Supreme Court spoke more in-depth with attendees about the courts’ Access to Justice program, its origins and initiatives, and the ways it works with the public to achieve access to the court and potential relief available through its processes.

Many senior members of the community were in attendance, seeking guidance on issues ranging from elder abuse, taxes, and estate planning to real estate, contracts, and benefits. The most requested type of consultation for all attendees was wills, trusts, and estates. Real estate, landlord/tenant, and mortgage foreclosure were second most requested, with family law and related issues rounding out the top three. Some very niche consultations were requested and accommodated by the volunteer attorneys, doing their best to provide at least some perspective and guidance to all who they spoke with.

Hon. Norman St. George, Hon. Vito M. DeStefano, and Jeneen Wunder Discuss Judicial Initiatives and Offer Professional Insights to NCBA New Lawyers Committee

On October 28, 2022, the New Lawyers Committee had the privilege of hosting a lunchtime panel of esteemed speakers consisting of the Hon. Norman St. George (Deputy Chief Administrative Judge for the Courts Outside of New York City), Hon. Vito M. DeStefano (Nassau County Administrative Judge), and Jeneen Wunder, Esq. (Principal Law Clerk to the Judge Norman St. George). The panelists discussed the New York State judiciary and its current initiatives, as well as offered insights on the successful practice of law as a new lawyer.

This in-person-only event, held in the Northside Dining Room of Domus, was well-attended and provided an intimate and inviting setting, which allowed all attendees to engage with both Judges St. George and DeStefano and Ms. Wunder. It further provided the attendees with unique insight into the organizational structure of the New York State judiciary, its various districts, appellate departments, and their respective functions.

Moreover, as each speaker detailed their own personal and professional career milestones, they offered anecdotes and
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I n the month of December at Domus, we celebrate a centuries-old tradition known as the “wassail bowl.” For those of you who are unfamiliar with the term, “wassail” is a hot drink that is made from wine and mulled cider, sugar, spices, and baked apples that is traditionally served in a large bowl during the Yuletide winter festival. This beverage is an integral part of “wassailing,” an ancient Anglo-Saxon drinking ritual meant to toast someone’s good health.

Many scholars have attempted to trace the origins of this wintertide ritual. Some scholars believe that wassailing has its origins in Ancient Rome, where villagers would make sacrifices to Pomona, the goddess of fruit and trees. Others believe that it has its origins in the Anglo-Saxon pagan custom of visiting fruit gardens to sing to the apple trees to scare away evil spirits. While in Germanic legend, the ritual of wassailing is thought to be connected to the Wild Hunt, a ghostly procession in the sky led by the Norse god Odin, and a supernatural group of celestial hunters.

Regardless of its origins, wassailing has continued throughout the centuries, being adapted in a multitude of ways: the house-visiting wassail in which a troupe goes from house to house with a wassail bowl singing carols to their neighbors and encouraging acts of charity; the orchard-visiting wassail, where people recite incantations and sing to the trees to promote a good harvest; and the wassailing that happens among warriors, who boast of their exploits and conquests. In fact, it is reputed that the wassail bowl of the Saxon Pagan Princess Rowena caused a British king to become so drunk, that he parted with a piece of his kingdom in the hopes of marrying her.

On December 9, 2022, the members of our Association will gather in the Great Hall to hear a rendition of the Tale of Wassail as told by President-Elect Sanford Stronger. One year ago, while serving as President-Elect, I recited my own version of the Tale of Wassail—a mythological account of the NCBA President’s Hero Quest which I reprint here. While our NCBA heroes and the source of their inspirations are indeed quite real, I have fictionalized their hero quests for dramatic effect.

It is said that in the years leading up to one’s presidency, each occupant of the office goes through a hero’s journey marked by a call to adventure, a mentorship, and overcoming a personal fear. It is said that in the years leading up to one’s presidency, each occupant of the office goes through a hero’s journey marked by a call to adventure, a mentorship, and overcoming a personal fear. It is said that in the years leading up to one’s presidency, each occupant of the office goes through a hero’s journey marked by a call to adventure, a mentorship, and overcoming a personal fear.

October 8, 2022, the members of our Association will gather in the Great Hall to hear a rendition of the Tale of Wassail as told by President-Elect Sanford Stronger. One year ago, while serving as President-Elect, I recited my own version of the Tale of Wassail—a mythological account of the NCBA President’s Hero Quest which I reprint here. While our NCBA heroes and the source of their inspirations are indeed quite real, I have fictionalized their hero quests for dramatic effect.

It is said that in the years leading up to one’s presidency, each occupant of the office goes through a hero’s journey marked by a call to adventure, a mentorship, and overcoming a personal obstacle. At the end of their journey, each President has gained the wisdom and experience needed to strengthen the Five Pillars of the Nassau County Bar Association: (1) Leadership, (2) Strength of Mind/Body/Spirit, (3) Public Service, (4) Charitable Giving, and (5) Diversity and Inclusion.

The journey of six of our NCBA Past Presidents—Marc Gann, Peter Mancuso, Steve Leventhal, Greg Lisi, Kate Meng, and Marian Rice—helped them gain a better understanding and appreciation for the importance of NCBA’s First Pillar—Leadership.

Gann, Mancuso, Leventhal, and Lisi, participated in an immersive self-directed learning experience with a foremost expert on Abraham Lincoln. As part of their tutelage, each President was dispatched to a unique location around the globe, a location that resonated with the historical calling of Abraham Lincoln. Gann traveled to the Homestead, Mancuso journeyed to the Norwegian Archipelago nearest the North Pole; Gann trekked to the Hachau Falls, across Grand Canyon West and the South Rim; while Leventhal was dispatched to Amsterdam. During their journeys, each of our presidents took a vow of silence for three months and used their time to ponder the most impactful of Abraham Lincoln’s writings and speeches, including his House Divided Speech, Cooper Union Speech, the Lincoln-Douglas debates, his First and Second Inaugural Address and, of course, the

Gettysburg Address. The rigors of such an immersive experience sharpened their minds so clearly, it is rumored they developed the power to discern other peoples’ thoughts.

The journey of Past President Kate Meng took her to Northern China, where she walked the entire length of the Ming Dynasty Great Wall—over 5,500 miles! During her at-times treacherous path, Meng listened to the greatest classical composers of all time (Mozart, Beethoven, Bach, Chopin, and Tchaikovsky).

She consumed audio books which discussed the greatest accomplishments of Genghis Khan, the First Great Emperor of the Mongol Empire. Meng was particularly impressed by Khan’s establishment of freedom of religion, banning torture, outlawing slavery, establishing universal law, and a universal writing system and his system of promoting people based on individual merit.

Meanwhile, Past President Marian Rice journeyed to Cairo to study the Great Pyramid of Giza. She joined a private expedition digging up ancient relics and treasures. She took courses in painting and drawing so that she could chronicle her adventures. In the evenings, she read a collection of historical accounts of the Reign of Queen Cleopatra, paying close attention to the manner in which she navigated Roman politics.

The paths of four of our Past Presidents—Andrew Simons, Rick Collins, Lance Clarke, and Elena Karabatos—helped them achieve a Strength of Mind/Body/Spirit, which is the embodiment of NCBA’s Second Pillar.

It was a journey of exploration for Simons, beginning in the Galapagos Islands of Ecuador. By day, he observed all manner of mammals, reptiles, birds, and fish, and he examined the effects of climate on the ecosystem, all while being extra careful to steer clear of poisonous mushrooms known to propagate the islands. At night, he studied the many languages of South America, including Spanish, English, German, and French. Having mastered those languages, he learned to read Sanskrit. It is rumored that he can recite from memory the epic poem known as The Divine Comedy written by Dante Alighieri, in its native 14th Century Italian.

Collins sought to reneat the biblical account of Samson, who was given immense strength which allowed him to perform superhuman feats. Upon learning that he would need to slay a lion with his bare hands, and defeat an entire army using only the jawbone of a donkey, Collins opted instead to demonstrate his prowess by training and competing in the most famous strong man competitions, including The World’s Strongest Man, the Arnold Strongman Classic, the Strongman Champions League, and the Giants Live Tour. When he was done lifting boulders, toting refrigerators, pulling trains, and towing an 18-wheel truck behind him, he scaled Mount Everest, went sky diving, and hung gliding in Rio de Janeiro.

Clarke’s journey begins in the spring of 2005, while he was backpacking through Europe. It was in the picturesque Italian City of Pisa, while admiring the Leaning Bell Tower, that he had a chance encounter with a very special tourist, one Colin Powell who had recently returned to private life. Clarke formed a unique friendship with General Powell and was given rare insight into the life of this statesman, diplomat, Army officer, and the first African American Secretary of State. It is not surprising that Clarke went on to blaze his own trail as the 105th President, and the first African American President of this Association.

Not one to shy away from any challenge, Karabatos likewise scaled the heights of Mt. Everest. It was there that she is said to have communed with Aristotle, one of the greatest philosophers ever to have lived. She worked on a rigorous course of study in science, mathematics, logic, and reason. Mathematics is the journey she embarked on which contributed to her successful efforts to resuscitate this Association from financial ruin in 2019.

The essence of the Third Pillar—Public Service—is most notable in the journeys of Past Presidents Martha Krisel, Susan Katz Richman, and Chris McGrath. Kriels’ journey took many roads. For a time, she sold in the sugar cane fields of Maui. In need of inspiration, she journeyed to India and spent weeks sketching

FROM THE PRESIDENT
Rosalia Balamonte

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spent months building an exact replica of the Wright Flyer—the world’s first successful motor-operated airplane invented by the Wright Brothers—and then flying it for a total of 12 seconds. Having mastered the inspiration needed to think beyond limits, McGrath next found himself deep in London’s underground. He camped day and night in Churchill’s Underground Cabinet War Rooms, where he perfected his methods of defusing confrontation.

The journeys of Past Presidents William Savino, Emily Franchina and Stephen Gassman, fortified NCBA’s Fourth Pillar—Charitable Giving. Savino travelled to the Amazon Basin in search of a sweet-smelling cinnamon spice. Legend has it that this spice was among the very first gifts which were given to the baby Jesus by the Three Wise Men, and that eating even the smallest hint of this spice fills a person with altruism and philanthropy. Many believe that a dash of Savino’s exotic cinnamon is added to every willow bowl to inspire the future generations of NCBA Presidents to prioritize charitable giving.

Meanwhile, Franchina travelled to the Valley of Kings, on the West Bank of the River Nile, in search of a rosemary plant which was thought to have been buried in the tomb of the Boy King Tutankhamen—a plant to potent, that a mere taste could bestow such power of communication and understanding as to transcend every language on earth. It is rumored that upon her return to Mineola, Franchina planted a sprig of this rosemary under the trees which flank the main entrance to Domus. Gassman’s journey included a visit to Northern France to walk along the coastline of Omaha Beach, the landing area used by Allied forces during the D-Day invasion of WWII. While there, he reflected on the words spoken by President Franklin D. Roosevelt at his Second Inaugural Address, where he said, “The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little.”

So, it would come to pass that Gauman founded WE CARE, the charitable arm of the Nassau County Bar Association during his tenure as President.

The Fifth Pillar—Diversity & Inclusion—was strengthened by the journeys of Past Presidents Dorian Glover, Susan Kluewer, and Douglas Good. As a testament to his personal hero, Thurgood Marshall, Glover sought to retrace the footsteps of a man who would one day become the first African American Justice of the U.S. Supreme Court, and founder of the NAACP Legal Defense and Education Fund. During a chance encounter with a librarian at Howard University School of Law, Glover learned that after his graduation, Thurgood Marshall went on a pilgrimage through Africa in search of a greater understanding of the power of connecting with others through faith and symbolism. So too, Glover traveled to the Ivory Coast, Ghana, Ethiopia, and Egypt, where he found himself beholding the Great Sphinx—a mythical creature with the head of a human, the body of a lion and the wings of a falcon. Glover learned that the Sphinx has been adapted by many societies, including the Free Masons, as a symbol of protection and benevolence, two of the most dominant hallmarks of his tenure as President.

Kluewer, studied the life of her personal hero, Eleanor Roosevelt. She learned that prior to becoming First Lady, Eleanor Roosevelt advocated for expanded roles for women in the workplace, the civil rights of African Americans and Asian Americans and the rights of World War II refugees. So inspired was she, that Kluewer traveled nearly 24 hours to China, to visit the Great Wall, in honor of First Lady Eleanor Roosevelt, who was denied the right to travel to China when she was a Delegate of the United Nations. It is said that Kluewer left a prayer for the bar association on a note which she placed in a crevice of the Wall along her journey.

Meanwhile, Good embarked on a perilous 48-hour journey on an expedition ship to Antarctica. When inclement weather prevented him from communicating with whales, penguins, and other wildlife, he pirated several satellite systems to access the internet, where he devoured information on the life and career of the Notorious RBG—Ruth Bader Ginsburg, a fierce advocate for gender equality and women’s rights and the first Jewish woman, and second woman ever, to serve on the United States Supreme Court. Since it is illegal to take as a souvenir even the smallest pebble from Antarctica, Good took back with him an ability to achieve absolute perfect pitch standing atop the highest, coldest, and driest continent, as well as a recipe for Chocolate Allspice Desert Nachos he got from the ship’s cook.

As for my personal journey—that remains to be written by a future President...
Eastern District Bankruptcy Roundup

In 2022, the Bankruptcy Court of the Eastern District of New York produced another set of interesting decisions. Here is a capsule summary of some of the highlights:

Dischargeability of Private Student Loans

In Homan, et al. v. Sallie Mae Inc., Navient Solutions LLC, et al., plaintiff, on behalf of a putative class, sought a declaration that his private, nongovernmental student loans were discharged in bankruptcy, and that Navient had nevertheless improperly continued to collect them for many years.

The key issue, was whether the private loans exceeded the cost of attendance at Title IV institutions (as defined under Section 221(d) of the IRS Code), and as such, were not “qualified education loans” which are nondischargable pursuant to Section 523(a)(8) of the Bankruptcy Code. If so, Navient’s continued collection efforts would have violated the statutory bankruptcy discharge he was granted, entitling him to damages for the willful violation of the discharge Order.

Initially, Judge Stong found that the request for a temporary restraining order (“TRO”) was properly confined just to include the members of the putative class who had standing to seek relief (i.e., only those whose loans exceeded the cost of attendance, who were subject to ongoing collection efforts, and who still had an outstanding balance).

As to plaintiff’s burden to show a “likelihood of success on the merits” the court held that the plaintiff showed that to the extent their private loans did not meet the criteria of §523(a)(8)(B), they would be covered by their bankruptcy discharges; having received notice of the discharges, Navient would have been in violation of the discharge Orders. The complaint also alleged that Navient continued to induce loan payments despite knowing that these were discharged loans, and without making any effort to determine whether the loans made to some 322,000 putative class members were within the applicable cost of attendance or not.

As to Navient’s argument that members of the class represented in their loan documents that the loans being taken were within the cost of attendance and could only be used for “qualified educational expenses,” the court found that such a standard, boilerplate statement was not enforceable in bankruptcy; the court also stated that if the facts showed that a private student loan exceeded the applicable cost of attendance, the borrower’s statement in the loan documents to the contrary did not change those facts.

The court found that plaintiffs showed they would suffer irreparable injury in the absence of an injunction. It found that in the absence of a TRO, class members would continue to be harassed by Navient for payments on discharged debts and might actually continue to pay them under pressure.

Next, the court found that: a) the “balance of hardships” tipped in the plaintiffs’ favor, because Navient’s collection efforts impeded plaintiffs’ right to a “fresh start” afforded by their discharges; and b) that the public interest would not be harmed by entering a TRO.

The court further held that it would enter an Order that had the effect of providing for relief outside of its own district, with respect to granting nationwide relief for alleged violations of discharge Orders in other districts. The TRO was granted and Navient was given sixty (60) days to comply.

Finally, the court declined to extend the TRO to a larger group of putative class members of borrowers who had other private loans that exceeded the cost of attendance and who attended Title VI institutions.

Dischargeability of Breach of Marital Stipulation

In Moneeousian v. Moneeousian, involved a stipulation entered into in a matrimonial case. The parties agreed to sell a jointly-owned condominium to their daughter in exchange for a release from her, but also, that they would not assist, finance or encourage their daughter to sue or seek to obtain title to the apartment. The agreement included remedies for its breach including a claim for indemnification.

The debtor breached the stipulation by locating and paying for an attorney, to enable his daughter to sue the debtor and his wife to obtain title to the apartment. His spouse sued him in state court for breaching the stipulation and obtained a judgment for $509,407 for damages and legal fees, for the loss of equity, and the delay in selling the apartment caused by the daughter’s lawsuit.

After the debtor filed a bankruptcy petition, his spouse brought an action under Section 523(a)(15) of the Bankruptcy Code to determine if this judgment from the state court was nondischargable. Judge Lord noted that the current version of the statute no longer considers the debtor’s financial ability to pay, or the needs and abilities of each party, as, now under the BAPCPA of 2005, the sole issue is—was the obligation created under a divorce decree, separation agreement, or court judgment.

Here, the obligation was incurred under the Stipulation of Settlement, and even though it was ‘one step removed’ from what is typically claimed under this section, it still qualified as a nondischargable debt.

“In rem” Relief for Multiple Filings

In In re Corretie, the debtor had two (2) Chapter 13 cases dismissed and was barred from refileing for six (6) months; then he filed a third case, which was dismissed with prejudice and the court barred a refileing for 180 days.

The debtor also controlled an entity that filed multiple Chapter 11 cases to forestall a foreclosure sale on a property in Merrick. All the Chapter 11 cases were dismissed, all appellate attempts were unsuccessful, and the Bankruptcy Court imposed sanctions on the debtor and counsel for bad faith filing.

During the debtor’s most recent Chapter 13 filing, another property in Freeport surfaced that the debtor had not disclosed in the prior filings. The debtor controlled another entity that had been blocking the owner of that property from pursuing an eviction at that premises by filing multiple bankruptcies. The debtor no longer had an ownership or leasehold interest in this property; he was only a holdover squatter with a mere possessory interest. The property owner filed a motion to lift the stay to gain possession of this property.

The court granted “in rem” relief under §362(d)(4) to bar another filing for up to two (2) years, unless the debtor in a subsequent case could show a change of circumstances or good cause for the new filing.

In light of the debtor’s scheme to hinder delay and defraud creditors by way of serial filings, such “in rem” relief would be binding in any other bankruptcy case filed in the next

ATTENTION NCBA MEMBERS!

Our October 2022 issue inadvertently published the article Advance Directives: Do Your Wishes Matter? under a wills and estates focus category. The correct focus category for this article is medical malpractice.

Nassau Lawyer regrets this error and has corrected the online version of the issue.
two (2) years that affected the same Freeport property.

Process For Extending Time to Object to Discharge

In In re Khelani, the debtor did not appear at the first meeting of creditors due to a Covid-related illness. At that time, the creditor's attorney claimed that the trustee discussed and verbally agreed with debtor’s counsel to extend the time to object to the debtor’s discharge for sixty (60) days from when the debtor appeared for examination. The debtor appeared at the adjourned creditors’ meeting. No stipulation or motion was filed with the court seeking an extension of the August 15, 2022, deadline for the trustee or any creditor to object to the debtor’s discharge, and a discharge was granted on that day.

Thereafter, the creditor filed a motion to revoke the discharge, and also filed a complaint objecting to the discharge and to the dischargeability of the creditor’s debt. Its argument was that the discharge was entered by mistake, because based upon representations by debtor’s counsel (which the debtor denied), and excusable neglect, the creditor believed it had sixty (60) days from July 6, 2022, to object to the discharge bringing the deadline to September 16, 2022. The debtor claimed that a possible extension of the trustee’s time to object to discharge was discussed at the first meeting, but that such an extension would only cover the trustee, and not individual creditors, and in any event, no such verbal agreement was ever made.

The court found that there was no mistake in the discharge having been entered on August 15, 2022, as the court never “so ordered” any agreement or stipulation to extend that deadline. In addition, the sixty (60) day deadline to object to dischargeability of debt or to discharge, runs from the “first date set for the meeting of creditors,” which can be extended for cause by motion before the time expires, and no such motion for an extension was sought. The strict interpretation of Bankruptcy Rule 9006(b)(3) compelled a finding that the court was without authority to extend the deadline after it had run. Any such verbal agreement between counsel without a timely application to the court and its approval, could not provide a basis to extend the deadline.

The creditor’s motion was denied since its reliance on an alleged verbal agreement or discussion of a possible extension of time was unreasonable and insufficient to extend the deadline.

Willful Violation of Automatic Stay

In Bayview Loan Servicing Servicing v. Fogarty, the debtor owned 99% of an LLC that owned property which was her primary residence. The house was in foreclosure and right before the sale, the debtor filed Chapter 7. The lender was notified but went ahead with the foreclosure sale anyway since the LLC did not file for bankruptcy. The LLC had signed the note and mortgage. The debtor was not an owner but was named in the action as a defendant-occupant. The sale was to a third party.

The debtor’s motion in Bankruptcy Court claimed a willful violation of the automatic stay by the lender and sought damages and sanctions. The Bankruptcy Court denied the motion, but the District Court reversed since the debtor was a named defendant in the foreclosure as having a possessory interest.

The Second Circuit affirmed and remanded to the Bankruptcy Court for a hearing on damages and sanctions. It held that the lender willfully violated the automatic stay provisions of Section 362 of the Bankruptcy Code prohibiting “the continuation of an action against the debtor,” and “enforcement of a judgment against the debtor”.

The court’s clear message was that the lender should have played it safe and moved to lift the automatic stay against the debtor’s possessory interest before foreclosing on the house.

Jeff Morgenstern maintains an office in Carle Place where he concentrates in bankruptcy, creditors’ rights, commercial and real estate transactions, and litigation. He is also an Editor of the Nassau Lawyer.

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8. F.4th 62 (2d Cir. 2022).
New York’s Cannabis Legislation Brings Thorny Tax Issues

Matthew E. Rappaport and Louis J. Kesselbrenner

P resident Richard Nixon began the American government’s so-called “War on Drugs” in 1971, but the nation’s discourse regarding drugs classified under Schedule I of the Controlled Substances Act (CSA) passed that same year—including marijuana—has changed dramatically ever since. In 1996, California passed legislation giving birth to the first legal medicinal cannabis market in the country. Today, thirty-seven states have legal cannabis laws in place, and nineteen states permit recreational use for its adult constituents. This growing coalition includes New York State; on March 31, 2021, New York passed the Marihuana Regulation and Taxation Act (MRTA), which decriminalized possession of marijuana (up to 3 ounces for personal use) and provides a regulatory schematic for licensing businesses to grow, process, distribute, and sell cannabis products to adults within the state.

The MRTA’s legalization of marijuana conflicts directly with the CSA, but it also introduces an entirely new set of statutes governing the state-level taxation of marijuana activities. On the federal level, §280E of the Internal Revenue Code of 1986, as amended, provides that expenditures in connection with the illegal sale of drugs, including marijuana, are not deductible for any person, including corporations. The only exception is a deduction for costs of goods sold. But §280E is a federal rule, and New York State passed legislation decoupling from the Code for §280E purposes and allowing New York marijuana businesses to deduct marijuana expenses from gross income for state income tax purposes. This means businesses must now navigate two separate regimes: the federal income tax, which holds that marijuana-related expenses are not deductible; and the state and New York City income tax, which provide that those same expenses are deductible. The lineage of §280E case law illustrates the difficulties cannabis businesses face when attempting to circumvent the limitations of §280E. In Califorinians Helping to Alleviate Medical Problems, Inc. v. Commissioner, a California corporation was found to operate with a dual purpose: (1) primarily, to provide caregiving services; and (2) to provide its members with medical marijuana pursuant to the California Compassionate Use Act of 1996. In short, the Tax Court ruled that a taxpayer operating in the illegal trafficking of a controlled substance trade or business precludes deductions under §280E for ordinary business expenses related to such illegal operation. It does not preclude the taxpayer from deducting expenses, however, from a substantially different trade or business that stands separate and apart from illegally trafficking controlled substances, such as expenses related to providing caregiving services.

But the Tax Court clarified in Olive v. Commissioner that incidental and complimentary services having a “close and inseparable organizational and economic relationship” to the sale of marijuana subjected those services to the same §280E limitations. The contrast between Californians and Olive shows that a taxpayer needs to run truly separate and distinct businesses from marijuana sales to qualify the non-marijuana enterprises for full deductibility of expenses.

More recently, the court reached a similar conclusion in Patients Mutual Assistance Collective Corp. v. Commissioner, when the taxpayer tried to argue it had activities constituting four separate trade or businesses: sale of marijuana products, sale of products with no marijuana, therapeutic services, and brand development. Because selling marijuana accounted for over 99.5% of the company’s revenue, the other activities were neither economically separate nor substantially different. As it did in Olive, the court found that the taxpayer’s other profit producing activities were merely incidental to its only true trade or business of selling marijuana, subjecting all expenses to §280E treatment.

Vertical integration in the cannabis space—from seed to sale operations—can reduce some of the tax consequences of §280E because such enterprises can share overhead costs like rent and utilities across their different business operations. In some states, vertically integrated cannabis business models are permitted, or even encouraged for certain licensure types. The MRTA generally limits businesses from vertically integrating, however, by prohibiting cultivators from holding a retail license or having a direct or indirect interest in any premises with an adult-use cannabis dispensary license. In New York State, the MRTA created the Office of Cannabis Management under the jurisdiction of the Division of Alcoholic Beverage Control to implement marijuana policy, but the New York State Department of Taxation and Finance (DTF) will still maintain jurisdiction over marijuana-related tax issues. The DTF will enforce at least three state-level taxes unique to marijuana, all of which will apply in addition to every other existing state- and local-level tax:

1. A 7% excise tax on the sale of medical marijuana.12
2. A 9% retail sales tax on the sale of recreational marijuana.13
3. A value-added style tax on the sale of recreational marijuana based on potency.14

This third category of tax is unique to New York State because no other state imposes any tax based on the potency of the recreational marijuana tax paid. Each of the three taxes will be reported and remitted as part of a dedicated tax return submitted to the DTF. As of this writing, practitioners still await legislatively delegated regulations the DTF might issue to clarify the administration and enforcement of these taxes, so attorneys will need to make judgment calls in difficult situations. One judgment call practitioners must make without the help of regulations or other administrative guidance is how to reconcile the federal tax optimization with state and local tax optimization. Tax advisors will need to weigh how different legal structures might affect outcomes under the federal income tax, state income tax, state and local sales taxes, state excise tax, and the potency-based tax.

The lack of clarity about how Code §280E applies to state and local taxes will not help; in non-precedential administrative guidance, the Internal Revenue Service advised that the excise tax levied by the State of Washington on the sale of marijuana should be applied as a reduction in the amount realized on the sale of the affected marijuana products.17 This guidance reconciled Code §280E with Code §164(a) by holding that the latter’s flush language called for capitalization of the excise tax into the basis of each item of inventory, so the momentary addition to basis would have the same tax effect as a deduction. If one applies this guidance to New York’s taxes imposed under the MRTA, all of those taxes should be capitalized into the basis of the affected products upon sale. If practitioners can get comfortable with this position despite the limited reliance value of Chief Counsel Advisory memorandum, they might give clients the opportunity to achieve better tax outcomes. As New York State grants licenses for recreational marijuana businesses to operate, tax advisors for those businesses will need to consider the several different types of taxes that apply on the federal, state, and local levels. Those advisors will also have to weigh tax consequences against non-tax business concerns, a tricky balance that might not come with clear answers.

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Civil Rights in a Post-Dobbs Era

On June 24, 2022, the Court handed down its decision in Dobbs v. Jackson Women’s Health Organization. The Court, in a 6-3 decision, held the Constitution does not confer a right to abortion. In a clean sweep, the Court overruled Roe v. Wade and Planned Parenthood of Southeastern Pennsylvania v. Casey and held “the authority to regulate abortion” should be “returned to the people and their elected representatives.”

The immediate consequences of Dobbs were felt nationwide. Several states with “trigger laws,” laws designed to instantaneously go into effect under certain circumstances without further state action required, resulted in complete statewide abortion bans, with no exceptions for rape or incest. Other states found that their laws now banned abortions at six, fifteen, eighteen, or twenty weeks. In forever blue states, like New York and California, there was no change in access to abortions. In some states, abortion remains legal, for now, while courts determine if new or existing bans can take effect.

What remains to be decided; however, is the effect of Dobbs on other rights not explicitly stated in the Constitution, including the rights to same-sex marriage and contraception. Cases in the October 2022 Term may reveal whether rights widely considered to be “fundamental” truly are so.

Is Dobbs Just the Beginning?

Justice Alito delivered the opinion of the Court, in which Justice Thomas, Gorsuch, Kavanaugh, and Barrett joined. Justices Thomas and Kavanaugh each filed concurring opinions, and Chief Justice Roberts filed an opinion concurring in the judgment. Justice Breyer, Justice Sotomayor, and Justice Kagan filed a dissenting opinion.

Perhaps one of the most striking statements in Justice Alito’s majority opinion is, “The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one in which the defenders of Roe and Casey now chiefly rely—the Due Process Clause of the Fourteenth Amendment,” thereby suggesting that if a right is not explicitly stated in the Constitution, then it may be at risk.

Justice Alito, addressing the concerns of the dissent, wrote:

[T]he dissent suggests that our decision calls into question Griswold, Eisenstadt, Lawrence, and Obergefell. But we have stated unequivocally that “[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.” We have also explained why that is so: rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what Roe and Casey termed “potential life.” Therefore, a right to abortion cannot be justified by a purported analogy to the rights recognized in those other cases or by “appeals to a broader right to autonomy.” It is hard to see how we could be clearer.

Throughout the majority opinion, it is repeated that the ruling addresses the right, or lack thereof, to abortions and no other rights. Justice Kavanaugh echoed Justice Alito’s assertions about other precedents involving contraception and same-sex marriage.

Justice Thomas’s concurrence, however, struck a different tune. While Justice Thomas agreed that “nothing in this Court’s [Dobbs] opinion” should be “understood to cast doubt on precedents that do not concern abortion,” he wrote “[i]n future cases, we should reconsider all of this Court’s substantive due process precedents, including Griswold, Lawrence, and Obergefell.”

Justice Thomas omitted Loving v. Virginia, the unanimous 1967 decision which held anti-miscegenation statutes violated both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

The dissent, jointly written by Justice Breyer, Justice Sotomayor and Justice Kagan, refused to take the majority at its word:

And no one should be confident that this majority is done with its work. The right Roe and Casey recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation…. They are all part of the same constitutional fabric, protecting autonomous decision-making over the most personal of life decisions…. The lone rationale for what the majority does today is that the right to elect an abortion is not “deeply rooted in history”… The same could be said, though, of most of the rights the majority claims it is not tampering with.

Depending on who is your favorite Justice, you may or may not believe the majority’s promise that Dobbs is an isolated decision. Are Griswold, Eisenstadt, Lawrence, and Obergefell next on the chopping block? If any of them fall, wouldn’t Loving also be at risk? In the October 2022 Term, the Court just might have the opportunity to set the record straight.

Coming Up Next: 303 Creative LLC v. Elenis

In February 2022, the Court agreed to hear an appeal from a Colorado web designer who is willing to serve LGBTQ+–identifying clients, but limits her wedding-related services to heterosexual couples. Specifically, the Court will consider “whether applying a public accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.”

If this case gives you a feeling of déjà vu, you are not alone. Back in 2018, in Masterpiece Cake Shop, LTD. v. Colorado Civil Rights Commission, the Court evaluated whether Colorado’s public accommodations law, which compelled a cake maker to design and make a cake that violated his sincerely held religious beliefs about same-sex marriage, violated the Free Speech and Free Exercise Clauses of the First Amendment.

The Court, in a 7-2 decision, held the Colorado Civil Rights Commission’s conduct in evaluating the cake shop owner’s reasons for declining to make a wedding cake for same-sex couples violated the Free Exercise Clause. The Court’s decision was narrow and left open the broader question of whether a business can discriminate against members of the LGBTQ+ community based on rights protected by the First Amendment.

In the three years since Masterpiece, the Court’s composition has changed dramatically. Justice Brett Kavanaugh joined the Court in September 2018, replacing Justice Anthony Kennedy. In September 2020, Justice Ruth Bader Ginsburg, a feminist who died after 27 years on the nation’s highest court. Within weeks of her passing, Justice Amy Coney Barrett was nominated by President Donald Trump and confirmed by the U.S. Senate.

In June 2022, Justice Stephen Breyer retired after 28 years of service and was replaced by Justice Ketanji Brown Jackson.

The controversial decision in Dobbs highlighted the ideological shift of the Court and led to heated debates about the role of the Court in the twenty-first century. Whether Dobbs makes you cheer or cringe, its effects on future civil rights cases may be profound. Decisions that will be rendered this Term will act as a seismograph to measure Dobbs’ consequences on various landmark precedents.

1. 142 S. Ct. 2228 (2022).
2. Id. at 2242–43.
4. Id. at 2247.
5. Id. at 2248.
8. Id.
13. James Ryan is Chair of the Litigation practice group and a partner at Cullen and Dykman LLP. He can be reached at jryan@cullenllp.com.
14. Seema Rambaran is an Associate in the Commercial Litigation practice group at Cullen and Dykman LLP. She can be reached at srambaran@cullenllp.com.
15. Clara Villanola is a Law Clerk, pending New York bar admission, at Cullen and Dykman LLP. Clara assisted in the preparation of this article.
since their inception about twenty-five years ago, merchant cash agreements have been very lucrative for the merchant cash advance providers. One reason is that the agreements were treated such that the providers were purchasing future receivables and then collecting the amount advanced plus an additional amount through daily or weekly collections. The amount collected was significantly greater than the amount advanced. Recent cases in both the Southern District of New York and the New York Supreme Court, however, have determined that the advance is not for a purchase of receivables but is actually a usurious loan.

Background
A merchant cash advance (MCA) is when a provider gives a merchant an upfront sum of cash that is repaid through a percentage of the merchant’s credit and debit card sales, plus a fee. It is claimed that since the provider is purchasing future sales, the transaction is not a loan. Repayment of the MCA is by one of two ways. Either there is an automatic weekly (or daily) deduction of a percentage of the merchant’s credit and debit card sales, or there is a deduction of an agreed upon fixed amount. Moreover, an interest rate is not charged for the advance. Instead, the fee is a factor rate.

There are also administrative, underwriting, and other fees that are charged and added to the amount owed. The effective interest rates for the advances, however, are often in the triple digits. When businesses cannot make their payments, many will take out additional advances to pay the old advances, creating a cycle of debt which often results in the business folding. “MCA agreements are financial products, often marketed to small businesses through high-pressure sales operations resembling ‘boiler rooms,’ that purport to purchase at a discount a portion of a business’s future receivables.”

The MCA industry started in the 1990s when a small business owner developed a method to be able to borrow funds from future credit card transactions. When the 2008 financial crisis led to large banks being wary of lending money to small businesses and making lending criteria more stringent, MCAs filled the void. MCA providers argue that they provide monies to businesses that, as a result of the decline of smaller banks, typical lenders often will not. However, the MCA industry has recently come under investigation by the Federal Trade Commission, the Manhattan District Attorney, and the New York State Attorney General’s office. Earlier in 2022, the FTC settled claims against MCA operators. In addition, Article 6 of the New York Financial Services Law, effective January 1, 2022, now requires MCA providers to provide certain disclosures.

Three Southern District Cases
MCA Agreements were at issue in Fleetwood Services, L.L.C. v. Ram Capital Funding, LLC, a case in the SDNY. In November 2016 the plaintiff, a Texas business involved in golf course construction, development, remodeling and renovation, entered into a MCA Agreement with Ram Capital. Pursuant to the agreement, plaintiff received an advance of $100,000 in exchange for the purported purchase of what was defined as all of Fleetwood’s ‘future receivables’ until Fleetwood had repaid the sum of $149,000. The repayments were to be by daily automated clearing house (ACH) withdrawals from a designated account in the sum of $1,399.00. The plaintiff commenced an action to recover for, among other things, a violation of the Texas usury statute on the basis that the cash advance was actually a loan with an interest rate well in excess of that allowed under Texas law and New York law. Plaintiff eventually moved for summary judgment on its causes of action.

In analyzing whether the MCA agreement was a loan or an actual purchase of future receivables, the court noted that “[t]he hallmark of a loan is that the lender “is absolutely entitled to repayment under all circumstances,’” or put otherwise, the “principal sum is repayable absolutely.”

In making the analysis as to whether repayment is absolute, three factors are considered: (1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy. These factors, however, are only a guide and not all three factors need to be present in order to determine the agreement is actually a loan. The “essential question” to be determined is whether the party advancing the funds “is absolutely entitled to repayment under all circumstances.”

An analysis of the relevant MCA agreement led to a determination that the transaction was a loan and not a sale of assets as the provider was absolutely entitled to be repaid under all circumstances and as the plaintiff bears the risk of non-payment. “Although on its face the Agreement purports to provide for the sale of accounts receivables, that is just window dressing. The Agreement has none of the characteristics of the sale of receivables in terms of transfer of risk and rewards.”

The obligation to collect on the “receivables” was squarely on Fleetwood, which was required to remit the specified percentage regardless of whether its customers made their payments. In the event Fleetwood filed for bankruptcy the provider would have been entitled to collect the full purchase price, inclusive of the additional fees, not just the amount actually advanced. “Viewing the Agreement as a whole, the Court concludes that it is a loan and not a contract for the purchase of future receivables. It thus may be subject to usury laws.”

Within a few weeks, the issue of MCA Agreements was again before the Southern District in Haymond Urgent Care PC v. Gefland Advance, LLC. In Haymond, merchants filed a putative class action asserting claims of, among other things, RICO violations. The defendant MCA companies and individuals moved to dismiss. In its decision, the court initially set forth various terms contained in the MCA agreements. It then analyzed the claim that the defendants were liable under RICO “for illegally operating an enterprise that loans money to small businesses at criminally usurious rates and then uses various improper tactics to collect on those loans.” For RICO purposes, a debt is unlawful if it runs afoul of the applicable usury statute. The fundamental question was whether the underlying transactions were actually loans. The court answered in the affirmative.

The first analysis is how the relevant agreement allocates risk.
“The root of [the analysis] is the transfer of risk. Where the lender has purchased the accounts receivable, the borrower’s debt is extinguished and the lender’s risk with regard to the performance of the accounts is direct, that is, the lender and not the borrower bears the risk of non-performance by the account debtor.” The defendants argued the three factors set forth in LG Funding are dispositive and, applying the factors to the agreements, the transactions are not loans.

The court, however, concluded that these factors, while relevant to the analysis, are not dispositive. The court went on to analyze other features of the agreements, like the remittance amounts being fixed and not based on good faith estimates of receipt of particular revenues or accounts that were being purchased were not identified, leaving the risk of nonpayment with the merchant; the merchants were to collect the revenues from all of their accounts; a default in the MCA occurs if the merchant’s bank rejects any automated debit without the merchant giving prior notice; such a default allows the lender to immediately receive payment in full; and in the event of a default, if the lender cannot recover from the merchant’s accounts, the merchant’s principal is responsible for the entire amount under the personal contract, like a usury claim is.

After consideration of all of these factors, the court determined that the transactions were loans, and the motion to dismiss was denied.

Kings County Supreme Court Analysis

These three District Court cases led to a Kings County Supreme Court Justice changing a prior determination he made. In Hi Bar Capital LLC v. Parkway Dental Services, LLC,28 the plaintiff MCA provider was initially awarded a default judgment against the merchant. The merchant’s motion to vacate the default on the ground that, inter alia, the agreement was actually a usurious loan was denied. The merchant moved to reargue.

On reargument, the court first analyzed the three factors enumerated in LG Funding and Principis Capital and referenced in Fleetwood Services for determining whether the agreement sets forth that the amount advanced is absolutely repayable, which would make it a loan. That analysis resulted in there not being any issues concerning the agreement.

However, the court then cited Haymount, Lateral Recovery and Fleetwood Services in stating that “[c]laimed Federal courts have engaged in a more thorough and exacting scrutiny of merchant cash agreements, looking at the agreements in a holistic and comprehensive manner and the conclusions they have reached are compelling.” After analyzing the MCA agreement at issue through the other factors outlined in the three federal cases, the court determined that “there are surely questions raised whether the agreement comports with the requirements necessary to be considered a genuine cash advance agreement.” The reargument motion was granted and upon reargument the motion to vacate the default was granted.

Additional Federal Cases

The analysis used in Haymount, Lateral Recovery and Fleetwood Services, as well as the factors in LG Funding and Endico Potatoes, formed the basis for similar determinations in AKF Inc. v. Western Foot and Ankle Center31 (the relevant agreement was a usurious loan), Lateral Recovery, LLC v. Capital Merchant Services, LLC32 (some of the MCA agreements at issue were usurious loans) and New York Cott v. Arch Capital Funding, LLC33 (agreements at issue were usurious loans, not business-to-business contracts).

Conclusion

These recent decisions signal that MCA agreements are to be scrutinized to determine whether the underlying transactions are actually usurious loans. Practitioners should make their own analysis based on the factors used in these cases when a potential client comes to them seeking guidance when the potential client defaults, or is about to default, on its MCA agreement. Given the number of MCA agreements entered during the pandemic and likely to be entered in the current economic climate, this is not an unlikely scenario.

Nassau Lawyer ■ December 2022 ■ 11

CALL FOR NOMINATIONS

The Nominating Committee welcomes applications for nominations to the following Nassau County Bar Association offices for the 2023-2024 year:

- President-Elect
- Vice President
- Treasurer
- Secretary
- Director

Applications are welcome for nominations to serve on the Nassau County Bar Association Board of Directors. There are eight (8) available director seats, each is for a three-year term.

The Nominating Committee invites applications for nominations to the following offices of the Nassau Academy of Law for the 2023-2024 year:

- Dean
- Associate Dean
- Assistant Dean
- Secretary
- Treasurer
- Counsel

NCSA members interested in applying for any of the above nominations, or in submitting suggestions for such nominations, are invited to submit such information to:

Dorian R. Glover
Nassau County Bar Association
15th & West Streets
Mineola, NY 11501

JANUARY 23, 2023 DEADLINE FOR ALL NOMINATIONS.
United States Supreme Court, Bankruptcy Update

Matthew V. Spero and Alexandria E. Tomanelli

The United States Supreme Court decided a bankruptcy case this year that all bankruptcy practitioners should be aware of. The Supreme Court also granted certiorari to hear an additional bankruptcy case and denied review of another.

**Siegel v. Fitzgerald:** The United States Supreme Court Declares Bankruptcy Fee Hike Under the U.S. Trustee Program Unconstitutional

In Siegel v. Fitzgerald, the United States Supreme Court resolved the issue of fee disparities imposed by a 2017 statute that increased U.S. Trustee fees in forty-eight states but not in Alabama or North Carolina. The Supreme Court reversed the Fourth Circuit’s ruling and held that the Office of the U.S. Trustee fee hike mandated by the Bankruptcy Judgeship Act of 2017 (the “2017 Act”) violated the uniformity requirement of the U.S. Constitution’s Bankruptcy Clause.

The dispute involved the disparity of U.S. Trustee fees and how they apply in bankruptcy proceedings. In 1978, the U.S. Trustee Program was created. This program transferred administrative functions of the bankruptcy courts to U.S. Trustees. In 1986, Congress enacted the “U.S. Trustee Program” in all federal judicial districts except those in Alabama and North Carolina. A different program named the “Bankruptcy Administrator Program” was adopted in these two states.

In 2017, the Office of the U.S. Trustee dealt with a shortfall of funding, and as a result, Congress passed the 2017 Act, which raised fees payable by Chapter 11 debtors in the forty-eight states using the U.S. Trustee Program. The 2017 Act raised the fees payable to the U.S. Trustee starting in the first quarter of 2018 from a maximum of $30,000 to a maximum of $250,000. This fee hike was not applied in Alabama or North Carolina.

Siegel arose from the Circuit City Stores Chapter 11 case, which was filed in the U.S. Bankruptcy Court for the Eastern District of Virginia (a U.S. Trustee Program district). While the case was pending, the 2017 Act took effect. As a result, Circuit City paid $632,542.00 in trustee fees across the first three quarters of 2018. If the 2017 Act had not taken effect, the debtor would have paid $56,400.00. The debtor then challenged the fee increase as unconstitutional because it did not apply uniformly in all fifty states.

Siegel filed for relief against the Acting U.S. Trustee, and in the Bankruptcy Court for the Eastern District of Virginia, Siegel asserted that the 2017 Act did not apply uniformly in the U.S. Trustee Program Districts and the Administrator Program Districts. In 2019, the Bankruptcy Court ruled the 2017 Act was unconstitutional because it violated the uniformity requirement imposed by the Bankruptcy Clause, which requires Congress to establish “uniform Laws on the subject of Bankruptcies throughout the United States.”1

The acting U.S. Trustee appealed this decision to the Fourth Circuit. The Fourth Circuit reversed and ruled that the 2017 Act was constitutional. At this time several circuits were split over the issue, as the Fifth and Eleventh Circuits found the 2017 Act to be constitutional, while the Second and Tenth Circuits disagreed. The Supreme Court granted certiorari to resolve the circuit split over the constitutionality of the 2017 Act.

In June 2022, the Supreme Court unanimously held, in an opinion written by Justice Sotomayor, that the 2017 statutory increase to U.S. Trustee Fees violated the uniformity requirement of the Constitution’s Bankruptcy Clause. Justice Sotomayor explained that the “bankruptcy clause offers Congress flexibility but does not permit arbitrary geographically disparate treatment of debtors.”2 The Supreme Court found that the 2017 Act was not “geographically uniform.”

**Certiorari Petition Granted in Another Bankruptcy Case—October Term 2022-2023**

**Bartenwerfer v. Buckley:** United States Supreme Court to Consider Whether a Debtor Can Be Held LIABLE for Partner’s Fraud

The Supreme Court has agreed to hear a case to resolve the issue of whether a debtor can be held liable for a debt incurred by fraud committed by the debtor’s partner or agent. The Bankruptcy Code offers debtors a “fresh start” and affords debtors the opportunity to discharge past debts. Certain debts, such as debts that are incurred by false pretenses, false representations, and/or actual fraud, are not dischargeable.

In Bartenwerfer v. Buckley, debtors (a married couple) renovated a home in San Francisco. After the renovations, the couple sold the house to Mr. Buckley. Before the sale of the home, the debtors signed disclosure statements regarding the property’s condition. The debtors made representations regarding water leaks, the condition of the roof and windows, and whether any additions or alterations were made to the home without necessary permits or in violation of the building codes.

After the home was sold, Mr. Buckley, the new owner, discovered significant defects. As a result, Mr. Buckley filed a lawsuit against the debtors. Mr. Buckley asserted several claims in his action, including that the debtors failed to disclose material facts about the home. The jury ultimately sided with Mr. Buckley, found the debtors liable for not making material disclosures, and awarded Mr. Buckley damages of $444,671.3

Subsequently, the debtors filed their Chapter 7 bankruptcy case. Mr. Buckley filed a non-dischargeability action alleging that the State Court judgment should not be discharged because it was based on the debtors’ concealment of material information regarding the home.

Kate Bartenwerfer, one of the debtors, alleged that she did not know of her husband’s fraud. The Bankruptcy Court entered a judgment in her favor, finding that her husband’s fraud should not be imputed to her. The Ninth Circuit reversed and argued that the Bankruptcy Court applied the incorrect “knew or should have known” legal standard for imputing liability.

On May 2, 2022, the Supreme Court granted certiorari. The question presented to the Supreme Court is whether an individual may be subject to liability for the fraud of another that is barred from discharge under 11 U.S.C. §523 (a)(2)(A), by imputation, without any act, omission, intent or knowledge of her own. Arguments are scheduled for December 6, 2022.

**PHH Mortgage Corp. v. Senesich (In re Gravel):** 6 F.4th 503 (2d Cir. 2021): United States Supreme Court Denies Certiorari in Bankruptcy-Related Matter

On June 13, 2022, the Supreme Court denied certiorari on a matter that involved punitive sanctions imposed on a secured creditor in three independent Chapter 13 cases in Vermont (these three cases were later consolidated on appeal). In PHH Mortgage, a sub-servicer of residential mortgages faced a series of fines for violating the notice provisions of Federal Rule of Bankruptcy Procedure 3002.1.

Rule 3002.1 requires secured creditors with claims secured by the debtor’s principal residence to provide notice to the debtor, debtor’s counsel, and interested parties of any changes in the debtor’s monthly payment amount, including any post-petition expenses, fees, and charges. To comply with this rule, secured parties must file a notice of any change of post-petition mortgage fees within 180 days of when the fees were incurred. As a result of violating Rule 3002.1, the Bankruptcy Court imposed punitive sanctions on PHH Mortgage. These punitive sanctions ($75,000 each) were applied in three independent Chapter 13 bankruptcy cases where PHH Mortgage was a secured creditor. PHH Mortgage appealed the order. The Second Circuit went on to hold that the bankruptcy court erred in imposing punitive sanctions on PHH Mortgage in three independent matters because Rule 3002.1 did not allow punitive fines.

Several issues were presented in the petition for a writ of certiorari; however, the Supreme Court has denied review of the petition.

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IRS Collection Alternatives: Options for Taxpayers Who Cannot Pay Their Taxes in Full

Karen Tenenbaum LL.M. (Tax), CPA

The last few years have been challenging for many taxpayers. COVID-19, inflation, supply-chain issues and financial losses have left many taxpayers struggling. Matters have recently worsened as COVID-related tax relief measures have mostly expired and the IRS is slowly catching up on its backlog. The latest infrastructure law is also giving more money to the IRS to increase audits. These factors mean that taxpayers must understand their options if they cannot pay their taxes in full. This article provides an overview of the most common collection alternatives.

IRS Collection Tactics

The IRS has an arsenal of tools they can use to compel individuals and businesses to pay their taxes. These include liens, levies, wage garnishment, penalties, passport revocation and criminal prosecution. Notably, in the case of businesses that owe taxes, the government can also go after the personal assets of certain responsible persons instead of just the assets of the business. This applies to IRS income taxes, social security taxes and Medicare taxes withheld from employee paychecks.

To avoid these consequences, taxpayers should consider an Installment Agreement, Offer in Compromise and/or Currently Not Collectible Status if they cannot pay their tax bill.

Installment Agreement

An IRS Installment Agreement (IA) allows taxpayers to pay their bills over time. However, interest and penalties will continue to accrue on unpaid tax balances. As a result, this option is often best for taxpayers who have adequate income, but who cannot obtain a loan to pay the entire bill at once.

There are several types of installment agreements, each with its own requirements. These include the following:

- Guaranteed IA. This IA requires that:
  - The amount of tax owed is less than $10,000 (not including interest and penalties);
  - The taxpayer filed and paid all taxes due for the last five years;
  - The taxpayer did not have had an IA with the IRS in the previous five years;
  - The taxpayer can pay the full amount owed within three years; and
  - The taxpayer agrees to pay the liability before the period for collecting the tax expires.

Note that a taxpayer is not required to submit a financial statement to qualify and may use the IRS’s online service or phone to apply.

- Streamlined IA. A taxpayer may qualify if:
  - The amount of tax owed is $50,000 or less (not including penalties and interest);
  - The taxpayer can pay in full within 72 months and within the time limit for the IRS to collect the tax; and
  - The taxpayer enters into a direct debit agreement if there is an assessed balance of $25,001-$50,000.

As with guaranteed IAs, streamlined IAs do not require a financial statement and one may use the IRS’s online service or phone to apply.

- Non-streamlined IA. The requirements are:
  - The taxpayer is an individual;
  - The amount owed is $250,000 or less;
  - The debt is paid within the remaining statute of limitations; and
  - The taxpayer enters into a direct debit agreement if required to do so at the discretion of the IRS.

- In-Business Trust Fund Express IA. A business may qualify if:
  - It currently has employees;
  - Owes $25,000 or less at the time the agreement is established;
  - The debt will be paid in full within 24 months; and
  - It complies with all filing and payment requirements.

Note that taxpayers can apply either online or by mail.

Pandemic Relief

Notably, during the pandemic, additional relief efforts were implemented for installment agreements and remain in effect including the following:

- Taxpayers with short-term payment plans have 180 days to pay instead of 120 days.
- Individuals who owe up to $250,000 may be able to set up non-streamlined IAs without financial documentation if their monthly payment proposal is sufficient and has not yet been assigned to a revenue officer.
- For individuals who were notified of taxes owed with liabilities up to $250,000 for Tax Year 2019 only, the IRS can offer one Installment Agreement opportunity with no lien filed.

See IRS COLLECTION ALTERNATIVES, Page 16
DECEMBER 7, 2022 (HYBRID)
Dean’s Hour: Legality of 3-D Printed and Homemade Guns
With the NCBA Civil Rights Committee, the NCBA Criminal Courts Law and Procedure Committee and the Nassau County Assigned Counsel Defender Plan
12:30PM – 1:30PM
1 credit in professional practice. Skills credits available for newly admitted attorneys.

DECEMBER 8, 2022 (HYBRID)
Dean’s Hour: The Curious Case of Dr. Sam Sheppard—The Perils of Prosecution by the Law (Law and American Culture Lecture Series)
12:30PM – 1:30PM
1 credit in professional practice.

JANUARY 5, 2023 (HYBRID)
Dean’s Hour: How to Write a Paragraph
12:30PM – 1:30PM
1 credit in professional practice. Skills credit available for newly admitted attorneys.

JANUARY 11, 2023 (HYBRID)
Dean’s Hour: No One is Immune to Eminent Domain
Sponsored by NCBA Corporate Partner LexisNexis
With the NCBA Real Property Law Committee and the NCBA Municipal Law and Land Use Committee
12:30PM – 1:30PM
1 credit in professional practice.

JANUARY 18, 2023 (HYBRID)
Dean’s Hour: Cybersecurity, Privacy, and Data Protection
Sponsored by NCBA Corporate Partners AssuredPartners and IT Group New York
12:30PM – 1:30PM
1 credit in cybersecurity, privacy, and data protection – general
**Please note this is a temporary title to enable us to open program for registration. More details forthcoming.**

JANUARY 24, 2023 (IN PERSON)
Planned Charitable Giving: What You Need to Know
With the NCBA WE CARE Fund
Program 5:30PM – 7:00PM;
Networking following program.
1.5 credits in professional practice. Skills credits available for newly admitted attorneys.

JANUARY 25, 2023 (HYBRID)
Dean’s Hour: What’s the Point Spread?
Introduction to Sports Betting—Economics, Regulations, and the Law
12:30PM – 1:30PM
1 credit in professional practice. Skill credits available for newly admitted attorneys.

FEBRUARY 4-5, 2023 (IN PERSON)
Hon. Joseph Goldstein Bridge-the-Gap Weekend
*Snow date: March 4-5, 2023
Sign up for the full weekend, a day, or individual classes
Newly admitted attorneys:
7 credits in professional practice, 6 in skills, 3 in ethics
Experienced attorneys:
13 credits in professional practice, 3 in ethics
FREE for NCBA Members. Breakfast, lunch, and written materials will be provided each day to attendees.

Bridge-the-Gap Chair: Michael E. Ratner, Esq., Nassau Academy of Law Associate Dean; Abrams Fensterman, LLP, Lake Success

FEBRUARY 7, 2023 (HYBRID)
Dean’s Hour: Shareholder Agreements and the Connolly Decision
With the NCBA Business Law, Tax and Accounting Committee
12:30PM – 1:30PM
1 credit in professional practice.

UPCOMING PART 36 CERTIFIED TRAINING CLASSES

FEBRUARY 9, 2023 (ZOOM ONLY)
Supplemental Needs Trustee: Part 36 Certified Training
With the NCBA Elder Law, Social Services & Health Advocacy Committee
5:00PM – 8:30PM
3 credits in professional practice; .5 in ethics
Registration fees: NCBA Member $150; Non-Member Attorney $250
Part 36 training is excluded from the free CLE offer included with NCBA Membership
NAL PROGRAM CALENDAR

MARCH 10, 2023 (ZOOM ONLY)
Guardian Ad Litem: Part 36 Certified Training
8:30AM – 12:30PM
3.5 credits in professional practice; .5 in ethics
Registration fees: NCBA Member $150;
Non-Member Attorney $250
Part 36 training is excluded from the free CLE offer included with NCBA Membership

MARCH 15, 2023 (HYBRID)
How to Get the Kitchen Sink into Evidence: Evidence from Openings to Closings and Everything in Between Part 3—Witnesses
Sponsored by NCBA Corporate Partner LexisNexis
5:30PM – 7:30PM
2 credits in professional practice. Skills credits available for newly admitted attorneys.
Join Former Supreme Court Judge Arthur M. Diamond for an interactive practical series that will teach you how to get things into evidence...from Voir Dire, emails, expert opinions to hearsay.

Program Coordinator: M. Kathryn, Meng. Esq., Past President, Nassau County Bar Association; First Dean, Nassau Academy of Law; Meng & Reznak, PC., Mineola.
Moderator: Michael P. Guerriero, Esq., Chair, NCBA Condemnation Law and Tax Certiorari Committee

APRIL 3, 2023 (HYBRID)
How to Get the Kitchen Sink into Evidence: Evidence from Openings to Closings and Everything in Between Part 4—Hearsay
Sponsored by NCBA Corporate Partner LexisNexis
5:30PM – 7:30PM
2 credits in professional practice.
Skills credits available for newly admitted attorneys.

Join Former Supreme Court Judge Arthur M. Diamond for an interactive practical series that will teach you how to get things into evidence...from Voir Dire, emails, expert opinions to hearsay.

Program Coordinator: M. Kathryn, Meng. Esq., Past President, Nassau County Bar Association; First Dean, Nassau Academy of Law; Meng & Reznak, PC., Mineola.
Moderator: Lee Rosenberg, Esq., Chair, NCBA Grievance Committee

Hon. Joseph Goldstein Bridge-the-Gap Weekend

February 4-5, 2023
FREE for NCBA Members

"IT IS OUR HOPE THAT GENERATIONS OF ATTORNEYS WILL BENEFIT FROM THE COURSES OFFERED AT THIS PERENNIAL FAVORITE."

-- THE GOLDSTEIN FAMILY
For individuals and out-of-business entities, the IRS will automatically include certain new tax year balances accrued in existing IAs so these taxpayers can avoid a default of the agreement.

Offer in Compromise (OIC)

An OIC is a settlement agreement in which the taxpayer’s liability is generally reduced to an amount that the taxpayer can afford to pay, not what the taxpayer owes. The IRS usually conducts an intensive review of a taxpayer’s financial information before acceptance of an offer. To qualify, taxpayers must show one of three grounds:

- **Doubt as to liability (DATL)**—the taxpayer can establish a genuine dispute as to the existence or amount of the correct tax debt under the law;

- **Doubt as to collectability (DATC)**—the taxpayer’s assets and income are less than the full amount of the tax liability; or

- **Effective tax administration (ETA)**—the taxpayer can pay the tax, but such payment would cause an economic hardship or there are compelling public policy or equity considerations.

Generally, the IRS will not accept an OIC on DATC grounds unless the amount offered reflects what the IRS would reasonably collect from the taxpayer (the Reasonable Collection Potential or RCP). The RCP is determined by looking at the taxpayer’s net equity in assets and anticipated future income less specified amounts allowed for reasonable living expenses.

For ETA, the taxpayer must show that they can pay the balance in full but that it would cause an economic hardship and would not leave them with sufficient assets or income to meet their basic living expenses. Hardship is often accepted in cases involving advanced age or illness and where the taxpayer has minimal or no future earning potential and unknown future living expenses.

A taxpayer can also show that public policy or equity would allow the OIC, such as if they relied on erroneous advice or instructions issued by the IRS or a criminal or fraudulent act committed by a third party created the tax debt.

By entering into an OIC with the IRS, the taxpayer agrees to the following terms:

- The taxpayer will pay the offer amount agreed upon in the OIC;
- The taxpayer will file tax returns and pay taxes for the following five years;
- The taxpayer agrees that the IRS will keep any tax refunds, payments and credits applied to the taxpayer’s tax debts prior to the submission of the OIC;
- The taxpayer agrees to forfeit any tax refunds that would have been payable during the pendency of the OIC.

Note that due to the pandemic, the IRS stated that it will provide relief for taxpayers having difficulty meeting the terms of previously accepted OICs.

Currently Not Collectible (CNC) Status

Another option for taxpayers is Currently Not Collectible (CNC) status, which provides temporary relief from collections. To qualify, taxpayers must show that they cannot pay both their taxes and basic living expenses. While the taxpayer’s account is in CNC status, the IRS generally won’t try to collect, but will still assess interest and penalties and may keep and apply tax refunds to the tax debt.

The IRS will conduct a periodic review of the taxpayer’s financial situation and may remove them from CNC status if it is determined that they can pay some or all of their liability. Further, the IRS may ask taxpayers to:

- File any past-due returns;
- Complete a Collection Information Statement (Form 433-A) and/or (Form 433-F, and/or Form 433-B), and provide supporting documentation; and/or
- Continue to make Estimated Tax Payments and Federal Tax Deposits on time.

Conclusion

This is just a partial list of collection alternatives when taxes cannot be paid in full. The best option for a taxpayer depends on their individual circumstances.
FOCUS: LAW AND AMERICAN CULTURE

Ira S. Slavit

Diversity and Inclusion Committee Presents
Tribute to Louis Brandeis

health to support his argument that a statute limiting the daily working hours for female laundry workers was constitutional.  
Brandeis’s concern for the rights of individuals manifested itself in his work and judicial decisions (often in dissent that became the underpinnings of future majority opinions) concerning monopolies, unfair business practices, insurance industry fraud (which he called “legalized robbery”), and Women’s suffrage.

In 1914, he published Other People's Money and How the Bankers Use It, a compilation of articles in effect declaring that the bankers were taking all the rewards and assuming none of the risks. This landmark tome was eerily prescient of the Crash of 1929 as well as the one which took place in 2008 when the banks were deemed too big to fail.

Brandeis was a life-long inspiration to the late Justice Ruth Bader Ginsburg.

Mr. Carmenatey devoted a substantial part of his presentation to Brandeis’s relationships with his contemporaries on the U.S. Supreme Court and with other prominent individuals.

He spoke of Brandeis’s unique connection with Oliver Wendall Holmes and the outright hostility to Brandeis by the virulently anti-Semitic Justice James Clark McReynolds. He detailed the long-standing relationship Brandeis had with Woodrow Wilson, the president who nominated Brandeis to the U.S. Supreme Court and for whom Brandeis had served as his chief economic advisor.

One hundred twenty-five (125) days elapsed from Brandeis’s nomination to his Senate confirmation, the longest wait that anyone had endured up until that time. His was the first nomination for which the Senate held a public hearing; all prior nominees had been confirmed or rejected, usually within a single day. Mr. Carmenatey discussed how much of the opposition to Brandeis stemmed from anti-Semitism.

At one point Mr. Carmenatey caused the audience to shudder. That was when he referenced the case of Erie Railroad Co. v. Tompkins and the Erie Doctrine. Brandeis wrote the majority opinion in that case that forever burns in the collective consciousness of first-year law students.

Brandeis was a fervent champion of free speech and of the right to privacy, believing that the 4th and 5th amendments of the U.S. Constitution conferred a right to individual privacy. The right to privacy was first conceived a landmark article published in the Harvard Law Review in 1890, entitled The Right to Privacy, that Brandeis wrote with Samuel D. Warren II, his law partner and Harvard Law School classmate.

One must wonder if Brandeis’s legendary prescience was so great that he foresaw the advent of social media (or at least wonder what he would have written had he lived in a time pervaded by social media). He wrote:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry, as well as effrontery. To saturate a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. ... The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Mr. Carmenatey extensively traces the history of Zionism and Brandeis’s leadership in the cause of establishing a Jewish state. Brandeis was named as president of the Provisional Executive Committee for Zionist Affairs, taking on a pivotal role in increasing the influence of American Jews in the movement following World War I.

When the United States formally recognized the newly created State of Israel in 1948, the Secretary of State at the time was Dean Acheson, a former law clerk of Justice Brandeis. Brandeis once said, “The greatest menace to freedom is an inert people.” This motif may well account for some of his devotion to Zionism.

The richness of Mr. Carmenatey’s presentation and written materials is elevated by numerous impressive quotes from Brandeis which were amiss. They are well-worth reading and rereading. One such quote, ostensibly about law, could be seen as being representative of the person Brandeis sought to be and was. Brandeis said: “If we desire respect for the law, we must first make the law respectable.”

As Mr. Carmenatey’s program made clear, Brandeis’s personal and professional accomplishments all flowed from the fact that his character was of the highest caliber.

Justice Brandeis retired from the Supreme Court on February 13, 1939. He died on October 5, 1941, from a heart attack.

Always a teacher of sorts as both an attorney and as a jurist, Brandeis’s most profound tangible legacy can be found in two worthy and esteemed educational institutions which bear his name. They are Brandeis University in Waltham, Massachusetts, and the Louis D. Brandeis School of Law at the University of Louisville in his native Kentucky. It is certain that Louis Brandeis would have had it no other way.

I. 208 US 412 (1910).
II. 286 US 414 (1932).
III. 318 US 485 (1943).

Ira S. Slavit

is chair of the NCBA Community Relations and Public Education Committee and immediate past chair of the plaintiff’s Personal Injury Committee.

He is an attorney with Levine & Slavit, PLLC with offices in Manhattan and Mineola, and can be reached at islavit@newyorkinjuries.com or at (516) 294-8282.

If we desire respect for the law, we must first make the law respectable.
Proposed Regulations Raise Difficult Questions Regarding Sexual Harassment and Sexual Identity Discrimination in Education

New regulations proposed by the Department of Education to define the responsibilities of colleges and universities under Title IX have sparked controversy.

Existing rules require public (and most private) universities and colleges to prohibit students and employees from sexual harassment. While the existing rules are relatively uncontroversial, the new rules face legal challenges as they expand the meaning of “sexual harassment” and extend protections to students who have nontraditional gender identities.

Defining Sexual Harassment
The regulation of sexual harassment in education is modeled upon federal laws that regulate employment. Federal laws prohibit employers from discriminating against employees on the basis of sex. Courts have long held that sex discrimination includes sexual harassment—that is, workplace harassment that occurs because of the employer’s sexual advances or demands of an employee.

Federal courts have generally imposed liability on employers when (1) a manager demands sexual favors in exchange for employment opportunities (such as keeping a job or receiving a raise or promotion) or (2) sexual harassment creates such a hostile work environment that employees must labor under oppressive, abusive, or intimidating conditions. An occasional remark (such as “that’s a sexy dress”), even if offensive, will typically not create a hostile work environment. Rather, the harassment must be either pervasive or severe to be actionable. Since Title IX prohibits sex discrimination in colleges and universities, analogous employment law decisions suggest that Title IX also prohibits sexual harassment. Courts have therefore recognized that a professor violates Title IX by conditioning a good grade on the receipt of sexual favors. “Quid pro quo” harassment—offering to exchange a benefit for sex—is unlawful both in the workplace and on campus.

The Department of Education has proposed a new definition of sexual harassment that applies to a campus environment. The proposed rule defines “quid pro quo harassment” as conditioning the provision of a benefit or service (such as a grade) on a person’s participation in unwelcome sexual conduct. In addition, specific acts of unlawful conduct are defined as sex-based harassment, including committing a sexual assault, engaging in domestic violence or dating violence, and stalking. The so-called Cleary Act requires colleges and universities to monitor and make public reports about those on-campus offenses.

When Is a College Environment Hostile?
More problematic is the definition of “hostile environment harassment” as: “Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity (i.e., creates a hostile environment).” A subjective evaluation presumably means that a student felt harassed, while an objective evaluation means that a reasonable student under the same circumstances would have felt harassed.

That definition represents an attempt to shornom rules that govern workplace conduct into campus environments. Yet campus environment is significantly different from a workplace environment. Private employers can generally prohibit employees from making offensive remarks (or from speaking at all), since private employers are not bound by the First Amendment. Public universities, on the other hand, must respect the First Amendment right of students to express opinions, provided that the opinions are not meant to threaten or intimidate others. The differences between a workplace and a college campus make it challenging to police sex-based language or conduct of students that might be perceived as offensive.

As courts interpret federal employment law, offensive language does not create a hostile work environment unless it is either extraordinary offensive or repeated so often that it challenges the ability to work. It is not clear how these rules translate into the larger environment of a college campus. Calling someone a “bitch” once or twice might be offensive, but from an objective standpoint, it would not likely hinder a reasonable student’s ability to obtain an education. Yet schools might fear a loss of Title IX funding if they do not punish every student who arguably contributes to a hostile educational environment by occasionally uttering an offensive sex-based word.

Because the rules have both a subjective and an objective component, every subjective complaint is likely to trigger an investigation by schools that fear a loss of funding. If a student politely but repeatedly asks another student for a date, the school will likely initiate an investigation if the recipient of those requests claims that the invitations prevented them from concentrating on their studies. No standards are established to determine whether that response to unwelcome invitations is objectively reasonable. If the objective reasonableness of a student’s response is a matter of opinion, the evaluation of the student’s response is not objective in any meaningful sense.

In addition, the new rules allow any student to make a complaint of sexual harassment, not just the student who might be seen as the victim of the harassment. Thus, even if the person who was repeatedly asked out on a date does not feel harassed, a friend might subjectively regard the conduct as harassing and might make a complaint that triggers an investigation and a possible disciplinary proceeding.

Gender Identity Discrimination
The Supreme Court has recognized that gender identity discrimination is discrimination on the basis of sex. In the context of employment discrimination, an employer that discriminates against male employees (but not female
employees] because they are attracted to men is treating employees differently because of their sex. The same is true of an employer that allows female employees to wear a dress but does not allow male employees to do so.

The proposed Title IX rules specifically define sex discrimination to include “discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.” While that concept should be uncontroversial, it can be problematic in its application.

The proposed rule, for example, would require a school to permit a student to participate in programs and activities “consistent with the person’s gender identity.” That rule may require a school to allow a biologically male student who identifies as a female to use a woman’s restroom. Women who object to sharing the restroom with a transgender student who is biologically male might be accused of (and subjected to discipline for) sexual harassment.

The proposed rule may also be in conflict with state laws that require individuals to use public bathrooms that correspond to their sex at birth. Such laws have been proposed more often than they have been enacted, in part because North Carolina’s “bathroom law” triggered an economic boycott that caused state businesses to lose billions of dollars in revenue. Bills to enact such laws are nevertheless pending in several states.

Athletic Competition

How the rule against gender identity discrimination will affect athletic competition is unclear. The same issues that surround access to restrooms arise when transgender students seek access to locker rooms. Some state attorneys general argue that prohibiting discrimination against transgender student athletes would destroy the integrity of women’s sports. In their view, allowing a biologically male student who identifies as female to participate in women’s sports might give a team an unfair advantage. Men are not necessarily taller, stronger,

or faster than women, but the fear is that a tennis or basketball player who is biologically male will have an advantage over opponents who are biologically female. The Department of Education has not yet proposed rules to address the difficult issue of athletic competition.

Pronoun Choice

Gender identity implicates the choice of pronouns. Whether a transgender person prefers the pronoun “he” or “she,” or whether a person who identifies as nonbinary prefers a neutral pronoun like “they,” is usually a matter of personal choice. Whether a student has the right to impose that choice on others—to demand that other students and professors respect their chosen pronoun—is a question the proposed rules do not directly address.

To the extent that a student believes the refusal to use a preferred pronoun creates a hostile educational environment, schools may feel compelled to discipline students for using a different pronoun. The Equal Employment Opportunities Commission takes the position that the repeated and deliberate failure to use a student’s preferred pronoun can be a form of sexual harassment. Applying that reasoning in the context of education could lead schools to mandate that students use the pronouns preferred by other students.

Disciplining students for their choice of pronouns may implicate their right of freedom of speech or religion. Students at a public university cannot be punished for engaging in protected speech. Students do not generally have a constitutional right to engage in offensive speech for the purpose of harassing or intimidating another student, but expressing the opinion that a student who is biologically male should be referred to as “he,” particularly when the opinion is driven by the student’s religious beliefs, is not necessarily an act of harassment or intimidation.

Unfortunately, schools have not always appreciated the subtle differences between protected expression of opinions and unprotected

...
The Day That the Music Died: John Lennon, New York City, December 8, 1980

On December 8, 1980 shots were fired in the driveway of the Dakota Apartments in New York City. When the smoke cleared, former Beatle John Lennon laid murdered. The impact of this violent act was deafening. It not only took a life; it silenced a voice which spoke to millions. For an entire generation, Lennon’s assassination was the day that the music died.

Lennon was more than a rock star. His songs became anthems, and his music shaped the soundtrack of the baby-boom. He also had an iconoclast. Throughout his life, he marched to the beat of his own drum; the Beatles ceased all live touring after 1966.

Lennon was not only iconic; he was also an iconoclast. Throughout his life, he marched to the beat of his own drum. The Lennons lived at the Dakota Apartments at 1 West 72nd Street overlooking Central Park. The day of Lennon’s life. That afternoon, just before leaving the Dakota, Lennon signed a copy of Double Fantasy for one Mark David Chapman. Paul Goresh, an amateur photographer and Lennon fan, caught on film their initial encounter. Their next meeting would prove fatal as Chapman had flown from Hawaii expressly to kill Lennon. Chapman was a disturbed individual who subsequently was diagnosed as a “paranoid schizophrenic.” Once a Beatles fan, Chapman, after a religious conversion, came to despise Lennon for the latter’s mocking of Christianity. His preoccupcation with Lennon was matched only by his obsession with the coming-of-age novel The Catcher in the Rye by J.D. Salinger. In the parlance of Salinger’s book, Lennon, in Chapman’s estimation, was a ‘phony.’ On the one hand, Lennon’s songs spoke in utopian terms: Imagine no possessions and Imagine all the people Sharing all the world.” At the same time, Lennon lived the extravagant lifestyle of a multi-millionaire.

Lennon and Ono arrived at the Dakota at 10:45 p.m. In hindsight, it would have been safer for them to have disembarked from their limo in the building’s enclosed courtyard. Instead, they stepped out onto 72nd Street which required them to walk from the street through an archway. As Lennon and Ono passed Chapman, for a brief moment victim and killer made eye contact. Chapman called out “Mr. Lennon” and fired five shots from a .38 caliber revolver. Four hollow-point bullets hit Lennon in the back, as he managed to stagger into the lobby of the Dakota bleeding profusely. Lennon would be pronounced dead-on arrival after being taken to nearby Roosevelt Hospital. The coroner’s report noted Lennon had lost eighty percent of his body’s blood supply.

Crowds congregated in front of the Dakota on word of the shooting and for days after the building’s entrance became a shrine for grieving devotees. Ono called for a vigil the following Sunday. On December 14, 1980, at 2:00 p.m. New York time, over 50,000 people gathered in Central Park as radio stations from around the world went off-the-air in solemn observance.

Chapman did not flee the scene. He waited for the police to take him into custody, making no effort to resist arrest. Among his possessions was a paperback edition of The Catcher in the Rye. He was charged with second-degree murder and instructed by his attorney, Jonathan Marks, to enter a plea of not guilty by reason of insanity.

Chapman then informed Marks he wanted to drop the insanity defense and plead guilty instead. He was adamant and said that God had told him to do so. Marks opposed Chapman’s change of heart, questioning his competence. Justice Dennis Edwards ruled that Chapman had made his decision of his own volition.

Permitting Chapman to enter a guilty plea, Justice Edwards sentenced him to twenty years to life, and ordered psychiatric treatment for Chapman during the term of his incarceration. Chapman has applied for parole numerous times since first becoming eligible and he has been denied on every occasion thus far. Lennon’s murder was the denouement of the 1960’s. Ironically, the Beatles captured the public’s imagination in 1964 following the
The knotty issue of Chapman’s actions has never been satisfactorily explained. After all, though a peace activist Lennon was not per-se a political figure, why him? Even if one could anticipate the events of December 8, how can one account for why this misguided wretched decision to kill John Lennon. 30

Was Lennon a victim of the cult of celebrity that so permeates modern society? No doubt Chapman was fixated on Lennon. The prosecutor in the case observed: “we would have proved that essentially, he wanted to draw attention to himself, to make people see how important he was. He was basically looking for fame.” 22

Chapman was also quite dogmatic when it came to his religious beliefs. He has frequently stated that his actions were motivated by Lennon’s controversial statements that the Beatles were more popular than Christ. This anger welled-up inside of Chapman for years looking for an outlet. That religion may have been the motive is quite troubling.

But the one unifying theory that perhaps best explains the method behind Chapman’s madness concerns the importance he placed on the need to have Lennon atone for his comments on Christianity, found their full-expression by Chapman assuming the mantle of Caulfield. By murdering Lennon, who saw his actions as some sort of malignant pied piper and a phony, Chapman would somehow be saving ‘innocence’ itself.

Whatever Chapman’s motivation, the violent death of John Lennon was as senseless as it remains perplexing. Beyond the immediate toll on Lennon’s family, it resulted in the death of a cultural luminary whose art influenced the world of popular song. Lennon was only forty and on the verge of a comeback when he was killed. If he had lived, who knows what music he could have made. 22

Taking the words of a psychotic individual at face value is always tricky, but this motif does seem to offer the only ‘rationalization’ for Chapman’s actions.

The desire for fame and the need to have Lennon atone for his comments on Christianity, found their full-expression by Chapman assuming the mantle of Caulfield. By murdering Lennon, who saw his actions as some sort of malignant pied piper and a phony, Chapman would somehow be saving ‘innocence’ itself.

Whatever Chapman’s motivation, the violent death of John Lennon was as senseless as it remains perplexing. Beyond the immediate toll on Lennon’s family, it resulted in the death of a cultural luminary whose art influenced the world of popular song. Lennon was only forty and on the verge of a comeback when he was killed. If he had lived, who knows what music he could have made.

1. Jordan Rauth, When John Lennon’s ‘More Popular Than Jesus’ Controversy Turned Up, Rolling Stone (July 29, 2016) at https://www.rollingstone.com,
   3. Michael Vitolin, Meet the lawyer who saved Judge John Lennon and Yoko Ono from deportation, Independent (September 16, 2016) at https://www.independent.com,
   5. Double Fantasy would go on to win the Grammy for Album of the Year in 1981.

Judicial Initiatives and Offer Professional Insights to NCBA New Lawyers Committee...

Continued from Cover

tips on becoming a more effective advocate learned from their years of practice. The meeting was moderated by Michael Berger, Esq, and Byron Chou, Esq., Co-Chairs of the New Lawyers Committee.

The presentation started with Judge St. George explaining the administrative structure of the New York State Unified Court System, expertly navigating attendees through its dense and formidable hierarchy, which was especially helpful for those attendees who are only at the prelude of their legal careers, while also providing color to such information by detailing how his role and the rules of Judge DeStefano and Ms. Wunder factored into the system.

Judge St. George highlighted several priorities and goals of the judiciary, including the “Resolving Old Cases” initiative (a rebranding of the formerly infamous “Standards and Goals” initiative) and the judiciary’s continued dedication to ensuring access to justice in its varied forms, including timely resolution of cases. In order to do so, the court will continue to push litigants to actively attempt alternative dispute resolution via mediation, arbitration, neutral evaluation, and in-court settlement conferences.

Citing the statistic that ninety-five percent of cases are resolved before trial, Judge St. George reminded those in attendance to approach each case with an eye towards a fair and equitable settlement as early as possible. He analogized cases being settled as opposed to being litigated to the Marvel Comics’ supervillain, Thanos’ catchphrase, “I am inevitable,” which also holds true for litigation—that the vast majority of cases inevitably end in settling without a trial. By acknowledging this fact and working towards that end, attorneys as well as the court can ensure swift justice for all.

Judge St. George shared insight into other initiatives, including those seeking to ensure equal justice in the courts. Notably, since the COVID-19 pandemic and the advent of the virtual courtroom, the judiciary has ensured such equal access to justice by providing kiosks and rooms within the courthouses for pro se litigants and those without computers to appear for virtual hearings.

Judge DeStefano echoed Judge St. George’s dedication to ensuring excellence by sharing several anecdotes sourced from his own venerable career in law. He emphasized the importance of professionalism and ethical conduct within one’s practice, citing to the Rules of Professional Conduct Rule 3.3: Conduct Before a Tribunal; Rule 5.1: Responsibility of Law Firms, Partners, Managers, and Supervisory Lawyers; and Rule 5.2: Responsibilities of a Subordinate Lawyer.

Judge DeStefano imparted upon the new lawyers the importance of finding a mentor to help guide their formative years in the practice of law; the advice and guidance of a good mentor is invaluable in one’s early years of practice; and bad advice will come back to haunt you. Moreover, the judge impressed upon all that as lawyers, we are here to serve the public, and that we should always seek out opportunities to be servant leaders.

Judge DeStefano also noted the importance of continued learning and keeping abreast of recent decisions and development. He further encouraged all to “reach for the brass ring” in order to achieve professional excellence and success by sharing a personal story from his early years of private practice. Ms. Wunder rounded out the presentations by emphasizing the importance of being attentive to details. Whether in motion practice, client advocacy, or visual presentation, details matter and are noticed.

The event was as inspiring as it was invigorating; it provided an opportunity for new and some not-so-new law students alike to receive updates about the court system and obtain invaluable insights into the practice of law. The co-chairs, attendees and the Committee wholeheartedly thank the speakers for their time, wisdom, and sage advice.

The New Lawyers Committee’s next meeting is scheduled for January 17, 2023, at 5:30 PM at the North Dining Room at Domus. All are invited to this planning meeting where the Committee plans to discuss and schedule future programs, CLEs, and social events.

Rudy Carmenaty is the Deputy Commissioner of the Nassau County Department of Social Services. He also serves as Co-Chair of the NCBA Publications Committee and Chair of the Diversity and Inclusion Committee.
Judiciary Night
October 20, 2022

On October 20, 2022, the leaders and members of the NCBA honored the esteemed judiciary of Nassau County. This year’s honoree, Hon. Anthony F. Marano (Ret.), former Presiding Justice of the Supreme Court of the State of New York, Appellate Term, Second Judicial Department for the Ninth and Tenth Judicial Districts, was presented with the Hon. Marie G. Santagata Gold Gavel Award by NCBA President Rosalia Baiamonte.

During the program, Judge Marano received personal accolades from Hon. Norman St. George and Hon. Vito M. DeStefano, and a Nassau County Citation proudly presented by Hon. Thomas A. Adams.

Photos by Hector Herrera
David M. Yaron is pleased to announce the opening of Yaron Injury Law located at 500 Duffy Avenue, Suite 510 in Hicksville. Mr. Yaron may be reached at DYaron@YaronInjuryLaw, (516) 400-4280, or via Instagram at @DYaronlaw.

Lamb & Barnosky, LLP Partner Lauren Schmitz will participate in a presentation on the topic “Legal Rights of Transgender and Gender Nonconforming Students” for the Nassau County Bar Association’s Women in the Law Committee on December 6, 2022. In November, the firm was named to the Best Lawyers® U.S. News & World Report “Best Law Firms” list.

Marc Hamroff of Moritt Hock & Hamroff is pleased to announce that the firm has received national recognition in the 2023 Best Law Firms rankings by Best Lawyers® U.S. News & World Report.

Stephen J. Silverberg is pleased to announce that the Law Office of Stephen J. Silverberg has been named to the Best Lawyers® U.S. News & World Report “Best Law Firms” list for 2023.

Jeffrey D. Forchelli, Chairman and Co-Managing Partner of Forchelli Deegan Terrana LLP (FDT), is pleased to announce that the firm’s regional “Best Law Firms” ranking, and the launch of its Condensation Practice Group to be chaired by Jason M. Peniggetti. FDT has ranked a Tier 1 firm on Long Island in Litigation—Labor & Employment. In early November, Jeffrey D. Forchelli created two endowed professorships at Brooklyn Law School.

Bernard Hyman, Managing Partner of Certilman Balin Adler & Hyman, LLP, is pleased to announce that the firm has been newly recognized as a Tier 3 firm on Long Island in the area for Elder Law for 2023 by Best Lawyers® U.S. News & World Report.

Jothi Narendran, Sophia A. Perna-Plank and Maria Girardi of Jaspan Schlesinger were featured in The New York Real Estate Journal as top Women in Professional Services. Partner Lawrence Tenenbaum was honored by The Long Island Business News with a Leadership in Law award.

Jacqueline Harounian has been appointed as the Co-Chair of the Matrimonial Committee of the New York State Women’s Bar Association. She has also joined the Board of Directors at Mondays at Racine Cancer Care Foundation.

Michele Pincus of H2M architects + engineers has been promoted to Deputy Market Director.

Ira S. Slavit of Levine & Slavit, PLLC, received a Leadership in the Law award in the Partner category from Long Island Business News.

Vishnick McGovern Milizio LLP (VMM) managing partner Joseph Milizio is pleased to announce that the firm has been named to Best Lawyers® U.S. News & World Report “Best Law Firms in America,” for the second consecutive year. The recognition follows the renaming of partner Joseph Trotti to “Best Lawyers in America” and partner Constantinage Papageorgiou and associates Meredith Chesler and Phillip Hornberger to “Best Lawyers: Ones to Watch.”

Mateen Hashmat has joined the firm as an associate to its Personal Injury practice. Partner Joseph Trotti, head of VMM’s Litigation Department and Matrimonial and Family Law practice, published on November 3 an article titled “In family law, don’t focus; use a wide-angle lens” in ABA Journal. On October 24, Trotti volunteered at the NCBA Volunteer Lawyers Project’s “Access to Justice Committee Open House” pro bono event, which served over 100 Long Islanders.

Karen Tenenbaum of Tenenbaum Law, P.C. is proud to announce that the firm was listed by Long Island Business News as a Top Tax Law Firm and nominated by the Long Island Press as a Best Law Firm on Long Island 2023. Karen moderated the NYSSCPA, NYS & Multi-State Committee presentation on “An Update on IRS Audits and Collections.” Tenenbaum spoke on both the Federal panel and the NYS panel for the NCCPAP Accounting and Tax Symposium 2022. On the Federal panel, Tenenbaum and her legal team gave a presentation on IRS Collections. For the New York State panel, they gave a presentation on NYS Collections, Sales Tax, and Residency. Tenenbaum and her legal team also gave a presentation to the NYSSCPA, Nassau Chapter entitled “Non-Filers: Strategies and Tips to Correctly Represent.”
We Acknowledge, with Thanks, Contributions to the WE CARE Fund

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<td>Hon. Andrea Phoenix</td>
<td>Marriage of Jill Stone’s son</td>
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Special thanks to those who volunteered their time:
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December 6, 2022–January 11, 2023
Questions/Contact Stephanie Page at (516) 747-4070 or spage@nassaubar.org.
Please Note: Committee meetings are for NCBA Members.
Dates and times are subject to change.
Check www.nassaubar.org for updated information.

TUESDAY, DECEMBER 6
WOMEN IN THE LAW
12:30 PM
Melissa P. Corrado/
Ariel E. Ronneburger

WEDNESDAY, DECEMBER 7
REAL PROPERTY LAW
12:30 PM
Alan J. Schwartz

THURSDAY, DECEMBER 8
INTELLECTUAL PROPERTY
12:30 PM
Frederick J. Dorchak

TUESDAY, DECEMBER 13
LABOR & EMPLOYMENT LAW
12:30 PM
Michael H. Masri

WEDNESDAY, DECEMBER 14
ASSOCIATION MEMBERSHIP
12:30 PM
Jennifer L. Koo

WEDNESDAY, DECEMBER 14
MEDICAL LEGAL
12:30 PM
Christopher J. DelliCarpini

WEDNESDAY, DECEMBER 14
GENERAL SOLO SMALL LAW
FIRM PRACTICE MANAGEMENT
12:30 PM
Scott J. Limmer/Oscar Michelen

WEDNESDAY, DECEMBER 14
MATRIMONIAL LAW
5:30 PM
Jeffrey L. Catterson

THURSDAY, DECEMBER 15
ALTERNATIVE DISPUTE RESOLUTION
12:30 PM
Suzanne Levy/Ross J. Kartez

THURSDAY, DECEMBER 15
DIVERSITY & INCLUSION
6:00 PM
Rudolph Carmenaty

TUESDAY, DECEMBER 20
PLAINTIFF’S PERSONAL INJURY
12:30 PM
David J. Barry

WEDNESDAY, DECEMBER 21
EDUCATION LAW
12:30 PM
Syed Fahad Qamer/
Joseph Lilly

WEDNESDAY, DECEMBER 21
ETHICS
5:30 PM
Avigael C. Fyman

TUESDAY, JANUARY 3
WOMEN IN THE LAW
12:30 PM
Melissa P. Corrado/
Ariel E. Ronneburger

WEDNESDAY, JANUARY 4
REAL PROPERTY LAW
12:30 PM
Alan J. Schwartz

WEDNESDAY, JANUARY 4
SURROGATES COURT
ESTATES & TRUSTS
5:30 PM
Stephanie M. Alberts/
Michael Calcagni

THURSDAY, JANUARY 5
PUBLICATIONS
12:30 PM
Rudolph Carmenaty/
Cynthia A. Augello

THURSDAY, JANUARY 5
COMMUNITY RELATIONS & PUBLIC EDUCATION
12:30 PM
Ira S. Slavit

TUESDAY, JANUARY 10
ENVIRONMENTAL LAW COMMITTEE/MUNICIPAL LAW AND LAND USE
12:30 PM
John L. Parker and
Kenneth L. Robinson:
Environmental Law
Judy L. Simoncic:
Municipal Law and Land Use

TUESDAY, JANUARY 10
LABOR & EMPLOYMENT LAW
12:30 PM
Michael H. Masri

WEDNESDAY, JANUARY 11
ASSOCIATION MEMBERSHIP
12:30 PM
Jennifer L. Koo

WEDNESDAY, JANUARY 11
MEDICAL LEGAL
12:30 PM
Christopher J. DelliCarpini

WEDNESDAY, JANUARY 11
MATRIMONIAL LAW
5:30 PM
Jeffrey L. Catterson

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Financial Advisor, Principal
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(516) 288-7880
Lee Korn
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jsechter@mpival.com

Joseph Ammirati, CPA, ABV, CFF
(631) 629-1048
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**MPI Business Valuation & Advisory**
Joshua S. Sechter, CPA/ABV, CFE
(516) 660-0864
jsechter@mpival.com

**MPI Business Valuation & Advisory**
Joseph Ammirati, CPA, ABV, CFF
(631) 629-1048
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