Meet the President

By: Ann Burkowsky

The Nassau County Bar Association (NCBA) is pleased to welcome Sanford Strenger, a Partner in the firm Salamon Gruber Blaymore & Strenger, P.C., as its 121st President. A long-time member of the NCBA for over 35 years, President Strenger has been active on numerous NCBA Committees, task forces, and as a Delegate to the NYSBA.

President Strenger will be installed on Tuesday, June 6, 2023, at Domus, the Home of the Association, with close family members, friends, and colleagues in attendance. President Strenger’s first column can be found on page three of this issue.

Education and Career

President Strenger attended the University of Rochester, where he obtained a BA in History and an MS in Public Policy Analysis. He then attended Benjamin Cardozo School of Law where he received his J.D. In law school, Strenger was a member of its Criminal Law Clinic and worked closely with then director Barry Scheck, who was developing the groundwork for the Innocence Project—dedicated to the utilization of DNA evidence to prove the innocence of individuals wrongfully convicted of crimes.

Post-graduation, Strenger was admitted to state and federal courts of New York and New Jersey, and later the United States Court of Appeals for the Second Circuit.

President Strenger began his law career serving as an Associate at various law firms from 1983 to 1990 in Manhattan and Long Island. In 1990, he joined Farrell Fritz PC, where he represented major corporations and financial institutions, including Exxon, Home Depot, EAB, and Dime, as well as many Long Island businesses and municipalities.

In 2000, he became Partner at the firm Salamon Gruber Blaymore & Strenger PC, where he currently practices and routinely litigates complex real estate, commercial, corporate, health care, and environmental matters in federal and state courts; and before administrative agencies from inception through trial; and appellate practice and counsels’ clients on commercial, real estate and health care transactions.

Mr. Strenger is also an arbitrator and mediator and has served as a neutral in numerous matters.

Professional Affiliations

President Strenger is an active member of numerous organizations, including the New York State Bar Association, New York State Bar Foundation, NYS Unified Court System Part 36, and Theodore Roosevelt American Inn of Court, among others. Mr. Strenger was an initial member of the NYSBA Technology and the Practice of Law Committee, has lectured on technology issues facing law firms, and taught the subject of electronic evidence in law schools.

In addition, he has lectured nationally on coastal zone issues and the Public Trust Doctrine and has also served as a judge for the Yale Mock Trial Association, and the Nassau County Bar Association Moot Court and Mock Trial competitions.

The Year Ahead

President Strenger’s goal for the upcoming Bar year follows the theme of “A Year of Member Engagement.” In keeping with his belief that a bar association is tasked with the primary mission of enhancing its members’ practice of law and lives through education, access to decision makers, networking, and social opportunities, as well as enhancing the local community, Mr. Strenger plans to place a focus on expanding opportunities for members to market their skills to fellow members and others through the addition of new networking opportunities throughout the Bar year and to encourage support of access to justice efforts and pro bono services for our veterans.
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I
t is my distinct honor to serve as the 121st President of the Nassau County Bar Association. As this is my first President’s Column, let’s get acquainted. I have been a member of the NCBA for over 35 years. Throughout that time, I have been active on numerous committees. I have served as the Chairperson of the NCBA Conciliation Committee (attorney fee disputes), Access to Justice Committee, Financial Oversight Committee, several presidential task forces, and as a Delegate from the NCBA to the New York State Bar Association House of Delegates.

I graduated from the Bronx High School of Science, and later the University of Rochester, where I obtained a BA in History and an MS in Public Policy Analysis. I then attended Benjamin Cardozo School of Law. At Cardozo, I was a member of the Criminal Law Clinic and worked with its Director, Barry Scheck in the South Bronx, as he was developing the foundation for the Innocence Project.

In my spare time, I practice law as a Partner at Salamon Gruber Blaymore and Stenger P.C., a small commercial law firm in Roslyn Heights. I am a trial lawyer who has tried many matters, both jury and non-jury, running the gamut from contract, real estate, tort, administrative and environmental claims. My practice these days focuses on real estate and corporate matters, both in litigation and transactional. I am an arbitrator and mediator and have served as such on multiple engagements. Throughout my legal career, I have been fortunate to have been mentored by great lawyers who taught me the intellectual beauty of the law, the tools of the trade, and the obligation to play mentorship forward.

Now that you know more than you probably wanted to know about me, let’s discuss some thoughts that I have about the coming year. I am big on themes, and as such, the theme for my presidency is the “Year of Member Engagement.” It is my view that a bar association is charged with the primary mission of enhancing its members’ practice of law and their lives through education, access to decision-makers, networking, and social opportunities. To fully achieve its mission, it is also charged with acting to enhance the communities where its members live by providing opportunities for its members to give back to their community.

We will be updating our website to make it more user-friendly and to have content that enhances your practice. With the assistance of Gary Port, Chair of our Veterans and Military Law Committee, we will undertake an initiative for NCBA to proactively provide pro bono services to our veterans, who need our help now more than ever before. With the additional grant monies obtained through the efforts of Immediate Past President Baiamonte, I look forward to the implementation of new initiatives of our Lawyers Assistance Program (LAP), and our LAP Committee expanding to include new members to assist in future fundraising efforts. I will also work toward establishing a formal advisory council for our Assigned Defender Program (10b) to assist it in its important function in our criminal justice system.

I am very proud of the creation of our new Asian American Attorney Section, as well as our new Cyber Law and Law Student Committees this past year. These additions demonstrate the forward-thinking of our Bar Association. NCBA has been a leader in diversity and innovation which will remain front and center in the coming year.

With the assistance of Past President Greg Lisi, we will strive to hold regular networking events at Domus to increase your ability to market your skills to our fellow members and other professionals. As part of these networking activities, we will look to provide opportunities for attorneys who desire to return to practice after a lengthy hiatus to meet and make valuable contacts. Through committees such as the New Lawyers Committee, I will encourage the NCBA to undertake increased social activities at Domus, including an “Iron Chef” competition, where we will learn who is the top chef at NCBA. Stay tuned.

In furtherance of the theme of “Year of Member Engagement,” I will follow in Greg’s footsteps and be present at Domus on Wednesdays for “Lunch with the President” and hope you join me to share ideas, stories, or just say hello.

I look forward to collaborating with the WE CARE Fund and our Academy of Law, with its new Director Stephanie Ball and new Dean Michael Ratner. I also plan to put a spotlight on our Lawyer Referral Service program and work toward its expansion with a new staff director and advertising to increase the quantity and quality of referrals.

Over the coming months, I will be highlighting the many things this Bar Association does to enhance your practice, better the lives of the people of this county, and how you can become involved within this column. During my years of membership in the NCBA, I have learned that no one has a monopoly on ideas. Come home to Domus and partake in all our wonderful programs and activities. Feel free to reach out to me to share your ideas and help me to make my presidency the “Year of Member Engagement.”
NCBA Announces Addition of Three New Committees

The 2023-2024 membership year will allow members to take part in three new committees: Asian American Attorney Section, Cyber Law, and Law Student.

Asian American Attorney Section: Open to all Members, no matter your ethnicity—will address the legal needs of the Asian attorney, confront Asian bias, disseminate relevant information, and hold networking and social events among the Asian attorney community.

Cyber Law Committee: Educates Association Members on mandatory “technology proficiency” and cybersecurity issues, as well as provide a platform for attorneys practicing in the area of cyber law to gather and share practice information and experiences in the field.

Law Student Committee: Provides law students the opportunity to network with practicing attorneys, gain insight into the legal field, and foster professional relationships with peers and future colleagues.

NCBA Committees are open to MEMBERS ONLY. If you are interested in joining one or more of these committees, contact Stephanie Pagano at spagano@nassaubar.org or (516) 666-4850.

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Conversely, it could be the respondent who makes a motion for an order directing the appellant to file its memorandum as a “supplemental record.” The respondent might do so if the appellant’s brief advances an argument which the respondent did not make in the memorandum be filed in the lower court. It could then be cited in respondent’s brief.

If the record on appeal does not include the memorandum of law that was filed below by the respondent, and it is the respondent’s position that its memorandum will show that the arguments that it intends to advance in its brief were preserved, the respondent may make a motion for an order directing the appellant to file that memorandum as a “supplemental record,” or permitting the respondent to do so.10

The need for the respondent to make such a motion would be obviated if, at the time the appeal is perfected, the appellant includes in the record on appeal any memorandum that the respondent filed in the lower court. Doing so would also enable the appellant to cite that memorandum in his reply brief if it shows that the respondent’s brief advances an argument which it did not make below.11

If there is both an appeal and a cross-appeal, which requires the parties to concur on the joint record to be filed, and the opposing party will not consent to the inclusion of the memoranda, a motion should be made for an order directing that they be included.12 If it is discovered after the fact, that the “joint” record that was filed does not include the memoranda, a motion should be made for permission to add them as a “supplemental record.”13

In addition to the delay that would be caused if any of the motions discussed above have to be made, the cost of the litigation would be increased, and an additional burden would be imposed upon the appellate court. Such adverse consequences would far outweigh any additional printing costs that would be incurred if the memoranda were simply included in the record on appeal at the time the appeal is perfected.

Before perfecting an appeal from an order deciding a motion, where memoranda of law were among the motion papers submitted to the lower court, it is necessary to review the short form order, or the decision and order, to be sure that it lists the memoranda of law among the papers that the motion court considered.14

If the submissions on the motion in the lower court were prepared in compliance with the Uniform Rules for the Trial Courts, the memoranda of law will be the only document in the record that shows the legal arguments that were made.15

If the recital in the order does not mention the memorandum, this should be brought to the attention of the court in a motion to reconsider.16

Only in the Appellate Division will not treat the memoranda as if they were a part of the record on appeal, even if they are included.17 As stated by the Second Department, “[t]he recital requirement contained in CPLR 2219 (subd [a]) is designed to identify those papers which should be included in the record on appeal.”18

If there is a decision which directs that an order be settled on notice, counsel for the prevailing party who drafts the proposed order should make reference to the memoranda when reciting the submissions upon which the order is based. If he does not, counsel for the losing party, who will be taking the appeal, should submit a proposed counter-order which does so.19

2. A purely legal argument may be considered for the first time if it is clearly supported by facts already in the record, Delman v. Chase Manhattan Mgmt. Corp., 10 A.D.2d 317, 194 N.Y.S.2d 320 (1st Dept. 1960); or, for the first time, if it is supported by a new document­-the “joint” record that was filed does not include the memoranda, a motion should be made to add them as a “supplemental record.”
17. People v. Frank, 70 A.D.2d 387, 388 (1st Dept. 1979).

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Memoranda of Law in the Record on Appeal

Some circumstances, however, such as where preservation for review is at issue (see e.g. Matter of Lloyd v. Blum, 50 A.D.2d 618, 356 N.Y.S.2d 501 (3rd Dept. 1974)), the Court of Appeals has found that the record on appeal must include the memoranda of law.20

The rule does not mention affirmations; but, one must be included.21

The rule also does not mention briefs; but, one must be included.22

The rule has been interpreted to mean that the record on appeal must include the memoranda of law.23

The rule should be interpreted to mean that the record on appeal must include the memoranda of law.24

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The Court of Appeals in Henry v. NJ Transit Corporation Reaffirms the Importance of Preservation

Melissa A. Danowski

Under CPLR 5601, a litigant can take an appeal to the Court of Appeals as of right in only four circumstances. One such circumstance, found in CPLR 5601(b)(1), is based on constitutional grounds: a party can appeal from an Appellate Division order that finally determines the action if the construction of the federal or state constitution is directly involved.

On March 21, 2023, the Court of Appeals decided Henry v. NJ Transit Corporation by dismissing the appeal on jurisdictional grounds. In so doing, the court reaffirmed its rule that unpreserved questions of law, not subject to any preservation exception, may not be the predicate for an appeal as of right under CPLR 5601(b)(1).

The question of law involved was whether the defendant, NJ Transit Corporation (“NJ Transit”), as an arm of the state of New Jersey, was entitled to dismissal pursuant to the doctrine of interstate sovereign immunity. Because NJ Transit did not raise that defense in the Supreme Court proceedings, the Court of Appeals dismissed the appeal.

The Background Facts

In October 2014, Kathleen Henry was a passenger on a bus owned by the defendant NJ Transit and driven by a NJ Transit driver in the scope of his employment. The bus was traveling in the Lincoln Tunnel from Manhattan to New Jersey when it collided with a motor vehicle. Ms. Henry was thrown to the floor and sustained shoulder injuries.

In June 2015, Ms. Henry filed a personal injury lawsuit against NJ Transit and the bus driver in New York County Supreme Court. NJ Transit and the driver served an answer that did not include an affirmative defense based on interstate sovereign immunity. The matter ultimately proceeded to trial, and in December 2018 a jury returned a verdict in favor of Ms. Henry. The jury awarded $800,000 in past and future pain and suffering damages in addition to medical expenses.

The NJ Transit defendants made a post-trial motion pursuant to CPLR 4404(a). The motion sought a new trial, or alternatively, a reduction of damages. In between the time that the motion was fully briefed in April 2019 and the decision and order was issued in July 2019, there was a change in the law governing interstate sovereign immunity.

The Supreme Court of the United States Decides Hyatt III

In May 2019, the Supreme Court of the United States decided Franchise Tax Bd. of California v. Hyatt (Hyatt III), which overruled Nevada v. Hall, which was the law in the state of Nevada in the time of the commencement of Ms. Henry’s lawsuit. Hall involved similar facts to Ms. Henry’s case. A bus owned and operated by the State of Nevada was involved in an accident on a highway in California. The Supreme Court in Hall held that the State of Nevada could not claim constitutional immunity from the suit in California. Under Hall, states were subject to private suits in sister states’ courts irrespective of their consent.

Forty years later, and while NJ Transit’s post-trial motion was pending in the Henry case, the Supreme Court in Hyatt III overruled Hall and held that states retain their sovereign immunity from private suits brought in the courts of other states.

NJ Transit Defendants Appeal to the Appellate Division

NJ Transit appealed from the order denying the relief sought in their post-trial motion. Before the First Department, Appellate Division, NJ Transit invoked the sovereign immunity defense for the first time, based on the ruling in Hyatt III. NJ Transit acknowledged that it did not raise the defense in the trial court and explained that it had no basis in law to raise the defense until Hyatt III was decided—after trial and after the post-trial motion papers were submitted. NJ Transit argued that because the defense of sovereign immunity speaks to the court’s subject matter jurisdiction, it may be raised at any time, including for the first time on appeal.

NJ Transit reiterated that it was entitled to a new trial or a reduction of damages for the reasons argued in the trial court. But the principal argument on appeal was to dismiss the case wholesale based on its entitlement to sovereign immunity.

NJ Transit, as an arm of the State of New Jersey, posited that it was immune from suit in New York’s courts absent its express consent. Since it did not expressly consent, interstate sovereign immunity applied.

The Appellate Division unanimously rejected NJ Transit’s arguments and affirmed the trial court’s order. The court found that NJ Transit waived its sovereign immunity defense by raising it for the first time on appeal. The decision reasoned that the sovereign immunity defense pre-dated the Supreme Court’s decision in Hyatt III and thus NJ Transit could have raised the defense as early as when it served its answer. NJ Transit waived the defense because it did not place the plaintiff or the trial court on notice in its responsive pleadings, during pretrial litigation, at trial, or on its post-trial motion.

The Court of Appeals’ Decision

NJ Transit appealed to the Court of Appeals on the basis that the case presented novel constitutional issues of public importance concerning interstate relations. As a threshold matter, the Court of Appeals considered whether it had jurisdiction to hear the appeal under CPLR 5601(b)(1) and N.Y. Constitution article VI.

The Appellate Division, which has interest of justice jurisdiction, had the power to review whether, by its conduct, NJ Transit waived its sovereign immunity argument. In contrast, the Court of Appeals found that it lacked jurisdiction to reach and decide the unpreserved question. The Court of Appeals never reached the issue to opine on the Appellate Division’s holding that NJ Transit waived its sovereign immunity by raising it too late. The appeal was dismissed, leaving the Appellate Division order intact.

The Takeaway

The result in Henry underscores why it is imperative to preserve legal issues for potential appellate review. If there is a valid, applicable defense or argument, it should be incorporated in the record, and early. But as was the case in Henry, there is sometimes precedent that forecasts a defense or argument will likely be a loser. So, when should an argument, claim, or defense be included?

Like most legal questions, it depends. A good starting point is to be mindful of the definition of a frivolous conduct as found in the Uniform Rules of the Trial Courts. Subdivision (c)(i) of section 130-1.1 provides that an argument is frivolous if “it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law.”

The decision of whether to argue for an extension, modification or reversal of existing law can be case dependent and requires consideration of many factors including the strength of supporting legal analysis, trends in the case law across jurisdictions, and current challenges pending on appeal. Appellate law practitioners tend to keep a pulse on these issues. It is one
of the reasons why it has become increasingly more common for litigants to retain appellate counsel to collaborate with the trial team early in litigation. An appellate lawyer can assist in case strategy and act as a safety net to ensure that the case is prepared for a range of appellate possibilities.

The failure to preserve a legal issue can be a death knell in some cases. For Ms. Henry, the defendants’ preservation failure worked in her favor. At the end of the day, she gets to keep her damages award.

But consider another scenario. In 2013 the Court of Appeals decided Hecker v. State of New York, where a party ultimately benefitted from a preserved immunity grounds, ultimately it suffered the harsh consequence of failing to preserve its defense. 31

Like Hecker once was, Henry is the latest cautionary tale on preservation. In fact, for decades, legal commentators have argued for reform of the preservation rule that precludes Court of Appeal review of an unpreserved issue of law while allowing the Appellate Division to do so in exercising its interest of justice jurisdiction. 32 Unless and until that reform occurs, Henry is a reminder of how the preservation of legal issues during trial court proceedings often determines the success or loss on appeal. 33

1. CPLR 5601.
2. CPLR 5601(b)(1).

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The Lemmon Slave Case Exhibit
Commemorated in Nassau Supreme Court

The Equal Justice in the Courts Committee is co-chaired by Judge DeStefano and Nassau County District Court Judge, Hon. Andrea Phoenix. At the ceremony, Judge DeStefano spoke about the pivotal role courts play in the pursuit of justice, referencing Judge St. George’s oft-stated observation that the judicial system is what separates order and justice from anarchy and lawlessness.

Judge DeStefano described how artwork hanging in the Supreme Court lobby reflects the importance of good citizens and good human beings working, moving forward, striving, and persevering to eliminate injustice. Directing everyone’s attention to Eastman Johnson’s painting depicting slaves escaping to freedom, A Ride for Liberty, the Fugitive Slaves, c. 1862, Judge DeStefano noted that it points towards a portrait of Hon. Moses Rigby, the first African American elected to the Nassau County District Court.

Discussing the exhibit and the work of the Equal Justice in the Courts Committee, Judge DeStefano commented that, “the fundamental and animating principle behind equal justice in the courts and access to justice is that every human being is entitled to be treated with dignity and respect and that everyone should be able to pursue their God-given rights to life, liberty, and the pursuit of happiness.”

Judge Solages acknowledged the portrait of Judge Rigby and also the portrait in the lobby of Hon. Kathleen Kane, the first woman judge elected in Nassau County. He noted that the U.S. Constitution, a copy of which is exhibited in the courthouse lobby, is the bedrock of democracy notwithstanding that the word democracy does not appear in it. The judge reviewed the history of Long Island’s connections to slavery, a word that he noted is also absent from the original Constitution.

In particular, Judge Solages spoke about the slave ship, La Amistad, a schooner seized by the U.S. government off the coast of Long Island. Africans on the ship who had been abducted from Sierra Leone to be sold as slaves in Cuba mutinied, killing the ship’s captain and cook. Ultimately, the US Supreme Court held that the Africans were free persons and ordered their immediate release.
Court Attorney Tracy Augustine directed her remarks primarily to the high school students, asking them to take a step back from the exhibit and breathe it in to understand its full meaning. She made the facts surrounding the Lemmon case relevant to the students, observing that the oldest slave was 23 years old, not much older than them. She emphasized that slavery can never be forgotten and that even today, people continue to have to fight for their rights. Ms. Augustine spoke passionately to inspire the students to take up the mantle from Justice Paine and the attorneys who represented the slaves and dedicate themselves to fighting for justice and perhaps someday return to the courthouse as attorneys advocating for their client’s rights.

The Lemmon exhibit was on display in the Nassau County Supreme Court building from March 27 through April 7, and in the County Court building from April 10 through April 21, 2023. It continues its travels to several courthouses in Suffolk County and thereafter in the boroughs of New York City. The exhibit will make a total of 45 stops in courthouses throughout the State.

In addition to the traveling exhibit, the Historical Society commemorates the Lemmon case with a video, *The Lemmon Case: 1852-1860 A Prelude to the Civil War*, narrated by James Earl Jones. The Historical Society’s website lionizes the New York Courts for the decisions in Lemmon because they were rendered in same era as the *Dred Scott* decision and as the Fugitive Slave Act of 1850 that required enslaved people to be returned to slaveholders, even if the formerly enslaved were in a free state.5

The Historical Society of the New York Courts was founded in 2002 by the then New York State Chief Judge Judith S. Kaye. The Society’s website states that its mission is to preserve, protect and promote the legal history of New York, including the proud heritage of its courts and the development of the Rule of Law. The Society promotes its mission through educational outreach to New York State students, and public programs and publications on these themes which inform our knowledge and role as citizens today.9

Readers interested in the history of the Nassau County Bar Association can peruse *A Toast to Domus: The Legacy of the Nassau County Bar Association*, published in 2020 and available online.10

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1. 20 N.Y. 562 (1860).
2. Laws of 1817, ch. 137.
5. 20 N.Y. at 601-602, 619.
6. 60 U.S. 393 (1856).

Ira S. Slavit is an NCBA Director, Chair of the NCBA Community Relations and Public Education Committee, and immediate past Chair of the Plaintiff’s Personal Injury Committee. He is co-chair of the Community Outreach and Programs Subcommittee of the Nassau County Equal Justice in the Courts Committee. An attorney with Levine & Slavit, PLLC, he can be reached at islavit@newyorkinjuries.com or (516) 294-8282.
Federal Discretion—The Judicial Notice Doctrine

Basicall, federal courts are vested with discretion accepting or disregarding purported facts within the context of civil lawsuits and criminal proceedings. The statutory basis of judicial notice is Federal Rule of Evidence 201. The litigant’s mere demand for judicial notice is insufficient for the federal court to exercise such power because the doctrine entails nuance. Litigants should be knowledgeable about the legal standards and topic areas to strategically request the exercise of judicial notice.

Judicial Notice Under the Federal Rules of Evidence
Federal Rule of Evidence 201(b)

“permits judicial notice of an adjudicative fact when the fact is one [1] not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” 9 Adjudicative facts are defined as “the ultimate facts in the case, plus those evidential facts sufficiently central to the controversy that they should be left to the jury unless clearly indisputable.” 9

Further, adjudicative facts are subject to the purview of Federal Rule of Evidence 201. “Legislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally, while adjudicative facts are those developed in a particular case.” 9 Federal courts are vested with discretion accepting or declining the exercise of judicial notice regarding purported facts. 5 Federal Rule of Evidence 201 governs the exercise of judicial notice. 5 In Pina v. Henderson, the Second Circuit declared that purported facts should not be supplemented outside the confines of the record, “unless the fact is clearly beyond dispute.” 9

Federal courts are statutorily permitted to sua sponte exercise judicial notice responsive to the litigant’s presentation of materials establishing the purported fact. 8 In Gulf Insurance Co. v. Glashaner, the United States District Court for the Southern District of New York declared that the litigant’s request for judicial notice is subject to the “reasonable dispute” inquiry, regardless of whether the litigant proffered the requisite materials. 8 The federal courts can exercise judicial notice through the conclusion of civil lawsuits and criminal proceedings. 10 Litigants are statutorily permitted to challenge the exercise of judicial notice before or after the movant’s request is granted pursuant to Federal Rule of Evidence 201. 11 If the federal court exercises judicial notice, then the court is mandated to “instruct the jury to accept the ... fact as conclusive.” 12 In Repouille v. United States, the dissent referred to the judicial notice doctrine as “informal inquiries” because the purported fact is not established by means of an evidentiary showing. 13

The Dynamic of Judicial Notice

The federal courts can exercise judicial notice regarding motions for judgment on the pleadings, motions to dismiss, and summary judgment applications. 14 Federal courts can exercise judicial notice accepting the purported facts alleged within pleadings, and “other documents in the public record” regarding unrelated proceedings. 15 Such unrelated court filings are “not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.” 16 United States District Court for the Southern District of New York proclaimed that courts “frequently” exercise judicial notice regarding “filing dates.” 17 United States District Court for the Eastern District of New York declared that courts “may ... take judicial notice of the state-court foreclosure proceedings.” 18 Federal courts can exercise judicial notice regarding “divorce proceedings” and “court records.” 19 In Latij v. Gonzales, the Second Circuit held that election results are within the purview of judicial notice. 20 District courts determined that judicial notice is appropriate regarding medical terminology and dictionary definitions, regardless of whether the terminology and definitions are available by means of the internet or physical books. 21

In Davis v. Cato, United States District Court for the Eastern District of New York exercised judicial notice that an individual “violat[ed] parole” and “plead guilty to the parole violation” after reviewing the “Administrative Appeal Decision Notice.” 22 The First Circuit determined that the trial court appropriately exercised judicial notice of the “criminal conviction[n]” at issue pursuant to Federal Rule of Evidence 201. 23 The criminal defendant did not “articulat[e]” the “reason why the court below was not ... justified in taking judicial notice” regarding the “prior conviction, particularly given the district judge’s familiarity with the defendant’s criminal case.” 24 Generally, litigants do not typically dispute the accuracy of “[g]eograph[ic]” locales, so judicial notice should be appropriate. 25 The traveling distance and traveling time between American territories is subject to the judicial notice doctrine. 26 Furthermore, courts have freedom utilizing “internet mapping tools” to calculate such traveling distance and traveling time including “Google Maps.” 27 Courts should not exercise judicial notice as to the “navigability” of waterways, unless “a matter of common knowledge and free from doubt.” 28

Judicial notice is appropriate regarding the existence of “foreign judgment[s].” 29 Foreign “criminal judgment[s]” can set forth “an official statement ... of the facts stated” therein. 9 The “facts adjudicated” within the judgments are deemed “prima facie evidence,” but the assertions should not be deemed “truth[ful].” 30 Federal courts should exercise judicial notice as to “government[al] statistics” and “census figures.” 31 In Banton v. Belt Line R. Corp., Supreme Court of the United States exercised judicial notice “that the purchasing power of money” weakened during a certain timeframe. 32 Supreme Court of the United States determined

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that judicial notice of an economic “depression” and “decline of market values” is appropriate.14 However, “experts” must articulate the severity of such “decline” regarding, inter alia, the applicable raw materials and “industry[s].”15 In In re GE Securities Litigation, United States District Court for the Southern District held that judicial notice of “well publicized stock prices … is permissible.”16

In Sinclair v. Ziff Davis, L.L.C., United States District Court for the Southern District of New York exercised judicial notice that a social media company promulgated “agreements and policies.”17 Notably, the trial court declined to interpret the “meaning” of corporate contracts and “policies” because same were deemed “a question of law for the court, rather than a question of fact …”18 Judicial notice is permissible regarding “publicly available information,” media publications, “internet website[s],” “internet material,” and YouTube “services.”19 In E. Profit Corp. v. Strategic Vision U.S., L.L.C., United States District Court for the Southern District of New York disregarded the defendant’s contention that judicial notice should be exercised to acknowledge the truthfulness of statements throughout “articles.”20 In Daniel v. Paul, the Supreme Court of the United States referenced the trial court exercising judicial notice of “ingredients” within “bread” and “soft drink” products “moved in interstate commerce.”21 The trial court declared, “The soft drinks were bottled locally, but certain ingredients were probably obtained by the bottlers from out-of-state sources.”22

June 13 (IN PERSON ONLY)
Dean’s Hour: Update on New York’s Bail Laws
With the NCBA Criminal Court Law and Procedure Committee
12:30PM-1:30PM
1.0 credits in professional practice

Please join our distinguished panel for a discussion about the upcoming changes to New York’s bail laws.

Guest Speakers:
Hon. Michael Montesano, Nassau County District Court
Marc C. Gann, Esq., Collins Gann McCloskey & Barry, PLLC
Ali Ajamu, Esq., Nassau County District Attorney’s Office
Timothy Naples, Esq., The legal Aid Society of Nassau County

Moderator: Christopher M. Casa, Esq.

June 14 (HYBRID)
Part 1 of two-part Paralegal Series—Dean’s Hour: The Laws and Rules that Govern Motion Practice and Explain How to Use Them to Your Client’s Advantage
12:30PM-1:30PM

Paralegals add value when they can help attorneys with motion practice in the age of e-filing. This two-part program series will give paralegals an overview of Supreme Court motion practice and advice on preparing motion papers in specific scenarios.

Guest Speaker: Christopher J. DelliCarpini, Esq., Sullivan Papain Block McGrath Coffinas & Cannavo P.C.

June 28 (HYBRID)
Part 2 of two-part Paralegal Series—Dean’s Hour: The Rules and Regulations to the Most Common Kinds of Motions, Including Discovery Motions, Summary Judgment Motions, and More
12:30PM-1:30PM

In addition to serving as a Board Member, Christopher J. DelliCarpini is Chair of the Court Practice Committee of the NCBA, and he serves on the Nassau County Bar Association’s Criminal Law Committee and Appellate Practice Committee. He is rated as an AV® Preeminent™ lawyer by Martindale-Hubbell®.

Guest Speaker: Christopher J. DelliCarpini, Esq., Sullivan Papain Block McGrath Coffinas & Cannavo P.C.

Marc Hamroff
of Moritt Hock
& Hamroff is pleased to announce
the opening of a new office in the
Fort Lauderdale, Florida metro
area serving the Southeast Florida
market. Marc Hamroff, Julia
Gavrilov, and Robert Cohen
will address legal developments
affecting the equipment finance
industry this year and best
practices for managing them
at the Equipment Leasing and
Finance Association (ELFA) Legal
Forum from May 7 to 9.

Ronald Fatoullah
of Ronald Fatoullah & Associates is hosting
an Elder Law and Medicaid
Lunch & Learn for professionals
on June 7. The event will be held
at Russo’s on the Bay in Howard
Beach. During the month of May,
Ron presented several webinars
regarding Medicaid updates.

Lori A. Sullivan
has joined Melzer, Lippe, Goldstein
& Breitstone, LLP as a Partner
in the firm’s Trust & Estate
Litigation practice group. Mary
O’Reilly, Co-Chair of the firm’s
Trusts & Estates practice group
and a partner at the firm, was
one of only 23 trusts and estates
practitioners elected a Fellow of
The American College of Trust
and Estate Counsel (ACTEC) for
2023.

Kevin Schlosser,
Shareholder and Chair of the Litigation &
Dispute Resolution Department of Meyer,
Suozzi, English &
Klein, P.C. was among
the New York State Bar
Association panelists
to discuss “There Has
to be a Better Way:
Changing How We Practice to
Obtain Professional Satisfaction.”

Karen Tenenbaum
moderated the joint webinar, “Artificial
Intelligence and ChatGPT for
Lawyers: 101 Disruptive Prompts
Lawyers Can Use to Run Their
Law Firm,” for the Nassau and
Suffolk Academies of Law; co-
hosted an “IRS Problem Solving
Day” with the IRS Taxpayer
Advocate Service; spoke to the
Metropolitan Association of
Home Inspectors on “Tax Audits
for Sole Entrepreneurs”; and co-
presented to the Nassau/Suffolk
Chapter of NCPAP, “OMG My
Client Owes ‘Taxes! What Can I
do to Help.” Karen was awarded the
SCBA Eileen Coen Cacioppo
Excellence in Curriculum
Development Award.

Jacqueline Harounian has
recently joined the Board of
Directors of JALBCA (Judges
and Lawyers Breast Cancer Alert).

Thomas J. Garry,
Partner at Harris
Beach PLLC,
moderated Franklin
H. Williams
Commission Seminar
on Diversity in New York
Judiciary.

Stuart H. Schoenfeld, Partner
at Capell Barnett Matalon and
Schoenfeld was named one of
2023’s Top Lawyers of Long
Island by the Long Island
Herald. Partner Yvonne R. Cort was the
moderator of a panel “Strategies
and Tips for Navigating
Collection Appeals” at the
nationally renowned New
York University’s 15th Annual Tax
Controversy Forum. Cort was
also quoted in the Wealth of Geeks
article, “You Missed the Tax
Filing Deadline? Here’s How
to Get Back on Track.” Partner
Robert S. Barnett presented
“Elder Law Planning and
Related Income Tax Aspects/
Current Issues in Trust Design”
for the New York State Society
of CPAs 2023 Estate Planning
Conference. Partner Gregory
L. Matalon presented “New
York State Estate Tax Cliff and the
‘Santa Clause’” for the Long
Island Community Foundation.
In addition, Barnett and
Matalon presented “Shareholder
Agreements and the Connolly
Decision” for the Long Island
Accountants and Financial
Planners Network.

Alan E. Weiner
received the Gary H. Friedenberg Service Award from the Estate Planning Council of Nassau County, Inc.

In recognition of Asian American, Native Hawaiian, and Pacific Islander Heritage Month, the Appellate Division, Second Department is celebrating its first annual Hon. Randall T. Eng Awards ceremony.

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

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

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

PLEASE NOTE: All submissions to the IN BRIEF column must be made as WORD DOCUMENTS.
IT'S TIME TO RENEW YOUR MEMBERSHIP!

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FOCUS: LAW AND AMERICAN CULTURE

Fakes, Forgeries, and Frauds: Clifford Irving’s Howard Hughes Hoax

Hughes became an icon who left his mark across the American landscape. That was until his idiosyncratic nature and a series of spectacular plane crashes impaired his physical health and undermined his mental stability. Hughes suddenly, and without rhyme or reason, withdrew from public view.

Today if Howard Hughes is remembered for anything, it is for his eccentric behavior. Hughes suffered from OCD—obsessive-compulsive disorder. When young, it accounted for much of his drive. As with many sufferers of OCD, he had an all-consuming mania for cleanliness and a phobia regarding germs.

As he aged, Hughes’ inexplicable behavior became more acute. He insisted on using Kleenex tissues to pick up objects to insulate himself from bacteria. In his later years, he was looked after by a retinue of Mormon retainers. Serving as sterile automatons, the Mormons rigidly implemented Hughes’ bizarre hygienic rituals.

As Hughes retreated from the world, he was neither seen nor photographed. Yet he maintained his hold on his public imagination. Press and public alike speculated about his living like some crazed hermit cloistered in his Las Vegas penthouse. Who was the real Howard Hughes was a question everyone was asking?

This situation proved an irresistible temptation for Clifford Irving. A wildly successful writer, Irving devised the most brazen con job in the history of American publishing. Irving was a charming rogue who managed to swindle McGraw Hill and Time-Life to the tune of over a million dollars.

Irving first came up with this scheme after reading “The Case of the Invisible Billionaire,” an April 19, 1970 Newsweek cover story about Hughes.1 This article provided him not only the spur, but the piece also contained samples of Hughes handwriting which Irving was able to use to forge letters and signatures.

Another stimulus may have come from Irving’s prior literary association with Elmyr de Hory, the noted art forger. A Hungarian-born painter, de Hory made a small fortune imitating the works by Modigliani, Picasso, Matisse and selling them to museums, galleries, and private collectors.2

While both men were living on the Spanish island of Ibiza, de Hory asked Irving to write his life’s story. The resulting book—Fake (1969)—cemented their friendship. When Time named Irving the Con Man of the Year, the magazine used a portrait of Irving painted by de Hory on its cover.

Irving produced dispatches that appeared to be the work of an author who was the opulent Howard Hughes. The forgeries were good enough to fool expert graphologists. Irving always claimed he had generated these forgeries with his own hand.3 Conjecture has it that Irving had de Hory’s help.

Irving delved deeply into Hughes’ life, unearthing every detail that was publicly available. Then Irving caught a break. He obtained unpublished diaries by a Hughes confidant named Noah Dietrich. The specifics derived from Dietrich’s diaries added an additional aura of authenticity which fooled many.

Irving proposed the prospective phony memoir to his editors at McGraw Hill. The imprint had previously published Fake. Irving’s ruse was that Hughes was so taken by Fake, that it led to an ongoing correspondence between the two men. It was the billionaire, according to Irving, who suggested they collaborate on a book.

Playing his hand with considerable aplomb, Irving went ahead armed with his forged letters, particulars from Dietrich’s diaries, and a lot of moxie. The editors at McGraw Hill were completely taken-in by Irving’s intrigue. The book when published represented not only a potential best-seller, but quite a literary coup.

Frankly, it was just too good to be true. The text was cobbled together with the help of Irving’s researcher Richard Susskind. Irving and Susskind each took turns pretending to be Hughes, while the other asked questions. By transcribing their taped conversations, the subsequent manuscript had an ‘as-told-to’ quality.

Irving’s guile was not limited to the printed page. Acting on his own behalf and as Hughes’ personal representative, Irving received an advance of $100,000, with an additional $400,000 to be paid to Hughes.4 Irving later bargained the sum up to $765,000.5 Life magazine bought the serial rights for $250,000.6

McGraw Hill’s checks were, at Irving’s direction, made out to “H. R. Hughes.” The publisher naturally assumed the money would be going to Howard Robard Hughes. Why Hughes needed the money in the first instance, $800,000 is a paltry sum when compared to the billions Hughes controlled, was never asked.

These sums were deposited in a Swiss bank account opened not by a man, but by a woman who claimed to be one ‘Helga Rosenkranz Hughes.’8 The account, it turned out, had been open on a falsified Swiss passport by Irving’s wife Edith Sommer.

Edith, a Swiss citizen, was not involved with the writing of the book. Her involvement came later. It was she who deposited and withdrew the monies received in Zurich. She participated only in this aspect of the fraud and did so only to bolster her troubled marriage with Irving.

In December 1971, McGraw Hill announced it would be publishing The Autobiography of Howard Hughes. Irving had bluffing his way past his editors, their lawyers, handwriting experts, and even a bevy of skeptical journalists. To every query, he seemed to have a clever comeback that somehow always sounded plausible.

In order to work, Irving’s scheme depended on Hughes’ acquiescence. Irving never thought that Hughes would come forward. Having convinced the publisher to keep things under wraps until they were ready to go to press, perhaps Irving had also conned himself.

Hughes, at the outset, remained silent. Suddently his representatives contested the book’s legitimacy. Irving claimed they were not speaking for Hughes but rather that he was. It would thus take the real Howard Hughes to put the upstart Irving in his place and expose him as a charlatan.

Hughes did so in his own inimitable fashion. As weird as Hughes may have been, he was still capable of rising to the occasion. A press conference was held in Los Angeles. Instead of appearing before the cameras, Hughes, who was in the Bahamas, was interviewed on the telephone.

Reporters questioned the disembodied voice to confirm Hughes’ identity. Hughes did more than challenge the legitimacy of the manuscript. He stated unequivocally he did not know, nor had he ever heard of Clifford Irving.8 A media maelstrom ensued. This was the pivotal moment when the hoax began to unravel.
As publication neared, McGraw Hill undertook an exhaustive investigation with the cooperation of Swiss banking authorities. The Swiss take their banking very seriously and were embarrassed by the scandal. McGraw Hill turned over the evidence it had accumulated to the U.S. Attorney for the Southern District of New York.

Hughes, however, was not finished with his scheme. On February 21, 1972, he left a note on his secretary’s desk saying: “The money was yours. You were my co-conspirator. Go to hell.”

The end of the Hughes saga was marked by a series of events that culminated in his death on November 21, 1976. Hughes had been living in a Swiss jail since his arrest in January 1972 and was serving a sentence of 17 years and 6 months for larceny and grand theft.

Hughes’ corpse was emaciated (weighing in at a scant ninety pounds), his fingers and toenails had grown out of his hands and feet, and the FBI needed to resort to fingerprints to conclusively identify the remains. His multi-billion-dollar estate was divided among his surviving relatives and estranged relatives after several court cases.

As his time in prison drew to a close, Irving became the target of a new conspiracy: to smear the reputations of his former partners. He hired a team of investigators to dig up dirt on Hughes’ past and present associates. The investigators uncovered evidence of Hughes’ involvement in illegal activities, including drug trafficking and murder-for-hire schemes.

The probe led to a series of arrests, including Hughes’ former personal assistant and his former lawyer. The investigation also revealed that Hughes had been involved in a scheme to defraud the government of millions of dollars in taxes.

Despite Irving’s efforts to incriminate his former partners, the probe ultimately failed. Hughes’ estate was divided among his surviving relatives and estranged relatives. The case was closed and Irving was eventually released from prison in 1980.

As for Irving, he continued to make headlines, but his reputation was tarnished by the scandal. He continued to write, publish, and appear in the public eye, but his days of glory were over.

As has been the case with many other celebrities, Irving’s story is a cautionary tale of the dangers of greed, ambition, and the pursuit of fame. He started life as a huckster, but ended up as a dead man, his body discovered in a Hollywood mansion.

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Building A Better Expert Affirmation

Christopher J. DelliCarpini

Summary judgment motions are a fact of life in medical malpractice litigation, and they often hinge on the parties’ medical expert affirmations. For the most part, the facts are not only undisputed but documented throughout the medical records. The issues then are whether the defendant physician departed from good and accepted medical practice and, if so, whether any of those departures proximately caused the injuries claimed—both of which require expert medical opinion.

Some common-sense techniques can ensure that our experts’ affirmations present their opinions most effectively. Just as any expert’s opinion can be conveyed in trial testimony comprehensible to any juror, it can also be reduced to an affirmation that any judge, clerk, or attorney can appreciate. Indeed, the more complex the issues, the more important that we lay out the expert’s opinion as clearly as possible.

The Law of Expert Opinions

The CPLR says little directly about medical expert affirmations but offers some guidance. CPLR §3101(d)(1)(i) speaks to pretrial disclosure, but it gives the clearest indication of what expert opinions should provide: the subject matter of the expected testimony; the substance of the facts and opinions on which the expert will testify; the expert’s qualifications; and the grounds for each opinion. CPLR §2112 permits submission of expert opinion for or against summary judgment without prior disclosure, though your court may require otherwise.

The CPLR speaks in detail, however, to the execution of an expert affirmation. CPLR §2106(a) permits New York-licensed attorneys, physicians, osteopaths or dentists who are nonparties to make out an affirmation “under the penalties of perjury” instead of an affidavit. CPLR §2309(c) allows affirmations taken out of state if accompanied by a certificate of conformity that complies with Real Property Law §299-a. CPLR §2001 permits courts to disregard defects in such certificates where no substantial right of a party is prejudiced but preparing a template certificate should help you avoid having to cite this rule.

The Uniform Rules apply to medical expert affirmations, including the word limits on “affidavits, affirmations, briefs, or memoranda.” In cases with multiple defendants facing different theories of liability, those limits may warrant multiple expert affirmations. Any affirmation exceeding 4,500 words, however, requires bookmarks in the PDF—easy enough to create, but a little practice before the filing deadline looms would be prudent.

Appellate decisions show us what makes a sufficient medical expert affirmation. We all know that expert testimony is necessary to prove a deviation and proximate cause, but experts must “specify the acceptable standards of medical care” applicable to the defendant and explain how the defendant did or did not deviate from those standards. Merely recounting the treatment and conclusory opining for or against it will not suffice.

Expert Affirmation As Testimony, and As Exhibit

A medical expert’s affirmation serves a similar purpose as trial testimony, and we should prepare the former much as we would the latter. The expert gives the substance, but the attorney provides the form, structuring the opinion for the most effective presentation. Litigators can review transcripts for the common, intuitive form that trial attorneys use to make medical opinions comprehensible to the lay juror—a goal no less desirable when our audience is a judge or law clerk.

Of course, the affirmation’s immediate purpose is as an exhibit for or against summary judgment and must satisfy that role as well. It should refer to the motion exhibits, citing pages of particular relevance. It should support our arguments on the motion, though requests for relief belong in the attorney’s affirmation and memorandum.

Speaking of exhibits, a few steps will make our medical record deposition exhibits easier to use down the road. If you make the entire chart from a given provider a single exhibit and then paginate it, you can refer in depositions to particular page numbers. This will make it much easier for the trial attorney, who may try the case years hence, to identify the exact documents discussed at deposition and select trial exhibits. Page-breaking is quick and easy when the chart, however large, is a PDF—another reason to request medical records in electronic form and immediately scan any records that come in hard-copy.

Substance, Structure, and Style

Every medical expert affirmation should have certain elements, and there is every reason to present these elements with the same structural techniques that we use in our affirmations and memoranda. Even simple headings will identify where an affirmation presents the requisite elements, helping readers find those elements and helping attorneys ensure that we have covered the bases. Rare as it may be, a table of contents is perfectly acceptable in an expert affirmation if it will help your readers.

We understandably focus on the substance of medical expert opinion right, but style can make that substance easier to follow. Short sentences and short paragraphs make each point easier to digest before moving to the next. Formulaic language in the paragraphs can signal the elements of each opinion much as headings do. Citation to particularly relevant exhibits helps, though expert opinions need not do so as scrupulously as must a statement of material facts. And avoid the passive voice wherever possible; personal injury litigation is about accountability, which the passive voice obscures.

In addition to the common features, each section of the affirmation benefits from particular techniques.

The Introduction must meet certain legal requirements, but also should advocate for the expert’s opinion. After declaring the requirements of CPLR §2106, a single prefatory paragraph (or just a sentence!) can summarize the expert opinions before getting into the details.

The Qualifications section should show not just that your expert is legally qualified to offer opinion, but also that they have been in the defendant’s shoes. Where a physician opines outside his or her area of specialization, they must lay a foundation for the reliability of their opinion. But even where the expert has the credentials to testify, experience with the condition, procedure, device, or medication at issue will minimize the chances of speculative or conclusory opinions.

The Bases for Opinion can be a simple list of documents reviewed but should include the exhibits for and against the motion. Apart from that, a general reference to their experience and education will suffice without the expert opening themselves to impeachment with some learned treatise.

Opinions on departure may not be simple but can and should be clear. A simple pattern is to begin, as you would at trial, with a brief statement of the expert’s opinion followed by the bases for that opinion: the plaintiff’s condition at the time; the standard of care for patients in such condition; the treatment rendered by the defendant physician; and an explanation of just any deviations.
how that treatment did or did not depart from the standard of care.

We all know to qualify opinions with “to a reasonable degree of medical certainty,” but language like “in this instance, the standard of care required...” and “the defendant did/did not depart from the standard of care because...” helps the reader identify the elements of each opinion. It may prove helpful to set out some background medicine, either up-front or throughout the affirmation as it arises in the narrative.

Opinions on causation must go step by step from the alleged departure to the claimed injury, touching on each and every possible intervening cause along the way. Too often opinions go on at length about the treatment and the departures, only to leave all mention of causation to a single paragraph at the end, almost as an afterthought. Devoting a separate section to the issue makes it easier for experts and attorneys to ensure that the issue is thoroughly addressed. A good example of defense and plaintiff’s experts addressing causation in a case of delayed diagnosis is Neyman v. Doshi Diagnostic Imaging Services, PC.10

Rebuttal of opposing expert opinions is not available to the movant unless they can explain why their expert did not address in their motion papers those opposing opinions.11 Where rebuttal is permitted, however, be sure to itemize the opposing expert’s opinions and rebut each and every one, even if only by reference to earlier in the affirmation.

The Finished Product

When working with an expert through drafts of an affirmation, exchange word-processing files only if each of you will be directly editing the document.

The risk in exchanging such files is that they will not appear as intended on the recipient’s computer. If only one party is making the actual edits, then exchange PDFs of each draft to ensure that the affirmation looks as intended.

When the expert sends you his executed affirmation, do not simply submit a scan as your PDF exhibit. Scans inevitably look worse than PDFs generated directly from word-processing software. Therefore make a PDF of the final draft and swap out the blank signature page for the scan of your expert’s executed page. The result will be a cleaner document, and there is nothing objectionable about this technique provided that the text is exactly what the expert signed off on.

Parties (variably plaintiffs) may redact the expert’s name consistent with CPLR §3101(d)(1)(i), but the Second Department has held:

A redacted physician’s affidavit should not be considered in opposition to a motion for summary judgment where the plaintiff does not offer an explanation for the failure to identify the expert by name and does not tender an unredacted affidavit for in camera review.12

That explanation can come in the attorney’s affirmation, but submit the unredacted affirmative to chambers when you file the unredacted affirmation. And whenever you must redact a document, the redaction feature in Adobe Acrobat or whatever PDF editing software you use will take less time, be more reliable, and look more professional than anything you could do with a magic marker.

The Learning Process

In an area as case-specific as medical expert affirmations, we can learn a great deal from successful affirmations in similar cases. In an era of mandatory e-filing, the expert affirmations in any case should be readily accessible on NYSCEF or PACER. We also should not hesitate to learn from our adversaries in a given litigation, recognizing what they do well and striving to match it in our own work. Both sides have an interest in the highest quality expert affirmations, as they will allow the court to expeditiously determine the motion on the facts and the law.13

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Norman Rockwell at the Bar: The Cornerstones of American Democracy—Civics, Civility, and Collaboration

Rudy Carmenaty
My fundamental purpose is to interpret the typical American. I am a storyteller.
—Norman Rockwell

On May 1, 2023, Law Day, the Nassau County Bar Association presented Norman Rockwell at the Bar: The Cornerstones of American Democracy—Civics, Civility, & Collaboration. The program was a tribute to the art of Norman Rockwell, and this article is an adaptation of the remarks delivered on this occasion.

Over more than half-a-century, Norman Rockwell was a sublime chronicler of life in the United States. Rockwell’s art portrayed the American experience absent sarcasm or disenchantment. With benevolent affection, his pictures tell stories that reflect a pride in our country and a firm belief in our democratic heritage.

Rockwell has often been dismissed by the intelligentsia for being naïve and unsophisticated. His enormous popularity hinged on the appeal his work had to the intelligentsia for being naïve and unsophisticated. His enormous popularity bred contempt among "the intelligentsia for being naïve and unsophisticated. His enormous popularity bred contempt among"

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In the 1940’s, he depicted a nation steadfast and fostering a collaborative spirit in challenging times.

American involvement in World War II followed Pearl Harbor. As envisioned and proclaimed by the President, the Four Freedoms were a tangible goal for world peace and a means of affirming human dignity:

In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms.

The first is freedom of speech and expression—everywhere in the world.

The second is freedom of every person to worshipping God in his own way everywhere in the world.

The third is freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world.

The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world.

That is no vision of a distant millennium. It is a definite basis for a kind of world attainable in our own time and generation. That kind of world is the very antithesis of the so-called new order of tyranny which the dictators seek to create with the crash of a bomb.

The motifs underlying the Four Freedoms became part of the Atlantic Charter signed by Roosevelt and Winston Churchill in August of that year. The Atlantic Charter would later serve as the foundation of the Charter of the United Nations in 1945 and for the Universal Declaration of Human Rights in 1948.

Rockwell envisioned his rendition of the Four Freedoms as an affirmation of American values, and he devoted all his energies to their realization in relatable terms. His goal, simply stated, was “to take the Four Freedoms out of the noble language of FDR and put them in terms everybody could understand.”

The paintings when completed were reproduced not on the cover but within the pages of the Saturday Evening Post over four consecutive issues in 1943: Freedom of Speech on February 20, Freedom of Worship on February 27, Freedom from Want on March 6, and Freedom from Fear on March 13.

For each of the four paintings an essay was commissioned by the Post. Sequentially, the articles were penned by novelist Booth Tarkington, historian Will Durant, Filipino author Carlos Bulosan, and poet Stephen Vincent Benet. The Four Freedoms were an immediate sensation and became a cultural phenomenon.

The government had initially rejected Rockwell’s concept, fortunately his editors at the Post eagerly embraced the idea. This led the Treasury Department to sponsor a war bond drive in 1943. Seen by 1,222,000 people during a sixteen-city tour, the Four Freedoms raised $133 million.

Freedom of Speech, along with Freedom of Worship, is in fact enshrined in the First Amendment to the Constitution. The idea behind Freedom of Speech was taken from an Arlington, Vermont town meeting. Once Rockwell conceived the theme, he used local townpeople as models.

The painting denotes a lone dissenter, speaking his mind freely, as he objects to spending money on the construction of a new school building. Jim Edgerton—the painting’s focal point—was a dairy farmer and he is presented in a Lincolnesque manner. Edgerton differs from his neighbors in several ways.

First of all, he seems to be a man who works with his hands. He is dressed in working man’s clothes, his...
THE FOUR FREEDOMS

FREEDOM OF SPEECH

FREEDOM OF WORSHIP

FREEDOM FROM WANT

FREEDOM FROM FEAR

hands which grip the bench in front of him are unclean. Those surrounding him, all of whom are listening respectfully, are all wearing ties and jackets indicating that they are from the professional classes.

Since Edgerton does not wear a wedding ring, while one of his listeners does, it can be assumed that he is single and may not have any school-age children. In the end, Edgerton will be outvoted. Nevertheless, he has his say in the best traditions of direct democracy inherent in the New England town meeting.

Perhaps what is most needed today, considering the prevalence of 'cancel culture,' is a respect for opposing points of view and a belief that even when individuals disagree there is no cause to be disagreeable. Free speech comes easy if all concur. Its true test comes when discordant views are tolerated.

Themes of religious expression recur in Rockwell’s paintings. Freedom of Worship depicts eight worshippers of different faiths and denominations in profile, standing shoulder to shoulder. The eight figures—men and women, white and black, old and young—are each seen in prayer and/or in contemplation of a higher power.

In the painting’s lower right corner there is an Orthodox Jew. The young lady with the well-groomed features on the left side of the painting is holding a Catholic rosary. There is an African American woman, possibly a Baptist. Then there is a man between them who is seen holding his chin (in another example of Lincoln-esque imagery). Maybe he is less fervent in his faith.

These people are worshipping, communally and separately, each in their own way yet at the same time. In short, it is an ecumenical scene that is embraceingly ecumenical. Above them all is a Jeffersonian inscription. Freedom of Worship is the only one of the four paintings to contain any text, the legend reads:

EACH ACCORDING TO THE DICTATES OF HIS CONSCIENCE

This was a time when the world was engulfed in religious hatred, and in Europe six million souls were being killed simply because they believed in the God of Abraham. Rockwell as an alternative painted a portrait of Americans affirming the free expression of their given faith with a respectful acceptance for the beliefs of others. Freedom from Want, also known as Rockwell’s Thanksgiving, is one of the artist’s most popular images. It shows a family gathering indicating multi-generation affection and material abundance without any great ostentation. The painting depicts a family about to partake in a holiday meal.

The family patriarch stands at the head of the table as the matriarch presents a turkey on a platter to her loving family. The light from the window appears to give the proceedings a benediction from above and the image in many ways harkens back to a Puritan ideal of Americans being blessed in some special way.

In the succeeding decades Freedom from Want has taken on a life of its own. It reveals in American virtue being rewarded. To some, the painting seems to promote consumer culture. Others have read the painting to suggest that freedom from want is to be found in private initiatives rather than from the government.

No matter how it has been interpreted, this idyllic image is emblematic of the ‘American Dream’ realized. Of the Four Freedoms, Freedom from Want best represents the popular conception of America most often embraced by Americans themselves and by people around the globe.

Freedom from Fear is the final installment in the series. This rather evocative painting has a mother and father putting their two small children to bed. The youngsters sleep peacefully, their watchful parents looking over them. The scene is universal in its implications, but it is firmly rooted in its time and circumstance.

It is the context of a world war that gives this tranquil scene its special poignancy. The father has a newspaper in his left hand with a banner headline reporting the ‘horror’ of aerial bombing. His concern, and that of his wife, is squarely on their children and the recognition that they are thankfully removed from harm’s way.

Whatever FDR’s specific defense policies may have been, Rockwell was able to articulate a vision of safety and security during an existential crisis which impacted the whole of American society and beyond. Of all the Four Freedoms, Freedom from Fear is the most intimate and it retains its impact most vividly still today.

Americans, in light of their current problems and various divisions, long for the values of community and continuity. Nostalgia often filters their view of the past. Perhaps there never was a golden age, except in Rockwell’s fertile imagination. Therein lies the man’s true gift.

As exemplified by the Four Freedoms, Rockwell painted his pictures during a time marked by depression, global war, civil unrest, and social dislocations. Present day America is not all that far removed from such conditions. For this is a time of economic troubles, world tensions, political turmoil, and ever-constant change.

Rockwell’s paintings provide a balm of sorts which touches the heart and inspires what Abraham Lincoln called "the better angels of our nature."11

In Rockwell’s art we see our yesterdays. We can, with a little effort, see today. And if we look closely enough, we can discover a path which points toward a better tomorrow.2

1. Rockwell’s first sale to the Saturday Evening Post was Mother’s Day Off which appeared on the cover of May 20, 1916 edition of the magazine.
4. Stuart Murray and James McCabe, Norman Rockwell’s Four Freedoms, 8 (1st, Billboard 1993), 6, id at 12.
5. id at 12.
7. Id.
11. Spoken by Lincoln at his First Inaugural Address, March 4, 1865.
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Photos By: Hector Herrera
NCBA Committee Meeting Calendar
June 6, 2023–June 28, 2023

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

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

WEDNESDAY, JUNE 7
SURROGATES COURT
ESTATES & TRUSTS
5:30 PM
Stephanie M. Alberts/Michael Calcagni

WEDNESDAY, JUNE 7
MATRIMONIAL LAW
5:30 PM
Jeffrey L. Catterson

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

WEDNESDAY, JUNE 14
EDUCATION LAW
12:30 PM
Syed Fahad Qamer/Joseph Lilly

WEDNESDAY, JUNE 14
ALTERNATIVE DISPUTE RESOLUTION
12:30 PM
Suzanne Levy/Ross J. Kartez

THURSDAY, JUNE 15
GOVERNMENT RELATIONS
12:30 PM
Nicole M. Epstein

TUESDAY, JUNE 27
DISTRICT COURT
12:30 PM
Bradley D. Schnur

WEDNESDAY, JUNE 28
CYBER LAW
12:30 PM
Thomas J. Foley/Nicholas G. Himonidis

Law Day 2023 Awards Dinner:
Cornerstones of Democracy:
Civics, Civility, and Collaboration

Liberty Bell Award presented to Dorian V. Segure by Alan Hodish

Peter T. Affatato Court Employee of the Year Award presented to Jeffrey M. Carpenter by Hon. Ellen R. Greenberg, Supervising Judge, Nassau County Family Court

Thomas Maligno Pro Bono Attorney of the Year Award presented to Michael J. Aronowsky by Thomas Maligno

Photos By: Hector Herrera
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