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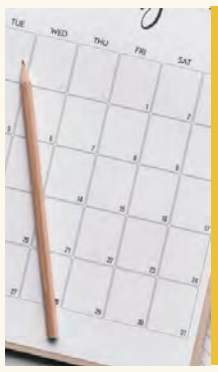

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Touro Team Wins Hon. Elaine J. Stack Moot Court Competition at Domus

Christine T. Quigley

The 2025 Hon. Elaine Jackson Stack Moot Court Competition culminated in the final round of oral arguments held on March 27, 2025, in the Great Hall at the Nassau County Bar Association in Mineola before a panel of five judges, with Nassau County Supreme Court Justice David Goodsell acting as the "Chief Justice of the Supreme Court of the United States." Acting as Associate Justices were criminal defense attorney and NCBA President, Daniel W. Russo; Dean of the Nassau Academy of Law, Lauren Bristol, of Kerley Walsh Matera & Cinquemani, P.C.; NCBA Past President, Rosalia Baiamonte, of Gassman Baiamonte Gruner, P.C.; and NCBA Past President, former NAL Dean and retired assistant district attorney, Peter J. Mancuso.

The five teams competing hailed from three local law schools—the Maurice A. Deane School of Law at Hofstra University, St. John's University School of Law, and Touro University Jacob D. Fuchsberg Law Center. Over the two-day competition, the competitors argued before the 21 volunteer judges in the preliminary and semi-final rounds.

The First Place Award was presented to Touro team members Ceili Howland and Jessica Sullivan, arguing on behalf of Respondents. The Second Place Award went to Touro team members Morgan Rubel and Alexandra Troiano, who argued for the Petitioners. In addition, St. John's team members Michael Galletti and Gabrielle Pilla won the Best Brief Award in recognition of their exemplary legal research and writing skills. Finally, Touro's Jessica Sullivan took home the Best Oralist Award, the only award recognizing an individual's performance in the competition.

The hypothetical moot court problem, drafted by Christine T. Quigley, posed two constitutional questions arising from two criminal cases consolidated on appeal. The first question before the Court asked whether a law enforcement officer who led a SWAT-team raid in the execution of a no-knock warrant on the wrong apartment was nonetheless entitled to a qualified immunity defense when his conduct was the result of the officer's honest mistake. The issue was based on a petition seeking certiorari filed in the U.S. Supreme Court arising from a federal circuit court of appeals decision that granted qualified immunity to a police officer under similar circumstances. See *Jimerson v. Lewis*, 94 F.4th 423 (5th Cir. 2024), *pending cert.*

The second question presented asked whether the trial court erred in admitting into evidence a post-arrest report that was prepared for use at an arrestee's bail hearing but was later used against him at his criminal trial where the defendant did not have an opportunity to cross-examine the

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THANK YOU!

From the President

Daniel W. Russo

As I sit here writing my final president's message, I can't believe how quickly the past twelve months have gone. It seems as if I was just recently sworn in as NCBA President by Judge Prime at the June 2024 Installation Ceremony. That evening, with my family and friends present to celebrate with me, was one of the proudest nights of my life.

Having the opportunity to serve as the 122nd President of the NCBA, during the Association's 125th Anniversary year, was an honor and a privilege that I will cherish forever. The experiences I had, the people I was fortunate enough to work with, and the lessons I learned along the way are simply irreplaceable. A past president once told me that the year you are president is a once-in-a-lifetime opportunity. He was right and I hope I did the position and the Association proud. I know I enjoyed every minute of it.

The most unique part of my term was the two 125th Anniversary celebrations held at Domus during the fall of 2024. The purpose of the two events was simple: to celebrate the history of the NCBA, to raise money for the Association, and to have fun in the process. Both the "Game Show Night" and the formal celebration, "Domus Through the Eras" (which included skits depicting Domus' history and a live art auction) were an enormous success and I am proud to say that the 125th celebrations raised over fifty thousand dollars. Both nights were special, fun and something of which all of us should be very proud.

Of course, my term wasn't just about celebrating the NCBA's 125th Anniversary. Like all presidents before me, there was work to be done to ensure that the NCBA remains not only one of the largest but also one of the most active and most respected suburban bar associations in the country. During the year we focused on maintaining membership numbers at a time when, across the nation, bar association memberships are in rapid decline. I am proud to say, with the help of Bob Nigro and Lindsay Boorman at the Assigned Counsel Defender Plan, we gained over one hundred new members who are ACDP panelists. Additionally, while our numbers did not grow exponentially, membership remained the same, despite the state and national trend of declining numbers. This is a testament to the loyalty of our membership to Domus.

Proudly, the NCBA recently launched its new website and, in conjunction, an entire new database and operating system for NCBA staff members. This update was overseen by Executive Director Liz Post, who worked tirelessly to make sure that the website and the database were up to the modern standards that our members and NCBA employees deserve. The new website has great new features for our members, including membership directories, updated NCBA calendars, online CLE options, and online sign up for NCBA events. Bringing the NCBA technologically up to date was overdue and I am thankful for all the work past administrations did to get us here. I happened to be the President when it happened, but the leadership teams that came before me deserve the credit.

Additionally, one of my goals for the year was to begin to explore additional ways the NCBA raises funds. Initially, the Executive Committee held several brainstorming sessions, sharing ideas and experiences that each of us had raising money for charitable organizations. These meetings led to several virtual meetings with a professional fundraising firm to discuss the logistics of a fundraising campaign for the NCBA in the future. While this is no small endeavor and will take significant planning and resources, it is an option that I am proud to say the leadership team explored. We are closer now to a professional fundraising campaign at Domus and it remains a real possibility for future administrations to consider.

Of course, in addition to implementing new ideas, new resources and special events, the steadfast work of the other arms of the NCBA had to continue. Frankly, this was the easy part for me and the Executive Committee. Not because it doesn't take hard work and tons of effort but because of the women and men already in place and leading these endeavors. People like Director Beth Eckhardt and her staff who continue to support our members in need through the Lawyer Assistance Program. People like Director Madeline Mullane and her staff—Cheryl Cardona, Samantha Flores and Omar Daza—who ensure the growth and success of the Mortgage Foreclosure Program. People like Administrator Bob Nigro, Deputy Administrator Lindsay Boorman, and the entire staff of the Assigned Counsel Defender Plan who continue to work tirelessly to assure that the professionals who serve indigent clients in Nassau County have the resources and technology to do so effectively.

Winter of 2025 brought a NCBA Academy of Law leadership change, and we welcome new Academy Director Natasha Dasani. Of course, under the leadership of Academy Dean Lauren Bristol, the NAL did not miss a step, continuing to provide cutting-edge CLE programs to our membership on just about every legal (and pseudo-legal) topic one could think of. Finally, the WE CARE Advisory Board, under Co-Chairs Jeff Catterson and Barbara Gervase, continued the long-standing, remarkable work of WE CARE, providing grants to Nassau County's children, elderly, and other residents in need.

Any good leader knows they are only as good as the men and women who handle the everyday nuts and bolts of the organization. There is no finer staff than that of the NCBA. Executive Director Liz Post never fails to amaze me with her ability to wear so many different "hats" and get all the jobs done. The members of the NCBA are fortunate to have Liz as their Executive Director. Liz is of course supported by her staff, and I would like to take this opportunity to personally thank Hector Herrera, Stephanie Pagano, Emma Grieco, Alvarez Faison, Carolyn Bonino, Han Xu, Jody Maze, Julie Trujillo, Jose Ganancio, and Patti Anderson for all you do. You are the men and women that deserve the accolades when it comes to making Domus what it is.

Last but certainly not least, I want to thank my Executive Committee, who care so deeply about the membership of the NCBA, the NCBA staff, the legal profession, and the community that our bar association serves: Immediate Past President Sandy Strenger, Vice President Honorable Maxine Broderick, Treasurer Sam Ferrara, and Secretary Deanne Caputo. All of you have made serving as President the highlight of my career. I have learned so much from each of you and I am so very fortunate that you have been by my side for the past twelve months. You are all true assets to the NCBA and to the legal profession, but, more than that, you are truly good people, and I am honored to call each of you, my friend.

On June 1, 2025, I will proudly step aside as James Joseph becomes the 123rd President of the NCBA. I want to thank you, James, for your friendship, your guidance and countless laughs over the course of the last year. Serving together gave me confidence to always do what we believed was in the best interest of the NCBA and its membership. This is what leading the NCBA is all about and I am so very grateful that we did so side by side. I know the NCBA is in great hands with you as President.

This past year has been an almost indescribable experience for me and my family. My wife Jennifer and my daughter Cate lived it with me and without their guidance, support and ability to keep me grounded, I would not have made it. I love you both more than I can say.

I guess it's true, all good things must come to an end. I am truly humbled to have had the opportunity to lead the Nassau County Bar Association, and I can only pray that I left a positive mark on the Association as the experience of being President has left a positively indelible mark on me. From the bottom of my heart, thank you for this opportunity.

FOCUS: BANKRUPTCY

Bankruptcy Update, United States Supreme Court

Stuart I. Gordon and Matthew V. Spero

In a busy year, the United States Supreme Court decided three bankruptcy cases in 2024 that impacted the rights of insurers to be heard in bankruptcy cases, whether refunds of fees paid to the Office of the U.S. Trustee are appropriate, and the types of non-consensual releases available under Chapter 11 plans.

Truck Ins. Exch. v. Kaiser Gypsum Co. (In re Kaiser Gypsum Co.)—Supreme Court Considers Standing of Insurers in Chapter 11 Cases

In *Truck Ins. Exch. v. Kaiser Gypsum Co.*, the Supreme Court reviewed a Fourth Circuit decision that denied an insurer standing to object to an asbestos producer's Chapter 11 plan.

For years, as long as a debtor's Chapter 11 plan was "insurance neutral," insurers were not considered "parties in interest" under 11 U.S.C. §1109, and therefore lacked standing to raise and be heard on Chapter 11 issues, and did not have a seat at the table despite being potentially obligated to pay upwards of millions of dollars in insurance coverage.

Section 524(g) of the Bankruptcy Code allows Chapter 11 debtors with significant asbestos liabilities to channel the present and future asbestos claims into a trust funded by the debtor, often primarily with the proceeds of its insurance policies.

In 2016, Kaiser Gypsum Company, Inc. and Hanson Permanente Cement, Inc. (collectively, "Kaiser") filed Chapter 11 petitions to deal with significant asbestos-related tort liabilities. Kaiser's Plan sought to fund a 524(g) trust for payment of these claims, with the proceeds of insurance policies issued by Truck Insurance Exchange ("Truck") to the trust.[1]

Truck objected to confirmation of the plan and to Kaiser's request for a judicial declaration that Kaiser did not breach the assistance and cooperation clauses in its policies or the implied covenant of good faith and fair dealing during the plan negotiations. Truck asserted that if the plan was confirmed it could potentially subject Truck to having to pay millions of dollars in fraudulent claims. It also alleged that the plan was collusive, not proposed in good faith, and did not comply with section 524(g).[2]

Though Truck objected to the plan, the Fourth Circuit affirmed the lower court's findings that because the plan was "insurance neutral," i.e. the plan neither increased Truck's prepetition obligations nor impaired its rights under the insurance contracts, Truck was not a "party in interest" under 11 U.S.C § 1109(b) and it lacked standing to challenge the plan.[3]

The Supreme Court granted *certiorari* to answer whether an insurer with financial responsibility to pay claims against the Debtor is a "party in interest" that may object to a plan of reorganization.

The Court first noted that the general theory behind § 1109(b) is that anyone holding a direct financial stake in the outcome of the bankruptcy case should have an opportunity to participate in the adjudication of any issue that deals with the party's interest.[4] Ultimately, the Court held that insurers with financial responsibility for bankruptcy claims are "parties in interest" because reorganization can affect an insurer's interests in many ways, including financially and contractually under its insurance policies.[5] It further found that the insurance neutrality doctrine made "little practical sense" since it ignored the myriad ways in which bankruptcy plans can impact an insurer's obligations.[6]

Truck promises a significant impact on future mass tort bankruptcy cases as now insurers, the parties being asked to fund all or substantially all of a debtor's §524(g) trust under a Chapter 11 plan and paying bankruptcy claims, will be able to insert themselves into the proceedings to ensure their rights are protected.

Office of the US Trustee v. John Q. Hammons Hotels & Resorts—Supreme Court Declines to Find Refunds are Appropriate Remedy for Overpayments

In *Office of the U.S. Trustee v. John Q. Hammons Fall 2006 LLC*, the Supreme Court decided that the appropriate remedy for past overpayments to the Office of the U.S. Trustee ("UST") was not refunds.

The Supreme Court reviewed the UST's appeal from a Tenth Circuit Court of Appeals decision which held that the UST should refund overpayments made by Chapter 11 debtors under the Bankruptcy Judgeship Act of 2017 (the "2017 Act").

The Supreme Court had previously addressed in *Siegel v. Fitzgerald*, 596 U.S. 464, 142 S. Ct. 1770, 213 L. Ed. 2d 39 (2022) fee disparities caused by the 2017 Act, which increased UST fees in 48 states, but not Alabama or North Carolina, since they use an Administrator program rather than a UST program. The Supreme Court held in 2022 that the UST fee increase in the 2017 Act violated the uniformity requirement of the Constitution's Bankruptcy Clause. However, it did not address what remedies were available to Chapter 11 debtors for prior overpayments to the UST, leaving the issue to the lower courts.[7]

In 2016, seventy-six Chapter 11 debtors affiliated with John Q. Hammons Hotels and Resorts filed for bankruptcy in the District of Kansas, a UST district. The Debtors paid UST fees. In 2020, the Debtors sought a partial refund on the ground that the discrepancy between the fees for the UST program and the Administrator program violated the Constitution.[8]

After *Siegel*, in August 2022, the Tenth Circuit reaffirmed its decision in *Hammons* and ordered the UST to refund more than $2.5 million in UST fees that the John Q. Hammons Hotels debtors had paid in excess of those fees that would have been paid had the case been pending in a Bankruptcy Administrator district.[9]

The Supreme Court granted *certiorari* to decide whether a $2.5 million refund of UST overpayments was the appropriate remedy.[10] The Court ultimately held that refunds were not appropriate because Congress had already amended the statute in 2020 to ensure that, prospectively, all fees would be uniform in the future.[11]

Because the fee disparity was "short lived" and "small," the Court opined that Congress would likely find refunds to be unworkable and would have shifted the burden from a program intended to be self-funded to one that taxpayers would need to bear were the government required to pay $326 million in refunds.[12]

Harrington v. Purdue Pharma L.P.—Supreme Court Disallows Nonconsensual Third-Party Releases in Chapter 11 Plans

In *Harrington v. Purdue Pharma L.P.*, the Supreme Court addressed an issue

which had beguiled lower courts: whether nonconsensual releases were permissible for non-debtor third parties who had not themselves filed for bankruptcy.

Purdue was a pharmaceutical manufacturer of opioids that eventually became subject to numerous litigations once the opioid crisis took root. It eventually filed Chapter 11 and sought a release and injunction for its owners (the Sackler family) in exchange for a $6 billion contribution to the debtor's plan. Thousands of creditors voted against the plan.[13]

The Court noted that the Sacklers had not filed for bankruptcy and had not made virtually all their assets available for creditors, yet as a result of the injunctions and releases they sought under the plan, they would essentially be discharged without having to file for bankruptcy themselves.[14]

The Court held that regardless of whether the Sacklers sought a "release" rather than a "discharge," the Court had no authority to extinguish claims (including for wrongful death and fraud) against the Sacklers without them putting anything close to all their assets on the table, all without the consent of the very parties the Sacklers sought releases from.[15]

The Court also stressed that it was not opining on several related issues, including the validity of consensual third-party releases under Chapter 11 plans, what qualifies as a consensual release, how to interpret a plan that provides for the full satisfaction of claims against a third-party nondebtor, and whether a plan that has already become effective and been substantially consummated could be unwound.[16]

Lower courts are still grappling with some of issues left open from the Supreme Court's decision in *Purdue Pharma*, and it may be a while before parties are truly clear about what constitutes a consent or release in a Chapter 11 plan.

1. *Truck Ins. Exch. v. Kaiser Gypsum Co.*, 602 U.S. 268, 269 (2024).
2. *Id.* at 275-76.
3. *Id.* at 272.
4. *Id.* at 277-78.
5. *Id.* at 281.
6. *Id.* at 269-70.
7. *Id.*
8. *In re John Q. Hammons Fall 2006, LLC*, 15 F.4th 1011, 1021 (10th Cir. 2021).
9. *Id.*
10. *Off. of the United States Tr. v. John Q. Hammons Fall 2006, LLC*, 602 U.S. 487, 494 (2024).
11. *Id.* at 499-500.
12. *Id.* at 490, 498.
13. *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 212 (2024).
14. *Id.* at 215.
15. *Id.* at 223.
16. *Id.* at 226.

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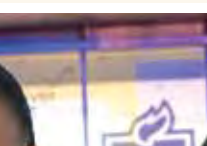
Moot Court Competition

Continued from Page 1

preparer of the report. This issue was largely based on *Franklin v. United States*, 2024 WL 1773244 (NY Ct. App. 2024), *pending cert.*, where the trial court deemed a similar report was non-testimonial and thus did not trigger a criminal defendant's rights under the Confrontation Clause of the Sixth Amendment.

After the final round of oral arguments, Judge Goodsell praised all the competitors, saying that they had each exhibited an impressive grasp of the issues at bar. Based on the performances he had observed this evening, Judge Goodsell continued that they would be most welcome to appear before him and to argue in his courtroom in the future.

The year's competition was coordinated by Dean Lauren Bristol, NAL Associate Dean Christopher DelliCarpini, NAL Advisory Board Member and Moot Court Chair Christine Quigley, and NCBA Executive Director Elizabeth Post, who would like to express their sincere gratitude to all the volunteer judges, timekeepers, brief graders, and NCBA Facilities Manger Hector Herrera, without whom this competition would not have been possible.



Christine T. Quigley is a member of the Nassau Academy of Law Advisory Board. Christine is a practicing attorney currently serving as a Senior Elections Officer at the Nassau County Board of Elections, Office of the Chief Clerk. She can be reached at ctquigs@gmail.com.

Time Management: Common Pitfalls and Tips!

Lawyer Wellness Corner

COMMON PITFALLS

- ***Taking on too much***—*Quality beats quantity. Use discernment when taking on new clients.*
- ***Allowing constant interruptions***—*Stay focused during timed work intervals, do not allow interruptions, and be clear about what constitutes an emergency.*
- ***Inaccurate estimating of the time needed to complete tasks***—*Before deciding how much time a project will take, look at everything else that is on your plate.*
- ***Procrastinating***—*Optimizing time begins by not putting off work. Tackle the hardest or most uncomfortable tasks first and vet clients thoroughly.*
- ***Talking too much***—*Be as concise as possible in the shortest time possible.*
- ***Doing everything yourself and dismissing technology***—*Delegate work to others and utilize law practice management software.*
- ***Being a perfectionist***—*Not everything requires 100% of your attention. You get 80% of your outcome from 20% of your effort. Perfectionism leads to procrastination.*

TIPS

We can be much more effective in far less time if we work like sprinters rather than marathoners.

- **Choose a task to work on**, then set a timer for 25-40 minutes. Work intensely on the task during the interval. If a distraction pops into your head, write it down, then immediately get back on task. At the end of an interval, get up and take a 5–10 minute break. After four intervals, take a 15-30 minute break.
- **Keep a spiral notebook** with you for all note taking rather than jotting things down on pieces of paper.
- **List-building**—Create a "macro" list of big objectives and responsibilities. Each macro list should have bullet points for each task necessary to accomplish the objective. Also, create a "micro" list which is a daily to-do list that identifies the specific sup-part tasks from the macro list.
- **Stop multitasking**—It may seem like you are saving time, but it is actually making you less efficient at multiple tasks.
- **Rely on reminders and alerts**—Do not rely on yourself to remember everything you must do each day. This takes energy and effort and creates an umbrella of stress.

The NCBA Lawyer Assistance Program provides confidential assistance to lawyers, judges, law students, and their immediate family members. For more information about LAP programs and services, contact Elizabeth Eckhardt at eeckhardt@nassaubar.org.

FOCUS: TRAFFIC

EEDR Update—What Can the Vehicle Reveal About the Case?

Dawn Flower

Traffic fatalities are growing in New York State, trending in the wrong direction for more than five years now. Unfortunately, Nassau County statistics show it to be consistent with this finding. The National Highway Traffic Safety Administration's most recent data shows a 40% increase in traffic fatalities on Long Island since 2019. Of the 1200 people who died in car crashes in New York state in 2022, 20% were on Long Island.

On average, the New York State DMV reports more than 300,000 traffic accidents per year, with Long Island consistently hosting a disproportionate share. For the Nassau County Bar, these statistics translate to the reality that many Nassau County court cases involve a motor vehicle. Though the number of accidents does not improve over the years, the ability to prove how they happen does.

The primary issue in a vehicular case is the way that a collision occurs. As with any issue, the facts are established by analyzing and interpreting the evidence in the case. This evidence may be testimonial (statements provided by parties, witnesses, doctors, etc.), or it may be physical. Physical evidence includes, for example, damage to the vehicle itself (be it induced or direct), the injuries, and the markings on the roadway. In addition to these forms of evidence, technology now provides an additional source: digital evidence. It is more and more likely in a vehicular case in Nassau County that video of the collision exists somewhere: a red light camera, building camera, camera mounted in the vehicle or on the vehicle, witness video (intentional or not), or possibly video from a vehicle parked nearby that isn't even involved.

Although this type of video evidence is extremely beneficial, the clearest evidence of exactly how a collision occurred can often be found within the vehicle itself. As of 2017, almost 100% of new cars sold in the U.S. were equipped with an Event Data Recorder ("EDR"); the vast majority of the cars on the road in New York have one. While retrieving crash data of this type has been possible for more than twenty years, passing time only increases the likelihood that one or both vehicles in a collision will hold the answers to the most important issues in the case.

An EDR is defined by 49 CFR Part 563 as "a device or function in a vehicle that records the vehicle's dynamic time-series data during the time period just prior to a crash event (e.g., vehicle speed vs. time) or during a crash event (e.g., Delta V vs. time), intended for retrieval after the crash event. For the purposes of this definition, the event data do not include audio or video data." The EDR is sometimes referred to as the "black box," but really it is simply a system in the vehicle that is constantly collecting information on the vehicle's status in the moment, or, more accurately, in the millisecond. Depending on the vehicle, it might be the Airbag Control Module ("ACM"), Sensing Diagnostic Module ("SDM"), Forward Collision Mitigation System ("FCM"), Adaptive Speed Control Module ("ASCM"), or Robot Operating System ("ROS").

All these systems, categorized as EDRs, are essentially safety systems in the vehicle meant to keep the occupants safe. The Airbag Control Module, for example, has the primary function of deploying the airbag when necessary. The information it gathers from the vehicle to determine when the airbag is needed is recorded within the module. (In the ACM example, one piece of the data assessed is the Delta-v experienced by the vehicle.) A similar analysis is done by the other types of EDRs: they are information gathering systems in the vehicle whose function is to take a snapshot of the status of several variables at the time that the system activated a safety measure. In essence, if the vehicle is 'deciding' whether to tighten a seatbelt or deploy an airbag, it maintains a record of the circumstances that caused it to do so. This is called the "algorithm wakeup"—what were the reasons that the safety system "woke up" and looked at the driver/vehicle behavior? What caused the system to consider taking an action? All vehicles do have such systems, but a small percentage of them aren't compatible with the software used to retrieve the information. (A complete list of accessible/supported vehicles can be found at crashdatagroup.com.)

The type of data available depends on the specific vehicle involved. While EDR reports may contain information unique to the make, model and year of the vehicle, a minimum set of data points to be recorded is mandated by Federal Law 49 C.F.R. Part 563. All vehicles that have an accessible EDR will therefore have 15 items of information in common. Speed is, obviously, the most litigated issue, and all EDRs will have information on not only the speed of the vehicle at actual impact but will also include the speed for the five seconds leading up to impact.

At the highway speed limit of 55 MPH, that would include vehicle speed for 400 feet pre-accident, and at a side street speed of 30 MPH, it would be 220 feet. This single item of information reveals the answer to the questions at the base of many cases: whether the vehicle was accelerating or braking or both; whether it stopped at the signal/sign before entering the intersection; whether it slowed for the yellow light or accelerated into it; whether it was slowing in anticipation of traffic ahead; whether it slowed or accelerating before changing lanes or turning; etc.

The details in this "speed" category of information are supported and explained by other data items that are also recorded. These include information on the braking and accelerating actions of the driver. The EDR report will reveal what the driver was doing at impact and for five seconds before (pressing the accelerator, and if so how hard; actively braking and if so how much), and what the vehicle was doing (what the RPMs were, whether stability control was engaged, whether ABS was in use). Other driver behavior recorded includes "steering input" that shows the exact degree to which the driver was turning the wheel for five seconds pre-impact.

Notably, while the way the driver was turning the wheel is recorded, the direction the wheels were turned is not. In a case where the vehicle slid across some surface, for example, other EDR data might indicate that the "yaw" sensor was triggered—meaning the car itself wasn't responding appropriately to the steering input given by the driver. These variables can be utilized together to more accurately determine where the vehicle was on the actual road when the driver and vehicle inputs occurred. The EDR information is an invaluable tool for re-creating the human input and automated situational responses of the vehicles involved.

Other legally mandated information includes "seatbelt status" for the driver and the passenger, though occupants who sit on their belts in order to stop the binging will be belied by their injuries if not by the EDR. In a case where who was driving is at issue, the data includes the seat position of both the driver and the front passenger and often indicates the "category" of person who was in the seat—child, or an adult male or female (by weight). The EDR may include other occupant details like the shifter gear position and the wheel pressure and whether any warning lights were indicated to the driver. As anyone who has handled any type of litigation knows, one single and seemingly innocuous detail could make or break it.

In addition to this information on the use of the vehicle, other key data about the collision itself is legally mandated to be included in the EDR reports. One such element that is helpful in many car cases is the direction of impact—the principal direction of force applied to the vehicle—during the collision. The EDR will show, with 360-degree specificity, what physical location on the car itself experienced the most impact and thereby indicate the angle of force felt by the car and the occupants. It will also show how quickly that force accelerated or slowed the vehicle, and therefore the occupants. This "Delta V" evidence is relied on in even the lowest speed collisions as proof of how the cars came together, and therefore how the occupants sustained injury—or didn't.

Delta V can also be used to answer other questions, such as whether the behind-driver saw braking ahead and took evasive measures or, for any number of reasons, did not. Speed and Delta V can also be used together to determine for example, how the factors in the collision would have changed if a speeding vehicle had been observing the speed limit (notable in this area of science that although commonly utilized as proof of injury at low and high speeds, Delta V evidence in this regard has increasingly been challenged; some research now suggests that the correlation between Delta V and injury may not always be as clear as it once seemed.)

The EDR in the vehicle is usually easily accessed, and a simple computer download performed by a technician with the appropriate software can be accomplished in one quick visit. It may be worthwhile obtaining the report at the outset of the case, for a clear picture of what actually happened and how (and if) it will ultimately be proven. The video evidence should also be accessed as early as possible, as it is easy. Digital technology in the vehicle itself holds the factual answers to the basic questions in the majority of vehicular cases: the pre-collision and impact behavior of both the driver and the vehicle itself.

Dawn Flower is an ACTAR Certified Collision Reconstructionist at her firm, Flower & Associates, LLC. She has been testifying as an expert witness in car accident cases for more than 20 years and is currently on Nassau County's 18b Expert Panel. She can be reached at flowerassociates@yahoo.com.

Pro Bono Recognition

On April 2, the NCBA Access to Justice Committee and Legal Services of Long Island hosted its annual Pro Bono Recognition event at Domus honoring about 220 volunteers who have demonstrated exemplary service to the community. Special guests included Deputy Chief Administrative Judge Edwina G. Richardson, NYS Unified Court System's Office for Justice Initiatives; Administrative Judge Vito M. DeStefano; Nassau County District Court Supervising Judge Tricia M. Ferrell; OCA Executive Director Helena Heath; Hon. Shahabuddeen A. Ally, Administrative Judge of the Civil Court of the City of New York; NYS Unified Court System Senior Court Analyst and Justice Coordinator Angela F. Maynor, Office of the District Administrative Judge; and Nassau County Supreme Court Chief Clerk Nick Grajales.

Photos by Hector Herrera

Thank You to Our 2025 Pro Bono Volunteers

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FOCUS: COMMERCIAL LITIGATION

Merchant Cash Advance Transactions: Recent Legal Developments

Lisa Giunta-Popeil

Earlier this year, the Office of the New York State Attorney General ("AG") announced a $1 billion settlement in *People of the State of New York v. Yellowstone Capital LLC*, et al., a case pending in the Supreme Court of the State of New York, New York County.[1] The $1.4 billion lawsuit—filed last year by the AG—accused over 30 companies and individuals of preying on New York small businesses "by issuing them illegal, short-term loans at sky-high interest rates through so-called 'merchant cash advances,' or 'MCAs.'"[2] The settlement involved 25 of the Respondents, including Yellowstone Capital LLC, its officers and various entities under their control ("Yellowstone Parties") and required the Yellowstone Parties to stop all cash advance operations, to collectively cancel over $534 million in debt owed by merchants and guarantors and to pay $517.4 million to the AG, including an immediate $16.1 million restitution payment to small businesses.[3] These developments highlight the newfound scrutiny facing merchant cash advance financing and demonstrate a movement toward stricter oversight of what had previously been a largely unregulated industry.

In an MCA transaction, an MCA company purchases a portion of a merchant's future revenue for a lump sum payment.[4] MCAs are an alternative form of financing available to small and midsize businesses. Under an MCA arrangement, a merchant sells a percentage of its future receivables to an MCA company in exchange for receiving funding quickly and which would generally not be available through traditional financing means. Typically, the MCA company will begin automatically debiting a fixed amount from the merchant's bank account on a daily basis but is supposed to regularly reconcile these daily payments to accurately match the percentage of sales purchased by the MCA company and to make adjustments reducing the amount of the automatic debit if the merchant's revenue declines.

However, when an MCA agreement does not require reconciliation or allows the MCA company to demand full payment of the uncollected purchase price it paid for future receivables plus fees if the merchant's default, the agreement becomes suspect, as the arrangement begins to look more like an illegal loan with a usurious interest rate rather than a true merchant cash advance. In New York, an interest rate that exceeds 16% per annum constitutes civil usury.[5] If the interest rate exceeds 25%, it constitutes criminal usury, and the loan is void in its entirety.[6] Such scenarios invite thorough examination by the courts.

The Second Department made this clear in *Crystal Springs Capital, Inc. v. Big Thicket Coin, LLC*, decided in October 2023.[7] The Second Department held that an MCA agreement was in fact a criminally usurious loan exceeding 25% in violation of Penal Law § 190.40.[8] The court reached this holding because (1) the MCA company automatically debited $4,000 each business day from the merchant's bank account, but was not required to reconcile these debits to a true percentage of the merchant's revenues and (2) in case of default by the merchant (such as by filing for bankruptcy or changing its payment processing arrangements), the MCA company was permitted to collect the balance of the uncollected purchase amount and all fees due under the agreement.[9] The court concluded that "[t]ogether, these terms established that the agreement was a loan, pursuant to which repayment was absolute, rather than a purchase of future receipts under which repayment was contingent upon the [merchant's] actual sales."[10]

For the past few years, MCAs have been looked at with a more careful eye in New York. In 2018, *Bloomberg News* published an award-winning five-article series exposing several deceptive and predatory practices that had infiltrated the industry, including MCA companies engaging in forgery, fabricating defaults and abusing the court system by filing over 25,000 confessions of judgment against unwitting small business borrowers and guarantors located not just in New York, but throughout the country, in the span of just four years.[11] During that four year period, the MCA companies used these questionable methods to collectively obtain judgments having an estimated value of $1.5 billion.[12]

Bloomberg News' reporting put the MCA industry in the crossfire of New York lawmakers and the AG. On August 30, 2019, then New York Governor Andrew Cuomo signed into law Senate Bill 2019-6395, which expressly referenced the *Bloomberg News* series in the legislative history and amended Civil Practice Law and Rules § 3128 to prohibit the filing of confessions of judgment against out-of-state entities and individuals.[13] The AG also launched an investigation into MCA companies operating in New York, resulting in the AG's lawsuit against the Yellowstone Parties and others.

Moreover, in 2020, New York enacted the Commercial Finance Disclosure Law ("CFDL"), colloquially referred to as the "Small Business Truth-in-Lending Law," to regulate MCA transactions and other types of alternative financing transactions of $2.5 million or less involving New York merchants.[14] Under the CFDL, MCA companies are now required to make certain standard disclosures to merchants when they make financing offers so that both businesses and individuals are in a better position to make informed decisions.[15] The CFDL became effective on August 1, 2023, six months after New York State's Department of Financial Services published its Final Regulations.[16] MCA companies that violate the CFDL can face up to $10,000 for each violation.[17]

The settlement with the Yellowstone Parties marks a significant victory by the AG for small business merchants in its efforts to reign in the MCA industry's predatory practices. That said, the AG's lawsuit is still pending against several other entities and individuals involved in the MCA business and accuses them of engaging in unlawful practices, including disguising criminally usurious loans as MCAs.[18] These remaining Respondents have moved to dismiss the AG's claims, challenging the AG's notion that the transactions in question are illegal loans rather than lawful MCA transactions.[19] Their motions to dismiss also question whether the AG's lawsuit is an improper attempt to legislate rather than litigate and argue the AG fails to take into account the new regulatory framework provided by the CFDL.[20] These motions have been fully briefed and await decision. The outcome will certainly have a critical impact on developing the law in New York regulating MCAs and once again put the industry in the spotlight.

1. *Attorney General James Announces $1 Billion Settlement with Predatory Lender Yellowstone Capital for Harming Small Businesses*, Office of the New York State Attorney General (Jan. 22, 2025), http://bit.ly/4cdKGcH.
2. *Attorney General James Sues Large-Scale Predatory Lending Operation Targeting Small Businesses*, Office of the New York State Attorney General (Mar. 5, 2024), https://on.ny.gov/444dJNQ; *People of the State of New York v. Yellowstone Capital LLC, et al.*, Index. No. 450750/2024 (Sup. Ct., N.Y. Cty.), NYSCEF Doc. No. 1.
3. *Yellowstone Capital LLC, et al.*, Index No. 450750/2024, NYSCEF Doc. Nos. 642, 643; *Attorney General James Announces $1 Billion Settlement with Predatory Lender Yellowstone Capital for Harming Small Businesses*, Office of the New York State Attorney General (Jan. 22, 2025), http://bit.ly/4cdKGcH.
4. Scott J. Bogucki, *How "Ordinary" are Merchant Cash Advance Transactions*, 43-DEC Am. Bankr. Inst. J. 18 (Dec. 2024).
5. G.O.L. § 5-501.
6. Penal Law § 190.40; *Adar Bays, LLC v. GeneSYS ID, Inc.*, 37 N.Y.3d 320 (2021).
7. 220 A.D.3d 745 (2d Dep't 2023).
8. *Id.* at 747.
9. *Id.*
10. *Id.*
11. Zachary Mider, Zeke Faux, David Ingold and Dimitrios Pogkas, *Sign Here to Lose Everything*, Bloomberg News, https://www.bloomberg.com/confessions-of-judgment (last visited Apr. 7, 2025); *"Sign Here to Lose Everything" by Bloomberg News wins 2018 Taylor Family Award for Fairness in Journalism*, Nieman Foundation (Apr. 17, 2018), https://bit.ly/4ld7dL0.
12. Bloomberg News and Nieman Foundation, *supra* note 11.
13. S.B. 2019-6395, https://bit.ly/4lbcl21.
14. F.S.L. §§ 801-812.
15. *Id.*; 23 N.Y.C.R.R. 600; *Superintendent Adrienne A. Harris Adopts Updated Regulation For Disclosure Requirements For Commercial Financing*, New York State Department of Financial Services (Feb. 1, 2023), https://bit.ly/42ckLxl.
16. F.S.L. §§ 801-812; New York State Department of Financial Services, *supra* note 15.
17. F.S.L. § 812.
18. *Yellowstone Capital LLC, et al.*, Index No. 450750/2024, NYSCEF Doc. Nos. 1, 629, 630, 648.
19. *Id.*, NYSCEF Doc. Nos. 566-72, 557-560.
20. *Id.*

Lisa Giunta-Popeil is Senior Counsel at Weiss Zarett Brofman Sonnenklar & Levy, PC, New Hyde Park, where she practices commercial litigation. She can be reached at lpopeil@weisszarett.com.

FOCUS: BANKRUPTCY

Eastern District Bankruptcy Roundup

Jeff H. Morgenstern

In 2024, the U.S. Bankruptcy Court for the Eastern District of New York provided another set of interesting decisions. The following is a capsule summary of some of the highlights.

Non-Dischargeability of Unpaid Wage Claims

In *Jiao, Yu, Zhai, et al v Zou*,[1] in a consolidated trial, former restaurant employees asserted claims for unpaid wages and other sums due for violation of the Federal Fair Labor Standards Act and New York Labor Law against owners/operators of a restaurant. They sought to have their claims declared to be non-dischargeable against the debtors as a willful and malicious injury under 11 U.S.C. §523(a)(6), and as a scheme to deliberately underpay them and to obtain their services by false pretenses and fraud, under §523(A)(2).

The evidence at trial showed that the defendants were not paid minimum wage, overtime, or spread of hour wages. Plaintiffs also claimed that their employer threatened them with kidnaping or death in retaliation for filing the federal claim and to induce them to withdraw their claims, which threats were made after they quit their jobs.

The court held that one debtor-employer did not provide the employees with pay stubs or minimum wage notices, and that he acted with malice in ignoring his duties in an injurious manner to this employee. This was sufficient to support a finding of "willful and malicious injury." As to the other debtor-employers, the evidence was insufficient to establish that they were responsible for or authorized to pay the wages in question.

As to the fraud claims, plaintiffs alleged that one employer represented that they would work long hours, six or seven days a week for little pay, and promised to give them raises. The evidence showed that these representations were not false. The court also held that it could not infer that the employer's failure to disclose that plaintiffs were entitled to be paid minimum wage and overtime constituted a misrepresentation for purposes of §523(a)(2)(A); therefore, the elements to satisfy that cause of action were not satisfied.

Motion to Rescind Foreclosure Sale

In *In re Plasterer*,[2] the Chapter 13 debtor sought to rescind the foreclosure sale on his home in Dix Hills, claiming he had a buyer ready, willing and able to buy it for more than what it sold for at the foreclosure sale and enough to pay the mortgagee in full.

Due to two bankruptcy petitions having been filed previously and dismissed in the prior year, his fourth filing, filed on the day of the foreclosure sale, did not trigger the automatic stay, based upon 11 U.S.C. §362(c)(4)(A)(i).

The court noted that the debtor did not request to impose the automatic stay, but rather just sought to rescind the sale. However, even if that request was made, he would have to show by clear and convincing evidence that his fourth filing was in good faith; in addition, imposing the stay would only be effective upon entry of such an order, and could not be entered retroactively to undo a sale that was already conducted.

Finally, the fact that the debtor had a buyer for the house for more money was not a basis to set aside the sale, noting that the U.S. Supreme Court ruled in *BFP v Resolution Trust Corp*,[3] that a fair and proper or reasonably equivalent value bid at a foreclosure sale is not avoidable at a properly held foreclosure sale. Further, the completion of the sale nullified the debtor's right of redemption under New York law, which could not be revived.

Motion to Reopen Dismissed Case

In *In re Damon Alfau*,[4] the debtor moved to reopen his dismissed Chapter 13 case, six years later, to try and confirm that the automatic stay was in effect to preclude the foreclosure sale of his Holtsville residence. The purpose was not to properly file documents or to file a plan to pay his debts, and he had not referenced the foreclosure in any of his prior five filings. The debtor also never challenged the foreclosure or the mortgagee's motion to lift the stay to evict him post-foreclosure.

The court treated the motion as one to vacate a prior Order under F.R.C.P. 60(b) since the estate was never administered, and denied the motion to reopen.

Post-Petition Activities After Foreclosure Sale

In *In re Murphy*,[5] the debtor filed a motion challenging the post-petition conduct of her mortgagee, Deutsche Bank, regarding delivery of the deed to her property to third parties, as violating the automatic stay. The foreclosure sale was held pre-petition.

The debtor claimed that the post-petition submission by Deutsche Bank of an order to deny a motion by the successful bidder of the sale to enjoin the referee's efforts to compel performance or forfeit the deposit, and the delivery of the deed to the bidder's assignee, violated the stay.

Since the pre-petition foreclosure sale extinguished all of the debtor's rights in the property (except for a possessory interest), the mortgagee's post-petition activities to finish the foreclosure process, were merely ministerial acts and not considered to be "the continuation of a proceeding or enforcement against the debtor." These ministerial acts did not infringe upon the debtor's mere possessory interest.

The court also noted that the foreclosure sale extinguished the

debtor's right of redemption in the property, notwithstanding the post-petition delivery of the deed.

Similarly, the post-petition entry of a state court order, which was issued pre-petition, did not resurrect the debtor's interests in the property nor affect the debtor's possessory interest.

Dischargeability of Divorce Obligations

Malovatsky v Gojani (In re Gojani)[6] involved the disachargeability of marital obligations arising out a stipulation in a divorce proceeding. That stipulation provided that the husband debtor was to transfer the marital residence to his ex-wife, and not to allow any judgments to be entered against him prior to the transfer of title.

However, the debtor's divorce attorney obtained a judgment against him for legal fees prior to his transfer of title to his ex-wife, which he failed to satisfy. When his wife went to sell the property years later, she had to satisfy that judgment for about $19,600.

After the debtor filed Chapter 7, the ex-wife commenced an adversary proceeding to object to the dischargeability of the obligation owed to her for reimbursement of the payoff of his attorney fees. The court analyzed 11 U.S.C. §523(a)(15), which deals with dischargeability of obligations that are *not* domestic support obligations, in connection with a separation agreement of divorce decree. (This typically involves obligations arising out of a property settlement). In finding that the debtor violated the So Ordered divorce stipulation, and caused damage to his ex-wife, Judge Grossman granted summary judgment for the ex-wife, with the debt owed to her for reimbursement being non-dischargeable under 11 U.S.C. §523(a)(15).

Dischargeability of Legal Fees Incurred

In *Jackson v Feldman*[7] (In re Feldman), the debtor's ex-wife was pursuing the debtor for failure to pay child support and to provide proof of life insurance as required by their Judgment of Divorce. The state court awarded her $4,500 for legal fees and costs in connection with that effort. She was later awarded another $9,100 in legal fees for post-judgment legal action she was required to take.

In an action by the ex-wife to have her claim for legal fees to be non-dischargeable as "domestic support obligations." The court noted that it is well established in the Second Circuit that claims of a former spouse for legal fees arising out of a divorce proceeding are non-dischargeable under 11 U.S.C. §523(a)(5) or (a)(15) of the Bankruptcy Code.

Tax Lien Sale Avoided as Fraudulent Transfer

In *Miranda v TLB 2019 LLC*,[8] the defendant acquired a tax lien from the Village of Mineola for $1,841 of unpaid taxes and after the homeowner's failure to redeem, acquired a Treasurer's Deed to the property by operation of law. The property was valued at about $650,000.

In the homeowner's Chapter 13 case, she brought an action to set aside the Treasurer's Deed as a fraudulent transfer on the grounds that "reasonably equivalent value" was not given for the transfer, which was made within two years of the bankruptcy filing. Section 522(h) of the Bankruptcy Code allows a debtor to set aside such a transfer when it was involuntary, and if the trustee opts not to bring the action.

The defendant argued that Section 522(h) only gives the debtor standing to avoid a transfer to the extent that she could have declared a homestead exemption; here, the debtor elected the New York homestead exemption under CPLR 5206, which eliminates that exemption to avoid a tax sale.

Judge Trust set aside the Treasurer's Deed as a fraudulent transfer since debtor could have elected the federal homestead exemption under 11 U.S.C. §522(d)(1) (which does not carry the same limitation to tax sales as CPLR 5206), and the debtor's ability to take the federal exemption was not limited by CPLR 5206. In addition, CPLR 5206 was pre-empted by the Federal Bankruptcy Code under the Supremacy Clause of the U.S. Constitution.

1. 656 B.R. 690.
2. 2024 Bankr. Lexis 345.
3. 511 U.S. 531 (1994).
4. Case No. 18-70983 (May 7, 2024).
5. Case No. 23-72942 (May 1, 2024).
6. *2024 Bankr. Lexis 1076* (May 7, 2024).
7. *2024 Bankr. Lexis 1100* (May 9, 2024).
8. *2025 Bankr. Lexis 73* (January 17, 2025). The author represented the defendant in that action which is on appeal to the U.S. District Court.

Jeff H. Morgenstern maintains an office in Carle Place, where he concentrates in bankruptcy, creditors' rights, and commercial and real estate transactions and litigation. He is also an editor of the *Nassau Lawyer*. He can be reached at jmorgenstern78@gmail.com.

NASSAU ACADEMY OF LAW

May 5 (Hybrid)

Dean's Hour: Family Regulation's Consent Problem

12:30PM

1.0 CLE Credit in Professional Practice

NCBA Member FREE; Non-Member Attorney $35

In New York and across the nation, virtually every child welfare investigation includes a search of a family's home. Though these searches are often referred to as "home evaluations" or "home assessments," they are searches under the Fourth Amendment, and subject to the constraints of the Fourth Amendment. This session will explain the constitutional limits on home evaluations in child welfare investigations, including the limits on tactics agencies can use to obtain consent.

Guest Speaker:

Anna Arons, Assistant Professor of Law, St. John's University School of Law

May 6 (In Person Only)

Homes Hijacked: Exposing Deed Fraud

With the NCBA Community Relations & Public Education Committee, Real Property Committee and Mortgage Foreclosure Assistance Project

5:00PM—7:00PM

1.0 CLE Credit in Professional Practice

FREE to NCBA Members and the Public

Members of the Nassau County Bar Association, Nassau County Clerk's Office, and the Nassau County District Attorney's Office will talk about New York's adoption of the Uniform Partition of Heir's Property Act, the implication of deeds now being transferred upon death, and the prosecutorial enforcement of deed theft crimes. This program is open to attorneys and Nassau County residents who want to learn more about how to protect one of their most valuable assets—their home.

Guest Speakers:

District Attorney Anne T. Donnelly, Nassau County; **Maureen O'Connell,** Nassau County Clerk; **Amy Abbandondelo**, Sherwood & Truitt Law Group, LLC; **Moriah Adamo**, Abrams Fensterman, LLP; **Andrew B. Bandini**, Mauro Lilling Naparty LLP

May 8 (Hybrid)

Dean's Hour: A Level Playing Field or a New Challenge?—Panel Discussion on DRL §237

12:30PM

1.0 CLE Credit in Professional Practice

NCBA Member FREE; Non-Member Attorney $35

New York's DRL §237 aims to protect individuals by ensuring that certain agreements—particularly prenuptial agreements—are fair, transparent, and enforceable. But does it level the playing field or create new obstacles for businesses and individuals alike? Join us for a panel discussion exploring the purpose behind DRL §237 and its impact on representation of monied and non-monied spouses in matrimonial cases.

Guest Speakers:

Irene Angelakis, Law Offices of Irene Angelakis, P.C.; **Andrea Brodie**, Meister Seeling & Fein; **Allyson Burger**, Berkman Bottger Newman & Schein, LLP; and **Elaine Colavito**, Afran & Russo, P.C.

May 13 (Hybrid)

Dean's Hour: Estate and Trust Income Tax Planning and Design for Attorneys

12:30PM

1.0 CLE Credit in Professional Practice

NCBA Member FREE; Non-Member Attorney $35

This lecture will discuss Form 1041 Income Tax planning and will include: distributable net income (DNI) and distributions; §199A calculations; expense allocations and final regulations under §67(e); income tax traps; and business entities and passive activities.

Guest Speakers:

Robert S. Barnett and **Gregory L. Matalon,** Capell Barnett Matalon & Schoenfeld LLP

May 14 (Hybrid)

Dean's Hour: Emergency Medical Services (EMS)—We Are Not Just Ambulance Drivers

With the NCBA Plaintiff's Personal Injury Committee

12:30PM

1.0 CLE Credit in Professional Practice

NCBA Member FREE; Non-Member Attorney $35

This program will address how the emergency medical services system works, the different levels of Emergency Medical Technicians, how to locate and understand the protocols for Emergency Medical Technicians, how to understand a Patient Care Report, and discuss case law and recent developments.

Guest Speakers:

Bruce M. Cohn, Esq., EMT-CC, IC, BMC Legal

Giulia R. Marino, Esq., EMT-CC, Marino & Marino, P.C.

May 15 (Hybrid)

Dean's Hour: Fakes, Forgeries and Frauds—The Howard Hughes Hoax

12:30PM

1.0 CLE Credit in Professional Practice

NCBA Member FREE; Non-Member Attorney $35

PROGRAMS CALENDAR

In January of 1972, author Clifford Irving confessed to authorities that along with his wife Edith, he had perpetrated the most fantastic literary hoax of the 20th century. To the tune of over a million dollars, Irving had swindled his publisher McGraw Hill and Time-Life for what he claimed to be an as-told-to autobiography of the reclusive billionaire Howard Hughes. The book was a pure fabrication. Perhaps the most audacious and brazen con job in the history of American publishing, the Howard Hughes Hoax was a mass media sensation. The ensuing scandal resulted in indictments and guilty pleas for violations of American and Swiss law.

Guest Speaker:
Rudy Carmenaty, Deputy Commissioner of the Nassau County Department of Social Services and the Department of Human Services

May 16 (In Person Only)

Dean's Hour: Rules of Practice in the Appellate Division—Insights from the Clerks of the First and Second Departments
With the NCBA Appellate Practice Committee
12:30PM
1.0 CLE Credit in Skills
NCBA Member FREE; Non-Member Attorney $35

Susanna Molina Rojas, Clerk of the Court of the Appellate Division, First Department, and Darrell M. Joseph, Clerk of the Court of the Appellate Division Second Department, offer insight into their department-specific rules and preferences. Learn the practice rules governing appeals and the nuances between the First and Second Departments.

Guest Speakers:
Susanna Molina Rojas, Clerk of the Court, NYS Supreme Court, Appellate Division, First Judicial Department
Darrell M. Joseph, Clerk of the Court, NYS Supreme Court, Appellate Division, Second Judicial Department

June 3 (Hybrid)

Dean's Hour: Intellectual Property Issues Related to Fanworks
With the NCBA Women in the Law Committee and the NCBA Intellectual Property Law Committee
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

Did you ever watch a television show and really hate the ending? Think you could write your own? Is that even legal? This CLE will discuss the intellectual property issues of fandom, including fanfiction, fanart, and cosplay, as well as the potential implications of sharing and selling such work online and at conventions like Comic Con, and what that means for fans creating works based on their favorite characters.

Guest Speaker:
Ariel E. Ronneburger, Cullen and Dykman LLP

NCBA Mortgage Foreclosure Assistance Project Annual Outreach for Volunteer Attorneys and Pro-Bono Interns

MAY 20 (IN PERSON ONLY)

Session I: Fundamentals of Mortgage Foreclosure
5:30PM Networking Reception
6:00PM Program
1.5 CLE Credits in Professional Practice
This program will provide an introduction and overview to mortgage foreclosure practice.

GUEST SPEAKERS:
Madeline Mullane, Director, NCBA Mortgage Foreclosure Assistance Project
Samantha Flores, Settlement Conference Coordinator, NCBA Mortgage Foreclosure Assistance Project

MAY 30 (IN PERSON ONLY)

Session II: Orientation to the Foreclosure Settlement Conference Part
11:00AM—1:00PM at the Foreclosure Settlement Conference Part, NYS Supreme Court, Nassau County
2.0 CLE Credits in Skills
At this program, attendees will receive an overview of the workings of the Foreclosure Settlement Conference Part.

GUEST SPEAKER:
Anthony J. Provenzano, Esq., Court Attorney-Referee, Supreme Court, County of Nassau; Manager, Foreclosure Settlement Conference Part

Sessions FREE to NCBA Members, Non-Member Attorneys and Law Students

The Nassau Academy of Law provides CLE financial aid and scholarships for New York attorneys in need of assistance. For more information, contact academy@nassaubar.org at least **five business days prior to the program.**

FOCUS: MENTAL HEALTH

The State of Mental Health: A Call for Action

Jamie A. Rosen

May is Mental Health Awareness Month. The topic of mental health will be widely publicized this month to increase awareness of mental health issues and raise funds to support mental health programs. One of the biggest shifts we have seen in recent years, and especially going into 2025, is how openly mental health is discussed—in the media, in the workplace, and at school. Mental health in the legal profession is certainly a pressing concern, with attorneys facing higher rates of depression, anxiety, and burnout than most other professions. The more we talk about the importance of mental health and well-being, the more we normalize these conversations. Efforts to increase mental health education and awareness aim to reduce the stigma surrounding mental illness, often a major barrier to seeking appropriate care.

The following updates reflect both positive strides and ongoing challenges in addressing mental health care.

2025 State of the State: New York

In January 2025, Governor Kathy Hochul announced major plans to reform New York's mental health laws to better serve individuals suffering from a mental illness and their communities. She proposed amending New York's Mental Hygiene Law to address gaps in the standards for involuntary commitment. The updated law, if passed, will allow intervention when individuals are at substantial risk of harm due to their inability to meet basic needs like food, shelter, or medical care.[1] Proponents of the reform argue that such a change will help reduce homelessness and involvement in the criminal justice system, making New York safer. Critics, including civil rights advocates, are concerned about the potential misuse of this expansion, infringing upon an individual's rights.

Governor Hochul also wants to strengthen the Assisted Outpatient Treatment (AOT) law, known as Kendra's Law,[2] to improve record sharing, expand who can petition for AOT orders, and use video conferencing to streamline the process.[3] Critics argue that these proposals fail to address the underlying issues such as a lack of housing and a shortage of providers. A major issue is inadequate funding for Assertive Community Treatment (ACT) teams that provide case management services under many of the court-ordered AOT plans.

For youth and teens, the governor promises to connect mental health resources to afterschool programs, offering mental health first aid training to state-funded afterschool providers, to ensure that youth have access to mental health resources after school hours.[4] She wants to provide similar training to teens, enabling them to identify, understand, and respond to signs of mental health and substance use amongst their peers.[5] She also plans to expand membership in clubhouse programs, places where youth can access mental health services in a safe space.[6]

New York City officials are also focused on youth mental health. In 2024, the New York City Department of Health and Mental Hygiene (DOHMH) Commissioner Dr. Ashwin Vasan, together with Mayor Eric Adams, launched "NYC Teenspace," a free tele-mental health service for teenagers to connect with therapists.[7] In 2025, the program will hopefully expand to ensure this population is fully supported with the coping skills and resources needed to serve individuals who would otherwise face barriers to such care.

National Updates

Despite the rising demand for mental health care services, barriers such as cost, stigma, and a shortage of qualified providers limit access to care. Many Americans still lack parity in insurance coverage of mental health and substance use services and/or medications.

Instead of focusing on how to increase the affordability and availability of mental health care, Congress is considering massive federal budget cuts that could significantly impact Medicaid and Supplemental Nutrition Assistance Program (SNAP).[8] Medicaid is the single largest payer for mental health services in the United States, while SNAP provides essential food assistance to impoverished Americans. Federal cuts of this size to Medicaid will jeopardize access to health care, including mental health care, for the country's most vulnerable communities.

Additionally, in March 2025, Secretary Robert F. Kennedy announced a restructuring of the Department of Health and Human Services (HHS), which would include a 25% reduction in workforce and a merger of the Substance Abuse and Mental Health Services Administration (SAMHSA) into a new "Administration for a Healthy America."[9] The proposed merger may impact the progress made in the areas of suicide prevention, overdose, and youth mental health.[10] Termination of many federal health agency employees began in April 2025.[11] In addition to the national impact on public health, medicine and research, these layoffs may slow down or reverse any progress New York has made to expand and fund mental health services, as outlined by Governor Hochul above.

Mental Health at Work

Employers are taking significant steps to address mental health issues in the workplace, for the benefit of employees and the company itself. To prioritize mental health awareness and education, employers can offer flexible work arrangements and remote work options, ensure employees have access to mental health services such as Employee Assistance Programs (EAPs), and/or provide comprehensive mental health benefits. To create and foster supportive, healthy workplace cultures, employers must train supervisors and employees at all levels to recognize and address mental health concerns.

Unfortunately, however, data shows that even when employers offer mental health benefits or support, employees are unaware of those services.[12] According to a National Alliance on Mental Illness (NAMI) poll on mental health in the workplace,

about 25% of employees did not know whether their employer offered mental health care benefits, an employee assistance program, flexible work arrangements, or sick days for mental health. This underscores the need to increase awareness and education of these essential workplace policies and how to access them in furtherance of creating a healthier, more supportive workplace environment in 2025.

The Impact of Technology

Telehealth has significantly increased access to mental health services, especially for individuals in rural or underserved areas. In the aftermath of the COVID-19 Pandemic, many patients still take advantage of virtual care, or hybrid, options. Telehealth, including virtual mental health care, remains a convenient choice. Recent legislation authorized an extension through September 30, 2025, so that Medicare patients can continue to utilize telehealth services.[13]

Other technological advances have impacted the field of mental health as well. Artificial Intelligence platforms and apps dedicated to mental health play a significant role in providing care to individuals who would otherwise not have access.[14] AI-powered tools such as chatbots, provide 24/7 mental health support and help link individuals to crucial resources. As this technology continues to evolve, it holds great promise for advancing mental health care.

The impact of technology, however, is a complex issue. The continued and increased overuse of screens and social media is linked to serious mental health conditions such as depression and anxiety, especially in young adults.[15] Cyberbullying, harassment, and sleep disruption due to excessive screen time, are just a few of the issues that must be addressed by policymakers and educators as they continue to craft guidelines.

988 Lifeline and Other Resources

In 2025, the 988 Lifeline continues to be a vital resource for individuals experiencing mental health crises. The 988 Lifeline, created in 2022, allows people to call, text, or chat with a trained crisis counselor who provides free and confidential support and counseling to individuals in crisis or emotional distress and connect them to resources.[16] Generally, the 24/7 service has been successful. Meeting the growing demand requires continued financial investment on the state and federal level to support the call centers around the country.

Despite this Lifeline being available for several years, most Americans are still not aware of the service. We must continue to raise awareness of critical mental health resources such as the Lifeline.

Mental Health Care Advancements

In 2025, we continue to see remarkable mental health care advancements.

The U.S. Food and Drug Administration (FDA) recently approved a new antipsychotic drug called Cobenfy, for the treatment of Schizophrenia.[17] This is the first new treatment for psychosis in decades, that takes a new approach and promises fewer side effects.[18]

The FDA also relaxed restrictions on Clozapine, a medication often prescribed for treatment-resistant Schizophrenia.[19] While this change will simplify access to this important medication, it is still recommended that prescribers monitor a patient's bloodwork.[20]

Virtual Reality (VR) therapy is used to treat conditions such as anxiety, Post-Traumatic Stress Disorder (PTSD) and phobias.[21] Patients can engage in controlled simulations to practice mindfulness or simulate social interactions in a safe, controlled environment.

The use of psychedelics is increasing as acceptance amongst clinicians and the public grows. Substances such as ketamine, psilocybin and MDMA have been used in controlled settings with safety protocols to treat depression, PTSD and/or addiction.[22] In 2025, continued studies on the risks and benefits of such therapies will continue in furtherance of obtaining FDA approval.[23]

Where Do We Go from Here?

When this month ends, the conversations and advocacy surrounding mental health must continue. According to NAMI, an estimated one in every five adults experience a mental health issue each year. The millions of Americans experiencing mental illness need access to affordable care. On a state and federal level, we must address the serious gaps in our fragmented mental health care system. Technological innovations, a shift towards proactive mental health care, and a focus on the youth mental health crisis are all steps in the right direction.

1. Governor Kathy Hochul, Governor Hochul Proposes Strengthening Involuntary Commitment Laws and Kendra's Law to Provide Support and Resources for New Yorkers Experiencing Serious Mental Illness, New York State (January 14, 2025), https://www.governor.ny.gov/news/governor-hochul-proposes-strengthening-involuntary-commitment-laws-and-kendras-law-provide.
2. Mental Hygiene Law § 9.60. AOT is a court-ordered mental health treatment for individuals with mental illness who are unlikely to survive safely in the community without supervision. The goal of the program is to prevent a relapse of deterioration of an individual's mental health condition. AOT includes services such as case management, medication, and therapy. It is considered a less-restrictive alternative to inpatient commitment.
3. Governor, *supra* note 1.
4 *Id.*
5. *Id.*
6. *Id.*
7. Mayor Adams Celebrates Early Success of 'NYC Teenspace,' Free Tele-Mental Health Service for NYC Teenagers, City of New York (May 23, 2024), https://www.nyc.gov/office-of-the-mayor/news/410-24/mayor-adams-celebrates-early-success-nyc-teenspace-free-tele-mental-health-service-nyc#/0.
8. In March 2025, the US House of Representatives passed a budget resolution that requires the House Energy and Commerce Committee, which oversees Medicaid, to make $880 billion in budget cuts over the next ten years.
9. Mental health is at risk: MHA's concerns over HHS agency restructuring and workforce reductions | Mental Health America, Mental Health America (March 28, 2025), https://mhanational.org/news/mental-health-is-at-risk-mhas-concerns-over-hhs-agency-restructuring-and-workforce-reductions/.
10. *Id.*
11. Stein et al., Widespread firings start at federal health agencies including many in leadership, NPR (April1, 2025), https://www.npr.org/sections/shots-health-news/2025/04/01/g-s1-57485/hhs-fda-layoffs-doge-cdc-nih/.
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13. Telehealth policy updates, Telehealth.HHS.gov, https://telehealth.hhs.gov/providers/telehealth-policy/telehealth-policy-updates. (last visited April 30, 2025).
14. Michael W. Best, Ph.D., The Top 10 Applications of Technology in Mental Healthcare, Psychology Today (February 11, 2025), http://bit.ly/4iaceBj.
15. Blaise Conway, Screen Time and Mental Health: Exploring the Connection and Finding Balance, Greater Boston Behavioral Health (December 30, 2024), https://bit.ly/3G05PeF.
16. Robin Foster, Two Years Later, 988 Crisis Line Has Answered 10 Million Requests, U.S. News and World Report (July 17, 2024), https://bit.ly/42qNzCB.
17. FDA Approves Drug with New Mechanism of Action for Treatment of Schizophrenia, U.S. Food and Drug Administration (September 26, 2024), https://bit.ly/4iacAYF.
18. *Id.*
19. Heidi Anne Duerr, MPH, FDA Officially Removes REMS Requirement for Clozapine, Psychiatric Times (February 25, 2025), https://www.psychiatrictimes.com/view/fda-officially-removes-rems-requirement-for-clozapine.
20. *Id.*
21. Best, Ph.D., *supra* note 14.
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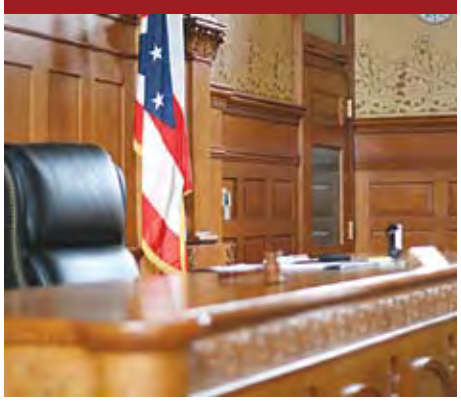
FOCUS: LITIGATION



He Said, She Said but What About What the Website Said?

Jacqueline A. Fink and Michael Schoenberg

Hearsay has been the bane of law students and practitioners alike. Often easy to identify as an out-of-court statement offered to prove the truth of the matter asserted, there are so many exceptions and exclusions it can make one's head spin.[1] The ubiquity of online information and the ease with which it can be searched, especially using artificial intelligence, makes information posted on websites a prime target for this objection.

When most think of hearsay, they default to the common "so and so told me that" opener that inevitably draws the objection. But, what if the witness testifies about something he or she read on a website or, better yet, the trial attorney wants to use a printout of the website itself to establish a particular fact? Will the hearsay objection be sustained? Should the court even consider the information?

Federal and state courts take somewhat differing approaches to answering these questions but the common thread seems to be an assessment of the reliability of the information and the weight it is given. There are two ways that website evidence is considered. The first is under the hearsay rubric, and the second under a judicial notice analysis.

In the federal courts, the focus is often on whether the judge can take judicial notice of information that is readily available and its accuracy can be determined without reasonable doubt. Judicial notice comes into play in two ways: without the request of a moving party or *sua sponte*, or based on a party's request with restrictions depending on whether it is a criminal or civil matter.[2] In civil cases, a judicially noticed fact is deemed conclusive and jurors are instructed as such. Whereas, in criminal cases, judicially noticed facts are not conclusive and jurors may or may not accept such facts.

In *United States v. Bari*, for example, the Second Circuit addressed whether the trial court erred in considering information confirmed by its own internet search.[3] While the opinion stemmed from a supervised release revocation hearing, where the rules of evidence are relaxed, the court nevertheless found that, in certain circumstances, a judge could use website information to confirm his or her intuition on a "matter of common knowledge."

In *Magnoni v. Smith & Laquercia, LLP*, Judge Marrero from the Southern District used an internet website to confirm a witness's testimony about the brand name of a wheelchair.[4] The court supported its search by stating that "it is generally proper to take judicial notice of articles and Web sites published on the Internet." The court reasoned that the information is publicly available and absent a challenge to the genuineness of the source of the document, judicial notice is appropriate.

In *A&E Television Networks, LLC v. Big Fish Ent., LLC*, a trademark infringement case, the court held that the plaintiff had pleaded sufficient facts to avoid dismissal. The court independently searched the internet–Google and YouTube in particular–to determine, among other things, that clips from both subject television shows appeared, supporting the court's holding that the plaintiff plausibly alleged, "that the products exist in the same online video market."[5]

Two other recent Southern District cases illustrate that federal courts are taking judicial notice of website information. First, in *Hesse v. Godiva Chocolatier, Inc.*, Judge Nathan took judicial notice of a trademark registration because it was "a matter of public record."[6] However, in *Carter v. Scripps Network, LLC*, judicial notice was taken of a non-governmental or public record website.[7] There, a class action suit was commenced against an entity that operated an online newsletter, which allegedly violated the Video Privacy Protection Act. The court took judicial notice of what the website entailed, which "included an online shop that recommended and linked to third-party home-and-garden products." The court did so in order to determine whether plaintiffs had failed to state a cause of action or could be part of the class that the Act meant to afford protection.

When courts view website evidence in the context of hearsay, the results are usually different. In *Novak v. Tucows, Inc.*, for example, the Second Circuit affirmed the lower court's holding that evidence from websites offered by a non-declarant to prove the truth are generally considered hearsay.[8] The court cited to other federal circuits elaborating on the idea of untrustworthiness of websites without proper authentication.

Similarly, in *F.T.C. v. Med. Billers Network, Inc.*, the Southern District found a website printout constituted inadmissible hearsay.[9] In that case, the defendant printed out graphs from a website depicting salaries that medical billers were allegedly receiving. However, the court found that the accuracy of the salary information in the printout could not be verified. Thus, the printout was inadmissible hearsay.

State courts, likewise, are reluctant to admit website documentation into evidence under hearsay exceptions when the website printout is not authenticated, even when it is a governmental website that is being used.

In *Faulkner v. Best Trails & Travel Corp.*, for example, the trial court allowed plaintiff to use an entity information printout from the Department of State's website to establish the defendant's principal place of business for venue purposes.[10] On appeal, however, the Second Department reversed, finding reliance on the website printout to establish the defendant's principal place of business was in error. The court reasoned that the website printout was not "certified or authenticated" so there was no "factual foundation sufficient to demonstrate its admissibility as a business record."

In *Dyer v. 930 Flushing, LLC*, a defendant similarly tried to use a computer printout from the DOS's website to establish that its principal office was located in Nassau County for venue purposes.[11] The Second Department affirmed the denial of defendant's venue motion, again finding that "the

computer printout submitted by the defendant in support of its motion was inadmissible, since it was not certified or authenticated by the head of the New York State Department of State, and it was not supported by a factual foundation sufficient to demonstrate its admissibility as a business record."

A lack of certification or authentication does not end the inquiry, however. Some state courts, like their federal counterparts, take judicial notice of online facts.

In *Munaron v. Munaron*, the defendant used a company's website showing that plaintiff was still listed as the president in an attempt to establish that fact.[12] The court rejected defendant's argument, finding the website lacked authenticity because "there is no way of knowing when the Web site was last updated, nor is there any way of knowing whether plaintiff remained president of the company notwithstanding his sale of the company."

The court, however, did its own search of the DOS entity information website and found that it stated plaintiff's executive position with the company. Although acknowledging the "unusual" nature of the evidence, the court found that it could "take judicial notice of this matter of public record."

Judicial notice, although discussed on a state level, has been narrowed more to the use of government websites.

In *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, the defendant used the U.S. Department of Health and Human Services' website to illustrate the plaintiff's wrongdoing.[13] Specifically, the defendant requested that the court take judicial notice of procedure codes used by the hospital. These codes were displayed on the government's website and plaintiff did not contest this fact. The Second Department took judicial notice of this information and held "that the diagnosis and procedure codes key published by the United States Government on its HHS Web site may properly be given judicial notice (see CPLR 4511 [b]), as the key is reliably sourced and its accuracy not contested."

As early as 1989, the First Department held, "this court may, in general, take judicial notice of matters of public record."[14] In *LaSonde v. Seabrook*, the court held that it "has discretion to take judicial notice of material derived from official government web sites such as those generated by the New York State Department of State."[15]

Courts are understandably skeptical of information supported only by website evidence when the information is used to establish a dispositive fact and there are no other assurances that the information is reliable. Reliability is the key.

Courts are the gatekeepers of what is or is not reliable. The rules of hearsay assist judges when making the determinations regarding credibility. With the internet ever evolving as a source of information that most use every day, it is not surprising that attorneys are increasingly asking courts to allow website information as evidence. As the world of artificial intelligence soars and social media becomes more news-like, it is reasonable to expect that attorneys will use evidence gleaned from those sources more regularly, too. The key to it all is the way in which the evidence is being introduced. As mentioned earlier, official government websites are more likely than others to be admissible, but the reliability of the information and the way it is to be used are still the touchstones to admissibility.

It will be interesting to see how this body of evidentiary law continues to evolve.

1. Fed. R. Evid. 801; CPLR 800.
2. Fed R. Evid. 201; CPLR 4511.
3. 599 F.3d 176, 180-81 (2d Cir. 2010).
4. 701 F. Supp. 2d 497, 501 (S.D.N.Y. 2010).
5. No. 22 CIV. 7411 (KPF), 2023 WL 4053871, at *18 (S.D.N.Y. June 16, 2023)
6. 463 F. Supp. 3d 453, 463 (S.D.N.Y. 2020).
7. 670 F. Supp. 3d 90, 98 (S.D.N.Y. 2023).
8. No. 06-CV-1909(JFB)(ARL), 2007 WL 922306, at *5 (E.D.N.Y. Mar. 26, 2007), *aff'd*, 330 F. App'x 204 (2d Cir. 2009).
9. 543 F. Supp. 2d 283, 301–02 (S.D.N.Y. 2008).
10. 203 A.D.3d 890 (2d Dep't 2022).
11. 18 A.D.3d 742, 742-43 (2d Dep't 2014).
12. 21 Misc. 3d 295, 296-97 (Sup. Ct. Westchester Cnty. 2008).
13. 61 A.D.3d 13, 20 (2d Dep't 2009).
14. 146 A.D.2d 666, 667 (2d Dep't 1989).
15. 89 A.D.3d 132, 137, n.8 (1st Dep't 2011).

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FOCUS: LAW AND AMERICAN CULTURE

Wild Bill Donovan and the Origins of American Intelligence

Rudy Carmenaty

This article is dedicated to all the members of the Nassau County Bar Association, past and present, who have worn our country's uniform, and most particularly our departed members who gave in Lincoln's immortal words "the last full measure of devotion."

William 'Wild Bill' Donovan led many lives and served his country in countless ways—as a soldier, as an attorney at law, but most strikingly as an intelligence chief. On learning of his passing, Dwight Eisenhower lamented in equal measures of sorrow as well as admiration: "What a man! We have lost the last hero."[1]

A veteran of both world wars, Donovan's service is nearly unsurpassed in American military annals. He was the recipient of four of our nation's highest decorations: the Congressional Medal of Honor, the Distinguished Service Cross, the Distinguished Service Medal, and the National Security Medal.[2]

Donovan earned the Medal of Honor and his red badge of courage commanding the famed Fighting 69th Infantry Regiment of the New York National Guard. At the Second Battle of the Marne in 1918, his outnumbered troops overcame a superior German force. Donovan rallied his men after being severely wounded himself.

On the occasion when the Medal of Honor was bestowed, Donovan, before thousands of his comrades, said it properly belongs not to him but rather to those among their ranks who did not make it back home. The citation reads:

> Lt. Col. Donovan personally led the assaulting wave in an attack upon a very strongly organized position, and when our troops were suffering heavy casualties he encouraged all near him by his example, moving among his men in exposed positions, reorganizing decimated platoons, and accompanying them forward in attacks. When he was wounded in the leg by machine-gun bullets, he refused to be evacuated and continued with his unit until it withdrew to a less exposed position.[3]

His valor also earned the Croix de Guerre and an Honorary Knighthood. When first offered the Croix de Guerre, Donovan refused it. The French had denied the same honor to another American only because the man was Jewish. Donovan's integrity kept him from accepting until his fellow soldier was recognized.

As the U.S Attorney for the Western District of New York, Donovan took on organized crime to aggressively enforce Prohibition. His vigilance also offended entrenched interests in his native Buffalo. This would hurt him politically when he campaigned for the governorship of New York in 1932, which he lost to Herbert Lehman.

In 1924, President Calvin Coolidge appointed Harlan Fiske Stone, Donovan's mentor from his days at Columbia Law School, to the post of U.S. Attorney General. The Department of Justice needed to be cleaned up after the squalid scandals of the Harding years. Donovan left Buffalo for the nation's capital.

In Washington, Stone named Donovan an Assistant Attorney General. He quickly established himself as an outstanding appellate lawyer and as a young man on the rise. Had things worked out differently, Donovan might have been the first Roman Catholic president, a generation before the election of John F. Kennedy.

A Republican, Donovan dutifully supported the candidacy of Herbert Hoover in 1928. Hoover had pledged to name Donovan Attorney General if elected. But in the face of virulent anti-Catholic prejudice, Hoover reneged.[4] Al Smith was that year's Democratic nominee, the first Catholic to run on a major party ticket.

Donovan left Washington for Manhattan. He launched his own white shoe law firm, Donovan, Leisure, Newton & Irvine, where he excelled at appellate advocacy. Donovan successfully argued, at the Justice Department and in private practice, numerous cases before the United States Supreme Court.

An inveterate traveler, Donovan's frequent business trips provided convenient cover for his activities. During the 1920s and 1930s, Donovan went to Eastern Europe, obtaining valuable, first-hand reconnaissance on the Russian Civil War and international communism. He also surveyed China, Japan, and Korea.

Isolationism was the order of the day. Still, Donovan believed the United States had a part to play during the inter-war years. He cultivated sources in Nazi Germany and Soviet Russia. He denounced Hitler, Mussolini, and Stalin as "Europe's Axis of Evil."[5] This set the stage for Donovan's endeavors in the 1940s.

For Hitler hated Donovan, more so than just about any other American during World War II.[6] Conversely, Donovan's exploits earned him the admiration and the ear of Franklin Roosevelt. Their relationship was based on a shared vision of America's role in world affairs in spite of their prior tiffs over domestic politics.

FDR always claimed he and Donovan were chums at Columbia Law School.[7] But Donovan was a working-class Irish Catholic from Buffalo and a star quarterback in his college days. Roosevelt, on the other hand, was the scion of a country squire from Duchess County. They were never friendly and occupied distinct social circles.

Yet in short order, Roosevelt came to appreciate Donovan as a trusted advisor, going so far as to call Donovan his "secret legs."[8] Donovan would eventually secure regular and personal access to the President, and he would regale FDR with accounts of the daring-do of his operatives from around the globe.

Once the Nazis and the Soviets invaded Poland in September 1939, FDR began putting the country on a war-footing. Running for an unprecedented third term the following year, Roosevelt filled his cabinet with prominent Republicans, Donovan among them. It was as close to a national unity government as American party politics permits.

At the time, there was no integrated intelligence service. Instead, responsibilities and resources were spread among various civilian and military components of the executive branch, including the State, Treasury, Navy, and War Departments. The very idea of having coordinated intelligence operations begins with Donovan.

The Office of Strategic Services (OSS), which Donovan conceived and personally led, was created to bridge this gap and fill any possible voids. OSS collected information and engaged in surveillance. By integrating research with intelligence gathering, OSS was able to effectively take part in subversion and sabotage.

Widely recognized as the "Father of American Intelligence," Donovan's legacy is most keenly felt in the realm of national security.[9] OSS is the forerunner of today's Central Intelligence Agency (CIA). Four directors of CIA—Allen Dulles, Richard Helms, William Colby and William Casey—were part of the war-time OSS.

FDR sent Donovan to London after the fall of France. Out maneuvering the defeatist American Ambassador Joseph P. Kennedy, Donovan functioned as a back-channel emissary. His mission was to determine British resolve in the face of Hitler's impending onslaught.

Donovan met with Winston Churchill, King George VI, as well as representatives from the intelligence services. Kindred spirits, Churchill gave Donovan unprecedented access to classified materials, and he was able to inspect coastal defenses. The Prime Minister persuaded Donovan Britain would fight on no matter the cost.

Reporting back to Roosevelt, Donovan provided the analysis that moored FDR ever more closely to Churchill. This experience was also key in birthing the idea there should be a homegrown American intelligence service patterned after the British model. After all, the British already had a sophisticated network in place.

The Canadian Sir William Stephenson was the head of British Security Coordination (BSC) for the western hemisphere. His codename, given to him by Churchill, was Intrepid.[10] Ian Fleming once said "James Bond is a highly romanticized version of a true spy. The real thing is ... William Stephenson."[11]

Stephenson/Intrepid oversaw maneuvers to prevent disruption of British interests and assess German penetration in the Americas. Seeking to coalesce Anglo-American operations, it was Stephenson who suggested to the President that Donovan be put in charge of the newly established U.S. spy network.

On July 11, 1941, Roosevelt signed an executive order naming Donovan Coordinator of Information (COI).[12] Donovan fashioned from whole cloth an intelligence program. That December right after Pearl Harbor, Donovan met with the President. FDR told Donovan, "It's a good thing you got me started on this."[13]

Donovan's steely determination and an ever-fertile imagination made him the ideal man to head OSS and direct its operatives in the field. He

initiated facilities to instruct in the nefarious arts of subterfuge. Donovan went so far as to personally recruit agents, selecting individuals from a variety of backgrounds and fields of expertise.

Filmmaker John Ford, future United Nations diplomat Ralph Bunche, future Supreme Court Justice Arthur Goldberg, baseball player Moe Berg, and the French Chef Julia Child were among the colorful personalities that comprised OSS. Donovan made a point of hiring women, ignoring objections regarding their suitability for espionage.

In 1942, the COI ceased to be a White House operation. The Office of Strategic Services was placed under the aegis of the Joint Chiefs of Staff. OSS would coordinate reconnaissance and surveillance behind enemy lines for all branches of the military.

Donovan returned to active duty with the Army with his World War I rank of colonel. He was promoted to brigadier general in 1943 and major general in 1944.[14] He personally took part in the landings at Salerno, Anzio and on D-Day on Normandy beach.

With the Wehrmacht on the march, Donovan recruited experts in numerous disciplines to evaluate existing and incoming information. Donovan obtained the cooperation of the Librarian of Congress, the poet Archibald MacLeish, to allow OSS to use the library's wide-ranging collections.[15]

This resulted in the Research & Analysis Branch, OSS's most heralded innovation.[16] Active in virtually every theater of operations, OSS collected and analyzed information for use by policymakers. The American war effort further required their own propagandists to undermine enemy morale.

Donovan wanted to effectively emulate the Nazi's propaganda and subversion techniques. OSS disseminated disinformation to help foster instability in Axis occupied areas across Europe and Asia. OSS was quite effective in the Balkans, China, Burma, and France.

OSS trained Kuomintang troops under Chang Kai-shek and indigenous irregulars in Burma to fight the Japanese. Such are the fortunes of war and international politics, OSS also armed and supplied Mao Zedong's Red Army cadres in China and the Viet Minh in French Indochina (Vietnam).

By 1944, Donovan had stationed thousands of American operatives and foreign agents in several overseas capital. As a Catholic war hero, Donovan was able to garner information on behalf of the allies from an informal network of Catholic priests throughout Europe.[17]

Donovan dealt with anti-Nazi Germans to broker what could have been an early surrender. If realized, it would have resulted in the exclusive occupation of all of Germany by American and British forces.[18] The post-war division of Germany would thus be unnecessary, resulting in a unified democratic state absent Soviet input.

When Roosevelt died, Donovan lost his patron. The new president, Harry Truman, disliked Donovan and the covert actions he represented. OSS was accused of everything from harboring communists to planning a war with Soviet Russia, from being under the thumb of the British to becoming a potential gestapo.[19]

Truman, with the active encouragement of FBI Director J. Edgar Hoover who saw OSS as an encroachment on his turf, sought to terminate OSS with the cessation of hostilities. His detractors dismissed and decried Donovan's proposed post-war intelligence service.

On September 20, 1945, Truman signed Executive Order 9621 abolishing OSS.[20] Yet two years later, in a total about face, Truman signed the National Security Act of 1947 which established the Central Intelligence Agency. The latter action proved to be the vindication of Donovan's original position.

Unfortunately, he was not rewarded for his foresight by being named the agency's first director. Although he would later be appointed Ambassador to Thailand by President Eisenhower, Donovan's public life was effectively over. Suffering from dementia, he died in 1959. Fittingly, he is buried at Arlington National Cemetery.

Donovan the man was no more, yet the myth of Wild Bill still lingers. His bravery at the Marne alone would be sufficient to qualify Donovan as a hero nestled firmly amidst the pantheon of American men at arms. Even so, it was when leading OSS during World War II that Donovan burnished his legend.

OSS left an enduring legacy, as Donovan articulated his over-arching vision, convinced FDR of its value, and was able to marshal the resources to carry it out. Overseeing intelligence work by its very nature must rely on qualities such as intuition, charisma, and courage. Donovan had these qualities in abundance.

Donovan is rightfully remembered as one of the architects of the national security state. He was a great deal more. As warrior, lawyer, and statesman, he was emblematic of another time, perchance a more romantic era. Donovan, with all his élan, may seem passe. America needed Wild Bill then. America needs men like him now.

1. Anthony Cave Brown, *The Last Hero*, 833 (1st ed. 1982).
2. Richard Dunlop, *America's Master Spy*, 106, 89, 108, 506 (1st ed. (1982).
3. Congressional Medal of Honor Society, William Joseph "Wild Bill" Donovan", at https://www.cmohs.org.
4. Hoover's opponent was Al Smith, the first Catholic to run for president.
5. Douglas Waller, *Wild Bill Donovan*, 55 (1st ed. 2011).
6. Dunlop, *supra*, 4.
7. Both men were members of the Class of 1907. However, FDR dropped out before completing the course of study after he passed the NYS Bar while Donovan graduated with the class.
8. Dunlop, *supra*, 42.
9. *"Wild Bill": The Father of American Intelligence* (July 24, 2019) at https://www.ivyleague.com.
10. William Stevenson, *A Man Called Intrepid*, xiii (1st ed. 1976).
11. *The True Intrepid: Sir William Stephenson* (May 28, 2004) at https://commanderbond.net.
12. Cave Brown, *supra*, 165.
13. Waller, *supra*, 85.
14. Corey Ford, *Donovan of OSS*, 176 (1st ed. 1970).
15. Dunlop, *supra*, 296.
16. Cave Brown, *supra*, 437.
17. Waller, *supra*, 256.
18. Cave Brown, *supra*, 359.
19. *Id.* 775.
20. Dunlop, supra, 472.

Rudy Carmenaty is Deputy Commissioner of the Nassau County Department of Social Services. He is the President-Elect of the Long Island Hispanic Bar Association. Rudy can be reached at Rudolph.Carmenaty@hhsnassaucountyny.us.

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.

Markotsis & Lieberman, P.C., a general practice firm in Hicksville, is pleased to announce that **George Neofitos** has been promoted to Partner.

Rivkin Radler is pleased to share that **Michael Antongiovanni** has joined the Commercial Litigation, Construction, Real Estate, Zoning & Land Use, and Trusts & Estates groups in the firm's Uniondale office as a Partner.

Ronald Fatoullah, Chair of the Elder Law Practice Group at Meltzer, Lippe, Goldstein & Breitstone, LLP., and Partner to the firm's Trusts & Estates Practice Group, presented a workshop entitled "Preparing for Long-term care and Protecting Assets as Women Age" at the annual Women's Diversity Network Summit on April 26. In addition, the firm of Meltzer, Lippe, Goldstein & Breitsone, LLP, along with friends and family, are completing our 3rd Annual 5 K Walk/Run on Saturday, May 3, this year supporting the Leukemia & Lymphoma Society.

Harris Beach Murtha's Long Island office celebrated its 15-year anniversary at a well-attended reception on April 24 at The Lannin in Eisenhower Park in East Meadow. More than 200 guests—including elected officials, firm clients and Harris Beach Murtha leaders and attorneys—celebrated the office's presence and progress since it opened in 2010 and the firm's ongoing commitment to growth in the Long Island community.

Futterman Lanza, LLP, one of Long Island's fastest-growing elder law and estate planning law firms, has expanded into Melville through a merger with Atlas Law Group, a boutique firm in the same practice areas. Futterman Lanza recently celebrated its twenty-first anniversary, and in addition to its new Melville office, has existing offices in Smithtown, Bay Shore, and Garden City, with 17 attorneys now servicing the Long Island community.

Stephen Gassman is the recipient of the Suffolk Academy of Law Dorothy Paine Ceparano Program Leadership Award, the highest recognition for outstanding academic achievement, leadership and service to the Suffolk County Bar Association and the Suffolk Academy of Law. The award will be recognized at their Annual Installation Dinner on June 4.

On April 16, **Robert S. Barnett**, Partner of Capell Barnett Matalon & Schoenfeld LLP, presented *IRC 754 Elections for Tax Counsel* for Strafford. Robert's upcoming lectures include a session on elder care and estate planning at the New York State Society of CPAs annual Estate Planning Conference on May 22 as well as a presentation for the NYC Lawyers Association on June 4 titled "Ten Insurance Trust Failures." Partner **Yvonne R. Cort** recently presented for the Network of Allied Professionals, Inc., on the topics of IRS and NYS filing and collection issues and was named to the list of Top Women Lawyers for 2025 by Super Lawyers.

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The NCBA is grateful for these individuals who strongly value the NCBA's mission and its contributions to the legal profession.

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Your contribution enables the NCBA to continue its legacy for years to come, and demonstrates a commitment to the NCBA and dedication to the legal profession.

To become a Sustaining Member, call the NCBA Membership Office at (516) 747-4070.

Mock Trial

The final round of the Nassau County Championship of the 2025 New York State High School Mock Trial Tournament was held on April 9, 2025. The Wheatley School prevailed over second-place finisher W.T. Clarke High School and 44 other high schools to win the tournament. The Wheatley School will represent Nassau County in the upcoming state finals to be held from May 18 to 20 in Albany. The Nassau Academy of Law sincerely thanks NCBA Past President Peter H. Levy and Hon. Lawrence M. Schaffer who chaired this year's competition, the attorney advisors to the 46 teams, and the dozens of NCBA volunteer who judged the competition. Congratulations to The Wheatley School, W.T. Clarke High School, and the hundreds of exceptional student advocates who participated in the mock trial tournament this year!

Photos by Hector Herrera

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Criminal Court Law & Procedure	Christopher M. Casa and Brian J. Griffin
Cyber Law	Thomas J. Foley and Nicholas G. Himonidis
Defendant's Personal Injury	Jon E. Newman
District Court	Bradley D. Schnur
Diversity & Inclusion	Hon. Maxine Broderick and Hon. Linda Mejias-Glover
Education Law	Liza K. Blaszcyk and Douglas E. Libby
Elder Law, Social Services & Health Advocacy	Lisa R. Valente and Christina Lamm
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Medical Legal	Bruce M. Cohn
Mental Health Law	Jamie A. Rosen
Municipal Law and Land Use	Elisabetta Coschignano
New Lawyers	Byron Chou and Michael A. Berger
Nominating	Rosalia Baiamonte
Paralegal	
Plaintiff's Personal Injury	Giulia R. Marino
Publications	Cynthia A. Augello
Real Property Law	Suzanne Player
Senior Attorneys	Stanley P. Amelkin
Sports, Entertainment & Media Law	Ross L. Schiller
Supreme Court	Clifford S. Robert
Surrogate's Court Estates & Trusts	Michael Calcagni and Edward D. Baker
Veterans & Military	Gary Port
Women In the Law	Melissa P. Corrado and Ariel E. Ronneburger
Workers' Compensation	Craig J. Tortora and Justin B. Lieberman

WEDNESDAY, MAY 7
Real Property Law
12:30 p.m.

THURSDAY, MAY 8
Labor & Employment
5:30 p.m.

The Committee will present the Larry Solotoff Award to Paul F. Millus and Jonathan D. Farrell at its annual dinner.

Diversity & Inclusion
5:30 p.m.

Law Student
5:30 p.m.

TUESDAY, MAY 13
Grievance Committee
12:30 p.m.

WEDNESDAY, MAY 14
Matrimonial Law
5:30 p.m.

THURSDAY, MAY 15
Association Membership
12:30 p.m.

Elder Law, Social Services & Health Advocacy
Mental Health Law
12:30 p.m.

Workers' Compensation
5:30 p.m.

TUESDAY, MAY 20
Family Court Law, Procedure & Adoption
12:30 p.m.

The committee will honor Adam H. Moser with the 2025 Feuerlicht Manning Award at its annual spring luncheon.

WEDNESDAY, MAY 21
Ethics
5:30 p.m.
Insurance Law
6:30 p.m.

Diversity & Inclusion
5:30 p.m.

Surrogate's Court Estates & Trusts
5:30 p.m.

THURSDAY, MAY 22
Lawyer Assistance Program
12:30 p.m.

WEDNESDAY, MAY 28
General, Solo & Small Law Practice Management
12:30 p.m.

Business Law, Tax & Accounting
12:30 p.m.

FRIDAY, MAY 30
Appellate Practice
12:30 p.m.

TUESDAY, JUNE 3
Women in the Law
12:30 p.m.

WEDNESDAY, JUNE 4
Real Property Law
12:30 p.m.

THURSDAY, JUNE 5
Hospital & Health Law
8:30 a.m.

Community Relations & Public Education
12:45 p.m.

Publications
12:45 p.m.

Elder Law
Tri-County Dinner
Verdi's at Westbury
5:30 p.m.

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