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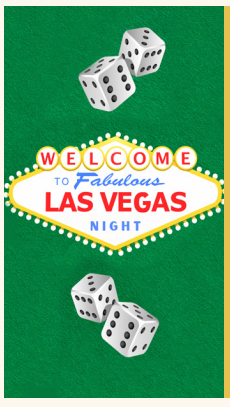

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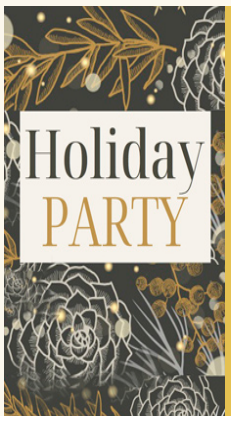

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Opening Access to Justice: NCBA Hosts Free Legal Clinic for County Residents

On Tuesday, October 21, the NCBA Access to Justice Committee hosted its annual Pro Bono Open House Legal Clinic at Domus. Attendees were able to walk in or make appointments ahead of time to speak with an attorney for free in the area of law they requested.

Over 80 volunteer lawyers, law students, recent law graduates, and paralegals donated their time to provide more than 115 consultations to attendees at the event. These consultations typically involve a "big picture" discussion of the attendee's legal issue, information regarding the types of resolutions available to them, and typically a referral to the Nassau County Bar Association Lawyer Referral Information Service or another legal service provider.

"This Open House of 2025 was the biggest and most successful pro bono event I have attended to date as a volunteer attorney for the NCBA," says bankruptcy and real estate law attorney Donna M. Fiorelli. "What an absolute privilege and honor it is to have the opportunity to provide helpful information to those in need.

"Specifically, at this event, I was able to consult with two homeowners facing a tax lien foreclosure and we discussed the court procedure as well as options to resolve the debt," continued Fiorelli. "These same individuals also had a matrimonial issue, and I was able to refer them to another volunteer attorney specializing in matrimonial law that same day! What a productive event for all!"

The Open House also served as an information and resource fair for residents. Nassau County agencies—including the Office of Consumer Affairs, the Office of the Crime Victim Advocate, and Nassau's Public Libraries—had representatives on hand, as well as Education Debt Consumer Assistance Program (EDCAP) and attorneys and support staff from New York Legal Assistance Group (NYLAG) and Legal Services of Long Island, to provide literature, information and an initial intake for their services.

The next Open House will be held on June 11, 2026, returning the event to its pre-COVID semiannual format. Madeline Mullane, Esq., NCBA Director of Pro Bono Attorney Activities, played a significant role in the return of this semiannual event.

"When I assumed the role of Director of Pro Bono Activities in early 2022, the Open House was the big event that needed to be brought back to life," says Mullane. "Many valiant efforts were made during COVID to serve the community and answer their questions, but being in person lends itself to a more open-ended environment where folks can not only have their legal question answered but also receive information and further resources that may significantly benefit them.

"The goal of the Access to Justice Committee is to bring the accessibility of the legal profession and courts to the public," added Mullane. "The Open House is an extension of that format and ever since reestablishing the event in person in 2022, one of the goals of the Committee and myself was to figure out how to incorporate a second Open House clinic every year. We are proud of how many clients we have served in our efforts so far and look forward to finding new ways to bring access to justice to the Nassau community."

In addition to her role overseeing the Bar's pro bono efforts, Mullane is also the Director of the NCBA's Mortgage Foreclosure Assistance Project. She regularly lectures on foreclosure and related areas through the Nassau Academy of Law, the Nassau County Supreme Court's Equal Justice in the Courts Committee, and the Homeowner's Protection Program (HOPP) network trainings.

The Mortgage Foreclosure Assistance Project is the only organization throughout the state that provides both limited direct legal representation pro bono clinics, and advice and counsel for any individual throughout the foreclosure process, from pre-default on their mortgage to post-eviction after a foreclosure sale. Due to the broad scope of the Project, Mullane was able to scale the Attorney General's grant to almost double from 2022 to 2024, facilitating the hiring of Settlement Conference Coordinator Samantha Flores in September 2024. Flores's experience in creditors' rights litigation and constituent advocacy as an attorney for local government made her a perfect complement for the Project's needs and growth.

See OPENING ACCESS TO JUSTICE, Page 11

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From the President

James P. Joseph

Thanksgiving has always been my favorite holiday. Our children are home, we host the dinner, and are with family and friends for the duration of the holiday weekend. In our household, Thanksgiving starts well before the turkey goes in the oven, well before the food shopping begins, and perhaps, dare I say, even before the turkey meets her demise. Along with the families of former Academy Dean Thomas Foley and his law partner, Brian Griffin, we host more than 2,000 runners at the Massapequa Turkey Trot, a race we founded in 2010, the proceeds of which go to charity. Without question, the season is exhausting, but it is a rewarding and thoroughly enjoyable week.

As Brother David Steindl-Rast wrote, "In daily life, we must see that it is not happiness that makes us grateful but gratefulness that makes us happy."

That sentiment resonates deeply with me and with the spirit of this Bar Association. Fortunately, the NCBA provides countless opportunities to remember how much we, as lawyers, have to be grateful for.

This past month, our Access to Justice Committee held its annual Pro Bono Open House. With the help of several dozen volunteers, we were able to provide free legal guidance to more than one hundred families in our community. The feedback from those served by our volunteers was a powerful reminder of how fortunate we are as lawyers to be able to provide legal counsel to those in need.

WE CARE's annual Thanksgiving Basket project, through which 200 local families receive boxed holiday dinners, is one of the many ways that WE CARE allows us to demonstrate to the public who we are as a profession. If you would like to support this effort, please see page 14 in this issue of *Nassau Lawyer*.

Each week, there are countless reminders that we are not merely colleagues; we are caring professionals who show up, contribute, and create a powerful and positive community. One recent Wednesday, for example, I attended the lunchtime Nassau Academy of Law Dean's Hour program, *Implications of Technology and Social Media for Domestic Violence and Family Court Cases*, moderated by Past Dean Mili Makhijani and featuring a speaker from Our Family Wizard. It was an eye-opening and unsettling program—revealing how easily technology can be used to track and manipulate others—but also a testament to how our Academy delivers education that is as timely as it is important.

That same evening, Domus was packed with the Asian American Attorney Section's Mahjongg lesson; the Surrogate's Court Estates and Trusts Committee's annual Game Night (thank you Co-Chairs Maria Johnson and Cheryl Katz for the invite—I'm so glad I was able to attend, albeit briefly); the monthly meeting of the Diversity & Inclusion Committee; and the Family Law Inns of Court meeting in the Great Hall. (As every room was taken, the New Lawyers and Law Student Committees' Autumn Outing was held off site. The energy at each of these events was palpable.

Warren Buffett once observed, "If you're in the luckiest one percent of humanity, you owe it to the rest of humanity to think about the other ninety-nine percent."

I thought of that quote recently while attending the Clio Conference, where I had the privilege of hearing Jon-Adrian "JJ" Velazquez speak. JJ spent 24 years in Sing Sing Correctional Facility for a crime he did not commit. Even after DNA evidence confirmed his innocence, years passed before his sentence was commuted and later finally exonerated. During his keynote, he shared that at his lowest point—when despair nearly overcame him—he found solace and purpose in Viktor Frankl's *Man's Search for Meaning*. Frankl's insight—that we retain freedom in how we respond to circumstances—gave JJ the strength to endure.

JJ's message was clear: those of us fortunate enough to serve as lawyers have both a privilege and a responsibility—to use our skills to help others find justice, meaning, and hope. I am proud that one of our own NCBA members, Oscar Michelen, is part of JJ's legal team and now devotes his practice largely to wrongful-conviction work. It is a reminder that our reach as a bar community extends far beyond Nassau County—and that gratitude and service are deeply intertwined.

As the NCBA Holiday Party fast approaches, I would be remiss not to express one more note of gratitude: that my role as the teller of the "Tale of Wassail" is complete. For those unfamiliar, this long-standing tradition requires the President-Elect to deliver the Tale of Wassail—an annual rite of passage that only past presidents and those with no interest in bar leadership describe as a "fun" and "light" hazing.

Last year, in what many, I must humbly admit, said was by far the best Tale to date, I shared that the long-lost "true tale" was finally discovered deep within Domus. Unfortunately, as Executive Director Liz Post approached to hand me the tale, the Grinch, who had, unbeknownst to any of us, been lying in wait in the kitchen, raced out, wrestled the tome from Liz, and locked it inside the time capsule from our 125th Anniversary Celebration. Whether Judge Broderick, this year's President-Elect, managed to retrieve it—or somehow uncovered another copy of the one true tale—remains to be seen, but knowing her creativity and competitiveness, I have no doubt the telling will be exceptional! I look forward to sharing the evening with many of you.

As this season of gratitude begins, I extend my sincere thanks to our members, staff, and supporters for the privilege of leading this extraordinary organization. Every day, I am reminded that our strength lies not in any one of us but in all of us—together.

I wish each of you and your families a happy, healthy, and meaningful Thanksgiving.

FOCUS: ARTIFICIAL INTELLIGENCE

Hallucinated Citations, Real Consequences: What Lawyers Should Know About GenAI

Jessica M. Baquet and Dylan Cruthers

Generative artificial intelligence (GenAI) promises to simplify all kinds of tasks, including some that lawyers spend years learning to perform. Attorneys are increasingly using this technology for legal research and writing and to summarize or generate evidence. There are inherent risks in doing so, as highlighted by recent judicial decisions and proposed legislation and rulemaking.

GenAI in the Legal Profession

Artificial intelligence "is commonly understood to mean the capability of computer systems or algorithms to imitate intelligent human behavior."[1]

GenAI is a particular type of artificial intelligence involving a tool "that is capable of generating new content (such as images or text) in response to a submitted prompt (such as a query) by learning from a large reference database of examples."[2]

Perhaps the GenAI tool with the most name recognition is ChatGPT. A user can ask ChatGPT to do things like explain a topic or event, draft or revise a letter, create a schedule, or summarize technical information in words that are more easily understood. A lawyer might ask ChatGPT to formulate a legal argument based on facts included in a prompt, or to find cases that stand for a particular proposition.

As some have learned the hard way, the output generated by GenAI is not always accurate. This has resulted in some lawyers or pro se litigants citing "hallucinations" in court filings, which "take the form of fake cases, misleading quotes, self-serving interpretations of actual authority, or outright made-up legal principles."[3] Why does GenAI produce hallucinations? Because these tools are "indifferent to the truth" of their responses and instead focused on predicting what the user wants to hear based on patterns the tool detects in the prompt.[4] This makes relying on GenAI for legal research and writing a perilous concept.

Developing Consequences

Over the last two years, courts across the country have increasingly been confronted with filings containing hallucinations. The filers have been met with consequences of varying severity depending on the circumstances.

The most sobering example to date comes from a decision of the U.S. District Court for the Northern District of Alabama in *Johnson v. Dunn*. There, incarcerated plaintiff Frankie Johnson accused attorneys for the Alabama Department of Corrections of fabricating citations in two motions.[5] The attorneys ultimately admitted that five citations, spanning two briefs, were hallucinations produced by ChatGPT. Some included real case names or real index numbers, but they referred to irrelevant decisions that did not support the propositions for which they were cited.

The court carefully examined each attorney's role in deciding who should be sanctioned. The court spared one lawyer whose name appeared in the signature block but who had not drafted, reviewed, or supervised the filings. Another associate was likewise excused because the record showed he had no supervisory responsibility and did not authorize the use of his signature. But three attorneys were sanctioned: one for creating the AI-generated portions of the briefs, one for signing and filing the motions, and one for allowing his name on the signature block without verifying the contents of the motion.

The court emphasized that monetary fines and public reprimands, which are the typical sanctions for the use of hallucinated case citations, have proven ineffective at deterring their continued use. The court instead ordered a public reprimand, referral to disciplinary authorities, and disqualification of the attorneys from the case. The sanctioned lawyers were further ordered to provide a copy of the sanctions order "to their clients, opposing counsel, and the presiding judge in every pending state or federal case in which they are counsel of record"[6] and "to every attorney in their law firm."[7] The order is especially punishing because it carries reputational consequences that touch every aspect of the lawyers' active practice.

Other courts have taken a firm but less severe approach, most notably the U.S. District Court for the Southern District of New York in *Mata v. Avianca, Inc.* In *Mata*, one of the first widely cited decisions involving GenAI, attorneys submitted a brief containing nonexistent cases with fabricated quotes and citations generated by ChatGPT.[8] In deciding to impose monetary sanctions, the court emphasized that counsel "acted with subjective bad faith in violating Rule 11" by, among other things, "not reading a single case cited in" an affirmation,

providing "conflicting accounts about their queries to ChatGPT as to whether" a case cited was real, and making an "untruthful assertion that ChatGPT was merely a 'supplement' to [their] research" when in fact it "was the only source of [their] substantive arguments."[9] The court imposed a $5,000 penalty and required the lawyers to notify both their client and the judges who were falsely named as authors of the fictitious cases.[10]

Where an attorney's conduct does not reflect bad faith, some courts have declined to impose monetary sanctions. In *Hall v. Academy Charter School*, plaintiff's counsel filed with the U.S. District Court for the Eastern District of New York an opposition brief that cited three hallucinated cases.[11] Magistrate Judge Wicks acknowledged the violation of Rule 11 but concluded that monetary sanctions were unwarranted because, unlike in *Mata*, the circumstances did "not support any finding of bad faith."[12] The court credited counsel's explanation that her failure to check the citations stemmed from the sudden and unexpected death of her spouse, which had impaired her ability to focus on her practice. Counsel also withdrew certain claims, admitted full responsibility, and assured the court that the lapse would not recur. Given these circumstances, the court limited sanctions to the admonishment of counsel and a direction that counsel to serve a copy of the order on her client.[13]

Courts have also shown leniency to pro se litigants. In *Dukuray v. Experian Information Solutions*, the pro se plaintiff included "several nonexistent judicial opinions with false reporter numbers."[14] The U.S. District Court for the Southern District of New York did "not believe any sanctions would be appropriate," recognizing that pro se litigants may not be "aware of the risk that ChatGPT and similar AI programs are capable of generating fake case citations" and also noting that "it may be more difficult for a pro se litigant without access to computerized legal databases such as Westlaw or LEXIS to check the veracity of case citations generated by AI programs."[15] The court nonetheless warned that any further filings with citations to nonexistent cases may result in sanctions as severe as "the case being dismissed."[16]

Regulation on the Horizon

There is not yet a statute or uniform rule in New York that governs the use of GenAI in judicial proceedings, though some judges have addressed the issue in their individual rules. For example, Supreme Court Justice Aaron D. Maslow requires all motion submissions to include a certification stating either that no GenAI was used in preparing the submission, or that GenAI was used but all text, citations, analyses and quotations were reviewed for accuracy and approved by an attorney.[17] If GenAI was used, the attorney must also identify the program used, the documents containing material generated by GenAI, and the specific parts of the submissions drafted by a GenAI tool.[18]

Suffolk County Surrogate Vincent J. Messina, Jr. recently announced a similar rule and published a form certification for use by counsel and unrepresented parties. In some respects, Surrogate Messina's requirements go even further, requiring the certifying attorney or pro se litigant to "preserve, for at least one year after final disposition of the underlying matter, the prompts given to the AI system and any output relied upon, subject to privilege and work-product protection." The rule also states that the submission of a hallucinated citation to the Surrogate's Court will "constitute prima facia frivolous conduct under 22 N.Y.C.R.R. § 130-1.1."

A less onerous rule concerning GenAI may soon come to the Commercial Division based on the recommendation of the Commercial Division Advisory Council.[19] Proposed Commercial Division Rule 6(e) does not require litigants or attorneys to disclose the use of GenAI but provides that, consistent with Part 130 of the Rules of the Chief Administrator, the act of filing a brief, letter or memorandum of law automatically "certif[ies] the accuracy and reliability" of any material prepared using GenAI.[20] In short, the proposed rule does not impose new obligations but calls attention to existing ones and the way they relate to the use of this new technology.

In the background, statewide legislation is being considered. Senate Bill S2698, which was introduced in January 2025, proposes to amend the New York Civil Practice Law and Rules to require anyone filing a document prepared using GenAI to "attach to the filing a separate affidavit disclosing such use and certifying that a human being has reviewed the source material and verified that the artificially generated content is accurate."[21] The bill is currently before the Senate Rules Committee.

Conclusion

It is easy to see why GenAI is attractive for busy professionals. But, as with any technology in its infancy, GenAI is far from perfect, and attorneys should not expect otherwise. Firms should consider prohibiting the use of GenAI unless they can provide attorneys with sufficient education about its proper use and the risks involved.

For those firms that allow it, the lesson is straightforward: every lawyer whose name appears on a document, especially those who draft it, sign it or supervise its preparation, must verify the citations and analysis submitted to the court. Tools like Westlaw's Quick Check make it easy to compare quoted language against actual decisions, a simple step that can help catch hallucinations. If one nonetheless slips through, diligence may weigh against a finding of bad faith. And, once discovered, candor and corrective action are critical in determining the severity of any sanction.

Lawyers should also recognize that hallucinations are only the tip of the iceberg when it comes to the pitfalls of using GenAI. The New York State Bar Association's Task Force on Artificial Intelligence has identified several other concerns that will likely come to the fore in the future.[22] As an example, have you yet had a client send you GenAI's assessment of their case or the advice you gave? You eventually will, and judges may soon be asked to consider whether the attorney-client or work product privileges are waived by the use of GenAI since the content of a user's prompts may be added to a GenAI tool's reference database and used to "train" the tool.

One thing is for certain—while GenAI might promise to make some aspects of the profession simpler, it will also create new work for litigators and the courts as the law hurries to catch up with innovation.

1. *Artificial Intelligence and the New York State Judiciary: A Preliminary Path*, New York City Bar Association (June 2024) *available at* https://www.nycbar.org/wp-content/uploads/2024/06/20221290_AI_NYS_Judiciary.pdf (last visited Oct. 7, 2025).
2. *Id.*
3. Brandon Fierro, *Short circuit court: AI hallucinations in legal filings and how to avoid making headlines*, Reuters (Aug. 4, 2025) *available at* https://www.reuters.com/legal/legalindustry/short-circuit-court-ai-hallucinations-legal-filings-how-avoid-making-headlines-2025-08-04/ (last visited Oct. 7, 2025).
4. *Id.*
5. *Johnson v. Dunn*, No. 2:21-CV-1701-AMM, 2025 WL 2086116 (N.D. Ala. July 23, 2025).
6. *Id.* at *21.
7. *Id.*
8. *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443, 448 (S.D.N.Y. 2023).
9. *Id.* at 464-65.
10. *Id.* at 466.
11. *Hall v. Acad.* Charter Sch., No. 2:24-CV-08630-JMW, 2025 WL 2256653, at *2 (E.D.N.Y. Aug. 7, 2025).
12. *Id.* at *6.
13. *Id.*
14. *Dukuray v. Experian Info. Sols.*, No. 23 CIV. 9043 (AT) (GS), 2024 WL 3812259, at *11 (S.D.N.Y. July 26, 2024).
15. *Id.*
16. *Id.*
17. Hon. Aaron D. Maslow Part Rules *available at* https://ww2.nycourts.gov/courts/2jd/kings/civil/MaslowRules.shtml (last visited Oct. 8, 2025).
18. *Id.*
19. Memorandum from Commercial Division Advisory Council to Administrative Board of the Courts (May 15, 2025) *available at* https://www.nycourts.gov/LegacyPDFS/rules/comments/pdf/CommercialDivision-ArtificialIntelligence-061125.pdf (last visited Oct. 8, 2025).
20. *Id.*
21. https://www.nysenate.gov/legislation/bills/2025/S2698.
22. Report and Recommendations of the New York State Bar Association Task Force on Artificial Intelligence, New York State Bar Association, (April 2024) *available at* https://fingfx.thomsonreuters.com/gfx/legaldocs/znpnkgbowvl/2024-April-Report-and-Recommendations-of-the-Task-Force-on-Artificial-Intelligence.pdf (last visited Oct. 7, 2025).

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FOCUS: LAW AND AMERICAN CULTURE

Roberto Clemente: A Legend Defined by Humanity, Not Duty

Rasheim Donaldson

Humanitarian. Athlete. Legend. Roberto Clemente will be remembered as all of these and more, thanks to his charitable endeavors, cultural influence, and extraordinary talent on the baseball field. Born in Puerto Rico, Clemente moved to the United States mainland in 1954 and rose to prominence in Major League Baseball (MLB) at a time when few Latino players were in the league.[1] Though celebrated as a hero today, Clemente's journey to success was far from easy.[2] Despite his remarkable athletic achievements, he experienced discrimination due to his Spanish accent and brown skin.[3] This article reflects on Clemente's extraordinary accomplishments and delves into the legal controversy that emerged from the plane crash that ended his life far too soon.

Roberto Clemente Walker was born on August 18, 1934, in Carolina, Puerto Rico, as the youngest of seven children.[4] As a boy, he often helped his father harvest sugarcane, balancing work with his growing passion for sports.[5] While Clemente excelled in track and field, his true love was baseball.[6] He began playing in Puerto Rico's amateur leagues at a young age and, by 18, had advanced to the professional ranks in the Puerto Rican Professional Baseball League.[7]

Clemente's MLB journey began in February 1954 when he signed with the Brooklyn Dodgers and played for their minor league affiliate.[8] Later that year, he was drafted by the Pittsburgh Pirates, making his MLB debut with the team in April 1955.[9] Clemente went on to play his entire 18-season major league career with the Pirates, remaining with the team until his final season in 1972.[10]

Despite several losing seasons in the 1950s, the Pirates triumphed over the New York Yankees in the 1960 World Series.[11] Even with his success in MLB, Clemente remained deeply connected to his roots, often playing and managing in the Puerto Rican Professional Baseball League during the MLB offseason.[12] Even at the height of his baseball career, he found time to serve his country, enlisting in the U.S. Marine Corps Reserve and remaining a private first class until late 1964.[13]

By the early 1960s, Clemente had become an All-Star and emerged as one of the league's premier players.[14] He led the Pirates to another World Series championship in 1971, earning the title of Most Valuable Player.[15] Over his career, he cemented his legacy as one of the greatest players in MLB history, achieving the milestone of 3,000 career hits before his untimely death.[16] Though his accomplishments were extraordinary, some believe Clemente's brilliance in Pittsburgh was often overshadowed by stars in larger markets.[17]

Clemente received numerous accolades throughout his career, including the National League MVP Award in 1966, four National League batting titles, 15 All-Star selections, two World Series championships (1960, 1971), and the 1971 World Series MVP honor.[18] In 1973, he made history as the first Latino player to be inducted (posthumously) into the Baseball Hall of Fame.[19]

Clemente's rise to prominence holds profound historical and cultural significance. He joined the Pittsburgh Pirates just one year after the team's first African American player and seven years after Jackie Robinson broke Major League Baseball's "color line," ending racial segregation in the sport by debuting with the Brooklyn Dodgers.[20]

Clemente was not spared from the racism that pervaded America, yet he steadfastly refused to accept it.[21] When he arrived on the U.S. mainland for spring training, he encountered the harsh realities of Jim Crow segregation in the South, where he was barred from eating at the same restaurants or participating in the same activities as his white teammates.[22] Clemente deeply admired Dr. Martin Luther King Jr. for his leadership in the fight against segregation and civil rights injustices.[23] Like Dr. King, Clemente courageously spoke out against injustice, even when doing so was difficult and unpopular.[24]

Clemente resented the fact that Latino athletes, like their African American counterparts, received second-class treatment.[25] Criticism aimed at Clemente was often harsher and more unforgiving than anything his white counterparts would have endured.[26] Sportswriters often ridiculed his accent, mocking his speech by quoting him phonetically in demeaning ways.[27] They even referred to him as "Bob" or "Bobby," despite his clear preference for his given name, Roberto.[28] Throughout these challenges, he remained unapologetically proud of his identity and Puerto Rican heritage.[29]

Beyond baseball, Clemente was deeply committed to charitable work, dedicating much of his time to helping underserved communities.[30] He once expressed his guiding philosophy: "If you have a chance to accomplish something that will make things better for people coming behind you, and you don't do that, you are wasting your time on this earth."[31] Demonstrating this commitment, he invested in building a sports facility in Puerto Rico to provide opportunities and support for disadvantaged youth.[32]

Clemente worked tirelessly to provide emergency relief to the victims in the wake of a devastating earthquake in Managua, Nicaragua, on December 23, 1972.[33] Although he sent several shipments of aid by airplane, he was disheartened to learn that the supplies were not reaching those in need.[34] Determined to ensure the relief reached the victims directly, Clemente decided to charter a flight and personally deliver the packages.[35]

Unbeknownst to Clemente, the plane he chartered had been in an accident and sustained damage earlier in the month.[36] The incident had prompted a Federal Aviation Administration (FAA) investigation, and although the agency cleared the aircraft for service after repairs, Clemente's flight departed without a certified copilot or flight engineer on board—and was loaded beyond its permissible takeoff weight.[37] Further, an FAA regional director had an order in effect in Puerto Rico requiring heightened monitoring of large aircrafts—a response to reports that some were flying in violation of airworthiness regulations.[38] The order required FAA flight inspections concerning, among other things, aircraft airworthiness, weight and balance, and pilot qualifications.[39]

Tragically, on December 31, 1972, shortly after takeoff, the plane crashed into the Atlantic Ocean off the coast of Puerto Rico.[40] There were no survivors, and while parts of the wreckage were recovered in the days and weeks that followed, Clemente's remains were never found.[41] In the aftermath, investigators discovered a series of serious safety failures surrounding the flight: the plane was overloaded, had known mechanical problems, lacked a flight engineer, and was missing a certified copilot.[42]

Beyond the existential questions raised by such a loss—why a revered figure would perish while performing a noble act—Clemente's death also sparked a complex legal battle involving the federal government.[43] Representatives of Clemente and the other victims of the crash filed wrongful death claims against the United States for the FAA's negligence under the Federal Aviation Act of 1958 and Federal Tort Claims Act in the U.S. District Court for the District of Puerto Rico.[44] The plaintiffs argued that the FAA had a duty to ensure the safety of the aircraft and its passengers and had breached that duty by failing to take appropriate action against the plane's owner before Clemente's ill-fated flight.[45]

According to the plaintiffs, the FAA could have prevented the disaster by taking several critical measures: declaring the plane unairworthy due to prior incidents; inspecting the aircraft and prohibiting its use until mechanical defects were corrected; requiring those defects to be resolved before the plane was leased; enforcing an order to inspect and review maintenance logs, which would have revealed improper weight and balance; informing passengers of the aircraft's deficiencies; and ultimately denying clearance for the flight to depart.[46] The FAA maintained that it could not be held liable because it owed no legal duty to the plane's passengers and argued that there was no direct causal link between any alleged breach of duty and the tragic crash.[47]

The District Court found the FAA liable, concluding that the agency had failed to exercise due care by violating its own mandatory order regarding the surveillance of aircraft.[48] The court found that the FAA's regional surveillance order was mandatory, not discretionary, and therefore did not fall under the "discretionary function" exception that protects the government from liability under the Federal Tort Claims Act.[49] It held that the FAA's failure to comply with its own directive contributed to the deaths of those aboard the plane.[50]

On appeal, the U.S. Court of Appeals for the First Circuit reversed the District Court's decision, holding that the FAA surveillance order issued by a regional director did not establish liability under the Federal Tort Claims Act.[51] The court disagreed with the District Court's interpretation of the statute and found the cases cited by the lower court to be unpersuasive.[52]

The First Circuit remarked that the lower court's reasoning "oversimplifies a complicated legal situation" and further acknowledged,

"We sympathize with the district court's struggles in attempting to apply the Tort Claims Act's conceptually difficult provision."[53] The First Circuit concluded that the duty created by the FAA's surveillance order required FAA employees to carry out their responsibilities in a particular manner for their employer, but that duty did not extend to the plane passengers.[54]

The First Circuit distinguished the cases cited by the District Court that involved government liability based on FAA air traffic controller negligence.[55] It emphasized three key differences: first, unlike FAA inspectors, air traffic controllers have established standards of care; second, they possess broader responsibilities to the public that go beyond FAA regulations; and third, there is a recognized public reliance on air traffic controllers to ensure air traffic safety.[56]

Relying on principles from the Restatement (Second) of Torts, the court explained that liability must be based on one of three conditions: (1) the employee's conduct increased the risk of harm; (2) the harm resulted from reliance on the inspection; or (3) there was a preexisting duty to conduct the inspection.[57] The court found that those essential conditions were not present in this case.[58]

The court reasoned that there could be no liability under similar circumstances if a private actor, and not the government, had been involved.[59] Applying a private actor analogy, the court compared the situation to a corporate employee who would not be held liable for a fire in another company's building merely for failing to inspect the building in accordance with the orders of the corporation's safety director.[60]

The appellate court acknowledged both the tragic loss and the humanitarian purpose behind the flight.[61] While recognizing the profound devastation of the incident, the court stated that the case raised policy questions more appropriately addressed by Congress and concluded that there was no judicial basis for imposing government liability under the circumstances.[62] The request to have the decision reviewed by the United States Supreme Court was denied.[63]

Clemente's untimely—and ultimately preventable—death was a profound tragedy, yet it is remembered as deeply heroic because it occurred in the pursuit of an altruistic mission. At its core, the federal litigation confronted one of the most essential questions in personal injury law—whether a defendant has a legal duty in the first place. While the controversial decision regarding whether the government had a duty to inspect an airplane resulted in a legal reversal, nothing can undo the enduring legacy of Clemente—an iconic athlete and humanitarian.

1. Stew Thornley, *Roberto Clemente*, Society For American Baseball Research, https://sabr.org/bioproj/person/roberto-clemente/#_edn50.
2. Nathalie Alonso, *Clemente continued what Robinson started*, MLB.com (December 21, 2022), https://www.mlb.com/news/roberto-clemente-day-celebration-mlb.
3. *Id.*
4. Thornley, *supra*.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. Alonso, *supra*.
19. *Id.*
20. *Id.*
21. Christopher Klein, *How Puerto Rican Baseball Icon Roberto Clemente Left a Legacy Off the Field*, History.com (October 13, 2021), https://www.history.com/news/roberto-clemente-humanitarian-accomplishments-pittsburgh-pirates.
22. *Id.*
23. Benjamin Sabin, *Roberto Clemente and Martin Luther King Jr.: In Service of Others*, Society For American Baseball Research, https://sabr.org/journal/article/roberto-clemente-and-martin-luther-king-jr-in-service-of-others.
24. *Id.*
25. Bruce Markusen, *Clemente Overcame Societal Barriers en route to Superstardom*, National Baseball Hall of Fame https://baseballhall.org/discover/baseball-history/clemente-overcame-societal-barriers-en-route-to-superstardom.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. Klein, *supra*.
31. Sabin, *supra*.
32. Klein, *supra*.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Clemente v. United States*, 422 F. Supp. 564, 565-569 (1976), *rehearing denied*, 426 F. Supp. 1 (D.P.R), *rev'd* 567 F.2d 1140 (1st Circ. 1977), *cert. denied*, 435 U.S. 1006 (1978).
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 568.
46. *Id.*
47. *Id.* at 569.
48. *Id.* at 574-577.
49. *Id.*
50. *Id.*
51. *Clemente v. United States*, 567 F.2d 1140 (1st Circ. 1977), *cert. denied*, 435 U.S. 1006 (1978).
52. *Id.* at 1144-1147.
53. *Id.* at 1144.
54. *Id.* at 1145-1147.
55. *Id.* at 1146-1149.
56. *Id.*
57. *Id.* at 1145.
58. *Id.* at 1145-1150.
59. *Id.* at 1145.
60. *Id.*
61. *Id.* at 1150-1151.
62. *Id.*
63. *Id.*

Rasheim Donaldson is a personal injury attorney at Grey & Grey, PLLC in Farmingdale. He is Vice Chair of the NCBA Plaintiff's Personal Injury and Diversity & Inclusion Committees. He can be reached at rasheim.donaldson@icloud.com.

Preparing for a Happy, Healthy 2026

Remember to call LAP for a presentation to your firm in the new year

Whether you will miss it or cannot wait to see it go, 2025 is nearly over.
As you navigate the gauntlet of holidays and year-end wrap-ups, take time to revel in the fact that there is a brand-new year waiting at the end of it! While there will always be things we cannot anticipate, one thing we can do is prepare ourselves physically, mentally and emotionally to deal with whatever 2026 has up its sleeve.

Keep these things in mind to prepare yourself for success:

- **Set Realistic Goals.** Establish achievable and realistic long-term goals for the new year. Set yourself up for success now by breaking them down into small, manageable tasks to sustain your interest and avoid becoming overwhelmed.
- **Learn Something New.** Begin to set aside regular time, even if you can only spare a few minutes per week, for personal development. Choose an intriguing new hobby or skill to focus on and let yourself enjoy the sense of accomplishment that comes from exploring and mastering a new frontier.
- **Practice Gratitude.** Keeping a gratitude journal is a terrific way to stay focused on the positive aspects of your life. It is a constantly evolving reminder to smile that can only enhance your overall well-being and mindset.
- **Schedule Regular Health Check-ups and Screenings.** Take control of your physical health by making all your 2026 appointments before the year even starts. Early detection and prevention are essential to maintaining good health, so ease your mind and ensure that you prioritize them by having these steps already in place.
- **Nurture Your Mental Well-Being.** Recognize current stressors in your life and seek enjoyable mindfulness techniques to incorporate into your daily routine. With some early effort, you can develop them into powerful, healthy coping mechanisms to use throughout the year.

The NCBA Lawyer Assistance Program is directed by Beth Eckhardt, PhD and the Lawyer Assistance Committee is chaired by Dan Strecker, Esq. LAP is supported by funding from the NYS Office of Court Administration, the WE CARE Fund, and Nassau County Boost. *Strict confidentiality protected by Section 499 of the Judiciary Law.

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FOCUS: IMMIGRATION

Potentially Dangerous Precedent Set in Recent Board of Immigration Appeals (BIA) Decision, *Matter of H-A-A-V-*

Daniel S. Drucker

On September 11, 2025, the Board of Immigration Appeals (BIA) rendered a decision in *Matter of H-A-A-V-*, holding that an immigration judge may pretermit (deny without a merits hearing or trial) a respondent's application for asylum when the judge is convinced that the respondent did not present a prima facie claim for relief.[1] In immigration proceedings, the respondent is the party to the action who the Department of Homeland Security is trying to remove from the United States.

In *Matter of H-A-A-V-*, the respondent is a native and citizen of Peru who was subjected to removal proceedings by the Department of Homeland Security/Immigration and Customs Enforcement (DHS/ICE).[2] In defense of his removal, the respondent, through legal counsel, filed an application for Asylum and Withholding of Removal.[3] To be eligible for political asylum, a respondent must prove that they are refugees seeking protection because they have suffered persecution or fear that they will suffer persecution due to: (1) race, (2) religion, (3) nationality, (4) membership in a particular social group, or (5) political opinion.[4]

The applicant must also prove that the harm or fear of harm is motivated by one of the above-mentioned protected characteristics, and that the government in the respondent's home country will cause the harm, or that it is unwilling to protect the applicant.[5]

In *Matter of H-A-A-V-*, the basis of the respondent's claim for asylum is alleged extortion by criminal gangs in Peru.[6] At a hearing before the Immigration Judge (IJ), the Department of Homeland Security made an oral motion to pretermit the respondent's asylum application, arguing that there are no factual issues in dispute.[7] The IJ took the side of the government, concluding that there were no factual issues in dispute and held that the respondent had not established a prima facie eligibility for asylum or related relief.[8] The IJ then ordered the respondent be removed/deported to Peru without ever having an individual or merits hearing.[9]

On appeal, the respondent's attorneys argued that the IJ's decision ran contrary to existing BIA precedent, and that the IJ violated the respondent's due process of law and his statutory and regulatory rights.[10] Statutory code, supporting regulations, and case law all establish that the IJ will decide applications for relief from removal "after an evidentiary hearing to resolve factual issues in dispute, and that at the evidentiary hearing, the respondent 'shall be examined under oath on his or her behalf.'"[11]

In *Matter of Fefe*, the Board of Immigration Appeals stated that full examination of an applicant ordinarily will be necessary for reasons of fairness and to prevent applicants from being presumed credible when the claim is fabricated.[12] The BIA also stated that at a minimum, the applicant should be placed under oath and questioned as to whether the information in the written application is complete and correct.[13] The BIA's decision in *Matter of Fefe* was later affirmed in *Matter of E-F-H-L-*, which held that an applicant for asylum and withholding of removal was entitled to a hearing on the merits of his or her applications even without having established prima facie eligibility.[14]

In *Matter of H-A-A-V-*, the BIA goes out of their way to discredit the above referenced precedential decisions by stating that *Matter of Fefe* is too old and predated the enactment of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA).[15] The BIA goes on to state that in *Matter of Fefe*, the BIA relied on regulations that were no longer in effect without stating why this would affect the holding of the case.[16]

With regards to that *Matter of E-F-H-L-*, the BIA in *Matter of H-A-A-V-* states that the case is no longer good law because *Matter of E-F-H-L-* was vacated by the Attorney General in 2018.[17] A basic reading of the Attorney General's one page decision to vacate of *Matter of E-F-H-L-* clearly states that he was vacating the decision on the grounds that the Board's remand had been mooted.[18] Attorney General Sessions' vacatur said nothing of the main holding in *Matter of E-F-H-L-*, which was to ensure that the respondent is entitled to an evidentiary hearing for asylum without having to first make out a prima facie showing of eligibility for relief.[19]

Due Process Concerns

One of the most fundamental rights in our judicial system is the right to testify on one's behalf, and to cross-examine any witnesses whom an opposing party may use to discredit one's testimony.[20] This holding has major due process implications because an immigration judge can deny potential claims for political asylum, and other discretionary forms of relief such as cancellation of removal, without giving the respondent an opportunity to testify and fully present their case.

A decision like this runs counter to the fundamental rights protected by the Constitution's Fifth and Fourteenth Amendments which protects all persons within the U.S. jurisdiction, not just citizens.[21] Undocumented immigrants are entitled to fundamental procedural protections, including the opportunity to contest removal in immigration court.[22] Most recently in *Zadvydas v. Davis*, the Supreme Court confirmed that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent."[23] Undocumented immigrants can call witnesses, present documentary evidence, cross-examine government witnesses, and testify on their own behalf during individual hearings.

As a result of this ruling, it is likely that many asylum applicants who otherwise would have meritorious claims will have their applications denied, without the opportunity to argue their case. This could result in more people being sent back to their country of origin, where they may face persecution and violence. It makes it all the more essential for immigration attorneys to advocate zealously on behalf of their clients, because it may become even harder to protect clients facing dangerous circumstances in the event of removal.

Takeaways for Immigration Law Practitioners

Make sure that the I-589, Application for Political Asylum, clearly establishes a prima facie case for asylum. The client's legal basis for asylum must be clearly articulated, and state a protected ground such as race, religion, nationality, political opinion, or membership in a particular social group. Failure to do so may result in a pretermitted application.

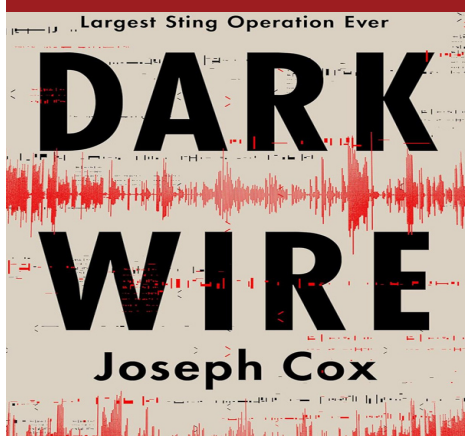
Make sure that a detailed affidavit or personal declaration from the client accompanies the asylum application. The affidavit should clearly and concisely state the client's story and connect their persecution to a protected ground.

Gather supporting evidence from the beginning of the case such as country condition reports, news articles, and possibly a psychological evaluation that will help substantiate your client's case and explain any inconsistencies.

1. *Matter of H-A-A-V-*, 29 I&N Dec. 233, 238 (BIA 2025).
2. *Id.* at 233–34.
3. *Id.* at 233.
4. See 8 U.S.C. § 1158 (2025).
5. See 8 U.S.C. § 1158 (2025).
6. 29 I&N Dec. at 233.
7. *Id.* at 233.
8. *Id.* at 234.
9. *Id.*
10. *Id.*
11. See 8 C.F.R. § 1240.11(c)(3) (2025).
12. *Matter of Fefe*, 20 I&N Dec. 116 (BIA 1989).
13. *Id.*
14. *Matter of E-F-H-L-*, 26 I&N Dec. 319 (BIA 2014).
15. *Matter of H-A-A-V-*, 29 I&N Dec. 233, 237 (BIA 2025).
16. *Id.*
17. *Matter of H-A-A-V-*, 29 I&N Dec. 233, 237 (BIA 2025); see *Matter of E-F-H-L-*, 27I&N Dec. 266 (A.G. 2018).
18. See *Matter of E-F-H-L-*, 27I&N Dec. 266 (A.G. 2018).
19. *Id.*
20. See U.S. Const. amend.V; U.S. Const. amend.VI; U.S. Const. amend. XIV.
21. See U.S. Const. amend.V; U.S. Const. amend. XIV.
22. See *Zadvydas v. Davis*, 533 U.S. 678 (2001).
23. *Id.* at 693.

Daniel S. Drucker is an Attorney at the Drucker Law Firm, where he concentrates his practice in immigration law, specializing in family-based cases, small business immigration, and college/university-based immigration. He also has a substantial litigation practice, specializing in personal injury, general litigation, criminal law, and family law. He can be contacted at ddrucker@druckerlaw.net.

FOCUS: BOOK REVIEW



Dark Wire: Where Did You Buy Your Last Cell Phone?

Brian Libert

"Experience is something you don't get until just after you need it."

—Steven Wright

That line could be the punchline for everyone in *Dark Wire*.[1] The traffickers, the brokers, the tech-savvy middlemen. All of them were sure they'd found a system law enforcement could never touch. They were wrong.

Joseph Cox's *Dark Wire* tells the true story of Operation Trojan Shield, which ran from 2018 to 2021. The FBI—working with Australian Federal Police and other international agencies—created and distributed ANOM, a fully functional encrypted messaging platform. They didn't hack into existing secure phones. They manufactured and sold their own. At its peak, over 12,000 devices were in circulation and every message sent through ANOM went directly to law enforcement.

It's nonfiction that moves like a novel: tense, detailed, and palpable in the way only real life can be.

The FBI had been chasing shadows for years. Criminal groups had learned to hide behind layers of encryption and privately manufactured phones designed to look ordinary but built for secrecy. When one major network went dark after a takedown, the FBI didn't just celebrate the win, it seized on an opportunity.

There was a vacuum in the market: thousands of high-level criminals looking for their next "secure" device. Cox details how the Bureau and a cooperating developer saw that gap and moved quickly to fill it. Together they built something new, a messaging service that looked every bit as elite and exclusive as the systems it replaced. The new system was called ANOM.

Cox walks the reader through how this came together as a real functioning business. There were resellers and distributors, support channels, and subscription plans. The FBI didn't build a tool; it built a company with officers and salesman—a full front-office. The kicker? Most of the people running the day-to-day operations didn't know who really owned it.

Phones were sold through word-of-mouth, the way any trusted underground product spreads. Criminals vouched for it, marketed it, and became its sales force. To buy one meant you were "connected, serious, in the loop." The pitch was simple: a phone for professionals who valued discretion, and it worked.

The brilliance of the operation wasn't in code or surveillance gadgets. It was in presentation. ANOM looked legitimate. It had distribution, customer support, even version updates. It behaved like a business, and it was one. It just happened to be owned by the FBI.

Cox's story is insightful and exciting. The book has rhythm, where the reader senses both sides, as if we're in a split-screen movie. On one side, law enforcement, on the other, the criminals, both with entirely different perspectives. It's like watching the slow burn of a candlewick where we know what's going to happen but watch with rapt attention anyway.

Cox traces the operation from its unlikely origins through its expansion across continents. There's the FBI, working with quiet patience; the foreign law enforcement partners, and the unwitting distributors, bragging about "their" product's growing market share. We see emails, marketing plans, even service disputes, all of it happening under the surface of an international sting.

The book is also surprisingly funny. Not in a mocking way, but in the way absurd truths can't help but be funny. The kind of dry humor that makes you smirk and shake your head. It's there when someone praises ANOM's "reliability," or when distributors argue about customer service response times on a system run by federal agents.

The core of this book, the "moral" if it has one, is, trust can be easily misplaced. Even the most protective people can be fooled given the right evidence. As lawyers, we're always told, circumstantial evidence, don't believe what you don't see—this book is more proof of what we've known all along.

ANOM wasn't built to fool a few people, it was built to look trustworthy at scale. It had the appearance of structure: invoices, contacts, updates, and even customer complaints. In the same way a startup builds confidence through polish and repetition, ANOM built credibility through familiarity.

That's what the book captures so well, how trust is often more about optics than proof. Cox doesn't lecture about the psychology of belief, but you feel it in every scene. The illusion worked because it was boring. There was no high drama, no futuristic hacking, just the idea that the criminals wanted to believe, it was convenient to believe, it "seemed right."

It's a book about technology, but not in the usual sense, because it's about human behavior dressed up in tech clothes and the theater of privacy. The operation at the center of the story could only work because people stopped asking where their security came from.

You don't have to be a technician or even know anything about encryption or policing to enjoy this book. *Dark Wire* is not highly technical and more like a case study in belief.

Cox takes a story that could have been procedural, another "true crime," and turns it into something else entirely. He writes about systems, about confidence, about how people convince themselves they're protected simply because the alternative is too unsettling.

There are legal questions about jurisdiction, evidence and constitutional law, although they are not the focus of the book. The investigation's reach raised novel evidentiary challenges: how could U.S. agents collect, store, and eventually introduce into court the messages of foreign nationals routed through servers overseas? The FBI was bound by limits on domestic surveillance, so it relied on its Australian partners, who operated under a different legal framework. That cooperation became the hinge of the case. The result was a delicate choreography of warrants, treaties, and mutual legal assistance that stretched across continents. The FBI was limited in what it could act on domestically, but it served as an intermediary facilitating hundreds of arrests.

What makes this book resonate is not the law, not the technology, it's the characters and their sincere beliefs. It's not about the law or the tech, it's about the people. The same people who prided themselves on discretion ended up subscribing to a government-run service. They weren't duped by complexity; they walked right through the front door because someone they trusted held it open.

Cox hints at this irony without rubbing it in. He writes about how people complained about bugs in the app or argued over pricing and even asked for new features! Everyday complaints made the fake company feel even more authentic. When voice messaging came out on iPhone, the ANOM customers wanted that feature on their phone and the FBI obliged, listening in real time. The sting didn't just mimic or tap into a phone network, it became one.

It's hard not to see the parallel in our own lives. We put faith in platforms, companies, and devices every day. We assume they work in our best interest. The story of *Dark Wire* doesn't accuse us of being naïve, it just reminds us how fragile that trust really is.

Dark Wire is interesting and quietly unsettling. It will make you look twice at the ordinary devices around you and it reminds us how much modern life depends on trusting what we can't see.

1. Joseph Cox, Dark Wire (2024).

Brian Libert is Bureau Chief, Legal Counsel of the Office of the Nassau County Attorney. He can be reached at blibert@nassaucountyny.gov.

Opening Access to Justice

Continued from Page 1

Now in HOPP Grant Year 14, the Project currently is staffed by Mullane and Flores, in addition to long-serving paralegal and Project Coordinator Cheryl Cardona, and bilingual paralegal and Lawyer Referral Coordinator Stephanie Rodriguez. In addition to its professional staff, the Project employs a strong network of volunteers, including practicing and retired attorneys, law students, and Pro Bono Scholars from Hofstra and Cornell Law Schools.

The Project partners with community centers, libraries, and local officials to expand outreach, and works closely with the Nassau County courts to improve resources for self-represented litigants. It has hosted clinics and public sessions on foreclosure, deed theft, and financial abuse, while also offering CLE-accredited trainings for attorneys.

The Project accepts attorney volunteers on a rolling basis; please contact sflores@nassaubar.org to become involved in volunteering. Law students, law graduates, and LLM students interested in volunteering or fulfilling their 50-hour pro bono requirement for admission should contact mmullane@nassaubar.org. The next available opportunity for these placements is spring 2026.

NASSAU ACADEMY OF LAW

November 5 (Hybrid)

Dean's Hour: Real Estate Reset—What Attorneys Need to Know About New Real Estate Broker Commission Rules

With NCBA Real Property Law Committee

12:30PM

1.0 CLE Credit in Professional Practice

NCBA Member FREE; Non-Member Attorney $35

This program will provide an update on new rules and practices changes regarding real estate broker commissions that impact how attorneys should approach real estate transactions and contracts of sale. The program will also provide a brief overview of other emerging issues in New York real estate that impact both real estate licensees and attorneys.

Guest Speaker: Patrick Fife, General Counsel, Long Island Board of REALTORS®

November 5 (In Person Only)

Chapter 13 Bankruptcy

With NCBA Bankruptcy Law Committee

Sponsored by TFS NATIONAL DATA CENTER SMART BANKRUPTCY TOOLS AND INFORMATION

5:30PM Dinner and Cocktails

6:00PM–8:00PM CLE Program

2.0 CLE Credits in Professional Practice

NCBA Member $25; Non-Member Attorney $50; Non-Attorney Legal Staff $25

Having trouble confirming your Chapter 13 plan? Looking for a way to make the process smoother? You will hear from both Chapter 13 trustees for the EDNY, the Founder and CEO of TFS Bill Pay, and the Chief Operating Officer from the National Data Center. Explore how automation, payroll-based strategies, and tools like TFS Bill Pay and the NDC can improve plan performance. Gain practical strategies to enhance debtor outcomes, increase collections, and strengthen attorney involvement.

Guest Speakers: Michael Macco and **Krista Preuss,** Chapter 13 Trustees, Eastern District of New York; **Patrick Schaefer,** TFS Bill Pay; and **David Shapiro,** National Data Center

November 6 (Hybrid)

Dean's Hour: William O. Douglas—The Westerner as Philosopher King

With NCBA Appellate Practice Committee

12:30PM

1.0 CLE Credit in Professional Practice

NCBA Member FREE; Non-Member Attorney $35

Wild Bill Douglas was a larger-than-life figure who roamed the legal and cultural landscapes of the U.S. for half a century. He carved a reputation as an ardent defender of individual rights and freedoms, yet, fittingly, he felt stifled and limited as a judge. As a champion of liberal causes and the environment, he is remembered as a Supreme Court Justice serving from 1939 until forced into retirement in 1975—setting a record for length of service.

Guest Speaker: Rudy Carmenaty, Nassau County Department of Social Services

November 17 (Hybrid)

Dean's Hour: Beware of "Routine" Plea Deals When Representing Physicians and Other Licensed Healthcare Professionals

12:30PM

1.0 CLE Credit in Professional Practice

NCBA Member FREE; Non-Member Attorney $35

This program will educate attorneys about the professional consequences that a plea deal, pending criminal charges, or conviction of a crime may have on physicians and other licensed healthcare professionals.

Guest Speakers: Nicole Emanuele and **David A. Zarett,** Weiss Zarett Brofman Sonnenklar & Levy, P.C.

November 18 (Hybrid)

Annual Criminal Law & Procedure Update 2025

With NCBA Criminal Court Law & Procedure Committee and Nassau County Assigned Counsel Defender Plan

Sponsored by PHP

1:00PM—4:00PM

2.5 CLE Credits in Professional Practice and 0.5 CLE Credit in Ethics & Professionalism

NCBA Member FREE; Non-Member Attorney $105

This annual favorite addresses developments in federal and state case law and recent statutory changes. In-person attendance strongly suggested.

Guest Speakers: Hon. Mark D. Cohen, Ret., Touro University Jacob D. Fuchsberg Law Center; **Kent Moston,** Legal Aid Society of Suffolk County; and Moderator, **Robert M. Nigro,** Nassau County Assigned Counsel Defender Plan

November 18 (Hybrid)

Estate Planning for Senior Attorneys

With NCBA Business Law, Tax & Accounting; General, Solo & Small Law Practice Management; Surrogate's Court Estates & Trusts; and Senior Attorneys Committees

PROGRAMS CALENDAR

Sponsored by GRASSI

5:30PM: Registration and Dinner
6:00PM—8:00PM: CLE Program
1.0 CLE Credit in Professional Practice and 1.0 CLE Credit in Ethics & Professionalism
NCBA Member FREE; Non-Member Attorney $75

This program consists of a moderated panel discussion for senior attorneys by experts in the areas of estate planning, estate tax planning, law practice transition and exit plans, mitigation of potential litigation, and the professional ethics implications of each of these subjects. The discussion will be in the context of hypothetical cases that have been designed to highlight many of these issues.

Moderators: **Maria L. Johnson,** Farrell Fritz, PC and **Cheryl L. Katz,** Forchelli Deegan Terrana, LLP

Guest Speakers: **Stephanie M. Alberts,** Forchelli Deegan Terrana, LLP; **Robert S. Barnett,** Capell Barnett Matalon & Schoenfeld, LLP; and **Marian C. Rice,** L'Abbate Balkan Colavita & Contini, LLP

November 20 (Hybrid)

Dean's Hour: Charter Schools on the Rise—Legal, Legislative and Developmental Impacts in New York
With NCBA Education Law, Government Relations, and Municipal Law & Land Use Committees
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

As charter schools continue to expand across Long Island and New York State, they bring with them a unique set of legal, regulatory, and developmental challenges. This program will explore the evolving legal framework surrounding charter schools, including governance structures, the state charter application process, and the implications for local public school districts. Panelists will examine the current and proposed legislative landscape impacting charter school operations and expansion in New York, as well as the complex real estate and entitlement issues involved in developing charter school facilities.

Guest Speakers: **Cliff S. Schneider,** Cohen Schneider Law P.C., and **Scott Barone,** Barone Management Inc.

November 20 (In Person Only)

CAMP Conferences: Advice from Mediators and Litigators
With NCBA Appellate Practice Committee
5:30PM—7:00PM
1.5 CLE Credits in Skills
NCBA Member FREE; Non-Member Attorney $50

CAMP (Civil Appeals Management Program) is the Second Department's initiative to settle cases at the appellate stage. CAMP conferences are also an opportunity to better understand your adversary's position and gain perspective on your own case. In this program, experienced mediators and litigators will share their tips for making the most of your CAMP conference.

Guest Speakers: **Hon. Joseph Covello, Ret.,** Mediation Solutions; **Anne D. Pope,** Civil Appeals Management Program; **Melissa A. Danowski,** Mauro Lilling Naparty LLP; and **Christopher J. DelliCarpini,** Sullivan Papain Block McManus Coffinas & Cannavo, P.C.

December 3 (Hybrid)

Dean's Hour: An Overview of 1031 Exchanges and Delaware Statutory Trusts
With NCBA Real Property Law Committee
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

This program introduces the fundamentals of a 1031 exchange, a powerful strategy that allows real estate investors to defer capital gains taxes by reinvesting in "like-kind" properties. Learn how exchanges work, what taxes apply without deferral, and the key role of the qualified intermediary in ensuring compliance. Receive an overview of Delaware Statutory Trusts (DSTs)—a popular 1031 replacement option offering passive ownership in institutional-grade real estate—and learn how DSTs can simplify exchanges, diversify holdings, and provide investors with steady income potential.

Guest Speakers: **Daniel P. Purcell,** Leeds Pond Properties, LLC, and **Jeffrey A. Kiesnoski,** Fortitude Investment Group, LLC

These programs are appropriate for newly admitted and experienced attorneys.

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

2025-2026 Sustaining Members

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

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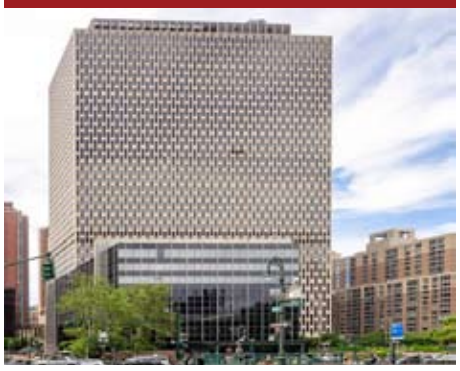
FOCUS: IMMIGRATION

The Death of Bond Hearings: How Recent Caselaw Has Crippled Due Process for Immigrants



Rebecca Medina

This year has seen the erosion of due process in immigration detention law. For decades, immigration judges have served as the gatekeepers of fairness—able to determine, case by case, whether a detained immigrant deserved release on bond while their case proceeded in immigration court. In the wake of recent statutory and precedential shifts, that safeguard has all but disappeared.

Historically, the concept of mandatory detention has applied only to a specific and limited class of immigrants convicted of certain enumerated crimes expressly listed under section 236(c) of the Immigration and Nationality Act. Some examples include those convicted of aggravated felonies or crimes involving moral turpitude. For those not subject to mandatory detention, the immigration judge was allowed to determine whether the immigrant was (1) a flight risk or (2) a danger to society, and, if not, release them on bond. Clients may have had bonds set from as low as $2,500 to as high as $20,000—of which 100% must be paid upfront to the Department of Homeland Security (DHS). However, the situation has become grim for perspective clients.

From Discretion to Mandatory Detention

On January 29, 2025, the *Laken Riley Act*[1] took effect, expanding mandatory detention to include not only those convicted of crimes, but anyone merely accused of certain offenses, such as shoplifting or theft. In practice, this caused detention of many individuals with pending criminal cases—including those with no convictions and those who have been falsely accused. The law has fundamentally transformed the presumption of innocence into an automatic detention without a right to a bond hearing by an immigration judge. Furthermore, many of these individuals are not being transported to their criminal hearing, further delaying the criminal process, and potentially causing them to sign their own deportation out of desperation before ever having a final disposition.

Adding to this immense change, the Board of Immigration Appeals (the "Board") has issued two precedents that collectively eliminate bond eligibility for vast categories of immigrants.

In *Matter of Q. Lim*,[2] the Board declared that respondents who presented themselves at the border—often seeking asylum or inspection—should be classified as "arriving aliens" and therefore ineligible for bond under the Immigration and Nationality Act. This redefinition places countless asylum seekers into indefinite detention, regardless of their danger to the community or risk of flight. This clogs the detention centers and causes further backlog in the immigration court system.

Then, in *Matter of Yajure Hurtado*,[3] the Board went even further, holding that any individual who entered the United States without inspection—through the border, no matter how long ago—is also ineligible for bond. Together, these decisions effectively trigger mandatory detention for nearly all recent entrants and many long-term residents with old entries, stripping them of bond hearings which were once a core due-process protection against arbitrary and prolonged detention.

Consequences on Individuals and Attorneys

For clients and their families, the impact has been devastating. Many clients who had already been scheduled for bond hearings—some with no criminal record whatsoever—found themselves suddenly reclassified as mandatorily detained. In detention centers across the country, judges have had to deny bond, citing lack of jurisdiction based on recent precedent. For families, this has meant weeks or months of unexpected separation, leading to financial issues when the primary breadwinner is detained, emotional and psychological trauma for the individual detained and the loved ones awaiting their release, and disruption in childcare for those who are the sole caretaker of their children.

During a time of mass detention, trust in the immigration system is eroding. The sight of ICE officers circling Hempstead causes chaos, fills immigrants with fear, and sends them into hiding. One of the greatest challenges for many immigration attorneys has been managing expectations amid a constantly shifting legal landscape. It has left attorneys addressing growing confusion and frustration from clients who retained counsel believing their loved-one was

bond-eligible, only to discover that the laws have changed overnight, completely revoking that eligibility.

Prolonged detention has left attorneys to track down their clients nationwide as the Department of Homeland Security Immigrations and Customs Enforcements moves clients away from their families to facilities in jurisdictions with a lower grant rate. It requires attorneys to work closer than ever with the client's family to find evidence in support of their case that moves quickly through the immigration system. However, the mandatory detention also poses an additional risk to the client—third country removal.

Even when a client is patient enough to endure prolonged detention, and they are successful in their case, they are facing a new risk of third-country removal. In a recent case, where a client was successfully granted protection under the Convention Against Torture after an appeal to the Board of Immigration Appeals, DHS held him for an additional 90 days, rather than releasing him, to see if they could find a third country for removal. No third country accepted him at that time, and he was released under the condition that he would check in with Enforcement and Removal Operations. However, at a recent check-in, he was informed that DHS was again seeking a third country for removal and would detain him at his next check-in in November.

At its core, due process ensures individuals facing detention have a right to a fair hearing by an immigration judge based on their individual circumstances. However, these recent changes effectively strip an immigration judge of their ability to conduct individualized assessments of each person's flight risk or danger to society, and create a blanket category to deny hearings. This has now caused many immigration attorneys to turn to federal district courts through habeas corpus petitions to challenge the legality and duration of the prolonged detention. Though there's never any guarantee of success, attorneys are seeking every avenue possible to assist their clients in being released, and remain a source of strength and guidance through the rapidly changing system, as they also try to ensure they remain updated with the daily changes.

A Moral Dilemma

Bond hearings were never about guaranteeing release—they were about guaranteeing fairness. The erosion of that basic safeguard under the *Laken Riley Act*, *Matter of Q. Li*, and *Matter of Yajure Hurtado* represents more than a legal shift; it's a moral one. Without a right to a fair hearing, we risk normalizing indefinite detention as an acceptable outcome for those merely seeking immigration relief. Some of these people have recently entered the United States seeking refuge, but some of them have well-established lives in the United States—they have their family, their home, and have paid taxes as well. Either way, they have a lot on the line in this immigration proceeding and attorneys must continue to advocate for legislative and judicial correction to preserve due process itself.

1. Pub. L. No. 119-1 (2025).
2. *Matter of Q. Li*, 29 I&N Dec. 66 (BIA 2025).
3. *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025).

Rebecca Medina is a Partner at Brill & Medina, LLP in Hempstead, where she focuses exclusively on immigration law, representing clients in complex immigration matters, including deportation defense, family petitions, and naturalization. She can be contacted at rmedina@brillandmedina.com.

FOCUS: REAL PROPERTY

What Do You Get if You Disregard 1,000+ Years of Old English Land Law?

George Frooks

In 2024, the New York Legislature enacted Real Property Law § 424, which provides for "Transfer on Death Deeds." This new law is extremely complicated; it appears to disregard established law on title by turning bargain and sale and warranty deeds into quitclaim deeds. There are far simpler solutions taken from Old English land law, whose legal history appears in unlikely places, including historical fiction and beyond, not just in real estate law.

Antecedents of Modern Real Property Law

Old English property law is the basis for current U.S. property law.[1] This old law is quite complicated, and over the centuries it changed. I took my real estate law class in 1968, and it was still based on Old English land law. The class was told almost all law schools in the United States had discontinued teaching this old law and replaced it with modern law. While states have modified this old law, portions remain.[2] I have consolidated and simplified its history to make it more understandable to today's practitioners.

After the fall of the Roman Empire, Europe entered its feudal period where at first people banded together for safety, but then one individual man, normally with an army, would become more powerful than the others. Before money and literacy existed in Europe, the more land you controlled, the wealthier and more powerful you were. Control is what a powerful person wanted. Land interest called estates was defined by control as present interest or future interest or both.

Today, we do not use these terms yet still use the principle. As an example, for a lease from A to B of a piece of land, the owner transfers the present interest to the tenant and retains the future interest. At the end of the lease, A regains the present interest and still has the underlying future interest.

Returning to history, the most powerful person had what was called a fee simple absolute since there were no exceptions to take the land away, except by force, i.e., with a larger army. Most of the people were farmers and wanted safely to farm and possibly have the land they farmed to stay with them forever. This kind of interest was called a fee and later, fee simple. Those that wanted safety along with the ability to farm on a powerful person's land had to agree to the powerful person's demands.

This land controller swore an oath to give safety and, in return, people who lived and worked on the powerful person's land had to give an oath to support and obey the powerful person or the land would revert to the grantor. This was control, since the grant was a fee simple not absolute and a violation of the oath could cause the land grant to revert to the grantor. A person, in effect, could lose everything if his present interest in the land was taken away.

Normally this action was done in a "seizin" ceremony, which was a public event (before literacy). While giving the oath, each party would hold some physical object from the land like grass, a branch, dirt, etc. to symbolize these mutual obligations and the connection to the land. Many years later, these powerful people became nobles.

Over the centuries this action became more refined. These powerful people throughout Europe controlled larger areas and were given titles like lord, duke, earl etc. In order to keep their estate lands, each had to give a similar oath to a more powerful person like a King who controlled more land with a larger army. When William, the Duke of Normandy, conquered England in AD 1066, this process crossed the channel, and all estate holders had to give this kind of oath to the King. This was the situation at the time of the American Revolution. After the revolution, this right of reverter transferred from the King to the colonies which became states.

Echoes of the Past in Modern Real Property Law

Use of words like joint tenants, life estates, and fee simple have declined. For example, roughly 15 years ago at an NCBA legal clinic, an individual came with an old deed wondering if it was still valid. It included words like fee simple, with conditions. I recognized it as a fee simple conditional, and it was still valid since New York recognized old terminology as valid unless prohibited by law. Decades earlier, land ownership deeds would use terms like "in fee simple to John Jones and his heirs." Today, we simply use "to John Jones."

When you buy a parcel of land with a house, remember it is not a fee simple absolute but a fee simple. (The states took over the King's position with the right of reverter.) For example, what happens if you do not pay your real estate taxes? As America grew, other states followed the same principle and over time modified the old property law as each state saw fit.

Think of a pie: if you have the whole pie it would be a fee simple absolute. If a piece of pie was missing, it was a fee simple or something else that would not last forever. That piece not transferred was normally a future interest that never transferred. So, when the present interest holder no longer had his interest, then the present interest reverted to the grantor who never transferred his future interest. This was the situation at the time of the American Revolution. When the King gave up his future interest to the colonies, it allowed the future states to decide what to do with the King's interest.

Returning to the present, subsection 11(e) of Real Property Law § 424, "Transfer on Death Deed," states: "A transfer on death deed transfers property without covenant or warranty of title even if the deed contains a contrary provision."

Most people have either a bargain and sale or warranty deed that have some type of warranty of title either by title insurance or research for ownership of past owners. In effect, using this new statute would turn the deed into that of a quitclaim deed that has no warranty of title. This warranty would be removed. It would be unlikely any real estate attorney would allow this possibility to pass muster except under the most unusual circumstances. In addition, while the statute requires the same standards as making a will, it makes a grantor's decision to change his mind for whatever reason far more difficult and expensive.

In New York, there are several ways to accomplish the same kind of goal without this new law. Put the deed into joint ownership while both parties are alive. Who would want to give real estate to someone the grantor did know or trust? Rights of joint tenants and tenants in common were retained. Joint tenancy is quite common and used beyond real estate ownership like bank and stock accounts.

Both types of ownership have distinct meanings and can be used for property ownership by simply putting in this type of ownership on the deed and using the same type of rules as other deed transfers. At closings in this area, there is a title closer double checking that all the necessary features are in place since the title company might need to defend the transfer.

Another method would be to have the grantor retain a life estate and transfer the future interest to the grantee. Upon the grantor's death, the present land interest transfers immediately to the grantee (remember present and future interest come together).

Another option is to fill in the blanks on the proper deed form and keep the deed without recording it. At the grantor's death, simply use normal surrogate's proceedings to do the paperwork. People do change their minds or die unexpectantly. Simply tear up the unrecorded deed or change the will. Most people will have either a probate or administrative process anyway. This statute simply makes more work.

Ancient Laws in Modern Dramas

Real estate law is not the only place these things pop up. Knowledge of this old law can give people a better understanding of history and why things happen. Here it is in historical fiction.

As time went on, a common example was a fee tail where the noble's estate could only be passed to the oldest male in a blood line. For example, over the centuries, the oldest male blood line loosened up, and daughters were encouraged to marry another noble with an estate and bear a son, which then merged both estates. In 1782, New York State abolished fee tails[3] and at various times many European countries and U.S. states did the same.

As simple examples, take the drama television series of *Outlander* and *Downton Abbey*. Knowledge of Old English land law makes things that happen in these series more understandable.

In *Outlander*, a historical fantasy television series currently running on Starz, a major figure, Highland warrior Jamie Fraiser, inherited an estate from his father since he was the oldest male child. In the beginning of the series, taking place around 1750-60, Fraiser, like other clan members, gave deference to another older relative who had the larger estate. Later, he and some others wanted to replace the English Protestant King with a Catholic monarch. That was a big "no no," with the potential of losing the estate (remember the "seizin" ceremony).

It appears to me that he had a fee tail that was a portion of a larger fee and his trying to depose the current King would have his estate revert to the Protestant King. He transferred the estate to his younger brother, then participated in the battle of Culloden where his side lost, and he moved to America. Later, having been granted an estate in North Carolina by the

King, he was encouraged to join the revolutionaries against the King. After a lot of thinking about Culloden, he knew if not successful, he could lose his estate in North Carolina just like in Scotland.

Fraiser ultimately joined the revolutionaries who were successful in the American Revolution and did not lose his American estate. He was given encouragement by his wife Claire, a time traveler from the future. A prequel series recently released, *Blood of my Blood*, gives details of where the characters in the earlier series came from and their position in terms of a fee tail. If one understands what a fee tail is, then the whole *Outlander* series comes together.

Feudal law history with fee tails is scattered throughout the British historical drama series *Downton Abbey*. Robert Crawley, the Earl of Grantham, inherited the family estate Downton Abbey. He and his wife, Countess Cora Levinson, an American heiress, had three daughters. Due to having no living sons, Crawley looks for a male relative to inherit Downton when he passes away.

Feudal times also required that when an estate owner died and leaves a widow, she receives a life estate of one-third of the income of the major estate, called dower rights. In the series, Lord Grantham's mother, Violet Crawley, played by Maggie Smith, was referred to as the "Dowager Countess," who had a smaller separate house and lived comfortably.

The past still influences our present legal practice and provides good precedent for the transfer and sale of real estate today. History guides us not only in real estate but in all current pursuits, and it provides knowledge as we move toward the future.

1. EPTL §§ 6-1.1 to 6-5.12.
2. Ray A. Brown, *Cases and Materials on the Law of Real Property* (HathiTrust 1941); Ralph W. Aigler, *Cases and Materials on the Law of Titles to Real Property Acquired Originally and by Transfer Inter Vivos* (Library of Congress 1942).
3. EPTL § 6-1.2.

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Diwali Celebration

On Friday, October 24, Members and their families gathered at Domus for the Asian American Attorney Section's and Diversity & Inclusion Committee's inaugural Diwali Celebration. The night was filled with authentic cuisine, henna art, lively decorations, and performances by Nartan Rang Dance Academy and the Telugu Literary & Cultural Association. Special thanks to Sponsors Cliffco Mortgage Bankers; J&M Insurance; Law Office of Ryan Nasim, PLLC; Gassman Baiamonte Gruner PC; Mortgage Foreclosure Assistance Project; Deep Chopra Esq. and Pankaj Malik, Esq. | PM Law PC; Suri Law; and The Law Offices of Gus Michael Farnella PC.

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.

City & State New York has recognized **Rivkin Radler** as one of the 2025 Top Places to Work in New York. Selected amongst 51 organizations, the firm was included in this inaugural list honoring the best workplaces across New York's political and policy landscape.

Germine A. Casanova, an Associate Attorney at Jaspan Schlesinger Narendran LLP in Garden City, has been elected to the Board of Trustees of Variety Child Learning Center, a nonprofit organization that provides specialized educational services to children and their families.

Capell Barnett Matalon and Schoenfeld LLP is proud to announce that several of its attorneys have been selected as Super Lawyers for the New York Metro area: founding Partner **Robert S. Barnett**, founding Partner **Gregory S. Matalon**, Partner **Stuart H. Schoenfeld**, and Partner **Yvonne R. Cort**. In addition, the firm congratulates Partner **Erik Olson** on being selected as a Rising Star. **Barnett** will be presenting *Charitable Contributions: Use of Trusts* for the NYS Society of CPAs on November 6 at their annual Tax and Financial Planning for Individuals conference, and participating in the panel discussion, *Estate Planning for Senior Attorneys*, at the NCBA on November 18. **Matalon** will be presenting *Estate Timeline for CPAs* at the annual Accounting and Tax Symposium in November 2025. **Schoenfeld** and **Barnett** will be presenting *Tax Issues in Elder Care and Supplemental Needs Planning 2025* at the symposium, and **Barnett** will also be presenting on the topics of partnership capital accounts and S & C corporation updates as well a lunch *Test Your Tax Knowledge* program.

Forchelli Deegan Terrana LLP Chairman and Co-Managing Partner **Jeffrey D. Forchelli** has been named Trustee Emeritus at Brooklyn Law School. Forchelli joined its Board of Trustees in 2005.

Sharon N. Berlin of Keane & Beane, P.C.'s Melville office was recognized in the 2026 edition of Best Lawyers in America in Labor Law–Management and Employment Law–Management, and as "Lawyer of the Year" in Labor Law–Management in Long Island. **Richard K. Zuckerman** was recognized in Education Law, Employment Law–Management, Labor Law–Management, and Litigation–Labor and Employment.

Newfield Law Group is pleased to announce that long-term disability insurance attorney **Jason Newfield** has been selected for inclusion in the 2025 New York Metro Super Lawyers® list for the thirteenth consecutive year.

FOCUS: LAW AND AMERICAN CULTURE

The Westerner as Philosopher King

Rudy Carmenaty

Decades before Ruth Bader Ginsburg, a.k.a. the "Notorious RBG," achieved icon stature there was "Wild Bill" Douglas. William O. Douglas was a larger-than-life character who was the first celebrity Supreme Court justice of the media age. He took an active part in the promotion of his own legend.

In courting public attention, Douglas attracted considerable controversy for espousing progressive causes on and off the bench. He managed to survive three impeachment threats. Wild Bill was a maverick who played the role of a cowboy, with a Stetson and all the trappings.

A product of the Columbia and Yale law faculties, Douglas thought of Washington State, not Washington, D.C., as home. After serving two years as Chairman of the Securities & Exchange Commission, Franklin Roosevelt named him to the Court. Douglas lived a hard-scrabble youth and there was a Horatio Alger quality to his story.

Still, Douglas had a penchant for embellishing the circumstances surrounding his personal narrative, which were already sufficiently captivating. John Marshall Harlan II once said to him after Douglas repeated a real whopper: "You've told that story so often, you're beginning to believe it."[1]

Fittingly, Douglas was a prolific author, penning more than thirty non-fiction tomes over four decades. Always outspoken, he advocated in his prose, as he did in his decisions, on behalf of issues he believed in—protecting the environment, reducing cold war tensions, promoting free speech and securing personal freedoms.

During the Vietnam war, he abused his position in a vain attempt to interfere with the armed forces. In *Schlesinger v Holtzman*, Douglas issued a ruling ordering the cessation of bombing in Cambodia.[2] The military ignored him, and the rest of the court was forced to unanimously stay Douglas' patently inappropriate injunction.

Thurgood Marshall, who orchestrated the reversal of this misguided foray, felt Douglas was "about as independent a cuss as I knew."[3] He regarded his law clerks "as the lowest form of human life."[4] His reputation is further diminished by his personal life. Douglas treated his wives (four marriages and three divorces) and children terribly.

At the height of the Warren era, Douglas, who could never be described as being warm or fuzzy, provided a reliable fifth vote. But the Court's progressive thrust was set by Earl Warren and William J. Brennan. Both men were warm and fuzzy, more importantly each was a judicious craftsman who left behind a lasting liberal legacy.

If Douglas was indiscreet, he was surely not a hypocrite. That he womanized and drank heavily was not a secret in the nation's capital. "He wasn't the sweetest person you'd ever want to meet," messenger Harry Datcher recalled, "he didn't give a damn what people thought of him."[5]

In spite of it all, Douglas wound up serving 36 years on the Supreme Court, from 1939 until 1975. His tenure was the lengthiest in the Court's storied history. Never a consensus-builder, he was prone to making quixotic rulings much to the chagrin of the other justices.

When Douglas first arrived, there was every expectation he would emerge as the Court's premier figure. The men Roosevelt appointed were not of one mind, and the New Deal Court soon began to fracture. Members gravitated around two rival poles representing the dichotomy between judicial activism/judicial restraint.

Hugo Black and Felix Frankfurter vied for leadership. Black advanced a broad reading of the Constitution and a dynamic that sought to expand civil liberties. Frankfurter, favoring restraint, promoted a countervailing impulse marked by a limited view of the Court's powers.

Siding with Black, Douglas became a charter member of the activist camp. Yet this was more than allowing ideology to dictate his decisions. Douglas was far too individualistic and idiosyncratic to conform to expectations. A results-oriented judge, he delighted in defying convention in order to arrive at a desired outcome.

"I'd rather create a precedent than find one" was his attitude.[6] In lieu of conventional methods, the justice went from issue to resolution, rarely providing a textual basis or even a suitable predicate. Instead, Douglas formulated his decisions as derived from his pronounced leftist-libertarian policy preferences.

Giving scant attention to any governing principle beyond the perceived rightness in his own positions and prescriptions, he did not see his role as that of an impartial arbiter. "The Constitution is not neutral," Douglas proclaimed, "it was designed to take the government off the backs of the people."[7]

This foible was compounded by his drafting his decisions in as little as twenty minutes. On occasion, Douglas wrote his opinions on the bench while he was still hearing, if not exactly listening, to oral arguments. He was known to dash off pithy and at times jaunty rulings, quite a few come across as hackneyed.

In doing so, Douglas set the record, authoring more than 1,200 decisions.[8] He dissented in 531 cases or nearly half his total.[9] This yield was not alone the product of the alacrity in which he handled his work as a jurist, but as well his ornery disposition.

Whether in the majority or in the minority, he preferred concurrences, giving his individual stamp to the particular case. Douglas wrote mostly by and for himself. This made for a modicum of collegiality. Tellingly, there is an inconsistent quality to his jurisprudence.

Was he indolent or was he arrogant? Or was he a frustrated politician posing as a judge?[10] Douglas appeared uninterested in performing the most rudimentary requirements of his duties. His behavior was more akin to those of a policy maker. Not surprisingly, Douglas harbored presidential ambitions.

The 1930s and 1940s saw Roosevelt entrenched in the White House. There was no room at the top of the pyramid for an ambitious young man. Douglas was forty when he was appointed. He was an Article III judge with life tenure on the nation's highest court and nowhere else to go.

The Supreme Court became for Douglas a gilded cage of sorts. A plateau, where after climbing the greasy pole of Washington power politics, he was compelled by circumstances to wait his turn. Then in 1944, a faint possibility of his becoming vice-president suddenly materialized.

FDR was going for an unprecedented fourth term. Powerbrokers within the Democratic party knew the President was dying. The truth about Roosevelt's health was concealed. The question was, what was to be done about vice-president Henry Wallace, who was unpopular with party regulars.

At the Democratic National Convention, there would be a concerted effort to get Wallace off the ticket. DNC Chairman Robert Hannegan released a letter from FDR declaring the President's top choices for a new running-mate to be "Harry Truman and Bill Douglas."[11]

Truman wound up nominated in Wallace's place. Douglas was a non-factor in the convention's deliberations. Had the convention somehow selected him instead of Truman, history would have been different. Douglas would have assumed the presidency upon the death of Roosevelt the following year in 1945.

As Douglas later told it, FDR's letter to Hannegan in fact read *Bill Douglas and Harry Truman*, not *Harry Truman and Bill Douglas*.[12] This was not so. For the rest of his life, Douglas' tall tale of Hannegan's switching names became the reason he professed of why he never reached the White House. It was nothing more than an old man's conceit.

As reflected by his work on the Court, Douglas never acclimated to the processes inherent in accepted appellate adjudication. A cowboy philosopher, he refused to execute the basics of legal analysis. Douglas' decisions appear shallow in retrospect. His opinions are replete with sophisticated sophistry.

In one dissent, Douglas opined that nature should have standing to sue. In *Sierra Club v Morton*, he sought to have the Court recognize the personhood in such things as "valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland."[13] Arguably the most esoteric of Douglas' many rulings.

Douglas was predisposed to discovering natural rights, rights not found in the Constitution's text, which he deemed so transcendent they limit the government's ability to restrict the liberties of individuals. As a sitting justice, Douglas had taken an oath to faithfully interpret the Constitution, not to unearth natural rights.

This is not to say Douglas opinions are without any redeeming value. Vigilant against censorship, Douglas, in tandem with Black, fostered a robust reading of the First Amendment defending people who held unpopular views. He held speech should not be sanctioned absent actual injury or a compelling interest by the state.[14]

Douglas' most celebrated opinion was *Griswold v Connecticut*.[15] In a 7-2 ruling overturning a state statue, the Court recognized the right of married couples to privacy allowing for their use of contraceptives. The text of the Constitution is silent on this question. Douglas infers an answer which he finds nestled in the Bill of Rights.

The entitlement is drawn from guarantees emanating from the First, Third, Fourth, and Ninth Amendments which have penumbras, formed by emanations of these guarantees.[16] The guarantees create the penumbras, or zones, of privacy protecting intimate marital relations which the Connecticut law unduly interferes with.

Douglas employs emotive language to bolster his point: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[17]

The Constitution is thus construed to protect a married couple's "access to medical assistance and up-to-date information in respect to proper methods of birth control."[18] Most Americans, then and now, agree with the proposition that Connecticut has no place in a married couple's bedroom.

Nonetheless, Black and Potter Stewart disagreed and dissented. Black, a textualist, believed a privacy right cannot be extrapolated from the language contained in the Constitution. Stewart, for his part, wrote the Connecticut law was "uncommonly silly," but it was not in and of itself unconstitutional.[19]

The reaction to *Griswold* is emblematic of the perception of Douglas writ large. He can be applauded for the tangible result but chastised for judicial overreach. Eight years later, Douglas voted in *Roe v Wade*, establishing a right to abortion premised on privacy.[20] Warren Burger prevented Douglas from writing the holding in *Roe*.

Douglas wanted to serve long enough to surpass the record of 34 years set by Stephen Field during the 19th Century. Field had to be pushed off the Supreme Court. A similar fate awaited Douglas. It turned out to be a sorry spectacle. One added motivation was not having Richard Nixon name his successor.

A Republican president did appoint his replacement, but it was not Nixon. In December 1974, Douglas was incapacitated by a stroke. Confined to a wheelchair and incoherent, he remained on the job for almost a year though he was obviously unfit, mentally or physically. It was an awkward episode for everyone involved.

The justices leaned on Douglas to retire. Douglas acquiesced, stepping down in November 1975. John Paul Stevens was confirmed in Douglas' place. Ironically, it was Gerald Ford who named Stevens to Douglas' old seat. As a Congressman, Ford led the effort to impeach Douglas in the House of Representatives in 1970.

Douglas refused to accept either his disability or his retirement gracefully. He tried to participate in oral arguments as a tenth justice in a capital case, *Gregg v Georgia*.[21] The nine sitting justices informed him going forward he no longer had a role in the Court's proceedings. With that, Douglas withdrew from public life.

His last years were poignant. Douglas never recovered from his stroke, confined to his wheelchair in constant pain. Once a vital outdoorsman, he died in 1980 at 81. Douglas is buried at Arlington National Cemetery, surrounded by the graves of his former colleagues from his time on the Court.

Scholars of all stripes refuse to rank him highly either as a consequential justice or as an effective theoretician. Considering his ability, intellect, and durability, Douglas should be one of the most momentous figures in American legal history. That he is not considered among the pantheon is revealing.

To some liberals, he is an embarrassing failure. Douglas sought to expand the ambit of constitutional protections. Yet his inability to establish a solid foundation for his innovations, coupled with his irritable temperament and slap-dash work-product, left very little behind beyond the outcome he achieved in any given matter.

Anathema to conservatives, a sign in Clarence Thomas's chambers at the Supreme Court best sums-up their attitude toward Douglas: P*lease don't emanate in the penumbras*.[22] To his legion of right-leaning detractors, Douglas was the personification of unrestrained activism, a pseudo philosopher king hiding behind his black robes.

That he did get things right on occasion does not explicate the man or his rulings. In dispensing justice as he did, William O. Douglas dispelled the paradigm of the sober-minded jurist. His rightful legacy was that he brought unparalleled color, along with unrivaled misgivings, to the Court's proceedings for a third of a century.

1. David J. Garrow, *The Tragedy of William O. Douglas*, The Nation (April 14, 2003) at https://www.thenation.com.
2. 414 U.S. 1321 (1973).
3. Garrow, *supra*.
4. Bruce Allen Murphy, *Wild Bill*, (1st Ed. 2003) 408.
5. *Id.*
6. Fred Barbash, *Justice Douglas'* Memoirs, Washington Post (September 1, 1980) at https://www.washingtonpost.com.
7. William O. Douglas, *The Court Years*, (1st Ed. 1980) 8.
8. William O. Douglas Film Project, Fast facts on the political and professional life of William O. Douglas, (August 9, 2022) at https://williamodouglas.org.
9. Encyclopedia.com, *Douglas, William Orville*, (May 14, 2018) at https://wwww.encyclopedia.com.
10. Murphy's thesis in *Wild Bill* is that Douglas' frustrated political ambitions account for his poor judicial performance.
11. Murphy, *supra,* 223.
12. Douglas, *supra*, 283.
13. 405 U.S. 727 (1972).
14. See *Terminiello v City of Chicago*, 337 U.S. 1 (1949).
15. 381 U.S. 479 (1965).
16. Garrow, *supra*.
17. Griswold, *supra*.
18. *Id.*
19. *Id.*
20. 410 U.S. 113 (1973).
21. 428 U.S. 153 (1976).
22. Garrow, *supra*.

Rudy Carmenaty is Deputy Commissioner of the Nassau County Department of Social Services. He can be reached at Rudolph.Carmenaty@hhsnassaucountyny.us.

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Pet Rescue Event

On Saturday, September 27, the NCBA Animal Law Committee hosted its inaugural pet rescue event in collaboration with the Community Relations & Public Education Committee, Posh Pets Rescue, Christina's Animal Safe Haven, and the Town of Hempstead Animal Shelter. Over 50 Members and local families attended, all hoping to provide foster animals with a loving forever home.






Judiciary Night

On Thursday, October 23, the leaders and members of the NCBA gathered at Domus to connect with colleagues and honor the esteemed judiciary of Nassau County at its annual Judiciary Night. Special thanks to Platinum Sponsors Certilman Balin Adler & Hyman LLP, Falcon Rappaport & Berkman LLP, Farrell Fritz P.C., Jaspan Schlesinger Narendran LLP, Joseph Law Group P.C., Moritt Hock & Hamroff LLP, and Ruskin Moscou Faltischek P.C.; Gold Sponsors Burdo, Rubin & Sachs, Esqs., Rivkin Radler LLP, and Stagg Wabnik Law Group; and Silver Sponsors Law Office of Alan B. Hodish, Peter H. Levy, Esq., Levine & Slavit PLLC, Moving Forward Strategies, Realtime Reporting, Inc., Sullivan Papain Block McManus Coffinas & Cannavo P.C., Salamon Gruber Blaymore & Strenger P.C., and Winter & Grossman PLLC.










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CALENDAR | COMMITTEE MEETINGS

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Cyber Law	Nicole E. Osborne
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District Court	Matthew K. Tannenbaum
Diversity & Inclusion	Hon. Maxine S. Broderick and Hon. Linda K. Mejias-Glover
Education Law	Liza K. Blaszcyk and Douglas E. Libby
Elder Law, Social Services & Health Advocacy	Christina Lamm and Dana Walsh Sivak
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Supreme Court	Clifford S. Robert
Surrogate's Court Estates & Trusts	Maria L. Johnson and Cheryl L. Katz
Veterans & Military	Gary Port
Women In the Law	Rebecca Sassouni and Melissa Holtzer-Jonas
Workers' Compensation	Craig J. Tortora

WEDNESDAY, NOVEMBER 5

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

Hon. Arthur M. Diamond, Ret. will speak on "Introduction to Article 81 Guardianship Trial Practice."

THURSDAY, NOVEMBER 6

Publications
12:45 p.m.

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

Dr. Christopher Rosa, President and CEO of the Viscardi Center—a non-profit organization that educates, employs, and empowers children and adults with disabilities—will join a panel to discuss the Americans with Disabilities Act and reasonable accommodations at work and school, among other topics.

Commercial Litigation
12:30 p.m.

Hon. Robert J. Miller, Associate Justice of the Appellate Division, Second Department, will present "Pointers for Appellate Practice."

MONDAY, NOVEMBER 10

Asian American Attorney Section
12:30 p.m.

Meng Li, Deputy Director of the Nassau County of Asian American Affairs, will discuss his background as well as the accomplishments, goals, and upcoming projects of the Office of Asian American Affairs.

TUESDAY, NOVEMBER 18

Women in the Law
12:30 p.m.

Moving Forward Strategies CEO and Founder Donna Sirianni will speak on "Neuro-Linguistic Programming."

WEDNESDAY, NOVEMBER 12

Labor & Employment Law
12:30 p.m.

Kelly C. Soltis, Esq., and Olivia R. Gonzalez, Esq. will speak on "Demystifying ESI."

Matrimonial Law Committee
5:30 p.m.

Hon. Darlene D. Harris, Hon. Edmund M. Dane, Patricia Dooley, Esq. and Mark A. Green, Esq. will be speaking on "Intolerable Cohabitation: Are Motions for Exclusive Occupancy and Orders of Protection the Only Path to Peace at Home?"

WEDNESDAY, NOVEMBER 19

Association Membership
12:30 p.m.

Defendant's Personal Injury and Plaintiff's Personal Injury
12:30 p.m.

Law Student
6:00 p.m.

THURSDAY, NOVEMBER 13

Alternative Dispute Resolution
12:30 p.m.

TUESDAY, NOVEMBER 25

Diversity & Inclusion
Annual Potluck Dinner
5:30 p.m.

WEDNESDAY, DECEMBER 3

Real Property Law
12:30 p.m.

Family Court Law, Procedure & Adoption
12:30 p.m.
Annual Holiday Luncheon

FRIDAY, NOVEMBER 14

Mental Health Law
12:30 p.m.

THURSDAY, DECEMBER 4

Publications
12:45 p.m.

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

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