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WHAT'S INSIDE

Shifting Gears or Cruise Control?
DOL's New Opinions on
Commuting pg. 4

PFAS Regulatory and Liability Issues:
An Evolving Challenge That May Well Last
Forever pg. 6

Key Income Tax Considerations for Real
Estate Investors pg. 8

New Rules Governing Lawyer
Advertising: Beware of the Dramatic
Changes pg. 14

Darrow Defends the Indefensible pg. 16

Insurance Law Update pg. 18

Become a Mentor—Celebrate 30 Years
of Making a Difference pg. 21

SAVE THE DATE



BOWLING NIGHT

**MONDAY,
OCTOBER 5**

pg. 3



JUDICIARY NIGHT

**THURSDAY,
OCTOBER 22**

pg. 11



WE CARE WIZARDS GAME

**SATURDAY,
OCTOBER 24**

pg. 20

Foodies Café Brings a Fresh Taste to Domus

Jamie LaGattuta

The Nassau County Bar Association welcomes Foodies Café to Domus as the NCBA's new caterer, providing exceptional dining and catering service to the Bar and our members. Foodies Café at Domus is open daily for lunch from 11:30 AM to 2:30 PM, offering fresh, well-prepared meals made with quality seasonal ingredients. Lunch is served in the Great Hall, at Academy and Committee meetings, and will be available for takeout.

Foodies Café is owned by Executive Chef Richard Laurelli, who trained at the Yale Club in Manhattan and brings extensive culinary and management experience to his new role at the NCBA. Also serving Sea Cliff Yacht Club, The Mariner Estate in Great Neck, Unqua Corinthian Yacht Club in Amityville, and Carle Place Deli—as well as hosting private events, fundraisers, and catering all over long island—Laurelli is confident in him and his staff's ability to maintain and enhance the sense of community at the Domus.

With this new partnership, Laurelli looks forward to expanding his business while giving the Bar his full attention to meet the needs of members and guests.

Positivity is central to Laurelli's approach to his work. "I hope Foodies Café will become a welcoming part of the Domus community by providing a great product, good energy, and an experience that keeps members coming back."

Foodies Café served members at the 2026 BBQ at the Bar on September 10, and officially launched for lunch on September 22. The response from members has already been positive. "The food is fresh and the menu has an incredible variety," shared NCBA Vice President Deanne M. Caputo about her first impression of the new caterer. "My co-workers were delighted to know we have a lunch spot once again at Domus and are so excited to



see what they will be doing for all the holiday events. The new caterer has already brought life back into Domus."

Foodies Café is not just the new spot for lunch, but they are also a full-service caterer that can assist members with food needs for their homes, offices, programs, and other events. For Laurelli, providing a consistent and reliable experience filled with quality that is excellent and recognizable is a top priority.

With a new menu, consistent hours, and opportunistic attitude, members can expect updates at Bar events filled with diverse options catered towards each occasion's specific needs. "Whenever people have ideas or suggestions, we urge them to communicate them with us and ask questions," Laurelli said. "We want to accommodate everyone, and we are looking forward to being at the NCBA for a while."

About 30 members of a Long Island chapter of BNI, the world's largest business networking and referral organization, have met weekly at Domus for many years.

"So far Richie and staff have been very attentive to us and their food has been quite an improvement," says James C. Markotsis, a member of the NCBA Board of Directors and BNI. "It is a little bit more expensive but we have made some adjustments to the new menu that is specific to our group and have been able to keep the price increase at a reasonable level with much better service and much better food. We are looking forward to a long and pleasant gastronomic experience with our new caterer!"

"Foodies Café marks a new era at Domus. Delicious food and excellent service with an interesting menu," says NCBA Treasurer Ira S. Slavitt. "Every NCBA member should come and see for themselves how good it is."

Whether members are looking for a place to meet a client, grab a bite after court, or get some work done, Foodies Café is open daily. Come by between 11:30 AM and 2:30 PM to try something new. Planning a private event or firm party? Catering menus can be found at foodiescafe.com. 🍴

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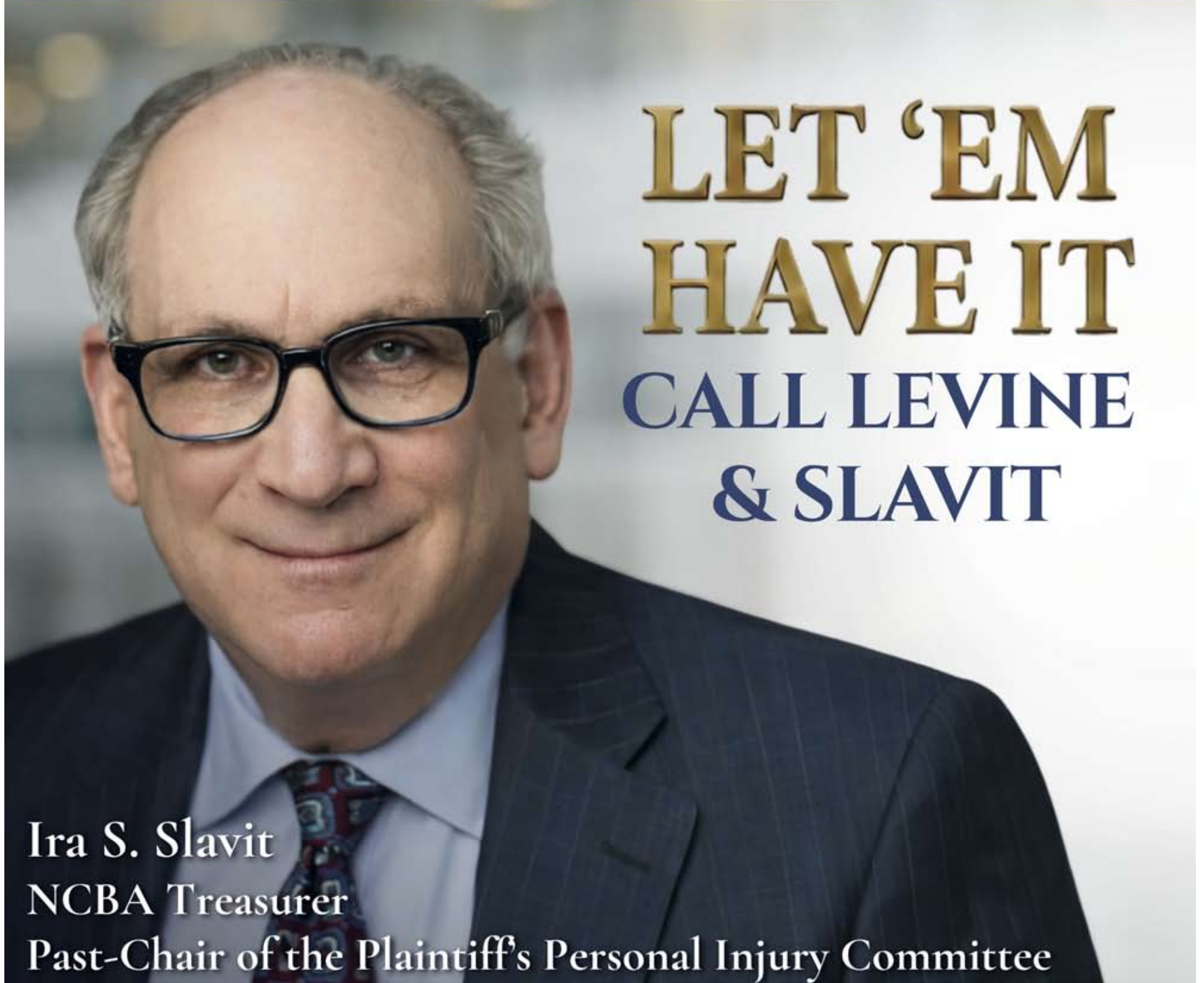


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Judiciary Night and the Gold Gavel Award

On October 22, 2026, the Nassau County Bar Association will host its Judiciary Night program at Domus beginning at 5:30 p.m., which will include the presentation of the Gold Gavel Award to Hon. Jerald S. Carter, retired Acting Supreme Court Justice. Judiciary Night was established to honor Nassau County's nearly 100 jurists for their service and dedication to administering justice and upholding the rule of law. The event is complimentary for all fulltime Nassau County judges.

Nassau County has a distinguished bench whose judges hear highvolume calendars spanning criminal matters, family and matrimonial cases, personal injury actions, probate proceedings, complex commercial litigation, and other significant matters throughout the courts. They also preside in Nassau County's problemsolving courts, including the Drug Treatment Court, the Veterans Treatment Court, and the Human Trafficking Intervention Court. They oversee scores of jury trials and handle felony and misdemeanor prosecutions, domestic violence cases, custody and visitation disputes, child support matters, orders of protection, commercial disputes, contract actions, business torts, real property and foreclosure matters, probate and administration proceedings, consumer credit actions, and town and village code violations.

Our judges bring deep knowledge to the bench, drawn not only from their work throughout the legal system but also from the many professional and civic roles in which they have served. Many have served as prosecutors, defense counsel, legal aid attorneys, attorneys for the child and law guardians, judicial law clerks, principal court attorneys, court referees, village justices, town and county attorneys, members of law enforcement, local government officials, state legislators, village mayors, corporate counsel, hearing officers, nonprofit board members, seasoned trial attorneys, arbitrators and mediators, adjunct professors and legal educators, instructors in judicial training programs, contributors to statewide court committees and task forces, and bar association leaders.

The Nassau bench is guided by an experienced group of supervising judges. They include Hon. Vito M. DeStefano, District Administrative Judge; Hon. Francis Ricigliano, Supervising Judge of the Supreme Court; Hon. Jeffrey A. Goodstein, Supervising Judge of the Matrimonial Center; Hon. Teresa K. Corrigan, Supervising Judge of the County Court; Hon. Tricia M. Ferrell, Supervising Judge of the District Court; Hon. Ellen R. Greenberg, Supervising Judge of the Family Court; Hon. Timothy S. Driscoll, Presiding Justice of the Appellate Term; and Hon. David P. Sullivan,



FROM THE PRESIDENT

Hon. Maxine S. Broderick

Surrogate of Nassau County. The town and village courts are overseen by Hon. Robert G. Bogle, whose supervision provides essential continuity and support for the local courts throughout the county.

NCBA extends its thanks to Hon. Norman St. George, First Deputy Chief Administrative Judge for New York State, and to Hon. Vito M. DeStefano for their steadfast partnership and support in providing access to Supreme Court courtrooms that allow the Bar Association to operate aspects of its civic and educational programming, including the High School Mock Trial Program and the Future Advocates Mock Trial Program. Additionally, Nassau judges volunteer in significant numbers to serve as judges in the foregoing programs as well as the Moot Court Competition, all while carrying heavy dockets.

It is important to acknowledge the personal sacrifices our judges make. Many take salary cuts when leaving private practice or other sectors. They relinquish certain personal freedoms, endure public scrutiny, and occasionally face judicial threats. They must abstain from political speech or activity, refrain from most business ventures, and limit public or private social activity that could undermine confidence in the judiciary. They manage substantial caseloads and sometimes work early mornings, weekends, and late nights alongside their dedicated staff. They do all of this with grace, professionalism, and precision. During the pandemic, many returned to chambers by May 2020 and addressed emergency petitions, hearings, and conferences both virtually and in person as permitted throughout that period.

The members of the NCBA Judicial Section—cochaired by Hon. Linda MejiasGlover and Hon. Ellen Tobin, both appointed to the Court of Claims—selected Hon. Jerald S. Carter as the recipient of the 2026 Gold Gavel Award. Established in 2021, the Gold Gavel Award recognizes an outstanding jurist who has contributed meaningfully to judicial education and demonstrated exemplary service to the law. Retired Justice Carter embodies these qualities. He is a true scholar and a gentleman whom I have had the privilege of knowing for more than a decade.

Judiciary Night is the highwater mark of our work to strengthen the partnership between the bench and the bar. Historically, as many as 50 judges attend this event. On behalf of the local legal community and the litigants we serve, NCBA thanks and salutes our distinguished judiciary and looks forward to celebrating our judges and Justice Carter on October 22. 🏏



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With the Nassau County Bar Association

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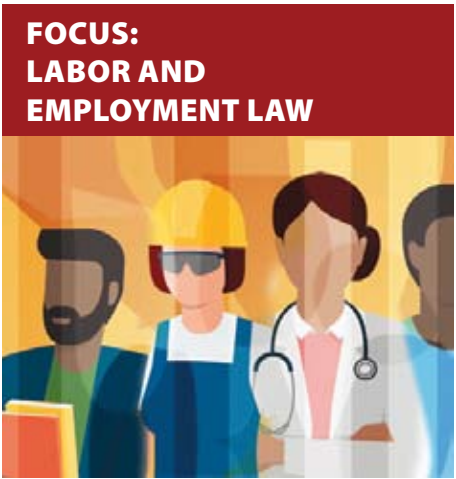
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Marc N. Aspis

Have you ever been in standstill traffic on the (euphemistically named) Long Island Expressway (or any other clogged parkway for that matter)? Have you ever inexplicably missed a connection at Jamaica Station? You may have thought to yourself, “commuting in and around Long Island is time-consuming and stress-inducing—I should get paid for this.” Spoiler alert: ordinary commuting time is generally not considered “work” and thus not compensable. In late July, the U.S. Department of Labor’s (“DOL”) Wage and Hour Division (“WHD”) released two opinion letters (“Letter 9” and “Letter 10”) further defining the contours of when—if at all—commuting time can be considered work and compensable, providing important considerations for both employees and employers.

Shifting Gears or Cruise Control? DOL’s New Opinions on Commuting

Before diving into the various rules regarding commuting, it is important to note the role that WHD opinion letters play. WHD opinion letters do not have the force of law.² The DOL explains that opinion letters “serve as a means by which the public can develop a clearer understanding of what the Fair Labor Standards Act (“FLSA”) and Family Medical Leave Act (“FMLA”) compliance entails[.]”³ and may be relied upon as a “good faith defense to wage claims arising under the FLSA.”⁴ DOL opinion letters often (if not always) deal with highly specific fact patterns, and opinion letters will contain a caveat that other facts or history may compel a different result. It is also worth noting that courts are no longer required to per se follow agency interpretations, but can make independent determinations of statutory meaning.⁵

There are several important concepts that underpin the DOL’s analysis in Letter 9 and Letter 10.

Work

Broadly speaking, the FLSA requires most employers to pay employees at least the federal minimum wage for hours worked (and at least time and a half for overtime). Letters

9 and 10 point out that the FLSA does not define “work.” Citing U.S. Supreme Court precedent dating back to the 1940s, as well as more recent federal court decisions and other WHD opinion letters, the common theme is that compensable work is time that employees spend performing duties primarily for the benefit of the employer. While seemingly common-sense and simple, this description of work has given rise to much litigation, in addition to formal and informal guidance.

Portal Act

Fearing that the open-ended definition of work might lead to unintended consequences, Congress enacted the Portal-to-Portal Act (the “Portal Act”) in 1947.⁶ As summarized by Letters 9 and 10, the Portal Act clarified that employers do not need to compensate employees for time spent “(1) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which [an] employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities[.]” In other words, getting to or from a workstation and

actions performed before or after work are generally not considered work and thus not compensable. It is important to note that the Portal Act only applies to activities before or after the defined workday—it has no bearing whatsoever on activities during the workday.

Commuting Versus Travel

Under the Portal Act, getting to or from the job (“ordinary commuting time”) is generally not compensable work.⁷ Many folks, and especially people living in metro New York, wish that commuting would be compensable, but at this point it is still just a wish and not likely to change any time soon.

By contrast, travel, when part of the principal activity of the work, is generally compensable. Letters 9 and 10 give examples such as going from worksite to worksite during the workday (*e.g.*, a repairman) or traveling somewhere other than a regular workspace for a special assignment (*e.g.*, a lawyer who practices on Long Island but is required to go to Albany for a trial). Indeed, even regular commuting can be considered compensable work if the employee



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is actually performing work during the commute, such as taking calls or crunching numbers on the train.

Continuous Workday

Courts and the DOL have long recognized the “continuous workday rule,” namely that “compensable time comprises ‘the period between the commencement and completion on the same workday of an employee’s principal activity or activities...[.]’ whether or not the employee engages in work throughout all of that period.”⁸ The DOL codifies in the federal regulations that the scenarios contained in the following non-exhaustive list constitute work: “[a] stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired[.]”⁹ Letter 9 notes that bathroom breaks and short rest periods also count as working time. The continuous workday doctrine has recognized the following exceptions: off-duty time¹⁰ and bona fide meal periods (subject to certain requirements).¹¹

These core principles are sometimes conflicting and sometimes complementary, requiring courts and the DOL to apply them based on specific fact patterns. This can be seen below with respect to Letters 9 and 10.

Letter 9

Letter 9 describes three scenarios in which non-exempt employees can shift or possibly shift their commute time. As a general matter, “non-exempt” employees are hourly employees and “exempt” employees are salaried.¹² Scenario 1 involves an employee who requests to commute mid-day (as opposed to during rush hour); Scenario 2 involves an employee who volunteers to do extra work early in the morning (so as to avoid arriving early or leaving late); and Scenario 3 involves an employee who requests to leave early to catch the last bus home (and then continue the work at home). The DOL ruled that the commuting time in these scenarios was not “work,” specifically concluding that “the home-to-work (or work-to-home) travel in all three of the scenarios you described would not qualify as FLSA-covered ‘work,’ as the facts provided

indicate that such travel time would be an ‘ordinary’ commute that is a normal incident of employment and thus primarily benefits the employee.”¹³ In other words, the DOL’s view is that ordinary commuting is ordinary commuting, regardless of when it actually takes place and regardless of any unique personal circumstances. The DOL also noted that:

- The mid-day commute is a third exception to the continuous workday doctrine.
- Mid-day travel that is not “ordinary” and primarily benefits the employer would still be considered “work.”

Letter 10

This letter deals with a question from an employee. The employee is a field service engineer and performs services at clients’ locations. The employee’s regular paid shift is from 8:00 a.m. to 5:00 p.m., but the first appointment can be as early as 8:00 a.m. The employer sends service requests between 7:00 a.m. and 8:00 a.m., and the employee then needs to make calls to schedule appointments and/or line up other field service engineers.

Based on the above background facts, the employee posed two scenarios. Scenario 1: The employee receives all the service requests and makes all the calls before the employee leaves at 8:00 a.m. to go to the first service call. Between 7:00 a.m. and 8:00 a.m., in addition to receiving service requests and scheduling appointments, the employee does some personal or preliminary things (including drinking coffee). Scenario 2: Similar to Scenario 1, but the employee must leave the house at 6:00 a.m. to make an 8:30 a.m. appointment. The employee receives the service requests and makes calls between 7:00 a.m. and 8:00 a.m., mostly from the car. In Scenario 2, the employer does not pay for the 6:00 to 7:00 a.m. hour but does pay from 7:00 a.m. onward.

With respect to Scenario 1, the DOL found that receiving service requests “is likely not compensable worktime” because it is not integral to the employee’s primary responsibilities. However, the time spent scheduling appointments and/or calling other engineers is compensable worktime because “[t]hese activities are required by, and primarily benefit, your employer[.]”¹⁴ Interestingly, the DOL further found that the commute from the employee’s home to the first appointment was compensable because it occurs after the employee has performed significant services (*i.e.*, the calls, indicating that the workday has begun) and this commute “bears few, if any, of the hallmarks of an ordinary commute between an employee’s home and worksite.”¹⁵

With respect to Scenario 2, the DOL found that the first hour of travel (6:00 a.m. to 7:00 a.m.) is ordinary commuting (and not compensable), but the remainder of the trip is compensable because the workday starts when the employee starts making calls, and the employee devotes the time between 7:00 a.m. and 8:00 a.m. to making calls.

Moving Forward

In these companion opinions, the DOL reached seemingly opposite conclusions—commuting was not compensable for some employees but compensable for others. To add to the confusion, DOL opinions are extremely fact-specific, where even slight shifts can move the needle, and may not hold up in court. Moving forward, employers and employees need to carefully analyze the categories of workers involved, which tasks are primary and which are incidental, the timing of certain activities, and the specific contours of the business. Employers and employees should review DOL opinion letters for guidance on whether pay practices are appropriate. Formally requesting guidance from the DOL is not the worst idea for employers, because the legal fees incurred in preparing a request for an opinion letter are far less than the legal fees for defending a class action; for employees, it is important to understand if they are being properly paid by their employers. ⚡

1. U.S. Dep’t of Lab., Wage & Hour Div., Opinion Letters FLSA 2026-9 & FLSA 2026-10 (Jul. 22, 2026).
2. U.S. Dep’t of Lab., Wage & Hour Div., Final Rulings and Opinion Letters, www.dol.gov (last visited Aug. 17, 2026) (noting that the “The requirements of the Fair Labor Standards Act (FLSA) and Family Medical Leave Act (FMLA) are set by statutes and regulations.”).
3. *Id.*
4. *Id.*
5. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).
6. Pub. L. No. 80-49 § 4(a)(1)-(2), 61 Stat. 84, 87 (1947) (codified as amended at 29 U.S.C. § 254(a)(1)-(2)).
7. Letter 9 notes that “both before and after the Portal Act, WHD and courts have long confirmed that ‘[n]ormal travel from home to work is not worktime.’” Opinion Letter FLSA 2026-9, *supra* note 1 at 9 (quoting 29 C.F.R. § 785.35).
8. *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 226 (2014) (quoting 76 Fed. Reg. 7655, 7658 (Nov. 18, 1947) & 29 C.F.R. § 790.6(b)).
9. 29 C.F.R. § 785.15.
10. 29 C.F.R. § 785.16(a) (“Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked.”).
11. 29 C.F.R. § 785.19(a) (“Bona fide meal periods are not worktime.”).
12. Exempt or non-exempt in this context refers to whether an employee is subject to the minimum wage/overtime rules of the FLSA. The standard for determining whether an employee is exempt or non-exempt can be very detailed and is outside the scope of this article.
13. Opinion Letter FLSA 2026-9, *supra* note 1 at 12.
14. Opinion Letter FLSA 2026-10, *supra* note 1 at 6, 7.
15. *Id.* at 8.



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John L. Parker

There are a number of concerns that continue to grow from a class of chemicals known as “forever chemicals.” They have been addressed by public health and environmental regulators and litigators. Over the past several decades, this family of chemicals was developed and engineered for specific uses—from industrial to consumer. The persistence of these chemicals when used as designed, or when released into the environment, has implications for humans exposed in a variety of ways both known, and unrealized. In some ways, these chemicals are like a forever friend that you did not ask to make and that you cannot seem to shake.

These chemicals have increasingly become the new forever concern due to their design and chemistry, which

PFAS Regulatory and Liability Issues: An Evolving Challenge That May Well Last Forever

results in chemical compounds with intentional longevity for industrial and other purposes.¹ They are used in many products that you would know, and even in pharmaceuticals, which you may not expect.² The pervasive use of chemicals results in widespread impacts because they get into soil, water, air, and drinking water, raising public health and regulatory agency issues.³ These chemicals are also raising human health concerns.⁴ In response, states are advancing legislative approaches to address and to minimize their use.

New York State offers an interesting example of how perfluoroalkyl and polyfluoroalkyl substances (PFAS) issues intersect with evolving public policy and legislative goals. There are currently at least twenty legislative initiatives pending in both houses of the state legislature. These initiatives address issues from growing concerns about the consumer packaging (Senate Bill S1464A) to how playgrounds should be constructed (Assembly Bill A7594A), and how bio solids on agricultural lands should be managed, including testing and reporting requirements (Senate Bill S9115A and S5759C). There is even legislation addressing health insurance coverage costs for PFAS

(Assembly Bill A10211). These issues are further complicated by the emerging understanding and ability to detect and properly identify these chemicals despite an acknowledgment that current testing has limitations given fully the thousands of variants. These initiatives are also growing around the world.⁵

The liability for these chemicals—some regulated as hazardous substances—is a concern for all commercial transactions, from property purchases to mergers and acquisitions. The history of chemicals used, and potentially released, at sites remains a key consideration and is commonly the subject of due diligence inquiry.⁶ These issues will be addressed during a fall meeting of the New York State Bar Association panel discussion.⁷ In addition, there have been a variety of legal cases under various provisions of law against manufacturers seeking to recover, among other things, the costs of clean up and treatment of these chemicals. Many cases seek costs associated with compliance with drinking water standards required of water providers.⁸

The PFAS Legacy

The PFAS forever chemical discussion often focuses on well-known variations—Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonate (PFOS).⁹ Despite growing concerns regarding the tens of thousands of different variants and types of the forever chemicals, few are regulated as hazardous substances under federal law. This legal designation would authorize various remedial actions, including emergency response, liability provisions, and regulatory actions under the Comprehensive Environmental Cleanup and Liability Act (CERCLA).¹⁰ The D.C. Circuit Court recently upheld the U.S. Environmental Protection Agency’s (USEPA) “hazardous substances” designation of PFOA and PFOS. The court’s review, based in part on a *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024) analysis, decided that plain language of the statute, and USEPA’s corresponding regulatory action designating them as hazardous substances, were valid and upheld them, ensuring that these chemicals will continue to be covered by the federal CERCLA liability scheme.¹¹ This decision, alone, will allow addressing PFAS chemicals to remain viable under federal environmental law in a variety of remedial contexts by impacted parties and by government regulators.¹² It also cements the reality due diligence concerns will endure for commercial transactions, and corresponding environmental insurance needs.

The legal pathway for states to address PFAS forever chemicals has included a combination of state enforcement actions, and state actions under various tort and business practice-based provisions of law. In New Jersey, the U.S. District Court recently upheld the “joint consent orders” after a six-year environmental enforcement effort by the New Jersey Department of Environmental Protection. The court approved substantial settlements against E.I. DuPont de Nemours and Cos. that totals \$2 billion dollars is one of the highest environmental settlements ever secured by a single state. With the second case against 3M, these matters, together, brings the total of the settlements to approximately \$2.5 billion.¹³

In July, New York State brought its own action against the manufacturers of PFAS chemicals under state law.¹⁴ The detailed complaint sets forth the history of use of these chemicals and sets forth numerous causes of action against the companies. These claims include public nuisance, strict common law products liability, unfair and deceptive business practices (General Business Law § 349), false advertising (General Business Law § 350) and persistent fraudulent actions (Executive Law § 63(12)). The litigation seeks liability for, and reimbursement from, the companies that have engineered these chemicals, and that the complaint alleges that have been released into the environment resulting in significant costs to address.

Regulatory Concerns, Regulatory Approaches

The challenge to regulators, and the various countries around the world, is to strike the correct balance in their regulatory approach. There are many ongoing debates here in New York on how, and whether, this extensive family of chemicals should be regulated. One area of regulatory concern is the drinking water supply. This is particularly relevant on Long Island, where underground aquifers provide water that households and businesses rely upon. There are 48 water suppliers that rely upon between 1,200 and 1,500 public supply wells, and there are also about approximately 25,000 folks that rely, in part, on private wells. The contaminant removal challenge presented by these forever chemicals is multi-level. The efforts to address the “end of pipe” clean drinking water issues are only a part of the interconnected challenge, which necessarily includes initiatives to increase the public’s understanding of how forever chemical are released



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into the environment causing contamination, and how use of these chemicals can be reduced or minimized.

The Nassau County Bar Association took a deep dive into these regulatory, liability and technical considerations during an Academy of Law event in April 2026. The program was entitled *PFAS Forever Chemicals are Changing Water Quality, Public Health, and Increasing Costs: A Legal and Technical Review*.¹⁵ The expert discussion focused on addressing the historic and legacy contamination found on sites throughout the country. The technical and legal discussions addressed the need for thorough and complete investigations when these chemicals are released. Importantly, the technical experts reviewed new and innovative ways being developed to eliminate these chemicals, through advanced, but more cost-effective technologies, particularly for drinking water.

The event also awarded the *Global Environmental Leadership Award* to Robert Billot, Esq., partner at Taft Law. It recognizes the legal challenges of establishing the impacts of PFAS chemicals through litigation efforts and underscores the complex federal regulatory situation under the authority of the USEPA. These litigation efforts uncovered this class of chemicals. The cases secured billions of dollars for clients adversely impacted by PFAS contamination, required medical

monitoring efforts, and set a template for multi-district litigation. From a public health perspective, these efforts led to increased public awareness and more in depth scientific analyses and conclusions regarding these chemicals and their cancer-causing public health impacts.

Story Yet Untold

The PFAS forever chemicals are a defining environmental issue of our generation. There are many technical and legal challenges to address. These highly engineered chemicals have widespread and significant uses and have become ubiquitous in the environment. They are also creating public health concerns as there are many pathways of human exposure, including through drinking water, clothing, pharmaceuticals, and in agricultural products. Two major cases addressed PFAS chemicals in New Jersey, and in a recently filed case in New York, seeking damages to remediate and address many PFAS related expenses in the State.

The regulatory agencies—state and federal—continue to review these forever chemical issues, with a federal hazardous substance designation for the two most widely known variants recently being upheld by the D.C. Circuit Court. This decision, alone, will ensure that these contaminant-related claims will continue, and that due diligence reviews of all forms of commercial transactions will have increasing importance for

businesses. There are innovators seeking to reduce the costs and increase the efficacy of efforts to remove and remediate PFAS from the environment. Finally, there are discussions at all levels of government, and efforts underway to decrease the use of PFAS chemicals in certain products. This story is ongoing, and it will be forever evolving. 🏠

1. See, "PFAS/EPA: PFAS structures in DSSTox (update January 2026)," available at <https://comptox.epa.gov>.
2. See, "Understanding PFAS in Pharmaceutical Manufacturing," available at <https://www.thermofisher.com>.
3. See, "Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS)," available at <https://www.niehs.nih.gov/health/topics/agents/pfas>.
4. See, "Our Current Understanding of the Human Health and Environmental Risks of PFAS," available at <https://www.epa.gov>.
5. On June 11, 2026, the international PFAS issues discussion was held at the Norwegian Embassy in Washington, D.C.. I was honored to moderate the notable Panelists, whose individual work warrants further review. See, "Norway Means Business: PFAS Challenges Facing Communities Across the Globe," <https://thedisruptivequarterly.com>; see also "Addressing Global PFAS Challenges Needs Partnerships Innovation Ecosystem," Atam P. Dhawan, Ph.D., available at <https://thedisruptivequarterly.com>; see also "We Know What's In the Water. Now We Need the Will To Fix It," Sally Gutierrez, available at <https://thedisruptivequarterly.com>.
6. The USEPA recognizes the ASTM Standard under the All Appropriate Inquires standard. See, "Standards and Practices for All Appropriate Inquiries," available at <https://www.federalregister.gov>; see also, 40 CFR 312.10.
7. See, "Meeting the Evolving Due Diligence Challenge of PFAS and the Forever Chemicals," Continuing Legal Education Panel Discussion," Fall Meeting, Environmental and Energy Law Section, New York State Bar Association, September 29, 2026, Manchester, Vermont.
8. See, "Long Island water providers in Nassau and Suffolk counties awarded over \$250 million," June 11, 2025, available at <https://www.liherald.com>.

9. See generally, "Our Current Understanding of the Human Health and Environmental Risks of PFAS," available at <https://www.epa.gov>.
10. See, 42 U.S.C. Section 9601, et seq.
11. *Chamber of Commerce of the United States, et al v. USEPA*, No. 24-1193 (August 18, 2026) (D.C.Cir.).
12. See, *Back to the Future: SCOTUS Undoes 40-year Precedent*, Nassau Lawyer, John Parker, September 1, 2024.
13. See, "Federal Court Approves Historic PFAS Settlements valued at Approximately 2.5 billion," August 6, 2026, available at <https://www.njoag.gov>; see also Opinion, available at <https://www.njoag.gov>; see also Order, available at https://www.njoag.gov/wp-content/uploads/2026/08/2026-0807_Order-granting-Motion-to-Approve-JCOs-and-Attorneys-Fees.pdf.
14. *People of the State of New York v. 3m Company, EIDP, Inc.; the Chemours Company, Inc.; The Chemours Company FC, LLC; Corteva, Inc.; Dupont De Nemours, Inc.*, Index No. 907879-26, available at <https://ag.ny.gov> see also, "Attorney General James Sues Some of Nation's Largest Chemical Companies Over Toxic Pollution from Consumer Products," July 9, 2026, available at <https://ag.ny.gov/press-release>.
15. The Academy of Law Event was highlighted in the Q1/Q2 2026 edition of the Disruptive Quarterly that I was honored to serve as the Contributing Guest Editor. See, Q1/Q2 2026 edition, available at <https://thedisruptivequarterly.com>.



John L. Parker serves as the Chair of the NCBA Environmental and Energy Law Committee and serves as a member of the Board of Directors. He leads the Environmental, Energy, and Resources

Practice Group at Sahn Ward Braff Coshignano. John also serves as Second Vice Chair of the NYSBA Environmental and Energy Law Section, where he is a member of its Executive Committee. He can be reached at jparker@sahnward.com.



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**FOCUS:
TAXATION**


Robert S. Barnett

Several tax provisions affect real estate investors. The most prevalent are the depreciation conventions, the at-risk rules of Section 465, of the Internal Revenue Code, the passive activity rules of Section 469, and the net-investment income tax rules of Section 1411. This article primarily addresses the at-risk and passive activity rules applicable to individual taxpayers and includes discussion of the net investment income tax surcharge of Section 1411.

Many real estate investors experience losses in the initial years due to the combination of interest expense and depreciation. Before losses may be utilized, several hurdles must be met. The first requires sufficient basis for loss deduction.¹ The second is the application of the at-risk rules. These rules were introduced in the mid-1970s to combat the tax shelter abuses prevalent at that time. Tax shelters typically utilized highly leveraged non-recourse debt with little true economic risk. A taxpayer is generally at-risk if she has sufficient money and property invested; any shortfall is carried forward until a sufficient amount at-risk is obtained.²

Once an investor has passed the basis and at-risk hurdles, the next obstacles to overcome are the passive activity rules contained in Section 469 and the related regulations. These rules were promulgated in the mid-1980s to address situations not adequately covered by the at-risk rules.

Special At-Risk Considerations

Amounts at-risk include money and the adjusted basis of property contributed to an activity and include funds borrowed and invested in the activity provided the taxpayer is personally liable for repayment. Amounts borrowed from a lender with an interest in the activity (other than as a creditor) or from a related party are not counted,³ nor are losses limited by stop loss provisions and other similar agreements and arrangements.⁴ A special exception is provided if the debt is considered qualified non-recourse financing, generally consisting of secured loans from a commercial lender.⁵ Any loss limited by the at-risk rules is carried forward and available in the first succeeding taxable year in which sufficient at-risk is available subject to the passive activity rules of Section 469.

Application of the Passive Activity Rules

Similar to the at-risk rules, the passive activity rules were designed to limit deductions of passive activity losses when

Key Income Tax Considerations for Real Estate Investors

the investor does not materially participate in the activity.⁶ A passive activity is generally defined as any activity which involves the conduct of a trade or business in which the taxpayer does not materially participate.⁷

Passive activities include “any rental activity”⁸ except as provided for certain taxpayers who qualify as real estate professionals under Section 469(c)(7) as discussed herein. As such, real estate investors must pay particular attention to these important rules. In general, taxpayers may utilize passive activity losses from an active trade or business to offset passive income, and excess loss may be utilized to offset other income if the taxpayer materially participates in the activity. Material participation requires regular, continuous and substantial participation.⁹ The Treasury regulations provide seven tests for material participation; however, generally only two are usually applied or addressed for real estate professionals. The first test requires that the individual participates in the activity for more than 500 hours during such year.¹⁰ The second test requires that the individual participates in the activity for more than 100 hours during the taxable year and that such individual’s participation is not less than the participation of any other individual during the year. Certain activities are not considered rental activities but are considered business activities. For example, the ownership and active management of a motel where the average stay is less than eight days is considered a rental business and not a rental real estate activity.

Real Estate Professionals- Qualifying Taxpayers

Shortly after the passive activity rules were implemented, Congress added a new section for certain qualifying real estate investors. These investors are generally referred to as “real estate professionals.”¹¹ The rules were added because Congress believed it was unfair to deny taxpayers, who materially participate, the benefit of their real estate losses.¹² These new rules present several important considerations for qualifying real estate investors. First, they provide the taxpayer with an election to treat all their interests in rental real estate as one activity. This is termed the aggregation election. By aggregating all rental activities, the taxpayer is allowed to combine their hours in a collective manner to see if they can satisfy the material participation standards. This is tremendously helpful.

Tax preparers need to be very careful not to confuse the aggregation election with other grouping elections which are provided in other parts of the passive activity rules. With certain exceptions beyond the scope of this article, real estate

rental activities are generally not able to be grouped but can be aggregated.¹³

The second important element added by these new rules is hourly tests for qualifying taxpayers. The taxpayer will qualify as a real estate professional if they meet two tests: (1) the taxpayer must perform more than 750 hours of services during the taxable year in real property trades or businesses in which the taxpayer materially participates, and (2) more than one half of the personal services performed in trades or businesses by the taxpayer during the year are performed in real property trades or businesses in which the taxpayer materially participates.¹⁴

Real estate trades or businesses include “any real property development, redevelopment, construction, reconstruction, acquisition, conversion, rental, operation, management, leasing, or brokerage trade or business.”¹⁵ Personal services performed as an employee will count as long as the employee owns at least a 5% interest in the applicable business activity. These rules can perhaps be best illustrated by several short examples:

Example 1: Taxpayer *A* is a teacher. She has three rental single-family houses that report small losses due to depreciation and rental expenses. The losses are suspended under the passive activity rules because *A* will not be able to meet either of the above tests.

Example 2: Same as one above but *A* is a builder and owns 50% of the construction business. *A* spends one thousand hours working in her construction business and 150 hours on each of her rental properties. *A* may qualify as a real estate professional because *A* will spend over 750 hours in real estate trades or businesses in which she materially participates because construction is included as a real property trade or business.¹⁶ She also meets the over fifty percent test. However, the real estate rental losses will still likely be suspended because *A* will not materially participate in the rental operation.¹⁷

CCA 201427016 provides that the first step is to determine whether *A* is a qualifying taxpayer and to describe the real estate trade or business. *A* spends more than 750 hours in a qualifying trade or business and *A* spends more time during the year in real property trades or businesses than performing other services as *A* is involved full time in real property trades or businesses. However, *A* does not materially participate in the real estate and therefore the real estate losses remain suspended.

Example 3: Same as example two above, but *A* has 10 single-family

rental properties and spends 80 hours on each rental property during the year and meets the over fifty percent test. Under this example, *A* can reasonably assert that she spends more than 750 hours in qualifying trades or businesses. However, *A* still has an issue with respect to the classification of the rental losses. Here is where the aggregation election becomes essential. If *A* does not elect to aggregate all rental real estate activities, the time spent in each separate rental property must be looked at independently to see whether *A* materially participates.

In this example, *A* will not be able to prove material participation in any of the properties because *A* has only proven 80 not over 100 hours, even if that test was available. The over 500-hour test is also not available for any of the properties. However, if *A* elects to aggregate the rental real estate activities, *A* will be considered to have materially participated in the rental activities (800 hours). *A* will be able to deduct the real estate losses against her construction income. Revenue Procedure 2011-34 provides a procedure for late elections, and a detailed discussion of this procedure is beyond the scope of this article.

These examples highlight the importance of properly designating the taxpayer’s real property trade or business for the purpose of applying the more than 750-hour test. A taxpayer may use any reasonable method of applying the facts and circumstances in determining the real property trade or business in which the taxpayer is providing personal services. The author recommends that in the above examples, *A* prepare a simple document that reasonably elects to treat her construction and rental activities as a unified trade or business for the purpose of determining qualification under Section 469(c)(7) as a qualifying taxpayer. The importance of making the aggregation election is highlighted under the basic facts presented for taxpayer *A* in the examples because she is able to prove over 500 hours in the rental activity.

Counting Hours

The Internal Revenue Service and the New York State Department of Taxation and Finance are focused on auditing the utilization of losses from rental activities. There are many reported cases which provide important guidance for taxpayers and their advisors. The burden of proof is on the taxpayer to prove they meet the test for qualification as a real estate professional. An important first step is showing that the aggregation election has been properly made and presented. Even though the election is permanent and continues once elected, the author recommends that it be included on every

return so that it is prominently available and does not become an additional issue in the audit.

It is important for the taxpayer to provide a contemporaneous diary if one is available and, if not, to reconstruct such a diary based on objective supporting documentation such as emails, charge cards, receipts, phone records, etc. The cases demonstrate that judges typically frown upon the use of “ballpark estimates” and every attempt should be made to provide more precise details. Certain activities are frequently in dispute such as management, financial, and travel activities. Auditors are often inclined to disregard the time expended in such activities even though they may be material.

A careful review of the taxpayer’s activities is essential. The Treasury regulations provide that management activities are included unless a management company is retained to provide such services.¹⁸ Another area frequently in dispute is time spent as an investor which includes financing activities, purchases, negotiation, reviewing financial statements and similar summaries and financial analysis. Contrary to the assertion of many auditors, time spent in participation as an investor is included in determining material participation if the individual taxpayer “is directly involved in the day-to-day management or operations of the activity.”¹⁹

The regulations state that the extent of an individual’s participation in an activity may be established by any reasonable means. Contemporaneous diaries and time logs are perhaps the best and most influential to substantiate the time expended in the activity. Other reasonable means can include phone records, meeting records and transcriptions, emails and correspondence regarding relevant issues and work performed. The analysis should include a reasonable identification of the services performed and accurate, reasonable time estimates based on the nature of the issues. Narrative summaries prepared by the taxpayer may be essential in describing the services performed and providing an accurate foundation for support of the hours claimed.²⁰

In *Lamas v. Commissioner*,²¹ the taxpayer was able to meet his burden of proof by providing corroborating evidence consisting of phone records and the detailed testimony of credible witnesses. In other cases, the witness’ testimony was not specific enough.²² Taxpayers with multiple rental properties often spend considerable time traveling from their principal work location to the properties, and traveling between the properties for management, rent collection, and repair and maintenance activities. Numerous cases beyond the scope of this article have reviewed the allowance for travel time and in general, travel related to the need to manage and maintain the rental property is allowable.²³

Income-Producing Properties— The Net Investment Income Tax Surcharge

Real estate professional status is also essential for income producing rental properties. Such income production can arise from positive rental income over rental expenses and from the sale of such real estate. The rental income and capital gain on sale of the rental property may be subject to a 3.8% income tax surcharge under Section 1411. The surcharge generally applies to both capital gains and to passive activities under Section 469.²⁴ Rental income of a real estate professional as defined in Section 469(c)(7) is generally not subject to the NIIT²⁵ (nor is capital gain upon sale). The regulations also provide a safe harbor rule for real estate professionals and is extremely important to apply when income is being recognized, provided the taxpayer participates in the rental real estate activity for more than 500 hours.²⁶

Conclusion

This article addresses certain important income tax considerations for real estate investors and is intended to provide a general overview. There are many provisions in the Treasury regulations that may apply to individual situations. All taxpayers and their advisors must properly plan to maximize the benefits and minimize the tax burdens and carefully evaluate tax elections. ✎

1. For example, § 704(d), of the Internal Revenue Code requires sufficient basis for partners to deduct losses passed through from partnerships and similarly, § 1366(d) applies to losses passed through from S corporations. All section references are to the Internal Revenue Code, unless provided otherwise.
2. IRC § 465(a)(2).
3. § 1.465-8. This presents issues for related party loans and financing.
4. § 465(b)(4).
5. § 465(b)(6)(B).
6. § 469.
7. § 469(c).
8. § 469(c)(2).
9. § 469(h)(1).
10. § 1.469-5T(a)(1) and (3).
11. § 469(c)(7).
12. H.R. Rep. 103-111 (1993).
13. § 469(c)(7)(A).
14. § 469(c)(7)(B).
15. § 469(c)(7)(C).
16. § 469(c)(7)(C).
17. CCA 201427016. She will need to meet the over 100 hour test which is difficult to prove.
18. § 1.469-5T(b)(ii).
19. § 1.469-5T(e)(2)(ii).
20. § 1.469-5T(f)(4).
21. TC Memo 2015-59 (03/25/2015).
22. *Senty v. United States*, 132 AFTR 2d 2023-6735, (Dist. Ct. WD WI 12/15/2023).
23. *Clarence M. Leland Jr., et ux. v. Commissioner*, TC Memo 2015-240.
24. § 1411(c)(1)(A)(ii).
25. § 1.1411-4(g)(7).
26. § 1.1411-4(g)(7)(i).



Robert S. Barnett, JD, MS (Taxation), CPA, is a founding partner at Capell Barnett Matalon & Schoenfeld LLP, Attorneys at Law, in Syosset. His practice areas include business tax planning, estate planning, tax dispute resolution, and Tax Court representation. He is an Adjunct Assistant Professor of Accounting at Hofstra University. He can be reached at rbarnett@cbmslaw.com.



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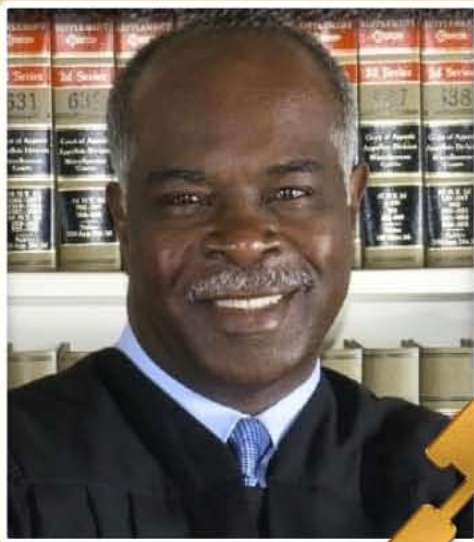
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October 6 (Hybrid)

Dean's Hour: Emerging Adult Justice—Rethinking the Court's Response to Young Adults

12:30PM

1.0 CLE Credit in Professional Practice

FREE for all attendees

Adults age 18–24 present unique challenges and opportunities for the criminal justice system. **Hon. Jared R. Rice**, New Rochelle City Court, will explore the developmental and legal foundations of Emerging Adult Justice and how courts and justice-system partners can respond more effectively. Using New Rochelle's Opportunity Youth Part as a case study, the discussion will examine practical strategies for balancing accountability, public safety, rehabilitation, and meaningful second chances.

October 7 (In Person Only)

Court Orders for Voting and Other Issues at the Polls

5:30PM—7:30PM

2.0 CLE Credits in Professional Practice

NCBA Member FREE; Non-Member Attorney \$70

Jared Kasschau, Nassau County Democratic Committee Law Counsel, and **John E. Ryan**, Nassau County Republican Committee Counsel and Co-Chairman of Law Committee, will train attorneys to prepare an application to permit a person to vote, including the questions to ask a prospective voter to form the basis for a court to forgive a missing registration. Panelists will also discuss other polling place issues that may arise on Election Day. Moderated by **Steven R. Schlesinger**.

October 8 (Hybrid)

Dean's Hour: New Resources for Criminal and Family Law Practitioners

12:30PM

1.0 CLE Credit in Professional Practice

NCBA Member FREE; Non-Member Attorney \$35

Learn more about the new programs available to criminal and family law practitioners in Nassau County: Family Wellness Court, a voluntary program providing mental health and addiction services to reduce the time children spend in foster care; Families Rising, an ATI program that provides Functional Family Therapy to 16-27 year olds to address underlying issues contributing to involvement with the Criminal Justice System; and NYSDA's Veterans Defense Program, which provides support and legal assistance to attorneys representing veterans and service members in Nassau's criminal and family courts.

October 15 (Zoom Only)

Dean's Hour: Ethical Rainmaking—From Introduction to Opportunity

12:30PM

1.0 CLE Credit in Ethics & Professionalism

NCBA Member FREE; Non-Member Attorney \$35

Omid Zareh, **Evan Polin**, and **Chuck Polin** will discuss relationship-based business development techniques to help attorneys strengthen networking effectiveness, improve referral conversations, and create more productive client and professional interactions in business and social environments while complying with ethical requirements.

October 19 (Hybrid)

Dean's Hour: 50 Years of Copyright—Enforcement in the Age of the Troll

12:30PM

1.0 CLE Credit in Professional Practice

NCBA Member FREE; Non-Member Attorney \$35

In today's digital world, businesses can face significant liability from something as simple as using an image found online. **Briana Enck-Smith** and **Elizabeth S. Sy** will explore the rise of copyright enforcement firms, commonly known as "copyright trolls," and the demand letters they send alleging copyright infringement. The program examines how these claims arise, the legal risks they present, common defenses, and practical strategies for advising clients on responding to claims and reducing exposure to liability.

October 19 (In Person Only)

SUM/UM Arbitration: Views from the Arbitrator and the Parties

5:00PM Dinner; 5:30PM CLE Program

1.5 CLE Credits in Skills

NCBA Member FREE; Non-Member Attorney \$50

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This program will provide an overview of SUM/UM arbitration from the perspectives of the arbitrator and the parties. Panelists will discuss the stages of the arbitration process, effective preparation and submission practices, common issues that arise, and practical considerations for presenting and deciding SUM/UM claims.

October 21 (Hybrid)

Dean's Hour: LLC Formation and Drafting LLC Operating Agreements

12:30PM

1.0 CLE Credit in Professional Practice

NCBA Member FREE; Non-Member Attorney \$35

PROGRAMS CALENDAR

This seminar will discuss formation and operation of LLCs and will describe why LLCs are often the best entity of choice. **Robert Barnett** and **Gregory Matalon** provide useful guidance for preparation of Operating Agreements including key considerations and traps. The flexibility of partnership tax structure will be highlighted. Topics include how to apply NYS statutory provisions, explanation of capital accounts, tax provisions and allocations, contributions and distributions, how to apply basis and debt allocations, and sale and liquidation provisions.

October 23 (Hybrid)

Dean's Hour: Navigating the Appellate Docket—Best Practices from the Clerks of the First and Second Departments

12:30PM

1.0 CLE Credit in Skills

NCBA Member FREE; Non-Member Attorney \$35

Susanna Molina Rojas, Clerk of the Court (First Department), and **Darrell M. Joseph**, Clerk of the Court (Second Department), will discuss best practices and pitfalls in filings specific to their departments. Topics covered will include electronic filing, emergency applications and interim relief, time expectations, and practitioner questions.

October 26 (Hybrid)

Dean's Hour: Crimmigration Basics for Immigration Lawyers

12:30PM

1.0 CLE Credit in Professional Practice

NCBA Member FREE; Non-Member Attorney \$35

This program will provide an overview of crimmigration and the immigration consequences of criminal convictions. **Michelle Caldera-Kopf** and **Jackeline Saavedra-Arizaga** from Long Island RIAC will address common immigration issues that arise in New York State courts and provide practical considerations for both immigration and criminal defense attorneys. The speakers will also discuss New York laws governing local cooperation with ICE, as well as recent Supreme Court decisions and other developments in immigration law.

October 26 (In Person Only)

Equitable Distribution Update

5:30PM Dinner; 6:00PM CLE Program

1.5 CLE Credits in Professional Practice

NCBA Member FREE; Non-Member Attorney \$85

Sponsored by



Stephen Gassman of Gassman Baiamonte Gruner, P.C., will discuss recent cases and trends relative to marital property and separate property issues including commingling; transmutation; equitable distribution factors; marital fault and wasteful dissipation; marital residence issues; burden of proof; valuation; tax aspects, and more.

October 27 (In Person Only)

The Amityville Horror: Legacy of Litigation!

5:30PM—7:30PM

2.0 CLE Credits in Professional Practice

NCBA Member FREE; Non-Member Attorney \$70

The 1974 murders of the DeFeo family inspired the book *The Amityville Horror* and over 40 films and TV shows (of questionable quality). They also led to a cascade of lawsuits involving criminal law, intellectual property, and even real estate! Join **Chris DelliCarpini** and **Sara Dorchak** for an exploration of the lessons to be learned from the many decisions around *The Amityville Horror*.

October 29 (Hybrid)

Dean's Hour: What's New in Chapter 13 Bankruptcy Practice for 2026

12:30PM

1.0 CLE Credit in Professional Practice

NCBA Member FREE; Non-Member Attorney \$35

Join **Krista M. Preuss**, Standing Chapter 13 Trustee, for an informative and interactive program focused on recent developments in Chapter 13 practice. She will highlight the new Chapter 13 plan, effective June 1, 2026, and discuss important changes and practical considerations for attorneys. Attendees will also participate in a Q&A addressing issues arising in current Chapter 13 cases.

October 30 (In Person Only)

4th Annual Veterans Forum: From Service to Startup—A Veterans Business and Opportunity Forum

9:00AM—12:30PM

FREE CLE Program and Continental Breakfast

These programs are appropriate for newly admitted and experienced attorneys. Newly admitted attorneys should confirm that the program format is permissible for the category of credit.

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**FOCUS:
ETHICS**

Robert P. Guido

Effective June 1, 2026, the Rules of Professional Conduct governing attorney advertising and solicitation principally contained in Rules 7.1 and 7.3¹ have been amended by a Joint Order of New York's Appellate Divisions dated May 29, 2026. The amendments are based on a proposal made to the Administrative Board of the Courts by the New York Bar Association ("NYSBA") dated December 1, 2025, and formulated by its Committee on Standards of Attorney Conduct ("COSAC"). This article is intended to highlight some of the more significant changes. As detailed below, although the amended rules serve to dramatically simplify the requirements that attorneys must follow when engaging in advertising, they simultaneously broaden their scope to apply to attorney communications that go beyond mere advertising and solicitation.

Former Rule 7.1, entitled "Advertising," prescribed some two dozen specific requirements to be followed when engaging in attorney advertising. It has now been entirely gutted and replaced by a new Rule 7.1, entitled "Communications Concerning a Lawyer's Services," which effectively reduces the requirements to two sentences:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

With this change, virtually all other former requirements (with one exception, discussed below) have been

New Rules Governing Lawyer Advertising: Beware of the Dramatic Changes

deleted, including these highlights (citations are to the former subsections of Rule 7.1):

- The inclusion of paid endorsements or testimonials without disclosing that the person is being paid therefore²
- The use of actors to portray a judge or lawyer without disclosure of same³
- The ban on ads made to resemble legal documents⁴
- The inclusion of the disclaimer, "Prior results do not guarantee a similar outcome."⁵
- The use of a client testimonial or endorsement without first obtaining the client consent confirmed in writing⁶
- The inclusion of the label "ATTORNEY ADVERTISING" on certain ads⁷
- Retention of copies of the advertisement for a specified period of time.⁸

Although these and the other former requirements are no longer itemized in the amended Rule, lawyers must remain cognizant that some of the advertising features which the former Rule addressed (e.g., use of actors, ads resembling legal documents, etc.) could nevertheless still transgress the new Rule if it can be shown by fair preponderance of evidence that a reasonable attorney would conclude that such particular feature in the ad constitutes a material misrepresentation of fact or law or a statement that is materially misleading.

One itemized requirement that has been carried over from former Rule 7.1 relates to the identity and location of the lawyer making the advertisement. Under former Rule 7.1(h), all advertisements were required to include "the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered." New Rule 7.1(d) requires that any advertisement include only "the name and contact information of at least one lawyer or law firm responsible for its content." Exactly what

constitutes "contact information" from an enforcement point of view remains an open question; it is not defined in the new Rule. Although new Comment 10 to new Rule 7.1 states that "contact information *should* always include a telephone number or physical office address, and *may* include...an email address..." (italics added here), the preamble to the Rules of Professional Conduct, at paragraph 6, instructs that terms such as "may" or "should" are "permissive" and define areas in which the lawyer has discretion to exercise judgment free of exposure to professional discipline. No explanation for this specific Rule change is offered in the COSAC proposal to the Administrative Board.

The mandate under the former rule to include the "principal office address" had served an important enforcement purpose by allowing jurisdiction and venue over any violations to be readily resolved among New York's eight separate Attorney Grievance Committees. It remains to be seen if the limitations under the newly amended Rule may complicate this determination.

New Rule 7.1 also broadens its scope and applicability far beyond the limitations of the former rule. Former Rule 7.1 was designed specifically to be limited only to communications constituting an "advertisement," a term defined by Rule 1.0(a) as follows:

"Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

As a result of the new amendments to Rule 7.1, the definition of "advertisement" has been necessarily deleted, as the new Rule is no longer limited to statements related to advertising and solicitation and despite it bearing the new title, "Communications Concerning the Lawyer's Services." The new Rule instead applies to any communication by the lawyer "about the lawyer or the lawyer services." This connotes an expansive application of the Rule.

Any false or misleading communication made by the lawyer "about the lawyer," including those that have nothing to do with advertising as it is commonly understood, is within the ambit of the Rule. Presumably this would include statements "about the lawyer"

made in ordinary correspondence, telephone calls, litigation papers, CLE presentations, website biographies, among a litany of other possibilities.

The NYSBA proposal to the Administrative Board reflects that the amended Rules are modeled on the current ABA Model Rules and are intended to "increase national unity" by bringing New York into compliance with many of the other jurisdictions who have adopted the Model Rules approach governing attorney advertising. The NYSBA proposal states:

[U]niformity is highly desirable given the interstate nature of modern legal practice and the geographically borderless nature of advertising on television, radio, the Internet, and other electronic media, as well as in national and regional print publications.

Given the stated desire to achieve national uniformity on the rules governing attorney advertising, it is curious as to why new Rule 7.1 was broadened to include any materially false and misleading statements "about the lawyer" absent any express connection to lawyer advertising. The prohibition against such statements is already governed largely by other provisions existing within the Rules of Professional Conduct.⁹

New Rule 7.1 also adds an element of "materiality" to its text not found in the former version. Unlike the former version, a communication may be found to be false or misleading only if contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole, not materially misleading (emphasis added). No explanation for this specific change is offered in the NYSBA proposal to the Administrative Board.

Interestingly, it mirrors a similar amendment recently made to Rule of Professional Conduct 4.1 which was also recommended by NYSBA. The former version of Rule 4.1 provided that "In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." The amended version, effective November 10, 2025, added the term "material" as follows: "In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person."

It is curious as to why a decision was made to relax the strict standards



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formerly governing the truthfulness of statements made by lawyers and instead now require that an element of “materiality” be proven before a violation is found. Although the term “material” is not defined by the Rules of Professional Conduct, Black’s Law Dictionary (revised 4th Ed.) defines it as follows:

Material: Important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form.

The rule making process ordinarily employs a “who benefits” analysis in relation to prospective rule changes. It is not unreasonable to consider the possibility that the public may view the changes here as serving to benefit the lawyers at the expense of clients or litigants or otherwise creating the impression that the system believes it is perfectly permissible for lawyers to lie just a little, even knowingly, so long as the lie is considered relatively immaterial to the matter at hand. On the other hand, proponents of the changes may offer in good faith the view that lawyers should not be held to account and exposed to professional discipline for minor misstatements that cause no harm and are of little or no consequence. All of this, of course, is objective speculation, but it perhaps may be of interest, and value, to both the profession and the public to understand how these competing interests were analyzed and resolved.

Former Rule 7.3, addressed to solicitation of clients, has been replaced entirely by new Rule 7.3, although it largely preserves the core prohibitions against person-to-person solicitation. Similar to the former Rule, the new Rule sets forth an exception that permits person-to-person solicitation of a person who has a “family, close personal, or prior business or professional relationship” with the lawyer.

The new Rule now adds an additional category that expressly permits a lawyer to engage in person-to-person solicitation with a person “who routinely uses for business purposes the type of legal services offered by the lawyer” (new Rule 7.3[b][3]). The NYSBA proposal to the Administrative Board does not offer any reasons for adding this exception to the Rule. It is not uncommon for businesses to routinely use various kinds of legal services, including those for tax, accounting, employment, and debt collection matters, among others. It remains unclear as to why the persons operating such businesses are not perceived as subject to the same dangers as all other persons whom the Rule is designed to protect, or why lawyers who qualify for this exception should enjoy its advantage. New Comment 5 to new Rule 7.3 offers only a conclusory statement noting the absence of “a

serious potential for overreaching when the person contacted...is known to routinely use the types of legal services involved for business.” As it stands, the text of the new Rule makes it perfectly permissible for lawyers who offer like services to freely engage in person-to-person solicitation of these businesses, including by phone, email, and in-person contact.

Interestingly, from an enforcement point of view, alleged violations of this new Rule may necessarily require a determination as to whether or not the legal services are “routinely” used by the solicited person’s business. At what point does the use of a legal service rise above, or remain below, the level of “routine?”

Among the other more significant requirements of former Rule 7.3 that have now been deleted by the new Rule are the following:

- As to solicitations conveyed in writing (commonly referred to as “direct mail solicitations”), lawyers are no longer required to file a copy of same with the local Attorney Grievance Committee, nor required to maintain a list of all recipients.¹⁰
- Lawyers soliciting clients involved in potential personal injury or wrongful death claims are no longer required to wait until 30 days after the incident to do so.

The newly amended Rules governing advertising and solicitation certainly relieve lawyers of the burden of complying with many of the requirements enumerated in the prior versions. Communications about the lawyer and the lawyer’s services that are truthful, accurate, and carefully avoid containing statements that may tend to mislead, should suffice and past muster under the provisions of the new rules. ⚡

1. 22 NYCRR Part 1200.

2. 7.1[c][1].

3. 7.1[c][3].

4. 7.1[c][4].

5. 7.1[e][3].

6. 7.1[e][4].

7. 7.1[f].

8. 7.1[k].

9. e.g., Rule 4.1 (In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person); Rule 3.3(a)(1) (A lawyer shall not knowingly make a false statement of fact or law to a tribunal...); Rule 8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

10. former 7.3[c][1] and [3].



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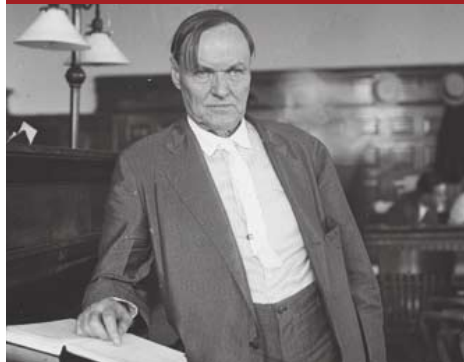
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**FOCUS:
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Rudy Carmenty

Neither Nathan Leopold nor Richard Loeb were your usual suspects. They grew up amidst affluence. Each possessed a brilliant, if warped, mind. Having absorbed the philosophy of Nietzsche, they saw themselves as the personification of the *Übermensch* or Superman.

They believed themselves superior. So superior, they were above the law and society's strictures. The duo did present a study in contrasts. The gnome-like Leopold was obnoxious and narcissistic. The attractive and athletic Loeb was outgoing. Somehow, their personalities meshed.

These two prodigies met in 1920 and quickly became inseparable. Loeb was obsessed with crime. Leopold was obsessed with Loeb. Not long after, they made a deal. Leopold would help Loeb carry out the perfect crime in exchange for

Darrow Defends the Indefensible

sex. It was a psycho-sexual arrangement that gave rise to murder.

The 'Perfect Crime'

Together they hatched a convoluted plan. They would kill a child, camouflaging their crime by making it look like a kidnapping. They would fool the authorities with an elaborate ruse for a victim who was already dead. The thought of getting caught never entered their minds.

Their victim was fourteen-year-old Bobby Franks. Leopold and Loeb knew him well. As young Franks was walking home on May 21, 1924, he was lured by Loeb into a rented automobile Leopold was driving.

Bobby sat on the passenger side with Loeb behind him. Leopold was behind the wheel. Loeb covered Bobby's mouth as he struck him in the head with a chisel. Loeb pulled the unconscious Bobby onto the back seat and suffocated him by stuffing a rag down the boy's throat.

Waiting until dark, they drove to a drainage culvert around Wolf Lake near the Illinois/Indiana state line to dispose of the body. They poured hydrochloric acid on Bobby's face and genitals. The acid on the boy's genitalia was to hide he had been circumcised.

They cleaned the rented car's upholstery, wiping-off blood stains,

and burned Bobby's clothes. The next day, May 22, the corpse was discovered protruding from the drainpipe. The police found a pair of tortoiseshell eyeglasses nearby. But for the eyeglasses, Leopold and Loeb might have gotten away with the killing.

What differentiated the eyeglasses was their unusual hinge. It turned out, only three such pairs with this type of hinge were sold in all of Chicago. One happened to belong to Leopold. In spite of their elaborate efforts, they left behind damning evidence.

When questioned, Leopold said the eyeglasses fell out of his pocket while bird-watching the week prior. When police searched Leopold's room, further suspicions were aroused when a letter he wrote to Loeb was uncovered indicating the boys were more than friends. Loeb was brought in for questioning.

Leading the investigation was Cook County State's Attorney Robert Crowe, a hard-nosed prosecutor. When Crowe questioned Leopold, he had an alibi which Loeb confirmed. On the night in question, they drove around in Leopold's car and picked up two unnamed girls. A flimsy story indeed if the boys were gay.

In keeping with pre-Miranda practices, Leopold and Loeb were held incommunicado, did not have counsel present, and were subjected to relentless interrogation. Their alibi fell apart after the family chauffeur told authorities he had been repairing Leopold's sedan, which never left the garage that night.

Crowe knew he had them. Loeb was the first to break. Loeb confessed, offering details only the killer could have known. Loeb also shamelessly blamed Leopold not only for planning the murder but stated he had killed Bobby in the back seat while he, Loeb, was driving the automobile.

When Leopold learned of Loeb's confession, he dismissed it. He soon turned on his lover. Leopold told police he had driven the car and Loeb was the killer. Once they started talking, they couldn't stop. Signed confessions were obtained, deviating only in that each claimed the other killed the boy.

Leopold and Loeb took the further step of reenacting the murder for the prosecution in full view of the press. They led police on a gleeful jaunt of the crime scene and related locations. When Crowe announced their arrest, he told reporters: "I have a hanging case and am ready to go to the jury today."¹

Basking in their newfound notoriety, Leopold and Loeb never showed any contrition. Most disturbing, they said they did it because they could, that they killed Bobby Franks for the thrill or as Leopold called it the "pure love of excitement."²

This thrill-kill aspect captured the media's attention. Chicago's newspapers went into a feeding frenzy to satisfy the public's insatiable appetite, publishing every salacious detail about the case.

Public sentiment ran high that Leopold and Loeb deserved the death penalty.

Enter Clarence Darrow

An ardent opponent of capital punishment, Darrow's reputation as the *Attorney for the Damned* loomed large in Chicago and in courtrooms across the country. A lifelong agnostic, he was also considered something of a miracle worker at the bar.

If he was to save his clients, who faced certain execution, Darrow, the champion of lost causes, would have to achieve the impossible. He would have to demonstrate these two scions of privilege were somehow victims of circumstance. That their being rich contributed to their being depraved.

At the June 11 arraignment, Darrow pled not guilty. Playing his cards close to the vest, he gave every indication he would argue they were not guilty by reason of insanity. Still, convincing a jury that these two highly educated young men could not distinguish right from wrong, the M'Naghten Rule, seemed insurmountable.³

A jury would be unlikely to empathize with the accused. Darrow realized a bench trial, which depended on getting before the right judge, offered their lone hope. The trial date was set for August 4, 1924, with motions scheduled for June 21. The case would be heard by the Hon. John R. Caverly.

Caverly founded Chicago's Juvenile Court. He was renowned for his compassion. He was also scheduled to retire, so this was Darrow's one shot at having the matter in front of Caverly. Call it luck, call it forum shopping, but Darrow got the judge he wanted.

Crowe complained Darrow schemed to go before a "friendly judge."⁴ Caverly called Crowe's remarks "a cowardly and dastardly assault upon the integrity of this court," and had the comments stricken.⁵ Nevertheless, no other judge in Chicago would have ruled as Caverly eventually did.

A Plea for Mercy Resulting in Tears

Darrow began with a perfectly executed strategic move. Acknowledging his clients' guilt, he switched their plea from not guilty to guilty. This maneuver changed everything. Crowe was beside himself. He now faced an uphill battle to get a death sentence imposed.

In one stroke, Darrow altered the entire dynamic of the proceedings while carving a new lane in criminal defense work. He had been formulating this provocative move since the arraignment. Darrow would argue the then-novel theory of diminished capacity for purposes of mitigation.

It became not so much the trial of the century, as it was the extended sentencing hearing of the century. Beginning on July 23 and for the next 33

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days, the judge heard Crowe and Darrow aim their arguments squarely at him in a legal tug-of-war which had the entire city of Chicago, as well as the country, on edge.

For Crowe it was premeditated murder carried out in cold blood and a kidnapping for a \$10,000 ransom. Each charge carried the death penalty. To that end, he proved every element in excruciating detail. Crowe made it clear the defendants were owed no consideration since they showed none to their victim.

Darrow raised no objections during Crowe's presentation. Then came his turn. He accentuated his clients youth, as both were minors, and their various deficiencies. Darrow went so far as to call them "Babe" (for Leopold) and "Dickie" (for Loeb), family sobriquets.

He stated the killing was "the senseless act of immature and diseased children" and noted "the court was the only thing standing between the boys and a bloodthirsty mob."⁶ The thrust of Darrow's case was that psychological debility is an extenuating factor to be considered at sentencing.

The defense was not claiming Leopold and Loeb were insane. Instead, Darrow was arguing was that they should not be put to death because they were sick. The families spared no expense hiring an assortment of clinicians, including alienists, a term used for psychiatrists, and presented extensive forensic testimony.

Let there be no doubt, money made all the difference. If Leopold and Loeb were penniless, they most certainly would have been executed. Crowe sought to exclude the expert witnesses and medical evidence, arguing it should only be admissible if the defendants pled insanity. Judge Caverly ruled otherwise.

For twelve days, Chicago and the nation waited for the decision. On September 10, Caverly sentenced Leopold and Loeb to life in prison for the murder, and 99 years for kidnapping. The judge premised his ruling on their youth, "moved chiefly by the consideration of the age of the defendants, boys of 18 and 19 years."⁷

Caverly sidestepped the psychological evidence with its thorny Freudian implications, because absent direction from the Illinois legislature, he could not permit it to impact his ruling.⁸ It appears Darrow's summation won the day. Gambling on the judge's humanity, this was the stuff of high drama.

Beginning on August 22 and lasting for twelve hours over three days, Darrow's closing oration cast a spell, dominating the courtroom. A virtuoso, he spoke without notes deftly touching every emotion. He refuted the state's claim the motive was money as Leopold and Loeb were driven by their maladjusted minds.

When Darrow finished, there were tears in his eyes. The judge was also

in tears. Even Leopold and Loeb were chastened and crying. Darrow moved everyone except the prosecution. To add to the mix, Darrow intimated this would be his final case. It wasn't, of course.

As for his clients, in 1936 Loeb was stabbed to death in the shower by another inmate who claimed Loeb had made advances. Leopold was released from prison in 1958. Although he married a woman in Puerto Rico, his ardor for Loeb, and for other men, continued unabated. He died of a heart attack in 1971.

Concerning Leopold's opinion of Darrow, he later wrote the two men who "came closest to preaching the pure essence of love" were Jesus Christ and Clarence Darrow.⁹ Rather fitting, because at the end of his summation, Darrow quoted from the Rubaiyat of Omar Khayyam:

If I should succeed in saving these boys' lives and do nothing for the law, I shall feel sad indeed. If I can succeed, my greatest reward and my greatest hope will be I have done something to help human understanding, to temper justice with mercy, to overcome hate with love. I was reading last night of the aspiration of the old Persian poet, Omar Khayyam. It appealed to me as the highest I can envision. I wish it was in my heart, and I wish it was in the hearts of all.

"So I be written in Book of Love,
I do not care about that Book above;
Erase my name or write as you will,
So I be written in the Book of
Love."¹⁰

Darrow's summation has since become part of the literature of American law. 🗡️

1. Bernard Ryan, Jr., *Leopold And Loeb Trial: 1924*, at <https://www.encyclopedia.com>.
2. Jeremy Lybarger, *Reopening the Case Files of Leopold and Loeb*, *The Paris Review* (July 26, 2018) at <https://www.theparisreview.com>.
3. The *M'Naghten Rule* is a legal standard that excuses criminal liability if a mental defect prevented the accused from understanding that what he did was wrong.
4. Micheal Hannon, *Leopold and Loeb Case* (1924), University of Minnesota Twin Cities (May 2010) at <https://librarycollections.law>.
5. *Id.*
6. Clarence Darrow, "PLEA FOR LEOPOLD AND LOEB" (22, 23, AND 25 AUGUST 1924) *Voice of Democracy* at <https://voicesofdemocracy.umd.edu>.
7. *The Loeb-Leopold Murder of Franks in Chicago May 21 1924*, 15 J. Crim. L. & Criminology 347 (1925).
8. *Id.*
9. Brian Keith Ohara, *Leopold and Loeb: The Murder of the Century and America's #1 Lawyer Clarence Darrow*, *Blogger.com* (April 27, 2019) at <https://briankeithohara.blogspot.com>.
10. Darrow, *supra*.



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I certify that 50% of all my distributed copies (electronic and print) are paid above a nominal price.

(17) Publication of Statement of Ownership. If the publication is a general publication, publication of this statement is required. Will be printed in the October 2026 issue of this publication.

(18) I certify that all information furnished on this form is true and complete. Elizabeth Post, Executive Director, September 29, 2026.

**FOCUS:
INSURANCE LAW**

Jeffrey Bloomfield and Michael Schultz

On May 28, 2026, Governor Kathy Hochul signed the FY 2027 Budget.¹ As part of this Budget, Governor Hochul enacted significant amendments to the Insurance Law that apply to all motor vehicle actions commenced on or after May 26, 2026, even if the collision occurred before that date.²

Insurance Law Article 51

Initially, the “No-Fault Law was adopted by the legislature to correct certain infirmities recognized to exist under the common-law tort system of compensating automobile accident claimants.”³ Only in the case of a statutorily defined “serious injury,” could a person recover for non-economic losses, such as pain and suffering.⁴ The legislature enacted this No-Fault “scheme” “to reduce the number of automobile personal injury accident cases litigated in the courts.”⁵

Insurance Law § 5102(d) Loses a Category

Insurance Law § 5102(d) had previously set forth nine categories of injuries that constituted a “serious injury.”⁶ Those categories were: death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.⁷

Governor Hochul’s budget amended Insurance Law 5102(d) to remove the last category.⁸ That category was often called the “90/180 category.”⁹

In keeping with the legislative intent behind Article 51, Governor Hochul explained that removing the 90/180 category would “[b]etter define what actually constitutes a ‘serious injury’ so that damages for pain and suffering or

Insurance Law Update

emotional distress are reserved for those able to objectively demonstrate that they have suffered a serious injury.”¹⁰

Damages Are Capped in Certain Circumstances

In New York, a plaintiff’s damages are reduced by the plaintiff’s proportion of fault in causing their injuries.¹¹ The purpose behind this rule was not to reduce a defendant’s damages for its wrongdoings but to prevent a defendant “from paying a portion of damages for conduct it could not have prevented.”¹² This “promotes the purposes and policies behind the comparative fault statute.”¹³

But the budget amendments limit the amount of damages a plaintiff who suffered a “serious injury” from a motor vehicle collision can recover for non-economic damages in certain instances of the plaintiff’s culpable conduct. Insurance Law § 5104(d) was added to cap a plaintiff’s damages at \$100,000 if the plaintiff is found to be both at fault and in violation of one of three provisions.¹⁴

The first provision is when a plaintiff is found to be “operating an uninsured motor vehicle and responsible under article six of the vehicle and traffic law for insuring such motor vehicle, except if a lapse in motor vehicle insurance coverage occurs for a period of time less than thirty days.”¹⁵

The second provision is when a plaintiff is found to be “operating a motor vehicle while impaired at the time of the accident and convicted of such.”¹⁶

The third provision is when a plaintiff is found to be “operating a motor vehicle in the commission of a felony, or immediate flight therefrom, at the time of the accident and has been convicted of such felony.”¹⁷

But these restrictions do not apply to an action for damages for injuries resulting in death.¹⁸

Precluding Motor Vehicle Actions

The budget amendments also move motor vehicle actions in New York from a pure comparative fault jurisdiction to a modified comparative fault jurisdiction.

To do this, CPLR § 1411(b) was added, which precludes recovery of any damages in a motor vehicle accident action when the plaintiff is attributed a greater level of culpable conduct than the defendant that the plaintiff seeks recovery against.¹⁹

Before this amendment, plaintiffs could recover damages from defendants even if the plaintiffs were 99 percent culpable. The plaintiffs’ total damages would be reduced by their percentage of fault in causing the accidents. Now, a

plaintiff found to be 51 percent or more culpable cannot recover any damages for personal injury.

Additionally, a plaintiff could previously obtain summary judgment by proving that a defendant was negligent without needing to prove a lack of comparative fault.²⁰ Yet because New York was a pure comparative fault jurisdiction, defendants moving for summary judgment maintained the burden to prove, *prima facie*, that they were not at fault in the happening of a collision.²¹

Now that a motor vehicle defendant need only prove that they were less culpable than the plaintiff, may a court apportion fault on a summary judgment motion to determine whether a plaintiff may pursue their action? If so, can a defendant obtain summary judgment dismissal of a plaintiff’s case by showing that they were less culpable than the plaintiff?

Prejudgment Interest Accrual Department Split Resolved

The budget amendments also resolve a long-standing split between the appellate departments about when prejudgment interest begins accruing in a motor vehicle action.

Under CPLR § 5002, “prejudgment interest” is calculated from “when the plaintiff’s right to be compensated for the damages they sustained becomes fixed in law.”²²

Yet, as Judge Rivera explained in dissent in *Sabine v. State*,²³ “[t]he question of when prejudgment interest begins to accrue in bifurcated automobile accident actions has divided the Appellate Division for decades.”

This is because the Second Department²⁴ and Third Department²⁵ held that whether a plaintiff suffered a “serious injury” was a question of damages, not liability. The Second Department reasoned that “[t]he determination of whether a particular plaintiff establishes a serious injury, or fails to do so, necessarily involves an examination of the parties’ evidence on damages.”²⁶ Rather, “[s]uch evidence is independent of the fault-based issues present in a bifurcated liability context such as duty, breach of duty, and proximate causality between acts or omissions on the one hand and an accident on the other.”²⁷

Therefore, prejudgment interest would begin accruing upon a plaintiff being granted summary judgment against defendants as to their culpability even if the plaintiff had not yet proven that they sustained a serious injury.

The Fourth Department, however, took the opposite view, determining that a plaintiff must also establish a serious injury before a defendant will be liable to that plaintiff.²⁸ For that reason, the Fourth Department would grant summary judgment on “negligence,” but prejudgment interest would not begin accruing until a serious injury was also established.²⁹

The budget amendments resolve this department split.

Insurance Law § 5104(a) was amended to include a new caveat that “[n]o liability for non-economic loss shall be fixed unless and until the trier of fact has determined the existence of a serious injury.”³⁰

Eschewing the Second Department and Third Department interpretations of liability, Insurance Law § 5104 now adopts the Fourth Department’s view that although a plaintiff may be entitled to summary judgment on a defendant’s “negligence” or “fault,” absent proof of a serious injury, that plaintiff will not be entitled to summary judgment on “liability.”

Therefore, prejudgment interest for non-economic loss will not begin accruing until the plaintiff also proves that they sustained a serious injury.

Fault Must Be Determined Before Serious Injury

Not only may liability not be decided “unless and until” a trier of fact finds a serious injury, but the last sentence in Insurance Law § 5104(a) adds that “the trier of fact shall not determine the question of whether an injury is a serious injury until the trier of fact has determined the party or parties at fault.”³¹

At trial this is straight forward: a judge or jury cannot determine the issue of serious injury before determining the parties’ fault. The order of the issues to be tried is now restricted by statute.

Summary judgment is more complicated though. Can a court decide a motion for summary judgment as to whether an injury is a serious injury before determining the parties’ fault? A plain reading of the statute seems to prevent a court from deciding a party’s serious injury threshold motion until fault has been determined. Under this reading, a court cannot decide a plaintiff’s motion for summary judgment establishing that the plaintiff met the serious injury threshold—by proving, for example, that the plaintiff died or sustained a fracture—until fault is first determined. Likewise, the statute prevents a court from determining a defendant’s summary judgment motion to dismiss a plaintiff’s action for failure to meet the serious injury threshold until fault has first been determined.

Must a court then wait for a summary judgment motion on negligence or “fault” before deciding a summary judgment motion on serious injury? Can a defendant concede “fault” to make a summary judgment motion on threshold? If so, is a plaintiff required to accept that concession? Or may a plaintiff condition acceptance on the defendant’s stipulating to begin prejudgment interest accruing from the date of the concession?

Final Takeaways

While some of these new amendments seem straightforward, some pose unanswered questions for practitioners. No matter the immediacy of the impact of these amendments, these new amendments will drastically

alter the litigation landscape for motor vehicle accident cases. Practitioners would be wise to follow the courts’ decisions for guidance in navigating this new motor vehicle litigation landscape. ⚖️

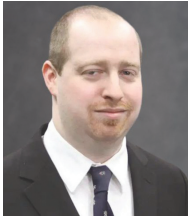
- 1. Governor Hochul Signs Budget That Makes New York More Affordable, Keeps New Yorkers Safe and Expands Opportunity for All, (New York State Governor’s Press Office) (May 28, 2026) <https://www.governor.ny.gov/news/governor-hochul-signs-budget-makes-new-york-more-affordable-keeps-new-yorkers-safe-and-expands>.
- 2. NY LEGIS 58 (2026), 2026 Sess. Law News of N.Y. Ch. 58 (A. 10008-C).
- 3. *Licari v. Elliott*, 57 N.Y.2d 230, 234, 441 N.E.2d 1088, 1090 (1982).
- 4. *Id.*
- 5. *Scheer v. Koubek*, 70 N.Y.2d 678, 679, 512 N.E.2d 309 (1987).
- 6. *Schmitt v. Reeves*, 273 A.D.2d 295, 296, 710 N.Y.S.2d 541, 542 (2d Dept. 2000).
- 7. Ins. Law former § 5102(d).
- 8. NY LEGIS 58 (2026), 2026 Sess. Law News of N.Y.

- Ch. 58 (A. 10008-C).
- 9. *Toure v. Avis Rent A Car Sys., Inc.*, 98 N.Y.2d 345, 357, 774 N.E.2d 1197, 1204 (2002).
- 10. *See supra*, n. 1.
- 11. CPLR § 1411(a).
- 12. *Adamy v. Ziriakus*, 92 N.Y.2d 396, 405, 704 N.E.2d 216, 220 (1998).
- 13. *Id.*
- 14. NY LEGIS 58 (2026), 2026 Sess. Law News of N.Y. Ch. 58 (A. 10008-C).
- 15. Ins. Law § 5104(d).
- 16. *Id.*
- 17. *Id.*
- 18. *Id.*
- 19. *Id.*
- 20. *Rodriguez v. City of New York*, 31 N.Y.3d 312, 324–25, 101 N.E.3d 366, 374 (2018).
- 21. *Woods v. Burgos*, 220 A.D.3d 688, 689, 197 N.Y.S.3d 324, 325–26 (2d Dept. 2023).
- 22. *Love v. State*, 78 N.Y.2d 540, 541, 583 N.E.2d 1296 (1991).
- 23. *Sabine v. State*, 43 N.Y.3d 1015, 1018, 262 N.E.3d 239 (2024).
- 24. *Van Nostrand v. Froehlich*, 44 A.D.3d 54, 59, 844 N.Y.S.2d 293 (2d Dept. 2007).
- 25. *Kelley v. Balasco*, 226 A.D.2d 880, 640 N.Y.S.2d 652, 653 (3d Dept. 1996).

- 26. *Van Nostrand v. Froehlich*, 44 A.D.3d 54, 61, 844 N.Y.S.2d 293 (2d Dept. 2007).
- 27. *Id.*
- 28. *Ruzycki v. Baker*, 301 A.D.2d 48, 51, 750 N.Y.S.2d 680 (4th Dept. 2002).
- 29. *Id.*
- 30. NY LEGIS 58 (2026), 2026 Sess. Law News of N.Y. Ch. 58 (A. 10008-C).
- 31. *Id.*



Jeffrey Bloomfield is an attorney with Gabriel Law Firm, P.C. in Rockville Centre, representing personal injury plaintiffs. He can be reached at jeffrey@gabriellegal.com.



Michael Schultz is the Managing Member of Schultz Appeals, PLLC. He can be reached at mschultz@schultzappeals.com.

BBQ at the Bar

On Thursday, September 10, more than 300 Members gathered on the lawn at Domus for an evening of camaraderie, great food, and networking to kick off the new Bar year. The NCBA Annual BBQ at the Bar featured sponsor tables, merchandise sale, giveaways, and baskets raffled by the Lawyer Assistance Program (LAP). NCBA President Hon. Maxine S. Broderick delivered a warm welcome and shared her vision for the year ahead. With a strong turnout and enthusiastic participation, the evening set a positive and energetic tone for the upcoming Bar year.



Photos by Hector Herrera

THE WIZARDS ARE COMING TO TOWN!



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PLAY FOR A PURPOSE
Proceeds benefit the Nassau County Bar Association, WE CARE Fund, which provides grants that help children, older adults, and others in need throughout Nassau County.

VENUE: CHAMINADE HIGH SCHOOL
ATHLETIC GYM | 340 JACKSON AVE | MINEOLA, NY 11501

DATE: OCTOBER 24, 2026

GAME TIME: 2 PM | **DOORS OPEN: 1 PM**



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Golf and Tennis Classic

The 30th Annual WE CARE Golf and Tennis Classic, held on September 14 at North Shore and Brookville Country Clubs, brought together 220 golfers and 350 dinner guests for an unforgettable event. With amazing weather, a raffle room with over 100 baskets, and a live auction, WE CARE raised vital funds that directly support the Nassau County community. A huge thank you to all who attended and supported the event, as well as to honorees Evan H. Krinick and Antonios Vournou.





Photos by Hector Herrera

Become a Mentor—Celebrate 30 Years of Making a Difference

Kevin Agoglia, Alan B. Hodish and R' Rebecca Sassouni

In schools throughout Nassau County, many young people are experiencing difficult and sometimes confusing times in their lives. They may be searching for acceptance among their peers, struggling to find their place, or simply looking for someone who will listen and take an interest in them.

This year marks the 30th anniversary of the Nassau County Bar Association Student Mentoring Program, a program created to provide young people with something every child can benefit from: a caring adult who is willing to listen, encourage, and help them see their own potential.

We invite you to become a mentor. Being a mentor is a wonderful opportunity to connect with a young person and make a meaningful difference in his or her life. It is not time-consuming, and you do not need to be an educator or counselor.

School social workers and guidance counselors help identify students who may benefit from having a positive adult role model in their lives. Mentors meet with students in a comfortable, nonjudgmental setting, often on a one-to-one basis at school. The primary goal is simple: establish a dialogue and build a relationship.

In many cases, we allow the student to take the lead. Students may talk about their interests, their hopes and aspirations, school, family, friendships, or, if they choose, things that may be troubling them. A good mentor does not need to have all the answers. Sometimes the most important thing a mentor can do is listen, encourage, and sometimes offer a different perspective.

Most mentoring sessions take place before school starts, or sometimes during first period, typically from 8:00 a.m. to 8:40 a.m. The time commitment is modest, but in comparison the impact can be lasting.

The annual culmination of the program comes every May with our

annual NCBA Mentor Luncheon, when mentors and students come together at Domus to celebrate the relationships they have developed throughout the school year. This past year, nearly 200 students from nine schools participated and shared a meal together.

Over the past 30 years, countless attorneys, judges, and other professionals have volunteered their time to participate in this program. Many have found that the experience is every bit as rewarding for them as it is for the students.

As longtime mentor and past NCBA President Dorian Glover once said: "I often feel like the students give more to me than I give to them."

The History and Breadth of the Program

The recently re-named NCBA Alan B. Hodish Lawyer Mentorship Program was founded in Hempstead three decades ago by Domus stalwarts Susan Katz Richman, Hon. Ira Warshawsky, and Alan Hodish. The program began in the Hempstead schools. At the time, Hodish served as a Hempstead elementary school teacher, athletic coach, and math specialist, later going on to become an attorney at law. Working with Hons. Richman and Warshawsky in the early years, Hodish grew the program of mentoring youth. In the spring of 2026, the NCBA Board of Directors renamed the program for Hodish for his long-time efforts coordinating the program.

The program continues to flourish. It currently serves seven districts across Nassau County, including Baldwin, East Meadow, Great Neck, Hempstead, Jericho, Uniondale, and Westbury school districts. This vital mentorship program provides a bridge between NCBA volunteer attorneys, school administrations, and school guidance

professionals to identify middle school students who benefit.

Call to Action: Become a Mentor in Your Home District or Near Your Office

The attorney's role is not to solve mentee's problems or to provide legal advice. Rather, attorneys serve as cheerleaders, someone who listens, encourages, and reminds these young people that they are capable of succeeding. Sometimes, having one consistent adult who takes an interest in their lives can make an extraordinary difference during what is often a challenging stage of adolescence.

According to Rebecca Sassouni, "I had had the experience of being coached by NCBA legend Susan Katz Richman as a mock trial student. As I was also serving as a Great Neck school board trustee, I made inquiries to learn more about the NCBA mentorship program in order to introduce it to my home district to ensure that Great Neck might, also, offer lawyer mentors to students, just as the other districts across the County. I was pleased that, after the relevant introductions, the NCBA program was welcomed by all. Everyone quickly realized the program's transformative impact for students. The NCBA program has run in Great Neck's two middle schools since."

Eight-year, seasoned mentor Kevin Agoglia stated that "over the years, I have had former mentees reach out to me when they graduated from high school to thank me for the encouragement and support they received. Those conversations have meant more to me than I can adequately express. Along the way, my students have also kept me informed about what's happening in their schools, on social media, and in their lives. Every meeting is an opportunity not only to encourage them, but also to better understand the world through their eyes."

We invite you to see for yourself just how rewarding it can be to serve as a mentor. You may never know exactly how much your time, attention, and encouragement will mean to a young person—but you can be certain that it matters.

We hope you will join us for the 30th anniversary year of the NCBA Student Mentoring Program and become part of this very special effort to make a difference in the life of a child.

Please consider joining, or initiating, the Alan Hodish Lawyer Mentorship Program at one of the school districts near you. Most of the school guidance programs would easily refer more students in need of an adult mentor if additional NCBA attorneys would commit to the program.

Feel free to contact rebecca@lawjaw.org, kagogliaesq@optonline.net, alhodish@aol.com, or Stephanie Pagano spagano@nassaubar.org should you have questions or for more information. 🗑️



Kevin Agoglia is a partner at the law firm of Agoglia, Holland & Agoglia, P.C. He currently serves as Chair of the NCBA Lawyers Assistance Committee and has been actively involved in the NCBA Mentoring Program for the past eight years. He can be reached at kagogliaesq@optonline.net.



Alan B. Hodish is the Founder of Law Offices of Alan B. Hodish, LLC and the NCBA Student Mentor Program. He can be reached at alhodish@aol.com.



R' Rebecca Sassouni currently serves as a member of the NCBA Board of Directors, and Co-chair of the Women in Law Committee. She previously co-chaired the Education Law Committee. Sassouni is Of Counsel, to Wisselman Harounian Family Law. She can be reached at rebecca@lawjaw.com.

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.

Forchelli Deegan Terrana LLP's Chairman and Co-Managing Partner, **Jeffrey D. Forchelli**, was selected by his peers for inclusion in the 33rd Edition of *The Best Lawyers in America®* for Land Use and Zoning Law and Real Estate Law. In addition, the following partners were recognized in the 2027 Edition of *The Best Lawyers in America®*: **Stephanie M. Alberts, Joseph P. Asselta, Adam L. Browser, Daniel P. Deegan, Kathleen Deegan Dickson, Gregory**

S. Lisi, and Gerard R. Luckman. The following attorneys were included in the *Best Lawyers: Ones to Watch® in America* 2027 Edition: **Nicholas F. Bekker, Gabriella E. Botticelli, Caroline G. Frisoni, Taylor L. Gonzalez, Sebastian Jablonski, Cheryl L. Katz, Julia J. Lee, Lindsay Mesh Lotito, Camila Morcos, Jeremy M. Musella, and Jonathan P. Weiss.** In addition, Forchelli Deegan Terrana LLP congratulates **Gregory S. Lisi,**

for receiving the 2027 Edition Lawyer of the Year designation for his work in Employment Law – Management.

Anthony Nozzolillo was named a 2026 "Influencer in Business – Law" by Long Island Business News (LIBN)

Makofsky Valente Law Group, P.C. is pleased to announce that the firm has been recognized in the Best of Nassau 2026 contest, presented by NYU

Langone Health, as Best Estate Planning Lawyer and Best Law Firm/Lawyer. Capell Barnett Matalon & Schoenfeld LLP congratulates its partners **Robert S. Barnett, Gregory L. Matalon, Stuart H. Schoenfeld, Yvonne R. Court, and Erik Olson** on all being presenters at the 24th Annual Accounting and Tax Symposium, organized by the National Conference of CPA Practitioners on November 18, 19, and 20.

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COMMITTEE CHAIRS

Access to Justice

Alternative Dispute Resolution

Animal Law

Appellate Practice

Asian American Attorney Section

Association Membership

Awards

Bankruptcy Law

Business Law Tax and Accounting

By-Laws

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Commercial Litigation

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Community Relations & Public Education

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Ethics

Family Court Law, Procedure and Adoption

Federal Courts

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Grievance

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Immigration Law

In-House Counsel

Insurance Law

Intellectual Property

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Craig J. Tortora

WEDNESDAY, OCTOBER 7

Real Property Law

12:30 p.m.

Paul Bugoni will speak on Cyber Crime.

THURSDAY, OCTOBER 8

Business Law, Tax & Accounting

12:30 p.m.

Jacqueline Harounian will discuss "Tax Considerations in Divorce Cases."

LGBTQ

12:30 p.m.

TUESDAY, OCTOBER 13

Ethics

12:30 p.m.

Labor & Employment Law

12:30 p.m.

Falcon, Rapport & Berkman Partner Elizabeth Schlissel and Associate Carly Galluzzo will speak on "But ChatGPT Said I Was Right: Responding to Workplace Complaints in the Age of AI."

WEDNESDAY, OCTOBER 14

Plaintiff's Personal Injury

12:30 p.m.

Matrimonial Law

5:30 p.m.

Hon. Joseph R. Conway and attorneys Jennifer Rosenkrantz, and Melissa Studin-Young will speak on "Splitting the Baby: Trends in 50/50 Custody Arrangements."

THURSDAY, OCTOBER 15

Asian American Attorney Section

12:30 p.m.

TUESDAY, OCTOBER 20

Commercial Litigation

12:30 p.m.

Diversity & Inclusion

6:00 p.m.

WEDNESDAY, OCTOBER 21

Association Membership

12:30 p.m.

Surrogate's Court Estates & Trusts

5:30 p.m.

TUESDAY, OCTOBER 27

Women in the Law

12:30 p.m.

THURSDAY, OCTOBER 29

District Court

12:30 p.m.

WEDNESDAY, NOVEMBER 4

Real Property Law

12:30 p.m.

Condemnation Law & Tax Certiorari

12:30 p.m.

THURSDAY, NOVEMBER 5

Community Relations & Public Education

12:45 p.m.

Publications

12:45 p.m.

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Burnout is a state of emotional, mental, and physical exhaustion caused by excessive, prolonged stress. As stress persists, you lose interest and motivation to practice law. Burnout doesn't happen overnight; its signs and symptoms often appear subtly and grow more pronounced over time, leading to extreme dissatisfaction, frustration, and decreased productivity. When experiencing burnout, you might have thoughts that signal you've reached a "survival mode" or exhaustion or depersonalization.

PHYSICAL

Burnout can leave you feeling tired or drained most of the time. You may also experience lowered immunity, frequent headaches, back or muscle pain, and changes in your appetite or sleep habits.

EMOTIONAL

You may experience feelings of failure, self-doubt, helplessness, or defeat. Burnout can also lead to emotional detachment, loss of motivation, a more cynical or negative outlook, and decreased satisfaction or sense of accomplishment.

BEHAVIORAL

Burnout may cause you to withdraw from responsibilities and isolate yourself from others. You may procrastinate, take longer to complete tasks, use food or alcohol to cope, take out your frustrations on others, or arrive late and leave work early.

WHAT TO DO

Take burnout seriously. Trying to push through the exhaustion and continuing as you have been will lead to further worsening of symptoms. It's important to slow things down or take a break. Cut back commitments and activities where you can. Give yourself time to rest, reflect, and heal. There are always ways you can improve your situation or at least your state of mind:

- Acknowledge the situation
- Ask for help
- Take breaks
- Identify what needs to change
- Actively address problems
- Reconnect with your "Why"

LAP offers free and confidential support to legal professionals and their family members who may be struggling with burnout and other mental health issues. If you or someone you know needs help, we're here for you.
LAP is supported by funding from the NYS Office of Court Administration, WE CARE Fund, and Nassau County Boost.