WCBA
Westchester County Bar Association

Westchester Bar Journal

Volume 45, No. 1 Fall 2020

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Westchester Bar Journal

Published by the
Westchester County Bar Association
4 Westchester Park Drive, Suite 155, White Plains, New York 10604

Annual Subscription Price: $10
Printed by Alloy Printing, White Plains, New York

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Policy for submission of articles to the *Westchester Bar Journal*

The editors encourage the submission of manuscripts for publication in the *Westchester Bar Journal*. All submissions should be forwarded to the WCBA electronically in Microsoft Word format as attachments to: editor@wcbany.org. Please indicate in the subject line of the email that an article for the *Westchester Bar Journal* is attached. Please feel free to call the Bar office at 914-761-3707, ext. 40, with any questions.

Articles should be between 1200 and 4000 words in length, and all citations should be written in accordance with a Uniform System of Citation published by The Harvard Law Review Association (popularly known as the "Blue Book"), and accuracy thereof verified by the author. Citations should be provided as endnotes not footnotes. Articles should be free from electronic formatting such as page numbering, headers or footers. "All caps" text formatting should NOT be used. All articles should be accompanied by a brief biography of the author(s), as well as digital headshot(s) as high resolution JPEGs.

Generally, it is the WCBA's policy not to accept reprinted articles. If an author seeks to reprint an article, that author MUST advise the WCBA in advance of the prior publication name and issue date. The author must also obtain from the original publisher a written letter granting the WCBA permission to reprint the article. It is the sole responsibility of the author to fulfill this requirement.

Material accepted for publication becomes the property of the Association. As holder of the copyright, the Association may consent to republication on the WCBA Website, WCBA *Westchester Lawyer* magazine, Westlaw, Lexis-Nexis or in other print or electronic publications.

Three complimentary copies of the issue in which an author's article is published will be distributed to the author or divided among the authors, if there are more than one. The editors reserve the right to accept or reject all manuscripts and to request changes if necessary.

To submit an article to the *Journal* please email: editor@wcbany.org

Westchester Bar Journal

The *Westchester Bar Journal* (ISSN 0746-1844), formerly titled *Westchester Bar Topics*, is the official publication of the WCBA and is issued for the purposes of presenting scholarly articles to its members.

The *Westchester Bar Journal* is published by the WCBA, 4 Westchester Park Drive, Suite 155, White Plains, NY 10604. It is provided free to members.

From the Editor-in-Chief

STEPHANIE L. BURNS, ESQ.

Welcome to the Fall 2020 edition of the *Westchester Bar Journal*. As the Editor-in-Chief, I am honored to have followed my recent predecessors, Mona D. Shapiro, Esq. and Carol Van Scoyoc, Esq., whose dedication and professionalism to the Westchester County Bar Association and annual Bar Journal are unrivaled. Prior to my current role as Editor-in Chief, I had the privilege of serving as an editor for this publication for numerous years under the guidance of both Mona D. Shapiro, Esq. and Carol Van Scoyoc, Esq.

This has certainly been a challenging year for all citizens of our country in a multitude of ways—medically, economically, pedagogically, socially (e.g. shelter in place orders) and politically (e.g. census, protests for police and social justice reform, presidential campaigns, stimulus packages, etc.). It has been a year of personal sorrow with the passing of loved ones due to the COVID-19 pandemic. Locally, here in Westchester County, the legal community grieves an icon, Henry Miller, who was a former President of both the Westchester County Bar Association (WCBA) and the New York State Bar Association (NYSBA). The breadth of the loss to our legal community by Henry Miller's passing is apparent from the outpouring of tributes to him that are located in the first section of this publication. Our professional community also suffered the loss of a national legal icon, Supreme Court Justice Ruth Bader Ginsburg, who was a native New Yorker born and raised in Brooklyn. She has been and continues to be a revered role model and inspiration for individuals from all professions and walks of life.

Despite these hardships, attorneys and law students have remained committed to the advancement of our profession. We received an unprecedented amount of articles from WCBA members for consideration to this Bar Journal that reflect the enthusiasm they have for the legal profession, the diverse

practice areas of our members and the gamut of issues that our society and profession endured during this tumultuous year. We have several first-time contributors as well as returning authors, without whom this Bar Journal would not exist. I commend all of our writers for putting in so much time and effort to share their insights and enrich the legal community.

The scholarly articles on timely topics in this edition of the *Westchester Bar Journal* span from an examination of the use of federal troops in responding to police brutality protests in Portland, Oregon and the use by the federal government of the Defense Production Act to combat price gouging that arose during the COVID-19 pandemic; to exploring the impact the COVID-19 pandemic is having on the education of special education students as well as law students; to an analysis of the recently enacted Child Parent Security Act regarding assisted reproduction, including gestational surrogacy; to providing case law impacts and updates in the areas of Estates, Estate Litigation, Tax Certiorari, Eminent Domain, Immigration, and Choice of Law; and to practice pointers and analysis of Section 3101(A)(4) of the CPLR, of how to prevail when making summary judgment motions, of effective utilization of alternative dispute resolution methods (mediation and arbitration), of how the law addresses purposeful end of life issues and of the role and processes of the WCBA's Grievance Committee.

I hope you find these articles as illuminating and compelling as I did. In addition, I encourage you to write and submit an article to the next edition of the *Westchester Bar Journal*. Inquiries and submissions should be sent to editor@wcbany.org.

In closing, I express my gratitude for the diligent, hard work of my Associate Editors, whose time and effort made the 2020 Bar Journal possible: Matthew Donovan, Esq., Michael Friedman, Esq., Dolores Gebhardt, Esq., James Landau, Esq., Nelida Lara, Esq., Andrew Schriever, Esq. Marc Sheridan, Esq. and Richard Vecchio, Esq. A heartfelt thank you is extended to WCBA staff as well. Mary Ellen McCourt returned part-time to manage the design and production of this edition of the Bar Journal. Without her time, experience, efforts, and terrific sense of humor, this edition would not have seen the light of day. I also thank Roni Brumberger, Director of Marketing and Communications, and Isabel Dichiara, Executive Director, who were instrumental in facilitating the production of this publication. Lastly, I thank WCBA President Wendy Marie Weathers, Esq., who selected me to be the Editor-in-Chief of this edition of the *Westchester Bar Journal,* and whose collaboration on the selection of articles and Associate Editors was invaluable.

From the President

WENDY MARIE WEATHERS, ESQ.

Welcome to the Fall 2020 edition of the *Westchester Bar Journal*. The Bar Journal gives our members and contributors an opportunity to publish lengthier and more scholarly articles than those that appear in our monthly magazine, *Westchester Lawyer*. We encourage all of our members to consider submitting an article for future editions.

We received a tremendous number of submissions to the Bar Journal this year. Thank you to all who participated! We are proud to have seventeen articles in this edition as well as a tribute to Henry Miller, a WCBA Past President and icon of the Westchester legal community who passed away on April 16, 2020 due to complications from COVID-19. As you will see, a variety of articles are contained within, and important issues are addressed. These articles are insightful, contemporary, poignant, learned, and strongly reflective of this year's remarkable challenges in the face of the COVID-19 pandemic and a deeply divided nation that is often instigated by social media. These articles touch on mediation and arbitration; procedural practice of civil litigation; affirmative legislation regarding gestational surrogacy contracts; tax certiorari and eminent domain decisions; end of life issues; the impact of COVID-19 on learning and the legal community; changes in immigration law; estate litigation; choice of law; price-gouging; and the deployment of Federal troops in Portland, Oregon this past summer.

As I write this message, I am reflecting on my first seven months as your President during this pandemic. I continue to learn, to listen and to grow. It has been a privilege and an honor to lead this organization in implementing the WCBA's mission statement.

> *"The purposes of the Association are to promote the ends of justice, to cultivate the science of jurisprudence, to maintain the availability of the law to all who seek redress, to facilitate the administration of justice, to elevate the standard of integrity, honor, competence and courtesy in the legal profession, and to participate with all members of society in seeking and perfecting the common good."*

Throughout my presidency, my focus has been "how can the WCBA be of service to itself and the community?" There have been many ways that the WCBA has taken action in the spirit of kindness, support and recovery.

The Community Recovery Task Force was created to provide and continues to provide guidance and solutions to the current legal challenges facing first responders, the business and legal communities, and the citizens of Westchester County as a result of the COVID-19 pandemic. We have assisted first responders who volunteer at ambulance corps and fire departments with preparing advance planning directives. The Landlord Tenant Task Force prepared and shared a chart encapsulating the procedural status and requirements for summary proceedings under the Executive Order No. 202.72 issued on November 3, 2020 by Governor Cuomo. This document assists in determining the next steps for any Landlord Tenant cases filed before the pandemic (March 17), during the suspension period (through November 3), and after November 3, 2020.

The WCBA endorsed a joint statement with other bar associations before the NYS Assembly Judiciary Committee Online Hearing last month in solidarity with the Judicial Associations and with the concerns of many within the legal community as a result of the Office of Court Administration's decision to deny certification or re-certification to 46 out of the 49 justices of the New York State Court system who sought certification or re-certification this year.

In July, Past President P. Daniel Hollis III hosted a virtual memorial service to honor and celebrate the members of the bar that we lost this past year: Peter K. Bertine, Sr., Robert P. Dohn, Raymond J. Keegan, Henry G. Miller, Honorable Steven I. Milligram, Honorable James F. Reitz, John N. Romano, and Joseph Anthony Sena, Jr. Each will be remembered for their integrity, fairness and wisdom. And on behalf of the Westchester County Bar Association, I extend my heartfelt condolences to the family members and colleagues of the attorneys and the judges that we lost this year.

Being sensitive to the needs of our local law students during these challenging times, the WCBA and the WCBF donated $8000 in support of

the Pace Law Emergency Assistance for Students (P.L.E.A.S.) fund in May. The next generation of lawyers are truly impacted by this pandemic and we are happy to have been able to help these students and the entire Pace community.

The WCBA Public Service Committee, chaired by Past President Kelly Welch and President-Elect James Hyer, led a very successful Real Men Wear Pink Campaign for the American Cancer Society resulting in WCBA being recognized as a lead fundraiser due to the efforts of Past President Richard Vecchio, Treasurer Paul Millman, Assistant Secretary Robert Hertman, and Criminal Law Section Chair Saad Siddiqui. While the traditional bingo night was canceled this year, the Public Service Committee delivered baskets and thoughtful notes to veterans at the VA Hospital in Buchanan-Montrose in honor and recognition of Veteran's Day.

The WCBA has hosted many webinars which facilitated informal and honest conversations regarding current issues confronting our legal community. The WCBA continues to update members of the evolving changes to the law, law practice management, courts, work-life balance, and other timely topics. Since April, the WCBA has offered nearly 50 CLEs, over 50 networking events, and another 40+ non-CLE webinars, many free of charge.

In response to the COVID-19 pandemic, we have restructured many traditional WCBA events. We added a virtual auction to the annual golf outing to replace the traditional dinner, a virtual wine tasting, and in December, the WCBA will host both a virtual whiskey tasting event and a combined CLE/Beer tasting covering alcohol distribution and consumption laws. Our Holiday party will be held a little differently this year. It will consist of a trivia battle between three bar associations - Westchester County Bar Association, Albany County Bar Association, and New York State Academy of Trial Lawyers.

The WCBA Diversity Committee, co-chaired by Karen Beltran and Keri A. Fiore hosted an informative discussion moderated by Judge Everett in December covering the current legal issues in police brutality claims spurred by recently enacted NYS Executive Orders and legislation in response to ongoing national occurrences of police brutality.

Since the start of the pandemic, the WCBA has welcomed nearly 200 new members. Since the beginning of my term, I have been honored by the hard work and dedication of my fellow members, appointing over twenty new co-chairs to the WCBA sections and committees.

The Membership Project created by Jessica Parker and Dan Lust, co-chairs of the Membership Committee, allows Pace Law students seeking

information about how the WCBA members have been coping with the current environment access to WCBA leaders. These interviews have been published in the magazine since October 2020.

Lastly, the WCBA developed a mentoring program for its lawyer members. With Mentoring Circles, each member is both a mentee and a mentor and all members receive professional development and networking opportunities. Mentoring Circles provide members with a confidential and more personal forum that allows the groups to hone law practice development and management skills, build relationships, expand referral networks and engage in substantive discussions. I am very excited that Michael Reed, Esq. of Yankwitt Law, LLP; Anastazia Sienty, of Hollis Laidlaw & Simon P.C.; Matthew Donovan, Esq. of Farrell Fritz, P.C.; Dolores Gebhardt, of Goldschmidt & Genovese, LLP and a Vice President of the WCBA; Lauren Abramson; and James Landau, Esq. - the current President of the White Plains Bar and WCBA Board Member- have collaborated with me to launch Mentoring Circles.

In conclusion, I want to thank Stephanie L. Burns for taking on the task of being the Editor-in-Chief of the *Westchester Bar Journal*. The hours she has spent to put forth this edition are greatly appreciated. I also want to thank the Association's Design and Production Manager, Mary Ellen McCourt, without her labors this edition would not have been possible. Finally, thank you to our Executive Director, Isabel Dichiara. Without her technological savvy and creative fundraising, this Association would not have been the premiere resource for its bench, bar and legal community throughout this challenging year.

Thank you everyone!

A Tribute to Henry Miller

February 18, 1931-April 16, 2020
Beloved Colleague, Friend and Trial Lawyer Extraordinaire
Past President
Westchester County Bar Association
New York State Bar Association

Hon. Morton B. Silberman, Henry Miller and Hon. Joseph Gagliardi

Henry Miller in Court

Governor Mario M. Cuomo, Henry Miller and Hon. Judith Kaye

Henry Miller and Hon. Lee P. Gagliardi

Henry the Wise

By Richard M. Gardella, Esq.

Introductory Remarks for Guest of Honor, Henry G. Miller, presented at the Westchester County Bar Association Annual Meeting, May 2014.

Reprinted from the WCBA Newsletter, May 2014

Lawyers, Judges and Friends ….

Tonight we Westchester lawyers recognize the foremost among us. The size of this crowd attests to that fact.

There is, of course, much that sets Henry Miller, our honoree, apart.

First, he is an unrivaled raconteur.

A while back there was a Westchester judge with a powerful voice and a sententious delivery. It was said of him that he made his restaurant dinner order sound like the Declaration of Independence. Well, Henry can make his dessert order sound like the Declaration or, maybe, even the Sermon on the Mount.

How many of us remember his witty, spirited introductions of the judges at Westchester Bar events over the years?

Second, for a half century our honoree, a senior member of the Clark, Gaglardi & Miller law firm, has been a top Westchester trial lawyer. I am sure that some in this audience have had to face him in court. Thankfully, I have never had that experience. The memory that stands out for me was my unsuccessful attempt to retain him for a municipal defendant many years ago. After careful consideration, Henry was just too busy to take the case.

Pushed by a rich and powerful plaintiff with a guerilla-type lawyer—the kind of lawyer Trump might hire —the land use case sputtered through a decade before it came to trial. By that time Henry was available. Not only did the non-jury trial managed by him result in a complete victory for the

Left: Henry Miller during his acceptance speech.
Right: Richard Gardella introducing Henry.

municipality, but the judge directed the village to investigate the possibility of bringing a court action against the plaintiff. My case was one of hundreds of cases tried by our honoree over his career. I don't think he even knows how many.

And, of course, there is Henry's leadership of our profession over the decades. He was president of this Association and then, later, president of the New York State Bar Association. Few lawyers can claim, as he can, to have also served as a Regent of the American College of Trial Lawyers, as well as a director of the International Academy of Trial Lawyers and an adjunct professor at St. John's Law School, his alma mater. He has lectured and written extensively on trial practice and has been appointed by New York governors in the past to address local government ethics and camera in the courtroom issues.

But there is more. There is Henry's avocation or is it his preferred vocation — acting. I ask you who among us could portray the great defender, Clarence Darrow, on stage. Not only is Henry capable of such performance, he has done it successfully several times. His performance in "All Too Human — An Evening with Clarence Darrow", a one man show, has received favorable reviews. Our Honoree has performed in other stage productions, including other plays written by him over the years.

Against the above Renaissance man background this award is more than justified for our own Henry the Great, but for me there is something else that makes this recognition appropriate. The award is named for the late James D. Hopkins, one of the wisest persons I ever met. I appeared a number of times before him. The last time was the morning following Judge

Wachler's public embarrassment. Judge Hopkins was a judicial hearing officer and I was the only lawyer who showed for the scheduled conference before him. His wise words in regard to that Wachler court crisis made a deep impression on me.

It is difficult to define wisdom, but certainly it cannot be found in newspaper headlines, internet tweets or in talk show rants. However, if you pay attention to speeches at events, such as this, you may learn something. There are wise words I remember from a speech given more than a decade ago at a Pace honor. Those words suggest important elements of wisdom.

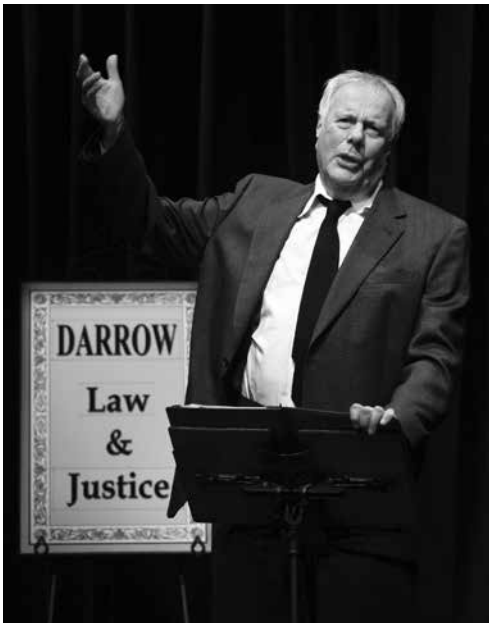
The speaker said: "...I do judge people by the way they treat the humblest among us. Those who fawn over the Chief Judge at a Bar dinner but are curt to the busboy who clears the table, reveal themselves in a most unpleasant light. They also misperceive the human condition. Aren't we all on the same bewildering and brief voyage? Not quite sure where the boat takes us."

"The secret of life, it therefore seems to me, is that we are never to know the complete meaning of our existence. So if uncertainty is our daily bread, then it seems to me wise to build on the rock of mutual respect. In an uncertain world, all we may have is each other. It is therefore, wise to help each other, and therefore, ourselves, wherever and however we can."

Any idea of who that speaker was … well here is a hint — he is sitting right next to me.

Ladies and Gentlemen I give you our honoree — Henry, the Wise.

Richard M. Gardella, Esq., is counsel to Bertine, Hufnagel, Headley, Zeltner, Drummond & Dohn LLP. He is a past president of the Westchester County Bar Association and the Westchester County Bar Foundation, the editor-in-chief of the *Wetcshester Lawyer* magazine, and a former WCBA delegate to the American Bar Association and the New York State Bar Association.



WCBA Member Spotlight

Reprinted from the Westchester Lawyer Magazine, August 2015

Number of Years as Member of WCBA: I've been an active member of the WCBA since 1968. I served as President of the WCBA from 1975-1977.

My current job and practice area are: Trial lawyer and senior partner of Clark, Gagliardi & Miller, P.C.

I was inspired to become a lawyer because: I thought it would give me an opportunity to talk to people and perhaps do some good.

A turning point in my legal career was: Trying a case before Judge Joseph Gagliardi and being invited to join his father's law firm.

Sources of professional pride include: Being president of the New York State Bar Association and receiving the Hopkins Award from the WCBA. I have had many favorite trials; so it's hard to select one. I always look back fondly on the *Lanera* case where we had to argue in a wrongful death case that the value of the loss of a parent to a child is very large even though it did not directly create a monetary loss. I have long believed that the loss of nurture from a parent is one of the hardest losses any child can sustain. In the *Lanera* case, we were able to establish basically a seven figure value for the loss of that 21-year-old mother to her baby girl. We believe it is among the highest verdicts ever given and affirmed for that kind of loss in New York.

Best thing I did to be a better lawyer: Remember to speak plainly to people, giving them the respect they deserve and never talking down, remembering that humility is the trial lawyer's best friend.

If I were not practicing law, I would be: An actor or writer or perhaps president of the United States. I have written a few plays which deal with the legal profession. *Lawyers* was done in Westchester and the Westport Country Playhouse. It was received better in the Connecticut run. (In the New York run, I must confess, the local critic said "in an unfortunate bit of vanity casting, Mr. Miller appears in his own play.") And, of course, I used to give talks on Clarence Darrow until I was talked into making it a one-man show. I did and performed it at the White Plains Performing Arts Center and off-Broadway at the 45th Street Theatre. Believe it or not, the *New York Times* gave me a pretty good review, saying it was "especially relevant" and said my years in the courtroom gave me a "commanding stage presence." (How shameless and immodest of me to tell you that.)

People may be surprised to learn: That I love to dance, have five children—one who is nine—and ten grandchildren, and I have written a novel.

What I splurge on: Dinner with friends and theater tickets.

The best hour of my day is: 5:00 p.m. You guess why.

Favorite movie: I have a few. *On the Waterfront, How Green Was My Valley, Mr. Smith Goes to Washington*.

What's on my playlist: Benny Mardones' *Into the Night*; Stephanie Mills' *Never Knew Love Like This Before*; Rod Stewart's *This Old Heart of Mine*.

My favorite vacation spot: My house in East Quogue.

Three things I can't live without: (1) my nine year old daughter, Anna, and my older children; (2) Vodka; (3) memories of sex.

One of my favorite things to do in Westchester: Dine at Mulino's.

Best advice I ever got: Don't take yourself too seriously and remember humility is the trial lawyer's best friend.

My advice to new lawyers: Same as above and never stop learning. I have always believed "teaching is the first profession." Who doesn't remember their first grade teacher or that teacher in high school or college that turned you on to a path in life and made it richer for you? Teaching is a way of giving back when so much has been given to you.

I have always enjoyed talking to people and having tried cases for over 50 years and still trying them, it was only natural I would want to talk about "The Trial." That is why I suggested some years ago to the State Bar that I would be willing to do a one-day seminar by myself talking to fellow lawyers strictly about "The Trial." Intending no self-praise which is always suspect and lame, I have been told by the State Bar that the program has been well received. That's good, because I do enjoy doing it. What makes the program easy for me is I can always tell them about all the mistakes I have made. There is no better teacher than defeat or mistakes: asking one too many questions; promising something in opening which you can't deliver; defending a weak argument in summation; or just falling in love with the juror you know you should have excused.

What I basically try to tell my fellow lawyers is: (1) they should treat the trial as a conversation, not as a speech, and (2) not take themselves too seriously because, as I was taught when I was a young lawyer, humility is the trial lawyer's best friend.

One of my future ambitions is to: Do more writing and try to make something of myself before I die.

My favorite part of being involved with the WCBA: I get to be with my friends.

Tejash V. Sanchala, Esq., interviewed Henry Miller for this Member Spotlight. This monthly column shares WCBA members' experiences and insights. Tejash is a member of the WCBA Nominating Committee, Co-Chair of the WCBA Employment Law Committee and former WCBA Board Member.

Memories of Henry Miller

By Hon. Philip M. Halpern

We all knew Henry as a trial lawyer, playwright, lecturer, colleague, mentor and friend. He had the rarest of combinations, indeed: a quick and incisive mind coupled with an understanding heart. He was a person who did not talk about living life, he lived life.

There are so many attributes and memories Henry had and created that it could fill a volume. I recall with fondness the many dinners I attended at which Henry was the emcee. Without fail, the program started on time, and it ended on time. In between, equipped with his sense of humor and timing, and his immeasurable class, Henry would treat everyone in the room to a taste of his memories or concern for an issue at hand or even, the need to stand up and support a cause.

I remember many times reaching out to Henry to lean on his superb ability and breadth of experience. I was concerned in one case about the sizeable sum of money the client was seeking and how to convey it to the Judge who had the case. I called Henry for advice and offered lunch and libation in exchange. He immediately accepted and thoughtfully and thoroughly digested my concerns, and gave me the advice which I followed. The resolution of that case based upon the advice Henry gave me was nine figures. Henry was thrilled he was able to help me and applauded my implementation of his advice rather than dwell on the sage wisdom he conveyed. That was my Henry!

Occasionally, I have in the past run into the need to find courses to take to complete the biennial CLE requisites of 24 credits; and I would invariably obtain and listen to "Henry Miller: The Trial." It is and will always be my favorite CLE experience – a day with Henry Miller talking about his trial experiences and situations he encountered. He would teach his basic tenets: ask questions, make lists, over prepare, watch other trials, be yourself, be respectful, be innovative, be upfront, never be arrogant, and be kind. Henry was a master trial lawyer.

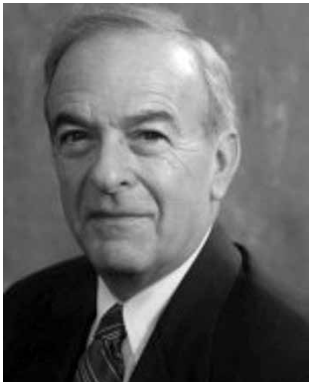
Henry was a master at life as well. He was a beacon to the legal profession, a warrior in the courtroom, and friend to all who would have him. He has rightfully earned his place in the long term memory of all of us who had the privilege of crossing paths with this legend of a lawyer and human being.

Henry Wadsworth Longfellow wrote:

> So when a great man dies,
> For years beyond our ken,
> The light he leaves behind him lies
> Upon the paths of men.

I know we will all fondly remember a great man who has passed, and I hope we may all follow the lighted path he showed us by his life's work and example.

Hon. Philip M. Halpern was appointed as a District Judge of the United States District Court of the Southern District of New York on February 21, 2020 by President Donald J. Trump. Judge Halpern was managing partner and head of the litigation group at Collier Halpern & Newberg, LLP in White Plains, New York.



A Warm Tribute to Henry Miller

By Richard L. Ottinger, Esq.

Henry was a personal and professional friend of mine since I came to Pace Law School 36 years ago. His outstanding legal career is well documented. I knew him best as a champion of Pace University and its Law School.

Henry's devotion to the Law School, starting with his help to Pace University President, Edward Mortola in establishing the Law School, and his 20 year service as a University Trustee, made him invaluable to all of the Law School Deans starting with its founding Dean, Robert B. Flemming, who relied on Henry for advice and assistance during the Law School's early years.

When I was Dean, 1989-1994, creating the Law School's first Advisory Board, Henry, with his tremendous knowledge and respect among the Westchester Bar, was able to identify and help Chair B.J. Harrington and I staff it with outstanding members. He also helped us in establishing and supporting the successful annual Pace Law Distinguished Service Award Dinner which has, for the past twenty three years, generated millions of dollars for student scholarships. Utilizing his wonderful acting skills, he served as its MC for many years after I retired.

Henry's law firm, Clark, Gagliardi & Miller, was the first to establish a Law School student internship program which allowed a select number of outstanding law students to intern for one year with the firm. Over 300 Pace Law alumni, including graduates who are now leading members of the Westchester Bar, are its graduates.

Henry always made himself available to advise our students, faculty and deans, and was highly revered by all of us. He and I met for lunch at the restaurant he owned in his office building about once a month to discuss Law School affairs. He was of particular help to me whenever problems arose that involved the University President and Board of Trustees.

Henry was always happy to be helpful. He was a man of such rich dimensions. My wife and I recall our delight with attending the opening of his off-Broadway production and acting in a play he wrote celebrating the life of Clarence Darrow.

The Law School, indeed the world, is much richer for the contributions made to us by the life of Henry Miller.

Richard L. Ottinger is Dean Emeritus of Pace University Elisabeth Haub School of Law, a former member of the U.S. House of Representatives from 1965 to 1971 and from 1975 to 1985. He was for 16 years a Member of Congress from Westchester County, N.Y., chairing the House Energy Conservation and Power Subcommittee.

Remembering Henry Miller

By Jay C. Carlisle, II, Esq.

In January of 1978 I was appointed Assistant Dean at the Pace University School of Law and Henry Miller was the first Westchester lawyer I met. Then Dean Robert Fleming had asked me to call Henry to arrange for a meeting with "Judge Gagliardi." I asked Henry for assistance with the meeting and he replied, "Happy to help but which Judge Gagliardi do you want to meet?" (I did not then know brother Joseph was the Chief Administrative Judge of the Ninth Judicial District and brother Lee, a federal district court judge.) I asked Henry which judge was the most important and Henry, after a long pause, replied, "Perhaps you should meet both of them." Several weeks later, Henry and I were seated together at a dinner for Pace Law School and spoke at length about trial lawyers. We became instant friends and Henry was my trusted advisor, confidant, colleague and mentor for over forty years. He facilitated my involvement with the Westchester County Bar Association and introduced me to the Who's Who of the legal community. Henry was a superb trial lawyer, a nationally recognized bar leader and an extraordinary humanitarian. He was General Counsel to the World. His door was always open to those in need. He will be sorely missed by all privileged to have known him.

I saw Henry's leadership skills while serving with him on two statewide commissions by statutory appointments from Governors Mario Cuomo and George Pataki. The first was the New York State Temporary State Commission on Local Government Ethics which was established by a 1987 state ethics act to create a commission to propose new municipal ethics legislation. The need arose from a series of government scandals in New York City during the administration of Mayor Edward Koch. On November 27, 1989, Governor Cuomo, a law school classmate of Henry Miller, appointed him as the chair and one of nine commissioners designated to draft the new legislation. By state law, a public advisory committee to the commission was appointed. Governor Cuomo selected me as one of his three appointments and later made me Chair of the Committee. Henry was the head of a large staff of lawyers, investigators and office personnel with Prof. Mark Davies of Fordham Law School named as the Executive Director of the Commission. (*See* Davies, "Final Report of the Temporary State Commission on Local Government Ethics," 21 Fordham Urban Law Journal 1-60 [1993]). After almost two years of hard work, Henry's Commission introduced legislation in the senate and assembly to completely overhaul the hodgepodge of dis-

gracefully inadequate ethics rules for municipal officials contained in Article 18 of the General Municipal Law. (See S. 6167 and A. 8637 – June 1991). Despite unprecedented support from state and local municipal associations, good government groups, individual municipalities and municipal officials throughout the state and over forty newspapers editorials, the bill died in committee. I know how disappointed Henry was but he reminded me frequently, "You win some and you lose some." Henry's municipal government ethics law remains a vision which has yet to be adopted in the Empire State.

Henry and I also worked closely together as statutory appointees of Governor George Pataki's well known Cameras In The Courts commission which was established in 1995. The 12 member commission was chaired by Fordham Dean John D. Feerick. (*See* Carlisle, "An Open Courtroom: Should Cameras Be Permitted In New York State Courts?", 18 Pace Law Review 297 [1998]). New York was then and remains one of the few states in the nation not permitting use of audio visual coverage of judicial proceedings. The Feerick Commission devoted one year of intensive review to the issue. Henry and I traveled to four hearings throughout the state including one where Henry "cross examined" a prominent jurist who was opposed to cameras in the court. When Henry's examination was finished, many believed the jurist had changed his mind or at least it seemed that way. Henry was always very modest about his expertise in the art of cross examination and enjoyed, I think, using it with a judge as his witness. The Feerick Commission developed two detailed judicial surveys, used national studies and hired a mathematician to develop statistics for guidance in determining if cameras would be useful in New York State courts. The Commission almost unanimously recommended adoption of cameras to Governor Pataki but then speaker of the assembly Sheldon Silver strongly opposed the recommendation. (*See Courtroom Television v. State of New York*, 769 N.Y.S.2d 70 [2003]). Henry, an accomplished, experienced and very successful trial lawyer, was strongly in favor of having cameras in the court room. He was again disappointed but still insisted, "You win some and you lose some." Henry is remembered by Professor Davies as "the best boss I ever had and the most honorable man I have ever known." I remember Henry as one in a million and know his exemplary legacy will continue to provide guidance to the bench and bar for many years. Rest In Peace Henry.

Professor Jay C. Carlisle is a professor of law emeritus at the Elizabeth Haub School of Law at Pace University. He has been a member of the Westchester County Bar Association for over forty years.

Grieving, Honoring and Celebrating the Life of Henry Miller, Esq.

Forword

By Anthony Pirrotti, Jr., Esq.

Affiliate President of the New York State Trial Lawyers

"Henry": If anyone said that name in the legal profession of New York, everyone knew who you were talking about. *It was Henry Miller, Esq.*, of Clark, Gagliardi & Miller. There are so many talented attorneys and Jurists in our profession, but Henry was a giant among the greats. He stood tall in stature, and, when he spoke, he captivated his audience. His voice/tone itself was unique; you knew when Henry was speaking, even in a crowd or from far away. He knew how to use the breath of the English language to express himself, along with the cadence and modulation of his voice, to be ever so effective. He was kind, compassionate, incredibly smart and knew how to relate to everyone, especially Jurors. He learned every client's grief to be their best advocate, and he truly cared. He wonderfully and liberally educated others in our craft, and never held back what he thought and taught. He embraced learning. He always had a warm handshake and smile and made the law student, lawyer, Judge and Court staff feel like a friend and important. He was ever so modest and knew practically everyone's name. A showman, like no other, whether acting in a play or in a Courtroom. He was the consummate Trial Attorney that we all aspire to be and his light, influence and leadership will shine upon our profession forever. We grieve his loss, and Honor and celebrate his life, by sharing with you the personal tributes and memories below.

Anthony Pirrotti, Jr., Esq., is a Partner in Pirrotti & Glatt Law Firm PLLC. He is Affiliate President of NYSTLA, Westchester Region, 2011-2020 and Dean of NYSTLI 2015-2020. He was Selected as a Super Lawyers® in 2007, 2010-2019 and as "Top 25 Attorneys" in Westchester area in 2012-2019.

Hon. Betty Ellerin, Retired
Appellate Division, First Department

Henry Miller was larger than life as a Trial Lawyer and showman. I remember when I was a Law Clerk to Judge Frank, and when Henry would walk in, the whole room would spark up. He literally captivated the room. He had such an impact on the New York State Bar. He was a unique man and so talented. He interjected humor at a whim to engage his audience. He was a leading light of the legal profession. I am terribly saddened by his loss.

Hon. Alan D. Scheinkman
Presiding Justice, Appellate Division, Second Department

I will always remember Henry's stentorian voice announcing the judges at the annual Westchester County Bar association dinner. His deep rich voice was the equivalent of being announced at the old Yankee stadium by Bob Sheppard. Henry announced the Surrogate last and in the most glowing terms of all. No matter who else was present. The Chief Judge, a federal judge, it didn't matter; the Surrogate always got the last and best introduction. Henry was a gifted orator who was passionate about everything he did. He was a guardian of Westchester legal lore and could regale with stories of the days of the old Main Street courthouse. I remember he said that Trial I (remember that!) was upstairs and lawyers would lurk at the bottom of the staircase and the clerks (and sometimes the judge) would have to yell down to tell them their assignments. Henry was all for family. He did some occasional defense work and not that long ago was working with my son. He would give me reports on how my son was doing and was very kind to him and to me. He was a true Lion of the Bar and he will be greatly missed.

Hon. Mark Dillon
Appellate Division, Second Department

It goes without saying that we have lost a giant of our legal community. I had worked for his firm while in law school, and twenty years later had the privilege of presiding over a couple of his jury trials at Supreme Court, Westchester. My reminiscence is as follows:

I recall speaking with Henry a couple of decades ago about how well he related with jurors, which I had observed presiding over a couple of his cases in Supreme Westchester. He was not immodest but addressed the issue up front. He explained that with a name like "Miller," he managed to have the Catholic jurors think he was Catholic, the Jewish jurors think he was Jewish, and the Protestant jurors think he was one of them too! With hindsight, he turned the 1:3 odds into 3:3, a true and skillful feat of any trial lawyer. Henry was the Dean of Westchester's practicing bar, and will be an influence on our profession for decades forthcoming.

Hon. Francesca E. Connolly
Appellate Division, Second Department

Henry Miller was widely known and respected as being an extraordinary and gifted trial attorney—among the very best in New York State and in our nation.

I had the pleasure and privilege of interacting with Henry on a professional level at two distinct and fortuitous times in my career. In 1986, as a very young and inexperienced attorney, I was assigned to monitor a trial on behalf of an excess insurer in federal court in which Henry was the attorney for the plaintiff. What better training for a young lawyer than to watch a master trial attorney at work! Decades later, as a New York State Supreme Court Justice, I presided over what turned out to be Henry's last jury trial. Nearly 30 years later, Henry remained as skillful and effective with the jury as ever.

Henry was a giant of the Bar and set the gold standard for advocacy, civility, and decency in our profession. He was the consummate gentleman. I was honored to know and learn from him he will be missed.

Hon. Joseph G. Owen, Retired
Supreme Court Orange County

Henry and I were contemporaries in NYC, having been admitted to the Bar in 1959. I started trying cases when I was an attorney with the Travelers Legal Firm and he started with the Hartford Firm. One day in our early careers, I happened to watch him do a great job in trying the defense of a personal injury case and in the Courtroom was a lovely woman critiquing him. When I asked him what the connection was, he told me that she was his mother, that she attended all his trials and offered him suggestions as he tried his cases. As he progressed in the legal profession, I knew how he came to be such an outstanding trial attorney. I was very saddened to learn of his passing away but will cherish the many memories. My thoughts and prayers are with him, his dear family and his many friends.

Hon. Lewis J. Lubell
Supreme Court Westchester County

I first met Henry in 1995. I was a newly admitted attorney appearing in Orange County for a preliminary conference in a medical malpractice case when Judge Orazio Bellantoni indicated that he was presiding over a brain damaged infant case with Henry, and that I was invited to stay and observe. I watched Henry handle witnesses like a skilled maestro conducting a symphony and he engaged the jury in a way the maestro's leadership would mesmerize an audience. Over the years, and more so after I was elected to

the Supreme Court, I got to know Henry on a personal level that engaged me from the first day I met him. He was a brilliant attorney, a staunch advocate and a man whose warmth embraced you like a summer's evening. We had wonderful conversations that continuously inspired me to strive to be my best. He always made the time to have a conversation that always had meaning. I only regret not making that short trip to his office to have a sandwich together as his health began to decline. His passing made me realize to strike when the iron is hot, because you may lose that opportunity. I will always regret not making that plan we so often talked about and in his memory and honor, I promise to seize the moment every day as if it's the last. Rest in peace my friend and may the Lord make your journey filled with the love you so often shared with us.

Hon. Gerald E. Loehr, Retired
Supreme Court Westchester County

As a young lawyer, new to Westchester and civil practice, I had the good fortune to work closely with Henry on motions for summary judgment and their related appeals in Rabadi v. Miller, et al. This was an assault by a number of youths in Nathan's parking lot on an employee, resulting in permanent extensive brain damage. Henry taught me the significance of finding a deep pocket defendant (we did not succeed). Henry was demanding and encouraging as a mentor, and, thereafter, we often discussed other matters. He was not hesitant to advise and share his knowledge.

Many years later, we were adversaries in a full trial during which he was both a formidable opponent and always a gentleman and gracious when the jury rejected his client's clause.

Henry clearly warranted his reputation as a star of the Trial Bar.

Hon. David S. Zuckerman
Westchester County Supreme Court

I have known Henry for over three decades. Unfortunately, I did not have the honor of having Henry appear before me. We often joked about that; with me telling him that, if it ever happened, I would be more a student than a judge.

I met Henry in 1986, when I began practicing law in Westchester. That year, I opened my first law office as Henry's tenant in the Inns of Court. Over the years, he was much less a landlord than a mentor.

As a former Bronx prosecutor, I had not heard of Henry nor knew of his stellar reputation. As I began practicing, I quickly learned of the reverence that the trial bar had for Henry's amazing litigation skills. When attorneys learned of my office address, they would consistently regale me with stories

about Henry's trial prowess. But I knew even more Henry was a generous teacher, a gentleman and warm friend. I was particularly honored when he attended my swearing in as a County Court judge. As he sat in the audience, he appeared to be happier than I!

I last saw Henry a number of months ago. He was sitting on the sidewalk, at the corner of Court Street and Martine. We had a wonderful chat about recent events in the courthouse. As always, he asked about my health and that of my family.

I will always remember Henry for his warmth and generosity. May his memory be a blessing.

Hon. Brandon R. Sall
Westchester County Surrogate

I was saddened to learn that Henry Miller passed away. He was a true giant in our legal profession. Last year, I had dinner at Mulino's with a few Surrogates from around the state while they were in Westchester attending programming at the Judicial Institute. I noticed Henry was dining there as well. When I asked my fellow Surrogates whether they knew of Henry Miller, all of them said they did. I was not surprised that all the Judges knew of Henry's reputation as a highly skilled trial attorney even though some of the Judges were from jurisdictions far from Westchester. I asked Henry if he would come over to our table to say hello to my colleagues. Henry was only too happy to do so. For about 15 minutes he regaled us with a few stories and left us all even more impressed with his wit and humor. It was a memorable evening for all of us. For sure, Henry Miller was one of a kind and will be missed.

Hon. John DiBlasi, Retired
Supreme Court Westchester County

When I was on the bench I had the pleasure of having Henry and Lucille Fontana before me in the trial of a complex medical malpractice case. There were numerous defendants and, as you can imagine, tempers often flared but never Henry's. He was a consummate professional and incredibly skilled in his craft. A true giant. But what impressed me the most was his calm and the fact that at all times, no matter how stressful the trial became, he was a gentlemen. That is what I remember the most about him as a sitting judge and it is something I will never forget.

Hon. Jonah Triebwasser
Village and Town of Red Hook Justice

I knew Henry as an acolyte of his CLE presentations and our work together on the State Bar. He truly was the Dean of New York trial lawyers. His advice was always sound, usually prefaced with "now listen to your Uncle Henry." Truly one of a kind.

Hon. Susan M. Sullivan Bisceglia
President of the Dutchess County Magistrates Association

Henry, a trusted attorney, a talented jurist, an inspirational leader and a true friend. We know you will always be with us in spirit.

Shoshana Bookson, Esq.
Past-President of the New York State Trial Lawyers Association

I was inspired and indeed always charmed by Henry and his legendary trial skills and successes. Unfortunately, I did not know him well personally and cannot share any special memory. I can only add to what has been said no doubt numerous times that he made you proud to be in the same profession as him and to share his occupation, trial lawyer.

Jeff Korek, Esq.
Past-President of the New York State Trial Lawyers Association

Henry was the absolute greatest. Kind, generous, smart and working at a level where he seemed to "never sweat the small stuff'. I recall, when I was President of the NYC chapter of ABOTA more than a decade ago, attending our annual ABOTA dinner with Henry in attendance. We were reminded by one speaker after another about some of the devilish doings in Washington concerning Newt Gingrich's "Contract for America" and how it translated to virtual doom regarding our client's rights. What was supposed to be a night of fun took on the atmosphere of a really sad wake. Then Henry spoke, "what is all of this doom and gloom …" Henry spoke as he always did beautifully. His words were uplifting and inspiring and he clearly stood out as someone who refused to sweat the small stuff – and as he would often remind me "it's all small stuff." I miss my friend Henry. I hope, like Vigorito said, he found his Courtroom in heaven. RIP Henry.

Evan Goldberg, Esq.
Past-President of the New York State Trial Lawyers Association

His legendary skill as a trial lawyer was exceeded only by his generosity and kindness. Anthony and I had the privilege of giving him a lifetime achievement award but it didn't even scratch the surface of what he de-

served. He was larger than life but more importantly, a nice man. Funny too. I remember his jury selection rule, don't stupidly use your last challenge, to be followed by the next rule, don't stupidly not use your last challenge. The plaintiffs bar has lost a titan. May he rest in peace.

Leslie Kelmachter, Esq.
Past-President of the New York State Trial Lawyers Association

It was with great sadness that I learned of Henry's passing. Henry was charming, intelligent, and a truly nice person. As a young attorney, I was on a trial with him and he was kind to me then and always after. Despite how busy I know he was and that he obviously had much more important things on his mind, he sent me kind notes when he learned of significant events in my life, like on the birth of each of my children and when I became President of NYSTLA. He was one of kind as an attorney and gave prestige to the work we do. He will be missed.

David Oddo, Esq.
Past-President of the New York State Trial Lawyers Association

After I left the D.A.'s office and set off to become a "civil" trial lawyer, I was told by someone at my new firm that all I had to do was watch the Henry Miller Trial Practice and Techniques lecture and I would be all set to try civil cases. So I did just that. In fact, I then watched every Henry Miller tape I could get my hands on. I made sure to never miss a CLE that he was part of. During the 1990's, Henry Miller was a legal rock star to me. Fast forward many years later, I saw Henry from a distance in the Westchester TAP Part. I worked up the nerve to introduce myself and thank him for helping me become a better trial lawyer. To my amazement, we must have spent a solid hour talking about trials. He then asked me about the case that I was waiting to be sent out on. He gave me his insight and some suggestions on how to address circumstantial evidence, which was crucial to my case. To this day, I swear that I won that case because of the advice he gave me that day. I will never forget how generous he was with his time and his knowledge. I will never forget his sense of humor and his true passion for his profession. I am a better lawyer and person for knowing him.

Helene Blank, Esq.
Past-President of the Brooklyn Woman's Bar Association

He was truly a gentleman and a scholar it is a loss to the profession

Christopher Meagher, Esq.

As with so many other trial lawyers, especially those from Westchester, Henry was a neighbor and a colleague and managed to make so many of us his friends. So as not to repeat the well considered and thoughtful comments of those who have already responded, I would just offer one word in his personal and professional memory, "Inspiring".

Alan Greenberg, Esq.

His lecture on jury selection along with the monograph on each type of juror is timeless. I once was watching him try a case in Supreme Bronx versus Ivan Schneider. In making an objection, he gets to his feet and, after objecting, says to Barry Salmon, "I fear your ruling may IMPERIL the trial." He sounded like Moses thundering from Mt Sinai. A very nice man and a master trial lawyer from another era.

Jeffrey Bloom, Esq.

Henry Miller was a wonderful, caring, funny man as well as a brilliant trial lawyer. He will be missed.

Joe Failla, Esq.

I worked for Henry in the law firm as a student intern my last year of law school. I was fortunate to be able to spend a lot of time one on one with Henry. He was kind and caring to myself and the other student interns. At the time, Bill Clinton was going through the impeachment hearings and Henry was on TV to discuss the impeachment. Therefore, I had the opportunity to research impeachment issues to help him on his talking points. Because of my time at CGM, I landed my fist job at Martin Clearwater & Bell. From there I ended up at VLMMC.

The first time I saw Henry after I was admitted to practice was in the Westchester County Courthouse. He came up to me with a group of attorneys around him and said hello and asked how it was going. As always I addressed him as Mr. Miller. He said to me, Joe you are one of us now, so call me Henry from here on.

As an aside, when I was working as a student at CGM, I was single and had free time. When he did not have a driver around on weekends, he would ask me to take a firm vehicle, pick him up at home and drive to the City for various events, and then home. This is how I had so much one on one time with him.

Henry was amazing to be around. It was an honor to be in his presences. His knowledge of the law and charismatic way was why he was a legend. When he was on trial, judges would say is that New York Procedure or Henry Miller Procedure? He will be truly missed.

Robert J. Menna, Esq.

I began working at Clark Gagliardi and Miller as a law student at the young age of 22 and Henry instantly set me on my career path as a trial attorney. At the time, Henry was in his 70s, but he came to work with such energy that elevated everyone around him. My fondest memory of Henry was when I accompanied him and Angela Giannini to a three week Med Mal trial in NY Supreme. I sat in the gallery and was amazed at his performance each and every day. His delivery was impeccable. His planning was so precise. This was my first exposure to a live trial and I was front row to capture the best in the business. During breaks and even at the end of a long day, Henry would ask for my opinion as to how the day went. He would also feed me trial tips for my future that I still use today. I was extremely lucky and honored to be a part of a Henry Miller trial. It was a substantial Plaintiff's verdict of course. At the time, I was naive thinking this type of trial was par for the course. Thirteen years later, I have never witnessed a better trial performance and likely never will. Henry was a big factor in me becoming the attorney I am today. Not only was his work ethic incredible, but his kindness toward his clients and fellow attorneys was second to none. He will be missed.

Ray Raskin, Esq.

The first CLE I ever attended was moderated and delivered by Henry Miller. The year, not 100% sure, but certainly in the 70's. Mr. Miller was engaging, interesting and practical. My boss, who was also attending and sitting next to me, told me "That's Henry Miller!" He was a legendary attorney and although I didn't know him personally, other than to say hi when our paths crossed, he always gave me a warm hello. Although I attended numerous CLE's since, the first is my strongest memory of him. He was a great trial attorney and his humor and grace will be missed. Rest in peace, Sir.

Michael Ronemus, Esq.

Henry Miller was such a gentleman and a talented lawyer. I loved to listen to his talks on how to be a better trial lawyer. He always had a kind word and a smile when you saw him in court. He also was a talented actor and I saw him in his one man play about Clarence Darrow. His funeral would have been attended by many hundreds of admirers.

Jeffrey Stillman, Esq.

About 25 years ago, NYSTLA (think it was NYSTLA) had a program called star wars with a who's who of top plaintiff and defendant trial attorneys each doing parts in a trial. By far the single most impressive of the group was Henry Miller, who did an opening that was amazingly good. I was trying cases back then and every time I did an opening I thought about what I learned from Henry that day and tried to incorporate it into what I did.

Brendan J. Alt, Esq.

I had the honor and pleasure of working for Henry during law school. He was always jovial and kind to the law students. Personally, he took the time to help me prepare for the National Trial Competition. I will always remember rehearsing my summation in his office and Henry instructing me to "always be yourself when talking to a jury, Brendan." He explained that many lawyers try to copy a famous lawyer that they've seen in a movie, TV, or in the courtroom. But jurors want authenticity and "you should develop your own style." He went on to educate me that the best way to deliver an effective opening, summation, or voir dire, is to throw away the notes! "Get up there and let it rip! If you don't know a particular fact or argument by heart when you get up there, then odds are it probably wasn't that important to begin with. Look the jurors in the eye and give it all you've got." Henry was a special man and immensely talented. He had a passion for this profession that only the elite possess. He will truly be missed by those who were blessed to get to know him. I have a photo of Henry and me after I won the awards for Best Summation and Best Overall Advocate in the NTC.

Charles J. Acker, Esq.

I had but brief contact with Henry. Those contacts were kind and unselfish as in willing to give a gratis class to the Putnam Bar and the patience to put up with delay and change.

Michael Eidman, Esq.

I never had the pleasure of meeting him, but I certainly had the pleasure of attending a couple of CLEs where he lectured on trial practice. I recall, at least 20 years ago, frantically jotting down notes as he gave his views about jury selection, and I think I have a book he wrote somewhere in my library. He certainly made an impression.

Josh Silber, Esq.

Special guy... generous, kind, funny. That generation was so great! Lucky to have known him. Sad to see him go.

Alfred Vigorito, Esq.

Learning that Henry Miller passed recently brought back several pleasant memories of having known him through the years. Henry, Lucille Fontana, John Pilkington and I found ourselves on trial before the Honorable Linda Jamison in Rockland County several years back. While the case settled early on for a fair number, being on trial with Henry was quite the experience. He commanded the courtroom much like Jordan did the basketball court or Koufax the pitcher's mound. His voice, its inflection, deep, clear and confident; his posture and his gait made him a giant in the world of trial lawyers. Those of us who do this for a living know that when you are in the presence of a truly great trial man, it matters little if he is your adversary or co Counsel. You must pay attention and admire the performance, much like watching any consummate professional practice his craft. I kind of regret that the case resolved. I wanted to hear Henry each day. Rest in peace Henry, I hope there is a courtroom in heaven for you.

Robert Ryan, Esq.

A personality larger than life, filled with charisma, integrity and enthusiasm. During the five years I worked for Henry at Clark Gagliardi and Miller, PC, he was all of those qualities, and the best mentor a young attorney could ask for. Even after leaving his firm, he always remained a friend and was ready to help whenever asked. Henry was a unique individual, in the best sense of the word. I miss his laugh, but most of all, I miss him.

Anthony Pirrotti, Jr.
Affiliate President of the New York State Trial Lawyers Association

Henry and I were on trial together for 3 months in the late 90's. My prior law firm had a defamation case against a hospital and doctors, and Henry defended the hospital. I was a young lawyer and I learned so much from him during that trial; it was the best teaching lesson! He taught me that humor is necessary to break the tension of a trial and to garner favor of the jury; modulation of your voice is critical; facial/hand gestures with purpose; and having a command of the English language is key (he spoke so eloquently). In the end, the case ended up in a mistrial, and it later settled. We were respectful adversaries, yet friends, never foes.

Some of you may recall the 2011 Masters Series CLE in Westchester with Ben, Evan, Judy, David and ....Henry. All were simply amazing, but Henry, the oldest of them all, shined equally: brilliant, witty and he brought you to tears because of the emotion he exuded when performing a summation on a case he recently tried. You could hear a pin drop when he spoke that evening.

Whenever NYSTLI asked Henry to do a CLE, he delightedly responded "yes". Past-President Evan Goldberg and I participated in lecturing on a Jury Selection CLE in Westchester, and Henry was one of the speakers I called upon; he was simply marvelous (a highlight of my career to lecture with him). He wrote the 44 Common Blunders of Jury Selection, which many of us use and read today, timeless. Always the elder statesman. In 2016, NYSTLA presented Henry with a Life-Time Achievement Award.

He was known as the "DEAN" of the Westchester Bar (and beyond of course). Henry's "The Trial" CLE, an all-day event sponsored by the NYSBA, was an inspiration and the best example of how to "perform" our craft (I attended twice!). The Westchester County Bar Association had the benefit of Henry being its President for a year, and its Past-President for so many years. He was also the President of the New York State Bar Association and was a prolific writer. He was an incredible source of knowledge and a tireless advocate for his clients and the Bar.

Some of the NYSTLA members will recall that we saw him at Mulino's restaurant, after NYSTLA "Decisions" CLE in October 2019, and he was with his daughter; he looked a bit tired, but still had that gleam in his eye, resounding voice and an incredible humbleness for such a giant in our Profession. He greeted all of us as old friends, with a warm smile and handshake.

May he rest in peace and know that his legacy shall continue to be a light for so many.

Angela Giannini, Esq.
Henry's Law partner for 28 years

I had the great privilege of being Henry's law partner and friend for over 28 years. I also had the great honor and fortune to second seat him on several of his trials. He was truly brilliant in the courtroom and had a commanding and captivating presence. He was indeed a master of trial advocacy. He had the extraordinary ability to make the very complicated, simple. There are too many lessons learned from him over the years to mention, but I will share his wisdom on openings and summations: "Be humble, enjoy, relax and speak slowly." Simple concepts but so very true and important for success. As to the man, I will never forget that at the end of one of our trials, a trial judge said it best, "Henry, you truly are a mensch!" He will be forever missed by those fortunate to have known him and by the entire Bar.

Lucille Fontana, Esq.
Henry's Law Partner for 36 years

It was my enormous good fortune to be hired by Henry as I was completing law school, and to have a front row seat for the next 36 years. His skills were remarkable and his wisdom was deep. If I could sum up his advice on litigation in a few words, it would be: Do it right and end it well. He was a veritable drum major for civility.

Among his many gifts, Henry was a master wordsmith, and the eloquence so very much on display in his summations, books, plays, articles, speeches, lectures, eulogies, and funny stories was under pinned by a great generosity of spirit and understanding of the human condition.

An invocation he delivered at a Westchester County Bar Association dinner in 1991 is, to me, a wonderful remembrance of Henry in his own words.

Invocation

97th Annual Banquet of the Westchester County Bar Association, March 1971

By Henry G. Miller, Esq.

As we gather here together to attend the 97th Annual Banquet of the Westchester County Bar Association, let us pause to think of those who came before us, the Judges and lawyers, many dear friends, now gone from us. They contributed to the tradition we now enjoy. They were once young and ambitious for the good life. All the thoughts and hopes we have they had. What would they say to us, if they could speak? Perhaps this: Have the humility to appreciate how rare are the gifts bestowed on you in a world rife with want and war. Have the courage to risk the disapproval of your peers and even your clients if principle requires it. Above all, have the wisdom to know that life is short and that the time to do good is now, the time to surrender that self righteous anger which always justifies itself is now, the time to forgive those who trespass against you is now, the time to help those in need is now, the time to set the example for those who come after you is now.

And by doing this, you will contribute to the tradition which never tires of the arduous search for a better world.

(What Henry said in 1991 is as applicable today, as it was then. Thank you in sharing in this tribute to a great man.)

HENRY G. MILLER, ESQ.

February 18, 1931-April 16, 2020
Past President
Westchester County Bar Association
New York State Bar Association

With heavy heart we announce the passing, due to the Covid virus, of Henry G. Miller, Senior Partner of the law firm of Clark, Gagliardi & Miller, P.C., and Past President of both the Westchester County Bar Association and New York State Bar Association.

Henry was the son of the late Henry A. and Anne Withers Miller. He was born in Brooklyn, New York, on February 18, 1931. Henry was predeceased by his wife, Helena McCarty Miller. He is survived by his five children and ten grandchildren: Jennifer and John Rand and their children, Michelle, Steven, Paul and Lucas; Henry and Elizabeth Miller and Henry's children, Emmet and Healey; Matthew and Julie Miller and their children, Michael, Tyler, Ryan and Kayla; Margaret Miller; and Anna Miller and her mother, Dawn Baker Miller. His brother, Robert Miller, also survives.

Henry G. Miller, a graduate of St. John's College (1952) and St. John's Law School (1959), was Past President of both the Westchester County Bar Association and the New York State Bar Association. He was a Past Regent of the American College of Trial Lawyers, a Past Director of the International Academy of Trial Lawyers and a Fellow of both the American and New York Bar Foundations and a Past Director of the New York State Trial Lawyers Association. At the time of his death, Henry was the senior member of the White Plains, New York law firm of Clark, Gagliardi & Miller, P.C. Henry was a member of the Board of Directors at Greater New York Insurance Company and a Trustee Emeritus of Pace University. He enjoyed sharing his knowledge of the law by giving continuing legal education programs for the New York State Bar Association and many other organizations. He was a past columnist for the New York Law Journal and the author of many legal texts, including his book, "On Trial – Lessons from a Lifetime in the Courtroom".

Along with his family and the law, Henry had a deep affection for the theater. He studied acting with Stella Adler and wrote and performed many of his own plays. He performed his one-man show, "All Too Human", about the life of Clarence Darrow, off Broadway at the 45th Street Theatre and originally at the White Plains Performing Arts Center, of which he was a member of the Board.

Henry leaves behind a host of dear friends and colleagues who will remember his quit wit and sage advice. He will be missed.

Mediation Advocacy: What Tools Do We Bring to the Table?

BY FREDERICK ALIMONTI, ESQ.

A Trial Lawyer's Nightmare

Pondering your upcoming trial, you fall asleep with openings, witness examinations, and closing arguments dancing through your brain . . .

You walk through the courtroom doors, step to the counsel table, and lay out various notebooks and materials. Everything is in order. The jury is called in. You gaze across the courtroom and, from the jury room, enters the defendant, his attorney, and his insurance representative. They take their seats in the jury box and look to you in anticipation. You then notice that the counsel table to your left is conspicuously empty.

You leap to your feet, addressing the judge, who sits unrobed before you.

"Your Honor, I don't understand. What are my adversaries doing in the jury box!?"

"They will decide your case. Are you ready to proceed?"

"Your Honor, I don't understand. Please order them to leave the jury box immediately and to take their seats at counsel table."

"I'm sorry counsellor, I can't make anyone do anything. You'll have to convince them to move."

"This is outrageous, Your Honor. How can you expect me to argue and win my case by convincing the very parties who think my client is in the wrong?"

"Oh, you're not here to win, counselor. No one wins here. No one loses either. But we do resolve cases."

"But Your Honor . . . . !"

You awake in a cold sweat. In what crazy world do you resolve a case by convincing your adversary?

Welcome to Mediation!

This vignette illustrates/exaggerates the major difference between litigating to mediating: your audience. Most of us were trained to litigate before a neutral and, as part of so doing, undermine and discredit the opposition. Many (if not most) of the tools and techniques that serve us well as litigators could lead to disaster if employed reflexively in mediation. I offer for your perusal ten thoughts on approaches to mediation advocacy that differ substantially from our trial and litigation skill sets.

1. Success Requires Focus on Your Adversary's Needs

I put this first for a reason. It is the most important distinction between litigating and mediating. While a capable mediator will do anything she can to facilitate a settlement, she depends on the parties' give and take to broker a deal that she is otherwise powerless to mandate. Thus, nearly everything done in mediation must be calculated to effect a positive change in our adversary's position. Alienating the adversary while trying to convince the mediator is a worthless endeavor – unlike a trial, it is the adversary that must be convinced.

So, what does this mean? It translates to participating in mediation with a sharp focus on what you learn about the needs of the other side – an almost irrelevant factor at trial. If we take a personal injury case as an example, an important part of Plaintiff's case may be non-monetary. For example, in addition to being compensated for damages, it may be very important for the plaintiff to be heard – to finally have her proverbial day in court. A mediation can be very effective in providing that opportunity to be heard, and a good adversary will seize on that opportunity to make gains in the negotiation.

For example, as an insurance defense lawyer and mediator, it is my experience that the vast number of plaintiffs, particularly in cases of serious injury, would trade their lawsuit back for their health in a heartbeat. They come to the table with a very specific idea of who is in the wrong and with very personal knowledge as to how this incident has affected them. They may be angry. So, what is the defendant to do?

The answer is to apply the correct mix of advocacy and empathy. Yes, you as the advocate are there with specific views and positions, and you need to express these in the correct manner at the mediation. Your primary goal is to get the best possible deal for *your* client, and this may mean, perhaps counter-intuitively, absorbing some blows without responding in kind – just to help the other side understand that you are listening. This is particularly true of the insured or institutional defendant sued by an individual plaintiff. This is your first chance to put a human face on your defendant.

This, in turn, leads us to the sometimes controversial subject of the joint session.

2. Have a Productive, Even if Short, Joint Session

There is some controversy about the efficacy of the joint session and related opening statements in mediation because of the tendency of lawyers to try to litigate their positions – focusing too heavily on why the other side will lose, without focusing enough on what the parties' interests are – what each side wants in order to settle, and why it may be to the other side's own benefit to settle. I remain an advocate of both the joint session and opening statements, but with a few caveats:

- The mediator should, in advance of the mediation, explore the possibility of a joint session with all the parties.
- While the mediator might encourage a joint session, she should not force it upon the parties.
- Once agreed, the mediator should work with the parties toward crafting an approach to the joint session that is in the best interests of the mediation process. This may include forewarning one party that the other needs to vent and discouraging a reply in kind.

Properly approached, no component of mediation has the potential to be more transformative than a properly choreographed joint session. Tolerating some unreturned venting, presenting a sympathetic ear, and presenting a human face for your adversary can set a positive tone that will reap dividends all day.

When it is your turn to open, remember who your audience is.

3. We Open for Our Adversary in Mediation

A purely trial style opening, calculated to lay out the evidence and showing our entitlement to relief, has little value in mediation. And because often much of a trial opening is directed at the failings of the adverse party, it is a potentially divisive instrument if deployed poorly in mediation. This is the basis for much of the disfavor for joint sessions among mediators.

As noted above, the mediation opening should be a tone-setter. The presenter will not be aiming to win the case or assure a verdict. Instead, a well-played mediation opening can begin realigning the parties from an adversarial mode to a more cooperative posture, for example, focusing on where there may already be points of agreement to build on, and reframing the other side's case and position in a way that shows the other side that you have been listening and understand their view of the case. Again, your

target audience is not the mediator, but the adversary.

In the few cases in which an opening became divisive in my experience, they have been when an attorney, perhaps over-enamored with the sound of their voice and trial skill set, could not resist going on the attack (often, despite pre-mediation promises to the contrary). This can be a setback, and the mediator would do well to politely reign in such an approach in its early stages, being careful to bring it back to the theme that all parties are there to collaborate to resolve their common problem—how to get out of the litigation on acceptable term.

4. We Succeed in Mediation Without Winning

Success in mediation requires an agreement with our adversary. Convincing a jury that the other guys are the bad guys, cannot be trusted, etc. is a tried and true trial technique. Indeed, we all dream of the withering cross-examination in which the opposing case collapses before our eyes.

A mediation is a facilitated negotiation, and the participants should never lose sight of this. The premise that we can prevail in mediation by vanquishing our opponent and convincing the mediator is a false one. Everything that we share with our adversary in mediation must be calculated for its effect on that adversary. We alienate or humiliate at our peril.

A scorched-earth approach to mediation will not force a settlement from the party on whose consent the settlement depends. We can seldom scare or bully someone into settlement. But we sure can bully them right out of the room.

A necessary corollary to this is that no party and no attorney in mediation can be seen to cave or lose face. If your idea of a win is to get everything you want in exchange for little or nothing, mediation is probably not your strength. At the end of the day, both parties have to justify any settlement with their clients, and this means explaining why the settlement is in the client's interest. Each party, on some level, has to report a success at the mediation—an understanding that the result achieved through mediation is a reasonable, and possibly better alternative to a litigated outcome. The mediation advocate must reason and persuade, not alienate and subjugate.

Many mediations begin with one party refusing to respond to an offer or demand that they view as too high. How often have I heard, "we'll move when they get serious"? Even if you are looking at an absurd number, declining to provide a counter only impedes the process. I suggest responding to even an unreasonable demand with a reasonable offer. Then, let the mediator go to work with the other side. By responding with a reasonable offer, you have empowered the mediator to pressure the other side to respond reasonably.

5. Use the Mediator for the Tough Stuff

So, now you've opened. You've played nice, but you have some really tough arguments to make that will not sit well with the other side. As plaintiff, perhaps you have a compelling punitive damages argument based upon a pattern of egregious conduct. As defendant, perhaps you are convinced of malingering and have video evidence to back it up.

Here's the beauty of mediation: *you don't have to pull any punches with the mediator in caucus*, and it's all confidential. After dealing with these tough issues behind closed doors, the mediator will not go after your opposite member party with "guns-a-blazen." It's her job to present your positions and concerns in such a way as to prevent alienating anyone - to massage the message. An effective mediator has many tools at her disposal to do so, including moving the participants around in the (real or virtual) caucus rooms. As counsel, we have all, hopefully, learned to accept tough opposing arguments in stride. Our clients are not likely similarly thick-skinned. Accordingly, addressing tough issues among counsel only can keep tensions at bay. A mediator may also, for example, address a claim of malingering, or deliberate exaggeration of injury, by exploring the subjective and objective evidence of an injury as a challenge in plaintiff's case. A claim of punitive damages can be addressed in terms of this claim surviving summary judgment and the attendant litigation risk if it goes to the jury. Trust the mediator to make your point in a productive way that relays your message and keeps everyone talking.

6. Be Candid With the Mediator

This topic could be an article of itself. I doubt there is a mediator out there who takes any party's representation of their bottom line at face value —particularly in the early going. Mediators expect that you will keep your real number close to the vest, and that this number will evolve in the course of the day. Nonetheless, here are a few things you should be open about.

- *Disclose problems with your client*. You may need the mediator to help you convince your client. This is the perfect thing to for the mediator to know about before the mediation.

Sometimes, the mediator may encounter an optimistic plaintiff's counsel who may have oversold the value of the claim. Perhaps defense counsel has under-reserved. Regardless, either side may need help bringing a reluctant or unrealistic client into the fold. Contrary to common conceptions of greedy unrealistic lawyers, very often the lawyers, if left to their devices, would resolve the case short of mediation but for what we call the client factor.

As mediator, client difficulties and control issues are mandatory topics of discussions in pre-mediation teleconferences with counsel. When I once asked if there were any client control and communications issues, one advocate responded, "I wish my last mediator had asked me that!" My awareness of this disconnect was invaluable to the mediation that followed.

- *Share your trial "bombshells" with the mediator*. As we prepare for trial, many of us come to believe that our best arguments are best kept under wraps till trial. Although experience has shown me that there are few true smoking guns, where there truly is a game-changing piece of evidence or argument, there is no harm in sharing one with the mediator, confidentially. You can then discuss it's impact in your case and perhaps, eventually, what elements may be shared with the other side. As negotiations get close, sharing a core strength of your case may provide that last push to resolve the matter.

- *Conversely, share your concerns with the mediator*. Perhaps the mediation is early in the litigation and discovery is minimal. Perhaps, you have concerns about a particular witness's composure? Perhaps, certain to-be-disclosed documents will not reflect well on your client? Sharing such concerns confidentially with the mediator will also help the process. Even though this may result in more pressure on the revealing party to settle, is this not better than having missed a settlement opportunity in favor of maintaining secrecy? The mediator needs to know what the parties have to lose if the case does not settle, along with the benefits of settling. The two are inextricably intertwined.

7. Trust the Mediator

Remember, having engaged in confidential discussions with both sides, the mediator knows more about the settlement posture and possibilities than either party in isolation. Although instances where the parties are on the verge of settlement, but don't know it, are rare, the parties are often closer than they realize.

Of late, I have mediated an increasing number of involuntary court-ordered mediations in cases that both parties felt would never settle. They seemed surprised when I expressed optimism; I knew, via pre-mediation conferences, that the parties were closer than they knew. Although often neither party expresses their true numbers, even to the mediator, we typically have a better view of the settlement prospects with the benefit of having employed various pre-mediation tools, such as confidential discussions with counsel as the date approaches.

8. Go With the Flow

A trial is highly regimented: opening; direct examination; cross examination; etc. They all happen at pre-set times in accordance with strict rules of evidence and procedure.

Mediation is more freeform. While we all like to be proactive, one must bring flexible thinking to mediation, and be prepared to react.

The caucus process takes time. If we, for purposes of analogy, cast our mediator as the analogue of the judge, unlike a trial, *ex parte* caucus sessions are the norm, and indeed, it is each party's ability to communicate privately and in confidence with the mediator that makes the process work. This takes time, give and take, and the building of a trust relationship. While this process can start with a productive joint session, this dance is far from a minute waltz. We must let the process, over time, work its magic including, dare I say, getting to a point where there is some mutual fatigue.

9. Embrace Setbacks!

We all dread the trial setback—the witness collapsing on cross; the document we missed; the fatal admission extracted by our adversary from our expert. At trial, even a single setback may be fatal.

In mediation, a setback can facilitate settlement. It is invaluable information. The setback can be a tool that a party can use to justify movement that brings the case closer to resolution. Sure, when it comes to bad news, we all would rather be the bearer than the recipient, but it may nonetheless help bridge a gap. Learning of a heretofore unknown weakness in your case in the benign environs of mediation is a blessing! When it brings the parties closer to settlement, it is a mutual blessing.

10. The Mediation Does Not End With the Mediation

Once the verdict is in, the trial is over with appeal as the next prospect. In contrast, mediation does not always have a similarly concrete endpoint. Many cases settle in the weeks following mediation, and but-for this mediation, would not have settled at all. This is, by any definition, a successful mediation.

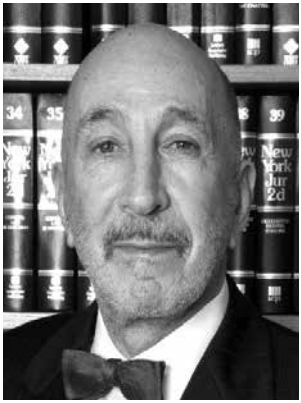
A good mediator will stay on the job even after a case does not settle and remain a conduit for further negotiations. Perhaps, the mediation ends with an open offer or a mediator's proposal (a tool where a mediator presents a resolution for both sides to accept or reject confidentially). In such cases,

the mediator should work the phones, keep the momentum, and help the parties determine their outcome. Unlike a trial, mediation offers more than one bite at the apple.

In Closing

As mediation becomes more and more the norm, particularly as civil dockets may become more backlogged during our pandemic, it will be increasingly important to advocate effectively in mediation and to adopt some methods unlike those we might employ at trial, but which are just as critical to being a successful advocate.

Frederick ("Rick") Alimonti, Esq., is an attorney and mediator; Member Mediation Panel SDNY; Founder of Alimonti Mediation Services; Inaugural Member SDNY Mediation Advisory Committee 2013-15; www.alony.com; www.aloadr.com; fpa@alony.com. Rick is based in Valhalla, New York and mediates "live" throughout the tri-state area and "virtually" just about anywhere else. His litigation practice emphasizes aviation law.




Estate Litigation Tidbits 2020

BY GARY E. BASHIAN, ESQ.
AND ANDREW FRISENDA, ESQ.

Matter of Fondacaro
66 Misc. 3d 1203(A), 120 N.Y.S.3d 584 (Table) (Surr. Ct. Kings Cty. 2019)
Surrogate Margarita Lopez Torres

Foreign Will Admitted to Probate With No Affidavit of Attesting Witnesses but Only Draftsman Notary Affidavit with Details of Two Witnesses and Testator Signing

The *Matter of Fondacaro* involved a written instrument that was drafted in a foreign country; it did not contain an attestation clause, and its execution was not supervised by an attorney, but it was nevertheless admitted to probate, as sufficient proof existed establishing that the document represented the decedent's testamentary intent.

The document offered for probate—in an uncontested probate proceeding—was "hand-scribed by a notary public;" written in the Italian language; submitted with a "rough" translation; stated that two witnesses were present at its execution; was declared by the decedent to be a last will and testament; made testamentary dispositions of property; included the witnesses' signatures and the decedent's signature; and was notarized.

However, when the Court sought to determine the document's validity, one witness refused to execute an Affidavit of attesting witness before an official of the American Consulate, and the second witness could not be located.

Nevertheless, the draftsman/notary submitted an affidavit that detailed the preparation and execution of the document; confirmed that the document offered for Probate was the one prepared for the decedent; and identified the decedent, as well as the witnesses' signatures.

Upon review of the proof offered, Surrogate Margarita Lopez Torres concluded that it was appropriate to dispense with the testimony of the attesting witnesses, and accepted the notary's testimony "…as that of a competent attesting witness."

Moreover, the testimony of the notary "sufficiently" met "… the burden of proving due execution…" and all of the record evidence "…indicates no reason to doubt that the propounded instrument is the valid last will and testament of the testator."

Accordingly, the document was admitted to probate.

Matter of Estate of Jallah
File No.: 2019-885 (Surr. Ct. Richmond Cty. 2020)
N.Y.L.J. Feb. 28, 2020
Surrogate Matthew J. Titone

Jurisdiction Obtained Even Where Citee Not Properly Served Pursuant to Court Order but Other Notice Sufficient

In *Matter of Estate of Jallah*, Surrogate Matthew J. Titone highlighted not only the importance of obtaining jurisdiction over a citee before a proceeding before the Surrogate's Court can move forward, but also the importance of following the Court's Order to the letter when alternative means of service has been directed.

In this case, several citees resided in the Country of Liberia.

Upon application, petitioner was ordered to serve the citation "…care of the Office of the Consulate General of Liberia…by first class mail, with a receipt for regular mailing for each individual to be served…"

Nevertheless, the proof of service submitted to the Court did not make clear if each of the citees was named as an addressee on each envelope, did not attach copies of the envelopes themselves, and the certified mail receipts did not include the names of each respective citee.

Accordingly, the Court lacked sufficient proof to conclude that it was likely each citee received a copy of the citation.

The Court further declined petitioner's request that these jurisdictional defects be cured by application of CPLR § 2001, as the defects were "…not a mere technical issue, but rather a substantial issue…" that prejudiced the rights of each citee, as they may not have received proper notice of the proceeding.

To that end, absent proof that notice of the proceeding was made in a matter that would "likely" provide notice to the citees, the Court correctly held that the citees' substantive rights would be effected if notice of the proceeding was not made, and as a result the ameliorative power of CPLR § 2001 could not be used to cure the defect in service—a defect that could have been avoided by compliance with the Court's Order directing means of service in the first place.

Estate of Ingberman
File No.: 2007-0879/B (Surr. Ct. N.Y. Cty. 2020)
N.Y.L.J. Jan. 27, 2020
Surrogate Rita Melia

Another Interesting Case Reviewing Inter-Vivos Gifts; Validity to Be Determined Upon Further Discovery and Proof

In this accounting proceeding, Surrogate Rita Mella addressed the issue as to whether or not a completed gift was made by a decedent's post-deceased daughter of certain business interests to the executor of decedent's estate, personally. The executor argued that a valid transfer was made, and the post-deceased daughter's surviving spouse argued that no such transfer had been completed.

To that end, decedent's daughter was a one-half beneficiary of decedent's estate, and inherited interests in several business entities. The executor proffered a paper writing, signed by decedent's daughter, indicating that she assigned her interests in these business entities to the executor, personally. While the paper writing also indicated that it was "accepted" by the assignee, it was not acknowledged or witnessed.

In his accounting, the executor reported that all such business interests were assigned to him personally, and that distribution of these business interests should be made pursuant to the assignment. Decedent's daughter's surviving spouse objected, arguing that the assignment was invalid as it did not comply with the mandates of EPTL § 13-2.2.

Although the Court agreed that the assignment did not comply with the mandates of EPTL § 13-2.2, it opined that the business entities could nevertheless have been transfered to the executor as an *inter vivos* gift, and prudently directed that further discovery be conducted.

Matter of Jacob A.B.
File No.: 2010-2501/G (Surr. Ct. Westchester Cty. 2020)
N.Y.L.J Jan. 31, 2020
Surrogate Brandon R. Sall

Westchester County Surrogate Sall Dissolves SCPA 17-A Guardianship Over Property After Change in Circumstances

As Surrogate's Court practitioners know, guardianship matters governed under Article 17 of the SCPA are subject to strict oversight by the Court, and involve a number of procedural restrictions—and policy considerations—that are separate and apart from Guardianship matters brought under Article 81 of the Mental Hygiene Law.

Nevertheless, guardianships—be they under Article 17 of the SCPA or Article 81 of the Mental Hygiene Law—are not immutable; emphasize crafting the "least restrictive" form of guardianship possible over a ward; and may be modified when and where necessary, as was the case in the *Matter of Jacob A.B*.

In *Matter of Jacob A.B.*, found the Court addressed a petition by the natural and appointed guardians of Jacob for the dissolution of their guardianship over his property (pursuant to SCPA § 1755 and § 1759). Petitioners argued that Jacob—though still suffering from cerebral palsy, cognitive delay and Asperger's Syndrome—could now make decisions for himself regarding his property.

When addressing the petition, the Court noted that "…there are relatively few cases dissolving 17-A guardianships..." However, in formulating its decision to ultimately dissolve the guardianship over Jacob's property, the Court further observed that "…the 'legal remedy of guardianship should be the last resort for addressing an individual's needs because it deprives the person of so much power and control over his or her life'…," and that during the course of a guardianship proceeding "…[t]he test in assessing whether a guardianship or continuation of a guardianship is in the person's best interest should include an assessment of the ward's 'functional capacity' and what he can and cannot do in managing daily affairs…"

With these considerations in mind, the record before the Court established that "…[b]y all accounts, with the support of the petitioners and others, Jacob has made excellent progress in his development since the court issued the original letters of guardianship of his person and property. He attended a boarding school for special needs students and after graduation, he completed a two-year post-high school transitional program and then transitioned to a program which enabled him to further develop his independent living skills. Significantly for the current petition, that program also provided healthcare oversight."

These facts, in conjunction with his physician's updated evaluation and diagnosis that Jacob had "…gone from being overly focused on the trivial to being very focused' on the details of managing his family's rental properties and handling his financial affairs, and the GAL report which concluded that Jacob in fact sought to end the guardianship over his property, the Court—warmly and with clear admiration for Jacob's progress—dissolved the guardianship.

Matter of Estate of Wilson
File No.: 2018-4834 (Surr. Ct. N.Y. Cty. 2020)
N.Y.L.J. Feb. 7, 2020
Surrogate Rita Mella

No Declaration of Death as Statutory Requirements Not Met Upon Proof Submitted

In the *Matter of Estate of Wilson*, the Court addressed a petition made pursuant to EPTL § 2-1.7 for a declaration that petitioner's son was deceased, relief necessary in order to secure the proceeds of a life insurance policy. However—though uncontested—the petition was denied, with leave to supplement, as it was not supported by sufficient proof to satisfy the Court that a declaration of death should be made.

The petition was supported by an investigator's affidavit that the alleged decedent could not be located and by affidavits by the alleged decedent's siblings. The petition was unopposed by the appointed GAL, who argued that no hearing would be necessary, and asserted that the alleged decedent "…was living in a cardboard box in the area of the World Trade Center in Manhattan '[i]n or about early 2001,' and that after the attacks on the World Trade Center on September 11, 2001, Mr. Wilson was never found."

As the Court recited, "…section 2-1.7(a) of the EPTL requires that, to invoke the statutory presumption of death, it must be established that the alleged absentee has been 'absent for a continuous period of three years, during which, after diligent search, he or she has not been seen or heard of or from, and [that his or her] absence is not satisfactorily explained.'" Accordingly, "…in the context of the matter at hand, petitioner must show: (1) absence of Mr. Wilson for a continuous period of three years; (2) during which absence, a diligent search for Mr. Wilson was performed; and (3) that Mr. Wilson's absence is unexplained."

However, the record proof was ambiguous as to the alleged decedent's absence for three (3) years. The investigator's affidavit lacked sufficient detail as to the period during which the investigation into the alleged dece-

dent's whereabouts was conducted; and the petition's "…absence of any detail or specificity as to Mr. Wilson's location raises more questions and fails to satisfy the court." The Court thus concluded that "…[t]he vague and unspecific references to searching hospitals, homeless shelters, and even inquiring about the receipt of public assistance [did] not satisfy the court that a diligent search was performed. Nor can the unsuccessful search here lead to the conclusion that the only reasonable explanation for the failure to locate Mr. Wilson is that he has died."

As such, the Court denied the petition, but suggested that petitioner seek letters of limited temporary administration so as to have authority to obtain information and proof that would have otherwise been unobtainable due to "…possible confidentiality concerns…"

Matter of Estate of Bucceri
File No.: 2018-4834 (Surr. Ct. Richmond Cty. 2020)
N.Y.L.J. Mar. 6, 2020
Surrogate Matthew J. Titone

Service by Publication Defects Not Fatal to Obtaining Jurisdiction

The *Matter of Estate of Bucceri* presents yet another cautionary tale to practitioners that attention to detail will save you, your client, and the Court time, money, and aggravation.

Petitioner was granted leave to serve unknown heirs by an order of publication. However, the "legal affidavit" provided by the periodical—in non-compliance with SCPA § 306(1)(A)—failed to state the dates of publication, or petitioner's address. The jurisdictional issue presented to the Court was clear: did these procedural defects render jurisdiction incomplete, or could they be surmounted?

Ultimately, the Court found that—since the publication itself included the name and address of petitioner's counsel, and properly "…identified the return date of the citation…" sufficient notice was provided to the unknown heirs that would allow them to appear should they have chosen to do so (*see Estate of Plantone*, 13 Misc. 3d 482 9 [Surr. Ct. Monroe Cty. 2006]; *see also Cook v. Kelsey*, 5 E.P. Smith 412 [1859]), as notice is the key component that can overcome the other procedural defects.

All the same, not every Court is so forgiving, and the need for attention to detail when obtaining jurisdiction over a party cannot be overstated.

Matter of Estate of Hassine
File No.: 2009-3748/C (Surr. Ct. N.Y. Cty. 2020)
NYLJ Mar. 13, 2020
Surrogate Nora S. Anderson

Attempt to Vacate Joint Stipulation of Facts and Joint Statement of Issues Fails Because Movant Provided No Details of "Mistake," or Lack of Consent

The "Eve of Trial" dispute at issue in *Matter of Estate of Hassine* involved movants trying to vacate a Joint Stipulation of Facts and Joint Statement of Issues that they themselves had agreed to through prior counsel, arguing that the agreement was the result of a mistake, and that prior counsel did not have authority to enter into the agreement that was submitted to the Court.

Specifically, movants sought vacatur alleging that they had not consented to the terms of the Joint Stipulation of Facts and Joint Statement of Issues when presented to them by prior counsel (who unexpectedly left the firm prior to its submission to the Court). Movants argued that they had demanded edits to the terms, *but* that the attorney assumed responsibility for the file submitted the document in its unedited, unapproved form.

Unfortunately, movants failed to "…even identify what mistakes they claim were made in the Stipulations. Rather, essentially, they assert that there was a mis-communication between them and the attorneys who took over their case after their long-standing attorney left the prior firm. This is insufficient to set aside the Stipulations, especially where, as here, such mis-communication could have been avoided or remedied (*see Matter of Nori-Alyce Y. v. Mark Y.,* 100 A.D.3d 1116 [N.Y. App. Div., 3d Dep't, 2012])." Accordingly, the branch of the motion that argued the Stipulation were the product of mistake was denied.

Moreover, movants also failed to establish "…that the prior firm was without authority to enter into the Stipulations…[as] the prior firm was exercising its judgment as to their content …which relate[d] to undisputed facts and joint issues for trial…[and] which counsel is called upon to do in managing litigation (*see Salesian Soc. v. Ellenville*, 41 N.Y.2d 521 [1977]).

Additionally, movants also sought to amend their expert reports and conduct depositions of eight more witnesses—all post Note of Issue, an as indicated above, on the eve of trial.

Needless to say, the Court was equally unsympathetic to this prayer for relief given that "…all such discovery could have been conducted before the lawyer at the prior firm, who had long represented them and with whom they do not claim to have had any mis-communication, filed a motion for summary judgment and two note(s) of issue asserting that discovery was complete." As such the motion was denied in its entirety, and the matter proceeded to trial.

Hanna v. Fenton
2020 W.L. 30000539, 2020 N.Y. Slip. Op. 31745(U) (Sup. Ct. N.Y. Cty. June 4, 2020)
Hon. James E. D'Auguste

"Right of Sepulcher" Funeral Rules Are Affirmed, in Detail, by New York County Supreme Court

Plaintiff in *Hanna v. Fenton* asserted two causes of action sounding in right of sepulcher and fraud in the New York County Supreme Court. He was promptly—and predictably—met with a pre-answer motion to, *inter alia*, dismiss; the controversy having emerged from a disagreement between the decedent's appointed guardians as to which funeral home the decedent's remains were to be delivered.

In a fact pattern reminiscent of a law school exam, the decedent's remains were first delivered to a funeral home at the direction of two of her co-guardians. Subsequently, at the insistence of plaintiff, decedent's brother and co-guardian, decedent's remains were removed to a second funeral home of his choosing.

Thereafter, plaintiff commenced litigation. The Court handily dismissed the right of sepulcher cause of action, holding that:

1 "The common law right of sepulcher originates from the absolute right of a decedent's surviving next of kin to immediately possess the body for preservation and burial. [citation omitted] As the First Department reflected, 'the right of sepulcher is less a quasi-property right and more the legal right of the surviving next of kin to find 'solace and comfort' in the ritual of burial;'"

2 "Further, 'a cause of action does not accrue until interference with the right directly impacts on the 'solace and comfort' of the next of kin--that is, until interference causes mental anguish for the next of kin;'"

3 "In general, the following scenarios constitute actionable interference: performance of an unauthorized procedure on the body (such as an unauthorized autopsy), inadvertent disposal of the remains, or defendant's failure to notify the next of kin of the death;"

4 Plaintiffs did not allege that "Fenton performed an unauthorized procedure on the body, inadvertently disposed of the remains, or failed to notify the next of kin of the death;"

5 "Although Fenton initially conveyed the wrong funeral home information to plaintiffs, the decedent's remains were located and transported

to the funeral home of plaintiffs' choice on the day of decedent's demise without any mishandling of the remains. Additionally, because plaintiffs are residents of Pennsylvania and could not take immediate possession of the body, the several hour delay in locating and transporting Ms. Hanna's remains to Reddens is not the type of deprivation of 'solace and comfort' of burial as contemplated by a claim sounding in a right of sepulcher, especially in light of the fact that a service was held for the decedent five days later;" and

6 "Accordingly, plaintiffs' cause of action sounding in the right of sepulcher was dismissed as against Fenton."

Similarly, the cause of action sounding in fraud was dismissed, as the complaint failed to allege any facts in support of the elements of a fraud cause of action, i.e.; there were no allegations that:

1 Indicated or permitted "a reasonable inference that Fenton had knowledge of the falsity of his representation regarding the location of [decedent's] remains;"

2 "[Defendant] intended to induce reliance upon that incorrect representation;" or

3 Plaintiffs suffered any injuries or pecuniary damages.

Speedfit LLC v. Woodway USA, Inc.
2020 W.L. 3051511 (E.D.N.Y. June 8, 2020)
Hon. Kiyo A. Matsumoto

Unjust Enrichment and Equitable Claims Carry With Them No Right to Jury Trial

Although Federal Court cases are rarely featured in "Estate Litigation Tidbits," the Eastern District's analysis of unjust enrichment claims is well worth review and serves as a stark reminder that—as Plaintiffs was unceremoniously reminded in the Court's Decision and Order of June 8, 2020—equitable remedies do not carry with them a right to a jury trial.

In the long-running *Speedfit* litigation, post summary judgment, plaintiffs were left with a sole surviving unjust enrichment claim against defendant and found their jury demand subject to defendant's motion to strike.

In opposition, plaintiffs vociferously argued that the unjust enrichment cause of action was entitled to be heard by a jury because:

1 "[P]laintiffs' sought-after money judgment makes their unjust enrichment claim, in essence, a legal, rather than equitable claim;"

2. "[T]he unjust enrichment claim is synonymous with quantum meruit and 'money had and received' causes of action, both legal claims warranting a jury trial;" and

3. "[T]he court must refrain from striking plaintiffs' jury demand because plaintiffs may yet move to amend the Supplemental Complaint at trial by asserting a claim for misappropriation of trade secrets, a claim at law that ordinarily is decided by a jury."

Notwithstanding these arguments, the Court concluded that plaintiffs' opposition sought to transmute the unjust enrichment claim into something other than the equitable remedy it is in a last ditch effort to preserve their right to a jury trial.

Indeed, the Court noted in pertinent part:

1. "The right to a jury trial stems from the Seventh Amendment to the Constitution;"

2. "Unjust enrichment does not arise under any federal statute, so the dispositive question is whether the Seventh Amendment preserves a right to trial by jury on a claim of unjust enrichment"—which requires a two-prong analysis;

3. Undertaking its analysis, the Court "must first consider the nature of the issues raised in the action," and then consider "if the remedy sought by the plaintiff is legal or equitable in nature;"

4. "Applying the analysis mandated by the Supreme Court, the court first finds that plaintiffs' action for unjust enrichment is equitable in nature;"

5. "[U]njust enrichment is an equitable cause of action and does not confer entitlement to a jury trial;"

6. "Nonetheless, the Supreme Court mandates consideration of whether the remedy plaintiffs seek is equitable, regardless of the cause of action;" but

7. "At bottom, plaintiffs' request for 'the return or restoration of whatever the defendant gained due to [its] wrongful action,' is the essence of restitution," and "[a]ccordingly, plaintiffs seek an equitable remedy, and therefore, are not entitled to a jury trial."

Matter of Trump
68 Misc. 3d 593, 126 N.Y.S.3d 901 (Surr. Ct. Queens Cty. 2020)
Surrogate Kelly

Injunctive Relief in a Probate Proceeding Regarding Trump Patriarch Dismissed by Queens County Surrogate Kelly

Independent of one's politics, it can be generally agreed that the Trump family and business have produced quite a bit of case law—in various areas of the law—over the past several decades. Recent proceedings before the Queens County Surrogate's Court continue this tradition, and, although not groundbreaking, serve as a reminder for trusts and estates litigators that sometimes a client's demands for judicial relief might not be supported by the law.

In this matter, petitioner sought, *inter alia*, a declaratory judgment and injunctive relief regarding the publication of a book that was alleged to be violative of a non-disclosure/confidentiality agreement. In denying the petition, the Surrogate was forced to identify several basic defects and "improprieties" in petitioner's papers, which serve an instructive reminder to us all.

First, the injunctive relief demanded was brought within a probate proceeding that terminated in 2001. Thus, it was impossible to grant as there was no pending action or proceeding pending wherein the motion could be brought.

Second, the declaratory relief sought was brought in an improper venue, as any such relief is best brought before the Supreme Court, and not as a special proceeding before the Surrogate's Court. The Surrogate further noted that, while the Surrogate's Court does have the authority to grant declaratory relief, "such instances are rare and crucially, involve the contested issues concerning the administration of estate assets," which was not the case.

Third, despite the expanding scope of the Surrogate's Court's jurisdiction, its authority to act was not unlimited. Indeed, in order for the Surrogate's Court to properly exert its jurisdiction, the matter in controversy must be related to an estate's affairs and should not be extended to such matters as far attenuated from an estate as demanded by petitioner. "The mere fact that the terms of the agreement alleged to be violated are contained in a stipulation of settlement arrived at during a probate contest is not enough, standing alone, to empower this court to obtain jurisdiction."

Finally, the Stipulation itself only preserved the Surrogate's Court's jurisdiction to "…'implement and carry out the terms' of the stipulation. In other words, if distribution pursuant to the stipulation would be at issue, this court maintained jurisdiction to ensure its provisions were complied

with. But as to the issue at bar, another forum was contemplated."

Accordingly, the matter was summarily dismissed.

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The Harm of Death: The Conceptualizations of Harm in End of Life Issues

BY OLIVIA BRENNER

Introduction

"Death is a law, not a punishment."[1]

When a constitutional issue is brought before a court, the discussion often revolves around nebulous concepts of individual rights and responsibilities, or the relationship between individuals and the amorphous State. While the outcomes of these cases have real consequences for the people involved, it can be difficult for outside parties to relate their lives to the abstract nature of the arguments made. However, cases that determine the manner in which an individual is allowed to die touch on questions that can and will come up in every person's life: To what extent can the State interfere in the process of death? Who is hurt by the choices a dying man makes? Can we find a balance between the value we place on life and the value we place on a life well-lived? How can we mitigate the harm inherent to an undesirable death?

Although death is a deeply personal experience, there are ways the State and the courts attempt to regulate it. One such way is by prohibiting forms of purposeful death. These prohibitions historically come to the courts in one of two situations. Either an individual wishes to die with the assistance of a medical professional and is blocked from doing so by state statutes, or the family of an incapacitated individual no longer wants to prolong the life of a loved one whose death is staved off by medical interventions. By examining the opinions and dissents written in these cases, readers can gain a deeper understanding of how the courts conceptualize the harms that accompany end-of-life issues. This in turn leads the reader to try and reconcile their own beliefs with those of the courts, which may begin the important process of confronting the reality of one's own death.

This paper will continue said work by using foundational case law, legal theory, and philosophy to analyze the damages with which lawyers and judges on all sides argue the legal system should be concerned when end-of-

life issues are brought forth. Part I will analyze the unique harms that can occur when there is a disagreement over prolonging the life of an incapacitated person through medical interventions, such as in *Matter of Quinlan*.[2] Part II will focus on the purported harm done to medical professionals in the event that they are forced to or prohibited from assisting an individual in dying.

1. Harm to Incapacitated Individuals

Incapacitation can strike at any random moment, or it could come after a long, well-lived life. Few people prepare in advance for incapacitation, in part because few people believe it will happen to them. Even the elderly, a population particularly vulnerable to incapacitation, often fail to formally discuss their wishes in regards to healthcare in the event of incapacitation. The right to make healthcare decisions about one's body is well established in common law for a person with capacity, but what are doctors and families to do when an individual no longer has the capacity to make end-of-life choices?

A. The Courts: *Quinlan, O'Connor,* and *Cruzan*

Several courts have considered petitions from family members of incapacitated individuals in a way that has defined the national discourse. In 1976, a New Jersey court heard the case of Karen Ann Quinlan, a young woman in a persistent vegetative state whose father wished to remove her life support. While the court ultimately ruled in a way that left open the possibility of removing Quinlan from life support,[3] it also set a much larger precedent. The court opined that "the State's interest [in the preservation of life] weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims."[4] The very idea that the state's interest in maintaining the sanctity of human life can be overcome by the suffering to which an individual is subjected is foundational to any argument made in favor of voluntary death.

Over a decade later, a New York court heard *Matter of Westchester County Medical Center on Behalf of O'Connor*,[5] in which daughters of a severely incapacitated woman sought to remove their mother's feeding tubes so that she could die naturally. Mary O'Connor had lost the ability to eat on her own after several strokes inhibited her gag reflex and left her cognitively impaired beyond capacity. The New York State Court of Appeals relied on a showing of clear and convincing evidence that the patient would want to discontinue life support if she had her full mental faculties in order to do so when she could not consent. However, this court found that the evidence of statements made by O'Connor that indicated she would not want the

use of prolonged medical intervention did not rise to the standard. In the majority opinion, Chief Judge Sol Wachter defended what he saw as "the most rigorous burden of proof in civil cases" by his belief that "if an error [in judgement] occurs it should be made on the side of life."[6] To him, the greatest harm that could occur in this case would be for O'Connor to die without absolute proof that it is what she would have wanted.

A rather different set of harms were identified by the dissenting judges. In direct contradiction to the assertions made by the majority, the dissenters believed that the strict standard implemented "is unrealistic, and for all practical purposes, it precludes the right of patients to forego life-sustaining treatment."[7] The dissent conceptualized the state's infringement on this right to be a unique harm unto itself, and one that could be mitigated by broadening the standard. The dissent also noted that that there is an absence of any real state interest asserted in the argument against the plaintiff,[8] and that in such an absence an infringement of a fundamental right is untenable. This argument can be traced back to the assertion made by the *Quinlan* court and will be seen in future cases as well.

The dissenters identify another harm committed, in the form of emotional trauma experienced by patients and their families. When a patient is beyond treatment, but medical procedures could sustain biological life, these procedures are only putting off the inevitable. For families who believe their loved one would not want to be subjected to a life in this state of purgatory the emotional toll can be great, and "undoubtedly inflicts needless suffering on many of our citizens."[9] While it is not explicitly discussed in this case, an idea is born here that will reverberate through the following cases: biological life may not be inherently worth preservation.

While state courts faced end-of-life issues in their jurisdictions, it wouldn't be until 1990 that the Supreme Court heard its first petition on behalf of an incapacitated person's right to terminate life support. *Cruzan by Cruzan v. Director, Missouri Dept. of Health*[10] involved Nancy Beth Cruzan, a woman who became incapacitated due to an automobile accident that left her in a persistent vegetative state without hope of recovery due to severe brain damage. When it became apparent that Cruzan would never regain her cognitive function, her father began a battle to remove her feeding tube that would span seven years and take him all the way to the Supreme Court.

The *Cruzan* Court followed multiple arguments to their conclusion in making their determination, and the majority opinion is clearly informed by concepts that are articulated in *Quinlan* and *O'Connor.* For example, the majority supports the assertion made in *Quinlan* that "the right of self-determination should not be lost merely because an individual is unable to sense a violation of it."[11] At the same time, the Court expounds on what

the state's interests are in far more detail than previous cases. The first interest they address is in protecting vulnerable people from abuse. The Court acknowledges that the choice to refuse treatment is both personal and final, and incapacitated people might not have family who will be faithful surrogates in that regard.[12] The Court also ruled that states have a right to "simply assert an unqualified interest in the preservation of human life."[13] This can be seen as a direct response to the dissenting opinion in *O'Connor,* which did not see upholding the general sanctity of life as a legitimate state interest.

Cruzan is also connected to *O'Connor* and other cases by the clear and convincing evidence standard. The Court agrees that placing an admittedly heavy burden of proof on the party seeking termination is just because "an erroneous decision not to terminate results in a maintenance of the status quo... an erroneous decision to withdraw life-support treatment, however, is not susceptible of correction."[14] The majority seems to be firm in their belief that death is by its very definition the most concerning harm they must address.

In a similar fashion, the in-depth dissents presented by the minority mirror those of the lower courts while further detailing the key themes. The first dissent, written by Justice Brennan, outlines a multitude of harms that he foresees occurring in light of the Court's decision. He touches upon the "debilitating effect" a prolonged death can have on a patient's family members,[15] and the possibility that knowing how difficult it will be to legally terminate life support might discourage doctors and families from attempting certain treatments in the first place.[16] However, the heart of Justice Brennan's dissent lies in two more conceptual arguments.

The first argument is that the proposed state interest in preserving the sanctity of life cannot exist on its own, and so there is no need to balance it against Cruzan's own liberty interests. Justice Brennan writes "the State has no legitimate general interest in someone's life, completely abstracted from the interests of the person living that life...."[17] While he leaves further discussion on the topic to Justice Stevens' dissent, this simple statement contains a radical idea. What Justice Brennan proposes requires an entirely new conceptualization of the rationale behind preserving life. It is not life itself that is essential in Justice Brennan's view, because there is no life without a person living it.

The second conceptual argument Justice Brennan makes is a direct condemnation of the majority opinion's view that the clear and convincing evidence standard is appropriately burdensome. Justice Brennen pushes back on the idea that terminating life support is an irrevocable act while continuing it will maintain the status quo by writing "from the point of

view of the patient, an erroneous decision in either direction is irrevocable." On the harm that occurs when life support is continued against a patient's wishes, he writes "[h]is own degraded existence is perpetuated; his family's suffering is protracted; the memory he leaves behind becomes more and more distorted."[18] If the majority sees a faulty judgment that leaves a patient biologically alive but in absence of their rights as the lesser harm, Justice Brennan is here to say that the real evil is in underestimating the harm a faulty procedural standard inherently inflicts.

As a companion piece to Justice Brennan's dissent, Justice Stevens also wrote a similarly fiery dissent. Many of their concerns overlap, but Justice Steven goes into depth on some issues Justice Brennan merely acknowledges. He first addresses the inclination of the Court to devise a state interest in biological life. He claims that the conflict between life and individual liberty present in this case is a manufactured one, and that it is "not the result of Nancy Cruzan's tragic accident, but are instead the artificial consequence of Missouri's effort, and this Court's willingness, to abstract Nancy Cruzan's life from Nancy Cruzan's person."[19] Justice Stevens chides what he perceives to be an effort by the Missouri legislature to define life, rather than a legitimate attempt to preserve it.

Justice Brennan's second argument that Justice Stevens addresses is that the harms associated with prolonging an unwilling patient's death are possibly greater than the harm of death itself. Justice Stevens presents the idea that a person's liberty interest in living "includes an interest in how she will be thought of after her death by those whose opinions mattered to her."[20] There is much more to Justice Stevens' understanding of life than pure biological function, and those aspects are what must be weighed against the effects of death itself.

Justice Stevens goes on to list a number of harms that accrue when biological life is "conceived separately from the idea of a living person."[21] resulting in the belief that death is irreversible while continuing treatment is a totally reversible state of existence. There is "the damage done to [Cruzan's family's] memories by the prolongation of her death," the continuation of her own pain, and an inability to find closure for her life that is consistent with her own beliefs rather than a doctor's or politician's.[22] It is clear that Justice Stevens believes the majority has been negligent in their analysis of the deeper questions imbedded in this case. In deciding whether Nancy Cruzan was allowed to die or not, the Court had to explicitly consider what role the state can play in defining the parameters of life and death. This is an incredibly difficult consideration to be sure, and with the gift of hindsight scholars have had time to reflect on the nuances of the Court's varied beliefs.

B. The State's Interest in Life: Outside Perspectives

As legal scholars have had the years since the previously discussed court cases to contemplate the harms presented by all parties, they have brought interesting nuances to the arguments. In particular, some scholars have focused on what it means for the state to have an asserted interest in the sanctity of life. One new point brought into the discussion is that even if such an interest is a legitimate one, it cannot claim to be absolute. There is no level of government in the United States that guarantees healthcare for all of its citizens, which results in incalculable numbers of deaths each year. Additionally, state-sanctioned capital punishment is still legal in some states, revealing that any interest in preserving life can be overridden by a state interest in ending a specific life.[23] When a rule is absolute, it is easy to ascertain its boundaries. If the state believed that the sanctity of life is legitimate and absolute, there could be no rational argument for any form of voluntary death. In the face of an ambiguous interest, lawyers and judges are instead tasked with creating what seem like arbitrary delineations that often present more questions than they answer.

A second perspective that scholars have added to the discussion is in the idea of a "wrongful life" lawsuit. These suits originated in situations where a child is born who, the plaintiffs allege, should not have been. The textbook example is a child born with birth defects that should have been detected by a doctor, and had the genetic anomalies been detected earlier the parents would have considered terminating the pregnancy.[24] Although there is little precedent in place, some legal scholars believe that individuals who are forced to remain on life support unwillingly should be able to avail themselves of the same cause of action. This is because both instances essentially assert that "an impaired life constitutes, in some circumstances, a legally cognizable injury."[25] The idea of life as an injury goes against the moral tenor of legal precedent as established in cases such as *Cruzan,* but when it is developed there are interesting moral implications worthy of study.

Ben A. Rich, a pioneering scholar in the work of wrongful life lawsuits, argues that the decisions in *Cruzan* and similar cases burden all citizens with a moral duty to live even in the face of extreme pain and suffering until all medical options have been exhausted. This, Rich claims, is the philosophical difference between humans and lower orders of animals purported by those who do not agree with a right to voluntary deaths. He goes on to propose that this philosophy is inherently accompanied by a belief that adults who would wish to decide the time of their own death are doing so in order to escape this duty, and that it is the role of the courts to punish them for it.[26] Here lies the true intention behind asserting a state interest in the sanctity of life according to Rich: regulation of the fulfillment of one's moral

duties. Scholars, philosophers, lawyers, and judges all have their place in the discourse around voluntary deaths. However, the most relevant opinion to many patients is most likely the very person entrusted with their care.

II. Harm to the Hippocratic Oath

The role of physicians in voluntary deaths is an essential, yet complicated one. Physicians may have strong personal views on the morality of assisting a patient with dying, but most believe they are bound by the Hippocratic Oath they take upon finishing medical school. Originating from Ancient Greece, the Oath is one of the oldest binding ethics codes, and a foundation of Western medicine. This does not mean, however, that there is not wild variation in how physicians and scholars interpret the provisions within the Oath. Particularly when it comes to issues such as the proper role of physicians in a patient's death, law and medicine can come into conflict with one another.

A. The Benefit of Healing

Nearly all physicians would agree that "[r]elief of suffering is a noble pursuit and an essential part of the [medical] profession's calling".[27] Where this becomes a controversial statement for some physicians is when it is juxtaposed against another essential aspect, which is the promotion of health and healing. The Hippocratic Oath requires physicians to apply their skills and knowledge "to the benefit of the sick," and this provision has generally been seen to imply that a physician's job is first and foremost to be a healer.[28] If read traditionally, this provision would seem to bar physicians from ever assisting a patient in dying because that is not a healing act, and so it is not beneficial to the patient.[29] The strongest proponents of this theory even go so far as to claim that healing is the only proper interpretation of the Oath's mandate to benefit the patient, which is why they are often also the strongest advocates for enshrining their beliefs in the legal system.[30] They see the law as a tool not only to help protect their patients from harm, but also one that protects the very Oath they have sworn to uphold.

Physicians who belong to a more contemporary thought camp understand the nature of benefiting their patients differently. These physicians do not see such a bright line distinction between healing and mitigating suffering. They claim that when faced with a patient for whom healing is no longer possible, such as Nancy Cruzan or Karen Ann Quinlan, "the only benefit that a physician may be able to confer on the patient is to help the patient die more peacefully and with less suffering."[31] The potential harm these physicians conceptualize is two-fold. First, if a physician is prohibited from assisting a willing patient in dying, then the patient will miss out on

the proper care the Oath affords them a right to. Second, the same physician would be barred from fulfilling his or her ethical duties to the fullest extent. Neither is a conscionable harm for those who hold themselves to a strict ethical standard.

Yet another camp of doctors, arguably the most radical, view the Oath as a "narrow, outdated view of the goals of medicine and the physician's duties".[32] These physicians wonder if the Oath has a place in a modern healthcare field that has been dramatically shaped by the technological advances of the last century. They see the Oath's requirement to prioritize patient benefit as inherently inconsistent with its mandate against assisting in a patient's death due to the reality of medical procedures available in today's world. Every day, physicians have to decide if a treatment plan that has the potential to help a patient biologically, but will also cause mental or emotional harm, is truly beneficial. Similarly, it may be immoral to ignore palliative options such as terminal sedation that could ease a patient's suffering, but it can be difficult to see how traditionalist would reconcile that with an ethical imperative to avoid the death of a patient at all costs.

B. The Double Effect Conundrum

In addition to the dichotomy presented by attempts to understand the nature of healing, physicians also wrestle with a philosophical principle known as "double effect." Coined by the theologian Thomas Aquinas, the theory of double effect proposes that it is circumstantially permissible to cause foreseeable harm if it is not the intention behind the action. This can be seen in the legal system in concepts such as self-defense. It is impermissible to kill another person intentionally, but it is permissible to kill in self-defense. This is in part because the intention in the killer's mind is defending his or herself, and, while the death of their attacker is a foreseeable consequence of self-defense, it is not in and of itself the goal.[33]

In the context of physicians and their patients, the concept of double effect is most often seen in the discussions that attempt to distinguish between acts such as providing terminal sedation and acts such as actively removing life support. Both result in the death of a patient, but some argue that the physician's role in that death is drastically different in each scenario. To those who agree with the theory of double effect, it is permissible for a doctor to provide terminal sedation even knowing that the patient's death is a foreseeable consequence, indeed an inevitability, because the doctor's intent in administering the drug is not to kill the patient.[34]

Other physicians argue that this is a false distinction, because one cannot accurately say that the medical field is absolutely harm adverse. For example, physicians who treat cancer patients often prescribe aggressive and

highly toxic, chemotherapy regimens. The treatment is administered with the intention of healing, but the side-effects can be extremely harmful or even lethal in their own right.[35] It would seem that the Oath simultaneously compels physicians to administer treatments regardless of potential harm if there is any chance they can heal the underlying illness, but also to avoid intentional "harms" that may yield net benefits. If the use of intention as the distinguishing factor in determining the ethicality of a physician's actions is in fact an arbitrary distinction, it falls upon each individual physician to determine how to interpret the Oath as an ethical system.

Conclusion

Like all laws are meant to do, death is applied in equal turns to everyone. The form and timing that a death comes in will vary from person to person, but there are no exemptions from the ultimate result. However, harm is not similarly inevitable. It is time for us all to consider what a path forward might look like that centers compassion for the dying over our own fears.

Endnotes

1 The last words of Jean-Baptiste Dubos, 1742 (*Stanford Encyclopedia of Philosophy*).
2 *Matter of Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976).
3 *Id.* at 41, 355 A.2d at 664.
4 *Id.*
5 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1998).
6 *Id.* at 531, 531 N.E.2d at 613, 534 N.Y.S.2d at 892.
7 *Id.* at 551, 531 N.E.2d at 626, 534 N.Y.S.2d at 905.
8 *Id.* at 539, 531 N.E.2d at 619, 534 N.Y.S.2d at 898.
9 *Id.* at 541, 531 N.E.2d at 620, 534 N.Y.S.2d at 899.
10 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990).
11 *Id.* at 273, 110 S. Ct. at 2848.
12 *Id.* at 281, 110 S. Ct. at 2853.
13 *Id.* at 282, 110 S. Ct. at 2853.
14 *Id.* at 283, 110 S. Ct. at 2854.
15 *Id.* at 311, 110 S. Ct. at 2869.
16 *Id.* at 314, 110 S. Ct. at 2870.
17 *Id.* at 313, 110 S. Ct. at 2870.
18 *Id.* at 320, 110 S. Ct. at 2873.
19 *Id.* at 351, 110 S. Ct. at 2889.
20 *Id.* at 344, 110 S. Ct. at 2885-2886.

21 *Id.* at 347, 110 S. Ct. at 2887.

22 *Id.* at 353, 110 S. Ct. at 2890.

23 Catherine J. Jones, *Decision Making at the End of Life,* 63AMJUR TRIALS 1, §9 (2020).

24 *Siemieniec v. Lutheran Gen. Hosp.,* 117 Ill. 2d 230, 512 N.E.2d 691, 111 Ill. Dec. 302 (1987).

25 Ben A. Rich, *The Values History: A New Standard of Care,* 40 EMORY L.J. 1109, 1162 (1991).

26 *Id.* at 1163.

27 Lois Shepard, *Sophie's Choices: Medical and Legal Responses to Suffering,* 72 Notre Dame L.R. 103, 104 (1996).

28 Emily P. Hughes, *The Oregon Death with Dignity Act: Relief of Suffering at the End of Medicine's Ability to Heal,* 95 Geo L.J. 207, 225 (2006).

29 *Id.* at 226.

30 *Id.* at 230.

31 *Id.* at 228.

32 *Id.* at 226.

33 Edward C. Lyons, *In Cognito—The Principle of Double Effect in American Constitutional Law,* 57 Fla. L.R. 469 (2005).

34 Hughes, *supra* at 228.

35 Dr. Lynette Cederquist, Ellen Waldman, *Palliative Care and End-of-Life Options,* 34 Quinnipiac L.R. 627, 631 (2016).

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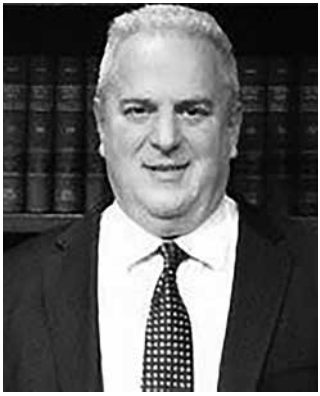

The Evolution of CPLR § 3101(a)(4): From "Adequate Special Circumstances" to Simple "Notice" for Non-Party Disclosure

By Anthony J. Centone, Esq.

In most lawsuits in New York State courts, counsel will seek disclosure from one or more non-party witnesses. In order to obtain this disclosure, the standard for determining whether counsel is entitled to this non-party discovery is set forth in CPLR § 3101(a). CPLR § 3101(a)(4) provides that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" by non-parties "upon notice stating the circumstances or reasons such disclosure is sought or required."

While "Parties", as set forth in CPLR § 3101(a)(1), are subject to all of the disclosure devices contained in CPLR Article 31, non-party witnesses are **only** subject to depositions under CPLR 3106 *et seq.*, or discovery and inspection as set forth in CPLR 3120(1). In addition, all requests for disclosure made upon a non-party require service of a separate subpoena upon the non-party in accordance with CPLR § 2301.[1] Most subpoenas under CPLR Article 23 may be issued "without a court order", by "an attorney of record for a party to an action." CPLR § 2302(a). In that case, the attorney will draft and serve both the subpoena and the discovery demand upon the non-party witness "in the same manner as a summons", pursuant to CPLR § 2303(a).

However, in addition to serving the subpoena and discovery demand upon the non-party, CPLR § 3101(a)(4) requires that a "notice" be served upon the non-party that is contained in either the subpoena or discovery demand, stating the "circumstances or reasons such disclosure is sought or required".[2]

Prior to its amendment in 1984, CPLR § 3101(a)(4) required a party seeking disclosure from a non-party to first obtain a "court order" based on "adequate special circumstance" (see former CPLR § 3101(a)(4)). In other

words, prior to the 1984 amendment, a party seeking any form of discovery from a "non-party witness" under CPLR § 3101(a)(4) was required to make a motion demonstrating the "special circumstance" as to why this non-party discovery was necessary and obtain court approval. However, as Professor David D. Siegel pointed out in his authoritative handbook:

> Before the amendment, "special circumstances" had to be shown under paragraph 4 for disclosure from a nonparty. That requirement, however, while stringent on its face, had been read generously by the courts. A showing that the nonparty was hostile was held sufficient to justify the disclosure, and the courts demanded less and less to establish "hostility" for that purpose. Any showing of kinship or friendship between the witness and a party did the job. A simple showing that the witness would not voluntarily furnish the seeker an affidavit or other proof needed to prepare for trial was deemed sufficient.[3]

As Siegel further points out, courts eventually relaxed this rule even further:

> Then a still more generous view appeared: the seeking party merely had to show the need of the nonparty's deposition in order to prepare for the trial. Quite liberal was this attitude, and the First Department held in *Slabakis v. Drizin* that the interpretation of the amended paragraph 4 of CPLR 3101 should be at least as liberal. Indeed, since the "circumstances" no longer have to be "special" under paragraph 4, the interpretation should be even more generous, but that view is not universal.[4]

In that regard, Siegel noted that not all courts were as lenient in interpreting the "special circumstance" rule as others. In *Dioguardi v. St. John's Riverside Hospital*,[5] a medical malpractice action in which defendant sought the deposition of plaintiff's non-party treating physician, the court held:

> It is proper to direct disclosure against a nonparty witness only in the presence of adequate special circumstances. This requirement survived the 1984 amendment to CPLR 3101(a)(4) (The existence of such "special circumstances" may be shown by establishing that the information sought to be discovered cannot be obtained from other sources. The existence of "special circumstances" is not established, however, merely upon a showing that the information sought might be relevant (internal citations omitted).

Fortunately for practitioners, the 1984 amendment eliminated the need altogether for a formal motion in order to obtain a simple deposition

of a non-party witness or obtain relevant documents from a third party. By enacting the amendment to CPLR § 3101(a)(4) the N.Y.S. Legislature deemed the requirement for a court order to obtain simple and necessary third-party disclosure "contrary to the purpose of the disclosure statutes".[6]

In spite of the loosening of the requirement under CPLR § 3101(a)(4), so that the disclosure notice to the nonparty merely states the circumstance and reasons such disclosure is sought, there was still a split between appellate divisions as to what specific "circumstances and reasons" are required before nonparty disclosure can be obtained. In 1989, the First Department held that, based on the amendment to CPLR § 3101(a)(4), disclosure from nonparties was available "practically for the asking".[7] However, the Second Department, although it had dropped the "special circumstances" requirement, substituted new factors to determine if the notice constituted adequate "circumstances and reasons," such as a party's inability to obtain the requested disclosure from another party to the action or from an independent source; a disparity in statements between party and non-party witnesses; unexplained discontinuance of an action against a witness who was formerly a party; or previous inconsistencies in the non-parties' statement.[8] For instance, in *Kooper v. Kooper*,[9] the court held that the non-party disclosure should be denied where the party seeking disclosure fails to show that the disclosure "cannot be obtained from sources other than the non-party." The Second Department held that the party seeking non-party disclosure needs to demonstrate a higher standard than merely stating that the disclosure is "material and necessary" to the defense or prosecution of the lawsuit.[10] The Third Department sided with the First Department in holding that the showing need only be that the discovery sought from the nonparty was "material and necessary" to the defense or prosecution of the lawsuit.[11]

It was not until 2014, 30 years after the 1984 amendment to CPLR § 3101(a)(4), that the Court of Appeals finally weighed in on this split of authority in the lower courts and held definitively that the "material and necessary" standard used by the First and Third Departments for nonparty discovery was "the appropriate one and is in keeping with this State's policy of liberal discovery".[12]

In *Kapon v. Koch*,[13] the petitioner Koch sought a nonparty deposition of the respondent Kapon, pursuant to CPLR § 3119, also known as the "Uniform Interstate Depositions and Discovery Act", as part of a litigation involving the same parties in a California litigation.[14] The lawsuit in California had been brought by Koch, a well to do wine collector, for fraud against an individual, Rudy Kurniawan, alleging Kurniawan had sold Koch

149 bottles of counterfeit wine through AMD, a retailer and auctioneer of fine and rare wines. Kapon was the CEO of AMC and a New York resident. Neither AMC nor Kapon were parties to the California action. However, Koch had previously commenced an action against AMC in the Supreme Court, New York County in 2008, over some of the counterfeit wine Kurniawan had "consigned" to AMC and AMC had sold to Koch.[15]

Koch, who sought both documents from and a deposition of Kapon here in New York, alleged as "circumstances or reasons" for the non-party disclosure that Kapon possessed information that was relevant to the California action. Kapon's attorneys did not object to the document disclosure but did bring a special proceeding to quash the deposition subpoena pursuant to CPLR § 2304, and for a protective order under CPLR § 3103. The Court of Appeals noted in that regard:

> Petitioners asserted that the subpoenas were defective because they were served before Koch had taken defendant Kurniawan's deposition, failed to state with particularity the reasons why disclosures was sought, and constituted an "end-run" around the discovery deadline in the New York action.[16]

The trial court denied both the motion to quash and the motion for a protective order but permitted petitioners to object to and decline to answer any questions regarding AMC's confidential information and trade secrets. The Appellate Division affirmed the lower court, holding that the Supreme Court:

> …. providently exercised its discretion in denying petitioner's motion, since petitioners failed to show that the requested deposition testimony is irrelevant to the prosecution of the California action.[17]

In affirming the Appellate Division, the Court of Appeals (Pigott, J.) noted that the "material and necessary" standard of the First and Fourth Departments was the appropriate one and is in keeping with this State's policy of liberal discovery.[18] The court held:

> The words "material and necessary" as used in section 3101 must "be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 235 N.E.2d 449, 235 N.E.2d 43 [1968]). Section 3101(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from

any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty.[19]

Petitioners maintained that CPLR § 3104(a)(4)'s requirement of "notice stating the circumstances or reasons such disclosure is sought or required", places on the subpoenaing party a need to meet the initial burden of establishing the need for the non-party deposition in preparing for trial.[20] However, the Court of Appeals held that the party moving for a protective order to vacate or to quash a subpoena, under either CPLR § 3103 or § 2304, has the burden of establishing that either the process to uncover anything legitimate is "futile, inevitable or obvious", or that the information sought is "utterly irrelevant to any proper inquiry".[21]

The court concluded with the following regarding the "burden of proof" as it pertains to the non-party disclosure:

> Although the nonparty bears the initial burden of proof on a motion to quash, section 3101(a)(4)'s notice requirement nonetheless obligates the subpoenaing party to state, either on the face of the subpoena or in a notice accompanying it, "the circumstances or reasons such disclosure is sought or required." The subpoenaing party must include that information in the notice in the first instance (citation omitted), lest it be subject to a challenge for facial insufficiency (citation omitted). Contrary to petitioners' contention, however, the subpoenaing party's obligation was never intended by the legislature to shift the burden of proof on a motion to quash from a nonparty to the subpoenaing party, but, rather, was meant to apprise a stranger to the litigation the "circumstances or reasons" why the requested disclosure was sought or required.[22]

The party seeking non-party disclosure must state on the face of the subpoena or notice the "circumstance or reasons" disclosure is sought from the non-party or else the subpoena may be deemed "facially deficient".[23] However, once this is done, the subpoenaing party has fulfilled this requirement of CPLR § 3101(a)(4), and it is solely the burden of the party moving to quash the subpoena or seeking a protective order to establish by a preponderance of the evidence the "futility of the process to uncover anything legitimate" or that the information sought in the subpoena is "utterly irrelevant" to the inquiry.[24]

The standard for a proper non-party subpoena or notice in New York courts is that the subpoena or notice merely state something to the effect that the deposition or documents are necessary to establish allegations relating to a particular accident or relating to a contractual dispute between

the parties. Essentially, any adequate recitation of the nature of the litigation and the non-parties' purported knowledge of facts relating to the same should be sufficient to comply with CPLR § 3101(a)(4), according to *Kapon*. It is the party opposing the subpoena who must: 1) prepare and file a motion to quash under CPLR § 2304, or a motion for a protective order under CPLR § 3103; and 2) meet the burden of showing the applicable standards set forth above, in order to prevent the deposition or document production by the nonparty from occurring. This can be a tall order. Furthermore, it is a 180 degree shift from the original rule regarding nonparty disclosure under CPLR § 3101(a)(4), which required the party seeking the non-party disclosure to prepare and file a motion to obtain a court order in order to obtain the same.

That is not to say that post-*Kapon* cases have not found motions to quash or motions for a protective order warranted. This includes cases where the subpoena is vague and fails to indicate why the disclosure is being sought from the third-party,[25] where the documents sought had already been produced as part of the litigation,[26] where the documents are being sought after the note of issue has been filed,[27] or where the documents being sought are privileged.[28]

However, based on *Kapon*, there is no longer any question as to who bears the burden of proving that the non-party disclosure should not take place. That lies squarely with the party opposing the non-party disclosure.

Endnotes

1 CPLR 3106(b); and 3120(1).

2 *Bigman v. Dime Savings Bank of NY*, 138 A.D.2d 438, 439, 526 N.Y.S.2d 17, 18 (2d Dep't 1988).

3 Siegel, *New York Practice* (3rd Ed.) § 345, p. 527.

4 Siegel, *supra* (citing *Slabakis v. Drizin*, 107 A.D.2d 45, 485 N.Y.S.2d 270 [1st Dep't 1985]).

5 144 A.D.2d 333, 334, 533 N.Y.S.2d 915, 916 (2d Dep't 1988).

6 Sponsor's Mem. Bill Jacket, L. 1984, Ch. 294.

7 *Rosario v. General Motors Corp.*, 148 A.D.2d 108, 113, 543 N.Y.S.2d 974, 977 (1st Dep't 1989).

8 Chase & Barker, *Civil Litigation in New York* (6th Ed.) Ch. 15, pg. 598.

9 74 A.D.3d 6, 18-19, 901 N.Y.S.2d 312, 323 (2d Dep't 2010).

10 *Kooper*, 74 A.D.3d at 13.

11 *American Heritage Realty, LLC v. Strathmore Ins. Co.*, 101 A.D.3d 1522, 1523-1524, 957 N.Y.S.2d 495, 497-498 (3d Dep't 2012).

12 *Hauzinger v. Hauzinger*, 43 A.D.3d 1289, 842 N.Y.S.2d 646 (4th Dep't 2007)

13 *American Heritage Realty, LLC v. Strathmore Ins. Co.*, 101 A.D.3d 1522, 957 N.Y.S.2d 495 (3d Dep't 2012).

14 *Hauzinger v. Hauzinger,* 43 A.D.3d 1289, 842 N.Y.S. 2d 646 (4th Dep't 2007).

15 *Kapon v. Koch*, 23 N.Y.3d 32, 988 N.Y.S.2d 559 (2014).

16 *Id.*

17 *Kapon v. Koch*, 105 A.D.3d 650, 651, 963 N.Y.S.2d 578 (1st Dep't 2013)

18 *Kapon,* 23 N.Y.3d at 38, 988 N.Y.S.2d at 564.

19 *Id.*

20 *Id.*

21 *Kapon,* 23 N.Y.3d at 38-39, 988 N.Y.S.2d at 565.

22 *Kapon,* 23 N.Y.3d at 39, 988 N.Y.S.2d at 565.

23 *Id.*

24 *Id.*

25 *Phoenix Grantor Trust v. Exclusive Hospitality, LLC.*, 59 Misc. 3d 1231(A), 2018 N.Y. Slip Op. 50808(U) (Sup. Ct. Queens Cty. 2018).

26 *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 164 A.D.3d 401, 84 N.Y.S.3d 82 (1st Dep't 2018).

27 *Cioffi v. S.M. Foods, Inc.*, 178 A.D.3d 1003, 116 N.Y.S. 3d 70 (2d Dep't 2019)

28 *Quinones v. 9 East 69th Street, LLC*, 132 A.D.3d 750, 18 N.Y.S.3d 106 (2d Dep't 2015).

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A City in Tears: Federal Troops in Portland Oregon

BY MARISSA B. COHEN AND JACQUELINE E. STEVENS

Introduction and Cultural Context

After the murder of George Floyd, Americans flooded the streets to address police brutality. President Trump swiftly responded by sending federal troops to quell these protests; however, the Trump Administration's tactics raise numerous legal questions. Firstly, whether the executive branch's power extends to the deployment of federal troops without the state or local government's consent; secondly, has the Department of Homeland Security (DHS) acted within its statutory authority; finally, is judicial intervention necessary?

Part I is dedicated to the Trump Administration's threats to federalism. Part II highlights DHS's authority and statutory framework for deploying federal troops. Part III addresses the civil liberties at stake and the likely results of judicial intervention. To conclude, this article hopes to inspire Americans. Protect your unalienable rights; do not allow democracy to diminish.

On May 25, 2020, a teenage employee of a Minneapolis food store called 911 alleging that George Floyd attempted to purchase cigarettes with a fake $20 bill.[1] Police found Floyd around the corner from the store, unarmed and sitting with friends on the hood of his car. Floyd initially resisted being handcuffed, but the officer explained that Floyd's arrest was for "passing counterfeit currency," and Floyd, therefore, stopped resisting arrest.[2]

"Court transcripts from police body cameras show Floyd appears co-operative at the beginning of the arrest, repeatedly apologizing to the officers after they approach his parked car."[3]

A white police officer, Derek Chauvin, arrived on the scene.[4] "[Floyd] lay there, face down, still in handcuffs. For seven minutes and 46 seconds, Chauvin kept his knee on Floyd's neck, the prosecutors' report says."[5] Floyd's last words were, "Can't believe this, man. Mom, love you. Love you. Tell my kids I love them. I'm dead."[6] Floyd's motionless body "was rolled onto a gurney and taken to the Hennepin County Medical Center in an ambulance. He was pronounced dead about an hour later."[7] Americans hit the streets in response to the viral video of police brutality. Floyd's last words were a call to his mother, and dozens of Portland moms heard his call.

The protests in Oregon included the "Wall of Moms," an organization started by Bev Barnum.[8] Barnum was concerned by the federal government's sudden presence in Portland. Barnum was adamant, "Let's make it clear that we will protect protesters without the use of violence, we will shine a light of the unjust narrative being thrown around."[9] The first group of nearly 40 mothers lined up that same evening, chanting: "Feds stay clear, moms are here."[10] However, "[t]heir line offered little protection once the federal officers started firing teargas and flash-bangs and charging with batons."[11] "'Trump's troops,' as some protesters call them, have greater leeway than local officers;" a court barred the city police from using teargas, but the order did not bind the federal officers.[12]

I. Federalism

Revitalizing the checks and balances between the executive and legislative branches is imperative to prevent presidents from abusing their authority. Article II of the Constitution states, "The President shall be Commander in Chief of the Army and Navy of the United States, and the Militia of the several States."[13] Within those enumerated powers comes the weight of the supremacy clause.[14] The Constitution also guarantees "the entire independence of the General Government from any control by the respective States."[15] However, the supremacy clause does not grant unlimited powers to the President; even when acting as Commander in Chief.

i. The Insurrection Act of 1807

To justify the use of federal troops in Portland, President Trump has threatened to invoke the Insurrection Act of 1807 (the "Insurrection Act").[16] Though Trump has not yet invoked the Insurrection Act, he did utilize analogous methods when deploying federal law enforcement on June 1,

2020 to forcefully clear protesters from Lafayette Square outside the White House. Subsequently, "Trump deployed thousands of National Guardsmen in Washington, D.C."[17] While the Insurrection Act is an antiquated law, its scope has expanded over the past century as a tool for presidents to subjectively chose where to send federal troops despite the behest of state and local governments.[18]

An insurrection is defined as "an act or instance of revolting against civil authority or an established government."[19] The most famous use of the Insurrection Act was when President Dwight Eisenhower "sent the 101st Airborne Division to enforce the desegregation of public schools in Little Rock, Arkansas."[20] However, the Insurrection Act was created at the request of President Thomas Jefferson because "Aaron Burr plotted to raise an army and establish his dynasty in either the Louisiana Territory or Mexico."[21]

Jefferson consulted his Secretary of State, James Madison, to see if the Constitution gave the President the ability to send troops to quash Burr's plans.[22] Madison stated, "It does not appear that regular Troops can be employed, under any legal provision [against] insurrections but only against expeditions having foreign Countries for the object."[23] "Jefferson was looking for a legitimate source of authority" to quell Burr's plot and, in December of 1806, Jefferson asked Congress to pass a bill "authorizing the employment of the land or Naval forces of the US. in cases of insurrection."[24] This legislation became known as the Insurrection Act of 1807. Since 1807, the Insurrection Act has been amended several times to meet different political challenges.

In 1861, Abraham Lincoln expanded the Insurrection Act as the legal basis for the Civil War. Without it, "he wouldn't have had the authority to send federal troops into a state without the governor's permission."[25] After the Civil War, the Insurrection Act was further amended to give the President authority to enforce the 14th Amendment and the conditions of Reconstruction in the South; the authority grants the President the power to act when "any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection."[26]

Finally, the Insurrection Act was invoked in 1992 "under President George H.W. Bush, after Peter Wilson, then-governor of California, requested help to quell widespread riots after four police officers charged in the beating of Rodney King were acquitted."[27] The civil unrest in 1992 mirrors the protests in Portland today. However, President Bush employed the Insurrection Act after an explicit request by California's governor, whereas

President Trump has usurped the authority of Oregon's governor by deploying unwanted troops.[28]

Without directly invoking the Insurrection Act, our current executive branch has utilized similar methods of deployment. In 2019, DHS published the "Strategic Framework for Countering Terrorism and Targeted Violence," which expanded foreign anti-terrorist efforts by recognizing the "growing threat from domestic terrorism and targeted violence here at home."[29] DHS defines domestic terrorism as "an act of unlawful violence, or a threat of force or violence, that is dangerous to human life or potentially destructive of critical infrastructure or key resources, and is intended to effect societal, political or other change."[30] The DHS domestic terrorist list includes groups that have caused harm to specific minority groups. Yet, their manuscript failed to publish data on anti-government actors' successful attacks or "left leaning Marxists."[31] DHS maintains there is a dangerous anti-government/anti-authority movement. Instead of considering this movement as the free flow of political debate, DHS cited radical liberal groups as a threat to national security.[32] Despite not citing the Insurrection Act, the Trump Administration has expanded anti-terrorism policies to include vocal groups about political change. DHS reported the threat of dangerous anti-government/anti-authority movements; however, it failed to justify the inclusion of left-leaning groups in their terrorist watch-list.[33] Despite not citing the Insurrection Act, the Trump Administration has expanded anti-terrorism policies to include vocal groups about political change.

Portland authorities have repeatedly implored the federal government not to send any national military force to the city.[34] The President can deploy federal troops only if he *feels* they are necessary to suppress an insurrection. However, Trump did not make the requisite proclamation. Furthermore, there is no sunset insight on how long these troops will be in Portland. Without a proclamation that troops will be deployed and no limit to how long military force will be used, the Trump Administration, even if it chooses to invoke the Insurrection Act, has still violated the law's explicit requirements.

ii. Insurrection Act of 1807: Caselaw

Judicial interpretations of the Act demonstrate its malleability. Whether in the early 20th century or during the civil rights movement of the 1960s, antiquated legislation requires constant clarification from the bench.

The Supreme Court's reluctance to expand the definition of an insurrection is best found in *Herndon v. Lowry,* 301 U.S. 242 (1937). In *Herndon*, the defendant was convicted of communist solicitation, specifically in "uniting,

combining, and conspiring to incite riots and to embarrass and impede the orderly processes of the courts and offering combined resistance to, and, by force and violence, overthrowing and defeating the authority of the state, that by speech and persuasion...."[35] Defendant asserted that the cited statute was unconstitutionally vague and unwarrantably invaded his rights provided by the First and Fourteenth Amendments.[36] Finding for the defendant, the Court held "that the limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation, which goes beyond this need, violates the principle of the Constitution."[37] The Court held that the state must prove defendant's intent of force and violence towards the state before suppressing their constitutional rights.[38]

Laird v. Tatum, 408 U.S. 1 (1972) demonstrates a notable deviation from the Insurrection Act's previous interpretation. The federal government deployed federal troops to silence protestors of the Vietnam War.[39] Petitioner alleged that the Army's surveillance of "lawful and peaceful civilian political activity" was unconstitutional.[40] The facts of the case established that "an army surveillance program" had been created to "quell civil disturbances" during the Vietnam War.[41] The Court held that petitioner did not assert an injury in fact, and the Court dismissed the case. Writing for the majority, Chief Justice Warren E. Burger noted [t]hat the civilians could not point to any specific actions taken against them; they could point only to the existence of an intelligence-gathering program.[42] Justice Douglas' dissent foreshadowed the present-day Portland conflict, "[T]he exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires."[43] Ultimately, Douglas feared, "The act of turning the military loose on civilians ... would raise serious and profound constitutional questions. Standing as it does only on brute power and Pentagon policy, it must be repudiated as a usurpation dangerous to the civil liberties on which free men are dependent."[44]

There is a need for a singular interpretation regarding the scope of the Insurrection Act. The application of the Act requires judicial consensus because caselaw demonstrates differing interpretations based on cultural tides. As such, the Trump Administration has flirted with the Act as a means to its political ends.

iii. Proposed Amendment to the Insurrection Act of 1807

On July 20, 2020, the House Armed Services Committee approved an amendment to the Insurrection Act of 1807; the approved amendment "would require a president consult with Congress in 'every possible instance' before invoking the Insurrection Act."[45] The Amendment would also require

the President and Defense Secretary "to make a certification to Congress that a state is unwilling or unable to suppress an insurrection in order to invoke the law."[46] The certification must include "demonstrable" evidence that a state is unwilling or unable to act.[47] Further changes include specifying that troops deployed under the Insurrection Act "are not allowed to participate in search, seizure, arrest or 'other similar activity' unless they are 'otherwise expressly authorized by law.'"[48] Rep. Veronica Escobar (D-Texas), the sponsor of the amendment, stated, "Today, if the president of the United States chooses to use military force abroad the president would have to consult with Congress… [y]et that same consultation is not required for use of military force on American soil."[49] Presently, the amendments await a full Congressional vote.

The proposed amendment is congruent with the legislative intent set forth during the Insurrection Act's ratification. Recall that Jefferson was looking for constitutional authority to deploy troops to a state. The Act was created by Congress with specific limitations, reflecting the blueprint of federalism. The current proposed amendments comply with Madison's advice to Jefferson: federal troops cannot be sent into the several states because the President does not have the authority without Congress's consent. Therefore, by reinvigorating the checks and balances between the executive and legislative branches, as the proposed amendment does, the Insurrection Act itself will revert to its intended purpose rather than an unchecked use of presidential authority.

II. The Executive Order and Departmental Action

Absent judicial intervention or congressional action, an unchecked Commander in Chief can direct law enforcement via Executive Order. Executive Orders are proclamations with broad ramifications; they carry the same effect of a statute.[50] While Executive Orders are subject to judicial review, courts often uphold the presidential directive, finding that the plaintiff lacks standing or that the issue involves a political question.[51]

On June 26, 2020, President Trump issued Executive Order 13933, *Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence*.[52] The Order addresses heightened protests in urban areas, "Many of the rioters, arsonists, and left-wing extremists who have carried out and supported these acts have explicitly identified themselves with ideologies- such as Marxism - that call for the destruction of the United States system of government."[53] The 2020 Order is similar to, and builds upon, the Homeland Security Act of 2002. The Homeland Security Act birthed the DHS, whose mission was "born from the commitment and

resolve of the Americans across the United States in the wake of the September 11th attacks."[54] DHS's purpose was international counterterrorism; however, the department's mission has expanded beyond foreign threats and now targets domestic terrorists. Trump's Executive Order was an explicit call to departmental action.[55] On July 1, 2020, Chad Wolf, Acting Secretary of DHS, announced a new task force to coordinate departmental law enforcement agency assets and protect monuments, memorials, statues, and federal facilities.[56] The task force, Protect American Monuments, Memorials, and Statues (PACT), was an answer to the President's call to use law enforcement personnel across the country.[57]

The statutory framework for the task force, 4 U.S.C.A § 1315, states in relevant part: "pursuant to the Homeland Security Act of 2002, the Secretary of Homeland Security…shall protect the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government…and the persons on the property."[58] The powers authorized by subsection 2 include; carrying firearms, the ability to make arrests without a warrant, service of warrants, investigations of possible offenses, and "other activities for the promotion of homeland security as the Secretary may prescribe."[59] Because of the vagueness of the statute, DHS has been able to justify potentially unconstitutional actions.

The Executive Order enabled DHS to apply symmetrical tactics, centralizing the force used against both foreign extremists and US citizens.[60] However, while al Qaeda and left-leaning "Marxists" have drastically different goals, "terrorism and targeted violence are addressed together…because they necessitate a shared set of solutions."[61] Of its many purposes, Objective 1.2 is the department's actualization of draining the swamp.[62]

III. Civil Liberties and Judicial Intervention

Without judicial intervention, the executive branch's interloping presence is limitless. Mass arrests and use of violent force in Portland evidences pervasive constitutional violations. Protestors are no longer able to exercise their constitutional rights without fear of combat tactics.

i. Due Process

In *Tennessee v. Garner,* 471 U.S. 1 (1985), the Supreme Court held that a seizure could be unreasonable even if supported by probable cause. Deadly force is considered a seizure. The defendant in *Garner* was an unarmed burglar who was met with deadly force by law enforcement. The Court held the use of deadly force violated the Fourth Amendment, regardless of the existence of probable cause.[63] Significantly, 18 U.S.C.A. § 4001(a) states,

"No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[64]

Hamdi v. Rumsfeld, 548 U.S. 557 (2004) stressed the importance of 18 U.S.C.A. § 4001(a), specifically the due process rights of American citizens. A captured American citizen, alleged to be an enemy combatant, petitioned for a writ of habeas corpus. Justice O'Connor's majority opinion held that a United States citizen detained as an enemy combatant must have a meaningful opportunity to contest the factual basis for his detention and exercise due process rights.[65] Justice O'Connor maintained that the act was created and "provided procedures for executive detention, during times of emergency, of individuals deemed likely to engage in espionage or sabotage."[66] The Court advocated for preventing a "reprise [of] the Japanese-American internment camps of World War II… The concentration camp implications of the [past] legislation render it abhorrent" and, therefore, the Court vocalized its support for Congress's new statute.[67]

Likewise, in *City of Chicago v. Morales,* 527 U.S. 41, 53, (1999), the Court found the following Chicago ordinance unconstitutionally vague: "Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place...he shall order all such persons to disperse and remove themselves from the area."[68] The majority concluded, "we have expressly identified this 'right to remove from one place to another according to inclination' as 'an attribute of personal liberty' protected by the Constitution."[69] Therefore, if "the loitering is in fact harmless and innocent, the dispersal order itself is an unjustified impairment of liberty."[70] The Court was equally concerned with giving the police the power "to decide arbitrarily which members of the public they will order to disperse."[71] Recognizing that the ordinance prevents a "substantial amount of innocent conduct," the Court determined the statute wrongfully "entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat."[72]

Like Nat West and his 16-year-old daughter, stories of Portland protesters prove that innocence is not factored into the federal troops' behavior.[71] Both West and his daughter "partially lost hearing after a device exploded next to his daughter's left ear."[72] Despite the Supreme Court explicitly denouncing law enforcement's unfettered and subjective decisions, the federal agents are openly flouting the Court's prescriptions.

ii. Warrants and the Fourth Amendment

The Court has denounced warrantless searches in countless cases.[73] "[A] Fourth Amendment seizure [occurs] ... when there is a governmental termination of freedom of movement through means intentionally applied."[74] Yet, the Court's opinions involving warrantless arrests and the use of deadly force can vary.

An example where courts have been hesitant to allow warrantless seizures came from the 8th Circuit in *Bissonette v. Haig*, 776 F.2d 1384, 1387 (8th Cir. 1985). The plaintiffs, residents of Pine Wood Indian Reservation, sued for damages after federal military personnel unlawfully used military force to seize and confine them within an "armed perimeter."[75] Plaintiffs contended that defendants violated the Fourth Amendment when respondents deployed federal military forces without lawful authority.[76] The court addressed the "special threats to constitutional government inherent in military enforcement of civilian law."[77] Limiting military involvement in civilian affairs "has a long tradition beginning with the Declaration of Independence and continued in the Constitution."[78] The court cited the Constitutional Convention: "[W]hen a government wishes to deprive its citizens of freedom, and reduce them to slavery, it generally makes use of a standing army."[79] The court held that "there are limits established by Congress on the use of military for civilian law enforcement," and law enforcement cannot flippantly disregard boundaries imposed by the Fourth Amendment.[80]

However, in the case of *Scott v. Harris*, 550 U.S. 372 (2007), the Supreme Court did not show the same passion for protecting Fourth Amendment rights as the Eighth Circuit did. *Harris* involved a police deputy who chose to end a "high-speed pursuit of respondent's car" by pushing his bumper to the rear of respondent's vehicle; this resulted in a crash, rendering respondent a person with quadriplegia.[81] Respondent initially filed a suit alleging excessive force resulting in an unreasonable seizure under the Fourth Amendment. However, the Court recognized a different issue, specifically if an officer can "take actions that place a fleeing motorist at risk of serious injury or death to stop the motorist's flight from endangering the lives of innocent bystanders?"[82] Writing for the majority, Justice Scalia held that "it is quite clear that [petitioner] did not violate the Fourth Amendment. [Petitioner] does not contest that his decision to terminate the car chase by ramming his bumper into respondent's vehicle constituted a 'seizure'". The Court concluded, "The car chase...posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise. [Petitioner]'s attempt to terminate the chase by forcing respondent off the road was reasonable." [83]

Justice Ginsburg concurred in the judgment, but she asked unaddressed, essential questions in her written concurrence; "Among relevant consider-

ations: Were the lives and well-being of others… at risk? Was there a safer way, given the time, place, and circumstances, to stop the fleeing vehicle?" [84] Before using deadly force, these questions should be asked, especially in the context of Portland's protests, where unbridled police violence is pervasive.

The Court has repeatedly sanctioned state-sponsored violence. *Hernandez v. Mesa,* 140 S. Ct. 735, 740 (2020), involved two Mexican citizen children who were "simply playing a game, running across the [border], touching the fence on the U.S. side [of the border], and then running back across the border," to Mexico. A Border Patrol Agent detained one of the kids who had run onto the United States' side.[85] The other child, petitioners' son, was also on the United States' side when his friend was detained; petitioners' son quickly ran back onto Mexican soil.[86] Respondent fired two shots at the boy's back as he was running away; one bullet struck and killed him on the Mexican side of the border.[87] The court held that "[w]e presume that Border Patrol policy and training incorporate both the Executive's understanding of the Fourth Amendment's prohibition of unreasonable seizures and the Executive's assessment of circumstances at the border."[88] Thus, the Executive decided respondent's behavior was "reasonable conduct by an agent under the circumstances that [respondent] faced at the time of the shooting, and based on the application of those standards, it declined to prosecute."[89]

These decisions demonstrate that the Court values some lives over others. The issues in these cases are the foundation of the Black Lives Matter Movement; the Court, government, and law enforcement consistently and unequally apply constitutional protections based on inherent biases. Because the inequality is self-evident, protesters have begun using their voices to fight for equality; however, freedom of speech is no longer free for those who wish to speak against the government.

IV. First Amendment Deterioration

Protestors and journalists have been limited in exercising free speech protections. "The Free Speech Clause exists principally to protect discourse on public matters."[90] It reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[91] It is "[p]remised on mistrust of governmental power,"[92] and "furthers the search for truth."[93] The First Amendment "ensure[s] that . . . individual citizen[s] can effectively participate in and contribute to our republican system of self-government."[94]

On July 23, 2020, US District Judge Michael Simon issued a temporary restraining order that blocked federal agents from physical force or de-

tainment of Portland journalists.[95] Undeterred by the judicial order, federal agents continued to use physical force against writers with clearly adorned press badges.[96] A list of physical injuries would be too long to list in this paper.

Federal orders setting conditions of release have included indefinite First Amendment limitations. Citizens have been faced with a choice of either abandoning their First Amendment rights or continued detainment. One release order stated that the defendant "may not attend any other protests, rallies, assemblies or public gathering in the state of Oregon."[97] A handwritten release order, signed by Magistrate Judge V. Acosta, prohibited a protestor from attending protests, assemblies, demonstrations, or public gatherings in Oregon.[98]

Whitney v. California, 274 U.S. 357, 374 (1927), addressed First Amendment rights of the Communist party—its right to assemble, and by extension, free speech.[99] Plaintiff allegedly violated the Criminal Syndicalism Act; plaintiff was convicted and sentenced to imprisonment.[100] The majority opinion written by Justice Sanford exclaimed, "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty."[101] His opinion made clear that "the remedy to be applied is more speech, not enforced silence."[102] Justice Brandeis' concurrence vocalized the need for a thorough analysis of petitioner's behavior because the due process clause of the Fourteenth Amendment "applies to matters of substantive law….[and the] right of free speech, the right to teach and the right of assembly are, of course, fundamental rights…Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion."[103]

Brandeis' concurrence addresses "the fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression."[104] The "[p]rohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society."[105] Even a "police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive."[106] Applying *Whitney* to Portland's violence, a standard that is nearly one hundred years old, it is clear that the government has crossed the line into suppressing unalienable liberties.

Conclusion

President Trump's deployment of federal agents has crossed several legal boundaries. The threads of federalism are wearing thin. By weaponizing a post-September 11th strategy, the federal government equates the violence of September 11th to the Black Lives Matter Movement. The Constitu-

tion explicitly precludes the government from interfering with American's unalienable rights; alas, the Trump Administration has executed extensive efforts that circumvent those liberties. Tanks roll through the street solely to protect federal courthouses, and pregnant women are tear-gassed without any research performed on how the tear gas effects a person's health, and history professors are waking up in emergency rooms and realizing their own government has put them there.

Endnotes

1 *George Floyd: What happened in the final moments of his life*, BBC NEWS (July 16, 2020), https://www.bbc.com/news/world-us-canada-52861726.

2 *Id.*

3 *Id.*

4 *Id.*

5 *George Floyd: What happened in the final moments of his life*, BBC NEWS (July 16, 2020), https://www.bbc.com/news/world-us-canada-52861726.

6 *Id.*

7 *Id.*

8 McGreal, Chris, *'I wanted to take action': behind the 'Wall of Moms' protecting Portland's protesters*, THE GUARDIAN (July 21, 2020), https://www.theguardian.com/us-news/2020/jul/21/trump-federal-agents-portland- protests-moms.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 U.S. Constitution, Art. II.

14 Nelson, Caleb and Roosevelt, Kermit, Common Interpretation: The Supremacy Clause, https://constitutioncenter.org/interactive-constitution/interpretation/article-vi/clauses/31 ("The core message of the Supremacy Clause is simple: the Constitution and federal laws [of the types listed in the first part of the Clause] take priority over any conflicting rules of state law.").

15 *Trump v. Vance*, 140 S. Ct. 2412 (2020).

16 House votes to curtail Insurrection Act powers, 2020 WL 4059507.

17 *Id.*

18 Roos, David, *Thomas Jefferson Signed the Insurrection Act in 1807 to Foil a Plot by Aaron Burr,* History Stories (June 3, 2020), https://www.history.com/news/insurrection-act-thomas-jefferson-aaron-burr.

19 https://www.merriam-webster.com/dictionary/insurrection

20 Roos, David, *Thomas Jefferson Signed the Insurrection Act in 1807 to Foil a Plot by*

Aaron Burr, History Stories, (Jun. 3, 2020), https://www.history.com/news/insurrection-act-thomas-jefferson-aaron-burr.

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 Roos, David, *Thomas Jefferson Signed the Insurrection Act in 1807 to Foil a Plot by Aaron Burr,* History Stories (Jun. 3, 2020), https://www.history.com/news/insurrection-act-thomas-jefferson-aaron-burr.

26 *Id.*

27 *Id.*

28 The Department of Homeland Security, *DHS Strategic Framework for Countering Terrorism and Targeted Violence* (September 20, 2019), www.dhs.gov/publication/dhs-strategic-framework-countering-terrorism-and-targeted-violence

29 *Id.*

30 *Id.*

31 *Id.*

32 Chemerinsky, Erwin, *Op-Ed: Trumps's troops in Portland are a constitution outrage*, LOS ANGELES TIMES (July 24, 2020), https://www.latimes.com/opinion/story/2020-07-24/donald-trump-portland-border-patrol-constitution.

33 *Id.*

34 *Id.*

35 *Herndon v. Lowry,* 301 U.S. 242, 245 (1937).

36 *Id.* at 244-245.

37 *Id.* at 258.

38 *Id.* at 259.

39 *Laird v. Tatum*, 408 U.S. 1, 16–17 (1972).

40 *Id.*

41 Vile, John R., *Laird v. Tatum (1972),* First Amendment Encyclopedia, John Seigenthaler Chair of Excellence in First Amendment Studies (2009), https://www.mtsu.edu/first-amendment/article/342/laird-v-tatum

42 *Laird,* 408 U.S. at 3.

43 *Id.* at 20.

44 *Id.* at 24.

45 *Id.*; Vile, John R., *Laird v. Tatum* (1972), First Amendment Encyclopedia, John Seigenthaler Chair of Excellence in First Amendment Studies (2009), https://www.mtsu.edu/first-amendment/article/342/laird-v-tatum

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 91 C.J.S. United States § 46.

51 L. Branum, Tara, *President or King? The Use and Abuse of Executive Orders in Modern-Day America,* 28 J. Legis. 1, 59 (2002).

52 *Executive Order on Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence* (June 26, 2020), https://www.whitehouse.gov/presidential-actions/executive-order-protecting-american-monuments-memorials- statues-combating-recent-criminal-violence/.

53 *Id.*

54 Homeland Security Mission Statement, DEPARTMENT OF HOMELAND SECURITY (Last Published July 3, 2019), https://www.dhs.gov/mission.

55 *Id.*

56 Press Release, *DHS Announces New Task Force to Protect American Monuments, Memorials, and Statues,* THE DEPARTMENT OF HOMELAND SECURITY (July 1, 2020), https://www.dhs.gov/news/2020/07/01/dhs-announces-new-task-force-protect-american-monuments-memorials-and-statues

57 *Id.*

58 4 U.S.C.A § 1315.

59 4 U.S.C.A. § 1315(b)(2).

60 *Executive Order on Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence* (June 26, 2020), https://www.whitehouse.gov/presidential-actions/executive-order-protecting-american-monuments-memorials- statues-combating-recent-criminal-violence/.

61 *Id.*

62 *Id.*

63 *Tennessee v. Garner*, 471 U.S. 1 (1985).

64 18 U.S.C.A. § 4001(a) (West).

65 *Hamdi v. Rumsfeld*, 548 U.S. 507 (2004).

66 *Id.* at 517.

67 *Id.*

68 *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999).

69 *Id.*

70 *Id.* at 57.

71 *Id.*at 60.

72 *Id.*

73 In *United States v. Jones,* 565 U.S. 400 (2012), the Court held that attaching a Global–Positioning–System (GPS) tracking device to defendant's car so law enforcement could monitor him though the warrant had expired violated the Fourth

Amendment. In *Riley v. California*, 573 U.S. 373 (2014), police officers violated defendant's Fourth Amendment protections when they searched the data on his cell phone without a warrant.

74 573 U.S. at 381.

75 *Bissonette v. Haig*, 776 F.2d 1384, 1385 (8th Cir. 1985), *on reh'g*, 800 F.2d 812 (8th Cir. 1986), *aff'd*, 48 U.S. 264 (1988).

76 *Id.*

77 *Id.* at 1387.

78 *Id.* at 1388.

79 *Id.*

80 *Id.* at 1389.

81 *Scott v. Harris*, 550 U.S. 372 (2007).

82 *Id.* at 374.

83 *Id.* at 386.

84 *Id.*

85 *Hernandez v. Mesa*, 140 S. Ct. 735, 740 (2020).

86 *Id.*

87 *Id.*

88 *Id* at 744.

89 *Id.*

90 *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 790 (2011).

91 *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

92 *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010).

93 *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, *Council 31*, 138 S. Ct. 2448, 2464 (2018).

94 *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982).

95 Zoe Tillman, *Videos Appear To Show Federal Officers Shooting And Macing Reporters And Legal Observers, Despite A Judge's Order,* BuzFeed News (July 28, 2020, 4:31 PM), https://www.buzzfeednews.com/article/zoetillman/federal-officers-shoot-mace-reporters-portland-lawsuit

96 *Id.*

97 Dara Lind, *Defendant Shall Not Attend Protests: In Portland, Getting Out of Jail Requires Relinquishing Constitutional Rights*, ProPublica (July 28, 2020, 4:13 PM), https://www.propublica.org/article/defendant-shall-not-attend-protests-in-portland-getting-out-of-jail-requires- relinquishing-constitutional-rights

98 *Id.*

99 *Whitney v. California*, 274 U.S. 357, 374 (1927).

100 *Id.* at 359.

101 *Id.*

102 *Id.*

103 *Id.* at 373.

104 *Whitney*, 274 U.S. at 378.

105 *Id.*

106 *Id.* at 377.

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NOTE: A version of this work is undergoing editorial review for publication in the North Carolina Civil Rights Law Review. The full piece will be available in Spring 2021.

The State of Estates

BY PAUL S. FORSTER, ESQ.

Although we are beset with a pandemic, an economic collapse, civil unrest, extreme political polarization, unsurvivable storms, and raging forest fires, hopefully, before the locusts, frogs and boils arrive, there will be time to read about some interesting cases involving (i) the right of a non-party to reasonable attorney's fees in addition to reproduction costs in complying with a subpoena; (ii) the absence of coverage for damages to property if the estate and/or heirs are not made an additional insured; (iii) the application of the new partition statute, Real Property Actionss and Proceedings Law (RPAPL) § 993, involving "heirs property" (a term of art) that is effective for actions brought after December 6, 2019, in an unusual circumstance effectively turning the purpose of the statute on its head; (iv) the right under some circumstances to obtain discovery in the context of a Surrogate's Court Procedure Act (SCPA) § 2110 proceeding to determine attorney's fees; (v) the continuation of the toll for disability under Civil Practice Law and Rules (CPLR) § 208, notwithstanding the appointment of a Mental Hygiene Law Article 81 Guardian; (vi) the enforceability of a Stipulation for payment of attorneys' fees in the context of a divorce action upon occurrence of an event certain, which occurred, notwithstanding the death of one of the parties which terminated the divorce action; and (vii) the authority provided the parents of a West Point cadet who died in a skiing accident to preserve their son's sperm even in the absence of any advance directives by him.

A Non-Party's Attorneys' Fees in Complying with a Subpoena in a Trust Accounting Proceeding May Be Recoverable

In a proceeding for judicial settlement of a fiduciary's accountings, objections were raised to amounts paid by the trustee to Cole, a real estate consultant, for services rendered in assisting in the development of a certain parcel of real property owned by the trust. Pursuant to the development agreement, Cole was to receive up to $1 million as a development

fee. Within their objections, the objectants contended that (i) despite Cole receiving $6,000 to $7,500 per month for several years, the property was never developed; (ii) Cole received over $700,000 in consultant fees and was reimbursed over $800,000 for purported expenses for which the trustee did not provide any documentation; and (iii) Cole was paid a $6 million termination fee, without any explanation by the trustee as to the basis for the fee.

Subpoenas were issued by the objectants as against Cole and his company, non-parties, for their records. Cole moved to compel objectants to defray the reasonable production expenses incurred in responding to the subpoenas, including $92,076.04 for legal fees. Cole's compliance included the collection and review of 19,583 electronic records considered potentially responsive to objectant's subpoenas. Of those records, Cole deemed 11,650 responsive and not privileged, and provided copies of these records to counsel for the trustee for counsel's own privilege review. Thereafter, counsel for Cole advised objectants' attorneys by email of the completion of the document review and, in regard to Cole's costs of complying with the subpoenas, stated, "pursuant to our prior agreement that your clients will defray those reasonable costs pursuant to CPLR 3122(d), attached please find invoices for payment." The invoiced payment included not only the costs for retrieving and reproducing the documents, but also the cost of Cole's legal fees.

Objectants' counsel, while agreeing to pay for the "reproduction" costs, strongly objected to paying Cole's legal fees, and Cole withheld the records from objectants pending resolution of the issue by the Court. In support of Cole's motion for payment of the full costs of production of the records, he submitted invoices from an electronic discovery vendor hired to facilitate the collection, hosting and production of the records, totaling $5,571.28. He also submitted copies of invoices and time records for attorneys' fees in the amount of $92,076.04.

Objectants argued that even if attorneys' fees were recoverable by a non-party for responding to and complying with a subpoena, Cole was not the ordinary innocent non-party bystander the rule is intended to protect. They argued that he was intimately involved with the trustee in the management of the trust properties, as well as in a failed development project for which he received millions of dollars in improper payments, which is the genesis for seeking surcharges against the fiduciary. Objectants argued further that, but for the fact that the litigation consisted of a trust accounting proceeding rather than a plenary action, Cole would have been named as a defendant. Therefore, they posited, he bears some responsibility with respect to the surcharges sought, and consequently he should be treated as

if he were a party and be required to pay his own expenses of producing responsive documents. Objectants also argued that Cole's attorneys were fully aware that consent was only given to pay the reasonable costs of "reproduction," and that despite numerous emails and telephone conversations, Cole's attorneys never indicated that attorneys' fees would be sought in addition to reproduction costs. Objectants contended that it was incumbent upon Cole's attorneys to have informed them in advance that objectants were being asked to bear the cost of Cole's attorneys' fees. Objectants further asserted that the amount Cole was seeking in attorneys' fees for a single document production was "outrageous." Objectants argued that there were certain time charges for which fees should not be recovered, such as time spent preparing responses and objections to the subpoenas, communications with and the transmission of documents to the trustees' attorney, and other interactions with the petitioners on privilege matters.

In response to objectants' contention that Cole should be treated as responsible for his own legal fees, Cole argued that, regardless of his alleged business relationship with the trustees, he still was nothing more than a non-party with respect to the accounting proceedings and, therefore, entitled to the reasonable production costs incurred, including attorneys' fees. Cole also contended that given the breadth of the subpoenas, which objectants did not agree to limit, his attorneys were required to review nearly 20,000 electronic records, which was a time-consuming and expensive endeavor. Cole's counsel, working with the e-discovery specialists and associate attorneys, claimed to have spent 173 hours in reviewing and producing the electronic records resulting from the objectants' refusal to agree to what Cole categorized as reasonable limitations on the subpoenas.

HOLDING: In granting Cole's motion to defray the costs, the Court noted that the costs for producing documents associated with complying with a subpoena can often be significant. The Court stated that in recognition thereof, CPLR § 3122(d) provides that "[t]he reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery." In the Court's view, the rationale for the rule was manifestly clear; to wit: that a non-party should not be burdened with shouldering the costs of litigation to which the non-party was unrelated. The Court noted, however, that what constitutes "reasonable production expenses," is not clear as it is not defined in the rule. The Court pointed out that in addition to the cost of the actual copying or reproducing of the documents, there are labor related costs in the search, retrieval and production of the documents, and often the expense of an e-discovery professional. The Court found it logical and without argument that these costs incurred by a non-party should be compensable as reasonable production expenses.

With regard to Cole's contention that in addition to those expenses, legal fees incurred in the process of reviewing the documents for compliance with the subpoenas are also reasonable expenses recoverable under the rule, the Court stated that there is no specific reference to attorneys' fees in the statute. The Court observed that the Practice Commentaries to the rule, while noting the omission of a specific reference to attorneys' fees, suggest that the Court would be empowered to direct the payment of attorneys' fees, particularly where any substantial right of the non-party witness is involved and representation by an attorney is needed. The Court concluded that reasonable legal fees incurred by a non-party conducting e-discovery in complying with a subpoena are reimbursable in Surrogate's Court proceedings, subject to the exercise of the Court's power to limit or deny them to prevent unreasonable expense or other prejudice to any person as the circumstances may present, pursuant to CPLR § 3103(a). The Court stated that while the Surrogate's Court does not have its own rules governing e-discovery, its review of such rules in the Federal Courts as well as the Commercial Parts of Nassau and New York City Supreme Court found the procedure followed by Cole and the objectants did not remotely comply with any of these guidelines, especially with respect to the discussion of costs. The Court noted that while the parties were free to chart their own procedural course, the guidance of the official rules in other Courts is instructive, especially in the absence of an explicit written agreement.

The Court further pointed out that the underlying dispute concerned whether or not the fiduciaries fulfilled their duties in administering this estate as executors and trustees, and that no showing had been made in any of the papers as to why the information sought from Cole could not be gleaned from the fiduciaries' own records or in what manner the fiduciaries' documents were inadequate. The Court concluded that objectants could not be heard to complain about the costs involved in getting additional material from a third party, especially after its production. Nonetheless, the Court held that upon the facts of this case the reasonable counsel fees for review of documents for privilege and relevancy were reimbursable to Cole, the producing party, but that not all of the services as set forth in the time sheets submitted were reimbursable. In consideration of (i) the breadth of the subpoenas' demands; (ii) the failure to reach an agreement on reducing the scope of the subpoenas as to certain documents; (iii) the lack of prior notice given to the objectants that Cole would seek reimbursement for its legal fees; (iv) Cole's relationship with the trustee in the management of the trust; and (v) excluding certain expenses for conferring with the trustees' counsel, preparing objections to the subpoenas and the like, the Court determined that in addition to the $5,571.28 electronic discovery vendor ex-

pense, Cole should be reimbursed for his reasonable legal fees and expenses in the amount of $40,000.00. *Matter of Elghanayan*, 66 Misc.3d 335 (Surr. Ct., Queens Cty. 2019)(Kelly,S.)

Estate Cannot Recover Damages to Insured Property if the Estate and/or Heirs Are Not Made an Additional Insured

Prior to her death the decedent contacted defendant, an insurance agent, to procure a homeowner's insurance policy covering her residence. Defendant insurance company thereafter issued decedent a policy for the initial term of May 17, 2006, to May 17, 2007, with decedent listed on the policy as the only insured. The policy was renewed each year thereafter and, despite the fact that decedent died in December 2010, the policy was in force for the term of May 17, 2013, to May 17, 2014, with decedent still listed as the only insured.

After the residence was destroyed by fire in January 2014, one of the decedent's daughters, Leonarda, filed a claim under the policy, and the insurance company disclaimed coverage. Plaintiff, Santina, another daughter of decedent who was appointed the Administrator of decedent's estate, thereafter commenced an action against the insurance company and the insurance agent. With respect to the defendant insurance agent, the Administrator alleged, *inter alia*, that he breached his duty to notify the insurance company of decedent's death and to ensure that the property was properly insured. Specifically, the Administrator alleged that defendant was informed of decedent's death in 2011 and again in 2012 when daughter Leonarda made payments directly to defendant to renew the policy.

Defendant submitted the deposition testimony of daughter, Tomaino, in which she testified that there was no discussion with defendant about any need for changes to the policy and that she was not asked for a copy of any death certificate. The defendant insurance agent moved for summary judgment dismissing the complaint. The Supreme Court denied the motion and defendant insurance agent appealed.

HOLDING: The Appellate Division reversed and dismissed the complaint against the insurance agent, determining that defendant had met his initial burden of establishing as a matter of law that he owed no duty to the Administrator or decedent's estate, inasmuch as he demonstrated that neither was a client. The Appellate Division found that defendant's submissions established that decedent, alone, was his client and that, after her death, no one represented the estate until September 2014, approximately eight months after the fire and four years after her death. The Appellate Division stated that the Administrator failed to raise an issue of fact sufficient to defeat the motion.

The Court went further to explain that even assuming, *arguendo*, that daughter Tomaino was a client of defendant, it concluded that defendant established his entitlement to summary judgment as a matter of law as he established that he had no common-law duty to advise, guide, or direct her to obtain insurance coverage for additional insureds in light of decedent's death. The Court also determined that defendant insurance agent further established that he did not assume or acquire duties in addition to those fixed at common law. The Appellate Division found that defendant had demonstrated that there were no payments made to him beyond the alleged premium payments, that there was no interaction with daughter Tomaino regarding questions of coverage, and that no special relationship was formed between himself and Tomaino. The Court added that even assuming, *arguendo*, that daughter Tomaino was a client of defendant and that she informed him of decedent's death and made premium payments to him in 2012 and 2013, such events were insufficient to raise a triable issue of fact as to whether defendant owed a duty to Tomaino to notify the insurance company of decedent's death and to ensure that the property was properly insured. *Gatto v. Allstate Indem. Co.,* 173 A.D.3d 1711 (4th Dep't 2019). [Author's note: a cautionary tale, begetting nightmares, since it appears that the decedent's daughter who dealt with the insurance agent succeeded to the property by operation of law as of the date of the decedent's death. Leave to appeal was denied. The resolution of the case against the insurance company is not reported.]

The New Partition Statute, RPAPL § 993, Involving "Heirs Property" (A Term of Art), Which Is Effective for Actions Brought After December 6, 2019, Applied in An Unusual Circumstance Effectively Turning the Purpose of the Statute on Its Head

On December 24, 2019, plaintiff, a corporate entity, commenced an action against defendants for partition of certain real property in Manhattan. The property was owned 1/6 by the plaintiff, 1/6 each by sisters Wendy Lewit and Leslie Lewit Milner, and 1/2 by a trust. Plaintiff had acquired its 1/6 interest for $1,200,000 from Guy Lewit, the brother of Wendy and Leslie. Guy, Wendy, and Leslie had obtained their interests under their father's Will. Plaintiff alleged in its complaint that defendants were using the premises for their own purposes without collecting or paying rent and/or without accounting to him for the income of said property. Defendants moved to have the property determined to be "heirs property" within the meaning of the new Real Property Actions and Proceedings Law (RPAPL) § 993, and for a notice to be issued to all parties identifying that plaintiff, as

alleged 16.667 percent owner of the property, had sought its partition, and of the time and place of the statutorily-mandated settlement conference, its purpose, and the requirements of RPAPL §993. Plaintiff opposed.

Defendant Milner stated that she and the other defendants collected rents from tenants at the property and relied on that income. She alleged that plaintiff's principal, a developer and claimed owner of an adjacent property, brought the partition action to force an involuntary sale of the property which she characterized as predatory. She recounted an unsolicited email by which plaintiff's principal introduced himself as a new neighbor and developer of an adjacent property and asserted that he claimed in the email that the property in issue was worthless and could not be developed unless combined with an adjacent property. Thus, he maintained, the sole option available was to sell to him all interests in the property.

Defendant Milner also described how plaintiff's principal personally appeared at her private residence and told her that he had purchased two buildings adjacent to the subject property, which he claimed would be rendered valueless once his planned development were completed, as it would dwarf the property. She also alleged that her brother had given defendants no notice of the sale of his interest in the property to plaintiff.

Defendants argued that RPAPL § 993 governed as the property constituted "heirs property" as it was held: (i) by tenants in common with no agreement binding all co-tenants in the event of partition; (ii) by at least one co-tenant who acquired title from a relative; and (iii) 20% or more of the interests were held by co-tenants who are relatives. They posited that inasmuch as each of the pertinent deeds was silent as to the form of the tenancy conveyed, title was as tenants in common with undivided interests. Defendants asked that the various requirements set forth in RPAPL § 993 become operative by entry of the appropriate orders.

Plaintiff's principal alleged that defendants would receive a higher price for the property from him than from a third party purchaser seeking to own and operate the premises as is, and that he paid a substantial premium for his share as compared to what Guy would have received from a third party. As his purchase of Guy's interest in the property was part of good faith attempts to acquire the others' interests, he accused defendants of seeking to punish plaintiff for those efforts. Plaintiff's principal also contended that defendants refused to allow him to manage the property jointly or to communicate with him, and that they had precluded him from participating in negotiations with the management company, new tenants, and brokers. He complained that plaintiff had thus received only $20,000 for its one-sixth interest in the property, and represented that he had offered $9 million for the remaining five-sixths' interests, along with other offers he has made

which, he asserted, were lucrative to defendants. He also asserted that he had offered to exchange plaintiff's interest in the property solely for the air rights. Thus, plaintiff alleged that its conduct with respect to defendants was not predatory and was not the kind of conduct targeted by RPAPL § 993.

Plaintiff further asserted that it was confronted with an entirely new statutory scheme designed to curb abuses not present in the instant action, resulting in a possible significant financial loss. Plaintiff asked that the price it paid for its share of the property and the price it had consistently offered to defendants be considered at any settlement conference held under the statute or in connection with the determination of the property's value pursuant to the statute.

HOLDING: The Court opined that the legislature had observed that in recent years predatory real estate speculators had taken advantage of New York's laws governing partition actions by purchasing a stake in a residential property, usually after a number of family members had inherited the property, and then, using that ownership stake to file a partition action to dispossess the family of the property through a forced sale, often for pennies on the dollar relative to the actual value of the property. The Court added that lower and middle-class families were particularly susceptible to these types of schemes, as they often did not engage in the kind of sophisticated estate planning that could prevent predatory partitioning actions.

The Court stated that, in the legislature's view, the new statute addressed the issue of predatory partition actions, while preserving a co-owner's right to sell his or her share of the property. The Court held that notwithstanding the legislative intent, and while plaintiff allegedly offered defendants, members of a family of significant means, well above fair market value for the mixed-use property where not one of them lived, defendants indisputably satisfied each and every statutory requirement for finding that the property was "heirs property." The Court noted that once it is determined that the property is heirs property, the property must be partitioned in accordance with the statute unless all of the co-tenants agreed in a record. The Court ruled that since it was not disputed that all co-tenants did not agree in a record, and as plaintiff had commenced a partition action, the Court must hold a conference as provided for in the statute within 60 days after the date of the filing of a request for judicial intervention, or on a date agreed to by the parties. *2nd Ave Holding 1 LLC v. Lowenbraun*, 2020 N.Y. Slip Op. 30803(U) (Sup. Ct., N.Y. Cty., Mar. 16, 2020) (Jaffe, J.). [Author's Note: The plaintiff got boxed in. The plaintiff apparently paid above fair market value for his 1/6 interest so he would be in a position to force a partition sale. However, under the new statute, effective eighteen days before he com-

menced his action, the plaintiff, by bringing the partition action, consented to be being bought out at fair market value. *See* RPAPL §993(7).]

Other Findings of Interest

Under some circumstances a party has a right to discovery in the context of an SCPA § 2110 proceeding to determine attorney's fees. *Matter of Levine,* NYLJ 10/18/19 (Surr. Ct., N.Y. Cty., Anderson, S.)

The toll for disability under CPRL § 208 continues despite the appointment of an MHL Article 81 Guardian. *Matter of Rita G.,* NYLJ 12/6/19 (Sup. Ct., N.Y. Cty., Kennedy, J.)

A Stipulation for payment of attorneys' fees in the context of a divorce action upon the occurrence of an event certain, which occurred, is enforceable, notwithstanding the death of one of the parties which terminated the divorce action. *Storch Amini P.C. v. Schlachet,* 65 Misc. 3d 137(A), 2019 N.Y. Slip Op. 51680(U) (App. Term, 1st Dep't, Oct. 24, 2019).

Very erudite exposition of the pertinent law to allow the parents of a West Point cadet who died in a skiing accident to preserve their son's sperm even in the absence of any advance directives by him. *Matter of Zhu*, 64 Misc.3d 280 (Sup. Ct., West. Cty., 2019) (Colangelo, J.).

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Make Online Mediation Work for You and Your Clients

BY ADAM J. HALPER, ESQ. WITH DONNA EREZ NAVOT, ESQ.

New York State's Presumptive, Early ADR Initiative and the Covid Pandemic have made it a necessity for attorneys to become conversant with alternative dispute resolution, particularly mediation. This article discusses best practices for attorneys and clients in online mediation.

March 9. First session.

This is how it begins. I am in Court to mediate a child custody/visitation dispute. After introductions and screening, I meet the parents in a tight room. Like all unhappy couples their story is complicated. They met years ago. They dated in high school. After graduation, they had a child—still children themselves. He cheated. So did she. He left. She raised their son, went to school and got an office job. He owns a house painting business. The son is now eight years old. He knows and loves his father, but parenting time has been sporadic. The son lives with his mother, who makes all of the decisions. The father is back now, more stable, and he has a wife. He wants to be in his son's life. She wants none of it.

Their allegations are endless. They disagree on all substantive issues—parenting time, schooling, who gets to be there for the child's birthday and holidays. They each have attorneys (who are not present at the mediation). Their preparation, if any, has come from materials I sent them ahead of the session. Her eyes are cast downward. His arms are crossed. As they speak, I take a mental step back. The child is a battlefield. They fight each other over every inch of him. I listen. I reflect. I summarize. I get nowhere, while they trade profanities.

Me: We have a lot of work to do. This was a hard day. I will summarize it this way—you agree on nothing. Except.

Except?

Except that you both love this boy. Maybe that's enough to keep going. You'll tell me whether you want to schedule another session. Let's break for the day. Maybe next time we can spend less time on what you've done to each other in the past and more time on how you want the future to look. They glare at me. I wonder whether the first agreement of the day is that they hate me. Six days later the world stops.

Presumptive ADR at This Moment.

In May, 2019, as a part of Chief Judge DiFiore's Excellence Initiative, Chief Administrative Judge Lawrence K. Marks announced the beginning of New York State's Presumptive, Early ADR (Alternative Dispute Resolution) Initiative.[1] The goal is to have litigants engage in ADR, particularly mediation and hopefully, to achieve resolutions earlier and more often than they might have through traditional litigation. Each of New York's Judicial Districts created plans to implement court-annexed ADR programs. In many ways, this announcement was a long-time coming. New York State has some of the busiest courthouses in the country. In 2019, there were 172,102 civil case filings in State Supreme, alone.[2] Statewide, there were 587,346 filings in Family and IDV Courts.[3] In 2019, NYC Surrogate's Courts had 14,237 filings.[4] Certainly, there will be more filings in the next two years.

The timing of this initiative is extraordinary. Judge Marks's ADR announcement came only months ahead of the Covid-19 pandemic. As of the writing of this article, New York State is in Phase Four of reopening. Many businesses have closed and will not reopen. Tens of thousands of New Yorkers have died.[5] Statewide, unemployment reached 15.6%.[6] How the pandemic will affect civil cases and current proceedings is not entirely knowable at this moment. Still, New York Courts will likely see an increase in commercial, real estate, bankruptcy and Surrogate's Court filings. They will add to the docket of civil cases that have been pending for several months, longer than they might have under normal operations. In this moment, the need to address and resolve civil disputes efficiently, through ADR, is critical.

Many attorneys participate in mediation at some point. Mediation is a confidential discussion with a neutral to explore ways to resolve a dispute. It may be held privately or through a Court-annexed program. The mediator encourages communication, problem solving, and option generating between the parties and helps them evaluate offers and counteroffers. The mediator works with parties, together (joint session) and separately (caucus). It's a conflict-intensive process. Parties and counsel get to speak freely in

ways they never could in a courtroom. This, of course, is one of mediation's main benefits. From candid discussion and evaluation of positions, offers and client goals, resolution becomes possible. A good mediator needs to have legal knowledge, interpersonal skills and a strong emotional IQ. Noticing behaviors like eye-rolling, sighs and crossed arms is crucial. So too, is noticing when people lean in to listen. Until March, 2020, having litigants and attorneys be in the same room together was widely considered a critical piece of the mediation process. What now?

Best Practices for Attorneys and Clients in Online Mediation.

New York's ADR Initiative combined with the continuing need for social distancing means there are going to be more online mediations in your practice. As an attorney, there are many tools you can use to turn an online mediation into a success.

Before your online mediation.

Begin with the basics. Create a pre-mediation plan. Attorneys and clients are no longer going to be in the same room during the session. Communication will be more challenging, so it is important that before the mediation session, attorneys discuss key issues with clients, including a range of lowest and highest numbers that the client would be willing to agree to. This includes discussing best and worst case scenarios in the event no agreement is reached; so, the client has a clear idea of what the alternatives will be if there is no settlement. Further, develop a bargaining timeline. Be prepared to make sensible incremental offers so the client has room for movement. Movement from one side tends to beget movement from the other. If the mediation is about more than numbers, develop a list of those issues with the client as well as thoughts on how to resolve them. Consider the mediation, if only for a few hours, as a problem-solving opportunity. Advanced preparation on these basics is key to a successful online mediation.

Also be prepared for technical issues and problems. It's tempting to imagine that because many clients now use online video in their work, they will already be prepared for the format of an online mediation session. Wrong. Being onscreen, regardless of purpose, is a self-conscious exercise. Consider how you and your client are going to engage with the format. For example, when watching several squares of people, where should the client look? How does the client sound through the computer microphone? Body language, audio and visual cues are more critical now than ever. Prepare your clients for the experience of discussing their conflict on a screen with their adversary. Conduct a video call with your client ahead of the mediation and pay attention to details like the client's background (which

should be uncluttered so as not to distract) and details such as the angle of the computer camera. To the extent possible, problem-solve any technical issues before the mediation. Finally, clean your desktop so that you may share your screen. Advise the client to do the same. It is incredibly helpful to share a screen for damages calculations, whiteboards and calendars. Spend a few minutes on this technical preparation in advance of the mediation and you will feel better, as will your client.

April 16. Second session.

I'm getting used to the Zoom platform. It shows. There is a sound problem. I can't hear one of the parties. There is a visual problem. I can't see the other. Although this is a family mediation and we intend to stay in a joint session together, I've set up breakout rooms so that I may speak with the parties individually. Momentarily, I place the father in a breakout room and then, I cannot find him. This goes on for several minutes. When I do find him and bring him back into the joint session, he asks me whether or not I did it on purpose. I lie and say yes.

Still, before the second session I sent both parents instructions on how we would proceed on Zoom. Among other tips, I noted that technical issues might arise and that we would all need to be patient. I asked, citing concerns regarding screen fatigue, that we avoid long-winded diatribes. They are unhelpful in an online mediation (and often not so helpful in person). Additionally, because talking over and past each other means that none of us can hear anything on Zoom, I ask that we pay particular attention to the ground rules for any mediation. Listen, consider, reflect.

Remarkably, amid technical issues, amid a global pandemic with uncertainty attached to every decision, this session goes better than the first. When I fix the technical problems and everyone can hear and see each other, the parties really begin listening. The screen imposes a sense of distance that is not altogether bad. Pointing, yelling, shooting daggers with their eyes seems less effective now. I watch their postures and expressions, carefully. Their shoulders are down. No one has their arms crossed. Eye rolling is minimal. This is a vast improvement. They appear to be in their kitchens. Both have coffee and refill it. They are dressed informally. As we go over the agenda and some of the more critical points, both parties refer to computer calendars and address books as well as other materials. I make a mental note that they would not have had their computers in the courthouse. I keep my eyes on theirs throughout the session, avoiding the "self view" (bearing in mind that looking them in the eyes actually means looking straight at the camera to create the *effect* of looking into their eyes). They follow suit by figuring out how to look at me and each other in the eyes.

During the online mediation.

Mediation is an emotionally taxing process. While there may be comfort in not being in the same room, being onscreen is fatiguing in its own way, so be prepared to keep it moving to hold the client's attention, keeping in mind the following tips:

First, as an attorney, consider developing an agenda of topics for the day. Develop it with the other side and with the mediator. We do not reveal anything in an agenda that is not already known to all sides. The agenda has purpose—when people know where the day is going, it's easier to get there. Build in time for joint session, caucus and attorneys-only sessions. Also, build in time for breaks. Breaks are critical for online mediation. Fifteen minutes of walking around your home in circles is likely to do more for your decision-making powers than answering emails and texts. During very long sessions, clients and attorneys should be encouraged to move around. Sitting in a chair, in front of a screen, attending to the arguments, offers and counteroffers for hours is challenging.

Second, work with the other attorneys and the mediator to take advantage of the endless possibilities for "meeting space" online. In a typical online mediation session—with only two sides - we set up no less than five breakout rooms: (1) Joint Session Room; (2) Plaintiff and Counsel; (3) Defendant and Counsel; (4) Counsel Only; and (5) Mediator, Co-Mediators, only. People can speak privately and candidly in any constellation that makes sense at the moment. In a recent mediation, the attorneys took lunch "together" in a breakout room. We discussed the pandemic, schools and television. There were no breakthroughs or sudden exchanges of numbers —there was a conversation. That conversation seemed to take the edge off the rest of the day's negotiations. The parties resolved the case that evening. Online, there is plenty of space for unexpected, helpful connections.

Third, take advantage of the fact that this moment is a complicated one for many reasons. The pandemic has created untold financial distress and suffering. Given current circumstances, review external pressures and costs in caucus with the mediator. How much will it cost to proceed with litigation? What are the chances of success at each step, e.g. a dispositive motion? How long will it take in a post-Covid world to get there? Has Covid impacted the timeline for your case to be heard by a judge? External pressures are always a piece of the puzzle. Never have they felt more present than at this very moment. Covid-19 is not a reason to settle. Still, its effects are being felt everywhere and should be discussed in any case and risk assessment. Offers and counteroffers are always a frustrating part of the mediation process for clients. Help clients, and yourself, by accounting for a changed reality and period of economic uncertainty.

Fourth, mediation is not litigation. Thoughtful consideration of positions, facts and pressures is a necessity because serve and volley arguments are very different in online mediation. Normally, we welcome fierce emotion and argument because it's often a necessary step towards resolution. Attorneys state strong positions in every mediation. However, the force of your arguments and how they are received online may be different than in person. For example, banging the table and standing up may not come across the way you imagine on a screen. Similarly, long-winded explanations about the merits of your case and the meritless arguments of your adversary is simply less impactful when we are not in the same room together.

Fifth, for online mediation, consider that along with reminding the other side of your arguments, remind everyone listening that you have come in good faith to resolve the matter. Avoid long statements and instruct the client to avoid withering remarks. Anger is to be expected in mediation. But if every comment from the other side is an insult or accusation, it's as if you've dialed into the worst online video you've ever watched. Similarly, it is not uncommon for mediators to ask everyone to speak at joint session, if they wish. Take advantage of this moment but do not take it for granted. It is possible that clients will be more likely to speak in the online format than in person and it will be harder for attorneys to stop them. Before the mediation, review your client's prepared statements or remarks if they have any. For clients, regardless of how much we may remind them otherwise, the mediator still seems like someone who needs to be convinced of the rightness of their cause. Clients' prepared remarks often echo this theme. Be wary of it. Prepared scripts, inevitably, sound like a tirade to the other side. It's an unnecessary opening that may derail rather than convince. A prepared statement can and often should include points about weaknesses in the other side's case, but it is critical that the statement reinforce a willingness to negotiate, including by recognizing any valid position on the other side, or coupling the opening remarks with a concrete point of concession on a smaller issue if possible (that is not a sacrifice for your client to give on), in order to trigger negotiating momentum.

Sixth, consider how you will adjust for reactions during the mediation. Throughout the mediation, whether in joint throughout or in caucus, there will be offers and counter offers. Attorneys play a pivotal role in modulating responses. Both attorneys and clients may find parts of the process discouraging, but the attorney should help the client understand that even when sides are very far apart, when offers are on "another planet," it doesn't mean that the mediation is over. It's the beginning. One cannot control offers and demands of the other side. One *can* control his or her own responses. When the anger and "different planet," remarks subside, work with a client and the

mediator on crafting counter proposals that have message and substance. Connect the numbers to reasons for those numbers. Everyone is in their home or office, so there's no need to rush. Idle time is different now because people are not waiting in a conference room building anxiety while a caucus is going on with the other side. This is one of the significant advantages of online mediation. Clients can use their down time to relax in their own environment and chat offline, or in a breakout room with counsel, which lowers the stress of decision-making.

In this respect, Covid-19 has created something unique in our national consciousness - a pause. For many, this may have offered a moment to be savored in this disaster. This could mean more time with children, more time binge-watching awful television, or more forced time out-doors, at a distance. People are working harder than ever while living very differently. For many, the lines between one's work and personal life have blurred. If that is so, then maybe so too have the lines blurred between what we know is the right answer and what the other side avers is the right answer. Holding conflicting thoughts about right and wrong is critical in mediation. Resolution requires living with that conflict. Clients discuss their experience of the pandemic a great deal. Listen. Their experience of this moment may offer insight into how a conflict could be resolved, particularly at a time where escalation of conflict is the last thing a client needs. In this way, the crisis creates an important opportunity for attorneys and parties in mediation. It gives one pause.

Concluding Online Mediation Session

Pay close attention to the state of the mediation if you get to a point where you don't yet have resolution, but everyone is ready to call it a day. Many mediations do not end in one day. Stay connected to the process and participate until the matter is done – either because you have achieved a settlement, or you have determined that all good faith efforts at settlement have been exhausted. As attorneys, it is our instinct when a mediation has not yet completed after the first day to return our attention to other matters or back to litigating the case. That can mean wasting an opportunity to build on progress from the mediation. Prior to the pandemic, repeated face-to-face sessions posed challenges which in turn served to stifle negotiating momentum. Now, such sessions are much easier to schedule and should be utilized for continuing the discussion.

If we look at the history of a dispute, including the events that led up to it as well as the litigation, past settlement attempts and more, we would likely agree that most civil cases did not come into being in one day. To imagine that they can be resolved in one day is to hope that, by some magic,

the mediation process will force the other side (or one's own client) to see the light of truth in a very condensed time frame.

The more likely scenario is that the parties will need some time to process what happens in an online mediation and that it will take more than one day to get to resolution. However, it is a far more accelerated process than what the clients experience in a traditional court setting. Engage with this process thoughtfully and you might find that issues get checked off and numbers get closer, if not on the evening of the mediation, then a few weeks later as everyone cools down. Counsel and parties may see that some momentum—any momentum—builds on itself and agreements become easier.

June 10. Third session.

We begin the Zoom session 15 minutes early. After some initial discussion regarding some easier points, we move to more complicated issues. We negotiate the meat and potatoes of the parenting time schedule and how the parties will divide summer vacation as well as holidays and religious events. These were flash points when they came up initially in the process.

This time, I ask the parties to share their screens. They have calendars and each has blocked off various pieces. When we look at them we see overlap, but also places where the other might have parenting time with the child, without interfering with some special occasion celebrated by the other parent.

They listen. They reflect. They summarize for each other.

July. The father's family has a big party on the Fourth. If he can be with his father for that, maybe, we can alternate years.

Christmas Eve. That's a special night to her. She can have him then.

New Year's. We'll both see him for the New Year. We can alternate day and evening.

Me: I'll write this up.

And then what?

Then you begin.

Endnotes

1 *See*, Press Release, *Court System to Implement Presumptive Early Alternative, Dispute Resolution in Civil Cases*, New York State Unified Court System, Hon. Lawrence K. Marks, Administrative Judge, May, 14, 2019, https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19_09_0.pdf.

2 *See,* New York State Office of Court Administration, *Annual Report of the Chief Administrator, 2019* at page 36, https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf.

3 *Id*. at 40.

4 *Id*. at 44.

5 *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, August 3, 2020; As of the time of the writing of this article, New York has had 32,413 deaths. The national total is 155,935. https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html?action=click&pgtype=Article&state=default&module=-styln-coronavirus&region=TOP_BANNER&context=storylines_menu

6 *See*, New York State Department of Labor, *Employed, Unemployed, and Rate of Unemployment By Place of Residence For New York State and Major Labor Areas*, June 2020, https://www.labor.ny.gov/stats/pressreleases/prtbur.pdf

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Changes in The World of Immigration Bonds Following *Matter of R-A-V-P*

BY SUSAN B. HENNER, ESQ.

The Immigration and Nationality Act (INA) provides for the release on bond for all persons, except those who are subject to mandatory detention as criminals or terrorists, or those who are arriving aliens. INA 236(a), 8 U.S.C. § 1226(a). Bond should be granted unless there is a finding that the alien is either a threat to the public safety, a threat to national security, or is likely to abscond. *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976). Over the years, the requirements for bond in immigration matters has changed - as has the interpretation of such laws. However, the recent case of *Matter of R-A-V-P*, 27 I&N Dec. 803 (BIA 2020), decided quietly by the Board of Immigration Appeals (BIA) on March 18, 2020 during the worldwide COVID-19 pandemic, is making sweeping changes to the regularly accepted standards assessed when considering bond. The ruling in this one case may result in aliens being kept in detention for the duration of their removal proceedings for no other reason than for the fact that they are seeking asylum.

Pursuant to INA § 236(a), an immigration judge may release a respondent from custody if the judge determines that he does not present a danger to society, is not a threat to national security, and that she or he does not pose a flight risk. *See also Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006) *(*citing *Matter of Adeniji*, 22 I&N Dec. 1102 [BIA 1999]). The determination of the court as to custody status or bond may be based on any information that is available to it or presented to it by the respondent or the Department of Homeland Security. *See* 8 C.F.R. § 1003.19(d) (2012).

The Immigration Judge's Bench Book and the case law on this subject list specific factors which the immigration judge must consider when setting bond. These include: 1) whether the respondent has a fixed address in the United States (*Matter of Guerra*, 24 I&N Dec. 37 [BIA 2006]); 2) the length of residence in the United States (*Matter of Andrade*, 19 I&N Dec. 488 [BIA 1987]); 3) any family ties in the United States (*Matter of Shaw*, 17 I&N Dec. 177 [BIA 1979]); 4) the employment history in the United

States (*Matter of Patel*, 15 I&N Dec. 666 [BIA 1979]; 5) respondent's immigration record (*Matter of Moise*, 12 I&N Dec. 102 [BIA 1967]); 6) any attempts to escape from authority or other flight to avoid prosecution (*Matter of San Martin*, 15 I&N Dec. 167 [BIA 1974]); 7) any prior failures to appear for scheduled court proceedings (*Matter of Guerra*, 24 I&N Dec. 37 [BIA 2006]); and 8) respondent's criminal record, including extensiveness and recency (*Matter of Guerra*, 24 I&N Dec. 37 [BIA 2006]).

On March 18, 2020, the Board of Immigration Appeals in *Matter of R-A-V-P* significantly expanded immigration judges' discretion to decide when an alien may pose a flight risk in an immigration proceeding. 27 I&N Dec. 803 (BIA 2020). In that case, the immigration judge denied bond, finding that the immigrant in question was a flight risk, because he did not demonstrate a sufficient likelihood that he would be granted asylum at his final hearing. At his bond hearing, the respondent in the case argued that he had a high incentive to appear for his final hearing, because he was seeking asylum and because he had presented evidence of past persecution and a well-founded fear of future persecution based on past threats of violence and homophobic harassment in his native country of Honduras.

The immigration judge nonetheless denied bond and found that: ". . . for various reasons, eligibility for asylum can be difficult to establish, and an Immigration Judge may consider an alien's circumstances in determining how likely it is that his application for relief will ultimately be approved. Even for aliens who are found to have a credible fear, a grant of asylum is uncertain. . . " 27 I&N Dec. 803, 806. As such, the immigration judge concluded that the respondent did not demonstrate a likelihood that he would be granted asylum on the ultimate merits of his case and decided that he posed a high flight risk. Said respondent was thereafter held without bond pending the outcome of his removal proceeding. *Id.* at 807.

The outcome in this case may dramatically change the number of aliens remaining in detention while awaiting their day in Immigration Court for a final immigration hearing. Immigration judges may now rely upon the holding in *Matter of R-A-V-P, supra,* to actually consider the facts of an alien's underlying immigration case and to make subjective determinations as to the ultimate outcome of such case during the bond phase of a proceeding. The problem with this holding is that judges may now make a premature determination without a full review of the evidence or testimony in such cases.

The setting of bond was designed to ensure an alien's presence at proceedings. *Matter of Urena*, 25 I&N Dec. 140 (BIA 2009). It has always been true that determinations as to whether or not an alien is allowed to remain in the United States are made at a removal proceeding that is separate and independent from the bond proceedings that determine if the alien is detained pending the removal decision. INA 236(a), 8 U.S.C. § 1226(a); *Matter of*

Guerra, *supra.* Bond hearings are designed only to provide an initial evaluation of facts and evidence relating to the detention of an alien until his or her merits hearing. Conclusive factual findings and legal determinations regarding the underlying case and relief sought are to be decided on the basis of the testimony and evidence presented at a full hearing on the merits. *See Matter of Chirinos*, 16 I&N Dec. 276 (BIA 1977). Yet, under the recent BIA decision, immigration judges may improperly merge the bond and the merits hearings. Judges can look beyond the recognized bond factors resulting in an incomplete initial determination as to the strength of a respondent's ultimate asylum case. This overstepping of authority is unfair in every aspect to the respondents. Under regular circumstances, it may sometimes take months or longer to gather proper evidence and prepare witnesses to present in court in support of an alien's case. Yet now judges may deny bond solely on the fact that an alien is seeking asylum or a withholding of removal. Under *Matter of R-A-V-P*, the judge need not consider any other factor before incarcerating aliens for months.

It is indeed a grave risk that some immigration judges may deny bond for any and every bond applicant who applies for relief in the form of asylum or withholding of removal. In a recent case that my firm litigated in New Mexico this very concern came to pass. Our client had been physically present in the United States for over 22 years. He had a permanent address in the United States and he was the caretaker of an aunt who was a US citizen living in California. He had a long history of employment and he owned three cars and his own landscaping business. The respondent had submitted proof of his strong ties to the United States and he had presented at least fifteen letters to prove that he was a moral and religious man having no criminal background. The respondent in our case was seeking relief in the form of a withholding of removal and under the Convention Against Torture (CAT). He was detained while traveling through New Mexico and he did not have access to supporting documents for his claim for relief. He advised the judge that he had been persecuted in his country 23 years earlier before he was forced to flee the country to come to the United States and he noted that his family (living in his native country) was still having problems with gangs and was still suffering. The respondent noted that his mother had been recently hospitalized in his country and was willing to present additional documents as to this fact. The immigration judge was further advised that witnesses, testimony, and supporting documents as to his withholding claim, as well as expert testimony relating to the claim for withholding would all be presented at his merits hearing. The judge and the DHS attorney barely questioned the respondent about his underlying claim for withholding and CAT and did not delve into the details of his underlying claim. Yet, at the end of the hearing, the immigration judge denied the respondent's bond concluding that he was a flight

risk and noting that respondent had no incentive to appear at his final merits hearing in the future because all claims for withholding of removal are difficult to prove. The judge resolved that any claim my client planned to make would surely be weak because claims from the respondent's country were, in his opinion, not strong. Clearly the decision of the judge relied on the newly issued *Matter of R-A-V-P* decision. Sadly, the decision was made without even discussing the underlying facts of my client's withholding or CAT claims and without giving the respondent a chance to present evidence of his underlying claim. The immigration judge made it clear that *any* withholding claim, no matter what evidence was presented, would be tenuous. Therefore, despite all of his ties and long presence in the United States, the respondent was found to be a flight risk and he was denied bond.

The question that the immigration judges should ask at a bond hearing is not whether a respondent will be ultimately granted asylum or withholding, it is whether the filing of his application for asylum or withholding will provide enough impetus for the respondent to appear at a future hearing. The bond hearing exists solely to ensure that the respondent will show up at his future hearings. A respondent should not be incarcerated indefinitely while he or she meets the other criteria for release on bond. The relief sought in the underlying case should not have a bearing on the decision of whether or not to grant bond as long as it is a bona fide and non-frivolous filing. The new holding in *Matter of R-A-V-P*, *supra,* is dangerous and gives the immigration judges too much discretion to decide that an alien is a flight risk based upon the ultimate outcome of the merits of an individual case and without hearing the facts of each case. The bond factors have long been decided and set forth by the courts and the BIA. This is yet another inglorious attempt to unilaterally re-write the law and detain aliens for extended periods of time. The result will be that immigrants may give up their claims and decide to return to their countries placing their lives at risk, because they are unfairly detained while waiting for their day in court.

Susan Henner, Esq., practices exclusively within the field of immigration law. She has over twenty five years of experience in handling all types of immigration cases to include business-related immigration matters for employers, visa petitions, and representing clients during removal proceedings. Susan is the winner of a New York City Mayoral Service Award (2016) for her work in the immigration field, one of the original founders of the Safe Passage Program, and she was a winner of the Business Counsel of Westchester's Forty Under Forty Awards (2004). She is a member of the Westchester County Bar Association and was the former Co-Chair of the Immigration Committee for over six years. Ms. Henner received her B.A. from State University of New York at Albany (1991) and her J.D. from New York Law School (1994).

Westchester County Bar Association Grievance Committee File Review and Hearing Outline

BY CHRISTOPHER L. MANGOLD, ESQ.
AND PAUL M. MILLMAN, ESQ.

Introduction

This article is intended to provide guidance to both the Complainant and the Attorney, i.e., the Respondent, of the rules and procedures of the Westchester County Bar Association Grievance Committee ("GC"). It is the intent of the GC to administer a fair and speedy review when a grievance is filed and to determine if a Rule of Professional Conduct ("Rule") was violated. Following the outline below will enable both sides to fully and completely explain their respective positions and make their goals more attainable. The outline also serves to enable both sides to understand the GC process. The GC seeks to complete the process in nine months or less.

Attorneys often fail to realize that the receipt of a complaint is a very serious matter, which should be treated with the utmost priority and completeness. For unknown reasons many attorneys fail to grasp the magnitude of the potential implications of a finding of a Rule violation or attempt to delay the process. A negative finding against the attorney could lead to suspension, or even disbarment. The Attorney should attempt to reply as completely and accurately as he or she would if the matter was before a court for summary judgment. Commensurately, the completeness of the Complainant's information is also critical to the GC process.

1. **Frequently violated rules include but are not limited to:**
   i. Not effectively communicating with client [Rule 1.4]
   ii. Not having a signed Retainer Agreement [Rule 1.5]
   iii. Fee is non-refundable and/or excessive [Rule 1.5(a) and 1.5(d)(4)]
   iv. Failing to cooperate with the Committee [Rule 8.4(d)]
   v. Lawyer not being competent in the area of representation [Rule 1.1]

2. **The complaint:**
   i. The complaint must be signed.
   ii. The complaint should supply as much information and documentation as possible. This can be provided in the initial complaint document or in response to the attorney's reply.
   iii. It is not expected that the complainant know which Rule of Professional Conduct was violated by the attorney, if any.
   iv. The complainant should not rely on the attorney's compliance, but should supply all documents he or she has. A review panel will look at the complaint, the reply to the complaint as well as all submitted documents to determine if the matter should be dismissed or sent to a hearing. *See* General File Review infra.

3. **The Attorney Reply:**
   i. Should be treated like a motion for summary judgment.
   ii. Only opportunity the attorney will have to respond in order to get a dismissal on the papers and not risk the complaint going to a hearing.
   iii. The attorney is expected to provide all relevant documents in their file on the matter, including retainer agreement, billings, e-mails, notes, etc.
   iv. The attorney is expected to treat the complaint as a very serious legal matter as it can lead to suspension or disbarment. The reply should be as complete as possible.
   v. The attorney should not expect adjournments to be granted, as the goal of the GC is to complete the entire process in less than nine months.

4. **Panel Review for violation of Rules of Professional Conduct.**

The Panel Review by three GC members is to determine if the matter should be dismissed on the papers or be sent to a hearing. Those are the only two outcomes at this stage in the process.

i. The GC job is to determine if one or more of the Rules of Professional Conduct were violated. GC members reviewing the file may call either GC Chair for guidance. GC members reviewing the file may also confer with the other members who have been assigned to review the file. This could be for clarification or to point out something that other members may have missed or for any other reason. One member of the GC review panel may have specialized knowledge and can provide input. If the file appears incomplete, the court files can be checked for document. Examples of relevant items that may be missed are specialized knowledge not in the attorney's field of expertise, volume of submission or even a nuance that a GC panel member believes the other parties on the review panel may have missed.

ii. GC members are not limited to the complaint and can go beyond the four corners of the complaint.

iii. The complaint is merely a notice of potential violation. Realize that in most cases the complainant can't identify the violation but was dissatisfied with the service given, which MAY be an indication of a violation.

iv. GC members are expected to receive from the attorney the signed retainer agreements, communications between the complainants and the attorney, billings, attorney advice letters to the complainants, including but not limited to, attorney professional protection letters that the attorney sends to client **or** has client sign.

v. Regardless of possible mitigating facts, if the attorney violated a Rule, the GC must report the violation to the Ninth Judicial District Grievance Committee.

vi. Must be a legitimate violation. See Rules of Professional Conduct for specific rules. Outcome of underlying legal matter is irrelevant.

vii. The objective of the GC is not to assist a complainant in the recovery of money.

viii. Make note of and advise the Ninth Judicial District of attorneys who have a frequency of complaints made against them.

ix. The GC is not reviewing the file for potential legal malpractice.

x. The written panel review members can communicate with each other to, *inter alia*, ask a member if they are experienced in the area of law and alert other review members of a material fact that may be overlooked. They can also confer with a GC Chair or a GC member who may have expertise in that particular area of law.

xi. GC members may cite underlying facts and rule violation in their review notes or on their retained personal ballot, not the ballot the member sends back to the GC. If a GC member is also on the hearing panel, the GC member can review prior thoughts on the matter.

xii. The GC can get information outside the complaint documents. One member of the hearing group may have specialized knowledge and can provide input. If the file appears incomplete, the court files can be checked to verify.

xiii. Goal is to fairly review the complaint so the complainant and attorney get a fair review and hearing. The GC is one of the few sections or committees that regularly deal with the public. So, it is critical that the complainant see the process as orderly, timely and fair.

xiv. If the complaint is filed, it must be reviewed even if the complainant seeks to withdraw, because withdrawal does not "cure" any violation of the Rules. The GC's goal is to protect the general public by reviewing cases that may lead to discipline of attorneys who may be violating the Rules.

5. Specific Areas of Law

A. Divorce and Family Law (collectively "Domestic Relations Matters"):

i. 22 NYCRR Part 1400 exclusively addresses rules in Domestic Relations Matters. Domestic Relations Matters are defined as Family Court or Supreme Court matters seeking divorce, separation, annulment, custody, visitation, maintenance, child support or alimony or proceedings to enforce or modify same.

ii. Each potential and actual client must receive a Statement of Client's Rights and Responsibilities ("SCRR") that is executed by the potential client and attorney. The SCRR must be signed for each meeting and a final one upon retention of the attorney. The client must receive a fully executed SCRR and the attorney must retain one. See 22 NYCRR 1400.1 and 1400.2 for the Rule and Form and Rule 1.5(e). The GC will look for this document in the file. If it is not provided by either party, the hearing panel, if any, will seek to confirm that the complainant and attorney executed one. If none, 22 NYCRR 1400.1 and Rule 1.5(e) likely have been violated.

iii. Regardless of the amount of the fee, attorneys in Domestic Relations Matters must have a fully executed Retainer Agreement ("RA"). *See* 22 NYCRR 1400.3 for the general terms required. It is very common for the actual RA to be more comprehensive.

iv. A "non-refundable retainer fee" is strictly prohibited. *See* Rule 1.5(d)(4) and 22 NYCRR 1400.4. A "minimum fee" is permitted. *See* Rule 1.5(d)(4) and 22 NYCRR 1400.4. However such a minimum fee:

- Must be reasonable;
- State in plain language the circumstances under which the minimum fee is incurred; and
- State in plain language how it will be calculated.

v. Other Domestic Relations RA prohibitions:

a. the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement;

b. a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement; or

c. the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence. 22 NYCRR 1400.5; *See* Rule 1.5(d)(5)(i)(ii)(iii).

vi. Right to Seek Arbitration – 22 NYCRR 1400.7

a. If a fee dispute occurrs, the client (emphasis added) may seek to resolve the dispute by arbitration pursuant to a fee arbitration program established and operated by the Chief Administrator of the Courts and subject to the approval of the Justices of the Appellate Division. The Ninth Judicial District has a program to be used for Fee Arbitration.

b. Be aware of attorney's Retainer Agreement seeking to opt out of the Ninth Judicial District Fee Arbitration Program.

c. Some cases may in fact be fee disputes and be incorrectly characterized as ethics issue.

vii. An attorney must provide an itemized bill "at least every 60 days". *See* 22 NYCRR 1400.3(9).

a. The GC will look at the frequency and date of each bill. The GC will watch for bills created after the fact in response to the complaint.

b. The bills are a very good tool to track effective communication, preparation for trials/hearings and excessive billing. ***Example:*** If the complainant provides dates of telephone calls/emails to the attorney, the billing invoice will be reviewed to determine if the attorney reviewed/responded to the email and/or returned the telephone call. In Domestic Relations Matters, billing is hourly so there is incentive to keep track of all billable time.

c. If the complainant claims the attorney was not prepared or did not advocate, the GC will look for Court documents, letters and Court transcripts provided in the file submitted to the GC. They can provide guidance on whether the complaint and allegations are accurate. ***Example***: GC file containing, *inter alia,* an allegation the attorney was not prepared and effective in Court. The attorney provided a transcript of a Court appearance. It revealed the attorney knew the facts and zealously advocated for the client.

viii. Sexual Relations

a. Sexual Relations—see definition at Rule 1.0(a)

b. A lawyer shall not in Domestic Relations Matters enter into sexual relations with a client during the course of representation.

c. The above rule does not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relations that predate the attorney—client relationship. *See* Rule 1.8(j)(2).

d. Lawyers in a firm are not subject to discipline if a lawyer in a firm has sexual relations with a client but did not participate in the representation of that client.

B. Criminal Law:

i. A lawyer shall not arrange, charge or collect a contingent fee for representing a defendant in a criminal matter. *See* Rule 1.5(d)(1).

ii. Not effectively communicating with client. *See* Rule 1.4.

iii. Lawyer not being competent in the area of representation. *See* Rule 1.1.

iv. Conflict of interest, *e.g.*, simultaneously representing more than one criminal defendant regarding the same criminal allegation(s). *See* all of Rule 1.7.

v. Delay of litigation *See* Rule 3.2.

vi. Misleading advertising.

C. Residential Real Estate Transactions:

i. Pursuant to 22 NYCRR 1215.1 an attorney must provide a written letter of engagement or a fully executed written retainer agreement. However, this is not applicable if the "fee to be charged is expected, to be less than $3,000, or representation where the attorney's services are the same general kind as previously rendered to and paid for by the client…" *See* 22 NYCRR 1215.2 (emphasis added).

ii. "Seller's Concession" or "grossed up" sale price. Real estate transactions, which involve a sale price that is grossed up by a certain amount and then reduced by a "seller's concession" in an identical amount, can pose ethical issues. In many cases, this arrangement is made for the purpose of artificially increasing the purchase price so the purchaser may obtain more financing than they would without the gross up/concession. Even if this arrangement is disclosed to the parties to the transaction and the lender in the documents, it may be deceptive or fraudulent to third parties (such as purchasers of the loan on the secondary market, or appraisers of property in the area, neither of which may have disclosure of the gross up/concession arrangement). NY Ethics Opinion 817 addresses this specific issue citing DR 1-102 and DR 7-102 (now embodied in Rule 1.2 (d)) in stating that a lawyer may not assist a client in engaging in "illegal" or fraudulent" conduct. Opinion 817 says that an attorney cannot participate in a transaction with a gross up/concession unless there is neither deception nor misrepresentation. The opinion leaves open the door to participation if there is disclosure, but it does not say what disclosure would be adequate. Note also that concessions to cover actual issues (like repair credits, etc.) are ethical.

iii. Representing the purchaser and receiving fees from the title or abstract company. Where a lawyer represents a purchaser of real estate, the lawyer often chooses the title or abstract company. Some title or abstract companies offer attorneys incentives (in the form of

payment of a portion of the title insurance premiums) in connection with such transactions. These arrangements can raise ethical issues, which are addressed in numerous NY Ethics Opinions (576, 595, 621, 738, 753) that discuss attorneys having an interest in abstract companies and receiving fees for services. Certain situations, like receiving fees for "ministerial services" may be permissible with disclosure. Other arrangements, such as acting as a lawyer for the buyer and at the same time acting as clearance officer for the title company can violate Rule 1.7 in as much as the lawyer may be representing differing interests and the financial incentive may cloud the lawyer's professional judgment.

v. The law is in flux as to whether a title company can offer to an attorney sports tickets, dinners or other benefits. If the law provides that this is banned, then an attorney accepting same may have a conflict of interest and also will be in violation of the law.

D. Labor/Employment

i. Pursuant to 22 NYCRR 1215.1 an attorney must provide a written letter of engagement or a fully executed written retainer agreement. However, this is not applicable if the "fee to be charged is expected, to be less than $3,000, or representation where the attorney's services are the same general kind as previously (emphasis added) rendered to and paid for by the client…" *See* 22 NYCRR 1215.2 (emphasis added).

ii. Fees in employment discrimination cases may be hourly, contingent or mixed. Fees under Section 1981 employment discrimination cases may be awarded by the court, generally to the benefit of a successful employee. If Section 1981 is involved in the underlying case, the attorney should provide the court's findings as to fees, as this may be relevant.

E. Estates and Trusts

i. Pursuant to 22 NYCRR 1215.1, an attorney must provide a written letter of engagement or a fully executed written retainer agreement. The fee may not be based on the size of the Estate but on hours of service. If an accounting is filed, the Surrogate Court will review the fee applications; so, the attorney should supply the court's determination. However, this is not applicable if the "fee to be charged is expected, to be less than $3,000, or representation where the attorney's services are the same general kind as previously rendered

to and paid for by the client…" *See* 22 NYCRR 1215.2 (emphasis added).

ii. The attorney is expected to provide services so that the Estate, unless there are undue complications, is completed in a timely fashion. Complaints based on neglect of matter occur when Estates go on for years, with the attorney failing to do simple basic steps to move the estate along.

iii. The owing of tax penalties or tax underpayment will not generally be a grievance issue as this often occurs in Estates.

iv. Review should be made if an attorney is named as a fiduciary in the estate planning documents and that the required disclosure was signed.

F. Bankruptcy

i. Pursuant to 22 NYCRR 1215.1 an attorney must provide a written letter of engagement or a fully executed written retainer agreement. However, this is not applicable if the "fee to be charged is expected, to be less than $3,000, or representation where the attorney's services are the same general kind as previously rendered to and paid for by the client…" *See* 22 NYCRR 1215.2 (emphasis added).

ii. Retainer Agreements in individual Chapter 7 cases must include preparation of the petition, schedules and statement of financial affairs, and attendance at the Trustee's meeting of creditors pursuant to Bankruptcy Code § 341. The retainer should specifically exclude other services, such as defending adversary proceedings, lien stripping motions, nondischargeability actions and involvement in extensive trustee investigation. If not specifically excluded, those services are included in the original flat fee retainer.

iii. An attorney must undertake a reasonable independent review of the client's financial information, assets and liabilities. The attorney must advise the client of the implications and potential negative aspects of filing for bankruptcy.

iv. Review of the fee application is done by the trustee. The attorney should supply all information with regard to the trustee's determination as this may be relevant.

a. Conflicts of Interest—See all of Rules 1.7, 1.8, 1.9 and 1.10.

G. Conduct of a Hearing:

a. GC members on the hearing panel review the entire file before the hearing.

b. One GC member shall take the lead and shall be responsible for conducting the hearing and maintaining order. This member will introduce the Panel members and explain the process and emphasize a goal of fairness.

c. The choice of who shall lead the hearing shall be by agreement of the three GC members, unless the Chair or a Co-Chair of the GC has appointed one of the three members to lead the hearing.

d. This may be the complainant's first experience with the process, and it is one of the few areas in which the general public deals directly with lawyers and the WCBA. The ultimate goal is to make a fair determination based on the facts, but a critical secondary goal is for the complainant to understand the process and not feel that this was a "one lawyer protecting another" situation or that the complainant was not fully heard.

e. No recording of a hearing is made by a stenographer or other means. *See* Judiciary Law Section 90(10) as further clarified by 22 NYCRR Part 1240(18) Rules for Attorney Disciplinary Matters. In hearings conducted by virtual or remote means, such as by Zoom, the attorney and complainant must both sign a document acknowledging the requirement for confidentiality.

f. Advise complainant and attorney that the Hearing Panel has reviewed the file in advance of the hearing. Complainant speaks first explaining the reason for the complaint. Then the attorney is given the opportunity to reply. Allow the complainant to explain the issues and problems faced. When practicable, questions should be held until the complainant is finished.

g. The Hearing Panel can ask questions and can use their knowledge of the area of law.

    i. Panel members can use GC file documents as Exhibit(s).

    ii. If Panel members obtain documents on their own, such as court filings, these may also be used as Exhibits.

    iii. It is helpful to pre-mark exhibits.

h. Each party should avoid reciting their filed documents as they already have been reviewed by the Hearing Panel. The purpose of the hearing is to clarify the facts. The Hearing Panel will seek to balance paragraph "f" above and this practice pointer.

i. If at the hearing a Panel Member has a conflict, it must be disclosed and the parties advised that the hearing may be adjourned to replace the conflicted Panel Member.

    i. The WCBA tries to set up pre-hearing disclosure of parties and counsel to address conflicts in advance.

    ii. As one goal is fairness, the conflict cannot be waived.

    iii. A hearing can be held before two GC members. Three is preferred but not required. A GC member, even if hearing is not virtual or remote, can attend by phone, Zoom or equivalent.

    iv. If the conflict is discovered at time of hearing, or a GC member who was supposed to attend did not appear, the first step is to call the Chairs of the GC to see if one can cover as an emergency replacement.

    v. All hearing documents are confidential. No witness may be in the room, except during his/her testimony.

    vi. If the complaint is strictly a fee dispute then: 1) the parties will be given an opportunity to step out and attempt to resolve the dispute; or 2) send the complaint back to the Ninth Judicial District Grievance Committee. If it is an alleged Rule violation, then the hearing will proceed.

j. Rules of evidence do not apply.

k. If a party is disruptive, then the hearing can be terminated. Alternatively, the parties may be put in separate rooms. If a GC member feels threatened or is in any way uncomfortable, the hearing should be immediately terminated.

l. Each party can be represented by counsel who can ask questions of the complainant and attorney respondent.

m. If the complainant does not appear, the Panel still must conduct the hearing. If the attorney does not appear, the Panel still will conduct the hearing for failure to cooperate under the Rules and send to the Ninth Judicial District Grievance Committee. The panel can also make a substantive finding based on the documents and statements provided prior to and at the hearing.

n. Neither party may send supplemental or additional information to the GC or Hearing Panel after the hearing. No evidence is accepted after the hearing is concluded.

i. Parties are instructed to supply all documents in the complaint and their responses for the hearing; nothing further is allowed.

ii. GC members must at all times be courteous to both sides.

o. Settlement by the Parties.

i. The GC's sole job is to determine if there is a violation of Rules of Professional Conduct.

ii. If the Parties resolve between themselves, this still does not resolve the grievance. The complainant filing is performing a potential public service of creating a warning that an attorney's performance may be a danger, in the sense of being unethical, to the public at large, and thus the GC must still determine if the attorney is guilty of professional misconduct to protect the general public as well as the reputation of the legal profession.

iii. The GC cannot force a settlement. There is no exception to this rule.

iv. At the same time if the GC Panel Members make a determination that there is no violation of any Rule, and that the dispute is solely about the fee charged, and if the parties advise the matter has been settled by the attorney agreeing to return some portion of the fee, the GC may hold the decision for a short period of time, e.g., ten days, until the Complainant confirms receipt of payment.

p. Post-hearing contact by the GC with the complainant or attorney is prohibited, except to advise of payment or non-payment of fee. Close of hearing and decision closes the matter. Contact or explanation is prohibited.

q. Adjournments: Adjourning the hearing based on new documents **may** be granted in the discretion of the Panel. There is no adjournment as of right. The Hearing Panel will consider how prejudicial the new information is to the Panel's ability to fairly review the matter. The Panel may adjourn the hearing briefly (e.g., 20–30 minutes) to allow the Panel members to review new information and then conduct the hearing. The attorney supplying documents on the day of the hearing is inherently unfair to the Hearing Panel and to the complainant. It may also be a violation of Rule 8.4(d). The GC realizes that complainant and attorney have set aside time to appear that day, so adjourning is an inconvenience to both parties.

i. If new documents are supplied on the day of the hearing that raise new issues and are not cumulative of prior behavior, in the discretion of the Hearing Panel, an adjournment may be warranted, if not prejudicial to a party.

ii. Adjournment is in discretion of GC Members. Example: New documents provided by complainant at hearing and the attorney requests time to review the new documents.

r. After the Hearing, the Panel must:

i. Draft handwritten decision that is signed by all Hearing Panel Members.

ii. Decision can be: i) Dismiss; or ii) Finding of Violation(s).

iii. Decision must recite basic facts as well as Rules allegedly violated and basis for finding same. If a violation is found, the matter goes to the Ninth Judicial District Grievance Committee. The write up helps the Ninth Judicial District Grievance Committee review the matter. If the decision is not complete, then the GC members hearing the matter may be called by the Ninth Judicial District Grievance Committee for more information.

s. Covid 19 Issues

i. Covid 19 complaints based on law firms non-compliance with employee accommodations are not generally an issue before the GC as they are not an issue of violation of a Rule of Professional Conduct.

ii. Zoom hearings are a preferred course of action during the Pandemic, as likely both parties will prefer to remain in the safety of their homes. If a party doesn't have Zoom capability, then the party may be present by telephone. Both parties must sign agreement as to confidentiality both before the hearing and during the hearing. Both parties must sign a waiver of the right to hold an in-person hearing and accept doing the hearing by Zoom or other remote means.

iii. The Zoom hearing may not be recorded. No witnesses are allowed in the room, except at the time they give their testimony.

iv. The GC Hearing Panel members may ask a party to move their camera around the room in which the party is present to make sure that there are no witnesses in the room and to attempt to make sure the hearing is not being recorded.

v. The U.S Supreme Court case, *In Re Ruffalo*, 390 U.S. 544 (1968), found that the hearing is "quasi-criminal" and, therefore, the attorney does have to consent to doing the hearing by Zoom. This is recognition of the right of due process as well as the right to confront the accuser. As a result, the attorney can require a hearing in which attorney and complainant appear in person, but all present must be at least 6 feet apart, wearing masks and comply with any other Executive Orders and/or rules regarding public health issues in effect at that time.

Christopher L. Mangold, Esq., conceived and wrote this article. He would like to dedicate the article to his father Harold, an attorney and Town Justice, who set him on a path of a fulfilling and rewarding profession. Mr. Mangold was admitted to the Bar in 1986, is of Counsel to Farber Pappalardo & Carbonari and is a proud member of the WCBA. He is a member of the WCBA Grievance Committee and will serve as Co-Chair of the Grievance Committee commencing January 2021. His practice is devoted to Family Law and Residential Real Estate.

Paul M. Millman, Esq., edited and updated the article with contributions from members of the Grievance Committee. Mr. Millman is a partner in Millman Law Firm and has been a member of the WCBA for over thirty years. He has been the Chair or Co-Chair of the Grievance Committee for the past six years. He previously served as a WCBA Board Member and is currently the Treasurer. His practice is primarily devoted to Estate Planning and Estate Litigation, Corporate and Partnership Taxation, and representation of inventors.

Tax Certiorari and Eminent Domain Decisions 2019-2020

BY JOHN (RAY) MECHMANN, JR., ESQ.

This annual article discusses tax certiorari and eminent domain decisions covering a broad range of issues, such as valuation in tax certiorari and eminent domain proceedings using the income capitalization method and exemptions for foundation property. This article also reviews recent cases involving selective reassessment, standing to contest tax assessments at the local level and pursuant to Article 7 of the Real Property Tax Law ("RPTL"), the scope of discovery including appraisal exchanges, the sufficiency of appraisal evidence, the taxability of fiber-optic lines, and inverse condemnation.

TAX CERTIORARI

1. Valuation Methodology, Burden of Proof

In *Foxcroft Village, LLC v. Town Assessor of Town of Fallsburg,*[1] Petitioner owns real property improved by a mobile home park. For tax years 2014 through 2017, the property was assessed at $4,698,925, with an equalized fair market value of $7,229,115 in tax year 2014. Petitioner administratively challenged the assessments for those tax years, and after denial of the challenges, in each year commenced RPTL Article 7 proceedings. At trial (before a Referee), the parties agreed to determine value for all tax years based on appraisals for tax years 2014 and 2015. Petitioner's expert testimony, and appraisal, yielded a value of $4,366,545. Respondents' appraiser valued the property at $10,400,000. Following the trial, the Referee dismissed the petitions, finding that Petitioner had not overcome the presumption of validity of the assessments. In addition, the Referee found, even if Petitioner had overcome the presumption, the proceedings would have to be dismissed, because Petitioner had failed to establish by a preponderance of the evidence that the property was overvalued.[2]

On appeal, the Appellate Division noted the rebuttable presumption of validity attaching to an assessment and that challenges to assessments bear the initial burden of coming forward with substantial evidence that the property was overvalued by the assessor. "Substantial evidence" requires merely that a petitioner demonstrate the existence of a valid and credible dispute regarding valuation. A taxpayer most often meets this burden by submission of a detailed, competent appraisal based on standard, accepted appraisal techniques prepared by a qualified appraiser. Contrary to the Referee's determination at trial, Petitioner had submitted an appraisal that met the burden, as it was detailed and competently prepared; based on standard, generally-accepted appraisal techniques; and was prepared by a qualified appraiser familiar with the valuation of mobile home facilities, who utilized both a market sales and income approach to valuation. Although the appraiser may have failed to provide objective data regarding factors in his income capitalization analysis, since he made adjustments to expenses based on his extensive personal experience with the operation of mobile home parks, his adjusted expense figures were easily compared to the actual expense figures for tax year 2014, varied from the actual expenses by only five percent, and gave a net income only two percent less than the actual net income. Since the appraisal also contained expense ratio information for the comparable properties utilized by the appraiser, his report contained sufficient information for Respondents' counsel to effectively prepare for cross-examination on that issue.[3]

The Appellate Division also found that, while Petitioner's appraiser's capitalization rate was based, in part, on personal experience and knowledge, the appraisal report contained sufficient information about the components of the capitalization rate to allow Respondents' counsel to prepare as well. Thus, Petitioner had rebutted the presumption of regularity attached to the assessment. Weighing the entire record to determine whether Petitioner established by a fair preponderance of the evidence that the property was overvalued, and giving deference to the Referee's resolution of credibility issues, the Court on appeal found no basis to disturb the finding that Petitioner failed to establish overvaluation. *Inter alia*, the Referee properly found that Petitioner's income capitalization analysis was not reliable, because the appraiser had failed to properly explain how he determined the capitalization rate, and he also failed to support either his loan-to-value ratio, the interest rate utilized for the mortgage loan component, or the reasonable rate of return to equity. Petitioner's appraiser had also used incorrect equalization rates to calculate the tax factors for 2014 and 2015. Finally, his comparable sales analysis did not properly support a fair market

value of $8,000 per mobile home site, since one comparable sale was not an arms-length transaction, another showed a substantial reduction in sales price for which the appraiser gave no explanation, and he apparently gave undue weight to comparable sales with the lowest sale prices.[4]

2. RPTL Article 7/Article 78 Proceedings Versus Plenary Actions

Verizon New York, Inc. v. Supervisors of Town of North Hempstead[5] followed the earlier *New York Telephone Co. v. Supervisor of Town of Oyster Bay,*[6] which held that Nassau County (for its towns and their ancillary bodies) could not impose special ad valorem garbage levies on utility mass property (in other words telephone lines, wires, cables, poles, supports and enclosures for electrical conductors situated on public and private land owned by others). Plaintiff herein, a successor in interest to New York Telephone Company, commenced ten related actions seeking refunds of the levies for the tax years 2003 to 2012 from Defendant Town of North Hempstead and related municipal bodies.[7] The Town commenced third-party actions against the Nassau County seeking indemnification (under the County Administrative Code), which actions were subsequently consolidated. The New York State Supreme Court granted Petitioner's motion for summary judgment, holding that the County was responsible for the refunds and thus they should pay them to Verizon.[8] After the Appellate Division held in related litigation that the Town must pay refunds directly to taxpayers, and then seek reimbursement from the County,[9] Verizon moved, in effect, for leave to renew the summary judgment portion of its prior motion, to direct the Town (rather than the County) to issue the refund.[10] The County opposed the motion, and cross-moved for summary judgment, arguing that Verizon should not have sought relief in a plenary action, but instead pursuant to RPTL Article 7.

The New York State Supreme Court granted the renewal motion, and on renewal, held that the Town was directly liable for the payments, and also directed the County to indemnify the Town. Verizon and the Town each submitted proposed judgments that the County opposed, arguing Verizon was not due prejudgment interest. After Verizon and the Town settled the main action, the County moved, in effect, for leave to renew its opposition to Verizon's motion for leave to renew. The New York Supreme Court denied the County's motion and entered a judgment in favor of the Town and against the County for the principal and prejudgment interest paid by the Town to Verizon.[11] On appeal by the County, the Appellate Division held that the County's summary judgment motion was properly denied. Since Verizon challenged the imposition of a special ad valorem garbage

levy on each property on the basis that the tax was "'wholly inapplicable'" to the property, Verizon properly sought relief in a plenary action, and not pursuant to RPTL Article 7.[12]

In *Groll v. Board of Assessment Review of Town of Delaware,*[13] Respondent Town conducted a Town-wide revaluation of its 2016 tax roll, followed by a partial inventory collection in 2017 to make corrections and adjustments to the valuations where warranted. The inventory collection resulted in changes to the assessed value of over one-third of the taxable parcels in the Town. Petitioners are the owners of multiple properties whose assessments were raised substantially in the 2016 revaluation and in the 2017 partial inventory. They separately commenced hybrid CPLR Article 78 and RPTL Article 7 proceedings challenging the 2017 update for improper and unconstitutional assessment methodologies resulting in unequal treatment for properties within the Town.[14] The Town Respondents moved to dismiss the petitions, arguing that they failed to state a cause of action with respect to the CPLR Article 78 claims. Petitioners opposed the motion, and cross-moved to consolidate the proceedings and to supplement their amended pleadings with an affidavit and report from their appraiser. The New York State Supreme Court denied the cross-motion and granted the motions to dismiss the CPLR Article 78 claims but denied the Town's motions to dismiss the RPTL Article 7 causes of action.[15] While the motions were pending, Petitioners commenced a third hybrid proceeding to challenge the 2017 and 2018 updates to the tax roll. The Town Respondents subsequently moved to dismiss this petition. The New York State Supreme Court granted the motion to the extent of also dismissing the CPLR Article 78 action but denied dismissal of the remaining RPTL Article 7 claims.[16]

On appeal, the Appellate Division recognized challenges to property assessments alleging illegality, overvaluation or inequality of assessments must be brought pursuant to RPTL Article 7, while CPLR Article 78 proceedings are proper in tax assessment cases where a petitioner challenges the jurisdiction of the taxing authority, the method employed in the assessment or the legality or constitutionality of the tax itself.[17] In this proceeding, the challenges concerned the assessor's methodology. A CPLR Article 78 proceeding cannot be brought to challenge the assessment methodology of one property but may be brought to challenge the methodology of assessment of several properties which establishes a policy or practice by an assessor. Petitioners' allegations of illegal methodology, rather than individual assessment errors, were not supported by the evidence; where a claim asserts that a valuation is excessive and unequal, the sole avenue for relief is an RPTL Article 7 proceeding.[18] The Appellate Division also found that consolidation was properly denied. Motions to consolidate are

addressed to the sound discretion of the trial court. While Petitioners' claims involve similar questions of law, their respective claims rely on unique facts regarding each parcel, including its location, characteristics and valuation. Thus, it was not an abuse of discretion to deny the motion.[19]

3. Summary Judgment

In *Sullivan Farms II, Inc. v. Assessor of Town of Mamakating,*[20] Petitioners own 51 townhouses on a parcel in a gated community. The Town's 2016 tax roll assessed each townhouse at a value of $115,700, with $6,000 attributed to the land and $109,700 attributed to alleged partial improvements. In the 2017 tax year, the assessed value of each of the properties increased to $200,800, $15,000 attributed to the land and $185,800 attributed to alleged completed improvements.[21] Petitioners commenced RPTL Article 7 proceedings challenging the 2016 and 2017 assessments. Petitioners moved for partial summary judgment on the issue of the constitutionality and legality of the assessment methodology used by the Town, and the New York State Supreme Court denied the motion.

On appeal, the Appellate Division noted that real property must be assessed at a uniform percentage of value, and that whatever valuation method is employed by an assessor must result in a "fair and realistic value of the property involved so that all property owners contribute equitably to the public fisc."[22] "Creation of different classes for purposes of taxation is permissible as long as the classification is reasonable and the taxes imposed are uniform within the class."[23] Classifications between taxpayers may violate constitutional equal protection if the distinctions between the classes are "palpably arbitrary" or amount to "invidious discrimination."[24]

Both Courts found that issues of fact precluded partial summary judgment in favor of Petitioners. Their submissions established no more than that their townhouses were assessed using different methodologies than that used to value newly-constructed single-family residences in the Town. However, questions of fact remain as to whether townhouses and single-family homes are in fact similarly situated, and whether the determination to treat townhouses as a separate and distinct class of single-family residences was palpably arbitrary or involved invidious discrimination. Petitioners thus failed to establish their entitlement to partial summary judgment as a matter of law, and the New York Supreme Court properly denied the motion.[25]

4. Preconditions to Action—Discovery, Standing

In *Village of Kiryas Joel v. Assessor of Town of Woodbury,*[26] Petitioner challenged Respondent's tax year 2017 assessment of an under-construction water pipeline. Petitioner duly filed administrative complaints with the

Respondent Board of Assessment Review of the Town. The Board thereafter directed Petitioner to submit information pertaining to the subject property by a date certain, expressly informing Petitioner that failure to comply would be deemed willful refusal to comply, and that the petition would be dismissed. Petitioner, through counsel, responded that it would not be possible to provide the information by the date specified due to client schedules and the nature of the information requested. Petitioner neither objected to the Board's requests nor requested an extension of time to comply. On the deadline set by the Town, and in the absence of a response from Petitioner, the Board dismissed the petition and soon thereafter the Town finalized its assessment rolls. Petitioner then timely commenced an RPTL Article 7 proceeding to challenge the assessment. Respondents moved to dismiss the petition, and the New York Supreme Court granted the motion.[27]

On appeal, the Appellate Division noted that review of tax assessments under the RPTL includes both administrative and judicial review, the former before a Board of Assessment Review. Challenges before the Board are "... designed to seriously address claimed inequities and adjust them amicably if it is possible to do so...."[28] The Board may require the challenger to produce any papers relating to the assessment; the Board alone determining what information is material to the proceeding. If the challenger willfully fails to provide the Board with the requested information, the owner is not entitled to a reduction; if the noncompliance was the result of an intent by the challenger to frustrate administrative review, then dismissal of a tax certiorari petition is appropriate.[29] Where a petition is dismissed based on a challenger's allegedly willful neglect or refusal to submit information, judicial review is limited to ascertaining whether there is support in the record for dismissal on that ground.[30] Petitioner neither requested an extension of time nor timely provided the information, which the Board deemed material to its review of the assessment. The record, including the Board's warning that failure to comply would be deemed willful refusal and cause dismissal of the petition, supports an inference that Petitioner's noncompliance was occasioned by a desire to frustrate the administrative review process.[31]

DCH Auto v. Town of Mamaroneck[32] involves an auto body shop renting a parcel on a net lease for 20 years. Petitioner was responsible under the lease for the real property taxes during the lease term. Petitioner had the right to contest assessments (at its own cost), the right to settle any challenge without consent of the owner, and the right to require the owner to join in or cooperate with any challenge if legally required.[33] Petitioner administratively challenged Town assessments for the subject property for

tax years 2009 through 2014, and Village assessments for tax years 2010, 2011, and 2013. After both the Town and Village Boards of Assessment Review denied the complaints on the merits, Petitioner commenced RPTL Article 7 proceedings contesting the Town and Village assessments for those tax years. The Town and the Village moved to dismiss, asserting that the administrative complaints before the Town and Village Boards of Assessment Review were defective since they were not brought in the name of the owner, a proper complaint pursuant to RPTL Section 524 being a condition precedent to a RPTL Article 7 action.[34] The New York Supreme Court granted the motion to dismiss finding that the condition precedent had not been met.

On appeal, the Appellate Division affirmed, holding that RPTL Section 524(3) requires that a complaint be based upon a statement by "the person whose property is assessed, or by some person authorized in writing by the complainant or his officer or agent to make such statement...."[35] While RPTL Section 704(1) permits a person claiming to be aggrieved by an assessment of real property to commence an RPTL Article 7 proceeding to challenge that assessment, and Petitioner may thus be "an aggrieved party," it failed to satisfy a condition precedent to the commencement of that RPTL Article 7 proceeding, since it filed challenges before the Boards of Assessment Review in its own name, and it was neither the owner, nor identified in the complaints as an agent of the owner.[36]

In *Long Island Power Authority v. Assessor of Town of Huntington,*[37] predecessor in interest Long Island Lighting Company (LILCO) agreed to sell and deliver to the Long Island Power Authority (LIPA) energy produced from LILCO's Northport Power Station (the subject property). Under the agreement, LIPA made monthly payments to LILCO, which included property and other taxes.[38] During the term of the agreement, LIPA commenced RPTL Article 7 proceedings to challenge tax assessments on the subject property for the tax years 2010/2011 through 2014/2015. Thereafter, Respondents moved to dismiss for lack of standing. The New York Supreme Court granted the motion.[39] On appeal, the Appellate Division noted that Article 7 confers standing upon "aggrieved" persons, who may contest assessments and that one is "aggrieved" when an assessment has "a direct adverse affect on the challenger's pecuniary interests."[40] Since the agreement required LIPA to pay all of the taxes levied against the property, any tax assessment of the subject property directly affected LIPA's pecuniary interest and, therefore, LIPA had standing to challenge the assessments under RPTL Article 7.[41]

5. Timely Filing of Note of Issue, Consolidation

In *Consolidated Edison Co. of New York, Inc. v. New York State Board of Real Property Services,*[42] a series of scheduling orders in successive RPTL Article 7 actions, challenging assessments for affected tax years 2009 through 2012, set notes of issue filing dates and consolidated the then-existing proceedings for purposes of scheduling and trial. A 2013 order also provided that an "anticipated" 2013 proceeding would likewise be consolidated with the earlier proceedings, and waived the requirement in RPTL Section 718 to file notes of issue within four years of commencement of the actions. A February 2014 order then adjusted the existing filing schedule, and put off the deadline for filing appraisals, without reference to a previously-set Note of Issue filing deadline of March 2014.[43] Respondent ORPS then moved for dismissal of the 2009 through 2012 proceedings, for Petitioner's failure to file notes of issue within four years of each proceeding's commencement. Respondent City of New York cross-moved for the same relief. The trial court granted the motions and dismissed the petitions for each of those tax years.[44] On appeal, the Appellate Division noted that "[t]he four-year filing requirement (RPTL §718[2][d]) is a 'mandatory provision and must be strictly applied.'"[45] In these proceedings, the last statutory deadline for the 2012 proceeding was July 2016 and that date, all the deadlines for the earlier proceedings, and all of the deadlines ordered by the trial court in its March 2014 order, had all passed long before the motions to dismiss were filed. Petitioner had filed no notes of issue, nor sought orders extending the time to file.[46]

While RPTL Section 710 provides that a court may "consolidate or order to be tried together" separate proceedings to review property tax assessments, these matters were not properly consolidated. Rather, they were ordered "tried jointly", wherein they maintained their separate identities although tried together, unlike consolidation, where separate cases are merged, and thereafter proceed as one case.[47] Thus, the note of issue deadline for the 2013 proceeding did not govern the earlier proceedings, and the provision in the June 2013 order that RPTL Section 718 was waived with respect to the 2009 proceeding did not waive those requirements for the other proceedings. The order setting a new note of issue deadline in March 2014 did not waive the note of issue deadline for the 2009 proceeding; it merely permitted the 2009 proceeding to be tried jointly with the other proceedings under the established schedule for all tax years.[48] Even the trial court's February 2014 order only established a discovery and motion schedule, but left appraisal filing deadlines to future determination, and set no new deadlines, nor altered the prior deadlines. Here, the legislative purposes of RPTL Section 718 are directly implicated, since the matter involves

four "pyramided" tax assessment review proceedings. Petitioner's failure to file notes of issue within the time limitations established of RPTL Section 718(2)(d) or obtain a stipulation or court order extending them before they elapsed, led to proper dismissal of the 2009 through 2012 proceedings.[49]

6. 22 NYCRR 202.59 Discovery, Appraisal Reports

In *Erie Boulevard Hydropower LP v. Town of Moreau Assessor,*[50] Petitioner utility commenced separate RPTL Article 7 proceedings to challenge the 2014, 2015 and 2016 tax assessments on three hydroelectric generating facilities. Petitioner sought reductions totaling over $105,000,000 for each of the three tax years at issue, for each of the facilities. After consolidation, the trial court ordered the simultaneous exchange of expert appraisals. On the designated day, Petitioner served three appraisal reports for each facility for each tax year, as well as an addendum which included electronic copies of the expert's work files.[51] Some thirty days thereafter, Petitioner's counsel received from the expert additional work papers (an EXCEL worksheet and graphics for each of the appraisal reports) that had not been included with the expert appraisal; these files were subsequently served on Respondent and filed with the trial court. Respondent opposed the supplemental submission. Petitioner responded that the supplemental file did not add to or amend the original reports. The trial court also set a trial date ten months in the future. Thereafter Respondent sought the trial court's rejection of the supplemental submission, and/or that Petitioner be required to move for permission to supplement the report. Petitioner then moved to supplement the reports with the addendum file. Respondent opposed the motion for, among other things, Petitioner's failure to demonstrate good cause for the delayed filing, and that the late filing would cause prejudice. After a hearing, the trial court granted the motion to supplement the filing.[52]

On appeal, the Appellate Division cited Section 202.59(h) of the Uniform Rules of New York State Trial Courts, which permits, upon application, and for good cause shown, a grant of relief from a default on service of an appraisal, an extension of the time for filing the appraisal, or the supplementing of a filed appraisal report, upon such conditions as the court may order.[53] The trial court properly exercised its discretion in granting the motion to supplement. The supplemental material consisted only of graphic illustrations of the use of capacity price forecasts in the expert's income approach, which made no change to the filed reports, and did not affect Respondent's ability to prepare for cross-examination of the expert. The request was also first made just one month after the exchange, immediately upon counsel's receipt of the material. This constituted good cause to supplement.[54] As to prejudice, the request to supplement was made nearly

one year prior to the scheduled trial date, giving Respondent ample time to review the material and prepare for trial. Although Respondent had already begun to prepare for trial, this did not establish prejudice.[55]

7. Taxability of Utility Property

In *Level 3 Communications, LLC v. Chautauqua County,*[56] Petitioner brought a hybrid CPLR Article 78 proceeding and declaratory judgment action seeking to annul a determination that its fiber optic installations are taxable real property pursuant to RPTL Section 102(12)(i). The trial court dismissed the petition. Petitioner on appeal conceded that fiber optic installations are taxable as 'lines' under RPTL Section 102(12)(i), even though they do not conduct electricity,[57] but nevertheless contended, as it had below, that the line installations are in any event exempt from taxation as "property used in the transmission of news or entertainment radio, television or cable television signals for immediate, delayed or ultimate exhibition to the public."[58] The Appellate Division held that Petitioner had failed to establish that its fiber optic installations are "primarily or exclusively used for one of the exempt purposes in RPTL 102(12)(i)(A)-(D)."[59]

8. RPTL 727

In *T.B.S. Realty Management, LLC v. Town of Ramapo,*[60] Petitioner filed separate RPTL Article 7 proceedings challenging assessments for tax years 2007 through 2010. The proceedings were settled in an order reducing the assessments only for tax years 2007 and 2010. Thereafter, Petitioner filed new RPTL Article 7 proceedings challenging assessments for tax years 2012 and 2013. Respondents moved to dismiss the proceedings based on RPTL 727's three-year moratorium upon challenges to the assessment.[61] The New York Supreme Court denied the motion, finding that the Petitioner had been prejudiced by the Respondents' delay in bringing the motion. On appeal, the Appellate Division held that, absent certain exceptional instances not present here, RPTL Section 727 bars an assessment challenge against the next three succeeding assessment rolls, where a valuation was determined after a prior assessment challenge; it also bars filing any petition for review of the assessment during that period.[62] The provisions of RPTL Section 727(1) are applicable to such property even where the order or determination results from a stipulation of the parties. While Petitioner alleged that Respondents had waited too long before moving to dismiss, the parties had conducted only limited discovery prior to filing the note of issue, court-ordered appraisals had yet to be exchanged, and Petitioner conceded that it had originally commenced the proceedings in error.[63]

9. Exemptions

In *International Student Exchange, Inc. v. Assessors Office of Town of Islip,*[64] Petitioner, a California nonprofit corporation, had timely submitted an application for a property tax exemption for the 2018/2019 tax year pursuant to RPTL Section 420–a. The application was denied by Respondent's Assessor, who found that Petitioner was not organized for an exempt purpose, and that the property was not used for an exempt purpose. Petitioner's administrative appeal was likewise dismissed, leaving the property assessed at $191,000.[65] Petitioner commenced an RPTL Article 7 and CPLR Article 78 proceeding to annul the exemption denial. Respondent moved to dismiss, arguing that Petitioner was not entitled to the exemption for which it had applied. The New York Supreme Court denied the motion to dismiss, found the Town's determination to be arbitrary and capricious, determined that the Petitioner was entitled to an exemption, and directed the Town to grant Petitioner a full exemption.[66] On appeal, the Appellate Division looked at RPTL Section 420–a(1)(a), which provides that property owned by a corporation organized exclusively for charitable purposes and used exclusively for such purposes, is exempt from property taxes. The two-part test to determine entitlement to a property tax exemption is whether the owner of the property is organized exclusively for an exempt purpose, and whether the particular property for which the exemption is sought is itself primarily used for such purpose. The burden of establishing these facts rests with the taxpayer.[67]

In this proceeding, Petitioner is organized exclusively for an exempt purpose; recognition as a tax-exempt entity by the Internal Revenue Service, while not determinative, can be considered, along with statements in the entity's organizational documents, in determining whether the entity is organized for an exempt purpose.[68] Even where the owner was formed for an exempt purpose, however, the entity must still demonstrate that the property is used exclusively for that exempt purpose.[69] "Exclusive use for an exempt purpose," in turn, depends on whether the primary use of the property is in furtherance of permitted purposes.[70] While there is no dispute that Petitioner used the property as its headquarters in furtherance of its exempt purpose, the property is improved with a two-story office building, and there were no record facts as to what portion of that building is used by the Petitioner in furtherance of its exempt purpose.[71] Further, Petitioner's application disclosed it planned to lease a substantial portion of the property to a tenant. Because RPTL Section 420–a(2) also provides that exclusive use can include lease or other exempt use by a tenant which is also exempt from taxation, issues of fact exist as to whether the Petitioner is entitled to a full or partial tax exemption for tax year 2018/2019.[72]

EMINENT DOMAIN

1. Valuation

In *Matter of Acquisition of Real Property by County of Warren,*[73] Claimant, a land development company, owned several tax parcels of undeveloped real property in the Town of Queensbury. Ten percent (10%) of the property lies south of an overhead power line that traverses the property, while the remainder is north of the power line. Claimant also has a 200-foot right-of-way below the power line connecting the parcels. Both parcels front on roadways. Claimant had approvals to develop a technological park and had undertaken development studies. Before development, Respondent appropriated approximately 4.0 acres of the northern parcel to preserve the neighboring airport's runway protection zone, and established an avigation easement over the remaining 80.72 acres of the northern parcel; just compensation for which Respondent paid Claimant $327,200.00, Claimant reserved the right to file a damages claim.[74] Thereafter, Claimant commenced a proceeding pursuant to Article 5 of the Eminent Domain Procedure Law ("EDPL"), claiming additional damages. Claimant's appraisals calculated the unencumbered value, and the diminution in value, from the taking and the easement. Respondent submitted a rebuttal appraisal. Claimant's expert appraised both north and south parcels together as constituting the entire property, finding that the whole was affected by the taking and easement. Respondent's expert appraised only the northern parcel. The New York Supreme Court dismissed Claimant's expert's testimony in its entirety at trial and awarded damages solely on Respondent's appraiser's testimony in the amount of $297,000.00.[75]

On appeal, the Appellate Division noted that just compensation must be awarded for takings in order to restore the owner to the financial position which he or she occupied before the taking. On a partial taking, the owner is not only entitled to the value of the land taken—-i.e., direct damages—-but also to consequential damages, the diminution in value of the remaining land as a result of the taking, or the use of the property taken, based on the fair market value of the property at its highest and best use on the date of the appropriation, whether or not the property was being used in such manner at that time.[76] The trial court should have considered all 97.48 acres of the property as a single parcel, rather than valuing the effect of the taking on just the northern parcel, because there was "...contiguity... unity of use, and unity of title or ownership."[77] Unity of ownership here was undisputed; contiguity will be found when parcels are adjacent, lack physical boundaries, and can be traversed. Even a publicly traveled highway running through a tract that has one purpose does not necessarily divide it

into independent parcels, if the owner has the legal right to cross the intervening strip of land, as Claimant did here. Unity of use can be found where Claimant demonstrates an intent to develop the entire tract for commercial purposes, and a common assessment of the parcels to Claimant or another entity, where it is demonstrated that negotiations towards development of the whole before the taking were substantially completed, or when engineers have evaluated the site for development as a single parcel.[78]

The test is was there a "reasonable probability that its asserted use could or would have been made within the reasonably near future." Notably, a use which is no more than a speculative or hypothetical arrangement in the mind of the claimant may not be accepted as the basis for an award.[79] The record demonstrated such unity of use. Claimant's concept thus constituted a bona fide development plan, whose progress was cut short by the condemnation. The highest and best use of the property is as a single economic unit featuring mixed use development, and damages should be determined based on diminution of value of the entire property. Because the trial court's assessment of damages was based solely on Respondent's valuation of the property, the Appellate Division looked to the trial evidence for proof of the pre-taking value of the parcel as a whole.[80]

Claimant's expert had appraised the property as having a pre-taking value of $33,000 per acre using five comparable sales, two of which were also utilized by Respondent's expert. Because the experts agreed that these sales were comparable to the property, the Appellate Division relied on them, as adjusted, to determine a pre-taking value of $20,912.00 per acre, or a pre-taking value for the entire 97.48 acres of $2,038,502.00. The measure of consequential damages in cases involving avigation easements is the diminution of market value, namely the difference in market value before and after the taking. The Appellate Division, like the trial court, credited the comparable sales approach of Respondent's appraiser, finding it to be reasonable and based upon a detailed, logical analysis of the market data derived from sales of similar properties subject to avigation easements, and applied it to the entire parcel, using the pre-taking value of $20,912.00 per acre (or $2,038,502.00 for the whole).[81] Damages owed to Claimant for the 3.86 acre taking, a one hundred (100%) appropriation, at $20,912 per acre, amounted to $80,720.00. As to the remaining 93.62 acres of the parcel, the Appellate Division applied a 22.45% diminution in value to the pre-taking value of $1,957,781.00, and assessed damages in the amount of $439,522.00, which when added to the $80,720.00 for the 3.86 acres that was 100% appropriated, amounted to a total award of $520,242.00, from which prior payments made to Claimant and taxes, penalties and interest actually paid were to be deducted.[82]

2. EDPL § 206 – Alternative Procedures for Eminent Domain

In *National Fuel Gas Supply Corp. v. Schueckler,*[83] Condemnor commenced an EDPL proceeding seeking to acquire, by eminent domain, temporary construction easements and a 50–foot wide permanent easement over property owned by Respondents, to construct and operate a natural gas pipeline. Condemnor argued that compliance with EDPL Article 2 was obviated by the statutory exemption set forth in EDPL Section 206(A), based on the Federal Energy Regulatory Commission's issuance of a certificate of public convenience and necessity for the project under the Natural Gas Act. Respondents contested the petition, asserting that the certificate was ineffective, because, although it authorized construction and operation of the pipeline, it was granted on condition that Claimant complies with certain environmental conditions, including one (receiving a water quality certificate) which Claimant had not met, and the failure to meet all conditions prior to construction invalidated the certificate.[84]

While Claimant conceded that NYSDEC had denied its application for a water quality certificate and that acquisition of the certificate was a condition imposed upon it, Claimant asserted it was separately seeking rehearing and clarification of the FERC order and argued that NYSDEC had waived its authority to deny the certificate by an untimely decision on their application. The New York Supreme Court granted Claimant's petition; on appeal, the Appellate Division reversed and dismissed the petition, holding that NYSDEC's denial of Claimant's certificate application meant that Claimant no longer held a qualifying federal certificate for purposes of the EDPL Section 206(A) exemption.[85] The Court of Appeals reversed.

The Court of Appeals noted that the EDPL requires prospective condemnors to make a determination to condemn property after invoking the hearing and findings procedures of EDPL Article 2, which involves procedures including a public hearing both to inform the public and to review the public use involved and the environmental impact of the proposed project. A condemnor then must render findings regarding the project, including its public use, benefit, or purpose; approximate location of the taking; general effect on the environment and nearby residents; and such other factors as the condemnor considers relevant. These procedures ensure that a condemnor does not acquire property without having made a reasoned determination that the condemnation will serve a valid public purpose.[86] EDPL Section 206 also provides alternative procedures exempting condemnors from regular compliance with EDPL Article 2, including, as asserted here under EDPL Section 206(A), that "...pursuant to other...federal...law or regulation it considers and submits factors similar to those enumerated in [EDPL 204(B)] to a state, federal or local governmental agency, board or

commission before proceeding with the acquisition and obtains a license, a permit, a certificate of public convenience...from such agency…."[87] While conditions in FERC's certificate of public convenience and necessity issued to Condemnor, including obtaining a water quality certificate, might have affected the ultimate completion of the project, it did not preclude Condemnor from pursuing eminent domain under EDPL Article 2 before all such pre-construction conditions were fulfilled, because such conditions were not preconditions to the validity of the certificate itself. FERC could also have conditioned eminent domain authority on completion of some act or obligation but did not do so.[88]

3. EDPL § 207 – Review of Determination to Condemn

In *Hudson Valley Housing Development Fund Co. Inc. v. County of Ulster,*[89] Petitioner is a not-for-profit housing development fund company that is the owner of two parcels of land, the subject parcel (3.3-acres in size) and a larger parcel (19.5-acre). The two parcels are separated by the tracks of an active railroad owned by Respondent County of Ulster. Petitioner seeks to build a housing complex on the larger, landlocked parcel, connecting to a main road through the subject parcel via a proposed easement Petitioner seeks to acquire from Respondents over the active railroad right-of-way. The subject parcel also includes a disused railroad right-of way which is currently a dirt path running parallel to the active railroad right-of-way.[90] Respondents seek an easement over the subject parcel to construct a 1.8-mile paved connector trail along the disused railroad right-of-way to connect the City of Kingston to an adjacent recreational trail. Petitioner and its predecessor-in-interest offered to exchange an easement over the subject parcel with the Respondent County of Ulster for an easement in the former's favor over the active railroad right-of-way. Instead, the Respondent County of Ulster offered Petitioner $24,000 for a permanent easement over the subject parcel; Petitioner never responded to the offer.[91] Respondent Legislature of the County of Ulster thereafter adopted a determination pursuant to EDPL Section 204 stating that a SEQRA review had been completed in 2016, at which time Respondent Legislature of the County of Ulster issued a negative declaration, identifying the project as one that would not have any significant adverse effects on the environment, and the project was reviewed as an unlisted action. Petitioner challenged the determination by commencing a proceeding pursuant to EDPL Section 207.[92]

On appeal, the Appellate Division confirmed that the scope of review of a condemnor's EDPL Section 204 determination is limited to whether the proceeding was constitutionally sound; whether the condemnor had the requisite authority; whether its determination complied with SEQRA

and EDPL Article 2; and whether the acquisition will serve a public use.[93] Petitioner bears the burden of showing that the determination herein was without foundation and baseless, or that it was violative of any of the applicable statutory criteria. Petitioner failed to allege that Respondents lacked the requisite authority, or that the process utilized was constitutionally unsound; rather, they asserted that Respondents violated SEQRA by designating the project as an unlisted action, rather than a Type I action, and failed to follow procedures required for Type I actions.[94] Petitioner also argued that Respondents were required to conduct additional environmental review after new information surfaced, and that the new information defeated the project's public purpose. However, because there was contradictory evidence on the location of the project with regard to the agricultural district, Petitioner failed to establish that the project included any property within an agricultural district which would require classification of the project as a Type I action. In light of Respondents having made contingency plans for the unavailability of a tunnel for their project, Petitioner also failed to prove that Respondents received any new information (such as the tunnel's unavailability) that would require them to revoke or amend their negative declaration, or that would defeat the project's public purpose.[95]

In *River St. Realty Corp. v. City of New Rochelle,*[96] Condemnor City commenced EDPL proceedings to acquire Petitioner's property in order to relocate a firehouse. After a public hearing, Respondent's City Council approved two resolutions, one adopting a determination and finding to acquire the property, and one a determination that the action would not have a significant effect on the environment, and thus that no environmental impact statement was required.[97] Thereafter, Petitioner commenced an EDPL Section 207 proceeding to challenge the determination. The Appellate Division noted that "the principal purpose of EDPL article 2 is to ensure that an agency does not acquire property without having made a reasoned determination that the condemnation will serve a valid public purpose."[98] "'Judicial review of a condemnation determination is limited to whether the proceeding was constitutional, whether the proposed acquisition is within the condemnor's statutory jurisdiction or authority, whether the determination and findings were made in accordance with the procedures set forth in EDPL article 2 and the State Environmental Quality Review Act [hereinafter SEQRA], and whether a public use, benefit, or purpose will be served by the proposed acquisition.'"[99]

Condemnor provided, as required by EDPL Section 204[A], proper notice of the hearing to the public and to the Petitioner and made a determination and findings within 90 days of the conclusion of the hearing. Petitioner's failure to appear at the public hearing waived any error by Con-

demnor regarding lack of mapping or property description (neither in any event is required by EDPL Section 203), or by Condemnor not permitting public comment thereat (an allegation belied by the record).[100] A challenger to a public use determination "'has the burden of establishing that the determination does not rationally relate to a conceivable public purpose.'"[101] Public purpose or public use is "broadly defined as...virtually any project that may confer upon the public a benefit, utility, or advantage, including any use which contributes to the health, safety, general welfare, convenience, or prosperity of the community."[102] Relocation of a City firehouse surely served a public purpose. Petitioner also failed to meet its burden to demonstrate that the City acted in bad faith.[103] Finally, the Appellate Division rejected the SEQRA challenge, finding that the City had prepared and filed the required form while identifying no adverse impacts, and Petitioner likewise failed to assert any significant potential for environmental impact from the project. Thus Condemnor "took the requisite hard look at the relevant areas of environmental concern and made a reasoned elaboration of the basis for its determination."[104]

4. 22 NYCRR 202.61 – Scope of Appraisal

In *Rochester Genesee Regional Transportation Authority v. Stensrud,*[105] Condemnor commenced an EDPL proceeding seeking to take Respondent's property for a public project. After appraisal exchanges, Condemnor moved *in limine* to strike so much of Respondents' appraisal report as determined "investment value," and to preclude so much of Respondents' expert testimony, which would assert valuations different from those contained in his appraisal. Respondents cross-moved *in limine* to strike Condemnor's appraisal report. The trial court denied the motion to strike the "investment value" portion of the report but granted the motion to limit the appraiser's testimony, which departed in valuation from his appraisal; it also denied Respondent's motion to strike.[106]

On appeal, the Appellate Division noted that the proper measure of damages is the fair market value of the subject property put to its highest and best use at the time of taking, but that there is no fixed method for determining that value, absent evidence of a recent arms-length sale of the property. The three traditional methods of valuation are comparable sales, capitalization of income, and reproduction cost less depreciation; where, in this proceeding, the property is income-producing, the proper method of valuation is the capitalization of income method.[107]

While Respondents' appraiser entitled the disputed portion of his appraisal an "investment valuation," the Appellate Division found this to be an income capitalization approach using the standard formula that value

equals net income divided by a capitalization rate.[108] It also applied factors that, as Respondents' appraiser argued, accurately reflected the property's value and would make the property more appealing to prospective purchasers. While Condemnor contended that factors considered by the appraiser do not accurately reflect market value, such questions go to the weight to be accorded the appraisal, and not to its admissibility.[109] However, preclusion of any testimony by Respondents' expert of a valuation higher than that set forth in Respondents' appraisal report was proper, since parties are "'limited [at trial] in their affirmative proof of value to matters set forth in their respective appraisal reports.'"[110] The trial court also properly declined to strike Condemnor's appraisal, correctly finding that issues of valuation are for resolution at trial.[111]

5. De Jure/De Facto Condemnation

In *In re Willis Avenue Bridge Replacement,*[112] the City of New York acquired by condemnation fee and easement interests for their Willis Avenue Bridge reconstruction project, including permanent and temporary easements over a portion of a lot abutting a landlocked lot owned by Claimant. Following the taking, Claimant filed a notice of claim under EDPL Section 503 which asserted a taking by easement over its lot; thereafter, Claimant also alleged that the bridge construction was causing flooding of its property. Claimant submitted an appraisal which determined that between November 2014 and May 2017 Claimant's property and the easement became flooded after rainfall, which flooding was allegedly caused by a drainage pipe in the easement area which was blocked by cement during the bridge reconstruction.[113] Claimant's appraisal alleged flooding damage from reduced rental income for the area, and for the inability to develop residential towers on the property. Respondent moved to strike the appraisal, arguing that the flooding damages did not result from a taking of Claimant's property and, therefore, they are not compensable by way of an EDPL action; rather, any claim for flooding must be asserted in a separate tort proceeding to recover for damages due to the project.[114]

While the State must compensate an owner for a taking, Claimant's property was not subject to a de jure or de facto taking by the City. Although a claim for inverse condemnation would provide just compensation for a taking when condemnation proceedings have not been instituted, to succeed on such a claim the claimant must show government intrusion onto the property and interference with the claimant's property rights to such a degree that the conduct amounts to a constitutional taking.[115] A de facto taking can involve either a permanent dispossession or permanent interference with a claimant's use, possession, and enjoyment of the property,

but only where the taking consists of a permanent, physical occupation of property which amounts to the exercise of dominion and control thereof.[116] The conceded interference with Claimant's property rights here is not sufficiently permanent to constitute a de facto taking as a matter of law, thus it is not inverse condemnation.[117]

Endnotes

1 *Foxcroft Village, LLC v. Town Assessor of Town of Fallsburg,* 176 A.D.3d 1527, 1527 (3d Dep't 2019).

2 *Id.*

3 *Id.* at 1527-9.

4 *Id.* at 1528-30.

5 *Verizon N.Y., Inc. v. Supervisors of Town of N. Hempstead*, 169 A.D.3d 740 (2d Dep't), *appeal dismissed,* 33 N.Y.3d 1060 (2019), *leave to appeal denied*, 34 N.Y.3d 910 (2020).

6 *New York Tel. Co. v. Supervisor of Town of Oyster Bay*, 4 N.Y.3d 387, 390-2 (2005).

7 *Verizon N.Y., Inc.,* 169 A.D.3d at 741.

8 *Id.*

9 *New York Tel. Co. v. Supervisor of Town of Hempstead*, 115 A.D.3d 821 (2d Dep't), *leave to appeal denied*, 24 N.Y.3d 905 (2014); *New York Tel. Co. v. Supervisor of Town of Hempstead*, 115 A.D.3d 824 (2d Dep't), *leave to appeal denied*, 24 N.Y.3d 905 (2014).

10 *Verizon N.Y., Inc.,* 169 A.D.3d at 741.

11 *Id.* at 741-2, 744.

12 *Id.* at 743-4; citing *Bankers Trust Corp. v. New York City Dep't of Fin.*, 1 N.Y.3d 315, 321 (2003), *quoting Matter of First Nat'l City Bank v. City of New York Fin. Admin.*, 36 N.Y.2d 87, 93-94 (1975).

13 *Groll v. Board of Assessment Review of Town of Delaware,* 183 A.D.3d 1156 (3d Dep't 2020).

14 *Id.* at 1156-7.

15 *Id.* at 1157-8.

16 *Id.* at 1158.

17 *Id., citing Matter of Glens Falls City Sch. Dist. v. City of Glens Falls*, 135 A.D.3d 1056, 1057 (3d Dep't), *leave to appeal denied,* 27 N.Y.3d 903 (2016).

18 *Groil,* 183 A.D.3d at 1158-9, citing *Matter of General Elec. Co. v. MacIsaac*, 292 A.D.2d 689, 691 (3d Dep't 2002).

19 *Groil,* 183 A.D.3d at 1159-60, citing *Matter of Lavender v. Zoning Bd. of Appeals of the Town of Bolton*, 141 A.D.3d 970, 975 (3d Dep't), *appeal dismissed*, 28 N.Y.3d 1051 (2016), *leave to appeal denied*, 29 N.Y.3d 907 (2017).

20 *Sullivan Farms II, Inc. v. Assessor of Town of Mamakating*, 179 A.D.3d 1176 (3d Dep't 2020).

21 *Id.* at 1176.

22 *Id.* (citing *Matter of Allied Corp. v. Town of Camillus*, 80 N.Y.2d 351, 356 [1992], *reargument denied*, 81 N.Y.2d 784 [1993]).

23 179 A.D.3d at 1176 (citing *Foss v. City of Rochester*, 65 N.Y.2d 247, 256 [1985]).

24 179 A.D.3d at 1176-7, (citing *Matter of Burrows v. Board of Assessors for Town of Chatham*, 64 N.Y.2d 33, 36 [1984]).

25 179 A.D.3d at 1177 (citing *Nash v. Assessor of Town of Southampton*, 168 A.D.2d 102, 108 [2d Dep't 1991]).

26 *Village of Kiryas Joel v. Assessor of Town of Woodbury,* 176 A.D.3d 721 (2d Dep't 2019), *leave to appeal denied*, 35 N.Y.3d 904 (2020).

27 *Id.* at 721-2.

28 *Id.* at 722 (citing *Matter of Sterling Estates v. Board of Assessors of County of Nassau*, 66 N.Y.2d 122, 125, *reargument denied*, 66 N.Y.2d 1036 [1985]).

29 176 A.D.3d at 722-3 (citing *Matter of Fifth Avenue Office Ctr. Co. v. City of Mount Vernon*, 89 N.Y.2d 735 [1997]; *Matter of Chester Mall Partners v. Village of Chester*, 239 A.D.2d 414, 414 [2d Dep't 1997]).

30 176 A.D.3d at 723 (citing *Matter of McCready v. Assessor of Town of Ossining*, 10 A.D.3d 452 [2d Dep't 2004]).

31 176 A.D.3d at 723.

32 *DCH Auto v. Town of Mamaroneck*, 178 A.D.3d 823 (2d Dep't 2019).

33 *Id.* at 824.

34 *Id.* at 824-5.

35 *Id.* at 825, citing N.Y. Real Prop. Tax Law §524(3)(McKinney 2019).

36 *DCH Auto,* 178 A.D.3d at 825 *(*citing *Matter of Larchmont Pancake House v. Board of Assessors and/or the Assessor of the Town of Mamaroneck,* 153 A.D.3d 521 [2d Dep't 2017], *aff'd on other grounds,* 33 N.Y.3d 228 [2019]); N.Y. Real Prop. Law § 704(1) (McKinney 2019).

37 *Matter of Long Island Power Auth. v. Assessor of Town of Huntington*, 164 A.D.3d 591 (2d Dep't 2018).

38 *Id.* at 591.

39 *Id.* at 591-2.

40 *Id.* at 592 (citing *Matter of Steel Los III/Goya Foods, Inc. v. Board of Assessors of County of Nassau*, 10 N.Y.3d 445, 452-453 [2008], quoting *Matter of Waldbaum, Inc. v. Finance Adm'r of City of N.Y.*, 74 N.Y.2d 128, 132 [1989]).

41 *Matter of Long Island Power Auth.*, 164 A.D.3d at 592 (citing *Matter of Malik v. Tax Comm'n of the City of N.Y.*, 68 A.D.3d 870, 871 [2d Dep't 2009]).

42 *Consolidated Edison Co. of N.Y., Inc. v. New York State Bd. of Real Prop. Servs.*, 176 A.D.3d 1433 (3d Dep't 2019).

43 *Id.* at 1433-4.

44 *Id.* at 1434-5.

45 *Id.* at 1435 (citing N.Y. Real. Prop. Tax Law § 718[2][d])[McKinney 2019] and *Matter of Santa's Workshop, Inc. v. Board of Assessors of Town of Wilmington*, 13 A.D.3d 1047, 1048 [3d Dep't 2004], quoting *Matter of Pyramid Crossgates Co. v. Board of Assessors of Town of Guilderland*, 302 A.D.2d 826, 829 [3d Dep't], *leave to appeal denied,* 100 N.Y.2d 504 [2003]).

46 *Consolidated Edison Co. of N.Y., Inc.*, 176 A.D.3d at 1435.

47 *Id.* at 1435-6; *see* Siegel, *N.Y. Practice* § 127, at 257 (6th ed 2018); N.Y. Real. Prop. Tax Law Section § 710 (McKinney 2019).

48 *Consolidated Edison Co. of N.Y., Inc.*, 176 A.D.3d at 1436-7.

49 *Id.* at 1437-9 (citing *Matter of Sullivan LaFarge v. Town of Mamakating*, 94 N.Y.2d 802, 804 [1999]; *Matter of Pyramid Crossgates Co.,* 302 A.D.2d at 829).

50 *Erie Boulevard Hydropower L.P. v. Town of Moreau Assessor*, 176 A.D.3d 1536 (3d Dep't 2019).

51 *Id.* at 1536-7.

52 *Id.* at 1537.

53 *Id.* at 1537-8 (citing *Matter of AG Props. of Kingston, LLC v. Town of Ulster Assessor*, 138 A.D.3d 1273, 1277-8 [3d Dep't], *leave to appeal denied,* 27 N.Y.3d 912 [2016]).

54 *Erie Boulevard Hydropower L.P. v. Town of Moreau Assessor*, 176 A.D.3d at 1538.

55 *Id.* at 1538-9 (citing *Matter of AG Props. of Kingston, LLC,* 138 A.D.3d at 1277-8).

56 *Level 3 Commc'n, LLC v. Chautauqua County*, 174 A.D.3d 1502 (4th Dep't), *reargument denied*, 177 A.D.3d 1347 (4th Dep't 2019), *leave to appeal denied,* 35 N.Y.3d 906 (2020).

57 *Id.* at 1503; *see Matter of T-Mobile Northeast, LLC v. DeBellis*, 32 N.Y.3d 594 (2018), *reargument denied,* 32 N.Y.3d 1197 (2019).

58 *Level 3 Commc'n, LLC v. Chautauqua County*, 174 A.D.3d at 1503 *(*citing N.Y. Real Prop. Tax Law § 102[12][i][D] [McKinney 2019]).

59 *Level 3 Commc'n, LLC v. Chautauqua County*, 174 A.D.3d at 1503 (quoting *Matter of Level 3 Commc'n, LLC v. Erie County*, 174 A.D.3d 1497, 1501 [4th Dep't], *reargument denied*, 177 A.D.3d 1346 [4th Dep't 2019], *leave to appeal denied*, 35 N.Y.3d 906 [2020]).

60 *T.B.S. Realty Mgmt., LLC v. Town of Ramapo*, 175 A.D.3d 694 (2d Dep't 2019).

61 *Id.* at 694; *see* RPTL §727(1),(3) (McKinney 2019).

62 *T.B.S. Realty Mgmt., LLC*, 175 A.D.3d at 694-5.

63 *Id.* at 695.

64 *International Student Exchange, Inc. v. Assessors Office of Town of Islip*, 185 A.D.3d 815, 128 N.Y.S.3d 216 (2d Dep't 2020).

65 *Id.* at 815-16, 128 N.Y.S.3d at 218.

66 *Id.* at 816-17, 128 N.Y.S.3d at 218-9.

67 *Id.* at 817, 128 N.Y.S.3d at 219 (citing *Mohonk Trust v. Board of Assessors of Town of Gardiner,* 47 N.Y.2d 476, 483 [1979]; *Matter of Homeland Found., Inc. v. Gotovich,* 148 A.D.3d 708 [2d Dep't 2017]).

68 *International Student Exchange, Inc.*, 185 A.D.3d at 818, 128 N.Y.S.3d at 219 (citing *Matter of Greater Jamaica Dev. Corp. v. New York City Tax Comm'n,* 25 N.Y.3d 614, 627 [2015]).

69 *International Student Exchange, Inc.*, 185 A.D.3d at 819, 128 N.Y.S.3d at 220 (citing *Matter of Adult Home at Erie Station, Inc. v. Assessor & Board of Assessment Review of City of Middletown,* 10 N.Y.3d 205, 216 [2d Dep't 2008]).

70 *International Student Exchange, Inc.*, 185 A.D.3d 819, 128 N.Y.S.3d at 220-21 (citing *Matter of Yeshivath Shearith Hapletah v. Assessor of Town of Fallsburg,* 79 N.Y.2d 244, 250 [1992]).

71 *International Student Exchange, Inc.*, 185 A.D.3d 819, 128 N.Y.S.3d at 221 (citing *Matter of Vassar Bros. Hosp. v. City of Poughkeepsie,* 97 A.D.3d 756 [2d Dep't 2012]).

72 *International Student Exchange, Inc.*, 185 A.D.3d 820, 128 N.Y.S.3d at 221.

73 *Matter of County of Warren (Forest Enters. Mgmt., Inc.)*, 182 A.D.3d 729 (3d Dep't 2020).

74 *Id.* at 729-30.

75 *Id.* at 730.

76 *Id.* at 730-1 (quoting *Matter of State of New York [KKS Props., LLC]*, 119 A.D.3d 1033, 1034 [3d Dep't 2014]).

77 182 A.D. 3d at 734.

78 *Id.* at 731-2 *(*citing *Matter of Village of Port Chester [Bologna]*, 95 A.D.3d 895, 896-7 [2d Dep't], *leave to appeal denied,* 20 N.Y.3d 852 [2012]).

79 *Matter of County of Warren (Forest Enters. Mgmt., Inc.)*, 182 A.D.3d at 732 (quoting *Matter of City of New York [Broadway Cary Corp.]*, 34 N.Y.2d 535, 536, *reargument denied*, 34 N.Y.2d 916 [1974]).

80 *Matter of County of Warren (Forest Enters. Mgmt., Inc.)*, 182 A.D.3d at 734.

81 *Id.* at 735-6.

82 *Id.* at 737-8.

83 *National Fuel Gas Supply Corp. v. Schueckler*, 35 N.Y.3d 297, *reargument denied*, 35 N.Y.3d 1073 (2020).

84 *Id.* at 305.

85 *Id.* at 305-6.

86 *Id.* at 303-4.

87 *Id.* at 303-4, 308.

88 *Id.* at 309.

89 *Hudson Valley Hous. Dev. Fund Co., Inc. v. County of Ulster*, 183 A.D.3d 974 (3d Dep't 2020).

90 *Id.* at 974-5.

91 *Id.* at 975.

92 *Id.*

93 *Id.* (quoting *Matter of City of New York [Grand Lafayette Props. LLC]*, 6 N.Y.3d 540, 546 [2006]).

94 183 A.D.3d at 975-6.

95 *Id.* at 976-8.

96 *River St. Realty Corp. v. City of New Rochelle*, 181 A.D.3d 676 (2d Dep't 2020).

97 *Id.* at 676-7.

98 *Id.* at 677 (quoting *Matter of One Point St., Inc. v. City of Yonkers Indus. Dev. Agency*, 170 A.D.3d 851 [2d Dep't 2019], quoting *Matter of Citibank, N.A. v. Village of Tarrytown*, 149 A.D.3d 931 [2d Dep't 2017]).

99 181 A.D.3d at 677 (quoting *Matter of One Point Street*, 170 A.D.3d at 852).

100 181 A.D.3d at 677-8.

101 *Id.* at 678 (quoting *Matter of City of New York v. Yonkers Indus. Dev. Agency*, 170 A.D.3d 1003, 1004 [2d Dep't 2019]).

102 181 A.D.3d *at* 678 (citing *Matter of Goldstein v. New York State Urban Dev. Corp.*, 64 A.D.3d 168, 181 [2d Dep't], *aff'd,* 13 N.Y.3d 511 [2009], *reargument denied*, 14 N.Y.3d 756 [2010]).

103 181 A.D.3d at 678 (citing *Matter of 265 Penn Realty Corp. v. City of New York*, 99 A.D.3d 1014, 1015 [2d Dep't 2012]).

104 181 A.D.3d at 679 (citing *Matter of Bonacker Prop., LLC v. Village of E. Hampton Bd. of Trustees*, 168 A.D.3d 928 [2d Dep't], *leave to appeal denied*, 33 N.Y.3d 904 [2019]).

105 *Rochester Genesee Reg'l Transp. Auth. v. Stensrud*, 173 A.D.3d 1699 (4th Dep't), *reargument denied,* 175 A.D.3d 1851 (4th Dep't 2019).

106 *Id.* at 1700, 1702.

107 *Id.* at 1700-01 (citing *Matter of City of New York [Franklin Record Ctr.]*, 59 N.Y.2d 57, 61 [1983]; *Matter of Allied Corp. v. Town of Camillus*, 80 N.Y.2d 351, 356 [1992], *reargument denied,* 81 N.Y.2d 784 [1993]; *Matter of Oakwood Beach Bluebelt, Stage 1 [City of New York—Yeshivas Ch'San Sofer, Inc.]*, 164 A.D.3d 1453, 1456 [2d Dep't 2018], *leave to appeal denied*, 33 N.Y.3d 903 [2019]*; Matter of City of New York [Oceanview Terrace]*, 42 N.Y.2d 948, 949 [1977]).

108 173 A.D.3d at 1701 (citing *Matter of Hempstead Country Club v. Board of Assessors*, 112 A.D.3d 123 [2d Dep't 2013]).

109 173 A.D.3d at 1701.

110 *Id.* at 1701-02 (quoting 22 NYCRR 202.61(e); *Matter of Town of Guilderland [Pietrosanto]*, 267 A.D.2d 837, 837-838 [3d Dep't 1999]).

111 173 A.D.3d at 1702.

112 *In re Willis Ave. Bridge Replacement,* 177 A.D.3d 453 (1st Dep't 2019).

113 *Id.* at 454.

114 *Id.*

115 *Id.* at 455 (quoting *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 [1981]).

116 177 A.D.3d at 456 (quoting *Reiss v. Consolidated Edison Co. of New York*, 228 A.D.2d 59, 61 [3d Dep't 1996], *appeal dismissed,* 89 N.Y.2d 1085, *leave to appeal denied*, 90 N.Y.2d 807 [1997], *cert. denied*, 522 U.S. 1113 [1998]).

117 177 A.D.3d at 455-6.

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The Pandemic: Law Students' Perspectives on COVID-19's Effects on Legal Education and the Legal Profession

BY REBECCA M. MILLNER, CARLY G. GRESHAM AND ERIN C. PALMER

To say that 2020 has been a turbulent year would be the understatement of the century. It seems that everywhere you look, Americans are faced with outrage, disagreement, and fear. COVID-19 has brought the world, and graduate education, to its knees.

The country's inconsistent responses to COVID-19 is, perhaps, understandable. Amidst conflicting information, Americans remain unsure about the best way to move forward. During the initial outbreak of COVID-19, the drastically varied response saw states, such as Florida, remaining open for Spring Break.[1] Florida, whose first confirmed case of COVID-19 was diagnosed as early as March 1, 2020, welcomed the "Winter Party Festival," a huge LGTBQ event sure to draw attendees from all over the United States during the week of March 4 through March 10, 2020, and maintained open beaches.[2] At the same time, California declared a state of emergency.[3] While Texas issued its stay-at-home order on March 31, 2020, only to lift it by April 17, 2020, New York extended its March 22, 2020 stay-at-home order through May, eventually extending it through July.[4] Many law schools responded by shutting down their in-person classes and moving to an online format for the remainder of the Spring 2020 semester.[5] Now, standing on the precipice of the Fall 2020 semester, law students across the country are nervous about their upcoming educational experiences (or lack thereof).

Students in School: Classes, Cost, and Comparisons

Offering classes remotely for the Fall 2020 semester seems to be a popular idea. Harvard Law School announced its decision to offer only remote classes for the Fall 2020 semester, claiming that offering hybrid online/in-person classes was "highly likely" to have a negative impact on students.[6] Other law schools have followed suit regarding online classes, with schools such as the University of California, Berkeley School of Law, Vermont Law School, the University of Connecticut School of Law, and Western Michigan University Cooley Law School stating that they too will be fully online for the Fall 2020 semester.[7] The resurgence of COVID-19 is of particular concern for schools such as these, which see many students come from out of state.[8]

Here in Westchester County, we are seeing a different approach. The Elisabeth Haub School of Law at Pace University ("Pace Law School") has announced plans to offer hybrid online/in-person classes to its students for the Fall 2020 semester.[9] Understandably, Pace Law School is attempting a return to normalcy in the form of in-person educational experience, but this information came too little too late for most students. By mid-Summer when Pace Law School sent out a revised course schedule to students detailing which classes would be online versus in-person, the students had already enrolled in Fall semester classes. This left students between a rock and a hard place when trying to plan for the next academic year — such as rearranging living accommodations and choosing student loan options.

That is not to say the teachers at Pace Law School did not respond to the needs of students. During the Spring 2020 semester, Pace Law School allowed students to choose between traditional letter grading and opting for a pass-fail grading policy. At the time of Pace Law School's transition to online learning for the remainder of the Spring semester, both students and professors were wary, but professors immediately adapted to teaching online and being cognizant of the uncertainties and fears their students were facing. Many professors went above and beyond what was expected of them by making themselves more available to students, providing extra study materials and adjusting course timelines. Many students saw the format of the classes themselves change to accommodate the new online classes. "Our professors and the Pace Law School community alike did an excellent job of fostering a collaborative atmosphere." reflects Katherine Sierra, a rising third year. Ms. Sierra continued, stating: "My professors met me halfway. From providing tips on how to make remote learning work for me to integrating opportunities that made our online courses more interactive. Our

professors developed a sense of community in each course and I thought that was pretty special!"

Like Pace Law School, Fordham Law School also intends to offer a form of hybrid classes, planning to open campus for in-person instruction on a limited basis.[10] In an email addressed to incoming Fordham Law School students, the school states that they will "prioritize the building for full-time 1L students" in an effort to ensure that their newest J.D. students are introduced to the school and the profession safely.[11]

Cost of attendance is high on the list of concerns for students. In response to moving to an online-only platform for the next year, Harvard "rolled-back" its planned tuition increase to its 2019-20 year tuition rate at $65,875 for the 2020-21 year and gave students the option to take leave for the Fall 2020 semester or the full 2020-21 school year.[12] For some students, simply not raising tuition is inadequate. Harvard student Abraham Barkhordar asserts that the quality of education is decreasing as a side effect of COVID-19, calling it "subpar."[13] Barkhordar has filed a class action lawsuit against Harvard, claiming breach of contract, unjust enrichment, and conversion in an attempt to receive partial reimbursement of tuition from the Spring 2020 semester.[14] When fellow Harvard students tried voicing their concerns about the upcoming fall semester, the administration responded with comments that were allegedly "insulting" to students, who felt like they were not being heard.[15]

During the Spring 2020 semester, students at both Columbia University and Pace University sued the schools for a partial refund of tuition and fees after the schools moved to online formats in the wake of COVID-19.[16] Pace Law School has incrementally raised tuition for the Fall 2020 semester.[17] After first charging a new "transportation fee" for the fall, in consideration of the pandemic, Pace Law School administration chose to reimburse students for the additional charge.[18] Without any further information on adjustments to the Fall 2020 tuition, many students are frustrated. Rising Pace Law School third-year law student, Samuel Middleton, states that "tuition rises in schools every year, but we are not seeing a corresponding rise in the quality of our education. Everyone gets straddled with ridiculous debt for the same [quality of education over time]."

Disagreement about tuition seems to reflect the larger issue of what students are paying for when they enroll in law school. From a practical standpoint, it does seem inherently unfair to charge students a full-price, in-person tuition fee and then provide them with classes that are mostly or completely online. In the popular law student Facebook group "Law School Memes for Edgy T14s", a platform in which current and prospective

law students share experiences and news about their law school education, members consistently reference their education at the "Zoom School of Law", referring to the platform most law schools have adopted to host their online classes.[19] The gist of the joke is that whether you are a student at Yale Law School or the University of South Dakota, you are basically receiving the same "Zoom School of Law" education.

While the truth of that is debatable, it does seem to raise some questions as to what a student's bill is actually paying for. Dylan Gleadall, a recent graduate of the University of Southern California Gould School of Law, states that because higher education is viewed as an industry in the United States, the focus at many universities isn't on the actual students' education, but rather, the delivery of that final slip of paper they receive at graduation. He poses, "...students [are] often being viewed more as customers of a product, rather than actually being treated as students who are there to grow and learn." Undoubtedly, COVID-19 has caused a major disruption in the world of education, and it seems appropriate for law schools to reassess their program offerings and tuition accordingly.

Assuming law students make it through school despite these hurdles, they meet even greater challenges on the other side: the bar exam and the job market.

Prohibitors to Practice: The Bar Exam and the Job Market

COVID-19 has created concerns for recent graduates regarding both the bar exam and their job searches. This year's graduating class has already had to contend with the changes made to their last semester. Law students were panicking about summer internships and job offers. Now, recent graduates have been stuck in limbo for months wondering when, how, and if the bar exam will take place while trying to study for it. Public health concerns regarding the pandemic caused jurisdictions to upend the traditional exam process with no consistent administrative plan in effect.

What follows is a snapshot of the current administrative chaos: seventeen jurisdictions in the States and Territories of the United States administered the bar exam in July 2020.[20] Of those seventeen, Indiana, Michigan, and Nevada offered a remotely administered exam, and two of those three states, Indiana and Michigan, administered a one day exam.[21] Some jurisdictions, instead of, or in addition to, administering the bar examination, expanded or adopted supervised and/or provisional practice rules for recent graduates to attain work prior to taking a bar exam.[22]

On July 16, 2020, New York canceled its already rescheduled in-person bar exam set for September 9 to 10, 2020, leaving registered examinees in

limbo for a full week before announcing the new plan.[23] Pushing the exam back by a mere month, the State will now administer the exam remotely in October.[24] New York also granted a temporary practice order for eligible graduates.[25]

One side effect of these jurisdictional changes is that many of the 2020 Universal Bar Exam ("UBE") scores are non-transferrable.[26] This negatively impacts examinees who planned to take the exam in one jurisdiction and transfer the scores to a different jurisdiction, which now will not accept scores from the initial jurisdiction this year. Do 2020 examinees now have to take the exam in the second jurisdiction? Should they wait and hope that later bar exams are reverted to UBE transferable scores? All of these changes to exam administration leave prospective examinees in a state of uncertainty.

The pandemic has brought to light the impracticality of administering the bar exam. This raises the question, would diploma privilege be a better option? Diploma privilege would ensure that "those individuals seeking admission to the bar are granted licensure upon successful completion of law school requirements and graduation from law school. Applicants are also required, under diploma privilege, to meet other requirements for admission to the bar, such as passage of the Multistate Professional Responsibility Examination and a positive Moral Character and Fitness determination."[27]

As it stands, studying for the bar presents its own challenges. The bar costs money to take and study for, presenting a barrier to those who cannot afford to take time off to study for and take the exam. Students themselves are conflicted in their views of granting diploma privilege. Allison Durrett, rising third year at Pace Law School states: "I am for diploma privilege! It provides law students with the ability to pay their bills while also honing their skills. A lack of diploma privilege now puts a major strain on law students financially, as well as leaving students stagnant in their careers [until passing the bar]." On the other hand, some students think that diploma privilege puts students at an inherent disadvantage in the profession. "I don't like it." Christopher Kantor, another rising third year at Pace Law School, simply states. Mr. Kantor continued, stating: "I just feel like if we were to take diploma privilege, established professionals in this profession would look at us differently, that we kind of squeezed by, and I feel like operating on a kind of handicap like that would make it even harder to get a job." In the wake of COVID-19, it may be time for lawyer licensing agencies like the American Bar Association to re-evaluate the purpose and relevance of the bar exam.

Before law school even begins, law students and graduate students make an important decision to take on the monetary and mental costs of continued education. Prior to making the choice to enter law school or other graduate school, many undergraduates find themselves faced with increasingly fewer job prospects for their degree. Harvard Business Review reported that the number of people enrolling in undergraduate programs continues to rise — devaluing the undergraduate degree.[28] The rising number of college graduates means that in order for employers to get the best candidate for the job, "27% of employers now require master's degrees for roles in which historically undergraduate degrees sufficed."[29]

The ABA reported that pre-pandemic jobs that "required or preferred J.D. degrees" rose 2.82% up from 2018.[30] In March 2020, the legal unemployment rates shot up from a low 2% to 6%.[31] During the same time period, the overall U.S. unemployment rate rose to 15%.[32]

So what is the legal profession doing to cope with this? For their part, firms have been taking measures to cut yearly costs including pay cuts and layoffs. Many large firms are implementing up to a 25% pay cut on associate salaries, and some are not paying partners at all.[33] Administrative staff has been cut down all around.[34] As a result of the economic uncertainty, many senior attorneys are postponing retirement.[35] This is anticipated to oversaturate the legal field with senior attorneys in place of recent graduates.[36] An essential, and insurmountable, stage in the job cycle is that senior employees must retire in turn to make way for new attorneys — causing extreme concern amongst the graduating classes.

There is, however, light at the end of the tunnel. Not all jobs within the legal sector have been similarly affected by the COVID-19 pandemic. For example, the in-house counsel job market has not fluctuated as quickly in response to the pandemic.[37] Other fields and practice areas such as bankruptcy, restructuring, and public interest are also likely to experience a surge in work as a direct impact of the pandemic.[38] At the culmination of the anticipated eviction crisis, in New York City especially, there will most likely be an increased need for housing lawyers. There could also potentially be an increased need for lawyers in employment law as many people seek to challenge or defend layoffs. The EPA's loosening of compliance requirements for businesses as a consequence of Stay-at-Home orders is likely to lead to an increase in jobs as lawsuits result further down the road.[39] The pandemic has unquestionably harmed legal job prospects, but there is still hope to be had.

Conclusion

The pandemic has had a massive influence on education, and only time will tell what the full impact will be. There has not been a time in modern history where the entire field of education nationwide has collectively experienced such an impactful event, or series of events. As law students we saw first-hand how schools responded to the pandemic, from watching what was happening inside our classrooms (or, alternatively, on "Zoom School of Law") to social media groups with other law students tracking how schools across the country acted. The 2020 graduating class missed out on their last semester — Barristers Ball cancellations, schools hosting Zoom graduation ceremonies, and all classes becoming remote. Now as they attempt to study for the bar exam, they have seen the date moved and the format of the exam changed.

The legal field did not respond kindly to students in the wake of COVID-19. Many question whether law school administrations have responded appropriately to the needs of their students. Students who took on legal education are tasked with taking on debt in order to pay for their advanced education, and then need jobs to pay off those debts. The changes to bar exam administration and the transferability of exam scores has left many registered examinees scared — what will the exam look like, will they need to risk their health and the health of others to take it in-person, will it happen at all? It has become increasingly difficult to enter into the job market without advanced qualifications. While the legal sector has been hit hard by unemployment as a result of the pandemic, there are possible areas of growth in the legal field. New attorneys will be needed to take on roles created or exacerbated as a result of the pandemic. It seems that, as a result of the pandemic, legal education in the U.S. is headed for a major upheaval.

Endnotes

1 Will Mullery and Janie Boschma, *Timeline: How Florida's coronavirus response compares to three other big states,* CNN (May 4, 2020), https://www.cnn.com/2020/05/04/politics/timeline-florida-coronavirus.

2 *Id.*

3 *Id.*

4 *Id*; N.Y. Exec. Order Nos. 202.7 (Mar. 20, 2020), 202.14 (Apr. 7, 2020), 202.18 (Apr. 16, 2020), 202. 28 (May 7, 2020), 202.31 (May 14, 2020), 202.38 (Jun. 6, 2020).

5 Amanda Robert, ABA Journal, Daily News, *Coronavirus and law schools: Numerous schools canceling in-person classes* (Mar. 11, 2020, 10:15 AM CDT), https://www.abajournal.com/news/article/At-least-seven-law-schools-to-close-or-cancel-classes-because-of-coronavirus.

6 Harvard Law School, HLS Fall Term 2020 Frequently Asked Questions, https://hls.harvard.edu/dept/registrar/hls-fall-term-2020-frequently-asked-questions/ (last visited Aug. 5, 2020).

7 Karen Sloan, *Online or In Person? Law Schools Diverge in Fall Semester Plans*, Law.com (July 1, 2020, 2:25 PM), https://www.law.com/2020/07/01/online-or-in-person-law-schools-diverge-in-fall-semester-plans/.

8 *Id.*

9 Email from Horace Anderson, Jr., *Message from Dean Anderson about returning to the Haub Law campus* (May 27, 2020) (on file with author).

10 Message from Dean Matthew Diller, https://www.fordham.edu/info/29639/law_school_coronavirus_updates.

11 Matthew Diller, email: Webview: Fall Plan for Fordham Law School, https://t.e2ma.net/message/imgesl/2x6hcy.

12 Harvard Law School, Fall Term 2020 Frequently Asked Questions, *supra*.

13 Kelsey J. Griffin, *Harvard Law Student Files Class Action Lawsuit Demanding Tuition Reimbursement*, The Harvard Crimson (June 26, 2020), https://www.thecrimson.com/article/2020/6/26/harvard-coronavirus-law-school-tuition-lawsuit/.

14 Lauren Lantry, *ABC News Exclusive: Harvard Law student sues university over tuition prices as classes remain online*, ABC (June 22, 2020, 9:32 PM), https://abcnews.go.com/US/abc-news-exclusive-harvard-law-student-sues-university/story?id=71345292.

15 Kelsey J. Griffin, *Harvard Law Student Files Class Action Lawsuit Demanding Tuition Reimbursement*, *supra*.

16 Bob Van Voris, *Columbia, Pace Universities Sued by Students Over Virus Refunds*, Bloomberg (Apr. 23, 2020, 3:12 PM), https://www.bloomberg.com/news/articles/2020-04-23/columbia-pace-universities-sued-by-students-over-virus-refunds.

17 Pace Law School, Fall 2019 - Spring 2020 Tuition and Fees, https://law.pace.edu/admissions-aid/tuition-and-fees.

18 Email from Angie D'Agostino, *Transportation fee adjustment* (July 13, 2020) (on file with author).

19 *Law School Memes for Edgy T14s,* https://www.facebook.com/groups/lsm4et14s.

20 *July 2020 Bar Exam: Jurisdiction Information*, National Conference of Board Examiners (July 27, 2020), http://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/.

21 *Id.*

22 *Id.*

23 *Bar Examination Update*, New York State Court of Appeals (July 23, 2020), https://www.nycourts.gov/ctapps/index.htm.

24 *Id.*

25 *Id.*

26 *Bar Exam Modifications Due to COVID-19: 50 State Resources*, JUSTIA (last updated July 2020, viewed Aug. 3, 2020), https://www.justia.com/covid-19/50-state-covid-19-resources/bar-exam-modifications-during-covid-19-50-state-resources/.

27 Valerie Strauss, *Why this pandemic is a good time to stop forcing prospective lawyers to take bar exams*, WASH. POST. (July 13, 2020), https://www.washingtonpost.com/education/2020/07/13/why-this-pandemic-is-good-time-stop-forcing-prospective-lawyers-take-bar-exams/.

28 Tomas Chamorro-Premuzic, *Should You Go to Graduate School?*, HARV. BUS. REV. (Jan. 7, 2020), https://hbr.org/2020/01/should-you-go-to-graduate-school.

29 *Id.*

30 *Jobs for 2019 Law Grads Increased Before Pandemic Hit*, A.B.A., News Archive (June 8, 2020), https://www.americanbar.org/news/abanews/aba-news-archives/2020/06/jobs-for-2019-law-grads/.

31 Sara Lord, *ANALYSIS: June Legal Industry Jobs Situation Improved, For Some*, Bloomberg Law (July 2, 2020, 2:25 PM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-june-legal-industry-jobs-situation-improved-for-some.

32 *Id.*

33 ALM Staff, *Pay Cuts, Layoffs, and More: How Law Firms are Managing the Pandemic*, Am. Law (July 31, 2020, 5:00 AM), https://www.law.com/americanlawyer/2020/04/16/pay-cuts-layoffs-and-more-how-law-firms-are-managing-the-pandemic/?slreturn=20200619162426.

34 *Id.*

35 Sara Lord, *Analysis: What the COVID-19 Downturn Means for Lawyer Careers,* Bloomberg Law (May 18, 2020, 4:27 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-what-the-covid-19-downturn-means-for-lawyer-careers.

36 *Id.*

37 Vault Law Editors, *Coronavirus & Changes to Legal Attorney Hiring- Part 1,* Vault (Apr. 6, 2020), https://www.vault.com/blogs/vaults-law-blog-legal-careers-and-industry-news/coronavirus-changes-to-lateral-attorney-hiring-part-i.

38 *Id.*

39 U.S. Environmental Protection Agency, Memorandum on COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program (Mar. 26, 2020).

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How Much Is Too Much? Price-Gouging Under the Defense Production Act

BY JIM MITCHELL, ESQ. AND KAMERA BOYD

The escalation of the COVID-19 crisis throughout the country has brought stories of front-line health workers and everyday people assisting one another in extraordinary ways. Unfortunately, it has also provided examples of others trying to take unfair advantage of the circumstances for their own economic gain. Federal and state authorities have responded by stepping up efforts to enforce criminal laws targeting hoarding and price-gouging. To that end, on March 24, Attorney General William Barr issued a memorandum to all federal law enforcement agencies making clear that the U.S. government "will not tolerate bad actors who treat the crisis as an opportunity to get rich quick," and directed the creation of a task force dedicated to addressing pandemic-related "market manipulation, hoarding, and price-gouging" (the "March 24 Memorandum").[1] This article will examine the due process concerns raised by the government's use of the Defense Production Act of 1950 (DPA) to criminally prosecute alleged price-gouging activity.

Background

Price-gouging involves a supplier of a product or service taking wrongful advantage of a national or local emergency by charging excessive prices. In the absence of a specific federal price-gouging statute, the Department of Justice (DOJ) has relied on the DPA, together with other general fraud statutes, in bringing charges during the pandemic caused by COVID-19. Section 102 of the DPA is an anti-hoarding statute, providing that

> no person shall accumulate (1) in excess of the reasonable demands of business, personal, or home consumption, or (2) for the purpose of resale at prices *in excess of prevailing market prices*, materials which have been designated by the President as scarce materials or materials the supply of which would be threatened by such accumulation (emphasis added).[2]

Section 103 makes willful violations of the statute a misdemeanor with maximum penalties of one-year incarceration and a $10,000 fine.[3]

The DOJ's newly-established task force was directed to "develop effective enforcement measures" and "coordinate nationwide investigation and prosecution" of conduct in violation of the DPA. As part of the initiative, each United States Attorney's office has been told to designate an "experienced" prosecutor as part of the task force.[4] In conjunction with the March 24 Memorandum, President Trump issued an Executive Order, pursuant to Section 102 of the DPA, aimed at ensuring the availability of items "such as personal protective equipment and sanitizing and disinfecting products," and authorizing the Secretary of Health and Human Services to designate such materials as protected by the DPA.[5]

While the DOJ is dedicating significant resources to the enforcement of the federal statute, there remains little guidance upon which a potential supplier can rely to stay within the bounds of the law. For example, the DPA nowhere provides a definition or further gloss on the meaning of "in excess of prevailing market prices." Nor have the federal courts provided a clear interpretation of the phrase. Under these circumstances, there is scant notice available to those sellers during the pandemic who want to avoid triggering price-gouging scrutiny. While the DPA's applicability may be clear in extreme cases of price inflation (*i.e.,* "you know it when you see it"), there remains no objective guidance for those situations that fall at the margins.

The Due Process Clause requires that "no individual be forced to speculate, at peril of indictment, whether his [or her] conduct is prohibited."[6] The absence of any clear direction as to what constitutes price-gouging under the DPA implicates those Constitutional concerns. If a responsible seller of personal protective equipment wants to raise prices—perhaps because his or her suppliers have already done so, or because of increased delivery expenses in today's increasingly contactless environment, or maybe because the seller needs the additional income to pay furloughed employees—where is the line that the responsible seller should not cross? Can that seller make a better return on the goods than it would have before the pandemic because it had the foresight (or luck) to have developed a large inventory even before the emergence of the novel coronavirus? In other words, how much is too much?

Recent Federal Enforcement Efforts

These issues are likely to be addressed in the context of recent federal prosecutions. For example, two criminal complaints filed in the Eastern District of New York charge violations of the DPA: Complaint, *United States v. Singh*, (E.D.N.Y. Apr. 24, 2020) (No. 20-MJ-326) and Complaint, *United States v. Kent Bulloch, et al.*, (E.D.N.Y. Apr. 27, 2020) (No. 20-MJ-327). In the *Singh* complaint, the government alleges that a Long Island business owner resold N-95 respirators, facemasks, and clinical-grade disinfectants through his retail company "at prices in excess of prevailing market prices."[7] The investigation described in the complaint determined that the defendant had sold these essential products at markups ranging between 59% and 1,328% above his per-unit cost, although most of the markups were in the 100-200% range. In *Bulloch*, the defendants are alleged to have taken part in a scheme that included, among other things, inducing customers to purchase large numbers of non-existent respirators and face masks, along with selling personal protective equipment, respirators and surgical masks at over 200% of prevailing prices.[8]

Tracking the language of the DPA, both complaints allege that materials were being resold or attempted to be resold at "prices in excess of prevailing market prices" (*e.g.*, the phrase that remains further undefined by the federal statute). For example, the DPA offers no guidance as to how (if at all) a seller, in complying with the statute, should factor in additional costs that the seller may have incurred from distributors and/or manufacturers—a more than likely circumstance during a period of national crisis and potentially limited availability of supplies.

In *Singh*, the DOJ asserts that the DPA applies because the defendant resold essential materials at "huge markups."[9] But that vague phrase again offers no real help to the lack-of-notice concern. The complaint also analyzes the defendant's pricing as a percentage above his cost, while not actually discussing "prevailing market prices." While there is presumably some relationship between a given seller's cost and the prevailing market price, nothing in the statute addresses that relationship sufficient to guide sellers in setting prices during a national crisis. Presumably, 1,328% would qualify as a "huge markup" that should not be allowable under almost any circumstance, but is a price 59% above unit cost excessive at all, let alone so obviously excessive that it overcomes any constitutional notice concerns?[10]

The *Bulloch* Complaint, on the other hand, addresses the issue primarily by examining the defendants' price of items "compared to their price in the market prior to the COVID-19 pandemic."[11] In one instance, masks were allegedly sold at prices 300-400% greater than their prices prior to the pandemic.[12] This analysis seems to address more closely the language found

in the DPA. Nevertheless, it does not answer what percentage above previous pricing qualifies as being "excess[ive]," how to factor in increased costs, or the appropriate means of determining prevailing market pricing (*e.g.*, is it the average market price pre-crisis, or just the highest price that was on the market at the time?). Along the same lines, the DPA does not account for the fact that pre-pandemic pricing may differ greatly among geographic markets. Should a seller face potential criminal prosecution if his or her pricing exceeds the market price prior to a national emergency by under 5% or 10%? How about 20%?

While the recent prosecutions under the DPA arguably reflect alleged conduct at the egregious end of the spectrum, the foregoing suggests that in less obvious cases, worthy challenges to the vagueness of the statute will be brought under the Due Process Clause.[13] Similarly, under the rule of lenity, courts may wrestle with motions seeking dismissal of charges in circumstances where reasonable doubt exists that a given defendant's pricing fell within conduct prohibited by the DPA. *See Ladner v. United States*, 358 U.S. 169, 178 (1958) ("lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation [is] no more than a guess as to what Congress intended."); *Lockhart v. United States*, 136 S. Ct. 958, 968 (2016) (ambiguity should be resolved in favor of the defendant only "when the ordinary canons of statutory construction have revealed no satisfactory construction.").

State Anti-Price-Gouging Laws

In the absence of an established federal anti-price-gouging statute, states have enacted their own laws prohibiting excessive price hikes during times of crisis. These statutes primarily provide state attorneys general with civil remedies, although in some instances criminal prosecution is available as well. While the specific statutory language defining wrongful conduct varies from state to state, the statutes primarily fall into two categories, both of which seemingly offer better guidance to sellers than the federal statute. For example, some states, such as California and New Jersey, along with the District of Columbia, have set a specific percentage above market rates that sellers cannot exceed when setting prices for consumer goods or services during an emergency. Other states, including New York, Florida, and Texas, do not rely on specific percentages but rather a more subjective "gross disparity" from the market standard. These state statutes will generally identify the scope of goods and services covered by the law, as well as the exceptions or defenses that apply to mitigate the general standard. A review of several of these state provisions will both highlight the constitutional notice prob-

lem presented by the DPA and inform potentially useful modifications to the federal statute.

California (one of the few states that provides for a criminal remedy) prohibits selling or offering to sell items or services for more than 10% above the price charged by that seller for those goods and services immediately prior to the proclamation or declaration of an emergency. The prohibition applies to items such as food, goods, or services used for emergency cleanup, emergency supplies, and medical supplies. Price increases are not actionable if the increase is directly attributable to additional costs imposed by a supplier or for labor or materials used to provide the service. Also, if a business was offering an item for sale at a reduced price immediately before the emergency, it may nevertheless use the price at which it normally sold the item to calculate the statute's limit on the price increase. Violations of the provision are misdemeanors.[14]

Similarly, District of Columbia Code 28-4102 prohibits charging greater than the "normal average retail price" for merchandise or services, which is defined as "not more than 10% more than the price at which similar services were sold or offered" in the area in the 90 days preceding the emergency. In the case of merchandise, it is the price reflecting the same percentage mark-up over the wholesale cost for similar merchandise prior to the emergency.[15]

New Jersey's price-gouging statute also prohibits selling covered items at more than 10% of the price that was offered in the usual course of business just prior to the emergency. The statute allows for an exception when the seller's costs have increased due to supplier or other increases attributable to the state of emergency.[16]

Florida prohibits selling essential commodities at an "unconscionable price," further defined as a gross disparity with the average price the seller charged in the usual course of business (or was readily obtainable in the area) during the 30-day period immediately prior to the state of emergency. A price is not unconscionable if the price increase is attributable to additional costs incurred in providing the commodity. Approval of the price by an appropriate government agency is another exception to the law.[17]

New York's statutory prohibition covers items sold at an "unconscionably excessive price," which—similar to Florida—is defined as a gross disparity between the price of the goods or services and the price at which they were sold by the defendant in the usual course of business (or readily obtainable in the area) immediately prior to the market disruption.[18] The prohibition broadly applies to "consumer goods and services used, bought or rendered primarily for personal, family, or household purposes."[19] Evidence of additional costs offers a defense.[20]

Finally, Texas prohibits selling "at an exorbitant or excessive price" and identifies no specific exceptions or defenses, largely echoing the federal statute.[21]

As noted above, these state statutes primarily provide for civil, not criminal, penalties. And while there have been vagueness/due-process challenges to certain of these state statutes, they not surprisingly arise in the context of civil enforcement of a statute. For example, in *People v. Two Wheel Corp.*, an intermediate appellate court upheld New York's price-gouging statute against an argument of unconstitutional vagueness.[22] The New York Attorney General had charged the defendant with selling generators at "unconscionably excessive" prices during a widespread power outage.[23] While the court recognized that "no fixed rate or percentage of permissible price increase [was] supplied" in the statute, the standards set forth nevertheless were determined "sufficient to apprise the [sellers] that their gross price increases of as much as 67 percent during the power outage were prohibited unless they were attributable to additional costs imposed by the suppliers of the generators."[24] *See also State ex rel. Hood v. Louisville Tire Ctr., Inc.*, 55 So. 3d 1068, 1073 (Miss. 2011) (Mississippi statute's language referring to pricing in the "same market area" and "at or immediately before" an emergency was not impermissibly vague and thus did not violate the Due Process Clause).

Again, these state decisions were in cases concerning *civil* enforcement of price-gouging statutes. Thus, the courts did not have to address the possibility—and more detrimental consequence—that a defendant could be incarcerated for running afoul of an unconstitutionally vague statute. Moreover, decisions like these seemingly offer little help to those responsible sellers who want to increase pricing at a time of national emergency while avoiding potential prosecution under the DPA.

Conclusion

There is no debate that the DPA and other state statutes aimed at curbing price gouging serve an important purpose, particularly during times of national crisis. Nevertheless, the lack of guidance offered by the DPA as to when a seller (and potential defendant) has marked up a good or service "in excess of prevailing market prices" raises a significant due-process concern. Some state statutes address this concern by providing specific percentages, above which price increases are deemed in violation of the law, while often allowing for the possibility that higher increases can be justified if supply costs have gone up as well. A fair enforcement regime under the DPA would seem to demand similar, more specific guidelines.[25] This concern is even more acute given the recent step-up in criminal prosecutions under the

statute during the COVID-19 crisis.

Deciding what specific parameters should apply is, of course, another issue. For example, those states that have set a definite limit often use a standard that bars any increase over 10% from what the seller charged (or was available in the market) immediately prior to an emergency's onset. Whether that 10% standard or a different one is appropriate under the DPA should be the subject of an analysis that carefully balances the need to root out wrongful market behavior with the interest in sufficiently incentivizing sellers to remain as market providers of what may often be vital goods or services during a time of crisis. Currently, with no real standard to guide them, those sellers remain in the dark as to "how much is too much," and face the very real risk of criminal prosecution without constitutionally fair notice.

Endnotes

1 Office of the Attorney General, *Memorandum for All Heads of Department Components and Law Enforcement Agencies* (Mar. 24, 2020), https://www.justice.gov/file/1262776/download, at 1.

2 50 U.S.C. § 4512.

3 *Id.* § 4513.

4 March 24 Memorandum, *supra*.

5 Exec. Order No. 13,910, 85 Fed. Reg. 17,001 (Mar. 23, 2020), https://www.federalregister.gov/documents/2020/03/26/2020-06478/preventing-hoarding-of-health-and-medical-resources-to-respond-to-the-spread-of-covid-19.

6 *Dunn v. United States*, 442 U.S. 100, 112 (1979) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 [1972]).

7 *Singh*, No. 20-MJ-326, ECF Dkt. No. 1 at 1.

8 *See Bulloch*, No. 20-MJ-327, ECF Dkt. No. 1 ("*Bulloch* Complaint").

9 Department of Justice, U.S. Attorney's Office, E.D.N.Y., *Long Island Man Charged Under Defense Production Act with Hoarding and Price-Gouging of Scarce Personal Protective Equipment* (Apr. 24, 2020), https://www.justice.gov/usao-edny/pr/long-island-man-charged-under-defense-production-act-hoarding-and-price-gouging-scarc-0.

10 Of course, if unconstitutionally vague, the DPA would be unenforceable under any circumstances, no matter the size of a seller's markup.

11 *Bulloch* Complaint at 23.

12 *Id.*

13 For example, in *United States v. L. Cohen Grocery Co.,* 255 U.S. 81, (1921), the Supreme Court upheld a lower court's voiding of the Lever Act, a federal statute criminalizing under certain circumstances the willful making of "any unjust or unreasonable rate or charge." The Court found the language of the statute lacked "an ascertainable standard of guilt" adequate to inform persons charged under the

statute of the "nature and cause of the accusation against them." *Id.* at 89. *See also, United States v. National Dairy Products,* 372 U.S. 29, 37 (1963) (Black, J., dissenting) ("The rule established by [*L. Cohen Grocery Co.*] has been often followed.")

14 Cal. Penal Code § 396(b)-(h).

15 D.C. Code § 28-4101(2).

16 N.J. Stat. Ann. § 56:8-108.

17 Fla. Stat. Ann. § 501.160.

18 N.Y. Gen. Bus. Law § 396-r(2), (3).

19 *Id.* § 396-r(2).

20 *Id.* § 396-r(3)(c).

21 Tex. Bus. & Com. Code. Ann. § 17.46(b)(27).

22 128 A.D.2d 507, 510 (N.Y. App. Div. 1987). The vagueness argument was not further appealed, and the Appellate Division decision was affirmed on other grounds. *See* 71 N.Y.2d 693, 697-700 (1988).

23 *Id.* at 508-09.

24 *Id.* at 510.

25 Since the March 24 Memorandum, several bills have been introduced in Congress aimed at price-gouging that vary in their language. *See, e.g.,* H.R. 6472 (a bill entitled the "COVID-19 Price Gouging Prevention Act" would give additional enforcement powers to the FTC and state attorneys general to prevent the sale of a "good or service" at an "unconscionably excessive" price for the duration of a public health emergency due to COVID-19) and H.R. 6450 (prohibiting price increases on consumer goods and services of more than 10% during a declared emergency). Ballard Spahr LLP, *Congress Considering New Federal Price Gouging Laws* (Apr. 10, 2020), https://www.ballardspahr.com/alertspublications/legalalerts/2020-04-10-congress-considering-new-federal-price-gouging-laws.

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The Negative, and Often Inconsequential, Impact Remote Learning Has Had on Students With Disabilities During COVID

BY ALISON MORRIS, ESQ.

On March 16, 2020, Governor Cuomo issued Executive Order 202.4,[1] ordering that "…every school in the state of New York is hereby directed to close no later than Wednesday, March 18, 2020…."[2] The New York State Education Department (NYSED) followed suit the following day,[3] stating schools would close in accordance with Governor Cuomo's order. Since then, schools have been providing instruction and services remotely. For many students with disabilities, this has effectively meant that they have not received meaningful instruction or services since March 2020. There is a spectrum of students with disabilities, and the impact virtual learning has had on their ability to receive appropriate instruction and services in order to make progress falls somewhere on that continuum. On one end, there are students who are, for instance, getting some direct instruction from teachers and related services (e.g., speech-language therapy, occupational therapy, physical therapy, counseling services) as required per their 504 Plans or their individualized education programs (IEPs). While the instruction and services for some students may be as effective as when the students attended an in-person program, there are several pieces of the programs that just cannot be duplicated with a virtual model. For instance, there is a socialization aspect that students are losing during this time. In addition, having a licensed therapist be able to demonstrate in-person how to properly engage in an action, versus showing or describing to that student that same action over the phone or via video, is not comparable.

As you move further toward the other end of the spectrum, the severity of disability and inability of a school district to meet that student's needs during this time becomes more glaring. For instance, there are students with severe autism or intellectual disabilities who cannot attend to virtual instruction lessons, who are not receiving any individualized instruction tailored to their functioning levels, and who cannot sit through a virtual therapy session and therefore receive no meaningful or substantive benefit from those sessions. Consequently, even if they are "receiving" their mandated related services and instruction, what is remote learning actually accomplishing for these students must be carefully considered.

On June 5, 2020, Governor Cuomo issued Executive Order 202.37,[4] declaring that "special education services and instruction required under Federal,

state or local laws, rules, or regulations, may be provided in person for the summer term in school districts."[5] However, because the language in the Executive Order is permissive and not mandatory, many school districts did not providing services in person over the summer, further impacting the students who need it most.[6]

Since remote learning began taking place in March 2020, many students with disabilities fall into at least one the following situations:

- The student has not received any of the related services that his/her IEP mandates.
- The student eventually began receiving his/her related services, but not at the frequency mandated per the student's IEP. In fact, the New York City Department of Education began requiring that all students with IEPs receive a Special Education Remote Learning Plan, which would state what "[s]pecial education and related services … will be provided remotely during the school closure," as opposed to what the student's IEP mandated.[7]
- If the student did begin to receive related services, they have not been meaningful or have not provided any substantive benefit to enable the student to make actual, meaningful progress. For instance, service providers calling to check in on the student, sending packets for the parent to complete with the student (sometimes well above the student's functioning level), merely sending videos for the student to watch, or attempting to have a parent provide services to the student without support. For a student with severe cognitive deficits, sensory deficits, and attention deficits, the implementation of related services in this manner is effectively meaningless.
- The student did not receive any instruction facilitated by a school district, either for a short time or to this date.
- The student is receiving instruction, but it is meaningless and not providing any substantive benefit that will allow the student to make any meaningful academic progress. For instance, for a student who is functioning well below grade level and cannot read, the district is not providing any direct, individualized instruction to the student, and just sending to the student what the district sends to all other students. Similarly, students who are extremely low functioning are receiving videos to watch as their instruction.

A June 18, 2020 article, where the parent of a "6-year-old … severely autistic and non-verbal" child who attends a Rockland BOCES program, encompasses the frustration and issues remote learning has posed for students with disabilities: "'My daughter requires 24/7 attention. She constantly puts things

she is not supposed to in her mouth … And virtual learning has not worked at all for us.'"[8] Similarly, the article quotes the superintendent of the Pleasantville Union Free School District, who acknowledged her students who receive special education "'need one-to-one instruction, which can be challenging in an e-learning environment.'" (Pleasantville Union Free School District, as the article pointed out, did create an in-person summer program for their special education students.)

A June 9, 2020 article further highlights the severely damaging impact of remote learning on students with special needs. The mother of an "11-year-old son … [who] is non-verbal and severely developmentally delayed, [explained that he] lost the three words he had learned over the course of his schooling — hi, bye and mom."[9] The mother stated: "'This is the longest he's ever gone without services since he was 16 months old. The regression is severe. The skills that he had that took him years to gain, such as self- hygiene, basic math, are now gone.'"

In addition, not only are students with special needs not receiving instruction at their level, in a form they can understand, or not receiving the direct instruction they require from their teachers and service providers, the parents of students with special needs have now become the individuals attempting to instruct and provide services as best they can to their children during this time.[10]

School districts, including the New York City Department of Education, have provided families with technology devices if a student did not have one and needed one in order to receive remote learning. However, in many cases, the devices and programs recommended were not always tailored to the specific student's needs or levels of functioning, again making the device and the instruction it could provide meaningless.

Federal guidance initially minimized providing services to students with disabilities during COVID. The United Stated Department of Education's (USDOE's) March 12, 2020 "Questions And Answers On Providing Services To Children With Disabilities During The Coronavirus Disease 2019 Outbreak" stated, in response to the question whether school districts are "required to continue to provide a free appropriate public education (FAPE) to students with disabilities during a school closure caused by a COVID-19 outbreak:"[11]

> ….If an LEA closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then an LEA *would not be required to provide services to students with disabilities* during that same period of time. *Once school resumes, the LEA must make every effort to provide special education and related services to the child in accordance with the child's [IEP] or [504 Plan]….* The Department understands there may be exceptional circumstances that could affect how a particular service is provided. In addition, an IEP Team and, as appropriate to an individual student with a disability … would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements….[12]

With this language, the result is school districts could, in essence, disregard students with disabilities during this time. Then, if necessary or warranted, compensatory (or make-up services) could be an option for the family at a later date.

NYSED followed suit in its March 27, 2020 "Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State" memorandum,[13] where NYSED stated: "School districts must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's [IEP] …. During this emergency, schools may not be able to provide all services in the same manner they are typically provided."[14]

However, both the USDOE and NYSED specifically stated that school districts must modify their remote learning plans to meet the needs of students with disabilities.[15] NYSED stated school districts:

> …must consider ways of ensuring that the planned activities are accessible to students with disabilities. Consideration should be given to including strategies to ensure that students with disabilities have equal access to the continuity of learning and receive educational benefits that are comparable to those received by others in the program and modified, or separate, aids and services necessary to provide access to students with disabilities. Where technology itself imposes a barrier to access or where educational materials simply are not available in an accessible format, educators may still meet their legal obligations by providing children with disabilities equally effective alternate access to the curriculum or services provided to other students.[16]

Unfortunately, many school districts have not modified their plans to address the needs of their students with disabilities, ranging from the student with dyslexia or dysgraphia who cannot read what the teacher is putting on slides or write what the teacher is requesting in an assignment, to the student with severely limited cognitive skills, who is receiving video clips to watch as their "instruction".[17]

As time passed, NYSED made clear that "there [is] flexibility regarding the provision of services on IEPs (e.g., group or individual sessions; specific group size for related services, frequency, duration and location of related services, special class size ratio, etc.)" as "during this emergency, schools may not be able to provide all services in the same manner they are typically provided."[18]

The option afforded to parents was that if this occurs, school districts might "need to provide compensatory services in the future," and school districts "must" maintain documentation "on the instruction and services that were provided to each student … for consideration when making an individualized determination as to whether and to what extent compensatory services may be needed when schools reopen."[19]

NYSED recently walked back its stance on school districts providing compensatory services to students with disabilities for the school districts failure to provide services during COVID – the only option for relief the USDOE or

NYSED has provided for families if services and instruction have not been appropriate or meaningful during this time. In NYSED's June 20, 2020 "Supplement #2: Questions and Answers" memorandum, in response to the question:

> Is a student automatically entitled to compensatory services because his/her special education programs and services provided through distance instruction provided virtually, online or telephonically did not mirror the offer of FAPE on his/her IEP?[20]

NYSED responded "No."[21] NYSED further explained:

> During the period of time schools are closed… schools may not be able to provide all education and related services in the same manner as they are typically provided. As such, the provision of FAPE may include, as appropriate, special education and related services through distance instruction provided virtually, online, or telephonically at a frequency and/or duration that may differ from the IEP …. *Alternative options for instruction and related service delivery, even when provided in a different mode, frequency and/or duration of services from the IEP recommendation, would not necessarily result in a denial of FAPE*.[22]

This is, seemingly, a shift from NYSED emphasizing that school districts "must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's [IEP],"[23] and that, if school districts cannot do so, school districts must be on alert that they will need to provide compensatory services to those students. Moreover, in NYSED's April 27, 2020 Question and Answer memorandum, NYSED explicitly stated that while school districts do have flexibility during this time regarding providing "the special education and related services identified in the student's IEP.… Making every effort possible now to provide required special education programs and services is the most effective way to mitigate the need to provide compensatory services in the future."[24]

There is no guidance or options available to parents and families now for what to do when the manner in which school districts are offering instruction and services to their students with disabilities are not practicable, effective, or meaningful. For many, what school districts are providing to their children with disabilities at this time is not appropriate and as a result, students are suffering. Despite requesting additional support (which should not be necessary as these students are already identified as having reading, attention, sensory, and/or cognitive issues), school districts are not providing further support. While NYSED did state that school districts "… must determine the type and extent of compensatory services" to be provided "if a student with a disability has needs that are so complex that he/she was not able to receive special education programs and services through distance instruction provided through virtual, online or telephonic methods[,]"[25] there is still no guidance on what the parents can do until or if compensatory services begin.

While creativity and openness to work with school districts must come into play on the parents' end and we recognize the challenges the school dis-

tricts are facing, school districts, in many cases, are not meeting these families in the middle, to provide any alternatives for additional instruction or more intensive instruction and services for the students that need it most. It is further unclear if school districts will consider compensatory services at 504 and IEP meetings as guidance suggests, or if the burden will fall to the parents to request compensatory services, and then have to file due process complaints if their school district does not provide compensatory services for the inappropriate and meaningless remote services it provided during COVID.

Many schools will have hybrid services in the fall, with a portion of instruction and services still being remote and conducted virtually. The question of what the impact of remote learning on students with special needs has been thus far, and what districts take from this going forward, must be taken into consideration. The cost so far has been monumental, and the impact of the total loss of services for some, and the loss of meaningful services for others, is severe and will likely be long lasting for these students who cannot make up for the lack of appropriate instruction and services like typically developing students can. Some of these students have lost five months of the intensive instruction and therapeutic services they required just to continue progressing toward meeting basic, foundational level skills. These students, their families, and their school districts might be seeing the lasting effects of this for years to come.

Endnotes

1 N.Y. Exec. Order 202.4 (March 16, 2020).

2 *Id.*

3 Shannon L. Tahoe, N.Y. State Educ. Dep't, ***Additional Guidance on Statewide School Closures*** *Due to Novel Coronavirus (COVID-19) Outbreak in New York State* (March 17, 2020), http://www.nysed.gov/common/nysed/files/programs/coronavirus/nysed-covid-19-third-guidance-3-17-20.pdf.

4 N.Y. Exec. Order 202.37 (June 5, 2020).

5 *Id.*

6 Swapna Venugopal Ramaswamy, *Despite Cuomo's approval, some children with special needs will not receive in-person services this summer*, June 18, 2020, https://www.lohud.com/story/news/education/2020/06/18/in-person-summer-school-special-needs-kids/3208790001/.

7 New York City Department of Education, *COVID-19 Closure Special Education-Remote Learning Plan*, https://www.uft.org/sites/default/files/attachments/covid-19-special-ed-plan.pdf (last visited July 30, 2020).

8 Swapna Venugopal Ramaswamy, *Despite Cuomo's approval, some children with special needs will not receive in-person services this summer*, June 18, 2020, https://www.lohud.com/story/news/education/2020/06/18/in-person-summer-school-special-needs-kids/3208790001/.

9 Swapna Venugopal Ramaswamy, *Parents of children with special needs hopeful about summer school amid lack of clarity*, June 9, 2020, https://www.lohud.

com/story/news/education/2020/06/09/special-needs-children-nys-summer-school/3143172001/.

10 Gary Stern, *Survey: Westchester parents spend average of three hours a day helping kids with schoolwork*, June 19, 2020, https://www.lohud.com/story/news/education/2020/06/19/westchester-parents-spend-3-hours-day-helping-schoolwork-survey/3221723001/ ("Parents of students with special needs said they were assisting their children with schoolwork an average of 3.3 hours a day, an increase of 2.2 hours each day since remote instruction began.").

11 U.S. Dep't of Educ., *QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING THE CORONAVIRUS DISEASE 2019 OUTBREAK*, Question and Answer A-1, March 12, 2020, https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf.

12 *Id.* (emphasis added),

13 Christopher Suriano, N.Y. State Educ. Dep't, *Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State*, Question 1, March 27, 2020, http://www.p12.nysed.gov/specialed/publications/2020-memos/nysed-covid-19-provision-of-services-to-swd-during-statewide-school-closure-3-27-20.pdf. *See also* U.S. Dep't of Educ., *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities,* March 21, 2020, https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf.

14 Christopher Suriano, N.Y. State Educ. Dep't, *Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State*, Question 1, March 27, 2020, http://www.p12.nysed.gov/specialed/publications/2020-memos/nysed-covid-19-provision-of-services-to-swd-during-statewide-school-closure-3-27-20.pdf.

15 *Id.;* U.S. Dep't of Educ., *QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING THE CORONAVIRUS DISEASE 2019 OUTBREAK*, Question and Answer A-1, March 12, 2020, https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf.

16 Christopher Suriano, N.Y. State Educ. Dep't, *Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State*, Question 1, March 27, 2020, http://www.p12.nysed.gov/specialed/publications/2020-memos/nysed-covid-19-provision-of-services-to-swd-during-statewide-school-closure-3-27-20.pdf.

17 *See also The switch to remote learning could leave students with disabilities behind*, March 24, 2020, https://www.pbs.org/newshour/education/the-switch-to-remote-learning-could-leave-students-with-disabilities-behind (highlighting ways for teachers to modify virtual lesson plans, but noting that "teachers may not be able to reach all students virtually" due to each students' particular disability.).

18 Christopher Suriano, N.Y. State Educ. Dep't, *Supplement #1 - Provision of Services*

to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State – Additional Questions and Answers (April 27, 2020), Question 27, http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-1-covid-qa-memo-4-27-2020.pdf.

19 *Id.*

20 N.Y. State Educ. Dep't, *SUPPLEMENT #2 - PROVISION OF SERVICES TO STUDENTS WITH DISABILITIES DURING STATEWIDE SCHOOL CLOSURES DUE TO NOVEL CORONAVIRUS (COVID-19) OUTBREAK IN NEW YORK STATE,* Question 45, June 20, 2020, http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-2-covid-qa-memo-6-20-2020.pdf.

21 *Id.*

22 *Id.* (emphasis added).

23 *See* N.Y. State Educ. Dep't, *Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State*, Question 27, March 27, 2020, http://www.p12.nysed.gov/specialed/publications/2020-memos/nysed-covid-19-provision-of-services-to-swd-during-statewide-school-closure-3-27-20.pdf.

24 Christopher Suriano, N.Y. State Educ. Dep't, *Supplement #1 - Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State – Additional Questions and Answers* (April 27, 2020), http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-1-covid-qa-memo-4-27-2020.pdf.

25 N.Y. State Educ. Dep't, *SUPPLEMENT #2 - PROVISION OF SERVICES TO STUDENTS WITH DISABILITIES DURING STATEWIDE SCHOOL CLOSURES DUE TO NOVEL CORONAVIRUS (COVID-19) OUTBREAK IN NEW YORK STATE*, Question 48, June 20, 2020, http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-2-covid-qa-memo-6-20-2020.pd

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The Child Parent Security Act

BY ELIZABETH NAKAMURA, ESQ.

The Child-Parent Security Act ("CPSA"), which was signed into law on April 3, 2020 as part of the Fiscal Year 2021 Budget and which will come into effect on February 15, 2021, makes two major changes to New York law: (1) it legalizes gestational surrogacy and (2) it provides a clear framework for establishing parental rights to a child conceived via assisted reproduction.[1] This new law will significantly impact same-sex couples, unmarried parents, and single parents whose children have been conceived in whole or in part through assisted reproduction, whether that be gestational surrogacy or gamete donation.

The stated legislative intent behind the CPSA was to bring New York up to speed with new advances in assisted reproduction technologies, to avoid uncertainty as to the legal parentage of children born using such methods and to legalize gestational surrogacy agreements.[2]

Gestational Surrogacy

Under CPSA, compensated gestational surrogacy is legal and protected. However, prior to the passage of the CPSA, New York[3] was one of only three US states in which compensated gestational surrogacy was illegal, the other two being Louisiana and Michigan.[4] In simple terms, compensated gestational surrogacy is where the surrogate carries a child to term who carries none of the surrogate's biological material. The surrogate mother, also known as the gestational carrier, is impregnated with an embryo created via invitro-fertilization using the genetic material of one, or both, of the intended parents.[5] It also covers surrogacy of children conceived using entirely donated genetic material on behalf of the intended parents.[6] However, the CPSA does not affect surrogates who have contributed genetic material to the conception of the child.[7]

For the CPSA to apply, both the surrogate and at least one of the intended parents must be US citizens or permanent residents.[8] If the parties involved meet those requirements, a surrogacy agreement can be executed in accordance with the terms of CPSA to protect both the surrogate and the intended parents.[9] A surrogacy agreement under the CPSA is unaffected if, during the surrogate's pregnancy, the surrogate gets married or the intended parents get divorced or legally separated.[10] A surrogacy agreement ensures there is no dispute over the intended parents' parental rights to the child.

Further, in addition to legalizing compensation for surrogates, the CPSA also codifies a Surrogates' Bill of Rights, which grants the surrogate control over her own health care decisions and psychological counselling and ensures that the intended parents are required to pay for the surrogate to have both (i) legal counsel of her own choosing, and (ii) health insurance and health care both for the entire duration of the pregnancy and for up to twelve months after the child is born.[11] Crucially, the CPSA allows the surrogate to back out of the surrogacy agreement without penalty at any time prior to becoming pregnant and there is no specific performance remedy offered.[12]

Conception via Gamete and Embryo Donation to Gestating Parent

The CPSA provides clarity on the parental rights with respect to children conceived via assisted reproductive technologies, including sperm, egg, or embryo donation and/or invitro fertilization.

Prior to the passage of the CPSA, Domestic Relations Law Section 73, the sole legislation on the issue, only covered sperm donation and only conferred parental rights on the intended parents if they were married when the child was conceived using donated sperm.[13] Section 73 was originally passed in 1974, well before egg/embryo donation or in vitro fertilization came into practice.[14] Crucially, even in situations where the narrow provisions of Section 73 did apply, it left parents vulnerable to claims from sperm donors, especially known donors, seeking parental rights to the child.

Further, because of the marriage restriction, Section 73 did not confer parental rights on the unmarried partner of the gestating parent,[15] who was forced to seek parental rights through the long, costly, and invasive process of second parent adoption after the child's birth, which often involved a thorough criminal background check, a child abuse clearance, and a home study.[16] It is important to note that unmarried parents are still permitted to seek second parent adoption even after the passage of the CPSA but they no longer need to do so to gain parental rights to their child.[17] The judgment of parentage afforded under the CPSA is binding and irrevocable, ensures a child's parentage is clear from the moment of his or her birth, and is entitled to Full Faith and Credit across the United States and abroad.[18]

Domestic Relations Law Section 73 will be repealed by CPSA on February 15, 2021[19] and Article 5-c Added to the Family Court Act to Address Parental Rights for Children Born Via Surrogacy or Via Assisted Reproductive Technologies

In addition to repealing the narrow and outdated Domestic Relations Law Section 73,[20] the CPSA adds a new article, Article 5-C, to the Family Court Act entitled "Judgment of Parentage for Children Conceived Through Assisted Reproduction or Pursuant to Surrogacy Agreements."[21] It is key to understand that this new Article does not apply to a child conceived through sexual intercourse, but only via assisted reproduction, whether that be gestational surrogacy or gamete/embryo donation.[22]

In broad terms, Article 5-C creates a framework to establish the legal parentage of a child born via assisted reproductive technologies. It also allows the spouse or unmarried partner of a child's gestating parent to establish legal parenthood of that child where said non-gestating spouse or unmarried partner either "provided gametes[23] for or consented to assisted reproduction with the consent of the gestating parent."[24] In other words, under the CPSA, parentage may be assessed at birth for an intended parent who neither contributed genetic material to the production of the child nor is married to the parent who gave birth to the child.[25]

Article 5-C also allows the intended parents of a child born through gestational surrogacy to be granted parental rights immediately upon the child's birth, pursuant to a surrogacy agreement, even if the child was conceived wholly with donated gametes and does not contain biological contributions from either intended parent.[26] As stated above, this does not apply to situations where the surrogate contributes her own genetic material to the child she is carrying.[27]

Finally, in a key provision addressing the legislative uncertainty over the rights of sperm donors in cases prosecuted under Domestic Relations Law Section 73, the CPSA severely restricts the ability of donors to assert parental rights over the children produced using their donated gametes. In short, a donor forsakes their parental rights if they've shown "donative intent" by (a) donating anonymously to a storage facility for gametes and/or embryos or (b) submitting a record "acknowledging the donation and confirming the donor has no parental interest."[28] In the absence of either of those two conditions, donative intent can be shown by clear and convincing evidence.[29]

In sum, the CPSA brings New York law up to speed with developments in reproductive and medical technology. It addresses the needs of modern families who may not be married, but are still just as much parents of their shared child and it provides a measure of stability by preventing gamete donors from making claims in the future to the children produced by their

donations. It is a triumph of progress and protects the rights of children with unmarried, single, and same-sex parents on unequal footing with the children of parents in a heterosexual marriage.

Endnotes

1 Gov. Andrew M. Cuomo, Governor's Press Office, *Governor Cuomo Signs FY 2021 Budget*, "Legalizing Gestational Surrogacy in New York State", April 3, 2020, https://www.governor.ny.gov/news/governor-cuomo-announces-highlights-fy-2021-budget (last accessed May 20, 2020); *Section 73: Legitimacy of Children Born by Artificial Insemination*, The New York State Senate, https://www.nysenate.gov/legislation/laws/DOM/73 (repealed February 15, 2021) (last accessed May 20, 2020).

2 State Senator Brad Hoylman, *S2071B (Active) – Sponsor Memo*, The New York State Senate, https://www.nysenate.gov/legislation/bills/2019/s2071?intent=support (last accessed May 18, 2020).

3 N.Y. Dom. Rel. § 122 ("Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable") (repealed by the CPSA as of February 15, 2021).

4 *Surrogate Parenting Act, Act 199 of 1988*, Legislative Council, State of Michigan, http://www.legislature.mi.gov/(S(i0p5cg45xv4se045b1kcxba5))/documents/mcl/pdf/mcl-act-199-of-1988.pdf (last accessed May 20, 2020); Rep. Bishop, et al., *House Bill No. 1102*, Louisiana State Legislature, https://www.legis.la.gov/legis/ViewDocument.aspx?d=1011810 (last accessed May 20, 2020).

5 American College of Obstetricians and Gynecologists' Committee on Ethics, *Number 660*: *Family Building Through Gestational Surrogacy*, March 2016, https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2016/03/family-building-through-gestational-surrogacy (last accessed May 20, 2020).

6 State Senator Brad Hoylman, *S2071B (Active) – Sponsor Memo*, The New York State Senate, https://www.nysenate.gov/legislation/bills/2019/s2071?intent=support (last accessed May 18, 2020).

7 *Id*.

8 N.Y. Fam. Ct. Act § 581-402 (effective February 15, 2021), https://legislation.nysenate.gov/pdf/bills/2019/s2071b (last accessed May 20, 2020).

9 N.Y. Fam. Ct. Act §§ 581-401 – 581-409 "Surrogacy Agreement" (effective February 15, 2021), https://legislation.nysenate.gov/pdf/bills/2019/s2071b (last accessed May 20, 2020).

10 N.Y. Fam. Ct. Act § 581-404.

11 N.Y. Fam. Ct. Act §§ 581-601 – 581-607 "Surrogates' Bill of Rights" (effective February 15, 2021), https://legislation.nysenate.gov/pdf/bills/2019/s2071b (last accessed May 20, 2020).

12 N.Y. Fam. Ct. Act § 581-405 (effective February 15, 2021), https://legislation.nysenate.gov/pdf/bills/2019/s2071b (last accessed May 20, 2020).

13 N.Y. Dom. Rel. § 73.

14 Nicholas Wade, "Pioneer of In Vitro Fertilization Wins Nobel Prize," The New York Times, October 4, 2010, https://www.nytimes.com/2010/10/05/health/research/05nobel.html (the first child born via in vitro fertilization was Louise Brown, born July 25, 1978) (last accessed May 20, 2020).

15 N.Y. Dom. Rel. § 73.

16 Adoptive and Foster Family Coalition, *Stepparent Adoption in New York*, https://affcny.org/stepparent-adoption-in-new-york/ (stepparent adoption is called "second parent adoption" if the parents are unmarried) (last accessed May 20, 2020).

17 N.Y. Dom. Rel. § 117; N.Y. Fam. Ct. Act §§ 581-201 – 581-206 (effective February 15, 2021), https://legislation.nysenate.gov/pdf/bills/2019/s2071b (last accessed May 20, 2020).

18 State Senator Brad Hoylman, *S2071B (Active) – Sponsor Memo*, The New York State Senate, https://www.nysenate.gov/legislation/bills/2019/s2071?intent=support (last accessed May 18, 2020).

19 *Section 73: Legitimacy of Children Born by Artificial Insemination*, The New York State Senate, https://www.nysenate.gov/legislation/laws/DOM/73 (repealed February 15, 2021) (last accessed May 20, 2020).

20 *Section 73: Legitimacy of Children Born by Artificial Insemination*, The New York State Senate, https://www.nysenate.gov/legislation/laws/DOM/73 (repealed February 15, 2021) (last accessed May 20, 2020).

21 N.Y. Fam. Ct. Act, Article 5-C (effective February 15, 2021), https://legislation.nysenate.gov/pdf/bills/2019/s2071b (last accessed May 20, 2020).

22 N.Y. Fam. Ct. Act § 581-301 (effective February 15, 2021), https://legislation.nysenate.gov/pdf/bills/2019/s2071b (last accessed May 20, 2020).

23 A gamete is a cell that has the potential to form an embryo when combined with another gamete; both eggs and sperm are gametes.

24 State Senator Brad Hoylman, *S2071B (Active) – Sponsor Memo*, The New York State Senate, https://www.nysenate.gov/legislation/bills/2019/s2071?intent=support (last accessed May 18, 2020)

25 N.Y. Fam. Ct. Act §§ 581-201 – 581-204 (effective February 15, 2021), https://legislation.nysenate.gov/pdf/bills/2019/s2071b (last accessed May 20, 2020).

26 N.Y. Fam. Ct. Act § 581-203 (effective February 15, 2021), https://legislation.nysenate.gov/pdf/bills/2019/s2071b (last accessed May 20, 2020).

27 State Senator Brad Hoylman, *S2071B (Active) – Sponsor Memo*, The New York State Senate, https://www.nysenate.gov/legislation/bills/2019/s2071?intent=support (last accessed May 18, 2020).

28 N.Y. Fam. Ct. Act, Article 5-C, https://legislation.nysenate.gov/pdf/bills/2019/s2071b

29 N.Y. Fam. Ct. Act § 581-202(d) (effective February 15, 2021), https://legislation.nysenate.gov/pdf/bills/2019/s2071b (last accessed May 20, 2020).

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The New York Revolution in Choice of Law: Does the *Padula* Approach Still Hold Water?

BY KONSTANTIN OSCHEPKOV

The innovations in choice-of-law approaches led by the New York Court of Appeals in the latter part of the twentieth century have often been referred to as the "New York Revolution."[1] The new distinction between conduct-regulating and loss-allocating rules was groundbreaking, but it led to a new dilemma: how to analyze statutes that are both conduct-regulating and loss-allocating.

The *Padula*[2] approach offered an answer: introducing the idea that a rule can be either *primarily* conduct-regulating or *primarily* loss-allocating. Two decades later, it remains unclear exactly what principles should govern in deciding whether a statute is *primarily* one or the other. An overview of the opinions by New York state and federal courts suggests that *Padula* continues to be acknowledged but is not actually applied to case analysis. Perhaps due to lack of clear guidance to determine whether the law at issue is *primarily* conduct-regulating or loss-allocating, the *Padula* approach remains in jurisprudential limbo. To revive *Padula*, the New York courts should articulate a clear standard.

1. Background

Up until about the middle of the 20th century, New York choice-of-law decisions had been based on rather inflexible territory-oriented rules characteristic of the First Restatement of Conflicts (the "First Restatement"), such as, for example, that the law of the jurisdiction where the injury took place should apply. To avoid the inherent rigidity that came with this approach, courts applied the public policy exception.

In the late 1950s, a new movement, dubbed the New York Revolution,[3] led by Chief Judge Fuld of the New York Court of Appeals, appeared in the field of choice-of-law rules. Judge Fuld departed from the First Restatement's focus on territoriality in favor of less restrictive rules that would provide more flexibility and protection to New York's citizens.[4] The rules

appeared in a series of cases dealing with the applicability of guest statutes—laws designed to limit the liability of drivers to their passengers. His efforts culminated in the so-called *Neumeier* rules—a set of rules harmonizing the seemingly conflicting approaches taken in the guest-statute cases.[5] Subsequently, the Court began applying the *Neumeier* rules to tort cases dealing with loss allocation.

Even as it was developing the *Neumeier* rules, the Court distinguished laws that dealt with *proscription of conduct* from laws that dealt with *compensation to plaintiffs*. This beginning of the distinction between conduct regulation and loss allocation can be traced to *Babcock*,[6] one of the guest-statute cases. The *Babcock* case involves New Yorkers who were injured in an automobile accident while on a trip to Ontario, Canada. All parties to the case were residents of New York. Under Ontario law, drivers were immunized from liability for injuries sustained by their passengers, but New York law provided liability in such cases. In a departure from the First Restatement's place-of-injury rule for issues arising in tort cases, the Court engaged in analysis of state interests. In the pertinent part of the opinion, the Court reasoned:

> Ontario's interest is quite different from what it would have been had the issue related to the *manner in which the defendant had been driving* his car at the time of the accident. Where the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive concern. In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in *regulating conduct* within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place. ...
>
> Although the rightness or wrongness of *defendant's conduct* may depend upon the law of the particular jurisdiction through which the automobile passes, the *rights and liabilities* of the parties which stem from their guest-host relationship should remain constant and not vary and shift as the automobile proceeds from place to place. Indeed, such a result, we note, accords with 'the interests of the host in *procuring liability insurance* adequate under the applicable law, and the interests of his insurer in reasonable calculability of the premium.'[7] (Emphasis added, Citation omitted).

Although the Court does not use the words "conduct regulation" and "loss allocation," the interest analysis used by Chief Judge Fuld strongly suggests this distinction. Under this principle, when courts deal with an issue related to one's conduct (here, the manner in which the defendant had been driving), the laws of the jurisdiction of the place of injury should

apply. But because in *Babcock* the issue was the financial responsibility of the driver due to negligence, the law of New York, the place of residence of the parties, was applied.

A clearer distinction between conduct-regulating and loss-allocating rules appeared in *Schultz v. Boy Scouts of America*.[8] In that case, the court introduced the distinction between conduct-regulating and loss-allocating rules with the now famous example of rules of the road versus rules limiting damages:

> [W]hen the conflicting rules involve the appropriate standards of conduct, rules of the road, for example, the law of the place of the tort "will usually have a predominant, if not exclusive, concern" . . . because the locus jurisdiction's interests in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future. . . .
>
> Conversely, when the jurisdictions' conflicting rules relate to allocating losses that result from admittedly tortious conduct, . . . rules such as those limiting damages in wrongful death actions, vicarious liability rules, or immunities from suit, considerations of the State's admonitory interest and party reliance are less important.[9]

Although the court introduced the distinction between conduct-regulating and loss-allocating rules, it was not clear how to analyze a statute that appears to be both conduct-regulating and loss-allocating. The court attempted to tackle this issue in *Padula*.[10]

2. The New Approach

In *Padula*, plaintiff, a resident of New York, was injured when he fell from a scaffold while working on the defendant's Massachusetts property. The defendant had been incorporated in New York. Plaintiff sought recovery under the New York Labor Law, which was more favorable to plaintiff than the law of Massachusetts.

Building on *Schultz*, the court considered whether the New York Labor Law statutes on which plaintiff relied were *primarily* conduct-regulating or loss-allocating:

> The relevant Labor Law provisions ... embody both conduct-regulating and loss-allocating functions requiring worksites be made safe (conduct-regulating) and failure to do so results in strict and vicarious liability of the owner of the property or the general contractor. We hold however, that sections 240 and 241 of the Labor Law are primarily conduct-regulating rules, requiring that adequate safety measures be instituted at the worksite. ...[11]

Finding that applicable statutes are *primarily* conduct-regulating, the court concluded that the laws of Massachusetts should be applied because that state had "the greatest interest in regulating behavior within its borders."[12]

The *Padula* approach raised more questions than it answered. Arguably, there are more laws that are both conduct-regulating and loss-allocating than there are of either category. How do courts go about analyzing whether a statute is primarily conduct-regulating or loss-allocating? What are the criteria?

Although some support the new categorization approach in *Padula*,[13] not all scholars agree on the usefulness of this categorization.[14] Most tort rules contain conduct-regulating and loss-allocating components designed to either deter certain behavior or compensate the plaintiff. Consequently, these rules cannot be meaningfully classified to be primarily one or the other.[15]

Perhaps the most surprising treatment of the approach taken in *Padula* came a decade later in *K.T. v. Dash*.[16]

3. Necessarily Arbitrary?

In *K.T. v. Dash*, the First Department had to decide whether to apply the law of Brazil or New York considering that the tortious act took place in Brazil, but both parties were New York residents. Under Brazilian law, the burden on plaintiff to prove her case was much higher than under New York law.

Plaintiff alleged that while on a holiday in Brazil, defendant raped her after she passed out from intoxication. Upon return to New York, plaintiff filed the suit seeking damages. The First Department first applied an interest analysis using the significant contacts test. The court found that because both parties are citizens of New York and contact with Brazil was limited to the holiday trip, New York has a stronger interest. Then the court analyzed whether the applicable law is conduct-regulating or loss-allocating. Admitting that relatively few rules are purely conduct-regulating or loss-allocating,[17] and citing to a law review article[18] on the point, the court decided to abandon the *Padula* approach:

> The law of intentional assault applicable here, like the law regarding liability for workers' injuries, includes components of loss allocation as well as of conduct regulation. However, it is not useful in this instance to embark upon what must necessarily be an arbitrary weighing process to decide whether such a rule should be deemed "primarily" conduct-regulating or loss-allocating, as the Court did in *Padula*. Even where a law is conduct-regulating, we do not blindly follow the lex loci rule. Rather, we must still decide

whether the foreign jurisdiction has the greater interest in addressing the alleged conduct.[19]

Perhaps because the *Padula* approach would lead to an unfavorable result for the New York plaintiff, the court thought it best not to try to analyze whether the rule at issue is primarily conduct-regulating or loss-allocating. Discarding the *Padula* approach altogether, the court decided to have the outcome turn on the analysis of whether application of Brazilian law would *thwart* important policies underlying the New York law, or, on the other hand, whether application of New York law would undermine any policies of Brazil's law. This analytical framework is not completely new. The court cites to a portion of the opinion of the Court of Appeals in *Schultz*. In that portion, the Court explained the reason why application of New York law and not Ontario law in *Babcock* was proper:

> Key, however, was New York's interest in requiring a tortfeasor to compensate his guest for injuries caused by his negligence. That concern would have been completely thwarted if Ontario's laws were applied to the action, whereas the application of New York's law would not threaten the policy underlying Ontario's statute, its interest in preventing fraudulent claims against its defendants and their insurer.[20]

It is not entirely clear why the First Department in *K.T.* would break away from the evolutionary version of the conduct-regulating versus loss-allocating rule analysis presented by the Court of Appeals in *Padula*. For a time, it appeared as if going through the analysis to determine whether a law is primarily conduct-regulating or loss-allocating was a useful and creative step in dealing with tort rules in conflict of laws analysis. But the *K.T.* court poked holes in *Padula*: being a subordinate court, it had the temerity to call the *Padula* approach articulated by the Court of Appeals an "arbitrary weighing process."[21] The *K.T.* court would not use *Padula* to decide whether a law is *primarily* conduct-regulating or loss-allocating. But why would the court use language from *Schultz* but discard *Padula*? After all, *Padula* built its analytical framework on *Schultz*. Instead, the *K.T.* court picked the "thwarting" language of *Schultz*, and used it as a more appropriate, or perhaps more convenient, analytical framework. Here is a portion of the analysis of the *K.T.* court:

> Brazil's interest in ensuring that citizens and noncitizens damaged by tortious conduct within its borders have the right to seek compensation from the tortfeasor, is in no way damaged by application of New York law in the present case. In addition, while enforcement of its rules regarding misconduct within its borders

> could generally be said to serve as a deterrent against future tortious conduct, the possibility of such a deterrent effect being felt in Brazil is minimal where the interaction was entirely between New Yorkers, and the matter is being addressed in a New York court.
>
> In contrast, . . . application of Brazil's rule could thwart New York's strong interest in providing recompense for its residents who have been injured by a sexual assault, especially if it was perpetrated by another New Yorker. So, even if the purpose of the Brazilian rule of law were said to be primarily conduct-regulating, in this context the general rule that "the law of the jurisdiction where the tort occurred will generally apply" should not be applied. New York's interest in addressing the alleged misconduct is stronger than Brazil's, particularly since application of New York's tort law "would not threaten the policy underlying [Brazil's rule of law]."[22]

It is not clear, however, whether this approach applies only to parties of the same jurisdiction as in *Babcock* and *K.T.* or also to parties who are citizens of different states.

It is particularly interesting that the *K.T.* court built its analysis on the explanation in *Schultz* of what analytical principles stood behind the *Babcock* decision. Why did the court decide not to rely on *Babcock* for the analysis? Maybe the answer is that there is no mention of a law of one jurisdiction "thwarting" a law of another; the parts of the *Babcock* opinion cited in *Schultz* discuss only the question of which jurisdiction has the greatest interest, Ontario or New York. This is the old-fashioned interest analysis and does not pretend to suggest some new "thwarting" approach.

It appears that the *K.T.* court shied away from using the *Padula* approach because the court did not want to find that the law was primarily conduct-regulating, a finding that would have led it to apply the law of Brazil. Although the court did not decide whether there was an actual conflict between the law of Brazil and New York law, it did mention that the burden of making plaintiff's case is higher under the Brazilian law.[23] The law of Brazil requires that "plaintiff prove that her honor or image was damaged by the assault."[24] New York law, however, only requires that plaintiff simply show that defendant "made bodily contact with plaintiff and that the contact was either offensive or made without plaintiff's consent."[25] Therefore, application of the Brazilian law puts a much higher burden on plaintiff than under the New York law. Apparently, the court wanted the New York plaintiff to enjoy the protections of the New York law of torts.

One may question what the *K.T.* court would have done had the facts been reversed—New York was the place where the tort was committed, and the parties were residents of Brazil. It is likely that the court would have

also chosen to apply the law of the forum because application of Brazilian law would have threatened New York law with its emphasis on protecting victims of sexual violence and deterring such attacks.[26]

4. Treatment of *Padula* in Federal Courts

It is a well-established precedent that federal courts sitting in diversity must apply the choice-of-law rules of the forum state.[27] After *Padula* presented the alternative approach of analyzing conflicting rules as primarily conduct-regulating versus primarily loss-allocating rules, it should typically be expected to see federal courts sitting in New York starting to apply this approach in their analysis. It is somewhat disappointing to discover that federal courts, although acknowledging its existence, avoided using the *Padula* approach and some courts simply ignored its application.

a. Hamilton: Acknowledged but Avoided

In *Hamilton v. Accu-Tek*, the United States District Court for the Eastern District of New York considered the conflict of laws issues arising out of plaintiffs' tort action against handgun manufacturers.[28] The case was brought against a number of handgun manufacturers by relatives of deceased shooting victims and one disabled survivor. The core of the complaint was aimed at the defendants' alleged negligent marketing practices that resulted in wide accessibility of handguns to New York criminals. Because two of the nine shootings in this case occurred outside New York state, the court analyzed the application of conflicting state laws.

The court was faced with the question whether New York or California law should be applied. In relevant part, the court considered one of the plaintiff's claims concerning the shooting in California that resulted in her husband's death. First, the court recognized that New York choice-of-law principles in tort cases distinguish between conduct-regulating and loss-allocating rules. Second, the court recognized that some of the laws involved in this case are both conduct-regulating and loss-allocating. For example, laws governing liability in torts (i.e., claims of negligence in marketing of handguns) are conduct-regulating, and if the law in question is conduct-regulating, then the law of the state where the injury occurred should apply. The shooting happened in California, and this was the last event necessary to make defendant liable.[29]

In contrast, the court continued, collective liability rules possess both components: conduct-regulating and loss-allocating.[30] Although the main function of the laws of collective liability is to compensate victims for injuries, these laws also serve as a deterrent to regulate conduct.[31] To support the idea that a law can be both conduct-regulating and loss-allocating, the

court referred to the "primary conduct-regulating" distinction of *Padula*. But then, the court did not follow *Padula* and did not try to determine whether the collective liability law is *primarily* one or the other. Instead, the court declared that even if the collective liability laws were viewed as loss-allocating, under the *Neumeier* rules the outcome would be the same, namely the law of California and not of New York would apply.[32] Thus, the court avoided the *Padula* approach and declined to use its weighing process. Because the court acknowledged *Padula* and what it stands for, the court should have at least tried to analize the collective liability laws using the *Padula* approach first and only then proceed to declare that even under the *Neumeier* rules the result would be the same. But the court felt it unnecessary to go through the *Padula* analysis to determine whether the collective liability laws are primarily conduct-regulating or loss-allocating.

b. Reed: Acknowledged but Ignored

In *Reed Construction Data, Inc. v. McGraw-Hill Companies, Inc.*, the United States District Court for the Southern District of New York considered defendant's motions to exclude expert testimony and grant summary judgment.[33] Both parties were in the business of construction product information; they provided information on ongoing construction projects that the subscribers to their databases could bid on. Plaintiff alleged that defendant hired third parties to pose as independent contractors in order to subscribe to plaintiff's database, view construction listings, and pass information to defendant. Plaintiff's alleged six common-law claims were (1) fraud, (2) misappropriation of trade secrets, (3) misappropriation of confidential information, (4) unfair competition, (5) tortious interference with contractual relations, and (6) unjust enrichment. Plaintiff was a Georgia domiciliary and defendant was a New York domiciliary. Both parties operated their business nationwide through the Internet. The parties disputed whether the laws of Georgia or New York should apply.

In its discussion of *Padula*, the court correctly stated that if the law is *primarily* conduct-regulating, then the law of the jurisdiction where the tort occurred will generally apply, and if the law is *primarily* loss-allocating, then the *Neumeier* rules apply.[34] At first, it appeared that the court would continue analyzing the claims using the *Padula* approach. But then, the court, unexpectedly, moved in another direction:

> Crucially, New York courts do not necessarily apply the law of just one state to a tort case. Rather, they assess the governing law issue-by-issue. *Babcock v. Jackson*, 12 N.Y.2d at 484, 240 N.Y.S.2d 743, 191 N.E.2d 279 ("[T]here is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the

> same jurisdiction."). Therefore, the Court will proceed tort-by-tort, deciding first whether the relevant rules are conduct-regulating or loss-allocating, second where the relevant tort is alleged to have occurred, third what the competing interests are with respect to each tort, and finally whether [defendant] is entitled to summary judgment under the governing law.[35]

Next, the court went issue by issue to determine whether the plaintiff's six claims belong to the conduct-regulating camp or the loss-allocating camp without trying to analyze whether the law was *primarily* conduct-regulating or loss-allocating. Although the court acknowledged the *Padula* approach, it completely and unjustifiably ignored it in its analysis without any explanation.

Although in *Reed* the court allocated plaintiff's claims to either the conduct-regulating or loss-allocating category, it does not appear that every single plaintiff's claim can easily be said to belong squarely to one or the other. For example, actions for fraud, misappropriation of trade secrets, misappropriation of confidential information, unfair competition, and tortious interference with contractual relations can be analyzed as both conduct-regulating and loss-allocating laws. Only laws dealing with unjust enrichment appear to be candidates for designation as purely loss-allocating. It is unfortunate to see federal courts avoiding or ignoring the *Padula* approach in their analysis.[36] Could it be because *Padula* failed to provide clear guidance on how judges should use its approach?

5. Conclusion

The introduction of *Padula*'s distinction between primarily conduct-regulating and loss-allocating rules at first appeared to be a useful tool for the New York courts in choice-of-law decisions. Nevertheless, with time, its usefulness has been questioned by scholars and even New York judges. *Padula* failed to provide the guiding principles to help judges to determine whether laws are primarily conduct-regulating or loss-allocating. Some courts maintained the appearance of using the *Padula* approach, other courts ignored it in favor of other approaches. It remains unclear whether New York courts will continue to use the *Padula* approach or whether it will be ignored and eventually replaced by other choice-of-law rules.

Endnotes

1 *See* Peter E. Herzog, *The "Conflict of Laws Revolution" in New York—And Where Did It Leave Us*, 50 Syracuse L. Rev. 1279 (2000).

2 *Padula v. Lilarn Properties Corp.,* 84 N.Y.2d 519, 620 N.Y.S.2d 310 (1994).

3 Herzog, *supra,* note 1, at 1279.

4 *See* Willis L. M. Reese, *Chief Judge Fuld and Choice of Law*, 71 Colum. L. Rev. 548 (1971).

5 *Neumeier v. Kuehner*, 31 N.Y.2d 121, 335 N.Y.S.2d 64 (1972).

6 *Babcock v. Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743 (1963).

7 *Babcock*, 12 N.Y.2d at 483-484, 240 N.Y.S.2d at 750-751.

8 65 N.Y.2d 189, 491 N.Y.S.2d 90 (1985).

9 *Schultz,* 65 N.Y.2d at 198, 491 N.Y.S.2d at 95.

10 84 N.Y.2d 519, 620 N.Y.S.2d 310 (1994).

11 *Padula*, 84 N.Y.2d at 522-523, 620 N.Y.S.2d at 312.

12 *Id.* at 522, 620 N.Y.S.2d at 311.

13 *See* Patrick J. Borchers, *The Return of Territorialism to New York's Conflicts Law: Padula v. Lilarn Properties Corp.*, 58 Alb. L. Rev. 775 (1995).

14 *See* Erin A. O'Hara and Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. Chi. L. Rev. 1151 (2000); Peter Hay and Robert B. Ellis, *Bridging the Gap Between Rules and Approaches in Tort Choice of Law in the United States: A Survey of Current Case Law*, 27 Intl. Law 369, 382 (1993).

15 *See* Wendy C. Perdue, *A Reexamination of the Distinction Between "Loss-Allocating" and "Conduct-Regulating Rules*," 60 La. L. Rev. 1251, 1252 (2000).

16 37 A.D.3d 107, 827 N.Y.S.2d 112 (1st Dep't 2006).

17 37 A.D.3d at 113, 827 N.Y.S.2d at 117.

18 Patrick J. Borchers, *The Return of Territorialism to New York's Conflicts Law: Padula v. Lilarn Properties Corp.*, 58 Alb. L. Rev. 775 (1995).

19 37 A.D.3d at 113, 827 N.Y.S.2d at 118.

20 *K.T. v. Dash*, 37 A.D.3d at 114-115, 827 N.Y.S.2d at 119, quoting *Schultz*, 65 N.Y.2d at 196, 491 N.Y.S.2d at 94.

21 *K.T. v. Dash*, 37 A.D.3d at 113, 827 N.Y.2d at 118.

22 37 A.D.3d at 115-116, 827 N.Y.2d at 119-20.

23 37 A.D.3d at 112, 827 N.Y.2d at 117.

24 *Id.*

25 *Id.*

26 *See* Patricia Youngblood Reyhan, *2006-2007 Survey Of New York Law: Article: Conflict Of Laws*, 58 Syracuse L. Rev. 821, 850 (2008).

27 *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

28 *Hamilton v. Accu-Tek*, 47 F. Supp. 2d 330 (E.D.N.Y. 1999).

29 47 F. Supp. 2d at 340.

30 47 F. Supp. 2d at 340, citing *Hamilton v. Accu-tek*, 935 F. Supp. 1307, 1327-29 (E.D.N.Y. 1996) (previously-decided case that discussed the law of collective liability).

31 *Hamilton v. Accu-Tek*, 47 F. Supp. 2d at 340.

32 47 F. Supp. 2d at 340-41.

33 *Reed Constr. Data, Inc. v. McGraw-Hill Cos., Inc.*, 49 F. Supp. 3d 385 (S.D.N.Y. 2014).

34 49 F. Supp. 3d at 424.

35 49 F. Supp. 3d at 424-25.

36 *See also Daniels v. Kostreva*, No. 15 CV 3141 (ARR)(LB), 2017 U.S. Dist. Lexis 5534, at *14-15 (E.D.N.Y. Jan. 12, 2017) (declaring that discouraging defamation is a conduct-regulating rule without any elaboration on loss-allocating function of the New York defamation law).

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"How Can I Not Sacrifice One for the Other?": Balancing Expediency and Cost-Effectiveness With Reliability and Reputation in Arbitration

BY JOHN A. PAPPALARDO, ESQ.
WITH RACHEL ROSENBLUM

Proponents of alternative dispute resolution processes such as arbitration highlight to potential clients that their dispute may be resolved more "more expeditiously, privately, and in a cost-effective" manner as compared to litigation. These promises are certainly not made in bad-faith, as at its core, "arbitration personifies due process and justice."[1] It is, however, equally important that arbitration proponents uphold the values of reliability and fairness inherent in our judicial system.

Arbitration certainly has many positive attributes, since "[i]t guarantees the rule of law domestically…through affordable access, expedited proceedings, expertise, and bridging the gap between national legal systems."[2] For parties who choose to begin arbitration and arbitrators alike, "arbitration embodies a trial process grounded in common sense, flexibility, and an ethic of problem-solving."[3] Choosing arbitration allows "disputing parties and their representatives to assemble the facts, present witnesses, assert and contest positions… [that]culminate in a final ruling by the adjudicator on the matters under consideration."[4] There is no denying that arbitration can offer parties another way to resolve their issues that does not involve the potentially grueling process of litigation. The ability to discuss these issues outside of court is exactly what makes alternative dispute resolution so interesting to potential parties. Therefore, "the popularity of arbitration rests

in considerable part on its asserted efficiency and cost-effectiveness— characteristics said to be at odds with full-scale litigation in the courts…".[5]

New arbitrators should not be intimidated by the aforementioned characteristics of arbitration that are thought to be "at odds with full-scale litigation," and instead channel that concern into a focus to make the arbitration "faster… and as good as or better than litigation" for the parties.[6] Often times, parties or their representative will prefer arbitration to resolve the dispute at hand. If arbitration is chosen as the appropriate dispute resolution mechanism, the arbitrator must continue to keep in mind that "arbitration embodies a trial process grounded in common sense, flexibility, and an ethic of problem solving."[7] Most importantly, the "ethic of problem solving," is what should compel the arbitrator to appropriately balance the cost-effectivenesst of arbitration, but also to not disregard the responsibility to render a fair and stable decision.

Expediency and Flexibility

Expediency and flexibility are hallmarks of arbitration. In choosing arbitration, the parties "trade the right to full review [by a court] for a speedier, less expensive, and private process in which it is certain that there will be an appropriate expeditious resolution."[8] The "speedy" benefit of arbitration is not simply a ploy for arbitrators to attract more business. Indeed, arbitration is statistically quicker and less expensive than a full-length litigation. "According to a recent study by the Federal Mediation and Conciliation Services, the average time from filing to decision was about 475 days in an arbitrated case, while a similar case took from 18 months to three years to wend its way through the court."[9] The difference between an average of 475 days, and maximum 1,095 days (if one decides to proceed through trial) is significant, both from a time and cost perspective.[10]

Additionally, as arbitration is contractual in nature, the inherent flexibility of the process allows parties to tailor the arbitration process to suit their needs. By way of illustration, "trials, which must be worked into overcrowded court calendars, [compared to] arbitration hearings [that] can usually be scheduled around the needs and availability of those involved, including weekends and evenings."[11] Parties in arbitration also have the flexibility to choose the arbitrator, set how the hearing will be conducted and its duration, and the scope of the final decision by the arbitrator. This self-determination combined with flexibility leads to a cost-effective process.

Pushing against the cost-effectiveness of arbitration is the filing fee structure, as illustrated in the fee schedules of various ADR providers. For example, under the JAMS fee schedule, "for two party matters, the filing fee is $1,750.00. For matters involving three or more parties, the filing fee is

$3,000.00. JAMS also charges a $1,750.00 filing fee for counterclaims."[12] The prices listed above only concern the fee to *file* an arbitration. The "hourly rate is set by the individual arbitrator(s),"[13] so, the overall total price may amount to more than just the filing fee. However, the price may also be determined by the amount of the claim.[14] The American Arbitration Association follows this exact procedure and determines filing fees and the final fee based upon the amount of the claim.[15] On one side of the scale, if the amount of claim is less than $75,000, the initial filing fee is approximately $925, with a final fee of $800, however, on the other side of the scale, if the amount of the claim is $500,000 to anywhere less than $1M, the filing fee is $5,500, and the final fee is $8,475.[16] Therefore, the fee that parties may be paying if they choose to arbitrate can be largely dependent upon how much money is involved in the dispute.[17] These fees are in stark contrast to the filing fees for a civil matter in the Supreme or County courts of New York State (the fee for obtaining an index number is $210.00, and the fee to make a Request for Judicial Intervention (RJI) is $95.00).[18] Additionally, arbitrators charge hourly rates to be paid by the parties, whereas judges' salaries are paid by taxpayers. Thus, an arbitrator should seek to maintain a flexible structure to facilitate the twin goals of efficiency and cost-effectiveness.

Reliability and Reputation

It is incumbent upon an arbitrator to "…uphold the dignity and integrity of the office of the Arbitration process."[19] The arbitrator "also has a responsibility to the Parties, [and] to other participants in the proceeding..."[20] This requires that "an arbitrator should seek to discern and refuse to lend approval or consent to any attempt by a Party or its representative to use Arbitration for a purpose other than the fair and efficient resolution of a dispute."[21] An arbitrator must preserve the integrity of the process, manage the parties and/or other participants in the proceeding, *and* require that all parties are using the arbitration in good-faith. This is paramount both for individual parties and the arbitral process overall. In short, an arbitrator shall "endeavor to provide an evenhanded and unbiased process…" [22]

As arbitral decisions are difficult to overturn, an arbitrator should strive to provide a reliable decision for the parties. Providing a fair and balanced arbitral process creates reliability for the parties and the ADR industry overall. The arbitrator must also "perform [his or her] duties diligently and conclude cases as promptly as the circumstances reasonably permit."[23] A arbitrator should be adept at sensing when it is appropriate to let the adversarial process continue versus preventing "…delaying tactics, harassment of parties or other participants, or other abuse or disruption…" The arbitrator should not be afraid to take ahold of the situation and get it back on track.[24]

It is the arbitrator's job to maintain neutrality while protecting the integrity of the process to create an equitable, reliable, and just result for the parties.

Identifying Discovery as the Issue

It is well known among those in the legal community that "one of the biggest cost-drivers in arbitration is discovery, especially electronic discovery…"[25] When an arbitrator is attempting to balance cost-effectiveness and reliability of a decision, a "cost-driver" such as discovery can have consequences for the arbitrator who is trying assure that there is not an exponential price increase. In order to guard against a drawn-out discovery process that only serves to waste parties time and money, the arbitrator should facilitate a discussion between counsel wherein they can "determine early on the evidence that will be needed to prove the claims or to refute the claims via defenses."[26] Similarly, the arbitrator should conduct an arbitration that does not allow for "counsel to ask for everything regardless of the necessity in the discovery phase because it is not cost-effective and can delay the arbitration process."[27]

When adjusting discovery for an arbitration, typically "arbitrators rarely permit the interrogatory or deposition practice that is available in judicial litigation."[28] Any good arbitrator will recognize the importance of limiting discovery, but also acknowledge that any resolution cannot be made without "sufficient information to allow all parties to prepare for and present a full and fair hearing."[29] Most importantly, "the AAA Commercial Rules make no provision for discovery requests except in large, complex matters…," therefore in small cases, the arbitrator may create their own provisions for the discovery portion of the arbitration.[30] Depending on the parties' claims, this may be an advantage or disadvantage. Regardless of positions, arbitration offers an opportunity for parties and the arbitrator to design their own discovery process.

Advantages of Discovery in Arbitration

For some, the ability to take part in the creation of the discovery rules is an exciting task, and for others, this same task seems daunting and frustrating. Nevertheless, the ability for parties to take part in designing their own discovery procedure is seen as an advantage, as it promotes the adherance to specific rules and reduces the likelihood of lengthy discovery disputes. Typically, in arbitration, "exclusionary rules of evidence do not apply, and arbitrators are allowed a great deal of discretion as to what is 'pertinent and material,'" and this discretion may be passed along to the parties in order to have them appropriately involved in the decision-making of their own case.[31] This self-determination fosters a straightforward and focused dispute resolution process.

Another advantage of arbitration-based discovery is that "the parties

may offer such evidence as is relevant and material to the dispute and shall produce evidence as the arbitrator may deem necessary to an understanding and determination of the dispute."[32] If the parties are abiding by a relevancy standard, there is less room for standard trial discovery procedures that are not necessary in arbitration. Abiding by the standard rules of evidence in court requires a significant time commitment; the attorney must introduce the evidence, and then explain its purpose. Such a procedure is not required in the discovery process in arbitration because "conformity to legal rules of evidence shall not be necessary."[33] The exchange of focused and purposeful discovery in arbitration reduces the time and cost normally associated with discovery battles in litigation.

Disadvantages of Discovery in Arbitration

While the idea of a flexible discovery process in an arbitration may sound helpful, in practice, for an attorney who would consider themselves a "trial lawyer," the open-ended rules of discovery may seem intimidating. Often times, things move more quickly if there are already established rules that must be followed. If the parties are already in a dispute, this means that they clearly do not agree on something, and adding other facets to this overall issue, such as figuring out the discovery rules, may be problematic and wasteful of all participants' time.

Some types of discovery that are helpful outside of arbitration, such as depositions that can provide information from a witness or opposing party, are "strongly discouraged by FINRA."[34] The process to include depositions in an arbitration requires "the requesting party [to] request depositions through a motion to the arbitrator or panel, and these depositions are permitted only under very limited circumstances, generally limited to…expediting large or complex cases, and accommodating extraordinary circumstances."[35] This strict policy against depositions can act as an impediment to the routes that an attorney may be able to take in order to appropriately advocate for their clients. On balance, the arbitrator and parties should balance the cost-effective and efficiency aspects of arbitration with the need for information gathering necessary to reach a fair and just resolution for both parties.

Conclusion

Arbitration "guarantees the rule of law domestically…through affordable access, expedited proceedings, expertise," and it also "personifies due process and justice. It enables society to resolve disputes and to prosper by dedicating its resources to other activities."[36] Arbitration at its core gives parties a venue that allows them to resolve their disputes in a relatively ex-

peditious and equitable manner. To create value for the parties and to reach an equitable result, the arbitrator must consider his or her "responsibility to the Parties, to other participants in the proceedings, and to the profession," and "… endeavor to provide an evenhanded and unbiased process."[37] The arbitrator must safeguard the process, while also assuring the parties' time and money is not being misused or dissipated. This process will lead to a durable decision for both parties.

Endnotes

1 Thomas E. Carbonneau, *Arguments In Favor of the Triumph of Arbitration*, 10 Cardozo J. Conflict Resol. 395, 397 (2009).

2 *Id.*

3 *Id.*

4 *Id.*

5 Matthew K. Edling, *The Evidentiary Hurdles Of Arbitration*, 18 J. of the Trial Evidence Committee 1, 6-9 (2010)

6 John Baker, *Recognizing the Hidden Costs of Arbitration*, Jordan Ramis PC, Attorneys At Law, https://jordanramis.com/resources/articles/recognizing-the-hidden-costs-of-arbitration/view/

7 Thomas E. Carbonneau, *Arguments In Favor Of The Triumph Of Arbitration*, 10 Cardozo J. Of Conflict Resol. 395, 397 (2009).

8 Arbitration Ethics Guidelines, Introduction, Part B, www.jamsadr.com/arbitrators -ethics.

9 Barbara Kate Repa, *Arbitration Pros and Cons*, https://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html

10 *Id.*

11 *Id.*

12 *Arbitration Schedule of Fees and Costs,* JAMS Mediation, Arbitration, ADR Services, https://www.jamsadr.com/arbitration-fees

13 *Id.*

14 American Arbitration Association, *Administrative Fee Schedules,* Commercial Arbitration Rules and Mediation Procedures, https://www.adr.org/sites/default/files/Commercial_Arbitration_Fee_Schedule_1.pdf

15 *Id.*

16 *Id.*

17 *Id.*

18 New York State Unified Court System, *Filing Fees,* The Courts, https://www.nycourts.gov/FORMS/filingfees.shtml

19 Arbitration Ethics Guidelines I, www.jamsadr.com/arbitrators -ethics.

20 Arbitration Ethics Guidelines VI B, www.jamsadr.com/arbitrators -ethics.

21 Arbitration Ethics Guidelines I, www.jamsadr.com/arbitrators-ethics

22 Arbitration Ethics Guidelines VI, www.jamsadr.com/arbitrators-ethics

23 Arbitration Ethics Guidelines VI B, www.jamsadr.com/arbitrators-ethics

24 *Id.*

25 Robert B. Davidson & Kimberly Taylor, *Using Arbitration for a Quicker and More Cost-Effective Resolution*, Business Insight for L. Dep't Leaders (2012), https://www.jamsadr.com/files/uploads/documents/articles/davidson-taylor-inside-counsel-2010-05-03.pdf

26 Ashley L. Belleau, *Practical Tips to Manage the Efficient and Cost-Effective Arbitration,* Primerus, https://www.primerus.com/business-law-articles/practical-tips-to-manage-the-efficient-and-cost-effective-arbitration-05072012.htm

27 Ashley L. Belleau, *Practical Tips to Manage the Efficient and Cost-Effective Arbitration,* Primerus, https://www.primerus.com/business-law-articles/practical-tips-to-manage-the-efficient-and-cost-effective-arbitration-05072012.htm

28 Matthew K. Edling, *The Evidentiary Hurdles of Arbitration*, 18 J. Trial Evidence Committee 1, 6-9 (2010)

29 *Id.*

30 *Id.*

31 Matthew K. Edling, *The Evidentiary Hurdles of Arbitration*, 18 J. Trial Evidence Committee 1, 6-9 (2010)

32 *Id.*

33 *Id.*

34 Matthew K. Edling, *The Evidentiary Hurdles of Arbitration*, 18 J. Trial Evidence Committee 1, 6-9 (2010)

35 *Id.*

36 Thomas E. Carbonneau, *Arguments In Favor of the Triumph of Arbitration*, 10 Cardozo J. Conflict Resol. 395, 397 (2009).

37 Arbitration Ethics Guidelines VI, www.jamsadr.com/arbitrators-ethics.

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Winning Summary Judgment Motions by Turning Issues of Fact Into Questions of Law

BY MARC ROWIN, ESQ.

Your summary judgment motion has been e-filed on the New York State Courts Electronic Filing website. You are sure that the motion papers are so strong that your adversary cannot defeat the motion or even say anything in opposition. Some time later, the court sends you an alert that your adversary has filed opposition papers. You open the links and read the filings with mounting dismay. Your adversary has filed affidavits disputing the facts and has retained an expert who claims that your position has no merit. Now you are worried that the court is going to deny your motion, because material issues of fact have to be decided by a jury. What should you do?

The most important thing is to understand what you must *not* do in your reply papers. Submitting new affidavits to contradict the opposing affidavits is counterproductive, because it just proves what your adversary said – that the facts are in dispute. What you *should* do is closely analyze the opposing papers to look for ways to convert what appears to be a factual showing into a legal question which the court can decide in your client's favor and award summary judgment. You may find that your adversary ran afoul of one of the legal doctrines which permit the court to rule that an evidentiary submission is inadmissible or incompetent. Some of these doctrines are discussed below.

An Affidavit Must Be in the Proper Form

Submissions on a summary judgment motion must be in the proper form. While CPLR 2106(a) permits attorneys and medical experts to submit an affirmation, everyone else must submit a signed and notarized affidavit.[1] Submissions which violate this rule cannot be considered in opposition to your motion as a matter of law.

An unsworn expert report or letter is not in the proper form and will not be considered. Thus, in *Banco Popular North America v. Victory Taxi*

Management, Inc., 1 N.Y.3d 381, 384, 774 N.Y.S.2d 480, 482 (2004), the Court of Appeals held that an expert's unsworn letter was not "evidentiary proof in admissible form" and could not counter the *prima facie* showing of the party moving for summary judgment. *See also Ulm I Holding Corp. v. Antell*, 155 A.D.3d 585, 586, 66 N.Y.S.3d 233, 234 (1st Dep't 2017) (an "unsworn report is not in admissible form and may not be considered in opposition to the summary judgment motion.")

Similarly, a party's affirmation is improper under CPLR 2106(a) and will be rejected. *Slavenburg Corp. v. Opus Apparel, Inc.*, 53 N.Y.2d 799, 801, 439 N.Y.S.2d 910, 911 (1981) (an affirmation by a party "is not in authorized form" and is "of no probative value.").

An Attorney's Affidavit Is of Limited Use

An opposing affidavit, like a moving affidavit, must be made by someone with knowledge of the facts contained in it. While an attorney has knowledge of, and can submit copies of and quote from, litigation papers such as pleadings and depositions, an attorney lacks knowledge of the underlying facts of the dispute. The Court of Appeals has held that as a matter of law an attorney's lack of knowledge renders her affirmation incompetent to put underlying facts into the record and thus cannot raise a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 563, 427 N.Y.S.2d 595, 598 (1980) ("[A]n affirmation by counsel is without evidentiary value and thus unavailing" to defeat summary judgment.)

Of equal importance, an attorney cannot speculate as to what facts may exist or what might have happened. *Clarke v. Helene Curtis, Inc.*, 293 A.D.2d 701, 702, 742 N.Y.S.2d 325, 327 (2d Dep't 2002) (the "speculative assertion of the plaintiff's attorney" as to what might have occurred is "insufficient to rebut the defendant's showing").

An Expert Affidavit May Not Be Sufficient

While an expert witness can give his or her opinion, an expert's affidavit must still comply with certain rules in order to be considered on a summary judgment motion. First, the expert must be qualified to give an opinion relevant to the case. As the Court of Appeals held in *Matott v. Ward*, 48 N.Y.2d 455, 459, 423 N.Y.S.2d 645, 647 (1979), an expert witness should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable. For that reason, an unqualified expert cannot as a matter of law render an opinion opposing a summary judgment motion.

Romano v. Stanley, 90 N.Y.2d 444, 661 N.Y.S.2d 589 (1997), was a case brought under the Dram Shop Act (General Obligations Law § 11-101(1))

against the estate of an allegedly intoxicated driver and several bars which had served alcohol to her. Two of the bars moved for summary judgment on the grounds that while the driver's blood alcohol level of 0.26 percent was above the legal limit, she had not been visibly intoxicated within the meaning of the Dram Shop Act while being served by them. In opposition to the motion, plaintiff submitted the affidavit of a forensic pathologist who was employed as a medical examiner and who averred that the driver's elevated blood alcohol level meant that she had to have exhibited signs of intoxication while drinking at the bars. The Court of Appeals held that the medical examiner's professional background provided no basis for his opinion about the visible manifestation of intoxication so that his affidavit was not sufficient to defeat summary judgment. *See also Williams v. River Place II, LLC*, 145 A.D.3d 589, 590, 43 N.Y.S.3d 347, 349 (1st Dep't 2016) (where the court held that a plaintiff failed to raise a material fact issue, because he "submitted no evidence that his expert, a civil engineer with a background in building design, was qualified to opine on the design and manufacture of power saws.").

Second, an expert's opinion cannot be speculative and must be based on facts in the record. In *Guarino v. La Shellda Maintenance Corp.*, 252 A.D.2d 514, 515, 675 N.Y.S.2d 374, 375 (2d Dep't 1998), the Appellate Division held that an expert affidavit which is not based upon record facts cannot defeat a summary judgment motion:

> However, even assuming that this affiant, with a background in electrical engineering, can be considered to be an expert in floor care, his conclusions are not based upon any facts in the record and are wholly speculative and conclusory. Accordingly, this affidavit was insufficient to give rise to any genuine issues of fact.

See also Amatulli v. Delhi Const. Corp., 77 N.Y.2d 525, 569 N.Y.S.2d 337 (1991) (expert affidavit which is conclusory, speculative or without factual basis cannot raise a fact issue sufficient to defeat a summary judgment motion)*; Bartholomew v. Sears Roebuck and Co.,* 159 A.D.3d 786, 787, 69 N.Y.S.3d 813, 814 (Mem) (2d Dep't 2018) ("The expert affidavit submitted by the plaintiff in opposition to the motion was speculative and conclusory, and insufficient to raise a triable issue of fact.*").*

Similarly, a plaintiff's expert's affidavit opposing summary judgment cannot assert a new theory of liability not set out in the plaintiff's bill of particulars. *Wright v. South Nassau Communities Hospital*, 254 A.D.2d 277, 278, 678 N.Y.S.2d 636, 638 (2d Dep't 1998) (affidavits in opposition to summary judgment motion may not make "new allegations" not in the bill of particulars); *Moore v. Johnson*, 147 A.D.2d 621, 622, 538 N.Y.S.2d 28, 30 (2d Dep't

1989) (an expert witness is not permitted to deviate from the bill of particulars to expound "a new or alternate unpleaded theory of liability . . . .").

The courts take this position because they understand that an expert's new theory was probably created solely to avoid summary judgment and so deem it to be feigned and insufficient to defeat the motion. This is illustrated by the determination of the court in *Wilson v. Prazza*, 306 A.D.2d 466, 467, 761 N.Y.S.2d 321, 322 (2d Dep't 2003), which stated:

> The affidavits of the injured plaintiff and the plaintiffs' expert submitted in opposition to the defendants' motion raised for the first time the issue that the accident was also caused by a defect in the height of the bottom step, which allegedly was shorter than the other steps, in violation of the New York City Administrative Code. This is a feigned issue of fact insufficient to defeat the defendants' motion.

A Party Affidavit May Also Fail

Even a party's affidavit may not as a matter of law be sufficient to raise a material issue of fact. Often, a plaintiff will attempt to avoid summary judgment by contradicting his deposition testimony. The courts understand that the party's opposing affidavit was drafted by his attorney for the purpose of avoiding summary judgment and routinely reject this ploy.[2] Thus, in *Titova v. D'Nodal*, 117 A.D.3d 431, 985 N.Y.S.2d 229, 230 (1st Dep't 2014), the court held that:

> Plaintiff's affidavit attesting that, at the time of her accident, the sidewalk contained ice and snow contradicts her deposition testimony that she did not see any ice or snow on the sidewalk. Accordingly, it is insufficient to raise a genuine issue of fact.

Similarly, in *Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, 616-617, 487 N.Y.S.2d 105, 107 (2d Dep't 1985), *aff'd* 66 N.Y.2d 701, 496 N.Y.S.2d 425 (Mem) (1985), the Court held:

> It is well established that on a motion for summary judgment, the court must determine whether the factual issues presented are genuine or unsubstantiated. "If the issue claimed to exist is not 'genuine, but feigned, and * * * there is in truth nothing to be tried' summary judgment is properly granted." In this case, defendant's feigned attempt to avoid the consequences of her earlier testimonial admission regarding the authenticity of her signature is insufficient to raise a triable issue of fact to defeat a motion for summary judgment. (Citations omitted; emphasis added)

A party's affidavit can run afoul of other legal rules. For example, a party's affidavit describing the contents of a document is not sufficient. The

best evidence rule requires that when the contents of a document are to be proven, the document itself must be put before the court. *Schozer v. William Penn Life Ins. Co. of New York*, 84 N.Y.2d 639, 643, 620 N.Y.S.2d 797, 799 (1994) (the best evidence rule "requires the production of an original writing where its contents are in dispute and sought to be proven."). An exception exists if the party can demonstrate to the court that there is a good reason why the document cannot be produced, but the proponent "must establish that the witness is able to recount or recite, from personal knowledge, substantially and with reasonable accuracy all of its contents." *Id.*, 84 N.Y.2d at 646, 620 N.Y.S.2d at 800.

Relying upon *Schozer*, *supra,* the court in *Ahmad v. Icon Legacy Custom Modular Homes, LLC*, 170 A.D.3d 1304, 96 N.Y.S.3d 368 (3d Dep't 2019), held that a summary judgment motion seeking contractual indemnification had to be denied, because the contract allegedly containing the indemnification clause had not been submitted with the motion. Other courts have cited *Schozer* to require the submission of an original prenuptial agreement (*e.g. Mutlu v. Mutlu*, 177 A.D.3d 979, 115 N.Y.S.3d 339 [2d Dep't 2019]), and an original insurance policy (*e.g. Pennsylvania Lumbermens Mutual Ins. Co. v. B&F Land Dev. Corp.*, 168 A.D.3d 868, 92 N.Y.S.3d 138 [2d Dep't 2019]).

The rule appears to be even more rigorous when the document is a business record. In *Deutsche Bank National Trust Co. v. Elshiekh*, 179 A.D.3d 1017, 1021, 118 N.Y.S.3d 183, 188 (2d Dep't 2020), the court held that the contents of a business record can only be proven by the document itself:

> Evidence as to the content of business records is admissible only where the records themselves are introduced; without their introduction, a witness's testimony as to the contents of the records is inadmissible hearsay. It is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted. (Citations omitted)

A party's affidavit may try to raise a material issue of fact by quoting a statement attributed to an employee of the moving party. However, such a quotation may be excluded if it violates the "speaking agent" exception to the hearsay rule. The speaking agent exception bars an agent's statement unless it is shown that "the making of the statement is an activity within the scope of [the agent's] authority." *Loschiavo v. Port Authority of New York and New Jersey*, 58 N.Y.2d 1040, 1041, 462 N.Y.S.2d 440, 441 (1983). This is reinforced in *Simpson v. New York City Transit Auth.*, 283 A.D.2d 419, 724 N.Y.S.2d 196, 197 (2d Dep't 2001), where the Court stated:

> A declaration made by an agent without authority to speak for the principal, even where the agent was authorized to act in the matter to which his declaration relates, does not fall within the "speaking agent" exception to the rule against hearsay and is not an admission that can be received in evidence against the principal.

In other words, the mere fact that the employee made the statement while engaged in her job is not enough; the proponent of the statement must demonstrate that the employee was authorized to make the statement. Although the Court of Appeals noted in *Loschiavo* that the speaking agent exception had been criticized, it remains in effect. While agents such as supervisors and store managers have been held to possess the authority to speak on behalf of and bind their employers (*Candela v. City of New York,* 8 A.D.3d 45, 48, 778 N.Y.S.2d 31, 33-34 [1st Dep't 2004], employees in positions such as security guards have been held to lack speaking authority (*Aquino v. Kuczinski, Vila & Assoc., P.C.*, 39 A.D.3d 216, 221, 835 N.Y.S.2d 16, 21 [1st Dep't 2007]).

Another line of cases holds that an affidavit making assertions which are incredible is to be rejected as a matter of law. This rule comes into play when the affidavit contradicts objective evidence such as photographs. Thus, in *Castro v. Hatim*, 174 A.D.3d 464, 106 N.Y.S.3d 24 (1st Dep't 2019), the First Department reversed the denial of the defendant's summary judgment motion and held that the plaintiff's version of how a motor vehicle accident occurred was not plausible and did not raise a material issue of fact because it was contradicted by post-accident photographs. *See also Citibank, N.A. v. Plagakis*, 8 A.D.3d 604, 779 N.Y.S.2d 576 (2d Dep't 2004).

Indeed, a plaintiff's recollection of events is not sufficient to controvert a moving defendant's detailed and objective showing that it could not have caused plaintiff's injury. In *Whelan v. GTE Sylvania Inc.*, 182 A.D.2d 446, 582 N.Y.S.2d 170 (1st Dep't 1992), defendant GTE demonstrated that it did not manufacture the type of light bulb which plaintiff alleged had exploded and had stopped selling light bulbs to the retailer where plaintiff claimed to have bought the bulb in question. The summary judgment motion was supported by affidavits averring that the filament of plaintiff's light bulb did not come from the type of bulb plaintiff said he had purchased and an affidavit from the retailer which, based upon a review of its records, confirmed that it had stopped buying GTE light bulbs years before plaintiff's alleged purchase. Plaintiff's opposing affidavit containing a "bald assertion" that the bulb was a GTE product "failed to raise a genuine triable issue of fact." *Whelan*, 182 A.D.2d at 449, 582 N.Y.S.2d at 173.

Similarly, in *Lewis v. Baker*, 1 A.D.3d 217, 767 N.Y.S.2d 109 (1st Dep't 2003), a retailer's summary judgment motion demonstrated through affida-

vits and copies of pages of its catalog that it did not sell the type of ladder on which plaintiff was injured. Because the opposing affidavit merely stated that the ladder had been purchased from the retailer's catalog and was not supported by "objective evidence such as receipts, manuals or warranty information," the Appellate Division held that it did not raise a material issue of fact and granted summary judgment. *Lewis*, 1 A.D.3d at 218, 767 N.Y.S.2d at 110.

Documents Can Be Excluded

All documents submitted on a summary judgment motion, including business records, must be properly authenticated. *O.K. v. Y.M. & Y.W.H.A. of Williamsburg, Inc.,* 175 A.D.3d 540, 107 N.Y.S.3d 85 (2d Dep't 2019) (Second Department held that a defendant had failed to properly support a motion to change venue with a computer printout from the New York State Department of State's website, because the printout was not certified or authenticated and had not been shown to be a business record).

CPLR 4518(a) sets out the requirements for the admission of a document as a business record. The court must find that the document was made in the regular course of the business, that it was the regular course of the business to make it and that it was made at the time of the act or transaction or within a reasonable time after the act or transaction. Even though CPLR 4518(a) states that the circumstances of the document's creation, including the lack of personal knowledge by the maker of the document, go to the document's weight, not its admissibility, the courts have taken a strict view of the personal knowledge requirement, especially in mortgage foreclosure cases. *Bank of New York Mellon v. Gordon*, 171 A.D.3d 197, 97 N.Y.S.3d 286 (2d Dep't 2019).[3]

* * *

Your reply papers are done. You did not engage the plaintiff at the factual level and instead demonstrated that his opposing papers were insufficient as a matter of law. You send the reply off to the court and wait for the decision. And when it comes, your approach paid off: the court excluded your adversary's submissions, held that your adversary failed to raise a material issue of fact and granted summary judgment in your client's favor. Congratulations!

Endnotes

1 There is an exception. Any person, including an expert, who is outside the United States can submit a sworn statement pursuant to CPLR 2106(b).

2 A witness's corrections to a deposition must be made in accordance with the procedures set forth in CPLR 3116(a).

3 However, pursuant to CPLR 4540-a, a document created or authored by a party and produced by it in discovery is presumed to be authentic when offered into evidence by an adverse party unless the document's authenticity is rebutted by a preponderance of the evidence.

Marc Rowin, Esq., is a partner in Lynch Rowin LLP, White Plains, New York. A graduate of the Harvard Law School, he specializes in civil litigation. He helped draft one of the motions that led to the U.S. Supreme Court's seminal summary judgment decision in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Using the principles discussed in this article, he has won numerous summary judgment motions, including the *Bartholomew* and *Clarke* decisions which the article cites.

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