Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

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NCBA COMMITTEE
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WHAT'S INSIDE

OF NOTE

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UPCOMING PUBLICATIONS COMMITTEE MEETINGS AT THE BAR ASSOCIATION

Thursday, May 7, 2020 at 12:45 PM

Thursday, June 4, 2020 at 12:45 PM

NCBA Stands Strong in Time of Uncertainty

By Richard D. Collins

As President of the Nassau County Bar Association, first and foremost, I would like to extend my most heartfelt good wishes to all NCBA members and your families during this difficult time. I hadn't planned on being a "wartime president" in the final months of a peaceful and enjoyable term, but the Coronavirus clearly had other plans. This is a challenging period for so many of us, especially those in small firms as well as others, but together we will make it through. Please know that I am here to help in any way that I can. I am dedicated to helping NCBA weather this storm so that this association and its members are strong when the skies clear.

Our number one priority is the health of our Bar staff, Members, and the public. Following the guidance of the U.S. Centers for Disease Control and the recommendations from New York State and Nassau County authorities, we have made adjustments that have impacted member services and events now and in the upcoming weeks. In response, I would like to share the ways that the NCBA will continue to serve you during this time of uncertainty.

Domus Temporarily Closed

Domus is temporarily closed to Bar staff, Members, and outside visitors. Academy programs, Committee meetings and events scheduled through April 1 have been postponed or will take place electronically or by phone. I want to thank those committee chairs who have scheduled these "remote" meetings to keep their members informed and educated. As we continue to monitor and reassess the COVID-19 situation, we will make necessary changes as developments occur and communicate them to you.

Furthermore, the Bar staff has transitioned to a remote-work environment. Rest assured the NCBA is committed to serving

See NCBA STANDS STRONG, Page 4

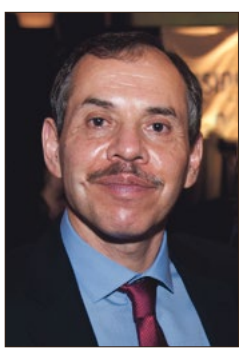
For NCBA Members
Notice of
Nassau County Bar Association
Annual Meeting

May 12, 2020 • 7:00 PM

Domus
15th & West Streets
Mineola, NY 11501

Proxy statement can be found on the insert in this issue of the *Nassau Lawyer*. The Annual meeting will confirm the election of NCBA officers, directors, Nominating Committee members, and Nassau Academy of Law officers.

A complete set of the By-Laws, including the proposed amendments, can be found on the Nassau County Bar Association website at www.nassaubar.org.



NCBA Hector Herrera to Receive 2020 President's Award

Each year, the NCBA President's Award is given to an individual whose extraordinary efforts have helped to further the goals of the Nassau County Bar Association. The NCBA is proud to announce that Hector Herrera, Building Manager of the NCBA for over 25 years, will receive the 2020 President's Award at the 121st Annual Dinner Dance Gala from NCBA President Richard D. Collins. The NCBA would like to thank Hector for his years of service and dedication to Domus, its members, and staff.

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General / OCA

Governmental Liability and Indemnification in Excessive Police Force Cases

In November 2019, the Court of Appeals handed down two decisions involving the use of excessive force by a police officer and a corrections officer. Decided one day apart, *Rivera v. State of New York*[1] and *Matter of Krug v. City of Buffalo*[2] exonerated the state and municipality from financial responsibility for the actions of their employees. In *Rivera*, a correction officer's brutal, unprovoked beating of an inmate outside a prison mess hall is found to be, as a matter of law, outside the scope of his employment. In *Krug*, an on-duty police officer who struck the complainant while breaking up a crowd of late-night street revelers, is also deemed to have acted outside the scope of his employment.

Rivera v. State

In January 2010, Jose Rivera was an inmate at a prison operated by the State Department of Corrections and Community Supervision ("DOCS"). He suffered from seizures, and wore a protective helmet. One afternoon, while entering the mess hall, Rivera heard Corrections Officer Michael Wehby make fun of his helmet. He asked Officer Wehby to stop. Officer Wehby then directed Rivera to move to the back of the mess hall. He then grabbed Rivera, pushed him outside the mess hall, shoved him down on the ground, and started beating him on his face and body. While other officers held Rivera down on the ground, Officer Wehby removed Rivera's helmet, and hit him on the head with his radio so forcefully that the batteries came out.

After a mistrial, Officer Wehby plead guilty to official misconduct. Rivera then sued the State of New York for negligent hiring and training under a theory of respondeat superior. The state moved for summary judgment. *Riviello v. Waldron* sets forth the relevant factors in respondeat superior cases:

- Connection between time, place, and occasion for the act
- History of relationship between employer and employee
- Whether act is one commonly done by such an employee
- Extent of departure from normal methods of performance
- Whether the employer could have reasonably anticipated such an act.[3]

Applying the *Riviello* factors, the Court of Claims held that there was "'no reasonable connection' between the assault and the duties normally performed by correction officers," and that the attack was a "'substantial departure' from the normal methods of performance."[4] Furthermore, the malicious and unprovoked attack was "wholly attributable to personal motive, reflected by the lack of any plausible justification." Concluding that DOCS could not have reasonably anticipated such an act, the Court of Claims granted the State's motion for summary judgment, and held that the State is not liable for the actions of Officer Wehby.[5] The Appellate Division affirmed.[6]

Appealing the decision, Mr. Rivera contended that the lower courts erred in granting summary judgment because Officer Wehby's actions, which occurred inside the prison, were within the scope of his employment as a corrections officer. The Court of Appeals disagreed, pointing out two distinct categories of cases involving excessive force by those whose occupation necessitates physical contact with others. In some cases, it is a factual question whether the challenged action falls outside the "boundaries attendant to the employment relationship."[7] In others, "the gratuitous and utterly unauthorized use of force [is] so egregious as to constitute a significant departure from the normal methods of performance of the duties of a corrections officer as a matter of law."[8]

Ellin Mary Cowie

Summarizing the issue, the Court states that the "question may be one of degree and not kind." Thus, the Court of Appeals affirmed the decision of the lower courts, finding the State not liable for a correction officer's assault and battery of an inmate.

Matter of Krug v. City of Buffalo

It was Thanksgiving eve in the City of Buffalo. Among other law enforcement personnel, Police Officer Corey Krug was deployed to break up a group of drunken street revelers. Devin Ford was unarmed; he had previously left the scene but then returned. Officer Krug questioned Mr. Ford as to why he returned, and then threw him onto the hood of a car, striking him repeatedly on the leg with his baton. The incident was recorded by a video camera. Criminal charges were filed against Officer Krug, and Mr. Ford filed a civil suit against him.[9]

Officer Krug requested that the City of Buffalo defend and indemnify him pursuant to General Municipal Law § 50-j.[10] After the Corporation Counsel's office denied the request, Officer Krug filed a petition under CPLR Article 78 to compel the city to defend and indemnity him. Granting Officer Krug's petition, the Supreme Court held that Buffalo's decision not to defend Officer Krug was arbitrary and capricious because it lacked a factual basis. It found that the 30-second videotape clip provided insufficient evidence that Officer Krug was acting recklessly or with an intent to cause harm so as to preclude defense and indemnification under Buffalo City Code § 35-28.[11] The Appellate Division affirmed.[12]

The Court of Appeals reversed in a memorandum opinion. In a conclusory fashion, the Court states that the "record" supports the city's determination that the police officer's conduct constituted "intentional wrongdoing," and thus was outside the scope of his employment. Whereas the Supreme Court found the city's decision not to defend Officer Krug to be arbitrary and capricious, the Court of Appeals found that the "record" in fact supported the decision of the Corporation Counsel. Can it be surmised that the 30-second videotape capturing the police officer beating the unarmed man repeatedly on the leg was proof enough of a malicious intentionality on the part of the police officer, so as to preclude imposing on the state the financial burden of his defense?

Foreseeability is the Decisive Factor

Krug is a case concerning a municipality's duty to defend and indemnify a public employee, and not a state's liability for the actions of a public employee, as in *Rivera*. Nevertheless, similar were results obtained. What prevails in the outcome of these cases may be a concern to direct public resources in an efficient way. They beg the question: should the state bear the costs associated with erratic, rageful behavior on the part of its law enforcement?

Considering these twin opinions on excessive force, one can conclude that where the employee's conduct is entirely unforeseeable, the court will not impose financial responsibility—be it cost of defense and indemnity or direct liability—on the state or municipality. Intentional wrongdoing or recklessness puts the tortious conduct outside the boundaries of foreseeability.[13] "Scope of employment" is a term of art, encompassing the duties expected of the particular employee and the normal methods of performance as spelled out by written and unwritten policies.

Ultimately, the court will place the financial responsibility for an individual's tortious conduct on the shoulders of the employer to incentivize the employer to improve its hiring, training, and retention policies.[14] In cases of an unprovoked brutal beating, however, courts may be loath to shift the cost burden onto the state or municipality where it is doubtful that heightened supervision and training could have thwarted such attacks, and there is no evidence of coverup or condoning said conduct.

In an "incident of really singular depravity,"[15] a Haitian immigrant Abner Louima was sexually assaulted by New York City Police Officers in a stationhouse bathroom in 1997. The criminal trial resulted in prison sentences for the two New York City Police Officers involved. Looking back, the prosecuting attorney, the United States Attorney for the Eastern District of New York, Zachary Carter, compared two types of police excessive force cases. The first type is a shooting, which involving the misuse of lethal force by police officers reacting to fear. The second type is a beating in which police officers use non-lethal force, acting out of anger. The latter cases, opined Carter, are the most "serious."[16] And possibly the least preventable, at least on the part of the employer.

Ellin Mary Cowie is the Focus Editor for this April's edition of *Nassau Lawyer*.

1. 2019 WL 6255785 (Nov. 25, 2019).
2. 34 N.Y.3d 1094 (2019).
3. 47 N.Y.2d 297, 303 (1979).
4. 2019 WL 6255785, at *2.
5. *Id.*
6. *Id.* at *3.
7. *Id.*
8. *Id.*
9. *Id.* at 1097 (Wilson, J., dissenting).
10. "Every city, county, town, village, authority or agency in the State of New York must indemnity police officers for negligence or tortious acts that occur while performing his or her duties and while within the scope of his or her employment…The duty to indemnity and save harmless prescribed by this section shall not arise where the injury or damage resulted from *intentional wrongdo-*

See GOVERNMENTAL LIABILITY, Page 11

NCBA STANDS STRONG...

Continued From Page 1

our Members and the public during these difficult times. The staff will continue to do their best to respond to phone calls and emails in a timely manner. Emails and telephone extensions can be found on the NCBA website at www.nassaubar.org under the "Contact Us" tab. If you have any questions or concerns, please reach out to them directly.

Keeping Members Informed

Keeping our membership informed remains a top priority. Now more than ever we want to be of great value to you. The latest COVID-19 pandemic information from New York State, New York State Courts, Nassau County Courts, and the Bar can be found on the NCBA website. Our staff is working diligently to update this page daily with useful information and announcements. Be sure to check in regularly! You can also follow our social media accounts on Facebook and Instagram where updates can be found as well.

Nassau Academy of Law Unveils "CLE on Demand"

Due to this pandemic, we have been asked to stay at home as much as possible, which has made it difficult for Members to obtain their CLE credits. In response, the Nassau Academy of Law recently unveiled "CLE on Demand," a new way for Members to obtain their CLE credits from the convenience of home. Nassau Academy of Law CLE seminars that are generally available on CDs and DVDs will be now be offered to stream online. New programs and updates will be added frequently. I want to thank the amazing Jen Groh and Hector Herrera for their hard work in making this happen.

Members can visit nassaubar.org and click on "CLE." There will be a drop-down link for CLE on Demand. You will then submit the affirmation form with the codes you heard throughout the program to the Academy via email at academy@nassaubar.org.

On-demand CLE is free to current NCBA members. If you are not a member, you can join online at www.nassaubar.org or contact Donna or Stephanie in our Membership Department at (516) 747-4070 ext. 1230 or ext. 1206.

Annual Dinner Dance Gala Postponed

Our Annual Dinner Dance is a highlight of the NCBA year and I was tremendously looking forward to honoring NCBA Past President Chris McGrath and NCBA's beloved staff member Hector Herrera as award recipients. However, it would be imprudent to attempt to maintain the current scheduling. Instead, we will be postponing the event to a new date in the early fall. I hope everyone understands the necessity of this, and I am hoping for an even bigger turn-out on the new date, which will be determined soon.

NCBA Lawyer Assistance Program is Here for You

During times like these, maintaining your mental health is just as important as physical health. As lawyers, many look to you for answers, and the uncertainty that has come with this pandemic can be extremely stressful and difficult to navigate. Please know that you are not alone, and that help is available to you.

The NCBA Lawyer Assistance Program (LAP) is here for you! LAP is offering confidential professional counseling sessions via doxy.me, a HIPAA compliant telehealth video platform. Please do not hesitate to call Beth Eckhardt, LAP Director, at (516) 512-2618 or (888) 408-6662 to set up an appointment. You will be sent an invitation with a link to her "waiting room."

Staying Safe and Healthy

It seems that within a matter of days, our daily routines and lives were put on a drastic hold. The world has changed in ways we could never imagine. It is important to know that we are all in this together; as a Bar, a community, a state, a country, and as citizens of the world. Liz, Ann, and I, along with the wonderful staff of the NCBA, are here to support and assist you. Meanwhile, follow the guidelines of the CDC, wash your hands frequently, don't touch your face, avoid unnecessary contact, stay home as much as you can, and most importantly, look out for your loved ones. Stay safe and well.

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General / OCA

Influencer Marketing: Legal Concerns and Best Practices

Influencer marketing has become one of the fastest growing channels for consumer acquisition, as well as one of the most cost effective. Brands are spending increasingly more of their marketing dollars to engage with influencers to endorse their products on Instagram and other social media platforms. As a result, attorneys advising brands should carefully consider the legal requirements and potential consequences of engaging influencers.

Who are "Influencers"?

Influencers are individuals who have the power to affect the purchasing behavior of consumers because of their experience, knowledge, position and/or relationship with their social media audience. Influencers typically fall into two primary categories:

(1) macro influencers, who have large social media followings and include celebrities, athletes and other public figures with devoted fans that want to emulate their lifestyle and product preferences; and

(2) micro influencers, who are everyday consumers who have become known for their experience, expertise, passion and/or niche in a particular market or industry and have significant social media followings, typically ranging between 1,000 to 100,000 followers.

Although micro influencers may have smaller followings than macro influencers, their audience is usually more interactive and engaged, which can hold appeal to marketers.

Legal Considerations

While influencer marketing may seem relatively simple on its face, it is critical for all parties involved to understand the legal framework at play, as influencer marketing has been a focal point for the Federal Trade Commission. Influencers and marketing brands can both be held responsible for noncompliance with regulatory and other legal requirements. Thus, attorneys advising brands should carefully consider and address the unique issues raised by influencer marketing, ranging from regulatory compliance, public relations risks and an assortment of issues relating to content, ownership and rights.

Generally speaking, long form agreements tend to be negotiated with macro influencers and their attorneys/agents, while micro influencers are often self-represented and engaged on a handshake, short form agreement, or even a text or email exchange of terms. Either way, the following considerations should be taken into account when structuring an influencer deal.

Initially, basic "truth in advertising" principles apply to an influencer's endorsement of a brand and its products or services. Endorsement are generally defined as any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser.[1] Endorsements can be any form of advertising message, including a social media post, photo, product review or even simply tagging a brand.

Endorsements must reflect the accurate experience and honest, truthful opinion of the endorser. To that end, influencers should not speak about their experience with a product if they have not tried it. If an influencer was paid to try a product and thought it was awful, they cannot say it was fabulous.

The FTC Guides

Terese L. Arenth

When someone is endorsing a brand and/or its products or services, and has a material connection with the brand, the Federal Trade Commission (FTC) Guides Concerning the Use of Endorsements and Testimonials in Advertising (the "FTC Guides")[2] will apply. "When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed."[3] In 2009, the FTC Guides were revised to apply to blogs and social media.

Under the FTC Guides, a "material connection" can include payments, free product, event tickets, tester products, sweepstakes entries and other incentives to promote the brand. If unsure if something qualifies as a material connection, ponder this question: Would the weight or credibility given to an endorsement by a consumer be affected if the consumer knew that the brand had given the influencer the payment, gift, incentive, etc.?

By way of example, bloggers have a duty to disclose when they receive free products or payment from a marketer. Celebrities have a duty to disclose their relationships with marketers when making endorsements outside the context of traditional advertisements, such as on talk shows or in social media. Employees who promote their employer's products or services in social media should clearly and conspicuously disclose their employment relationship.

While the FTC Guides do not mandate any special language, the goal is to effectively communicate the influencer/marketer relationship with clear and conspicuous disclosures. For social media platforms, disclosures should be "above the fold" of the post. For example, when an Instagram feed is viewed on most smartphones, longer descriptions (currently more than two lines) are truncated, with only the beginning lines displayed. To view the rest of the post, a consumer must click "more". If an Instagram post makes an endorsement through the photo or beginning lines of the description, any required disclosure should be viewable without having to click "more".

Hashtags like "#ad" or "#paid" should be used at the beginning of a post and not buried amongst other links and hashtags. Hashtags like "ambassador", "spon" and "sp" are not sufficient, as the FTC views them as ambiguous and confusing. By contrast, "#XYZ_Ambassador" (where XYZ is the brand name) and "#Sponsored" are likely more understandable. Similarly, simply saying "thank you" to the sponsoring company has been deemed insufficient, as it does not necessarily communicate that the endorser got something for free or was given something in exchange for an endorsement.

Examples of acceptable disclosures include: "Company X gave me this product to try…" or "Thanks XYZ for the free product". Lack of space is no excuse for failing to make required disclosures. If those or similar statements are too long for the particular platform (like Twitter), the FTC recommends using #Sponsored, #Ad or #PaidAd. If an endorsement was incentivized by entries into a sweepstakes or contest, #contest or #sweepstakes should be used to make disclosure of the material connection (but not #sweeps, which has been rejected by the FTC).

YouTube and online videos require disclosures in the beginning of the video and multiple times throughout. The disclosure should be superimposed over a Snapchat or Instagram story and followers must have time to read the disclosure. In a series of disappearing posts, disclosure may only be needed on the first post if the disclosure stands out and viewers have time to process it before the next post appears.

To assist influencers and brands in making required disclosures, social media platforms have begun to offer built-in disclosure tools (for example, the "Paid" tag on Facebook, "Includes paid promotion" mark on YouTube or "Paid partnership with" tag on Instagram). However, the FTC has not officially sanctioned these tools, which depends on whether the tool clearly and conspicuously discloses the connection. For the moment, the FTC has cautioned that it does not think that these tools will suffice.

The key word is "transparency". While it is important that the influencer make the required disclosures, those disclosures must also be made effectively.

While regulators are paying attention to what brands do with their influencers, a brands' customers, competitors and consumer protection attorneys are likely also paying attention. In selecting an influencer to work with, due diligence is advisable. Brands are well-advised to assess a number of factors about the influencer, including whether the influencer is a good fit for its brand, if they have been associated with a competitor, have made past offensive statements or have skeletons in their closet, and whether or not their number of followers and impressions are legitimate.

Contract Best Practices

To mitigate against risks and potential exposure, several key provisions should be included in influencer contracts. The scope of services should be clearly defined, including volume, frequency and timing of posts, and the type of content that the influencer is expected to create.

The contract should provide detailed guidance and examples of proper disclosure. Simply providing that the influencer must comply with the FTC Guides is not best practice. As the advertiser can be liable for its influencer's endorsements, consider contractually providing for approval rights and/or creative control, by having a process for reviewing the influencer's posts, including when/how the influencer should present the brand with its posts and rights to edit and/or approve the posts. Influencer agreements

See INFLUENCER MARKETING, Page 22

General / OCA

Being an Active Member of the Nassau County Bar Association:

Twenty-Plus Years of Learning, Growing and Invaluable Opportunities!

Chandra M. Ortiz

If I could turn back the hands of time, the best advice I would have given myself, as an aspiring attorney, would be to join the Nassau County Bar Association (NCBA). Not only has my career benefited enormously, but for more than twenty years I have experienced the tremendous gifts of learning, growing and professional fellowship.

My decision to become involved with the NCBA proves the adage that the beauty of life is that as individuals we get to decide and determine our own destiny. And thankfully, I am able to share this advice today with law students, newly minted attorneys and more experienced practitioners who are looking to advance their legal careers. The most effective choice you can make is to join and get involved with the NCBA.

The Beginning of My Involvement

I first learned about the NCBA as a law student. I was attending law school at night while working full-time in a Fortune 500 company. I also had to balance the obligations of being a wife, being a mother and of having another child while in school. Believe me it was not easy. However, with discipline and determination anything is achievable.

As a student, I felt overwhelmed at times. The last thing I needed was one more commitment. As fate would have it, I attended a seminar sponsored by the NCBA. The seminar provided participants a behind-the-scenes tour of Nassau County's various courts. I decided to sign up since I was unfamiliar with the court system.

Attendees were allowed to observe proceedings, meet judges and court personnel, and see first-hand the logistical functioning of different courtrooms. It is often said that the decisions we make today will affect the decisions we will make tomorrow. This was certainly true in my case. My decision to attend that NCBA seminar many years ago, continues to have a beneficial and lasting effect on my legal career.

At the seminar I was greeted by Mrs. Barbara Kraut, the director of the Nassau Bar Association's Nassau Academy of Law (NAL). Barbara, a friendly and engaging individual, took the time to explain the benefits of NCBA membership and the NAL. She stressed that we should consider active membership. I recall thinking I would love to but how would I ever manage to find the time with my schedule and obligations.

I decided I would join anyway, and Barbara became my guide, friend, and mentor. She was the first of many people that I would meet at the NCBA who would be encouraging and supportive of me. Upon Barbara's retirement, NCBA and NAL were extremely fortunate to gain a phenomenal replacement Director in Ms. Jennifer Groh. Jen, as we affectionately call her, is a dedicated individual and her contribution to each member is ineffable. As the years have passed, I became more and more involved. Soon I realized that my efforts were reciprocated, as the NCBA was appreciative of my dedication. The NCBA would help to advance my career through its seminars, professional networking and the friendships I made. The knowledge and experience I have gained from these interactions have been priceless.

Coping with Transitions

Prior to law school, I had completed an ABA post graduate paralegal certification program and had worked for two law firms. But law school was far different. For me the law was moving at a faster pace, and it came with new responsibilities and obligations. At the very same time, I was also already working at a demanding job with McDonald's Corporation' New York Development Team, in real estate acquisitions and the construction of its New York restaurants.

As with any step forward which we take in life, there is usually a level of uneasiness, including for those who may be afraid to admit it. This is a natural human response. I always kept in my mind the mantra of my then-employer who often quoted its founder Ray Kroc: "if you're green, you're growing…."

I also found that my involvement with the NCBA was a way for me to channel my uneasiness with my transition into law. There is a sense of calm being around others who are traveling, or have traveled, along a similar path in the same profession. Most of those who I would meet stood ready to mentor me, they helped me realize that this is a big field and there is enough room for all of us with our varied interests

The NCBA provided me a bridge between my prior work experience and my new career as an attorney. I began participating in programs, got involved with the various committees, and volunteered in numerous public service programs. All the while, I was acquiring new skills and knowledge, learning how to manage the different interactions, and simultaneously making new friends; networking in its natural and most constructive way.

The basic objectives of any bar association are to promote and advance the legal profession and the development of its members. You will find people with similar interests seeking to do similar things at any bar association. However, what sets one bar association apart from another is its cultural objectives. The NCBA cultivates a supporting and nurturing culture that permeates its organizational structure.

The culture of NCBA as an institution was and continues to be reassuring, to provide its members the level of understanding needed to ease the uncertainty that is associated with transitional growth. After twenty plus years I can confidently say that active membership in the NCBA is equally beneficial to facilitate any transition regarding our profession—whether you are a new attorney just entering the ranks, or an experience attorney seeking to acquire new skills.

This nurturing culture can be found in every corner of DOMUS, the home of the NCBA, and surely among its outstanding staff. The NCBA has been fortunate to have Hector Herrera as its building manager. Hector can always be depended on to resolve any concern. The same can be said of other staff members—who go out of their way to meet the needs of the NCBA's members whether they work in the NAL or are involved in putting together the Nassau Lawyer, the NCBA's monthly newspaper, or catering lunch and other events at DOMUS

See ACTIVE MEMBER, Page 22

General / OCA

The Impaired Attorney and Obligations of Law Firms

Your partner is frequently late for appointments, depositions or court appearances, and her absences are mounting. Increasingly, she fails to timely return telephone and email messages. Occasionally, she returns from lunch and you detect the odor of alcohol on her breath. She may be socially isolated and asking others to cover for her. You meet with her and review her files. She promises to improve. A few weeks later, her concerning behaviors reoccur.

What are your obligations? What must you do and what should you do?

Relevant Provisions of the New York Rules of Professional Conduct

Mandatory reporting requirements are set forth in Rule 8.3(a) of the New York Rules of Professional Conduct ("RPC"). The Rule provides as follows:

> A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

There are two specific carve-outs set forth in RPC 8.3(c). The first is for actual knowledge obtained confidentially, for example, during the course of representing the attorney. The second protects "information gained by a lawyer or judge while participating in a bona fide lawyer assistance program." This exception is required by the confidentiality provisions set forth in Judiciary Law § 499, which protects all communications with a lawyer assistance program ("LAP") coextensively with the attorney-client privilege. The provision is also designed to encourage an attorney's participation in a LAP for treatment and assistance.[1]

Reporting is mandatory under RPC 8.3(a) where the following requirements are met: (1) actual knowledge of a violation of a RPC; (2) by another lawyer; (3) raising a substantial question; and (4) the substantial question concerns the "lawyer's honesty, trustworthiness or fitness as a lawyer."

In our hypothetical, there is no actual knowledge of a violation of a RPC, although danger lurks. Mere suspicion or a belief without actual knowledge does not require a report.

Additionally, the hypothetical does not yet raise a substantial question regarding her honesty, trustworthiness or fitness as a lawyer. Professor Simon writes that "if another lawyer is an alcoholic or manic-depressive whose personal life seems to be in disarray, Rule 8.3(a) does not require a report unless the alcoholism or depression has led to a violation [of] the Rules of Professional Conduct…. Alcoholism, for example, is troubling, but by itself it is not a violation of the Rules of Professional Conduct. Alcoholism may lead to violations …, but simply drinking too much or too often is not a violation."[2]

Change the hypothetical—the attorney is neglecting matters entrusted to her, and failing to return calls and emails from clients and others. Your required response may well be different. These behaviors may involve violations of, inter alia, RPC 1.1 (general competence), RPC 1.3(b) (neglect of a matter) and/or RPC 1.4(a)(4) (compliance with client requests for information). Two questions arise: (1) does her conduct now raise a substantial question about her "honesty, trustworthiness or fitness as a lawyer?" and (2) how do you fulfill your supervisory or managerial responsibilities under RPC 5.1?

Regarding the duty to report under RPC 8.3(a), there is no easy answer but the likely answer depends upon the extent of the neglect. The threshold for punishable neglect is difficult to ascertain. Professor Simon cites two cases in which federal courts imposed discipline on attorneys for repeatedly neglecting matters and violating court orders.[3] Otherwise, he notes that "[i]f a lawyer's neglect has brought the client to the brink of a disaster, the lawyer has probably violated Rule [1.3(b)] even if the lawyer ultimately rectifies the situation …."[4]

Mark E. Goidell

RPC 5.1(a) requires law firms to "make reasonable efforts to ensure that all lawyers conform to these Rules." In turn, RPC 5.1(b) imposes upon managerial and supervising attorneys the responsibility to use "reasonable efforts" to ensure compliance with the Rules. RPC 5.1(c) requires a law firm to "ensure that the work of partners and associates is adequately supervised, as appropriate." As a result, an attorney cannot ignore a suspected or known impairment of another lawyer in the firm.

ABA Formal Opinion 03-429, entitled "Obligations with Respect to Mentally Impaired Lawyer in the Firm," addresses many of these issues. It notes that the "paramount obligation is to take steps to protect its clients." At a minimum, the firm should determine the extent of the impairment, conduct a thorough file review and, if necessary, remove the attorney from responsibilities until recovered from the impairment.[5]

Change the hypothetical one more time, and consider your obligations where the impaired attorney is not associated with your firm, but is an adversary in litigation. Importantly, RPC 8.3(a) is not concerned with whether the subject lawyer is within or outside your firm. Reporting is mandatory if the elements of the Rule are satisfied.

When reporting is mandatory, RPC 8.3(a) requires that the report be made "to a tribunal or other authority empowered to investigate or act upon such violation." Typically, a required report is made to a Grievance Committee. In litigation, the report can be made instead to the court where the litigation is pending. In extreme cases involving actual knowledge of criminal activity, such as theft from an escrow account, the report can be made to the office of a prosecutor with jurisdiction to investigate the matter.

RPC 8.3(a) is only concerned with the misconduct of "another lawyer." Therefore, there is no self-reporting requirement. Nevertheless, RPC 1.16((b)(2) requires withdrawal from representation when "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client." Further, representation of a client during a period of impairment may violate the general rule of competence set forth in RPC 1.1.

The filing of a report pursuant to RPC 8.3(a) enjoys an absolute privilege, protecting the reporting attorney from defamation or malicious prosecution claims.[6] Additionally, the Court of Appeals held that a retaliatory discharge of an attorney who reported the misconduct of another attorney in the firm pursuant to the substantially similar provision of the former Code of Professional Responsibility (DR 1-103[A]) was actionable.[7]

The Role of Lawyer Assistance Programs

Regardless of whether the mandatory reporting requirements of RPC 8.3(a) are triggered, a referral to a LAP is advised and encouraged. Whether the subject attorney is a partner, employee or colleague in our industry, no lawyer should suffer with alcoholism, substance abuse, or mental illness without treatment. No law firm should risk discipline or liability by failing to take action when an attorney becomes impaired.[8]

The pervasiveness of alcoholism, addiction, and mental illness in the legal profession is well documented. The most recent and comprehensive study of alcoholism in the legal profession found that over 20 percent qualify as problem drinkers, and that at least 28 percent of us struggle with some level of depression, anxiety, or stress.[9] The study reached no conclusions about the prevalence of cognitive impairments or substance abuse disorders among attorneys.[10]

Recognizing the need for action, the ABA commissioned a Task Force to recommend appropriate changes with all stakeholders in the profession. The ABA Task Force Report made several suggestions to meet this health crisis, including those for law firms dealing with impaired attorneys.[11]

The Nassau County Bar Association and the New York State Bar Association, both of which have professionally staffed LAPs, published a Model Policy for law firms.[12] The ABA Task Force Report expressly endorsed our Model Policy.[13] Long Island law firms are employers that are subject to the New York State Human Rights Law (Executive Law § 290 *et seq.*), and may be subject to the Americans with Disabilities Act (42 U.S.C. § 12101 *et seq.*).[14] The Model Policy provides firms with tools to comply with the law and the RPC while simultaneously protecting and assisting our most valuable assets—our attorneys.

Among other things, the Model Policy expresses a law firm's commitment to the well-being of its attorneys and provides the opportunity for treatment and assistance of impaired attorneys. Typically, referrals are made to the LAP, which then directs the attorney to an appropriate provider for care and treatment. The LAP then provides monitoring services, sometimes formalized in a Return to Work Agreement, to support the attorney and maximize the potential for recovery. Communications with LAPs are and forever remain strictly confidential pursuant to Judiciary Law § 499 and RPC 8.3(c).

LAPs are critical to the ongoing effort to enhance attorney well-being and treat suffering attorneys with confidentiality, competence and care. The Nassau County Bar Association LAP works with individual attorneys and law firms to help attorneys recover from alcoholism, substance abuse, and mental health issues. The LAP also works with the Committee on Character and Fitness and the Grievance Committee for the Tenth Judicial District. For attorneys who are the subject of disciplinary complaints or proceedings, there is a statewide rule authorizing a diversion program for attorneys requiring assistance.[15] LAPs work with attorneys who seek to take advantage of the diversion program.

Conclusion

RPC 8.3(a) imposes a legal obligation upon lawyers to report actually known misconduct which violates the Rules of Professional Conduct and "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer." Failure to comply with the Rule constitutes grounds for discipline and may expose the lawyer's firm to liability. Frequently, attorneys become aware of these and less serious matters that may not trigger the mandatory reporting provisions of RPC 8.3(a) but which may arise from a suspected concern about alcohol abuse, substance abuse, or other mental health issue. LAPs exist to effectively assist such attorneys while protecting them from public exposure. The services of LAP are free. Please let our LAP know if it can be of assistance.

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1. *See* RPC 8.3, Comment [5].
2. Roy D. Simon, Jr., *Simon's New York Rules of Professional Conduct Annotated*, § 8.3:2 (May 2019).
3. *Id.* at § 1.3:5, citing *In re Castillo*, 645 Fed.Appx. 41 (2d Cir. 2016) and *In re Gluck*, 114 F.Supp.3d 57 (E.D.N.Y. 2016).
4. *Id.* at § 1.3:6.
5. As discussed below, appropriate supervisory steps may include a referral to a LAP and the implementation of the Model Policy promulgated by both the New York State Bar Association and Nassau County Bar Association.
6. *Sinrod v. Stone*, 20 A.D.3d 560, 562 (2d Dept. 2005) ("The Supreme Court correctly concluded that the claims challenging the complaints of misconduct filed with the Grievance Committee by the defendant were absolutely privileged."); *Fowler v. Leahey & Johnson, P.C.*, 272 A.D.2d 240, 241 (1st Dept. 2000) ("Contrary to plaintiff's contentions, complaints to the Departmental Disciplinary Committee (DDC) may not be used as grounds for claims of malicious prosecution.").
7. *Wieder v. Skala*, 80 N.Y.2d 628, 638 (1992).
8. In early February 2020, the Dentons law firm in Calgary, Canada was sued by its client for, among other things, permitting an impaired attorney to handle client matters. *See* https://www.cbc.ca/news/canada/edmonton/edmonton-lawyer-drunk-driving-lawsuit-1.5452118.
9. P. R. Krill, R. Johnson, & L. Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. Addiction Med. 46 (2016).
10. Earlier studies have concluded that substance abuse is more widespread in the legal profession than in the general population. *See* Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 Creighton L. Rev. 265, 266 (1997).
11. ABA National Task Force on Lawyer Well-Being (2017) ("Task Force Report"), pp. 31-34.
12. The Model Policy is available at https://www.nassaubar.org/UserFiles/Model_Policy.pdf.
13. Task Force Report, p. 32.
14. *See, e.g., Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 A.D.3d 18 (1st Dept. 2014); *Lyons v. Legal Aid Society*, 68 F.3d 1512 (2d Cir. 1995).
15. 22 NYCRR § 1240.11.

General / OCA

Santoro: Nursing Home's Claims Against Child for Parent's Death Rejected

Sandra Santoro's mother was admitted to a residential health care facility following a hospital admission for a heart attack. While a patient at the nursing home, her mother fell, fracturing several ribs and puncturing her lung. She was transferred back to the hospital and thereafter returned to the nursing home. Approximately one month later, the nursing home discharged her to her home where she lived with Ms. Santoro. Three days later, her mother fell at home while walking to a portable commode near her bed and fractured her hip, requiring another hospitalization and surgery. She died from septic shock ten days later.

Little did Sandra Santoro realize at the time the nursing home gave her instructions for her mother's discharge that it would later attempt to use those very discharge instructions as the basis for a third-party action asserted against her for common-law indemnification and contribution in a wrongful death lawsuit she brought as executrix against the nursing home.

Fortunately for Ms. Santoro, the Second Department in *Santoro v Poughkeepsie Crossings, LLC* held that the nursing home's third-party action failed to state a cause of action and dismissed the action.[1] The court's decision is important not only for its outcome but also for its broader implications for any case alleging negligent supervision of an infirm parent by an adult child. It is also important for its explicit declination to impose what the court called a "new" duty on those who live with infirm individuals to use reasonable care and to hold them liable for harm caused by failing to do so.

A Third-Party Claim for Negligent Supervision

The nursing home predicated its third-party action against Ms. Santoro upon her alleged failure to properly supervise and control the decedent in disregard of its discharge instructions leading to her fall at her home and her eventual passing. The defendant alleged that Ms. Santoro failed to install a monitoring system in her house and to arrange for 24–hour care, seven days a week, contrary to the defendant's "clear and explicit instructions as to how to best care for the Decedent." The defendant further alleged that the cause of the decedent's death was septic shock resulting from C. difficile colitis, and that her death was in no way related to the fall in its facility.

Santoro was an appeal from the denial of plaintiff's cross-motion pursuant to CPLR 3211(7) to dismiss the third-party complaint for failure to state a cause of action on the ground that there is no cognizable claim for an adult child's failure to provide adequate supervision to a parent or other adult family member. The motion court found that issues of fact existed as to whether Ms. Santoro assumed a duty of care for the decedent in accordance with the discharge instructions and, if so, whether Ms. Santoro was negligent in the decedent's post-discharge care, and whether any such negligence caused or contributed to the decedent's death.

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The Appellate Division reversed, granting the cross-motion to dismiss the third-party complaint for failure to state a cause of action. The cause of action for common-law indemnification was dismissed because indemnification principles apply where the entire liability is shifted to the negligent party, and the defendant did not allege any scenario under which it could be held vicariously or statutorily liable for any negligence of Ms. Santoro.[2]

The Appellate Division's analysis of the cause of action for contribution centered on the issue of whether Ms. Santoro owed a duty to the decedent or to the defendant, noting that the existence of a duty is generally a question of law for the courts. Upon an exhaustive discussion of potential legal theories, the court held that no such duty existed.

Theories of Liability Rejected

Theories the court considered and rejected included a duty arising by virtue of breach of contract, a duty of care owed to the public at large, assumption of a duty to a third party based upon gratuitous conduct, voluntary assumption of the care of another and so secluding the helpless person as to prevent another from rendering aid, and creation of a legal duty by the legislature.

Breach of contract was rejected because there was no allegation that Ms. Santoro assumed a contractual duty to the decedent to take care of her and to provide treatment for her condition. No duty of care owed to the public at large existed because there was no allegation that Ms. Santoro or her agents set forces in motion that caused the decedent's injuries—rather, the purported cause of action was based upon Ms. Santoro's alleged failure to sufficiently supervise her mother who had herself set the forces in motion.

Gratuitous conduct was rejected as a basis of Ms. Santoro's assumption of a duty because there was no allegation that her failure to exercise reasonable care increased the risk of harm or that her conduct placed her mother in a more vulnerable position than she would have been had Ms. Santoro done nothing. The court observed that failing to act in accordance with the discharge instructions is not equivalent to placing the decedent in a more vulnerable position than if she had done nothing.

No viable cause of action for breach of a duty created by the legislature existed because a private right of action could not fairly be implied from any relevant legislation.

A Worthy Extension of *Holodook*

Perhaps the most interesting aspect of the *Santoro* decision is how the familial relationship between the decedent and her daughter affected the court's analysis of the issue of duty and public policy considerations related thereto. There is no common-law duty of a child to care for a parent.[3]

The seminal Court of Appeals opinion regarding the viability of third-party claims of negligent supervision against a member of plaintiff's family is *Holodook v. Spencer*.[4] In *Holodook*, the father of a four-year-old who allegedly darted out from between parked cars and was struck by an automobile sued for personal injuries, and the defendant then brought a third-party action against the infant's mother alleging she negligently failed to perform her parental duty to instruct, control and maintain her child.

Holodook held that a child does not have a legally cognizable claim for damages against his/her parent for negligent supervision, and the absence of a primary cause of action defeats the counterclaim and third-party complaint.[5] The court explained the policy considerations supporting its holding:

> The mutual obligations of the parent-child relation derive their strength and vitality from such forces as natural instinct, love and morality, and not from the essentially negative compulsions of the law's directives and sanctions. Courts and Legislatures have recognized this, and consequently have intruded only minimally upon the family relation.… [T]he cases before us involve a parent's duty to protect his child from injury—a duty which not only arises from the family relation but goes to its very heart.[6]

The Court of Appeals subsequently stated, "*Holodook*'s foundation, then, is the concern for the inevitable strain on the family relationship."[7]

Although the situation in *Holodook*, a parent's duty of care to supervise their child, is of course the reverse of the situation in *Santoro*, a child's duty of care owed to supervise their parent, the policy considerations that dictated the result in *Holodook* nonetheless apply equally to *Santoro*. Further, none of the limited exceptions to the *Holodook* rule, such as negligent entrustment of a dangerous instrumentality, exist in *Santoro*.

The last point *Santoro* addressed was the defendant's advocation for the imposition of what the court called a new duty on those who live with infirm individuals to use reasonable care and of concomitant liability for harm caused by the failure to use reasonable care by affirmative act or omission. An earlier Supreme Court decision had recognized such a duty, defining it as a duty owed by "a child who assumes responsibility for the care of a parent who is limited by age or illness, or both."[8]

The Second Department disagreed, poignantly stating:

> The imposition of such an obligation carries with it public policy considerations of possible negative consequences, since such a general obligation could discourage persons from residing with the infirm, discourage children and infirm parents from living together, and discourage the infirm from attempting to resume independent living. The circumstances alleged here 'provide no justification for creating' such a duty.[9]

Looking forward, it remains to be seen whether *Santoro*'s declination to impose a duty to use reasonable care on those who live with infirm individuals will be followed in the future where no parent-child or other familial relationship exists. Additionally, one of the caveats of *Holodook* is that where the duty is ordinarily owed apart from the family relation, a breach of that duty is not rendered inactionable merely because the parties are parent and child. *Holodook* gives as such an example the duty to drive carefully, a duty owed to the world at large and derived from the parties' relation as driver and passenger.[10] Subsequent decisions provide additional examples, such as where a fire causes harm.[11]

Conclusion

Sandra Santoro ultimately avoided what would be fairly considered to be a nightmare for any child—being cast in damages for trying to take loving care of her mother. This would no doubt be just as true for a spouse caring for a spouse. The result in *Santoro v Poughkeepsie Crossings, LLC* is rightly consistent with New York's long-standing public policy of maintaining family harmony,[12] and is beneficial to the health and well-being of the elderly and the infirm.

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1. *Santoro v Poughkeepsie Crossings, LLC*, 180 A.D.3d 12 (2d Dept. 2019).
2. *Glaser v. Fortunoff of Westbury Corp.*, 71 N.Y.2d 646 (1988).
3. *Ulrich v. Ulrich*, 136 N.Y. 120 (1892).
4. *Holodook v. Spencer*, 36 N.Y.2d 35 (1974).
5. *Id.* at 40.
6. *Id.* at 50–51.
7. *LaTorre v Genesee Mgt., Inc.*, 90 N.Y.2d 576, 580 (1997).
8. *Jacobs v Newton*, 1 Misc.3d 171, 178 (Civ. Ct., Kings Co. 2003).
9. *Santoro*, 180 A.D.3d at 21, *citing McCabe v. Dutchess County*, 72 A.D.3d 145 (2d Dept 2010); *Anthony v. United States*, 616 F. Supp. 156 (S.D. Iowa 1985); *Adams v Genie Indus., Inc.*, 14 N.Y.3d 535, 545 (2010).
10. *Holodook*, 36 N.Y.2d at 50
11. *See e.g. Maldonado v Newport Gardens, Inc.*, 91 A.D.3d 731, 732 (2d Dept. 2012); *Hurst v Titus*, 77 A.D.2d 157, 159 (4th Dept. 1980).
12. *Gelbman v. Gelbman*, 23 N.Y.2d 434, 438 (1969).

General / OCA

Event Data Recorders: Preserving and Using an Unbiased "Witness"

Event Data Recorders ("EDRs") are devices installed by vehicle manufacturers to control the vehicle's occupant restraint systems, including airbags and seat belt pretensioners. EDRs also record important information regarding crashes, such as vehicle speed, brake status, and acceleration.[1] In 2004, the National Highway Traffic and Safety Administration ("NHTSA") estimated that seventy percent of vehicles on the road were equipped with EDRs.[2] Today, manufacturers install EDRs in nearly all vehicles on the road.[3] While the purpose of EDRs is to monitor and assess vehicle safety system performance and improve safety,[4] the data captured by EDRs is now commonly used in both civil and criminal proceedings.[5]

Although EDR data existed as early as the 1990s, after September 1, 2012, federal regulation defines what constitutes an EDR,[6] what data the EDR must record,[7] and (most importantly) that manufacturers must make tools to retrieve the data available to all consumers within 90 days after the first sale of a new vehicle.[8] Attorneys in both civil and criminal practice should understand: (1) what data is available; (2) when the data is available; (3) how to preserve and retrieve the data; and (4) how to effectively use the data.

What's In the EDR?

Vehicles equipped with an EDR—as defined in 49 CFR § 563.5—*must* record: vehicle speed, engine throttle, brake status (on or off), and throttle position in the time period five seconds before the crash at one-second intervals.[9] The EDR must also record seatbelt status, delta-v, airbag warning lamp status, airbag deployment time, time between crash events, and whether a full record of the crash is saved.[10]

In addition to the mandatory requirements, manufacturers may also choose to include more information in the EDR capabilities, including: occupant size, steering input, vehicle roll angle, and outside temperature (to name a few).[11] Regardless of whether a manufacturer chooses to include the "optional" data elements, EDR information can be used to examine pre-crash motion (e.g., speed and direction of travel through an intersection), establish a collision sequence or order of events, put someone behind the wheel of the vehicle, and even evaluate injury potential.

It is relatively easy to find out if a vehicle is equipped with an EDR because manufacturers are required to include that information in the owner's manual.[12] It is not as readily apparent whether or not data will exist after a crash event. EDR data is recorded only if a non-trivial ("near-deployment event") situation occurs, or an event occurs requiring an airbag to deploy ("deployment event"); no data is recorded by the EDR under normal driving conditions.[13]

In the event an airbag is deployed, barring any power failures during the recording process of the EDR, that information is saved in a way that it will not be recorded over.[14] However, in a near-deployment event (an event severe enough to trigger the sensing diagnostic module which initiates occupant restraint systems, but not severe enough to deploy the air bags) the data is temporarily recorded and will be cleared after approximately 250 ignition cycles.[15]

Obtaining EDR Data in Discovery

In near-deployment event situations, litigants are encouraged to send preservation letters in order to put parties to potential litigation on notice of their duty to preserve evidence.[16] Additionally, to thwart potential claims of spoliation of evidence, it is prudent to place all interested parties on notice of the time and place for the downloading of information from the event data recorder and any related inspection of the vehicle.[17] As a matter of course, attorneys should make a demand for disclosure of information from event data recorders as part of standard discovery demands in any case involving an automobile accident.[18]

Another factor to consider in obtaining and preserving EDR data is who owns the data. New York State Vehicle and Traffic Law § 416-b defines "owner" as: "a person having all the incidents of ownership, including legal title; a person entitled to the possession of a vehicle as the purchaser under a security agreement; or a person entitled to possession of the vehicle for more than three months as a lessee pursuant to a written agreement."[19] As a practice tip, keep in mind that if an insurance company takes ownership and title of a totaled vehicle, that company becomes the owner of the data. If a vehicle, shortly after an accident, falls into the hands of an uncooperative third party, attorneys should make use of available procedural devices for obtaining pre-litigation discovery so that the vehicle may be inspected and information from the event data recorder may be retrieved and preserved.[20]

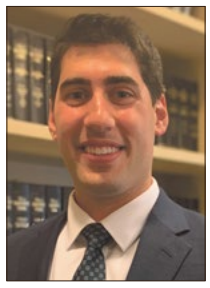
Obtaining the data requires a crash data retrieval system that permits a user to connect a laptop computer to an EDR, download the recorded data, and display it in the form of graphs and tables.[21] Bosch is the world leader in EDR information and imaging technology.[22] The Bosch Crash Data Retrieval ("CDR") Tool can download vehicle crash data from the largest selection of automobile manufacturers. Once downloaded, the raw data is converted into a readable format. While an attorney is certainly capable of reading the graphs and tables, interpreting that information pre-trial may require an expert, and will certainly require an expert's testimony at trial.

Introducing EDR Data at Trial

It is well settled that data obtained from an EDR is admissible in court under both the federal *Daubert*[23] and New York *Frye*[24] standards.[25] When data from an EDR is properly analyzed, experts in accident reconstruction can use it as an impartial source of evidence.[26] In some cases, civil liability may attach with the only witness being the evidence established from the driver's own car.[27]

However, EDR data is still susceptible to an array of attacks from competing experts. Such attacks may include claims of: false reporting of seat belt status, loss of electrical power creating issues with the data, recorded-speed errors and data limitations, missing data, incomplete information on fault codes, unreliable acceleration data, and misleading interpretations of air bag deployment timing data.[28]

In most cases, an expert called to testify needs to be familiar with crash reconstruction principles or be an expert in crash reconstruction itself.[29] Examples of experts and potential methods of admitting the EDR data include: an accident reconstructionist with training in EDR technology,[30] a manufacturer representative laying a business record foundation,[31] and members of law enforcement or investigators with accident reconstruction training.



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1. Mark Joye, *Big Brother or Big Savior? Here Comes the Black Box*, 16 S.C. Law. 38, 40 (2004).
2. Andrew Askland, Ph.D., *The Double Edged Sword That Is the Event Data Recorder*, 25 Temp. J. SCI. TECH. & ENVTL. L. 1, 3 (2006).
3. Federal Motor Vehicle Safety Standards; Event Data Recorders, 84 Fed. Reg. 2804 (Feb. 8, 2019).
4. 49 CFR § 563.2 (2020).
5. *Figueroa v. Gallager*, 20 A.D.3d 385 (2d Dept. 2005) (concluding there was no triable issue of fact, based on EDR, with respect to any design defect and that General Motors was entitled to summary judgment); *People v. Hopkins*, 6 Misc.3d 1008(A) (Monroe County Ct., 2004) (using EDR to show defendant driving at 106 mph three to four seconds prior to crash, resulting in criminal conviction); *Bachman v. Gen. Motors Corp.*, 332 Ill.App.3d 760 (2002) (using EDR data to defend against products defect liability claim).
6. 49 CFR § 563.5 (event data recorder (EDR) means a device or function in a vehicle that records the vehicle's dynamic time-series data during the time period just prior to a crash event (e.g., vehicle speed vs. time) or during a crash event (e.g., delta–V vs. time), intended for retrieval after the crash event. For the purposes of this definition, the event data do not include audio and video data.).
7. 49 CFR § 563.6-11.
8. 49 CFR § 563.12.
9. 49 CFR § 563.7; *State v. Shabazz*, 400 N.J.Super. 203, 207 (2005).
10. 49 CFR § 563.7.
11. *Id.*
12. 49 CFR § 563.11; VTL § 416-b.
13. *Id.*
14. John K. Powers, *The Black Box: Cruisin' With Big Brother*, 2 Ann.2006 ATLA-CLE 2141 (2006).
15. *Id.*
16. *See Gitman v. Martinez*, 169 A.D.3d 1283 (3d Dept. 2019) (finding spoliation in the absence of preservation letter); *Saeed for Rashid v. City of New York*, 156 A.D.3d 735 (2d Dept. 2017) (remitting case for decision on spoliation issue based on demand to produce and preserve).
17. Brian D. Casey, *Electronic Witnesses: The Use of Event Data Recorders in Motor Vehicle Accidents*, 80 N.Y. St. B.J. 45, 46-47 (2008).
18. *Id.*
19. VTL § 416-b; *See also* Driver Privacy Act of 2015, Pub. L. No. 114-94, § 24302 (2015).
20. Casey, supra n.17, at 47.
21. Stephen E. Van Gaasbeck, *How to Challenge A Black Box Report*, 43-Feb. JTLATrial 50 (2007), at 55-56; Casey, *supra* at 45.
22. *See* https://bit.ly/3cLMx9N; https://bit.ly/39C7pyj.
23. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).
24. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
25. Casey, *supra* at 45-46 (discussing admissibility under Frye standard); Powers, supra (discussing admissibility in federal and state courts); *see also People v. Slade*, 233 N.Y.L.J. 11 (Sup. Ct., Nassau Co. Jan. 18, 2005); *People v. Hopkins*, 6 Misc.3d 1008(A), 800 N.Y.S.2d 353 at 14 (Monroe Co. Ct. 2004).
26. 40 A.L.R.6th 595 (Originally published in 2008).
27. David Uris, Comment, *Big Brother and a Little Black Box: The Effect of Scientific Evidence on Privacy Rights*, 42 Santa Clara L. Rev. 995, 996 (2002).
28. Gaasbeck, supra at 52–56 (explaining, in detail, how each listed area of attack is commonly made).
29. *Singh v. Siddique*, 52 Misc. 3d 1204(A) (Sup.Ct., N.Y. Co. 2016) (finding while biomechanical engineers are generally permitted to testify to whether a crash would result in particular injuries, the purported expert lacked the requisite qualifications to be admitted in the instant matter).
30. *Matos v. State*, 899 So.2d 403 (Fla. Dist.Ct.App. 4th Dist. 2005).
31. *Bachman*, 332 Ill.App.3d at 789–90.

General / OCA

The Importance of Having Practice Systems in Place to Help Avoid Grievances and Malpractice

Practicing in the field of grievance defense reveals one apparent and frustrating fact: that most grievances and malpractice findings are the result of mistakes rather than intentional misconduct.[1] We believe that the firms that are successful in avoiding these mistakes have developed and implemented successful systems to manage most aspects of their practice. The purpose of this article is to stress the fact that systems can be highly beneficial not only to multi-attorney firms, but also to small and solo practices.

Systems

There is nothing to fear in the word "systems." In the context of running a law firm, a system is simply a way of doing a task that is clearly definable and teachable. Systems provide clarity to both the attorneys who implement the systems and the staff members who operate within the parameters set by the attorney.

The best systems are created, modified and implemented with the continued involvement and cooperation of both the attorney and the staff member(s). Not only are systems helpful to running a practice, there is a strong argument that systems are required by the Rules of Professional Conduct in order to meet many of the minimum ethical standards set forth therein.

Communication

Rule 1.4 of the Code of Professional Conduct sets forth various circumstances where a lawyer is required to communicate with his/her client. For example, attorneys are mandated to "keep the client reasonably informed about the status of the matter." Rules of Professional Conduct, Rule 1.4(a)(3). Therefore, it is not just advisable to implement a system of communicating with your clients, it is required if you are to meet the communication requirement.

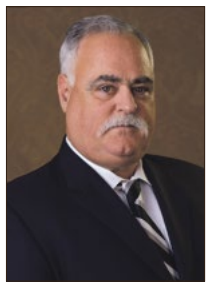
On a practical level, satisfying this Rule can be accomplished in several ways. First, if the attorney, or the firm, has the resources, case management programs provide a great way of scheduling calls to clients on a set basis. For example, you could set up your files in such a way that each client is contacted every 3-4 weeks via phone or email. The call/email could be as simple as informing the client that nothing of substance is going on.

In reality, to a client in today's world of constant interaction, the fact that you have communicated is often just as important as the content of the communication. An attorney must be able to establish that he/she regularly communicates with his/her clients. An easy way to accomplish this would be utilizing a case management system that records past communications and prompts future communications.

Google Sheets

If the attorney does not have the resources to purchase a case management system, a free, self-designed system is easily created using Google products. Using the example of client contact above, an attorney could enter each client's name in "Google Sheets," Google's version of a spreadsheet. In the column next to the client's name could be multiple columns entitled "Date/notes." In those columns, the attorney could enter the date of contact with the client and any notes regarding that conversation. This document can be modified and changed as needed. It is free, easy to use and helps the attorney track communication with the client. A reminder to communicate with a client in the future can be entered into a separate calendar with notification capabilities.

Systems are more than just knowing how to prosecute a personal injury action or how to defend a criminal prosecution successfully. Systems can and should be applied to every aspect of your firm and practice. For example, the moment a phone call or email comes into the office from a potential client a system should apply. Indeed, your firm should have systems that apply from that point all the way through to the completion of the case when you issue your close out letter unambiguously terminating the representation and engaging in cross marketing.



Chris McDonough

Thomas J. Foley

While we will try to discuss a few generic systems that apply to most firms, please note that while every law firm should have systems in place, those systems will vary from firm to firm depending on many factors. Such factors include the firms' practice areas, the number of lawyers, the experience of the lawyers, staffing, etc.

Intake

One system that can and should be implemented in almost every firm is establishing your mission statement and the role each member and employee plays in accomplishing that mission. Each member of your firm and your staff must understand the goals of your practice. This not only puts everyone on the same page going forward, it also builds a stronger team feeling within your practice that should result in greater productivity and pride of effort.

One system that is essential to every law practice is your intake system. Intake starts with the phone call or other communication from a potential client or referral source. This includes such basics as which staff member(s) answer the phones, what they say when they answer, how they direct the calls, how they make and transmit messages regarding incoming calls to the appropriate staffer or attorney, and how they confirm that the potential client communication has been forwarded to the proper person or persons.

If that potential client becomes a client, you must have a retention system that includes an intake report memorializing the interaction with the client, the purpose of the retention, the potential limits of the retention, whether a case is accepted fully at that time or just for investigation, and all other pertinent information, goals, etc. Intake must include a system for a conflict check of the client and all interested, potential parties, witnesses, etc. The intake system should also provide for a rejection letter if the case is not accepted, or a referral to another lawyer as appropriate.

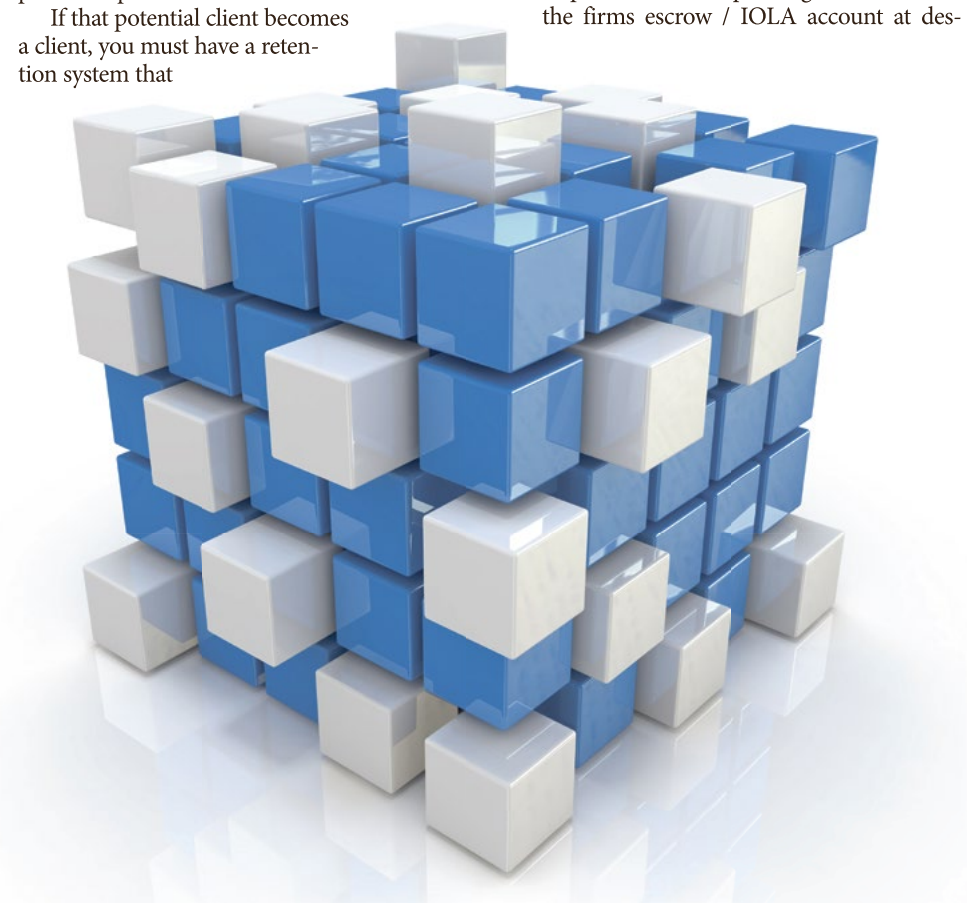
Once the decision to accept the client is made, you should have a system for crafting a written retainer agreement to be signed by the client, creating an appropriate file (physical or electronic) and assigning the appropriate personnel.

The next system impacted could be putting the case on a litigation track, scheduling the next meeting, calendaring a court date, etc., depending on the nature of the case and what needs to be done. You should have a system in place to assure that each new case is properly scheduled, and every important date or task memorialized; preferably on a multi-user accessible calendar system that includes regular reports and alerts as to all upcoming tasks and dates.

Escrow

Perhaps the most important system should apply to escrow. The best system for dealing with escrow comports with Rule 1.15. Here is a sample system to consider:

- All checks received that are to be deposited in escrow, must be given to a specific designee / account signatory;
- A client / case ledger is created to thoroughly memorialize every financial aspect of the transaction;
- The designated attorney-signatory is responsible for depositing the check in the firms escrow / IOLA account at designated bank. A copy of the check and deposit slip must be given to the firm's accountant or other designee;
- Checks for this account are blue in color and kept under lock and key. Attorney-signatories are the only firm members authorized to access these checks. The checks and deposit slips for this account shall reflect that it is the firm's escrow account;[2]
- The firm shall always maintain a balance of $200 to cover any expenses reasonably necessary to "maintain the account or to pay account charges;"[3]
- Upon receipt of an escrow check, the firm shall promptly notify the client of receipt of the check;[4]
- After depositing the check in the bank, an entry shall be made in Quickbooks of the deposit. The entry shall identify the date, source and description of each item deposited;
- Entries shall be made of all debits from the account that identify the date, payee and purpose of each withdrawal or disbursement. All entries and disbursements must be entered into the case/client ledger and the inclusive account ledger.
- The following shall be maintained for seven years on the account: all checkbook and check stubs, bank statements, prenumbered canceled checks, deposit slips, wire instructions, ledgers, and any other document or record relating to funds received in trust;[5]
- This account must be reconciled monthly.



Conclusion

The purpose of this article is not to recommend or design systems for your practice or highlight every system available. As every practice is unique, so are the systems necessary to achieve the goals of your firm. Our purpose is to suggest to every lawyer that systems are essential to practicing more effectively, to creating a strong team environment, and avoiding grievances and malpractice claims.

Moreover, while creating systems takes time from your practice to set up, in the end properly created and managed systems will save you time, effort and stress.

Finally, understand that the mere creation and institution of systems is not enough. The importance and necessity of your systems must be reinforced regularly and your staff's adherence to the systems must be enforced. The lawyer responsible for managing the office must continually confirm that each member of your team understands the systems in place, understands why they are important and is using them.

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1. While this conclusion is anecdotal, it is based upon our combined experience in the field.
2. *See* RPC 1.15(b)(1) for specific captioning requirements.
3. *See* RPC 1.15(b)(3).
4. *See* RPC 1.15(c)(1).
5. *See* RPC 1.15(d).

General / OCA

Proving the Family Tree: Navigating A Kinship Proceeding in Surrogate's Court

When a decedent dies without a will and leaves only remote heirs behind, a kinship proceeding is born. The client, as a prospective heir, is now tasked with proving the family tree before estate assets can be distributed. As the practitioner, the goal is to establish that the client is entitled to inherit and eliminate the possibility that any unknown heirs exist. Depending on the size and scope of the family tree, this may be a daunting task. However, a kinship proceeding provides a unique opportunity for the attorney to assume the role of detective, genealogist, and litigator.

In many cases, the surviving relative does not learn about the decedent's death until contacted by a third party, such as an heir search company or the public administrator. The client now looks to the practitioner to help navigate a kinship proceeding. The client may feel frustrated with the task of proving kinship, especially when the surviving members of the family are in agreement about who should inherit. However, the steps required to prepare for a successful kinship hearing should not be taken lightly, even if there is no dispute among the surviving heirs. The practitioner should manage the client's expectations while explaining the items needed to adequately prepare for a kinship hearing.

The Commencement of a Kinship Proceeding

Unlike a probate proceeding, which is typically commenced by a nominated executor, kinship proceedings often manifest when the public administrator is appointed to act as the fiduciary due to an absence of family members with standing to administer the estate. For instance, under New York law, when the sole living relative of the decedent is a first cousin, he does not have standing to become a fiduciary. Instead, the public administrator will become the fiduciary.[1]

While the public administrator is busy administering the estate, several months may pass before the administration is completed and the estate accounting is filed. The practitioner should use this precious time to gather as much information as possible to draft a complete family tree and gather supporting documentation.

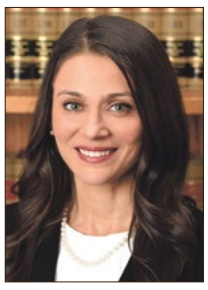
The fiduciary's accounting, once filed, will demonstrate the assets collected and expenses paid. It will also list so-called "alleged heirs." They are "alleged" because kinship has not yet been proven. At this point, objections to the designation of the clients as "alleged heirs" must be made as well as a request to schedule the kinship hearing. The act of filing these objections commences the kinship matter. It signals to the fiduciary and the court that an alleged heir, sometimes called a claimant, intends to prove their relationship to the decedent.

Once objections are filed, the court sets a date for a preliminary conference to set dates for discovery to be exchanged and a date for the kinship hearing. The kinship hearing date is crucial because all proof must be submitted within one year of that date.[2] The time to complete proof is limited to prevent ongoing delay and to allow the fiduciary to settle the account and be discharged.[3]

The Kinship Hearing

The kinship hearing is a trial of the family tree where all parties will have the chance to question and probe the evidence presented. The practitioner representing the alleged heirs may need to contend with both the public administrator as well as a guardian ad litem representing unknown heirs, who will seek to probe or unravel the evidence presented. As the fiduciary of the estate, the public administrator has an interest in having the court's determination of the true heirs and a full discharge on the approval of the accounting. Therefore, if documentary evidence is missing, the public administrator will object to any distribution subject to the submission of proper evidence.

Amy F. Altman



Kristen M. Walsh

In addition, a court always appoints a guardian ad litem in kinship proceedings on behalf of potential "unknown heirs." Her role is to perform due diligence and to review the evidence to determine whether any unknown heirs exist and are entitled to share in the inheritance. Lastly, the Attorney General is a statutory party and will have the opportunity to appear.[4]

The hearing is held in the Surrogate's Court of the decedent's domicile and before a court attorney referee.[5] Kinship hearings are tried by the court only; juries are not available for this purpose.[6] The court attorney referee is the finder of fact and may also ask pointed questions to the extent she believes that some fact or issue needs to be clarified for the record. The burden of proof for the claimant is the fair preponderance of the evidence.[7]

Thus, it is not enough to show that the client is related to the decedent, the practitioner must also prove that there is no one closer in lineage to the decedent that may cut off the client's right to the inheritance. In New York, the legal right to the assets of the estate is governed by § 4-1.1 of the Estates Powers and Trusts Law (EPTL). For example, if the claimant is a first cousin of the decedent, she must prove the entire family tree up to grandparents on both the maternal and paternal sides.[8]

The Investigation and Collection of Evidence

The investigation phase can unearth family information that may be helpful or, on occasion, harmful to the case. This makes for interesting investigative work. The best way to start the investigation is to conduct interviews with the client, friends, co-workers and neighbors of the decedent to develop a consistent and corroborated family tree. Since the family tree is at the heart of the evidence presented at the kinship hearing, the importance of developing it through exhaustive investigation and documentation cannot be stressed enough.

A thorough examination of the decedent's personal items may lead to helpful information, especially if the claimant has limited information regarding the family's genealogy. When the public administrator is the fiduciary, it will have accumulated a file of the decedent's personal documents, such as the decedent's certified documents, letters, photos, address book and cell phone. An appointment can be made to view and copy these items. Even though the originals must remain with the public administrator, they can be deemed to be part of the record at the hearing.

Once established, the family tree will act as a roadmap to determine what documents and testimony are necessary to prove the tree at the hearing. Documentary proof for each individual on the tree is required, which may include a birth certificate, baptism record, marriage record, death certificate, obituary, prayer cards, and census records. When a document is preserved by the State of New York, such as a certified copy of a birth, marriage or death certificate, it is considered self-authenticating under CPLR § 4540 and may be admitted into evidence as an exception to the hearsay rule.[9] If there is sufficient documentary evidence to establish the birth, marriage and death of an individual on the tree, other extrinsic evidence such as holiday cards, photos, letters and even third party affidavits are superfluous. In this instance, throwing in the "kitchen sink" may raise hearsay objections at the kinship hearing.

Because the United States is a country of immigrants, in many cases, records will need to be retrieved from overseas. This may present unique challenges, depending on how accessible and well maintained the records are in the foreign country. The client may consider retaining a reputable genealogist to obtain hard-to-get documents the average layperson or attorney cannot procure. In New York, foreign documents will also require authentication pursuant to CPLR § 4542.

Other considerations include obtaining records for individuals who survived the decedent but died some time later, otherwise known as a post-deceased relative. Efforts to establish the fiduciary for the post-deceased relative's estate will become necessary to prove that branch of the family tree. Ideally, after all documentation is collected, the practitioner will create a binder that includes the final family tree and original certified documents for each member of the tree. This binder will be copied and circulated at the hearing with the intention of entering all of the documents into evidence.

In addition to the documentary evidence that has been prepared well in advance of the hearing, testimony is required. Ideally, only two witnesses should be prepared to testify. The first witness should be a person who has known the decedent but *is not* an interested party (that is, he does not benefit financially from the proceeding).

The disinterested witness's primary purpose is to testify regarding whether the decedent had a spouse or issue, and to connect the decedent to the larger family tree.[10] In New York, an interested party cannot testify with respect to any transaction or communication with the decedent pursuant to the Dead Man's Statute,[11] and a kinship hearing is no exception. Therefore, the interested heirs are not allowed to testify about the decedent in any way. During the investigative stage, the practitioner should already be thinking about which non-interested family member can be selected to testify.

The second witness may be the claimant, who can testify to the remainder of the family tree and pedigree information already personally known to him about every individual in the family tree, other than the decedent. Statements of personal and family history fall under an exception to the hearsay rule in New York.[12]

Proving the Family Tree

The family tree chart is offered for identification purposes prior to the testimony of the witnesses. It acts as a guide and checklist to make certain that each individual on the family tree is accounted for through the witnesses' testimony. The court attorney referee may review each document, subject to an objection, and then admit it into evidence. The client may request to have the original binder of documents returned after the matter concludes.

To the extent there are open issues, such as an outstanding death certificate, the matter will remain open pending submission of all outstanding documents. Every effort should be made to obtain the missing documents as quickly as possible, given the one-year time limit for proving the family tree.[13]

Once all documents are submitted, the respective parties rest their cases and await the report and determination of the court attorney referee and report of the guardian ad litem. If the kinship hearing is successful, the Surrogate will issue a decision and order outlining the distribution to the client, as a lawful heir.

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Kristen M. Walsh is an associate in the trusts & estates department at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP and a member of the NCBA Surrogate's Court Estates & Trusts Committee.

1. SCPA § 1001(f)(ii).
2. 22 NYCRR § 207.25(a). If the kinship proceeding was brought in an administration proceeding, then proof must be completed in six months. *See* 22 NYCRR § 207.25(b).
3. *Ibid.*
4. SCPA § 316.
5. SCPA §§ 205(1) and 506.
6. SCPA § 502.
7. 2 Harris N.Y. Estates: Probate Admin. & Litigation § 27:3 (6th ed.) citing *Matter of Deluca* (Dec. 19, 2011) N.Y.L.J. Slip Op 52U (Sur. Ct. Nassau Co).
8. EPTL § 4-1.1(d)(4) and Fritz Weinschenk, "An Update on Kinship Proof in Surrogate's Court," NYLJ (Oct. 9, 1992), at 1 col, 1.
9. CPLR § 4540 and § 4521.
10. If the decedent did have a spouse or issue that divorced or predeceased, as the case may be, then that will need to be presented.
11. CPLR § 4519.
12. New York Code of Evidence, Rule 804(b).
13. If the open issues cannot be resolved in this timeframe, the funds will be deposited with the New York State Comptroller's office. In this case, review SCPA § 2225, which creates a presumption that the claimants are the only heirs if certain criteria are established.

Governmental Liability ...

Continued From Page 3

ing or recklessness on the part of the officer or employee" (emphasis added).
11. "The duty to defend shall not arise where the Corporation Counsel determines that the injury or damage complained of was the result of the *intentional wrongdoing or recklessness* of the officer or employee" (emphasis added).
12. 162 A.D.3d 1463 (2018).
13. *Cf. Wilson v. City of Chicago*, 6 F.3d 1233 (7th Cir. 1993) (holding that police officer's torturing a suspect to obtain a confession is within the scope of employment).
14. *See* Terese E. Ravenell & Armando Brigandi, "The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation," 62 Villanova L. Rev. 839, 872 (2017).
15. Beth Fertig & Jim O'Grady, "Twenty Years Later: The Police Assault on Abner Louima and What It Means," WNYC News (Aug. 9, 2017), available at https://tinyurl.com/svkn2wm (quoting former United States Attorney Zachary Carter).
16. *Id.*

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General / OCA

The Unintended Consequences of the Housing Stability Tenant Protection Act of 2019

On June 14, 2019, the New York State legislature passed The Housing Stability Tenant Protection Act of 2019 ("HSTPA").[1] This statute represents a major overhaul of the state's housing laws. It's been widely reported that the major impetus behind the legislation was, as the name suggests, to stabilize the housing industry by providing greater protections to tenants under the law. There have, however, been a number of unforeseen consequences since the HSTPA's enactment that Albany law makers certainly did not forsee.

Bloomberg News reported on January 27, 2020 that sales of apartment buildings in New York City fell by 36% in 2019, and that the money spent on those sales fell by 40%.[2] The reason for this decline in real estate values, throughout New York City and statewide, is due to the new restraints the HSTPA has placed on the owners of rent regulated apartments.

The Eviction Paradox

A major benefit for owners of rent regulated apartments under the Emergency Tenant Protection Act (in Nassau County), or the Rent Stabilization Code (in New York City), has been that once a tenant vacated, the landlord was entitled to raise the registered rent. This was previously achieved by taking a vacancy increase with each new tenancy.

With substantial rent increases, on average 18% of the legal regulated rent,[3] landlords were motivated to commence summary holdover proceedings in housing court. The goal of these actions was to evict tenants thus securing an eventual hike in the rent with every new vacancy lease offered. With the HSTPA in place, landlords are now less inclined to evict tenants that may be keeping up with their monthly rent payments but violating the terms of their leases or the rent regulation laws in other ways.

Melissa S. Levin

Is a decline in the number of eviction cases commenced necessarily a bad thing? At first glance, it's not; for there will be fewer cases clogging up the courts' calendars with fewer financially burdened tenants facing the risk of eviction. These seem like positives. But what the legislature failed to consider was how this would affect other tenants that are in good standing. Namely by removing this vacancy increase, New York State effectively eliminated a landlord's financial incentive to commence a holdover eviction proceeding against a good-paying, but badly behaving tenant.

Accordingly, there may no longer be any alternative for the other tenants in a rent stabilized building who have to live alongside the tenant creating a nuisance in their apartment. The same could be said about the neighbors of a tenant who may be engaged in illegal activity in their rental unit or the tenant illegally subletting their regulated apartment to undesirables coming and going at all hours of the day or night. Without the highly sought-after vacancy increase as a motivation for landlords, it appears the only thing for the rest of the building's occupants to do is to lower their expectations of "apartment living".

The legislature as well seems not to have realized that a decline in the number of eviction proceedings would essentially create a newly accentuated affordable housing shortage. Since the end of World War II, the legislature has consistently enacted rent regulation laws to address the persistent housing emergency situation and guarantee low-income individuals a sufficient supply of affordable housing options. By eliminating previous incentives for landlords which would have increased the supply of vacant units, New York is likely to be in store for a new affordable housing storage, one that this time is being fostered by the very government tasked with preventing it.

Repairs Left Undone

Another major way the HSTPA has detrimentally affected rent regulated apartments is the new cap it has placed on a landlord's ability to share the costs of enhancements to individual apartments (i.e., installing a new oven) or to building-wide capital improvements (i.e., replacing a leaky roof) with the tenants who benefit from them. Prior to the enactment of the HSTPA, landlords would complete renovations on rent regulated apartments and/or buildings, and pass along the renovation costs in the form of fractional monthly rent increases to their tenants.

With the HSTPA now law, landlords have been severely limited in their ability to pass along these renovation costs. As such, landlords have cut back exponentially on upgrading and improving their buildings and the apartments contained therein. In fact, a recent survey conducted by the Community Housing Improvement Program ("CHIP") revealed that 69% of building owners in New York City have cut their spending on apartment upgrades by more than 75% since the HSTPA was enacted.[4]

Not only does this hurt the tenants who have to live in these unrenovated/unrepaired buildings and/or apartments, but it also has an impact on the overall economic picture. For it devalues the overall housing market and has resulted in massive layoffs in the construction industry statewide.

The HSTPA has also further eliminated a landlord's ability to eventually deregulate rent regulated apartments (i.e., charge market rates) once the legal rent reached a high "threshold" level. This has caused a tremendous drop off in the sale of regulated buildings due to a declining valuation of the market.

Financial Consequences for the Most Vulnerable

Additionally, the HSTPA now mandates that a landlord may only accept one month's security deposit at the inception of a tenancy. This change negatively affects not only landlords but low-income tenants as well. It used to be that when a landlord was hesitant to approve a prospective tenant's application due to a prior bankruptcy filing or a recent change in employment, the landlord could ask for three months' rent upfront "just in case" there was a problem.

Now these marginal renters that landlords were unsure of are more likely to be rejected for housing outright. When an owner can no longer demand more than one month's security deposit, prospective tenants who don't have the best credit history or financial stability will have a harder time being approved for an apartment in the first place.

Finally, its disconcerting to believe that the legislature intended the minor child of a tenant to be named as a respondent in an eviction proceeding. Unfortunately, as a result of the HSTPA, this has become a reality. Before the passage of the new law, the general rule of practice was that minor children in a unit need not be named as a respondent-occupant in a summary holdover proceeding.

The HSTPA now specifically requires that no tenant or lawful occupant shall be removed from possession unless they are specifically named in the petition. The legislature may not have specifically intended for this to result in landlords naming minors in eviction actions, which may effectively ruin a child's financial credit before he or she reaches the age of majority. Nevertheless, the most prudent way to interpret this new requirement is for a landlord's attorney to name every single individual living in an apartment, regardless of age, in order to actually be able to regain legal possession of the premises.

While the legislative intent behind the HSTPA may have been to afford greater protections to tenants navigating a system that has traditionally favored landlords, it appears that much of the Act has actually worked to accomplish just the opposite. Only time will tell whether the HSTPA really does remedy the problems it set out to solve, or whether it has merely created new ones for all those involved in housing law.

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General / OCA

Lawyer, Ballplayer, Spy: The Many Lives of Moe Berg

First Inning

Maybe I'm not in Cooperstown like so many of my baseball buddies, but I'm happy I had the chance to play pro-ball and am especially proud of my contributions to my country. Perhaps I could not hit like Babe Ruth, but I spoke more languages than he did.

—Moe Berg

Appropriating Churchill's words, it could rightfully be said that Morris "Moe" Berg was "a riddle, wrapped in a mystery, inside an enigma." One of the most intriguing personalities in baseball history, Moe Berg cut a larger-than-life figure in the annals of American espionage. Berg was equally at home in a ballpark or some exotic foreign locale.

A graduate of Columbia Law School, Berg was a member of the New York Bar who practiced law during the off-season. Being a Wall Street lawyer was but one of the various roles that Berg assumed in an enigmatic life that raised more questions than it answered.

Berg was the consummate polymath. It has been said that he spoke anywhere from six to sixteen languages. He played fifteen seasons with the Dodgers, the White Sox, the Indians, the Senators, and the Red Sox. If that were not enough, he was a gentleman spy during World War II.

Second Inning

He was a renaissance man, a professional adrift in a social milieu, where his peers spit tobacco juice and scratched their crotches during the national anthem.

—Jerry Izenberg, Newark Star-Ledger

The child of Jewish immigrants, Moe grew up in Newark. In what would prove to be the first of the many guises, Berg learned to play baseball at the local Methodist Church under the name Runt Wolfe.[1] His upbringing wasn't religious, but he was proud of being Jewish. While at Princeton, he refused to join an exclusive Eating Club which would not accept his fellow Jews.[2]

Moe's father objected to his obsession with baseball. His mother, by contrast, delighted in her son's pursuits. Baseball proved to be Berg's "field of dreams," providing him entree to the American mainstream.

After graduation, Berg signed with Brooklyn. He used his $5,000 signing bonus to study at the Sorbonne in Paris.[3] Laconic and exceedingly well-educated, Moe always stood apart from his fellow major-leaguers. As one later noted: "We'd all sit around and listen to him discuss the Greeks, the Romans, the Japanese, anything. Hell, we didn't know what he was talking about, but it sure sounded good."[4]

Third Inning

I'd rather be a ballplayer than a Supreme Court justice.

—Moe Berg

Even before law school, a lawyer's advice proved pivotal in Moe's life choices. Walter "Dutch" Carter, once a star pitcher at Yale and subsequently a prominent New York attorney, always regretted never having played pro-ball. When asked, Carter told Moe right off: "Take the baseball career, the rest can wait."[5]

Professor Noel Dowling enabled Moe to tailor his schedule so he could pursue his law degree at Columbia and still be able to attend spring training.[6] Berg graduated in February 1930,[7] landing a position with the white-shoe law firm Satterlee & Canfield.[8] But his heart belonged to baseball.

Fourth Inning

I call him the mystery catcher. Strangest fellah who ever put on a uniform.

—Casey Stengel

Moe was a shortstop in college, switching to catcher when he came to the White Sox. A presence behind the plate, he was an "excellent defensive catcher, possessing a strong arm [that] could gun down the swiftest baserunners."[9] It would be as a journeyman catcher that Berg found his place in the majors.

Rudy Carmenaty

He played in 662 games over fifteen seasons with a lifetime batting average of .243, 441 hits and 6 home runs in 1,812 at-bats, with a career high .288 in 106 games in 1929.[10] The line on Moe was that "he speaks a dozen languages but can't hit in any of them."[11]

He was considered the "brainiest man in baseball,"[12] becoming a star on radio after multiple appearances on the popular quiz show Information Please.[13] For Jewish Americans, Berg was an inspiration who "confirmed that you could be an intellectual and an athlete, and an American, too…. He was Einstein in knickers."[14]

He was also quite idiosyncratic. He loved reading newspapers, but if anyone in the clubhouse touched them before he finished reading them "he would consider the paper 'dead' and run out to buy a replacement."[15] He ended his career as a coach in Boston mentoring a young Ted Williams, who remembered Moe as being "absolutely unique in baseball."[16]

Fifth Inning

To Hell with Babe Ruth!
To Hell with Lou Gehrig!
To Hell with Moe Berg!

—Taunts yelled by Japanese soldiers in the Pacific War

Moe played on a single pennant winner, the 1933 Washington Senators, but he never made the All-Star team. That was until 1934, when Berg joined future Hall of Famers Babe Ruth and Lou Gehrig on a good-will tour of Japan.[17] Every other man on the team was a superstar, but Moe was the only one who spoke the language.

Moe first made a name for himself in Japan in 1932. That off-season, he helped organized baseball clinics teaching the game to the Japanese.[18] Because of his language skills and his charisma, in Nippon Berg would be the equal of Ruth.

Berg remained in Asia after the exhibition games were over, traveling throughout the Far East. Most colorfully, Berg donned a black kimono, concealing a Bell & Howell movie camera, and took 16-millimeter films of the Tokyo sky-line.[19] These materials would become his calling card to the nascent world of American intelligence.

After Pearl Harbor, Berg delivered a broadcast urging the Japanese to surrender: "Believe me when I tell you that you cannot win this war. I am speaking as a friend of the Japanese people."[20] But Berg would prove to be more than the male version of Tokyo Rose.

Sixth Inning

Berg had gone on to become the Jewish James Bond.

—Ron Grossman, Chicago Tribune

Moe left the Red Sox, eager to join the war effort. Initially, he gathered intelligence in Latin America for Nelson Rockefeller's Office of Inter-American Affairs.[21] But Moe's greatest contribution to the war effort was as a "paramilitary officer"[22] for the Office of Strategic Services (OSS), the predecessor of today's Central Intelligence Agency.

OSS was a repository of colorful characters under the aegis of the legendary "Wild Bill" Donovan. Berg operated precariously behind enemy lines in Europe. If captured, he faced certain death not only because he was a civilian, i.e. not a uniformed soldier covered by the Geneva Convention, but also because he was a Jew.[23] Further enhancing the danger was Moe's celebrity as a professional athlete.

Moe would find himself in Yugoslavia, where his analysis led to American support for Tito's partisans.[24] In Italy, he ferreted out Antonio Ferri, a noted authority on aeronautics, and a cache of vital documents.[25] Anticipating the oncoming Cold War, Berg was instrumental in efforts to capture German scientists ahead of the Red Army as victory neared in 1945.[26]

Seventh Inning

Moe if you teach me everything you know about baseball, I will teach you everything I know about the atom. No, you already know about the atom more than I will ever know about baseball.

—Albert Einstein

There was considerable anxiety in military and scientific circles that Hitler would get the atomic bomb first. German physicists were exceptional, particularly Nobel Laureate Werner Heisenberg. Heisenberg could be considered the German equivalent of J. Robert Oppenheimer, the American physicist in charge at Los Alamos.

In 1944 Moe went to Zurich University, armed with his beretta and a potassium-cyanide capsule, to ascertain how far Heisenberg had progressed.[27] Moe learned nuclear physics sufficiently so as to make an accurate assessment. If need be, he was to kill the German scientist and then himself.[28]

Moe attended a lecture by Heisenberg and engaged him in conversation. Such was his skill as an operative, that he correctly determined that the Nazis had not made enough progress to merit killing Heisenberg. Learning the results of Berg's mission, President Roosevelt responded by saying "give my highest regards to the catcher."[29]

Eighth Inning

In a position of responsibilities in the European theater, he exhibited analytical abilities and a keen planning mind. He inspired both respect and constant high level of endeavor on the part of his subordinates which enabled his section to produce studies and analysis vital to the mounting of American operations.

—Berg's Medal of Freedom Citation

The years after World War II were a disappointment. Moe never found a firm footing, living as a semi-recluse with relatives and sponging off friends. It almost seems as if his dexterity with languages, his major league career, his war-time service, and his law degree, were all for naught.

Moe died in 1972 after sustaining a fall in his sister's home, a virtually forgotten old-timer. As mysterious in death as in life, Moe remained true to baseball and purportedly his final words were, "How did the Mets do today?"[30]

In 1946 Moe was offered the Presidential Medal of Freedom. Inexplicably he declined the honor, which his sister posthumously accepted. The medal is now in Cooperstown, although Moe is not, and Moe's baseball cards and other memorabilia are exhibited at the CIA Museum in Virginia.

Ninth Inning

I'd love to sit down and talk with him. In the evening when I close up the museum, I go over and say good night to Moe. I think his spirit is here.

—Linda McCarthy, CIA Museum Curator

Recently, Moe has gotten some measure of his due. The film The Catcher Was A Spy (2018), starring Paul Rudd and based on the book by Mark Dawidoff, dramatizes and romanticizes Moe's war-time heroics. Last year, the documentary The Spy Behind Home Plate by Aviva Kempner was released to wide acclaim providing a more comprehensive portrait of the man.

But no one will ever know the real Moe Berg. Too many years have passed. Moe once tried his hand at an autobiography, but was put off when he learned the publisher had mistaken him for Moe Howard of the Three Stooges.[31]

Nevertheless, Moe Berg continues to fascinate. He was a complex and elusive individual, but definitively he was a ballplayer, a patriot, and a brilliant if erratic genius. Perhaps the final word on Moe belongs to Franklin Roosevelt: "Well, I see old Moe is still catching them."[32]

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General / OCA

The Case for Mediation Advocacy Training in the Age of Presumptive ADR

The Age of Presumptive ADR in the New York State Court System is upon us. Whispers began almost two years ago with a New York State Office of Court Administration ("OCA") Press Release in April 2018. "New ADR Initiative Aims to Reduce Case Delays and Enhance Access to Justice".[1]

Flash forward to May 14, 2019, when OCA advised that it would be implementing presumptive Early Alternative Dispute Resolution for Civil Cases throughout New York State.[2] How the program would work would vary within the counties, and within the county's individual courts. What was clear, however, was that there was going to be a systemwide movement to implement presumptive ADR. The parties in a broad range of civil cases (with appropriate exceptions for cases such as those which involved domestic violence) would be directed to ADR methods, with a focus on court-sponsored mediation.

It is important to recognize that the presumptive ADR initiative does not require judicial intervention for a case referral to ADR. Rather, it is intended to act as a first step in a case proceeding to court. In accordance with the May 14, 2019 press release, implementation of presumptive ADR within the New York State Court System was scheduled to begin in September 2019.

Despite initial programs having been established last Fall, the courts are still working to implement the right procedures for the myriad types of cases that come through their doors—for the bench, the bar and the parties. During this birthing process for presumptive ADR within the state, those initial systems continue to be tweaked, providing the perfect opportunity for practitioners to offer suggestions on how to best implement presumptive ADR within their local courts, whether it be for a tort, medical malpractice, commercial, estate and trust, real estate, construction, or other dispute. The question is not whether, but how presumptive ADR will work in the various court Parts. Therefore, an understanding of the full measure and worth of mediation as a tool in an advocate's toolbox is critical, both for the practitioner and the client.

Moving Litigators into Mediation Advocacy Mode

It is an all too familiar scenario: litigators come into mediation prepared to fight. Granted, it's hard to switch that off.

Can an attorney who's lived with a case for months, sat with his/her client numerous times, prepared pleadings, written motions, conducted discovery, all focused on winning—or at least gaining as strong a position as possible—now switch that off and move into a new approach where advocacy remains important but finding the most reasonable outcome supplants crushing your adversary as the goal?

Mediation advocates at the Nassau County Bar Association ("NCBA") submit that, in order to do their best for a client, that's exactly what needs to happen. Since mediation is being pushed strongly by New York's courts some may wind up in it somewhat unwillingly. Nevertheless, attorneys remain ethically bound to seek the best outcome for their clients. That best outcome very often rests with a facilitated, negotiated settlement… just the kind of outcome mediation is designed to seek.

The Mediation Process: An Overview

At its heart, mediation is a problem-solving process. It entails recognition of the value of having a trained, experienced neutral help guide the parties through an exploration not just of their positions, but also of their underlying interests. It's also a forward-looking process, as opposed to litigation which typically looks to the past and simply seeks redress for alleged wrong. Mediation can seek creative solutions, sometimes finding redress for wrongs but also—or sometimes alternatively—looking for solutions that benefit the parties in ways they may not have considered. For example, commercial litigants go to court over a disrupted business relationship, but find their way to a framework for working together, continuing to profit in the years ahead, while also establishing an agreement for dealing with any future issues in order to avoid future costly entanglements.

Jess A. Bunshaft

Marilyn K. Genoa

In managing the process, the mediator will guide the parties through an examination of their cases. This may seem like educating the mediator, but it's as much about forcing a careful examination by the litigants as it is about sharing information to help the mediator manage the process.

At the outset, mediators typically call each attorney to discuss expectations and the plan for next steps. Each party is asked to prepare a confidential mediation statement for the mediator's eyes only (although there are circumstances where the parties and mediator will agree to statements that can be shared). Typically, the parties are expected to confidentially explore their case's strengths and weaknesses, reasonable possibilities for settlement and available alternatives. In reality, however, all too many attorneys provide statements similar to their initial pleadings and briefs, and suggest settlement numbers in a range unlikely to sit well with the other parties. In other words, they're still in litigation mode.

Once parties gather at the mediation table, the mediator's overarching goal is to get the parties to hear each other, understand each other, explore options and find common ground. No matter the neutral's skills and experience, in the end there has to be willingness on behalf of the parties and their attorneys to seek a solution.

This has long been a challenge for mediators, with some attorneys being dedicated to the process while others remain litigators placed in a different setting. Now, however, as mediation is growing with the adoption of Presumptive Mediation by New York's courts, mediators are faced with both a challenge and an opportunity.

The challenge is working with some attorneys whose raison d'être is to fight and win. The opportunity is in showing colleagues in the law how to make the most of mediation, guiding them to a new skill set that will make them effective advocates for their clients in mediation. Steps have been taken to add training opportunities for those interested in learning how to be mediators; but far less has been done to educate litigators on how to be effective as advocates in this important part of the legal process that some will come to reluctantly.

Now is the time to grow programs, both at the county and state level, to remedy this perceived shortcoming.

Addressing the Need for Effective Mediation Advocacy Training

To move litigators, at least for the mediation setting, into a new mindset, mediation advocates must demonstrate the value of mediation to the skeptics and help guide them to a new way of thinking.

To begin with is a well-known fact: the vast majority of cases settle. A civil case that goes all the way to verdict is a rarity. Various statistics are quoted, but rarely is the overall settlement rate seen as below 90 percent. Often the average is well into the nineties. In many instances, the real question is when a case will settle, not if.

Different courts are taking different approaches to New York's Presumptive Mediation initiative, but early utilization of dispute resolution is a ubiquitous aspect of the initiative. These initial, early efforts to negotiate a settlement may be too early for fruitful outcomes. Some cases can be settled early, but others will require a certain amount of discovery before fruitful discussions can take place. Even so, these discussions help set the stage for future efforts.

When a case has matured enough for mediation to work effectively, it will be important for counsel to come to the table in a mediation-focused mindset. The question then is, what can be done in terms of focused training?

Key components of an effective mediation advocacy training program may include the following:

- Using the mediation statement to explore reasonable settlement goals and creative opportunities for settlement
- Understanding how a mediation opening differs from a trial opening
- Exploring psychological issues driving positions: what is client's underlying interests
- Setting appropriate goals
- Preparing the client for mediation
- Working with the mediator to effectively communicate opportunities for settlement

Also, mock mediation is an effective tool to enable the litigator and the client to get into a mindset to make progress during a mediation. Mock mediation is one tool that focuses on the structure of mediation. With a skilled mediator preparing them, litigators who receive advocacy training may be able to drive a more effective mediation presentation when the actual mediation occurs.

The Best Alternative to a Negotiated Agreement (BATNA)

It is critical, before entering into mediation (or any settlement negotiation) for the attorney, and his/her client to fully understand their alternatives. BATNA, a term coined by Roger Fisher and William Ury in *Getting to Yes: Negotiating Without Giving In*,[3] helps the parties identify the best they can do if the other side refuses to negotiate with them, which is often not necessarily their ideal outcome. BATNA is an example of just one of the tools available to the litigator in preparing an effective and successful mediation.

A BATNA is often defined as the most advantageous alternative a negotiating party may reach if the negotiations fail and an agreement cannot be reached. A thorough analysis and understanding of your BATNA, and what options exist, can help form the basis of whether it is in the client's best interest to concede on a point or push the other side harder.

BATNA's are not always readily apparent. Fisher and Ury outline a simple process for determining the client's BATNA: develop a list of actions one might take if no agreement is reached, convert some of the more promising ideas into practical options, and select the one that seems best.[4]

Care should be taken to ensure that the alternatives and their outcomes are accurately weighed. BATNA considerations include, without limitation: forum; anticipated composition of a jury; the judge; the other attorneys; and the credibility of the parties and other witnesses, experts, etc. Additional considerations include the potential range of both an adverse and a positive verdict; hours of trial preparation and length of trial; trial preparation costs such as discovery, experts, and attorneys' fees; and client's opportunity costs in disruption of business, life, etc. After the trial's conclusion, what is the likelihood of appeal or a retrial, with the same analysis for those proceedings? Understanding the opposing party's BATNA is often as critical as understanding that of the client.

Conclusion

Mediation is one of the key answers to easing the burden on the courts and moving the profession to a better system of resolving disputes. Better integration of mediation into the process, and more respect for it as a major component of dispute resolution are essential. Mediation advocates, be they specialists or retrained litigators, undoubtedly are part of moving things forward.

With that in mind, ADR leaders at the Nassau County Bar Association plan to focus their efforts on adding relevant training, and call on their colleagues in like positions to do the same. The time has come where mediation advocacy training must become as commonplace as mediator training, if not more so. While the profession grows the ranks of skilled mediators, it similarly needs to provide the tools for counsel to make, proper, effective use of mediation. The ADR Committee of the Nassau County Bar Association, in conjunction with its NYSBA counterpart, is currently planning several mediation advocacy training programs which will be available to all members.

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View from the Bench

Evidentially Speaking April 2020

The Missing Witness Charge: Often Requested, Often Misunderstood

One of the most common motions made, both pre- and post-trial, is the missing witness charge. This charge, found in Pattern Jury Instructions—Civil, Section 1:75—when given allows the trial judge to advise the jury that in considering its verdict, it may draw an unfavorable inference due to a party's failure to call a witness, who presumably would have testified favorably to that party.[1]

Key elements of the charge refer to a witness being "available" and under "control" of the adverse party, both seemingly simple concepts. The case law, however, indicates that those words do not always mean what trial lawyers think they do. Fortunately, the Court of Appeals recently addressed this issue in a decision in June 2019. This column will, hopefully, give trial attorneys the information they need in making the motion when it is warranted and objecting to it when it is not.

Gonzalez: Shifting Burdens

Prior to the Court of Appeals revisiting the issue this past June, I consistently relied on the case of *People v. Gonzalez*[2] in determining whether or not the charge is warranted. If you are solely a civil practitioner, do not stop reading; the fact that the case law derives primarily from criminal law in no way affects its application to civil practice. The case of *DeVito v. Feliciano*[3] states unequivocally that the charge applies to both civil and criminal matters. As I have often written, except where the Criminal Procedure Law or the Civil Practice Law and Rules establish otherwise, evidence is evidence, and these principles may be applied in all areas of practice.

The facts of *Gonzalez* are straightforward. In the early morning hours of May 17, 1981, Maria Jiminez was robbed of eight hundred dollars by two men as she entered her apartment building. Ms. Jimenez had received this money from her mother earlier in the day, but had stopped at a neighborhood bar for a short time on her way home. Before leaving the bar, she took the money out of her pocketbook and placed it in her right shoe. She was then accosted by two assailants in the lobby of the building, one of whom she recognized from her neighborhood as Defendant Gonzalez. While one man showed a gun, Defendant Gonzalez held a knife to her neck, grabbed her shoe, and took the money. Both men then fled the scene. Ms. Jimenez testified that she immediately ran to her common-law husband's second-floor apartment, who looked out the window and also identified Defendant Gonzalez. The husband was never called as a witness at trial, but Ms. Jimenez was apparently allowed to testify to his involvement.

At the charge conference, defense counsel requested a missing witness charge due to the People's failure to call the husband at trial, asserting the position that he was a material witness and under the People's control. The district attorney took no position on the application, yet the court denied defense counsel's request. Nevertheless, during his summation, defense counsel asked the jury to consider the whereabouts of complainant's husband of seven years, and commented that the statement she made about what her husband saw was hearsay and that defense counsel didn't have a chance to cross-examine the husband. The People objected to all of these statements, and the court sustained the objections. Defendant Gonzalez was eventually convicted.

Writing for a unanimous Court, Justice Alexander stated that in order for a trial court to give the requested charge, three things must be shown:

1. that the uncalled witness is knowledgeable about a material issue upon which evidence is already in the case
2. that the witness would naturally be expected to provide noncumulative testimony favorable to the party who has not called him; and
3. that the witness is available to such party.[4]

Hon. Arthur M. Diamond

While sometimes this information may be available before trial, sometimes it may not be available until witness testimony is completed. In either scenario, the burden is on the movant to notify the court as promptly as possible that there is such an uncalled witness.[5]

Procedurally, once the movant has established her entitlement to the charge, it then becomes incumbent upon the party opposing the charge to either account for the witness's absence or demonstrate that the charge is not appropriate for some other reason. Some examples of alternative reasons not to read the charge include that that witness is not knowledgeable, that the issue involved is not material or relevant, that the testimony would be cumulative to other evidence already in the non-calling party's case, that the witness is not under the party's control such that it would be expected the witness would give favorable testimony to the other side, or that the witness is actually not physically available due to death or incapacity, or is otherwise missing.[6]

The opinion by Justice Alexander emphasized that availability is *not* the same as control. The former refers simply to the ability of the non-caller to produce the witness; the latter is more complex and actually refers to the relationship between the parties.[7] Under these definitions, a stranger to both sides would not be under the control of either; yet, a witness who is physically available to both sides but is favorable to or under the influence of one party and hostile to the other is then said to be under the control of the party to whom he is favorably disposed.[8] Being favorable to one party over the other may be based upon the legal relationship or on the facts of the particular case.

Based upon the above stated facts and the law, the Court held that Defendant Gonzalez was entitled to the missing witness charge due to the prosecution's failure to produce her common-law husband. Ms. Jimenez's testimony established that her husband had actual knowledge about a paramount issue in the case, namely, the identity of the assailant, especially after she was impeached at trial on certain other aspects of her testimony. The Court held that, due to the uncalled witness's relationship to Jimenez, he would be expected to testify favorably on her behalf and was, in fact, under the control of the People.

Smith: Clarifying the Burdens

More than thirty years later, in June 2019, the Court of Appeals decided to hear the case of *People v. Smith*, an appeal from the Fourth Department originating in Monroe County.[9] The opinion, authored by Justice Feinman, set forth the underlying facts of the case.

In May of 2013, the victim and her boyfriend, Dees, were walking in the City of Rochester. The victim noticed a man, wearing a green hooded sweatshirt and a black baseball hat with red and orange trim, was following them. When that man got to be about fifteen to eighteen feet from the couple, Dees yelled that the man had a gun and attempted to push his girlfriend to the ground. She did not fall, but got turned around and saw the man. The victim testified that the man smiled at her and shot her while firing several rounds. When the police responded, they found the victim lying face down in a pool of blood in a nearby driveway. The victim had suffered serious injuries to her liver and lungs. Two hours after the police brought the victim to the hospital, she was able to give a description of her assailant, stating that she did not know him by name. Defendant Smith was later arrested and charged with a variety of felony counts.

At the trial, video surveillance film of the incident was admitted into evidence, and showed a man fitting the description the victim had given to police, whom she identified as Defendant Smith. Her boyfriend Dees was also initially on the witness list, but did not testify, prompting defense counsel to request a missing witness charge. Defense counsel argued that Dees was in the People's control, had seen the shooter first, and had attempted to push the victim out of the way before fleeing. The prosecution responded that the testimony of Dees would be cumulative to that of the victim. The trial court denied the request to charge, without a reason.

The Fourth Department affirmed the decision of the trial court, but two justices dissented. In its decision, the court stated that one seeking a missing witness instruction has the initial, prima facie burden of showing that the testimony of the uncalled witness would not be cumulative of the testimony already given.[10] The dissenters disagreed that the proponent of the charge had the burden of establishing that the testimony would not be cumulative. The Court of Appeals granted leave to appeal thereafter.

The Court of Appeals reversed and ordered a new trial, holding that the People had failed to meet their burden in opposing the missing witness charge. Writing for a unanimous Court, Justice Feinman's decision reiterated the long-stated principles of *Gonzalez*, that the proponent of the missing witness instruction had the initial burden to demonstrate the existence of three conditions precedent via a prompt request for the charge. First, the requesting party must show that there is an uncalled witness believed to be knowledgeable about a material issue that is already in use in the case; second, that such witness can be expected to testify favorably to the non-calling party and is under the control and available to the non-calling party; and third, that such party has failed to call that witness.[11] The party opposing the charge can defeat the initial showing by one or both of the following: show that the witness is unavailable and explain why or demonstrate why the underlying charge is otherwise inap-

See EVIDENTIALLY SPEAKING, Page 22

WE CARE 32nd Annual Children's Festival

Wednesday, February 19, 2020

Photos by Hector Herrera

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Committee Reports

Plaintiff's Personal Injury/Defendant's Personal Injury

Chair: Ira Slavit (Plaintiff's)
Chair: Matthew Lampert (Defendant's)

The Tuesday, May 5, 2020 CLE program entitled "Why Civility in the Practice of Law Matters" jointly presented by the Plaintiff's and Defendant's Personal Injury Committees has been postponed until further notice.

Michael J. Langer

Elder Law, Social Services & Health Advocacy

Meeting Date: February 25, 2020
Co-Chairs: Katie Barbieri, Patricia Craig

A mock Article 81 hearing was held which included direct and cross examination of two witnesses and the presentation of the court evaluator. Insightful critique was given of the performance by Nassau County Supreme Court Justice Arthur M. Diamond, and a Q&A session was held thereafter.

Women in the Law

Meeting Date: February 26, 2020
Co-Chairs: Jennifer L. Koo, Christie R. Jacobson

Joint CLE presentation with the Business Law, Tax, and Accounting Committee entitled "Technology and Social Media Competence" was presented by Anthony Davis.

The Committee Reports column is compiled by Michael J. Langer, a partner in the Law Offices of Michael J. Langer, P.C. Mr. Langer is a former law clerk in the United States Court of Appeals for the Second Circuit, and a former Deputy County Attorney in the Office of the Nassau County Attorney. Mr. Langer's practice focuses on matrimonial and family law, estate and commercial litigation, and criminal defense.

Nassau County Administrative Judge Norman St. George Welcomes More Than 400 Nassau County High School Students and Educators to Nassau County Supreme Court

On Wednesday, March 4, the Honorable Norman St. George, Administrative Judge of Nassau County welcomed more than 400 high school students, educators and parents to the 2020 New York State Mock Trial Tournament held in the Nassau County Supreme Court. The Mock Trial Tournament is a joint initiative sponsored by the New York State Bar Association, the Nassau County Bar Association and hosted by the Nassau County Courts. It continues to be one of the largest in New York State.

The annual tournament allows teams of high school students to compete trying complex legal matters before volunteer judges and attorneys in the Supreme Court courthouse. As in past years, 48 public and private high schools from Nassau County will participate; the winning team from Nassau County continues on to compete for the New York State championship title.

Nassau County volunteer judges and attorneys advise the high school teams and preside over individual trials to provide students with an opportunity to further their understanding of both the content and processes of our legal system. The program provides high school students with an opportunity to gain practical skills needed to work in a professional legal setting, introduces students to the ethics and responsibilities required in practicing law and enables individuals to apply their education in the law, while under the direct supervision of experienced staff and members of the legal community.

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

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Due to COVID-19, many NCBA Committees are currently meeting remotely. See below for a list of Committee Chairs and contact information. Questions? Contact Stephanie Pagano at (516) 747-4070 or spagano@nassaubar.org.

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We welcome the following new members

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In Memoriam

Michael Chetkof
Charles Kleinhardt

NCBA Diversity & Inclusion Committee to Mentor First-Year Law Students Through Long Island Legal Diversity Fellowship Program

(L-R) Lalaine Mercado, St. John's Law Career Development; Vernadette Horne, Hofstra Law Career Services; Hon. Maxine S. Broderick, Chair of the NCBA Diversity and Inclusion Committee; and Jessika Pineda, NCBA Diversity and Inclusion Committee Member.

The NCBA Diversity and Inclusion Committee is pleased to announce the launch of the Long Island Legal Diversity Fellowship Program ("LILDFP"). The LILDFP endeavors to increase diversity in the legal profession in Nassau and Suffolk counties by placing first-year law students, from under-represented groups, in positions as paid summer associates at 12 premiere Long Island firms. The program serves students at Hofstra, Touro, and St. John's Law Schools.

Select members of the Diversity and Inclusion Committee will assist students by reviewing resumes, sharing interview tips, conducting mock interviews and providing feedback on mock interview performance. Committee members will select students for placement at individual firms and provide mentoring throughout summer 2020 to ensure their success.

The program's main objectives are to increase the number of diverse attorneys practicing in Nassau and Suffolk County law firms, to assist Nassau and Suffolk County law firms in their efforts to recruit diverse attorneys by introducing them to diverse law students, and to provide mentors to the diverse law students within the participating firms to help employers retain talented attorneys with diverse backgrounds.

In Brief

Marian C. Rice

Capell Barnett Matalon & Schoenfeld LLP partners **Robert Barnett** and **Gregory Matalon** spoke at the Trust and Estate Taxation Conference in NYC for the Foundation for Accounting Education. Robert and partner **Yvonne Cort** spoke recently at the NYSSCPA, Nassau Chapter, 67th Annual All-Day Tax and Estate Conference in Uniondale. Mr. Barnett, Mr. Matalon, Ms. Cort, and partner **Stuart Schoenfeld** were speakers at the three-day Long Island Tax Professionals Symposium sponsored by the National Conference of CPA Practitioners, attended by over 700 tax practitioners where they presented and moderated numerous seminars on topics including taxation of trusts and estates, estate planning, and IRS and NYS tax collection and audits.

Alan B. Hodish, of the Law Offices of Alan B. Hodish, was inducted into the 2020 class of the Long Island Metropolitan Lacrosse Foundation's Hall of Fame in recognition for his contribution as a "Coach/Contributor" to the sport of lacrosse. Mr. Hodish had a coaching stint at Levittown Memorial High School before assuming the head coaching position at Hempstead High School where he coached from the late 70s into the late 80s.

Jeffrey D. Forchelli, managing partner at Forchelli Deegan Terrana LLP proudly announced that the firm will be honored as the "Top Property Tax Assessment Firm" at LIBN's annual Real Estate, Architecture, and Engineering Awards honoring those who help create and build Long Island's future, and recognizing some of the most dynamic and successful business people in the commercial real estate community. The firm will also be recognized in the "Top Industrial Renovation" category.

David M. Yaron, associate at the law firm of Edelman, Krasin & Jaye, PLLC, has been selected to receive the 2020 *Top 10 Under 40* Attorney Award for the State of New York in the field of plaintiff's personal injury litigation by the National Academy of Personal Injury Attorneys.

Ronald Fatoullah of Ronald Fatoullah & Associates presented an educational lecture at East Meadow Adult Education on "Wills, Trusts, and Estates." In addition, in collaboration with the Alzheimer's Association of Long Island, Mr. Fatoullah presented "Important Legal and Financial Concerns of Aging" at the Atria Park Assisted Living of Great Neck.

Alan W. Clark is proud to announce that effective January 1, 2020, he is "Of Counsel" to the law firm of Duffy & Duffy, PLLC located at 1370 R&R Plaza, Uniondale, NY 11556 concentrating in medical malpractice, nursing home negligence, and personal injury law.

Karen Tenenbaum, tax attorney at Tenenbaum Law, rang the Nasdaq closing bell with Women in Toys and was interviewed by the toy museum relating to her connection with teaching kids about money. Ms. Tenenbaum and **Leo Gabovich** spoke at The International Restaurant & Foodservice Show of New York at the Javits Center about NYS Sales Tax while **Hana Boruchov** was presented with the Hofstra 2020 Outstanding Women in Law award.

The In Brief column is compiled by Marian C. Rice, a partner at the Garden City law firm L'Abbate Balkan Colavita & Contini, LLP, where she chairs the Attorney Professional Liability Practice Group. In addition to representing attorneys for 35 years, Ms. Rice is a Past President of NCBA.

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

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

PLEASE NOTE: All submissions to the IN BRIEF column must be made as WORD DOCUMENTS.

Name That Tune

Wednesday, March 4, 2020

The Nassau County Bar Association's first annual Name That Tune was held on Wednesday, March 4. Participants created teams and enjoyed a night of fun and good food while they guessed the title and artist of various songs throughout the decades, as well as classic duets and TV show themes. The first NCBA Name That Tune winners were crowned, and will surely be a tough group to beat during next year's competition!

Photos by Hector Herrera

INFLUENCER MARKETING ...

Continued From Page 5

also routinely include provisions outlining the parties' takedown and removal rights. For example, reserve the right to take down content that is inconsistent with the brand's guidelines or potentially infringing a third party's intellectual property rights.

Typically, influencers own any content that they create. Influencer contracts should specify who owns or can use the content. Depending upon the campaign, its duration and the content, a brand may want to own the influencer-created content and should have a "work made for hire" provision to ensure its full ownership of the copyright in the influencer-created content. As an added layer of protection, the contract should provide that if, for any reason, the influencer-created content is not copyrightable subject matter or for any reason is deemed not to be a "work made for hire," then the influencer assigns all right, title and interest in and to the content to the brand. If ownership of the content is not required by the brand, the contract should provide for a license to use the content and the type of license that is wanted/needed. For example, an exclusive, perpetual license to the content may be appropriate, contrasted with a limited, non-exclusive license.

If confidential marketing or other business information will be shared with the influencer, the contract should include a confidentiality provision. Since the influencer is only required to disclose that he/she has a material connection with the brand and is not required to disclose what, if anything, the influencer is getting paid, perhaps provide that any payment terms are confidential.

The influencer agreement should address if the brand wants exclusivity that prevents the influencer from partnering with competitors and/or posting competitive content during a specified time period and, if so, the scope and breadth of the exclusivity (for example, limiting exclusivity to certain competitors or product categories).

Another contractual provision that has become more common and, in some cases a necessity, is a "morals clause." Although it is good practice for a brand to thoroughly investigate an influencer to confirm that the influencer's views, image, behavior and reputation align with the brand image and marketing intent, it is better practice to protect the brand further by including a morals clause in its influencer agreement to protect against unforeseen events and conduct, or any past transgressions that may subsequently come to light. A morals clause holds the influencer to specified behavioral standards and prohibits socially irresponsible behavior that could tarnish the brand's reputation/image. Violation of a morals clause could include the brand's termination of the agreement and/or other remedies, such as rights to remove brand-associated content posted by the influencer, financial penalty or payment of damages.

Conclusion

This article highlights only a handful of the potential legal issues and best practices to take into consideration with influencer marketing. While having benefits, influencer marketing is under high scrutiny by regulators and the regulatory framework is under continuous evolvement to account for changes in technology, platforms and the marketplace, as well as consumers' expectations and understanding of it all. Most recently, on February 12, 2020, the FTC issued a Proposed Notice requesting public comment on whether to make changes to the FTC Guides, including with regard to disclosure of material connections, affiliate links, media aimed at children, incentivized reviews and other issues.[4] It is critical to stay abreast of the legal lay of the land to help clients stay on the right side of the law, as well as the right side of the regulators keeping a close eye on influencer marketing.

Terese L. Arenth is a partner with Moritt Hock & Hamroff LLP in Garden City. She chairs its marketing, advertising, and promotions practice group and co-chairs its cybersecurity, privacy, and technology practice group, both within the firm's intellectual property department.

1. 16 CFR § 255.0(b).
2. 16 CFR Part 255.
3. 16 CFR § 255.5.
4. Federal Register, *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, available at https://bit.ly/2TSlXnU.

ACTIVE MEMBER ...

Continued From Page 6

Becoming Active While Being a Part of Something Larger

The NCBA exhibits an ongoing interest in all the members of our profession. The NCBA has an open committee structure in numerous practice areas, members do not require an invitation to join a committee nor are they charged a fee for joining a particular committee.

I first joined the Real Property Committee, because that was my background. I then became a part of the Construction Law Committee and the Business Law Committee as my interest in those practice areas blossomed. With every involvement, I was learning and growing as members worked to inform their committees and keep each other updated on changes in the law. During this journey as my career advanced, I became more involved with committee leadership roles.

Over time committees began co-sponsoring programs, understanding most legal developments are inter-disciplinary. This openness amongst committees is a tremendous benefit to NCBA members. Members are exposed to various areas of law, and colleagues practicing in other disciplines. In addition to the availability of NAL's unlimited free continuing legal education, this interaction affords members the opportunity to learn about other areas of law first-hand.

As the law touches all aspect of our lives, the NCBA continues to recognize and embrace this reality and its corresponding obligations. Members have been able to strengthen their minds and soul with the numerous public service programs the NCBA offers, through its charitable arm WE CARE and other community involvements. As members we proudly promote the NCBA's involvement in community outreach that includes: a foreclosure clinic, the Hurricane Sandy program, and the annual Law Day pro bono services.

Through WE CARE, in addition to its own initiatives to provide to needy children and seniors, the NCBA is able to support the efforts of numerous community programs. WE CARE partners with many community service organizations that uplift those who are troubled and less fortunate in our communities.

The NCBA also seeks to help its own through the Lawyer's Assistant Program (LAP). This program is designed for those within our profession who find themselves vulnerable to certain dependencies and related problems. The NCBA is truly a place where the good energy of our profession finds synergy, and moves each of us to become better lawyers, advancing our profession to benefit the communities we serve.

True Diversity and Inclusion

As our profession grows and becomes more diverse, the NCBA has kept pace with the reality of the legal world around us. As a woman, my involvement in the areas of my practice sometimes comes with its own challenges. These areas are generally dominated by male colleagues. As a female-solo practitioner, however, I do not ever feel alone because I can call on many colleagues to discuss various legal topics.

In life none of us succeeds on our own. There are always many people who are directly or indirectly involved with our success. Along the path to manifest success in our individual careers, NCBA members have been by each other's side. The members of NCBA continue to open doors for fellow members, resulting in a network system of support for each other.

In life none of us succeeds on our own. There are always many people who are directly or indirectly involved with our success. Along the path to manifest success in our individual careers, NCBA members have been by each other's side.

But more than that, the NCBA has embraced diversity not only by talking the talk, but its leadership has been more than willing to walk the walk. The newly formed Diversity and Inclusion Committee is but one aspect of this commitment. The NCBA as well seeks to educate and promote diversity with its Civil Rights Committee and its LGBT Committee.

As a member of the Diversity and Inclusion Committee, our focus has been to champion the beneficial aspects of a more inclusive legal profession while simultaneously addressing issues of concern such as implicit bias. Committee members educate by presenting reenactments of landmark civil rights cases. These reenactments are effective in bringing awareness and understanding of past actions, and the negative impact those actions have had on our society.

During the past two years, the Committee has presented *Meredith v. Fair: A Reenactment of a Landmark Trial and Fred Korematsu and his Fight for Justice. Meredith* depicted the legal struggles of James Meredith to be admitted to the then all-white University of Mississippi in 1962. Korematsu concerned the internment of Japanese Americans during World War II and its present-day ramifications. In 2020, the committee is planning a reenactment of the Amistad Case from the 19th century.

The committee also provides seminars which allow members to discretely evaluate their individual thoughts that may lead to unintentional but implicit biases. The Diversity and Inclusion committee is comprised of the NCBA' diverse members. The Diversity and Inclusion Committee members work toward a diverse and inclusive bar association and as with the NCBA's general membership, is open and welcoming to all attorneys and law students.

Join, get involved with NCBA—it is one of the BEST decisions you can make to advance your legal career!

Chandra M. Ortiz is a solo practitioner who practices in the areas of real estate and business transactional law that includes franchising. She is a past Dean of the Nassau Academy of Law, and was the first person of color to hold that role. She has been involved with many committees including Chair of the NCBA Corporation, Banking and Securities Law Committee, Co-Chair of the Real Property Law Committee, Judiciary Screening Committee, and Nominating Committee. She has written various articles for the *Nassau Lawyer*; and participates in various community service programs, including the NCBA Pro Bono Mortgage Foreclosure clinics.

EVIDENTIALLY SPEAKING ...

Continued From Page 17

propriate.[12] This burden in opposition can be met by, for example, showing that the testimony would be cumulative to other evidence in the case.[13]

Justice Feinman's decision reiterates the structural framework of *Gonzalez* by reminding us that the Court "has never required the proponent of a missing witness charge to negate cumulativeness to meet the prima facie burden."[14] Trial lawyers and judges alike should be mindful that it may very well be impossible to argue or rule on cumulativeness pre-trial, as there has not been any testimony at that point.

Conclusion

A few practical considerations can be gleaned from the foregoing. The *Smith* decision should put a stop to the creeping attempt to shift the burden that has been going on for some time in both the trial courts as well as the respective Appellate Division departments regarding the charge. It also serves as a reminder that the term "control" is a term of art in these cases which must be interpreted broadly based upon the relationship between the witness and the party.

It does not require a certain type of relationship, such as employer–employee or principal–servant. Rather, in my opinion, it requires the trial court to take a common-sense approach to evaluate the on-going status of the people involved and determine whether under all the facts and circumstances the person in question should be expected to testify at the trial. Keep in mind that, even where the charge is denied, the case law is clear that the attorney of the proponent may comment on the failure of the witness to be called at the trial.[15] Finally, the rules and procedure surrounding the missing witness charge also apply to expert witnesses.[16]

See you next column!

1. PJI 1:75.
2. *People v. Gonzalez*, 68 N.Y.2d 424 (1986).
3. *Devito v. Feliciano*, 22 N.Y.3d 159 (2013).
4. *Gonzalez*, 68 N.Y.2d at 427.
5. *Id.* at 427.
6. *Id.* at 428.
7. *Id.* at 428–29.
8. *Id.* at 429.
9. *People v. Smith*, 33 N.Y.3d 454.
10. *People v. Smith*, 162 A.D.3d 1686 (4th Dept. 2018).
11. *Smith*, 33 N.Y.3d at 458–59.
12. *Id.* at 459.
13. *Id.* at 459–60.
14. *Id.* at 459.
15. *People v. Thomas*, 21 N.Y.3d 226 (2013).
16. *Hanlon v. Campisi*, 49 A.D.3d 603 (2d Dept. 2008).

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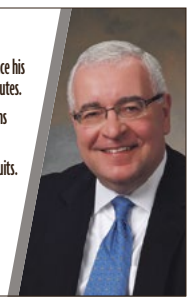

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