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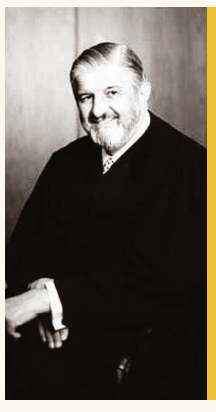

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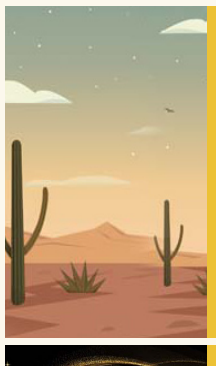

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Nominating Committee Seeks Candidates for NCBA Board of Directors

The Nominating Committee is seeking active NCBA Members who want to serve on the Nassau County Bar Association Board of Directors. The deadline to apply is Monday, January 22, 2024.

The NCBA Board of Directors consists of the President, President-Elect, Vice President, Treasurer, Secretary, 24 elected Directors, as well as the Dean of the Nassau Academy of Law, Chair of the New Lawyers Committee, NCBA delegates to the NYSBA House of Delegates, and all past presidents of the Bar Association.

NCBA Officers and a class of eight Directors are elected at the Annual Meeting on May 14 and take office June 1, 2024. Officers serve for one-year terms and Directors hold office for 3-year terms. Officers and Directors will be sworn in at the NCBA Installation on June 4, 2024.

Members who wish to be nominated must be a Life, Regular, or Sustaining Member of the Association for at least three consecutive years, and an active member of a committee for at least two consecutive years. The Nominating Committee also considers each applicant's areas of practice, leadership positions in the Nassau County Bar Association and other organizations, and the diversity of experience and background a candidate would bring to the Bar's governing body.

In 2023, twelve NCBA Members applied for eight Director positions and seven Members applied for Secretary. Directors are encouraged to make a financial contribution to the NCBA of at least $1,000 annually by becoming a Sustaining Member, purchasing or selling event tickets and sponsorships, or soliciting new members and corporate sponsorships.

The Nominating Committee consists of nine Members of the Association who previously served on the Board of Directors. Gregory S. Lisi, NCBA Immediate Past President "once removed," is Chair of the Committee and Immediate Past President Rosalia Baiamonte serves as Vice Chair.

Interviews with candidates will begin in early February; the Committee will nominate one person for each Officer—other than President—and Director position and issue its report at least one month prior to the 2024 Annual Meeting and Election to be held on Tuesday, May 14.

NCBA Members interested in applying to become a Director or Officer should forward a letter of intent, application, resume, or curriculum vitae no later than January 22 to Executive Director Elizabeth Post at epost@nassaubar.org or NCBA, 15th & West Streets, Mineola, NY 11501. The application can be downloaded on the Bar's homepage at www.nassaubar.org.

The NCBA Celebrates Its 125th Anniversary in 2024

On March 2, 1899, only a few months after the birth of Nassau County, 19 attorneys met at Allen's Hotel in Mineola to name themselves the charter members of the Nassau County Bar Association. Augustus N. Weller was voted President; George W. Eastman, Vice President; Edward T. Payne, Treasurer; and William Clark Roe, Secretary. Annual dues were declared to be six dollars, and, without hesitation, the men established the Nassau County Bar Association Constitution and its bylaws.

Now, in 2024, the Nassau County Bar Association celebrates its 125th anniversary, one hundred and twenty-five years of rich history, excellence, and dedication to the community. To honor this momentous occasion, the Bar Association has planned a series of events to recognize its past and celebrate the future of the legal profession in Nassau County. Kicking off the celebration on March 7, the NCBA will host a reception to honor its past presidents.

The celebrations will continue throughout the year and will also include a capital campaign to retire Domus' mortgage, history and arts projects, and, on November 14, 2024, a 125th Anniversary Celebration Gala at Domus. This social event will include the sealing of a time capsule containing Bar keepsakes and historical objects, to be opened in 2049 during the Bar's 150th anniversary. Dan Russo, President-Elect of the NCBA, says, "As President-Elect, I simply cannot wait to spend 2024 celebrating all that the Nassau County Bar Association was in the past, is in the present, and continues to strive to be in the future."

This year, the NCBA will host its 124th Annual Dinner Gala on Saturday, May 4, at the Cradle of Aviation Museum to honor Distinguished Service Medallion recipient, Hon. Lance D. Clarke, a past president of the Nassau County Bar Association. This is a stark contrast to the first Annual Dinner held in 1901 at the Arena in New York City with nine members attending. In past years, the NCBA has held its Annual Dinner Gala at the Garden City Hotel and later the Long Island Marriott, with attendance ranging from 350 to over 500 guests.

It is our hope that this celebration will bring NCBA Members together and remind everyone that at the heart of this community is Domus.

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nassaulawyer@nassaubar.org

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From the President

Sanford Strenger

In 2024, I will mark forty years since my law school graduation and the beginning of my real-life training in the practice of law. At that time, I had the good fortune to be hired as an associate by Murray Schwartz, an accomplished trial lawyer who loved the law and the ability it gave him to provide a livelihood for his family as well as serve his clients vigorously and ethically. I learned a great deal from Murray and the other mentors I have had the pleasure of working with, and for, during the past four decades. Not one day do I regret my choice to enter this profession, no matter what challenges I was faced with, to advance my clients' interests and to be part of our system of justice.

The Nassau County Bar Association, too, has a meaningful anniversary in 2024—its 125th. It was my good fortune over three decades ago to be introduced to the NCBA and be welcomed into its fold of committed attorneys with whom I could share my triumphs and defeats, obtain encouragement, and sage counsel. The NCBA is not a static organization, just as the law is not static. This Association has taken stands in the interest of justice, reached out to assist those less fortunate through its members' pro bono services, and has been there for members of the profession who need a helping hand through its Lawyers Assistance Program.

During the past 125 years, the Nassau County Bar Association has had many innovative and thoughtful leaders, among whom is the Hon. Lance D. Clarke, who will be awarded the NCBA's highest honor, the Distinguished Service Medallion, on Saturday, May 4 at the Cradle of Aviation Museum. I cannot think of a more fitting venue for us to celebrate Lance, his leadership, innovation, and example of being a family man, dedicated public servant, role model, and advocate. Mark your calendar to honor Lance and celebrate with your peers in a unique and historic venue. The cocktail hour will be held in some of the galleries of the museum where the history of Long Island's role in aviation and space travel are on exhibit.

NCBA has not lasted 125 years or become the leading innovative suburban bar association without the support of its members. There is no question that we are currently facing troubling times. As a nation, we have emerged from a harrowing pandemic only to be confronted with hardened and seemly intractable political divides. Foreign conflicts have ignited ethnic and racial flames of discord, which have created a fear of a regression from what we believed was a future of tolerance, to one of hatred of our neighbors for their beliefs—religious and political—or the color of their skin.

There is an important place in 2024 for this Association, and that place is a home for all those who practice law to find common ground together and to share that community with others. As attorneys, we possess special skills and are looked to by our family, friends, and institutions we cherish to protect them and help them lead lives with less fear and hope for the future. As this is my New Year's article, I invite you to join me in the resolution to help our community of lawyers continue their work, provide a livelihood for their families, and foster tolerance.

In the coming year, as part of NCBA's 125th celebration, let's bring Domus forward. With your time and financial assistance, we can bring to our beautiful home physical changes that will make it more welcoming to all our diverse members and the public we serve.

Let us help Domus grow together. Bring in your partners, associates, and colleagues as members of the NCBA. Share with them your stories of how being a member helped you settle that case, close that deal, or just made you feel good inside for mentoring that teenager or providing a few hours of pro bono services.

Make the pledge to yourself that you will spend time away from your screen and attend in person as a presenter or participant in an Academy of Law or committee program. Go learn what's new in the field of animal rights or what possibilities are available for our veterans. Or, just come to Domus to have lunch, meet a friend, and take a breath.

Apply this month to be a member of our Board of Directors or take the exciting step of interviewing to be an Officer of this Association. You have great ideas—share them and implement them.

NCBA is not a static entity, but it cannot be what you want it to be without your input. Be an active part of our 125th year celebrations and our future. You'll thank me later.

Let me wish you a Happy and Healthy New Year, and I look forward to seeing you at Domus, your home away from home, in 2024.

FOCUS: IMMIGRATION LAW

Violence Against Women Act and Its Immigration Applications

Francis X. McQuade

In an effort to provide protection to a vulnerable component of the immigrant community, the Immigration & Nationality Act (INA) created provisions to assist foreign nationals who have been victims of domestic abuse.[1] These immigration recourses arise from the Violence Against Women Act (VAWA) enacted by Congress in 1994 and reauthorized several times (most recently on January 4, 2023).[2]

VAWA serves as a resort for many immigrants. The measure also provides funding for law enforcement and initiatives for the prosecution of criminal domestic violence. Furthermore, VAWA, provides an effective means of escape to those who might otherwise be held as virtual hostages by their erstwhile spousal sponsors enabling them to obtain legal status in the United States.

Each reauthorization of the VAWA has steadily increased the scope of eligibility and expanded the waiver of the basis of inadmissibility. How does the VAWA apply to immigration cases to afford forms of relief? There are three principal ways, two by implication, political asylum and the U Visa, and one directly, the VAWA Special Immigrant self-petition.

Domestic Abuse as a Basis for Political Asylum

VAWA has crept into a category of basis for a claim of political asylum[3] as the abused person is classified as being a member of a "particular social group."[4] Persecution as an affected "member of a particular social group" is one of the so-nominated categories for basing an asylum claim (along with political opinion, religion, race, and nationality). Domestic abuse as a basis for asylum took-off after the 2014 case *Matter of A-R-C-G- et al*, when it was determined that a Guatemalan woman seeking asylum defined sufficiently a recognizable social group that made for an arguable claim by alleging gender-based abuse that was not addressed by state agents (such as the local police).[5]

VAWA-type asylum claims appear more viable when it involves asylees fleeing such persecution in countries where there exists traditionally male-dominated social structures, such as is still found in parts of Latin America. As well, where there exists religious-based gender submissive classes, such as in Islamic lands where strict Sharia law is enforced. More obvious gender-based asylum claims exist where there is threat of forced female genital mutilation, as is currently practiced in parts of Africa.

To prevail, the asylum applicant would need to show historical patterns of gender-biased predisposition, actual abuse by a family, spousal or common relationship, and statue sanction or failure to offer protection. Domestic abuse as a basis for an asylum claim was seriously curtailed by an Attorney General decision in 2018 called Matter of A-B. However, this curtailment was vacated by a succeeding Attorney General in 2021 in Matter of A-B III and Matter of L-E-A-.[6]

U Visa as a Crime Victim

Another immigration recourse for an abused or battered person comes in the form of the U Visa.[7] The U Visa is for victims of a serious crime (and their immediate family) committed in the United States which is perpetrated against them (this category includes victims of gender-based violence). The U Visa is a non-immigrant, i.e., temporary, visa for four years, providing employment authorization. There is also mechanisms that can create a pathway to legal permanent residency after the initial U Visa term expires.

The U Visa requires actually being a victim of serious crime and

that the victim participates in a material and ongoing way with police or prosecutor investigation, prosecution and sentencing phases of proceedings against the perpetrator.

The U Visa is not only a means of providing immigration status to an adversely affected immigrant, but it provides effective encouragement to break the inertia of shame to report that might accompany the more sordid types of sex crimes by motivating the victim-immigrant to come forward and help law enforcement.

The T Visa also exists specifically for victims of human trafficking.[8] The T Visa permits human trafficking victims (labor and/or sexual trafficking) to secure a visa to remain and work in the United States. As with the U Visa, recipients of T Visas must cooperate with law enforcement and the prosecution, and it could be used to provide visas for immediate family members.

The VAWA Self-Petition

The most explicit VAWA-related immigration recourse for victims of domestic abuse is the Special Immigrant VAWA self-petition (form I-360.)[9] Through this recourse, a victim of domestic abuse can self-petition herself or himself for legal permanent residency. The petition may be filed concurrently with an application for an employment authorization document. In fact, if the victim-self-petitioner is otherwise a candidate for an immediate immigrant family-preference category (e.g., spouse of a U.S. Citizen) the self-petitioner can file concurrently for adjustment of status as a legal permanent resident.[10]

The VAWA self-petitioner must be the spouse (or recently divorced ex-spouse), parent or child of an abusive U.S. Citizen or Legal Permanent Resident spouse (or parent or child.) The abuse must have actually occurred, been substantial, and it would best to have the abuse documented by police or medical records. The VAWA self-petitioner can be a lifesaver for those who cling to inherently dangerous relationships fearing to lose eligibility for a family-based application for legal permanent residency.

The most recent VAWA reauthorization[11] permits the direct self-petition rather than making Special Immigrant VAWA status available only after a predicate I-130 family petition[12] is filed by the abusive family sponsor. The self-petitioner must show evidence of actual abuse, and must also demonstrate good moral character, proof of the qualifying relationship with the abuser and that any marriage with the U.S. Citizen or Legal Permanent Resident was, in fact, bona fide.

Problems with VAWA Fraud

The liberal provisions of the 2023 reauthorization of the VAWA seem to have triggered added interest in VAWA self-petitions. VAWA petitions have increased precipitously. Like any statutory benefit, to be granted requires substantial evidence to prove qualification. Despite exacting evidentiary requirements, VAWA self-petitioners are approved annually at rates between a low of sixty-seven percent and a high of eighty-two percent.[13]

Despite the laudable public interest served by VAWA benefits, there are problems, notwithstanding, when making an honest appraisal of VAWA immigration programs. The most serious flaw of VAWA immigration programs is the potential for fraud. The lure of getting legal status and even the desire for getting a coveted work permit (that will be presumptively issued even before final adjudicated approval of the VAWA petition) has encouraged the unscrupulous (including practitioners) to facilitate the composition and dispatch of unfounded claims and to prompt injudicious claimants to seek fraudulent claims.

Proof of predicate abuse to prove a self-petition is subject to a startingly low level of evidentiary burden:

> *In acting on [petitions]…the Attorney General shall consider any credible evidence (italics mine) relevant to the petition. The determination of what evidence is credible and the weight given to that evidence shall be within the sole discretion of the Attorney General.*[14]

The relative ease of making a prima facie claim has led to applicants to fabricate accounts of abuse arising out of dissolute marriages. At times, even spouses of bona fide marital relationships have been known to collude with the petitioning partner to assist in the partner's gaining benefits (especially true if the colluding spouse allowing allegations to be made against him is otherwise ineligible himself for future immigration benefits). The question being would he nonetheless risk a blemished reputation, a police record, risk of prosecution and even deportation?[15]

The failsafe against such fraud includes the requirements to show a prior bona fide marriage, and furthermore, a successful VAWA petitioner cannot later petition the alleged abusive partner for residency after receiving his or her own permanent residency. Despite the risks to the accused and risks to the self-petitioner if fraud is proven, and in the interest of simple justice and honesty, VAWA self-petitions have unfortunately become a fertile field of frivolous and even fraudulent claims.

Other criticisms have been levelled at VAWA immigration measures. They include the increased federalization of local police, historically part of a state's jurisdiction; the risk of exposing petitioners to removal proceedings in the event the petition or residency application fails for wont of evidence; and the perpetuation of female victimhood stereotypes.

While VAWA stands on the positive side of the ledger for serving the public interest, future reauthorizations need to carefully gather and gauge empirical evidence for fraud and other issues in considering expansion or continuation of immigrant provisions under the Violence Against Women Act.

1. 8 U.S.C. 1101 ff.
2. Passed as Title IV, sections 40001-40703 of the Violent Crime Control and Law Enforcement Act of 1994, and signed as P.L. 103-322; 8 U.S.C., section 2616 (c)(4) and U.S.C. 244 (a).
3. INA 208, U.S.C. 1158.
4. Refugee Act of 1980, P.L. 96-212, 94 Stat, 102, 96th Congress.
5. *Matter of A-R-G-C- et al.*, 26 I&N Dec. 388 (BIA 2014).
6. Matter of A-B, 27 I&N, Dec. 36 (A.G. 2018); Matter of A-B. III, 28 I&N, Dec. 307 (A.G. 2021); Matter of L-E-A- III, 28 I&N, Dec. 304 (A.G. 2021).
7. Victim of Trafficking and Violence Protection ACT (Battered Immigrant Women's Protection Act of 2000), s. 2787, Title V.
8. *Id.*
9. 8 U.S.C. 204.2 (c)(1) and (e)(1).
10. 8 U.S.C. 1255, INA section 245.
11. Violence Against Women Act Reauthorization of 2022, Division W of the Consolidated Appropriations Act of 2022 (VAWA 2022; P.L. 117-103).
12. INA section 204.
13. USCIS Office of Performance and Quality, Data Analysis and Reporting Branch.
14. INA section 204 (a)(1)(J), codified at U.S.C. section 1154 (a)(1)(J).
15. INA section 237 (a)(2)(E), U.S.C. section 1227 (a)(2)(e).

Francis X. McQuade is a private practitioner specializing in Immigration Law, with offices in Long Beach and Central Islip.

FOCUS: IMMIGRATION LAW

Family Reunification Program

Linda Goor Nanos

A new program announced by the United States Citizenship and Immigration Services ("USCIS") is by invitation only. USCIS is selecting cases from the waiting lists of family petitions to reunify relatives. The invitation is available to people who waited their turn for residence processing outside of the United States but find themselves stuck in seemingly interminable backlogs.

The Immigration and Nationality Act establishes the number of individuals who can immigrate in various family relationship categories.[1] The filing date for petitions is known as the priority date. Because the number of pending petitions far exceeds the allotted number of immigrants per category, and the numbers have not been updated for decades, people who are committed to following the rules and waiting their turn are separated for years. The United States Department of State ("DOS") publishes a Visa Bulletin monthly to advise of the priority dates it is processing.[2]

United States citizens filing relative petitions are subject to backlogs, unless the relative is in the immediate relative category including spouses, minor children, or parents. There is immediate availability to immigrate for those three relationships. Those who are not immediate relatives are subject to the waits: currently, adult single sons and daughters wait six years, married sons and daughters wait 13.5-years, and siblings wait 15.5-years. Lawful Permanent Residents can only petition spouses, children, and single adult sons and daughters. Single adult sons and daughters must wait six years.

The waiting lists are so long that it is not unusual for a Petitioner to die during the process. For a beneficiary waiting outside the United States, the case can continue if the petition has already been approved, there is a qualified substitute sponsor, and a humanitarian basis can be established. The new Family Reunification Program recognizes the extreme hardship that the long waits cause to families.

Individuals on the waiting lists may receive an "Invitation Letter," inviting the Petitioner to participate in the reunification program. At this time, the designated countries included in the program are Colombia, Cuba, Ecuador, El Salvador, Guatemala, Haiti, and Honduras.[3] A Petitioner cannot request inclusion, but will be notified if selected from the backlogs. Any Beneficiary residing in the United States is disqualified since the intent is to reunify family. The government is selecting cases for invitation on a rolling basis as operations allow.

Attorneys have an unusual status in the process. We are not able to enter a Notice of Representation with the government to complete the online applications by Petitioner and Beneficiary. We can only advise from the sidelines. The attorney should screen the Beneficiary for any grounds of ineligibility, such as prior unauthorized presence in the United States, removal history, or criminal convictions. We can assist our clients in completing the online applications and helping to scan documents into the accounts that they have to establish. The Beneficiary outside the United States will need assistance if he or she is not computer savvy.

The procedure begins with the Petitioner establishing an online Request to be a Supporter and Declaration of Financial Support within one year of receiving an invitation letter. From the beginning of the process, the attorney must determine that there is a qualified financial sponsor. If the Petitioner is not able to establish a margin above the poverty guidelines,[4] there will have to be a joint sponsor. An important practice pointer is to make sure the Beneficiary, as well as any family member to be included, has a valid passport and that the Petitioner

enters the correct name and date of birth that match the passport.

If the Petitioner's request is accepted, the USCIS will contact the Beneficiary to meet the requirements of a valid passport and medical exam by a panel physician, including vaccinations. Biographic documents such as birth certificates, marriage certificates and divorce decrees will be required. The Beneficiary must then establish an account with the United States Customs and Border Protection ("CBP"), so CBP can issue Advance Authorization to Travel. The importance of the names and dates of birth matching cannot be over-emphasized because the Petitioner's Online Request and the Beneficiary's account must dovetail.

Once CBP authorizes travel, the Beneficiary will have 90 days to enter the United States. Children under 18-years-old must have their own authorization but cannot use the authorization to enter without a parent or legal guardian.

Upon arrival, CBP will screen the Beneficiaries for admission. It gathers biometrics including a photograph and fingerprints. Presently, the prior history can cause a Beneficiary to be denied entry based on a ground of inadmissibility. If the Beneficiary is admissible, he or she will be paroled into the United States for up to three years.

The newly arrived beneficiary will be eligible to apply for employment authorization, but this requires a separate application for permission to work.[5] The beneficiaries must maintain their status until their date on the waiting list is reached when they can apply for a residence interview inside the United States. This may necessitate renewing the parole status and employment authorization. The government charges filing fees for these applications for employment permission and parole extensions.

The application for adjustment of status to resident is made when the priority date is finally reached.[6] The application is supported by the initial approved family petition; biographic documents (birth, marriage, divorce, passport); financial support by the Petitioner and Joint Sponsor (if needed); medical exam results; and proof of lawful entry on parole and maintenance of lawful status during the entire time in the United States. The filing fee is surprisingly high, currently $1,225.

The alternative is for the beneficiary to remain outside the United States for the duration of the waiting period and participate with a residence interview at the United States Consulate in the home country when the priority date is reached. A Beneficiary invited to participate in the program will not be prejudiced for refusing to pursue the reunification program and waiting outside the United States. The Beneficiary is not required to respond to the Invitation Letter. If he or she does not respond, the process will proceed for an interview in the home country. This may be the preferable option based on his or her employment or ongoing education in the home country.

The intent of the program is to discourage illegal immigration occurring because of frustration from the long waiting lists when Beneficiaries avoid the process. Beneficiaries may intend to avoid the process as a result of desperation becoming deemed illegal immigrants within the United States. The program rewards individuals patiently remaining in their countries to enter lawful status.

1. See 8 U.S.C.S. §1151(c)(1)(B)(ii).
2. See The Visa Bulletin, Travel.State.Gov, available at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html.
3. See *Family Reunification Parole Processes*, U. S. Citizenship and Immigration Services, available at https://www.uscis.gov/FRP.
4. The margin is 125% above the Department of Health and Human Services ("HHS") Poverty Guidelines published annually.
5. See 8 CFR §247a.12(c)(11).
6. See 8 U.S.C. §1255.

Linda Goor Nanos has practiced immigration law for over 40 years. She is a senior attorney for the law firm of Nanos, Gomez & Associates, P.C. located in Garden City. Linda is a member of the American Immigration Lawyers Association and Nassau County Bar Association Immigration Law Committee.

FOCUS: UNIFORM CIVIL RULES

Verbose—The Mystery of the Word Count Certification

Ian Bergström

The Uniform Civil Rules for the Supreme Court set forth the standard for the mandatory word count certification pursuant to 22 NYCRR §202.8-b. Despite such mandate, the trial courts and appellate division do not necessarily deny motion practice because the movant disregarded the word count certification standard(s). Notably, the appellate division permits the judiciary to set aside the failure to comply with the word count certification pursuant to CPLR §2001. New York State supreme courts render differing approaches to the word count certification requirement(s), thereby causing confusion whether compliance with the certification is essential.

The Amended Uniform Civil Rules for the Supreme Court

The Uniform Civil Rules for the Supreme Court and County Court are not "legislative[]" creatures, but rather the "Chief Administrative Judge['s]" implementation of "rules" that "advisory committees" promulgate.[1] The Uniform Civil Rules for the Supreme Court are "applicable to civil actions and proceedings in the Supreme Court ...."[2] Consequently, the rules are "[in]applicable" to the New York State surrogate's courts.[3] The uniform civil rule(s) for the supreme court can be disregarded subject to certain standards.[4] New York State supreme courts must interpret the uniform civil rules for the supreme court harmonious "with the ... CPLR ...."[5] The amended Uniform Civil Rules for the Supreme Court became operative in February 2021.[6] The modification of the uniform civil rules for the supreme court were intended to echo the supreme court—commercial division rules.[7]

The Layout of Motion Papers

Affidavits are required to set forth the "fact[ual]" circumstances.[8] Memoranda of law are required to set forth the legal standards and legal contentions.[9] Affirmations "should briefly summarize" an attorney's "legal position, and avoid citing case law."[10] The Uniform Rule(s) for the Supreme Court mandate that the affidavits, memoranda of law, and affirmations drafted by means of "computer" conform to the requisite word count limit(s).[11] If necessary, the litigant can request judicial permission to overstep the word count restriction(s).[12] Attorneys are mandated to "attach[]" the word count certification "page ... to the end of the applicable [motion papers][.]"[13]

An Analysis of Judicial Decisions

Litigants may contend that the trial court should disregard or otherwise deny the application because the movant exceeded the word count "limit[]" pursuant to 22 NYCRR §202.8-b. The intention is to persuade the trial court to strictly enforce the legitimacy and supremacy of the Uniform Civil Rules for the Supreme Court. Although the Uniform Civil Rules for the Supreme Court mandate compliance with the word count certification standard(s), the trial courts and appellate division undermine such "technical" mandate pursuant to the CPLR.[14] Supreme Court of Bronx County "denied as procedurally defective" the summary

judgment application because the movant contravened, inter alia, 22 NYCRR §202.8-b.[15] Supreme Court of Queens County disregarded the affirmation opposing the sanctions application and discovery-related application because the papers lacked the requisite word count certification.[16] Supreme Court of Queens County denied the application "to appoint a referee" because the movant did not attach the requisite word count certification "page" to the moving papers.[17] Supreme Court of Queens County denied the application to foreclose upon the residential mortgage because the movant contravened 22 NYCRR §202.8-b.[18] Supreme Court of Queens County denied the applications, but granted judicial permission for the movant to renew the application thereafter complying with 22 NYCRR §202.8-b.[19] The Second Department determined the judiciary has the statutory power and discretion to "disregard[]" the noncompliance with the word count certification pursuant to 22 NYCRR §202.8-b.[20] Presently, the mystery is whether contravention of 22 NYCRR §202.8-b affects litigants' interests regarding motion practice.

1. See *Estate of Ziegel*, 2023 N.Y.L.J. LEXIS 969, File No.: 2015-4928/F (Sur. Ct., Queens County 2023) (J. Kelly).
2. See 22 NYCRR §202.1(a).
3. See *Estate of Ziegel*, 2023 NYLJ LEXIS 969, File No.: 2015-4928/F (*citing* 22 NYCRR §207.1(a) and New York Constitution, Article VI, §12).
4. See 22 NYCRR §202.1(b).
5. See 22 NYCRR §202.1(d).
6. See David Ferstendig, *Significant Amendments to Uniform Rules*, NEW YORK STATE BAR ASSOCIATION (February 2021), available at https://nysba.org/significant-amendments-to-uniform-rules/.
7. See *id.*
8. 22 NYCRR §202.8(c); *Chan v. Majewski,* 2017 N.Y. Slip. Op. 32243(U), *15-16 (Sup. Ct., N.Y. County 2017) (J. Crane); *Tripp & Co., Inc. v. Bank of NY (Del), Inc.*, 28 Misc. 3d 1211(A), 2010 N.Y. Slip. Op. 51274(U), *6 (Sup. Ct., N.Y. County 2010) (J. Fried).
9. 22 NYCRR §202.8(c); *Chan*, 2017 N.Y. Slip. Op. 32243(U), *15-16; *Tripp & Co., Inc.*, 28 Misc. 3d 1211(A), 2010 N.Y. Slip. Op. 51274(U), *6.
10. See *Polanco v. Holkmann*, 2017 N.Y. Slip. Op. 30929(U), *1 (Sup. Ct., Bronx County 2017) (J. Capella) (footnote number two (2)); see *also Zuckerman v. New York*, 49 N.Y.2d 557, 563 (1980).
11. See 22 NYCRR §202.8-b(a)-(b); see *also* 22 NYCRR §202.8-b(e).
12. See 22 NYCRR §202.8-b(f).
13. See 22 NYCRR §202.8-b(a)-(c); see also 22 NYCRR §202.8-b(f).
14. *Anuchina v. Mar. Transportation Logistics, Inc.*, 216 A.D.3d 1126, 1127 (2d Dept. 2023); *315 W. 55th Owners Corp. v. Rainbow Spa 23 Inc.*, 2023 N.Y. Slip. Op. 51225(U), *5, Index No.: 653446/2023 (Sup. Ct., N.Y. County 2023) (J. Lebovits) (footnote number seven (7)); *Jara-Salazar v. 250 Park, L.L.C.*, 2023 N.Y. Slip. Op. 33764(U), *3, Index No.: 152788/2019 (J. Kraus) (footnote number two (2)); *Urano v. U.S. Tennis Association Inc.*, 2023 N.Y. Slip. Op. 32847(U), *10-11, Index No.: 518621/2019 (Sup. Ct., Kings County 2023) (J. Sweeney); *Clarke v. Albee Development LLC*, 2023 N.Y. Slip. Op. 30363(U), *1, Index No.: 501390/2018 (Sup. Ct., Kings County 2023) (J. Cohen) (footnote number one (1)); *Urano v. United States Tennis Association Inc.*, 2023 N.Y. Slip. Op. 32847(U), *10-11, Index No.: 518621/2019 (Sup. Ct., Kings County 2023) (J. Sweeney); *Wilmington Savings Fund Society, FSB v. Akther*, 2023 N.Y. Misc. LEXIS 6903, *1-2, Index No.: 712694/2020 (Sup. Ct., Queens County 2023) (J. Dufficy); *Brown v. NYC Department of Education,* 2023 N.Y. Slip. Op. 30106(U), *7, Index No.: 157642/2020 (Sup. Ct., N.Y. County 2023) (J. Stroth) (*citing* 22 NYCRR §202.1(b)); *Wetzel v. Systra USA Inc.*, 2022 N.Y. Slip. Op. 33728(U), *3-4, Index No.: 151707/2022 (Sup. Ct., N.Y. County 2022) (J. Rosado) (*citing* CPLR §2001); *Selim v. Castillo*, 79 Misc. 3d 1240(A), 2023 N.Y. Slip. Op. 50840(U), *2 (Sup. Ct., Bronx County 2023) (J. Hummel) (*citing* CPLR §2001); *GHH Association LLC v. Trenchant Funds, USA LLC*, 2023 N.Y. Slip. Op. 31758(U), *4, Index No.: 156936/2020 (Sup. Ct., N.Y. County 2023) (J. Saunders) (*citing* CPLR §2001); *Kruk v. Jamaica Avenue Owner, LLC*, 2022 N.Y. Misc. LEXIS 19266, *20, Index No.: 703568/2019 (Sup. Ct., Queens County 2022) (*citing* CPLR §2001 and 22 NYCRR §202.1(b)); *Board of Managers of 325 Fifth Avenue Condo. v. Contl.*, 2022 N.Y.L.J. LEXIS 2716, *20, Index No.: 154764/2023 (Sup. Ct., N.Y. County 2022) (J. O'Neill Levy) (citing CPLR §2001); *Bonaguro v. Old Firehouse No. 4 LLC*, 2022 N.Y. Slip. Op. 30109(U), *6, Index No.: 505762/2016 (Sup. Ct., Kings County 2022) (*citing* CPLR §2001); *Daniels v. Armenio*, 2023 N.Y. Misc. LEXIS 22511, *5-6, Index No.: 715786/2019 (Sup. Ct., Queens County 2023) (J. Caloras) (*citing* CPLR §2001); *Matthews v. Forest City Ratner Cos., LLC*, 2021 N.Y. Slip. Op. 32164(U), *1 (Sup. Ct., Kings County 2021) (J. Cohen) (footnote number two (2)) (*citing* CPLR §2001); *Semenyuk v. Hladkyi*, 2022 N.Y. Misc. LEXIS 6882, *7, Index No.: 500100/2020 (Sup. Ct. Kings County 2022) (J. Ottley) (*citing* CPLR §2001); *Raigosa v. Vlahos*, 2022 N.Y. Misc. LEXIS 14698, *1, Index No.: 717688/2018 (Sup. Ct., Queens County 2022) (J. Velasquez); *Kim v. City of Newburgh*, 2021 N.Y. Slip. Op. 33441(U), *16, Index No.: EF001148/2019 (Sup. Ct., Orange County 2021) (J. Onofry); *McCourt v. Fashion Institute of Technology*, 2023 N.Y. Slip. Op. 31442(U), *2, Index No.: 162044/2018 (Sup. Ct., N.Y. County 2023) (J. Cohen) (footnote number two (2)); *Union Mutual Fire Insurance Co. v. Femur Holding Corp.*, 2023 N.Y. Misc. LEXIS 21857, *3-4, Index No.: 709431/2020 (Sup. Ct., Queens County 2023) (J. Ventura).
15. See *Rivera v. 3051 Fulton LLC*, 2023 N.Y. Misc. LEXIS 18832, *1, Index No.: 21934/2019E (Sup. Ct., Bronx County 2023) (J. Ramirez).
16. See *Edwards v. Freedom Church of Revelation*, 2023 N.Y. Misc. LEXIS 20034, *1-2, Index No.: 701022/2020 (Sup. Ct., Queens County 2023) (J. Butler); see *also Idalides Castellano v. Vladimir I. Estrada & Pepsi-Cola Bottling Co. of NY, Inc.*, 2023 N.Y. Misc. LEXIS 12872, *4, Index No.: 717797/2021 (Sup. Ct., Queens County 2023) (J. Butler).
17. See *NYCTL 2019-A Trust v. Samantha Khan, 2023* N.Y. Misc. LEXIS 20544, *1, Index No.: 722334/2020 (Sup. Ct., Queens County 2023) (J. Taylor).
18. See *U.S. Bank N.A. v. Tagin*, 2023 N.Y. Misc. LEXIS 8557, *1-2, Index No.: 710441/2017 (Sup. Ct. Kings County 2023) (J. Johnson).
19. *Yong Zhao v. Five Star Beauty Salon, Inc.*, 2023 N.Y. Misc. LEXIS 8644, *1-2, Index No.: 703034/2022 (Sup. Ct., Queens County 2023) (J. Titus); *Kim v. JPMorgan Securities, LLC*, 2023 N.Y. Misc. LEXIS 6937, *1-2, Index No.: 721457/2021 (Sup. Ct., Queens County 2023) (J. Titus); *GEICO General Insurance Co. as Subrogee of MD Saleh v. Martinez*, 2023 N.Y. Misc. LEXIS 21842, *2-3, Index No.: 711933/2021 (Sup. Ct., Queens County 2023) (J. Titus).
20. *Anuchina*, 216 A.D.3d at 1127 (*citing Wetzel*, 2022 N.Y. Slip. Op. 33728(U), *3-4, Index No.: 151707/2022 (*citing* CPLR §2001); CPLR § 2001; 22 NYCRR §202.8-b(a)-(c).

Ian Bergström is the founder of Bergstrom Law, P.C. He can be reached at Ian@IBergstromLaw.com.

FOCUS:
HIGHER EDUCATION

The Impact of *Students for Fair Admissions* on Public Sector Recruitment Practices

Martha Krisel

"So Too in Other Areas of Life."[1]

A wide range of litigation as well as agency policies following the decision in *Students for Fair Admissions*[2] *(Students)* demonstrate that the decision should not be construed as limited to higher education admission practices. In fact, the decision must be read as increasing the scrutiny of affirmative action "to other areas of life,"[3] including the public sector workplace. To develop a diverse public sector workforce, municipalities have long relied upon outreach, "pipelines," "pathways" and affinity groups to increase awareness of and interest in employment opportunities. In public sector employment particularly, these recruitment strategies are crucial because the competitive testing system allows canvassing based only upon established lists resulting from examination scores. To be in the running for competitive civil service positions, applicants must respond to examination announcements within strict deadlines, qualify for the examination and of course pass the examination.[4] While civil service law broadly requires competitive examination announcements to be issued to specific locations, including BOCES, high schools, colleges, universities, local social services districts, and job training programs,[5] a proactive municipality should also participate in job fairs and actively pursue outreach opportunities to ensure that all prospective and current employees are aware of opportunities for hiring and for promotions.

In fact, New York State Civil Service Law established an independent commission to increase diversity in the state government workforce.[6] The law sets out specific tasks to increase diversity, including reviewing and recommending recruitment and employment practices that will "bring Hispanics into jobs classified as shortage category occupations, as well as other occupations."[7] And the law requires the development and promotion of "the participation of minority state employees in career development programs."[8]

Pre-Application Recruitment Must be Directed to the Entire Population

Diversity strategies that focus on recruitment designed to attract candidates to apply for the examinations that establish lists must be expanded to reach all potential applicants. Education and outreach in advance of the closing date of the application period increases the pool of eligibles and is consistent with New York State Civil Service Law. Training on the application process, the qualification process and the advantages of a public sector career should include detailed instructional classes on how to complete an application and how to determine in advance of completing an application that an individual's background (education and employment history) meets the qualifications.

Students decided that the admissions systems used by Harvard College and the University of North Carolina (UNC) are not lawful under the Equal Protection Clause of the Fourteenth Amendment. When Chief Justice Roberts evaluated challenges to affirmative action initiatives relied upon by Harvard and the University of North Carolina, he reviewed United States Supreme Court decisions that cumulatively had been interpreted to allow institutions of higher education to include race as a factor in admissions.

Chief Justice Roberts did not limit his analysis to higher education admissions decisions; rather, he also relied upon Supreme Court decisions about public accommodations, including busing and public beaches.[9] In light of this, since the *Students* decision issued in June of 2023, the more than 50 federal and state court decisions and pleadings that have relied on or cited to it have not been limited to higher education admissions.[10] For example, it has been cited for its detailed analysis of standing.[11] Others applied applied *Students* to litigation that did not involve college admissions but rather pertained to other initiatives that included race in their eligibility qualifications.[12]

The United States Department of Justice (DOJ) and Department of Education (DOE) have jointly issued an FAQ[13] on the viability and legality of pipelines and pathways in college admissions recruitment. While the FAQ focuses on college admissions, its guidelines are instructive in other areas including employment. In short, while pipelines and pathways are still permissible, the DOJ/DOE FAQ cautions:

> The Court's decision in SFFA does not require institutions to ignore race when identifying prospective students for outreach and recruitment, provided that their outreach and recruitment programs do not provide targeted groups of prospective students preference in the admissions process, and provided that all students—whether part of a specifically targeted group or not—enjoy the same opportunity to apply and compete for admission…Ensuring that institutions of higher education are open to all includes not only attracting, admitting, and matriculating a diverse student body, but also retaining students from all backgrounds. To that end, it is important that students—particularly those who are underrepresented—feel a sense of belonging and support once on campus. An institution

may, consistent with the federal laws the Departments of Justice and Education enforce, foster this sense of belonging and support through its office of diversity, campus cultural centers, and other campus resources if these support services are available to all students. An institution may also offer or support clubs, activities, and affinity groups—including those that have a race-related theme—to ensure that students have a space to celebrate their shared identities, interests, and experiences, so long as the clubs, activities, and affinity groups are open to all students regardless of race.

The United States Equal Employment Opportunity Commission (EEOC) issued a press release on June 29, 2023, stating: …the decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina* **does not address employer efforts** to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.[14] (emphasis added).

Nevertheless, lawsuits have been filed in the non-educational arena, including law suits against law firms that recruit through DEI policies, arguing violations of constitutional law in reliance on on *Students*.[15]

In September of 2023, the New York State Bar Association issued a comprehensive report on the implications of *Students*, including its applicability to the workplace.[16] The report includes a specific section on guidance for private employers, advocating stay the course of adherence to diversity, equity, and inclusion (DEI) initiatives:

> Given the benefits of diversity for organizations and the business community… companies, including law firms, need not—and should not—abandon their commitment to advance DEI within their organizations, but should use the [*Students*] decision as an opportunity to review and enhance their workforce DEI initiatives to ensure that they are aligned with their recruitment, retention and development, and supplier diversity goals.[17]

This is sound advice for the New York State Civil Service Commission and local municipal commissions as it allows the continued prioritizing the recruitment and retention of its diverse workforce through outreach to reflect the communities served. Best practices include tracking updates to government agency policies as well as related court decisions.

1. 600 U.S. 181, 204 (2023).
2. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*. 600 US 181 (2023)
3. 600 US at 204.
4. Civ. Serv. Law §50(1)(2).
5. Civ. Serv. Law §50(2)(b).
6. Civ. Serv. Law §7-a
7. Civ. Serv. Law §7-a(f)
8. Civ. Serv. Law §7-a(h)
9. *Gayle v. Browder*, 352 U. S. 903 (1956) (invalidating state and local laws that required segregation in busing); *Mayor and City Council of Baltimore v. Dawson,* 350 U. S. 877 (1955) (affirming a decision striking down racial segregation at public beaches and bathhouses maintained by the State of Maryland and the city of Baltimore).
10. The decisions are from the United States Supreme Court, the United States Court of Appeals, the United States District Courts as well as state courts. *See*, compilation of post Students decisions and pending litigation in Gibson Dunn's DEI Task Force DEI Task Force Update (November 2, 2023) - Gibson Dunn.
11. See, e.g., *Elizabeth Cady Stanton Trust v. Neronha*, 2023 WL 6387874 (Sup. Ct. 2023) (An organizational plaintiff may establish Article III standing in either of two ways: by showing (1) the organization, in its own right, has suffered an injury and meets general standing criteria ("organizational standing") or (2) the organization represents a member who would have standing on their own ("member standing") (Students citation omitted).
12. *See*, e.g., *Ultima Servs. Corp. v. US Dept. of Agric. et al,* 2023 U.S. Dist. LEXIS 124268, 2023 WL 4633481 (Court enjoins long-term United States Small Business Administration program; moving forward, all applicants must be treated equally without the rebuttable presumption of social disadvantage for members of certain racial and ethnic groups).
13. US DOJ and DOE FAQ: QUESTIONS AND ANSWERS REGARDING THE SUPREME COURT'S DECISION IN STUDENTS FOR FAIR ADMISSIONS, INC. V. HARVARD COLLEGE AND UNIVERSITY OF NORTH CAROLINA.
14. https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action.
15. DEI Task Force Update (November 2, 2023) - Gibson Dunn.
16. https://nysba.org/app/uploads/2023/09/NYSBA-Report-on-Advancing-Diversity-9.20.23-FINAL-with-cover.pdf.
17. *Id.* at 56.

Martha Krisel retired from her position as the Executive Director of the Nassau County Civil Service Commission. She is a Past President of the Nassau County Bar Association and Co-Chair of the Diversity Committee of the New York State Bar Association's Local and State Government Law Section. With thanks to Jason Schwartz, Co-Chair of Gibson Dunn's Labor & Employment Group for permission to refer to its November 2023 DEI Task Force report.

Agency Policies/Interpretations

Agency/Agencies	Date	Summary
U.S. Department of Labor (DOL)–Office of Federal Compliance Programs	8/30/23	"…the Supreme Court's decision in *Students for Fair Admissions* applies only to higher education admissions programs and does not address the employment context."
U.S. Department of Justice (DOJ)/ Department of Education (DOE)	8/14/23	"An institution may, consistent with the federal laws the Departments of Justice and Education enforce, foster this sense of belonging and support through its office of diversity, campus cultural centers, and other campus resources if these support services are available to all students."
U.S.Equal Employment Opportunity Commission (EEOC)	6/29/23	*Students* "does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background."

NASSAU ACADEMY OF LAW

January 8, 2024 (IN PERSON ONLY)

Fireside Chat and Book Signing with Kenneth J. Kunken: *I Dream of Things That Never Were—The Ken Kunken Story*

With the NCBA Diversity & Inclusion Committee

Reception: 5:30PM—6:00PM
Program: 6:30PM—7:30PM
1.0 credit in Diversity, Inclusion and Elimination of Bias

Almost totally paralyzed because of a spinal cord injury incurred during a college football game in 1970, Ken Kunken battles back from the depths of depression and despair, earns four college degrees and becomes a well-respected assistant district attorney. But *I dream of Things That Never Were* is about more than overcoming adversity. It is a love story that leads Ken to marry the woman of his dreams and become the father of triplet boys.

Books will be available for purchase and signing by Ken after the program.

NCBA Members: Complimentary
Non-Members: $35

January 11, 2024 (HYBRID)

Dean's Hour: Local USCIS Updates with the Long Island Field Office Director, Barbara Owlett

12:30PM—1:30PM
1.0 credit in Areas of Professional Practice. Skills credit available for newly admitted attorneys.

USCIS Long Island Field Officer Director Barbara Owlett, in a conversation with former USCIS New York Field Office Liaisons, will discuss the structure of the New York field offices. This will include updates on the New York field offices, best practices for responding to RFEs, attending interviews, addressing agency errors, and INFOPASS trends. Speakers will also discuss the pros and cons of USCIS's modernization tools and how to use them effectively, translator issues, telephonic appearances, current trends, issues in agency adjudications and whether there are any future changes in field offices.

Guest Speakers:
Barbara Owlett, Field Office Director for the Long Island Field Office in the NY District, and former Supervisory Immigration Officer, and SIO

Sylvia Livits-Ayass, Immigration attorney and founding member of Livitis Ayass Baskin PLLC

Rachel Baskin, Founding member of Livitis Ayass Baskin PLLC, practicing US immigration law exclusively

NCBA Members: Complimentary
Non-Members: $35

January 16, 2024 (HYBRID)

Dean's Hour: Disabilities and the Law—Americans with Disability Act vs. Fair Housing Act vs. Section 504 of the Rehabilitation Act: Who to Sue Under What Rules if a Disabled Individual Has Had Their Legal Rights Violated (For Public and Private Accommodations)

12:30PM—1:30PM
1.0 credit in Diversity Inclusion & Elimination of Bias

This program will cover the disability rights laws that protect the civil rights of those with disabilities, including the Americans with Disabilities Act (ADA) (1991 vs. 2010); the Fair Housing Amendment Act (FHAA); and Section 504 of the Rehabilitation Act.

Guest Speaker:
Heather Brin, Principal of Heather Brin, Architect PC, as well as Aging in Place Architecture, PLLC. She is a licensed architect that advocates for disabled individuals by providing expert consultations, investigations, reports, and testimony where required in legal matters that relate to violations of the basic rights of those individuals with disabilities.

January 23, 2024 (IN PERSON ONLY)

An Evening with Justice Arthur Diamond: Back to Basics—Addressing Evidentiary Issues at Trial for Personal Injury Attorneys

With the Nassau County Bar Association's Personal Injury and Defendants' Personal Injury Committees

5:30PM—7:30PM
2.0 credits in Areas of Professional Practice

Join former Supreme Court Justice Arthur M. Diamond as he covers basic evidentiary issues faced by personal injury attorneys at trial, including, but not limited to, laying a foundation, authentication, spoilation, the admission of social media postings, hearsay, and the admission of radiology records. There will be the opportunity to ask questions throughout the presentation.

Moderated By:
Giulia Marino, Esq., Partner, Marino & Marino, Chair, Plaintiff's Personal Injury Committee
Jon Newman, Esq., Managing Partner, Newman Law Associates, PLLC, Chair, Defendant's Personal Injury Committee

NCBA Members: Complimentary
Non-Members: $70

January 31, 2024 (IN PERSON ONLY)

An Interactive Evening with Hon. Andrew A. Crecca and Hon. Caren Loguercio: Representing Litigants in Domestic Violence Cases

With the Nassau Bar Foundation Pro Bono Services Department

3.0 CLE credits in Professional Practice

Because of the interactive nature of this program, registration for this event is limited to 55 participants.

PROGRAM CALENDAR

Cocktail Reception and Dinner Buffet Hosted by the Nassau Bar Foundation Pro Bono Services Department: 5:00PM—6:00PM
Program: 6:00PM—8:30PM

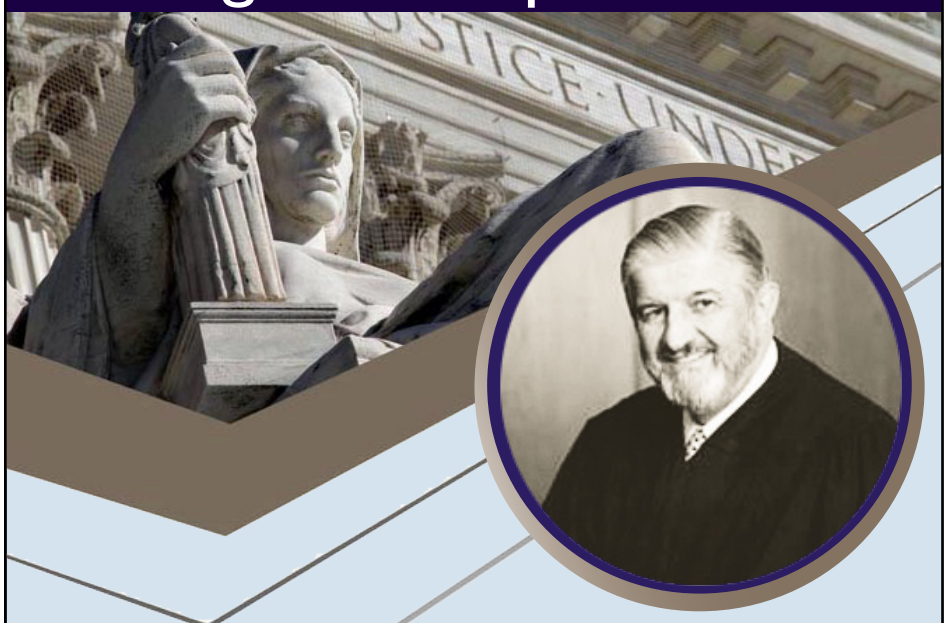
This in-depth interactive presentation will give participants an advanced understanding of domestic violence, including the context of violent behavior. In addition, participants will gain a better understanding of victim behavior and how domestic violence impacts victims and children. This program will provide invaluable insight to criminal, family, and matrimonial judges and practitioners.

Guest Speakers:
Hon. Andrew A. Crecca, District Administrative Judge of Suffolk County

Hon. Caren Loguerico, Supervising Judge of the Suffolk Family Court

NCBA Members: Complimentary
Non-Members: $105

Hon. Joseph Goldstein Bridge-the-Gap Weekend



FEBRUARY 3 AND 4, 2024
SNOW DATES: MARCH 2 AND 3, 2024

NEWLY ADMITTED ATTORNEYS:
7 CLE credits in professional practice,
6 in skills, 3 in ethics

EXPERIENCED ATTORNEYS:
11 CLE credits in professional practice, 3 in ethics,
1 in cybersecurity, privacy and data protection–general,
1 in diversity, inclusion and elimination of bias

Sign up for the full weekend, a day, or individual programs! Breakfast, lunch, and written materials will be provided each day to attendees.

FREE FOR NCBA MEMBERS
Bridge-the-Gap Chair: Lauren B. Bristol, Esq.
Nassau Academy of Law Associate Dean
Kerley, Walsh, Matera & Cinquemani, P.C.

(HYBRID)

Creative & Effective Appellate Brief Writing

FEBRUARY 29 AND MARCH 1, 2024
9:00AM—4:30PM
(both days)

ROWAN D. WILSON
NYS Court of Appeals Chief Judge

Presented by the Nassau County Bar Association, in coordination with the NYS office of Indigent Legal Services, Appellate Defender Council

An intensive, two-day program designed specifically for appellate defenders on criminal and family court (parent representation appeals), with an in-person appearance and keynote speech by NYS Court of Appeals Chief Judge Rowan D. Wilson.

In-person attendance is required for workshop participation. In-person attendees will receive 10.0 CLE credits. Virtual attendees will receive 4.0 CLE credits.

GUEST SPEAKERS AND WRITING WORKSHOP INSTRUCTORS

Tehra Coles, Esq., Executive Director, Center for Family Representation

David Feige, Esq., Author of *Indefensible: One Lawyer's Journey into the Inferno of American Justice*, and Co-Creator of the legal drama, *Raising the Bar*; Former Trial Chief, The Bronx Defenders

Andrea Hirsch, Esq., Former Supervisor, The Legal Aid Society of New York City Criminal Appeals Bureau, Director, Appellate Advocates, and the Center for Appellate Litigation

Kent Moston, Esq., Director of Training, Suffolk County Legal Aid Society; Former Attorney in Chief and Appeals Bureau Chief of The Legal Aid Society of Nassau County

Christine Waer, Esq., Managing Director of Litigation, Center for Family Representation

ALL ATTENDEES: $150
(Includes Breakfast and Lunch Both Days)

please join us in person only

2024 ANNUAL SCHOOL LAW CONFERENCE

MARCH 22, 2024

Sign-in begins 8:00 am
Program 9:00 am–2:30 pm
Breakfast and Lunch Included
CLE credits TBD

NCBA Members—**$100**
Non-Member Attorneys—**$250**
School Personnel—**$250**
Purchase orders accepted from school districts.

FOCUS: LAW AND AMERICAN CULTURE

A Government of Laws and Not of Men

Rudy Carmenaty

For his services in that seminal year of 1776, John Adams became known as the "*Atlas of American Independence*."[1] It was Adams, who through sheer force of will and the brilliance of his legal arguments, shepherded the Patriot cause during the fraught tenure of the 2nd Continental Congress.

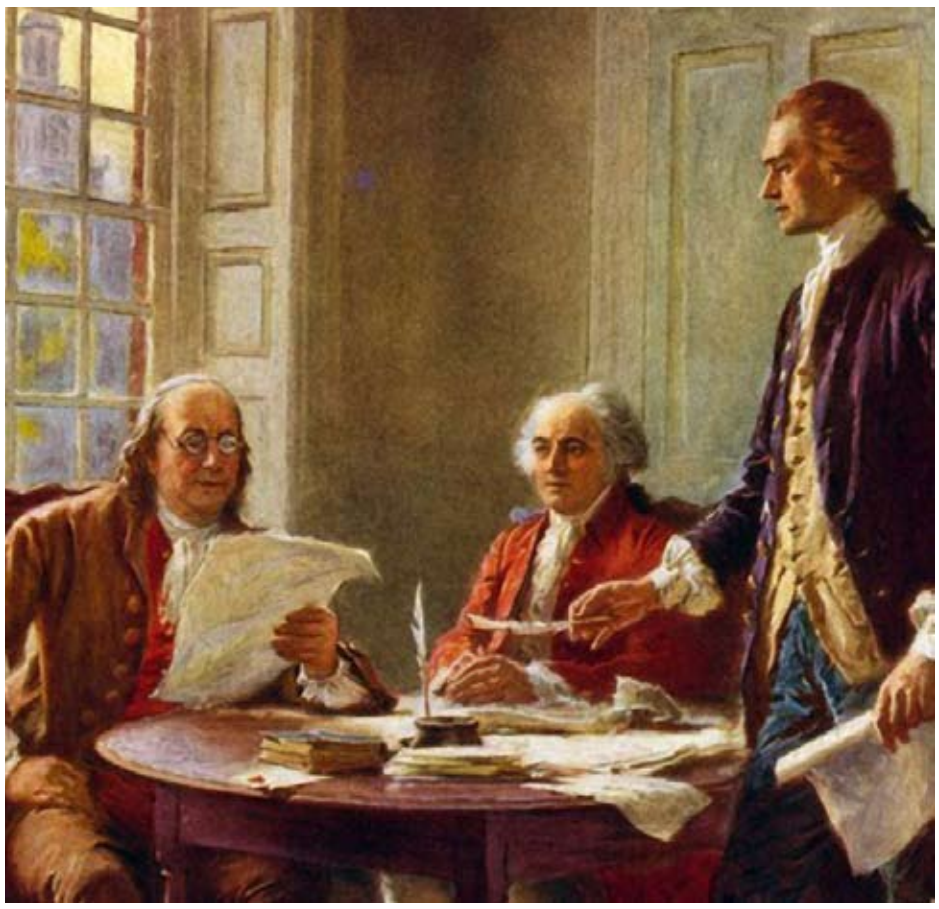
This was but one of the many services Adams performed for the fledgling nation. He was a constitutional theorist, a diplomat abroad, a future president and a great deal more. It can rightfully be argued that without Adams, the United States would not have come into fruition as it eventually did.

An integral part of Adams' story concerns his beloved wife, Abigail Adams. An early advocate of women's equality, she was well-read, politically astute, and her husband's equal in every measure. Theirs was a marriage unique for its time. Abigail was John's devoted and "*dearest friend*."[2]

Adams also sired a political dynasty. He set the paradigm for his son John Quincy, who followed in his father's footsteps all the way to the White House. Succeeding generations of the Adams line played their part in this nation's history.[3] Adams' contributions and those of his progeny have left their mark.

For John Adams was 18th century America's foremost lawyer/statesman. As was the custom, he read law under James Putnam of Worcester. Adams was admitted to the bar in 1758 and began to build his law practice.[4] It was as an attorney of note in his native Massachusetts, that he first distinguished himself.

Adams affirmed the values of the presumption of innocence and the right to counsel. His contributions to



the legal profession were invaluable. His knowledge of history, both ancient and modern, provided texture to his legal analysis not only on the matters before him, but also regarding the political crisis which was unfolding.

Adams could best be described as a 'Conservative Revolutionary.' Seeing matters in terms of rights and responsibilities, ostensibly through a legal prism, his disposition did not lend itself either to radicalism or mob action. ver the lawyer, Adams' revolutionary fervor was always tempered and judicious.

The law provided the philosophical underpinnings of his political thought. At the outset, Adams favored petitioning Parliament to redress grievances harmful to American liberty. His dedication to the law would manifest itself in countless ways as Adams became a pivotal leader during the revolution.

The Stamp Act of 1765 set the pace for what was to follow. A tax imposed on the colonists without their consent, it required a stamp on everything from documents to playing cards. Adams' response was the *Braintree Instructions* objecting to the statute's validity under English Law.[5] The Stamp Act was repealed the next year.

In 1770, the Boston Massacre took place. British troops shot and killed five townsmen after they pelted the soldiers with snowballs and rocks. Adams took the case when no other lawyer stepped forward to defend the accused. It was quite an unpopular move.

In doing so, he placed his professional reputation and his personal safety on the line. Adams valiantly, and at considerable risk, acted as defense counsel. Public sentiment demanded a conviction. Juries, in two separate trials, acquitted the majority of the soldiers although two were found guilty of manslaughter.

In 1775, Adams left for Philadelphia and the 2nd Continental Congress. Adams marshalled all his energies to the cause of self-rule. Congress however was fractured. Delegates split along three lines: those favoring conciliation, those favoring a break with the Crown, and those who kept their own counsel.

John Dickinson of Pennsylvania was the leading proponent for remaining loyal to Britain. Within a year, Dickinson and Adams would be on opposing sides. New England favored independence. But the Patriot cause needed the support of the mid-Atlantic states and the South. Adams surmised that Virginia was the key.

As such, Adams nominated George Washington to lead the Continental Army. Washington, who attended Congress in uniform, had fought in the French & Indian War. Adams selected the Virginian over John Hancock, a fellow Bostonian. Washington, for his part, would prove himself to be an American Cincinnatus.

With Washington at the front, Adams conducted his own rear-guard action. Though not a military man per-se, Adams left nothing to chance. He knew that without troops and war material, the battle would be lost. Adams chaired the Board of War and Ordnance, becoming in effect a one-man Pentagon.[6]

Adams mastered the details of raising, equipping, and fielding an army. As a member of Congress, he established the tenet of civilian control over the military. Adams also became the '*Father of the U.S. Navy*' by promoting legislation to outfit armed ships establishing the precursor Continental Navy.

It was Adams who obtained passage of the Declaration of Independence. Adams led a Committee of Five made up of Benjamin Franklin, Thomas Jefferson, Robert Livingston, and Roger Sherman. Assigning the writing of the document to Jefferson, another Virginian, Adams made the rhetorical case for its adoption.

On July 1, with the resolution on the floor, Congress sat as a committee of the whole. Southerners raised objections to passages concerning slavery, which were reluctantly stricken from the text. Adams abhorred slavery with every fiber of his being. He conceded the point for the sake of unity.

Congress approved the Declaration on July 2. Twelve colonies ultimately voted in favor, with New York abstaining. On July 3, Adams wrote Abigail that "*yesterday was decided the greatest question which was ever debated in America, and a greater perhaps never was nor will be decided among men.*"[7]

Long before there was a Foreign Service, Adams was an envoy extraordinaire. Adams secured the neutrality of the major European powers during the struggle for independence. Adams as well negotiated a loan of five million guilders and a treaty of amity with the Dutch.[8]

In 1778, Adams was dispatched to Paris to join Franklin to procure an alliance with France. By the time he arrived at Versailles, the proposed alliance had been already agreed upon. Franklin, a celebrity at court, cast a long shadow. Whereas Franklin readily adapted to Parisian mores and manners, Adams did not.

Unlike many of his colleagues, Adams took a dim view of the French. This antipathy would resurface when he became president. When Adams next returned to France, it was to discuss the terms of the Treaty of Paris in 1873. The treaty concluded the Revolutionary War with the formal recognition of the new nation.

Adams was appointed the ambassador to Great Britain in 1785. He came to the Court of St. James forthrightly as a freshly minted American. Only a few years earlier, Adams would have been hanged for treason. Now he appeared before George III as the initial representative of an independent United States.

In between trans-Atlantic diplomatic missions, Adams was elected to the Massachusetts Constitutional Convention. Serving as part of a drafting committee, Adams unaided wrote the Massachusetts Constitution in 1780. Ratified by the people of the Commonwealth, the document is still in effect today.

Adams felt that human beings were by nature ambitious. He favored what became known as "*checks and balances*" which was later adopted in the federal Constitution. Adams' handiwork created a bicameral legislature, a governor whose veto could be overturned by a two-thirds vote, and an independent judiciary.[9] Adams abolished slavery in Massachusetts in the document's Declaration of Rights.[10] He and his son were the only chief executives among the nation's first seven presidents who never owned a slave. John Quincy would later argue before the Supreme Court for the freedom of the Africans seized aboard the Amistad.

Adams was elected president in 1796 after two terms as Washington's often neglected vice-president.[11] This was an apt metaphor. Adams, in the estimation of his contemporaries, ranked just after Washington in terms of his revolutionary credentials. Unlike Washington, Adams was not universally admired or lauded.

Adams had won a narrow victory in a close contest. In office, Adams faced scathing opposition from Jefferson. Under the rules then governing, having come in second, Jefferson was his less than faithful vice-president.[12] Adams also faced political difficulties with Alexander Hamilton, the true leader of the Federalists.

Hamilton is much in vogue these days thanks to the success of the namesake Broadway musical. But for Adams, Hamilton was nothing more than the "*the bastard brat of a Scottish peddler.*"[13] That being said, Adams feared Hamilton fancied himself another Napoleon or even a Caesar.

The least known of Adams' achievements may well have been that it was Adams who kept the United States a republic during a critical juncture in our early history. Under Article I, §VIII, the Constitution provides that Congress has the authority to "*raise and support Armies and maintain a Navy.*"

The founding generation, exemplified by Washington, feared standing armies as an inherent threat to the republic's stability. Although Adams was favorably disposed to 'maintaining' a navy, fully in keeping with the text of the document, he was leery of a significant land force. Events in France confirmed Adams' suspicions. Adams opposed the excesses of revolutionary France. As noted, Adams was never favorably disposed to the French dating back twenty years prior. These opinions were hardened by the French Revolution. Adams was appalled by the chaos, the fanaticism, and, most of all, the bloodletting.

To that end, the United States engaged in an undeclared naval conflict with France. Known as the Quasi War, the U.S. Navy fought alongside the Royal Navy in American coastal waters and the Caribbean. This unexpected collaboration was a product of necessity and of American vulnerability.

It was the diplomatic resolution of the Quasi War that was perhaps Adams' most notable achievement as president. Paradoxically, this effort denied him the opportunity to campaign as a war leader. Adams lost his bid for reelection in 1800 in his rematch with Jefferson. Adams may have also staved-off a potential coup d'état.

As vice-president, Adams advised Washington to stay neutral in the burgeoning hostilities between the British and the French. As president, Adam was confronted with the very real prospect of going to war with France. Hamilton and the Federalist sided with the British and were clamoring for a fight.

Adams continued Washington's policy of official neutrality, while engaged in the Quasi War. Yet, he also sought a peaceful settlement. While most Americans initially favored France, tensions mounted when the French began confiscating U.S. merchant ships. Anti-French sentiment resulted in the Alien & Sedition Acts.

The Alien & Sedition Acts are a stain on Adams' legacy. The alien measures called for the deportation of French emigres. The Sedition Act banned the publication of "*false, scandalous, and malicious writing*" against the government undermining the 1st Amendment.[14] Adams signed the bills half-heartedly, but did so nonetheless.

Adams 'naval strategy proved costly to the French, while safeguarding American shipping. The Quasi War led to the creation of the Navy Department in 1798. It also

led to calls by Hamilton to establish a significant contingent of army troops. Adams agreed to a land force, but not one as large as the one Hamilton advocated for.

Adams feared Hamilton's ambitions, and the President refused to name Hamilton the army's commander. Adams choose Washington instead, knowing implicitly that General Washington could be trusted. Washington accepted. Yet he asked for, and Adams reluctantly conceded, to naming Hamilton as second-in-command.

Washington at the time was old and he was tired. The great man would soon be dead. Hamilton assumed operational control of the army. Seeking military glory, Hamilton argued on behalf of a furtive scheme to join forces with the British in an attack against French interests in Louisiana and what was then Spanish Florida.

The divide between Adams and Hamilton became even more pronounced. Their enmity further splintered the Federalists just ahead of the upcoming election. Hamilton publicly called for Adams' defeat in 1800. Much too late, the President began dismissing pro-Hamilton partisans from his cabinet.

Adams relied mostly on his wife Abigail for advice and counsel. Among the men Adams did promote was John Marshall. Marshal would first be named Secretary of State, and then, in an inspired move, Adams nominated Marshall to the post of Chief Justice.

Adams was an incisive arbiter of character, and he made three monumental appointments during his own illustrious career. He called on Washington to lead the Continental Army. He next decided that Jefferson should write the Declaration. As president, Adams selected Marshall to lead the Supreme Court.

Adams also understood that Hamilton needed to be pacified. The Royal Navy's victory at the Battle of the Nile, induced France to bring the Quasi War to a close. Adams walked a fine line between parleying with the duplicitous French or continuing a naval conflict which no longer served any real purpose.

The Convention of 1800 formally ended the Quasi-War that September. However, news of the Convention did not reach American shores until after the November election. The Senate would ratify the treaty in a lame duck session the following year. By then it was too late. Adams's diplomatic efforts cost him reelection.

Adams lost the one issue that all Federalists could unite behind. Adams could have easily played the demagogue encouraging jingoistic sympathies to help his prospects. He refused to do so. Adams put not only principle above expediency, more importantly he put peace over war.

Adams promptly ordered Hamilton's army disbanded. Any possible coup was thwarted as Adams quashed any prospect of a military adventure on Hamilton's part. The nation owes Adams a tremendous debt. Adams scarified himself for something greater than his own personal political advantage.

In succeeding decades, Latin American nations, emerging from colonial rule, were not as fortunate. Most, if not all, succumbed to the lure of men on horseback. This set a centuries-old pattern which usually curtailed any prospect of representative government in its embryonic stages. Thankfully, our republic was preserved.

Still, Adams left office embittered, rejected by the electorate. He did, however, establish the tradition of the 'peaceful transfer of power' by turning the reins of government over to Jefferson upon his defeat. Adams once again distinguished himself by this final contribution. Adams quietly retired to Massachusetts.

Adams wanted to live long enough to see the fiftieth anniversary of the Declaration of Independence. On the afternoon of July 4, 1826, Adams, age ninety-one, died after suffering a stroke. His last words were: "*Thomas Jefferson still survives*."[15] Unbeknownst to Adams, Jefferson had died that morning.

That they died on the same day, and not just any day but July 4th, was deemed an act of Providence. Most particularly since it came on the fiftieth anniversary of the signing in Philadelphia. That Adams died on the same day as Jefferson was fitting. These two men represented the arc of the revolution, both North and South.

Adams, always anxious that he would be forgotten, held he would be relegated to a footnote in the history books. He may have been correct. Posterity for the most part has neglected him. Adams' legacy should be remembered with reverence and with affection. Even when he fell short, it was for the nation's greater good.

To succeeding generations of lawyers, Adams bequeathed a profession, which if properly maintained, can perpetually be worthy of respect. As Americans, it was Adams who conceived of this nation as having "*a government of laws and not of men.*"[16] He made sure of that. The debt owed to John Adams is incalculable.

1. Richard Stockton, a delegate from New Jersey who signed the Declaration, affirmed: —*"The man to whom the Country is most indebted for the great measure of Independence is Mr. John Adams of Boston"—"I call him the Atlas of American Independence"—"He it was who sustained the Debate, and by the force of his reasoning demonstrated not only the justice but the expediency of the measure."* See *To John Adams from Richard Stockton*, 12 September 1821 at https://founders.archive.gov.
2. "*Dearest Friend*" was the appellation by which John and Abigail addressed one another in their correspondence.
3. In addition to John, Abigail and their son John Quincy, the Adams family line includes John Quincy's son Charles Francis Adams, who was Lincoln's ambassador to Great Britain during the Civil War, and Charles Francis' sons the noted historians Henry Adams and Brooks Adams.
4. *Biography of John Adams Lawyer* (1758-1761) at https://www.let.rug.nl.
5. *Before the Boston Tea Party, there was the Braintree Instructions*, (May 28, 2015) at http://www.patriotledger.com.
6. John Adams, *12 June 1776*, Adams Papers Digital Edition at https://masshist.org
7. *Letter from John Adams to Abigail Adams* (1776) at https://teachingamericanhistory.org.
8. *Dutch Loan 1782*at https://www.johnadams.us.
9. *See Massachusetts Constitution* at https://malesilature.gov.
10. *Id.*
11. Adams, like almost all of his successors, hated his time in the vice-presidency. He described the office thusly:" *My country has in its wisdom contrived for me the most insignificant office that ever the invention of man contrived or his imagination conceived.*"
12. This issue was resolved with the adoption of the XII Amendment.
13. Donald R. McClarey *Hamilton: The Problem Child Founding Father, The American Catholic*, at https://the-american-catholic.com.
14. Alien & Sedition Acts (1798)/National Achieves at https://www.archives.gov.
15. Martin Kelly, *The Later Years and Last Words of John Adams* (July 1, 2018) at https://www.thoughtco.com.
16. John Adams, *The Letters of Novanglus*, Adams Papers Digital Edition, *supra.*

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

FOCUS: IMMIGRATION LAW

The Impact of U.S. Immigration Quotas on the Workforce

Rachel Baskin

Foreign nationals who may have otherwise come to the United States for work and to contribute to the United States' economy are reconsidering options given the current status of United States immigration laws and backlogs, as reported recently by *The New York Times*.[1] Specifically, in the article, Ms. Yuan interviews several Chinese individuals, many of whom work in the technology industry, and reports that they are leaving China to continue to work in the sector, but are not coming to the United States. This is happening for a number of reasons, including the current state of our immigration system.

In the first instance, students who wish to come to the United States must obtain a student visa from a United States Embassy or Consulate abroad. Admission to university does not alone permit a student to come to the United States. Rather, a student must make an embassy appointment, and convince an embassy officer that she will study in the United States and plans on returning home upon completion of her studies. The Consular Officer will consider prior time spent in the United States, prior immigration violations, and the ability to pay for university, among other factors when determining whether to issue an F-1 visa. Consular Officers also consider the relationships between countries when determining whether to issue visa stamps. As Ms. Yuan reported, the United States Embassy issued fewer visas to Chinese students in recent years than Great Britain.[2]

Once a student graduates from an university in the United States, they are generally entitled to apply for employment authorization. This employment authorization is not without restriction, as the position must be related to the individual's field of study, and the student is not allowed to be unemployed for more than 90 days.[3] Generally, employment authorization is valid for one year; though the United States has recognized the need for more professionals in STEM fields, and allows graduates to apply for work authorization for up to three years, so long as their employer complies with additional requirements, such as enrolling in E-Verify and maintaining a training plan.[4]

In order to extend work authorization, foreign nationals must generally have an employer willing to file a petition on their behalf (sponsor them). In many cases, the most appropriate visa option for these individuals is the H-1B visa. The H-1B visa is a temporary visa, valid for up to six years which requires that the foreign national have a bachelor's degree or higher in a specific field, and that the job offered requires that an individual have a degree in that field, or a closely related field.[5] However, there are only 85,000 H-1B visas allotted each year. Of the 85,000, 20,000 are for individuals who have graduated with a master's degree from a qualifying United States University, which is known as the Master's Cap.[6]

Given the limited number of H-1B visas, the U.S. Citizenship and Immigration Service (USCIS) conducts a lottery annually. Employers can enter their potential employees in the lottery, and if selected, file an H-1B petition on their behalf. If a Master's qualified individual is not selected in the Master's Cap, then their name goes into the applicant pool for the remaining 65,000 visas. For 85,000 visas, USCIS reported receiving more than 350,000 eligible applications for fiscal year 2024![7] An employer is only permitted to enter the foreign national one time in the lottery, so this figure represents separate individuals who may qualify for the H-1B and permission to continue to work.

In some instances, foreign nationals can apply several years in a row in an attempt to be selected for the lottery, but it is certainly a gamble, and there is no guarantee for selection, even if after prior rejections. Accordingly, it is easy to understand, in these instances why foreign nationals would want more certainty when planning their immigration future.

For those foreign nationals fortunate to be selected in the H-1B lottery, or qualify for employment through other visa categories, it is important to note that these visas are for temporary employment, not permanent resident status (green cards). Applying for permanent resident status poses other hurdles, including long backlogs. The Immigration and Nationality Act (INA), which was enacted in 1952 and codified in Title 8 of the United States Code, provides the number of immigrants who can apply for permanent resident status on an annual basis.[8] This includes a breakdown based on family sponsorship and employment sponsorship. For employment, there are only 140,000 green cards available annually.[9]

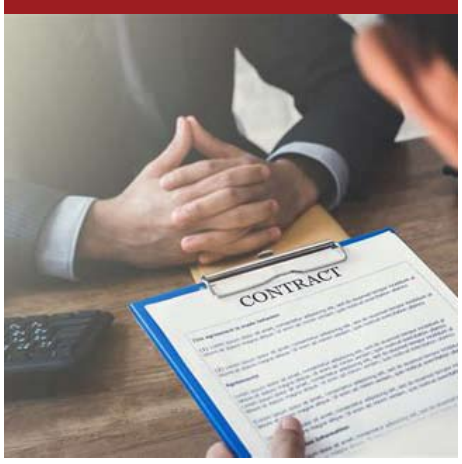
This 140,000 figure is broken down further based on specific preference categories[10] and also based on the countries from which immigrants are born.[11] Based on these calculations, there is a significant backlog for individuals born in China to obtain permanent resident status in the United States. For those individuals with a bachelor's degree only, the wait time can be three years, while the wait time for master's degree applicants is approximately four years.[12] These wait times are worse for Indian nationals who have a wait time of more than ten years in both the Masters and Bachelor's categories.[13]

Given the limited number of temporary work visas available, the lottery system with which to apply, along with the long wait times for permanent resident status in the United States, it is no surprise that foreign nationals who would otherwise benefit the United States economy are relocating to other countries with more predictable timelines and options. Only Congress can adopt legislation to expand the number of H-1B visas and also the number of employment-based green cards for foreign nationals. Perhaps it is time to make recommendations that they do so to avoid losing potential talented American workers.

1. Yuan, Li, "China is Suffering a Brain Drain. The U.S. Isn't Exploiting It," *The New York Times*, Oct. 3, 2023 (available at: https://www.nytimes.com/2023/10/03/business/china-brain-drain.html).
2. *Id.*
3. See 8 C.F.R. §214.2(f)(10)(ii)(E).
4. See 8 C.F.R. §214.2(f)(10)(C)(5); 8 C.F.R. §214.2(f)(11)(ii)(C), and 8 C.F.R. §214.2(f)(12)(ii).
5. See 8 USC §1184(i).
6. See 8 USC §1184(g) and (g)(5)(C).
7. https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process.
8. See 8 USC §1151.
9. See 8 USC §1151(d).
10. See 8 USC §1153(b).
11. See 8 USC §1152(a)(5).
12. See Visa Bulletin for December 2023, available at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2024/visa-bulletin-for-december-2023.html.
13. *Id.*

Rachel Baskin is a founding member of Livits Ayass Baskin PLLC and practices U.S. immigration law exclusively. She represents a diverse range of clients in the arts, entertainment, and business sectors. She is the former NY chapter chair of the American Immigration Lawyers Association (AILA) and has spoken at conferences about visas for artists and entrepreneurs.

FOCUS: EMPLOYMENT LAW



Employment Law Landscape in 2024—New Laws and Trending Topics

Paul Millus

New year—new laws. The employment landscape is littered in the state with new laws taking effect in 2024 that will impact almost every aspect of employment. Keeping employers and employees up to date on these changes is essential. This article will also address current trends that will also significantly impact the employer/employee relationship.

New Laws

The Freelance Isn't Free Act

This Act provides protections to freelance workers and will take effect on May 20, 2024. Businesses must provide any freelance worker with a written contact if the freelance work is worth at least $800, which includes the value of multiple assignments. The contract must include the name/address of both parties, an itemization of all services to be provided by the worker, the value of such services and the rate and method of compensation. Also, the hiring party may not retaliate to take any action that is reasonably likely to deter a freelance worker from exercising or attempting to exercise any rights under the law. Complaints may be filed with the New York State Department of Labor. Additionally, the freelance worker may file a civil action for damages subject to a six-year statute of limitations.

A "freelancer" is any person *or organization* composed of no more than one natural person that is hired or retained as an independent contractor by a hiring party to provide services in exchange for an amount equal to or greater than $800. There are some exceptions. The Act does not apply to sales representative as defined in §191-a of the Labor Law. The takeaway from this is, there has been a significant erosion of the distinction between independent contractor and employee, and where that erosion has not occurred broadly or fast enough, it appears this act will bridge the gap—protecting only those who would qualify under the narrow exceptions as they stand, as an "independent contractor."

The Employee Bill of Rights

This is a law that applies to N.Y.C only. No later than July 1, 2024, employers will be required to provide a copy of their Bill of Rights to each of their current employees and those newly hired on the first day of work. Employers will also be required to post the information at the employer's place of business in the areas that we all know are "accessible and visible" to employees as well as posting the information on their website. If an employee regularly communicates with employers through electronic means, the employer must provide access to the workers' bill of rights online or on the employee's mobile application.

So what needs to be on the bill? The employer must (i) identify federal, state and local labor laws that provide protections to employees and independent contractors; (ii) it must provide information to employees of their right to form a union; and (iii) explain these rights regardless of the employee's immigration status. No matter that there are a multitude of federal, state and local laws that require employers to post almost innumerable rules and laws that apply to employees for their edification, this is simply another layer of information to promulgate in a different way.

In addition to the obligations imposed by the new ordinance, on that same subject, the state will now mandate that employers provide employees a written notice of eligibility for unemployment benefits amending §590 of the Labor Law. This notice must be provided no more than five working days after the termination date or the reduction of the employee's working hours. Also, not to be forgotten, §195(6) of the Labor Law still requires an employer to "notify any employee terminated from employment, in writing, of the exact date of such termination, as well the exact date of cancelation of employee benefits connected with such termination."

Human Rights Law—Statute of Limitations

In the State of New York, the statute of limitations for filing with the State's Division of Human Rights has been extended from one to three years, mirroring the three-year statute of limitations for sexual harassment complaints which has been in effect in New York for some time. Employees who failed to meet the one year deadline, thus requiring them to seek counsel and file a private action, now have a significantly greater time period to get the state involved. From a practical standpoint, this will keep exposure open to the employer for a far lengthier period of time that would otherwise dissipate if an employee did not feel motivated enough to seek the statute of protections within the one year period previously allotted.

The "New" Separation or Settlement Agreement

In 2024 the rules of the game have changed regarding the content of separation or settlement agreements involving claims of harassment. Prior to this time, all that was required to obtain confidentiality in such a settlement agreement was that the complainer was required to (i) attest that it was their preference for confidentiality; (ii) be provided with a confidentiality agreement *separate* from the general settlement agreement; and (iii) wait 21 days after being provided with a separate confidentiality agreement before signing, and be granted up to seven days after signing the confidentiality agreement to revoke their signature.

Now, the 21-day waiting period for confidentiality is waivable. This makes perfect sense as most employees who settle do not wish to wait twenty-one days for their settlement to be viable. However, the seven-day period in which they can revoke their signature still applies. Moreover, confidentiality agreements cannot prevent the employee from speaking to the New York State Attorney General. This is not a major change as there were always similar carveouts: i.e., an employee's right to speak/filing with federal agencies (like the EEOC) notwithstanding agreeing to a settlement.

Next, tying into the laws as they continue to erode what used to be known as the "independent contractor" relationship, these requirements now extend to confidentiality agreements with independent contractors. Also, the act now makes any release involving claims of discrimination, harassment or retaliation unenforceable if part of the agreement resolving those claims (i) require payment of liquidated damages for violation of a nondisclosure clause or non-disparagement clause; (ii) require

the complainant to forfeit all or part of the consideration for an agreement for a violation of a nondisclosure clause or non-disparagement clause; or (iii) require any affirmative statement, assertion or disclaimer by the complainant that the complainant was not, in fact, subject to the unlawful discrimination. Keep in mind that the language of the statute could be interpreted as applying to all claims—whether they are formally filed, prelitigation or in the standard severance agreement that an employer utilized to reduce risk as it pertains to potential claims that might be brought by a departing employee.

Wage and Hour

Wage and Hour Law is a constantly evolving source of concern for employers that continues to be so in 2024. First, the salary basis test for employees classified as exempt under the Administrator and Executive Exceptions is expected to increase based on proposed regulations issued by the New York State Department of Labor. These regulations, which are expected to be adopted, impose substantive changes on salary thresholds as they would be applied to determine if an employee is exempt from overtime. For example, in New York City, Westchester and Long Island the amount to be classified as exempt was $1,125 per week or $58,500 per year and now will be $1,200 per work or $62,400 per year. Axiomatically, as the salary basis increases, less and less employees are swept up into a status that may result in their not being entitled to overtime. Of course, the salary basis test is just one aspect of the test as it applies to whether or not an employee is entitled to overtime. The exemptions still apply.

There will also be an increase in minimum wage. Effective January 1, 2024, the minimum wage will change across the board. Bottom line is that the minimum wage in New York City, Westchester and Long Island will now be $16 per hour as opposed to $15 per hour. For those employers in the food service industry, minimum cash wage is anticipated to increase. Thus, in New York City, Westchester and Long Island cash wages must be $10.65 per hour and $5.35 tip credit/hour increased from $10 cash wage and $5.00 tip credit/hour. A service employee who is not a food service worker or fast food employee who customarily receives tips will also be affected. Now, in New York City, Westchester or Long Island, such an employee will earn $13.35 cash wage and $2.65 tip credit/hour. There are also proposed changes to the New York Credit allowance for food service workers, service employees and non-service employees.

New York's Paid Family Leave Law

Effective in 2024, the maximum weekly benefit for employees taking paid family leave will be $1,151.16. Employees who take paid family leave receive 67 percent of their average weekly salary, up to the cap of 67 percent of current New York State average weekly wage which, for 2024, is $1,718.15 making the maximum weekly benefit $1,151.16; $20.08 more than the previous year.

Social Media Disclosures

Effective March 12, 2024, New York employers will no longer be permitted to request, require or coerce any employer or applicant to disclose any username, password or other authentication information for accessing a personal social media account, nor may the employer access the individual's personal account in the presence of the employee or reproduce in any manner photographs, videos or other information contained within a personal account. Employers should check their job postings, if they had required this in the past, and make the appropriate changes. Employers should review electronic communication policies as well to ensure compliance.

There are exceptions--such as for accounts used for business purposes where the employee was provided prior notice of the employer's right to request access, accounts known by the employer to be used for business purposes, and in connection with devices paid in whole or in part by the employer where the employer's payment of the device was conditioned on the right to access the device and where the employee was provided prior notice and expressly agreed to the employer's right to access the device. However, the exceptions do not allow an employer to access personal accounts (although the employer is permitted to prohibit access to certain websites on an employer's network or device), nor does it preclude employers from accessing and utilizing information about an employee or applicant that can be obtained without asking for the employee's information or access. Thus, what an employee posts on social media that is available to the public continues to be fair game.

Criminal Wage Theft

Governor Hochul signed legislation amending the penal law to streamline the way prosecutors can pursue wage theft charges on a criminal basis and bring new larceny charges for wage theft of an employee. To those lawyers in the wage and hour business, it has become increasingly clear that not only civil penalties may be applied—which in many cases can be severe—for the proven failure to properly pay employees under applicable wage and hour laws, but there is a substantial push among various district attorneys to actually charge employers criminally for wage theft. While not the norm at this point in time, it is only a matter of time, if the resources are provided to the various local district attorneys, that we will see criminal prosecutions on a more regular basis for wage and hour violations.

Height and Weight Discrimination

This is an amendment to the N.Y.C Human Rights Law which prohibits discrimination based on height and weight. The law bars employers, housing providers and public accommodation in New York City from discrimination based on the actual or perceived height or weight of an individual.

Not Yet Laws But On The Horizon As Well As Other Important Concerns

Earlier this year, the FTC issued a ruling which essentially favors banning non-competes. The trend disfavoring restrictive covenants continues. For example, the NLRB weighed in on this issue in May as General Counsel announced her belief that non-competes should be discouraged, if not outright prohibited, as they chill employees' rights to concerted activity in violation of Section 7 of the National Labor Relations Act. More recently, Governor Hochul has yet to sign a proposed new law in New York which would have, effectively, made non-competes a thing of the past. However, at the time of this writing, it is understood that there are negotiations taking place to reflect some of Governor Hochul's concerns in order to get some variant of the law in effect prior to the deadline of December 31, 2023. Whatever the outcome, to the extent that non-competition agreements will continue to exist, they must be drafted carefully and narrowly to accomplish at least some aspect of what the employer hopes to accomplish.

Next, will there be any consequences for what an employee can say on social media? The political divisions that exist today as it pertains to a myriad of subjects leave employees feeling free to opine in their personal social media accounts. Potentially, some things an employee may say can interrupt or negatively affect the office's good working relationship or may bring disdain to a business thus harming its bottom line. As stated above, an employee's public social media postings are still fair game for an employer review. But for what purpose? Familiarity of Labor Law §201-d (also commonly referred to as the "smoker's law") is assumed. Question: does an employee's views on the issue of the day constitute "political activities" or even "recreational activities" that are legal? What constitutes "political activities" is defined fairly narrowly. Nevertheless, whether speech relating to a controversial topic is protected remains unclear. If, in general, if an employee were to take a side in a very controversial issue, the taking of a particular side would probably be looked at by the courts as protected. However, words do matter, and the type of statements made by an employee might not afford the employee the same protection. For example, in Labor Law §201-d(3), an employer can argue that a protected activity created a "material conflict of interest" if the speech was related to the employer's business allowing the employer to terminate.

In sum, being an employer in the State and City of New York is difficult. The minefields are many. The employer has an obligation to educate itself on the do's and don'ts from whatever sources available—whether it be through legal consultation or simply taking time to read the laws as well as "the tea leaves"—in order to properly protect itself in this very challenging environment.

Paul F. Millus, Esq. is a Shareholder at Meyer, Suozzi, English & Klein, P.C. in the Employment and Business Litigation Departments.

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Samuel J. Ferrara and Michael E. Ratner
Charlotte M. Betts
Elena L. Greenberg and Florence M. Fass
Martha Haesloop
Elena Karabatos and Bryan Skarlatos
Lois S. Campbell
Stephen Gassman

New Members:

We Welcome the Following New Members

Karen B. Alexander

Joshua Benjamin Ashkenazy

Sean Donovan Collins, Esq.

Matthew Michael Livi, Esq.
Law Office of Tzvi Y. Hagler, P.C.

Amanda X. Maldonado

Keleisha Milton, Esq.
Rubin Paterniti Gonzalez Rizzo Kaufman, LLP

Glenn William Nick, Esq.
Sullivan Papain Block McManus Coffinas & Cannavo, P.C.

Kunal Madhukar Phatangare, Esq.

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NCBA Committee Meeting Calendar
January 3, 2024–February 8, 2024

Questions? Contact Stephanie Pagano at (516) 747-4070 or spagano@nassaubar.org.
Please Note: Committee meetings are for NCBA Members.
Dates and times are subject to change.
Check www.nassaubar.org for updated information.

WEDNESDAY, JANUARY 3
Real Property Law
12:30 p.m.
Suzanne Player

THURSDAY, JANUARY 4
Community Relations & Public Education
12:45 p.m.
Ira S. Slavit

THURSDAY, JANUARY 4
Publications
12:45 p.m.
Cynthia A. Augello

TUESDAY, JANUARY 9
Education Law
12:30 p.m.
Syed Fahad Qamer
Joseph Lilly

TUESDAY, JANUARY 9
Labor & Employment Law
12:30 p.m.
Marcus Monteiro

WEDNESDAY, JANUARY 10
Medical Legal
12:30 p.m.
Bruce M. Cohn

WEDNESDAY, JANUARY 10
Commercial Litigation
12:30 p.m.
Christopher J. Clarke
Danielle Gatto

WEDNESDAY, JANUARY 10
Matrimonial Law
5:30 p.m.
Karen L. Bodner

THURSDAY, JANUARY 11
Asian American Attorney Section
12:30 p.m.
Jennifer L. Koo

THURSDAY, JANUARY 11
Access to Justice
12:45 p.m.
Hon. Conrad D. Singer
James P. Joseph

TUESDAY, JANUARY 16
Intellectual Property
12:30 p.m.
Sara M. Dorchak

TUESDAY, JANUARY 16
Surrogate's Court Estates & Trusts
5:30 p.m.
Michael Calcagni
Edward D. Baker

WEDNESDAY, JANUARY 17
Association Membership
12:30 p.m.
Jennifer L. Koo

WEDNESDAY, JANUARY 17
New Lawyers
12:30 p.m.
Byron Chou
Michael A.Berger

WEDNESDAY, JANUARY 17
Family Court, Law, Procedure & Adoption
12:30 p.m.
James J. Graham, Jr.

WEDNESDAY, JANUARY 17
Ethics
5:30 p.m.
Mitchell T. Borkowsky

WEDNESDAY, JANUARY 17
Diversity & Inclusion
6:00 p.m.
Sherwin Safir

THURSDAY, JANUARY 18
Business Law, Tax & Accounting
12:30 p.m.
Varun Kathait

WEDNESDAY, JANUARY 24
District Court
12:30 p.m.
Bradley D. Schnur

WEDNESDAY, JANUARY 24
Elder Law Social Services Health Advocacy
5:30 p.m.
Lisa R. Valente
MaryBeth Heiskell

WEDNESDAY, JANUARY 24
Surrogate's Court Estates & Trusts
5:30 p.m.
Michael Calcagni
Edward D. Baker

FRIDAY, JANUARY 26
Appellate Practice
12:30 p.m.
Amy E. Abbandondelo
Melissa A. Danowski

MONDAY, JANUARY 29
Surrogate's Court Estates & Trusts
5:30 p.m.
Michael Calcagni
Edward D. Baker

THURSDAY, FEBRUARY 1
Hospital & Health Law
8:30 a.m.
Douglas K. Stern

THURSDAY, FEBRUARY 1
Community Relations & Public Education
12:45 p.m.
Ira S. Slavit

THURSDAY, FEBRUARY 1
Publications
12:45 p.m.
Cynthia A. Augello

WEDNEADAY, FEBRUARY 7
Real Property Law
12:30 p.m.
Suzanne Player

THURSDAY, FEBRUARY 8
Asian American Section
12:30 p.m.
Jennifer L. Koo

THURSDAY, FEBRUARY 8
Access to Justice
12:45 p.m.
Hon. Conrad D. Singer
James P. Joseph

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.

Annamarie Bondi-Stoddard, Managing Attorney at Pegalis Law Group, LLC, is proud to announce that Senior Partner **Steven Pegalis** has been recognized by *Best Lawyers®* as *the Long Island 2024 "Lawyer of the Year" for both Medical Malpractice Law* and *Plaintiffs' Personal Injury Litigation*. Bondi-Stoddard, **James B. Baydar** and **Robert V. Fallarino** (*2023's Lawyer of the Year for Plaintiff's Medical Malpractice Law*) have also been individually named as 2024 "Best Lawyers." Earlier this year, five of the firm's lawyers, Steven Pegalis, Annamarie Bondi-Stoddard, James B. Baydar, **Gary Nielsen** and Robert V. Fallarino were named to the 2023 Metro Area Super Lawyers' list.

Jeffrey D. Forchelli, Managing Partner of Forchelli Deegan Terrana LLP (FDT), is proud to announce that the firm has launched a Securities Litigation and Regulation practice group. The firm also welcomed attorneys **Cheryl L. Katz** (Tax, Trusts & Estates, with a concentration in Estate Litigation) and **Julia J. Lee** (Tax Certiorari), as well as **Caroline G. Frisoni**, an Associate pending admission (Corporate and Mergers & Acquisitions). **Robert Ricigliano** also joined FDT as a Law Clerk along with Tax, Trusts & Estates Paralegal **Nicole Ciano**.

Faith Getz Rousso of the Law Office of Faith Getz Rousso, P.C. is proud to announce that she was appointed to New York Metro Chapter Board of Gift of Adoption Fund and named to *2023 New York Metro Super Lawyers*.

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 40 years, Ms. Rice is a Past President of NCBA. Please email your submissions to nassaulawyer@nassaubar.org with subject line: IN BRIEF

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