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NCBA COMMITTEE MEETING CALENDAR

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OF NOTE

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NCBA Lawyer Assistance Program is Here for You

By Beth Eckhardt, LCSW, PhD
Henry E. Kruman

May is Mental Health Month, a perfect opportunity to provide information to NCBA members about the valuable and *confidential* services that the Lawyer Assistance Program (LAP) and Lawyer Assistance Committee (LAC) provide to judges, lawyers, law students, and their immediate family members. This information is especially important as we enter the third month of physical isolation resulting from the COVID-19 pandemic.

Without warning, our lives have been turned upside down. We have had to create ways to work productively at home while balancing our professional and personal needs with the needs of our families, partners, and clients. This is no easy task, especially when many of us are learning new ways of communicating online via Zoom and other video platforms. By now, COVID-19 has touched all aspects of our lives.

These are challenging times. Some stress, anxiety, and sadness are normal. It is difficult to keep abreast of important and relevant news without feeling overwhelmed. We are looking for answers that are hard to find or do not presently exist. There is uncertainty about the short, medium, and long term impact of this experience on all of our lives. We are unsure of when we will resume our "normal" activities, to what degree, and how to stay safe once we do.

Lawyers have higher rates of problematic drinking, depression, and suicide than most other professions and significantly higher than the general population. Physical isolation and fears related to the COVID-19 pandemic can exacerbate these problems. Drinking alcohol, overeating, online gambling, and other compulsive behaviors can provide immediate and temporary relief but can go from manageable to unmanageable very quickly.

Take the time to ask yourself if you are experiencing any or all of the following:

- Difficulty sleeping, concentrating, or making decisions
- Feeling especially fatigued
- Over or under eating
- Difficulty controlling anxious or fearful thoughts
- Irritability and lack of patience
- Engaging in unhealthy behaviors such as excessive drinking, eating, gambling or other compulsive behaviors

If you find that you are having difficulty managing your thoughts or you are concerned about the amount that you are drinking, eating, or engaging in other compulsive behaviors, you may have a problem for which there is help.

The Lawyer Assistance Program provides free counseling sessions via a confidential, HIPAA compliant online telehealth platform. LAP is also currently hosting weekly lawyer only AA meetings on Zoom. Call (516) 512-2618 if you would like to attend. In addition, members of the Lawyer Assistance Committee provide peer support. YOU ARE NOT ALONE!

Here are 10 tips to help us manage our stress and stay sane during this time. An article, if not a book, could be written on each tip.

Create a Space to Do Work and a Space to Relax

If possible, these spaces should be separate. This helps us to separate from work and separate from family. It is helpful to have a place that you can "get away" to. It doesn't have to be a big space, just a place that you can go to get away from work, family, expectations. A place to regroup, breath, and "reset". We are likely to be checking emails and returning calls during our supposed down time or family time if we don't have a separate place for work.

Manage Expectations of Ourselves and of Others

Lawyers tend to be overachievers; they are who people go to for advice and for answers. It can be difficult in times like this to accept that our expectations may be too high—of others and ourselves. Having reasonable expectations will increase the likelihood that you will be able to stay the course and maintain a healthy and productive mindset. This is a time when we need more from others who are able to give less.

Create a Routine You Can Keep

It doesn't have to be the same as it was before. It is more important that it be one that you can stick to. Some will start work later and end later while others may start and end earlier. It may be that some take breaks in the middle of the day. Get dressed each morning; it will put you in the frame of mind to work.

Set Boundaries

Limit how often you check your emails to two or three times a day and let clients know this. This helps them have realistic expectations of you that can be sustained. Limit social media use to 30 minutes per day. Monitor your screen time. We all need a break from external stimulation, turn off notifications during your breaks.

Practice Tolerating Uncertainty

Part of what makes this pandemic so scary is that there is so much we don't know and the information and recommendations are evolving in real time. We are learning as we go. One of the best ways to deal with uncertainty is to accept it. Feel your anxiety, don't

See ASSISTANCE PROGRAM, Page 13

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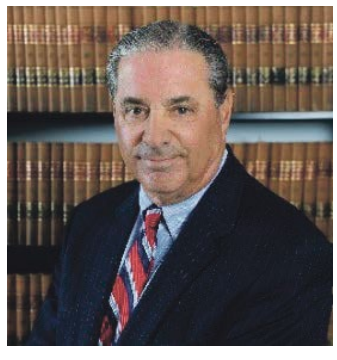

David H. Besso, past Chairman of the Grievance Committee, has been representing attorneys for more than twenty years.

Michelle Aulivola has represented attorneys in grievance and disciplinary proceedings for more than a decade.

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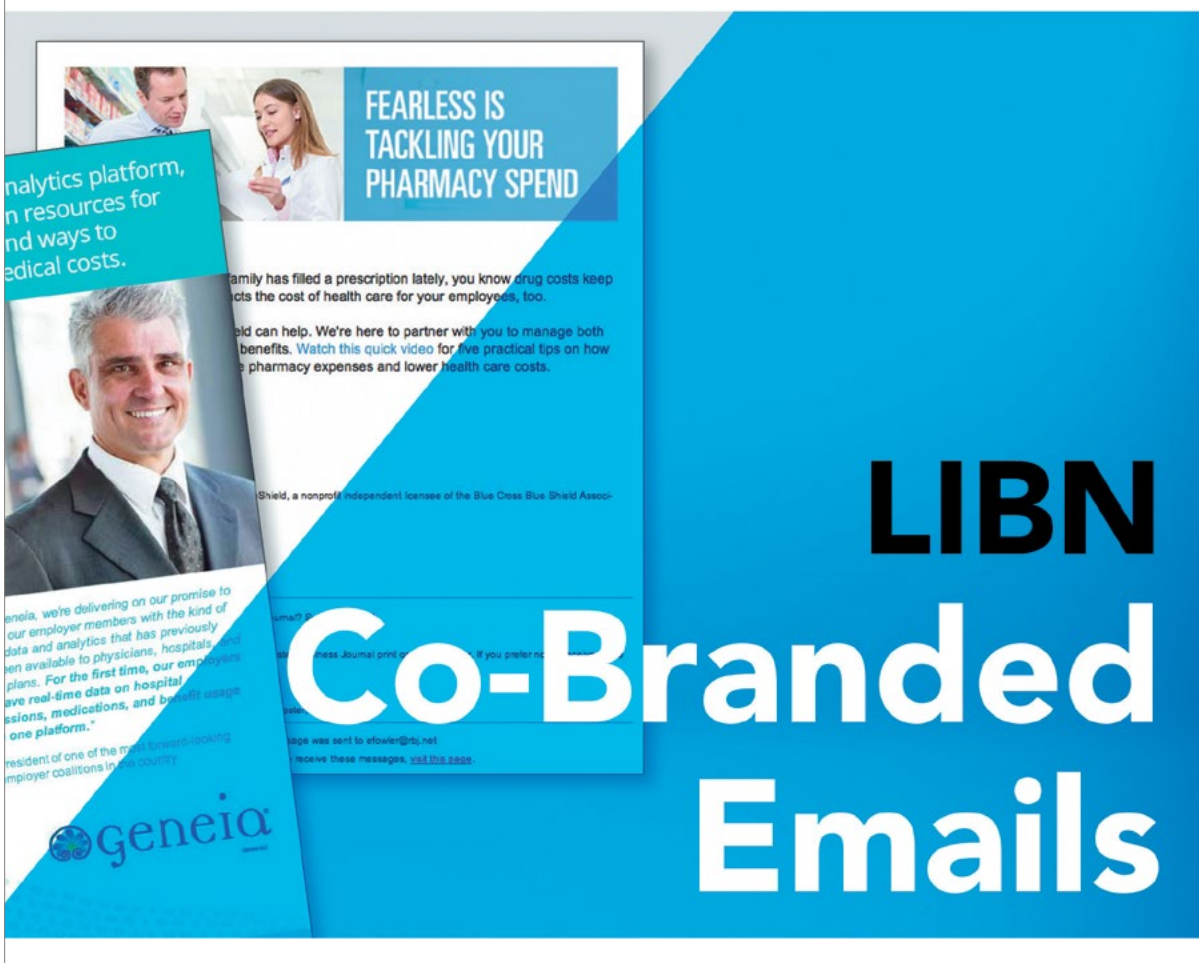

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Matrimonial Law

Ten Tips for Negotiating Complex Assets and Private Securities During Divorce

Nancy E. Gianakos

In a matrimonial action, parties navigate financial issues of varying complexity often complicated by obfuscating tactics, hidden assets, sluggish or neglected production of documentation, antagonistic behavior of counsel, and litigants. Shielding assets and income from forensic scrutiny is not uncommon, thwarting efforts to obtain a comprehensive financial accounting and assessment for maintenance (lifestyle) and equitable distribution purposes.

Adding to the frustration of securing an honest and fair valuation are assets whose value is not readily apparent such as complex assets and private securities. The current state of the economy under COVID-19 only exacerbates deciphering their value. Seeking meaningful historical data in an asset valuation, as in the past, is advisable. However, the past data must be balanced with an unprecedented level of financial uncertainty in the immediate future and perhaps for years to come.

Computation of a party's real net worth is particularly demanding when delving into the murky waters of the non-traditional or layered asset structure of complex assets. Complex assets include private and junior debt, structured credit, start-up options, warrants, and any intangible asset such as a patent or trademark. The ownership interest of such assets presents a host of informational challenges, and the nature of the asset compounds the financial risk of distribution in a marital dissolution.

The tips herein are a collaborative collection of the author's experiences as a complex asset valuation expert and a seasoned matrimonial practitioner with an eye to "best practices" for the attorney confronted with illiquid assets, those lacking a clear price/value, and derivative income of such assets.

Fixed-Payment Risk of Value-Volatile Assets

In the equitable distribution of an asset, the payment may be made in a variety of ways—a fixed sum paid out over a duration of months or years, as a lump sum on a date certain, or a hybrid thereof. Attorneys contemplating the payout of a complex asset according to a traditional payment method to the non-titled spouse should be wary of the risks associated with such distribution to either spouse.

- The fixed payment may overstate or understate the real economic value at the time of payment though "fair and equitable" at the execution of the settlement agreement. Complex assets are innately illiquid and often privately held; even absent catastrophic disruption to the markets, these assets have inherent price volatility which compounds the issue of their equitable distribution.
- Most distributive payments do not include a provision to lower or increase the actual payout when the underlying asset value falls or rises.

To minimize these risks, one option is to structure an equitable distribution payment schedule that allows for flexibility of payment by utilizing "the alignment of interests" approach. In such a scenario, the non-titled spouse retains nominal ownership or accepts an in-kind distribution of the complex asset. The parties "wait and see" for a valuation until an actual arms-length liquidity event occurs to determine the market price or underlying value of the asset.

Keep in mind that the policy of New York as is reflected in precedent, is one of finality regarding the distribution of assets and awards in matrimonial actions. Attempts to utilize claims of unjust enrichment or mutual mistake of fact to unwind settlement agreements for a loss of asset value sustained post-judgment have thus far been unsuccessful in the four Departments.

Underscoring the finality of awards is the Court of Appeals' decision in *Simkin v Blank*.[1] In *Simkin*, the *unanticipated* loss of value to a couple's investments due to a third party's criminal actions and the catastrophic loss resulting therefrom in one of the most damaging Ponzi schemes of all times failed to move the Court. A post-judgment revisit of the parties' asset distribution pursuant to a valid written settlement agreement even under such an unprecedented event that zeroed out an asset's value was rejected. Here, the fact that the appellant had the opportunity to cash out of the asset prior to the event and admittedly made a withdrawal from the investment prior to the event in partial satisfaction of his distributive obligations was noted by the Court.

Recognize Potential Buyers and Biased Opinions

Bankers or investors bring a wealth of real-world, marketplace knowledge to the analysis of complex assets, however they are not valuators. Seeking input of these sophisticated intermediaries may, however, prove useful as a sanity-check on a qualified appraisal *if the asset is likely to be attractive to outside capital* such as high-growth private equity or emerging venture capital.

More esoteric assets, such as patents, may have tremendous potential value. However, the simulation financial modelling and market share research of these assets to unsheathe such value requires the skills of an experienced valuator. The same logic and advanced analysis apply to distressed complex assets such as out-of-the-money warrants or options. Intermediaries may simply not have the requisite expertise to delve into the financial weeds presented by these scenarios.

Discounts for Lack of Marketability and Inequitable Results

Historically, New York State fair value decisions for dissenting shareholder cases or minority oppression cases have often applied a discount for lack of marketability (DLOM). The DLOM can drastically lower the valuation of a noncontrolling interest and is a mechanism used by dissenting shareholders to force a liquidation. *The International Glossary of Business Valuation Terms*[2] defines the DLOM as "an amount or percentage deducted from the value of an ownership interest to reflect the relative absence of marketability." As theoretical as the concept of value may be, case law reflects how real the impact of such discounts upon value is in distributions of assets.

In recent New York decisions, courts have refused application of DLOM in those scenarios where the application equated to *suppressing value and creating a subsequent wind-fall to the controlling shareholder seeking to purchase the noncontrolling interest.*[3]

Similarly, an analogous inequity could result in a matrimonial action were the court to blindly allow a valuation of a spouse to use DLOM to an unfair advantage. As stated in *Zelouf Int'l Corp v. Zelouf*, the "court's role is not to blithely apply formalistic and buzzwordy principles, so the resulting valuation is cloaked with an air of financial profes-sionalism."[4]

Shotgun Clauses Where Spouses Are Business Partners

The shotgun clause forces one partner to "take it [the offer] or match it" in a short period. The strategy may help formulate a settlement when both spouses helped build a business, and each continues to spend significant energy running the endeavor. In these situations, either spouse could operate the company and as often happens, the selling shareholder may start a competitive business down the road.

Use of a Buy-Sell Clause

Shotgun clauses represent mechanisms to tackle the "what," "who," and "when," whereas buy-sell contract requirements focus on the "how" process. A buy-sell legal provision may address timing and specify ways to value an interest. However, this provision generally is not workable for most complex assets which often do not lend themselves to a formulaic valuation. Buy-sell clauses may help in select private equity or venture capital circumstances where the buy-out multiples stem from market data or market indicators of a recent appraisal.

Internal Records and Prior Sales History

Prior sales history may shed light on the value of complex assets. The decision to include this information in any third-party valuation is determined by the timeliness and arm's length nature of the prior transaction to the present. To the extent available, a party should seek from the titled spouse previous sales history and board minutes as each is a data source that may shed light on internal assessments for complex assets.

Know Your Expert's Credentials

Many forensic CPAs in matrimonial services may lack the licensure or expertise for complex asset advisory services. There is a significant difference between an audit of a complex asset and an independent valuation.

Most valuation professionals with sophisticated asset expertise practice extensively in financial reporting valuation. Complex asset valuators maintain financial reporting credentials such as the American Institute of Certified Public Accountants' CEIV credential (Certified in Entity and Intangible Valuation) geared to both complex and financial reporting valuations.

See TEN TIPS, Page 17

NCBA Presidential Farewell

From the President

Richard D. Collins

It seems like a century ago when I started my term as NCBA President. I remember our BBQ at the Bar last September, with members and guests densely populating the lawn and our Domus Ambassadors sharing the history of our incredible building. The whole world was ours to enjoy, brimming with adventure and opportunity. Our trip across the pond to hobnob with our colleagues in London will always stand out as one of the greatest travel experiences of my life.

I am winding down my presidency under very different circumstances. The COVID-19 pandemic changed the way we live and work in profound ways. Domus, the home of the Association for 90 years, is temporarily shuttered. Rather than packing for travel abroad, we started suiting up in masks and gloves just to leave our houses. At a time when I should have been easing comfortably into the position of Immediate Past President, I found myself thrust into the position of having to mobilize personnel and resources to deal with an unseen enemy jeopardizing what we built over our 120-year history.

With Domus closed and events canceled, we needed to quickly adapt to a new stay-at-home world. With the courts open only for emergencies and our clients suffering financially, many of our members were scared for both the present and the future. This was a time of need, for the NCBA members and for the community at large. It was a time to step up to meet unprecedented challenges.

And step up we did. I can't adequately thank all the people who enabled this Association to confront and overcome the obstacles we faced. But I will do my best. First and foremost, Liz Post, NCBA's Executive Director, was incredible. I couldn't have asked for a better soldier-partner. We were in the foxhole together, on a daily basis, on days, nights and weekends. Even when COVID-19 hit Liz personally, she continued to fulfill all her duties at the very highest levels. We are so blessed that she was our Executive Director during this time of crisis!

In order to provide information and professional education to our membership, we needed to transition the Nassau Academy of Law. Jen Groh, our NAL Director, was tireless in her efforts to quickly create and expand our CLE on Demand and virtual Academy of Law to allow members to access Academy programs from their home computers. Thank you, Jen, not just for that, but for always having my back throughout my term. You are truly a treasure, both to me personally and to this Association. Under the leadership of Jen and our terrific Deans, we have created cyber-resources that will bring value to our members long after the coronavirus has gone away.

NCBA's committees are the backbone of the Association. With our committees prevented from meeting in person, we needed to offer virtual alternatives. Stephanie Pagano, our Committee Liaison, was the key staff player in making that happen. Working with so many of our amazing committee chairs, we quickly arranged Zoom meetings for countless committees. I want to express my appreciation to Stephanie for her outstanding work, and to all the committee chairs for their tremendous accomplishments! Many of you reinvigorated committees, and your efforts were not unnoticed. Thank you for your service, and a special thanks to those of you, like Jenn Koo, who took on so many special projects at my request.

In April, I held the very first virtual meeting of the NCBA Board of Directors. While strange to me at first, it went quite smoothly. My thanks to Patti Anderson for facilitating that, and for all she did for me throughout the year. Whenever I had questions, she had answers. I also want to thank the Board of Directors, and especially members of the Executive Committee, for all they did. Elena Karabatos, as our Immediate Past President, was a wonderful resource to me, especially during the early part of my term when I most needed a guiding hand. Likewise, my thanks to Past President Chris McGrath. You were always there for me as a wise adviser, and I am looking forward to awarding you the Distinguished Service Medallion at our rescheduled Annual Dinner Dance Gala.

Of course, none of this could have been accomplished without technology. The MVP of all that was Hector Herrera. I stand in awe of all he does for us, and sometimes suspect he may have cloned himself to be everywhere we need him at all times. While we have been away, he has lovingly maintained Domus so that we can one day soon return to our beloved home of bricks and mortar.

The unique circumstances of the pandemic have required special efforts. I appointed two Presidential Task Forces. I want to thank Bill Croutier, Jr., for leading a COVID-19 Supreme Court Task Force to work with Judge Norman St. George, and Martha Krisel for leading a COVID-19 Community Response Task Force. Both groups will play an important part in helping us all to deal with the difficulties we face ahead. I also want to express my appreciation to Past NAL Dean Tom Foley, who accepted my appointment as de facto "Tech Czar" to assist Hector in educating committee chairs unfamiliar with virtual platform logistics. Also, my thanks to Sam Ferrara for moderating our virtual Town Halls to explain to the members the changes occurring in the Nassau courts.

Throughout our period of quarantine, we were able to provide enormous value to our members and the profession. None of it could have happened without Ann Burkowsky, our Communications Manager, who was a monumental asset to me in keeping our members informed. And how could I have functioned without our tireless Membership Coordinator Donna Gerdik? Donna, you and I were a great team! But every other NCBA staff person contributed much to our success—Barbara Decker, Carolyn Bonino, Pat Carbonaro, Pat King, Beth Eckhardt, our WE CARE Coordinator Bridget Ryan, Gale Berg and the staff of the Mortgage Foreclosure Pro Bono Project, Cheryl Cardona and Christine Stella, and Bob Nigro and the staff of the Assigned Counsel Defender Plan. I could go on about the contributions of each and every one of you, because I know what they were and I will never forget them. With the help of all these amazing people and others—too many to mention—the NCBA brought even greater value to our members than ever before.

I want to thank my partners, Marc Gann, Gerard McCloskey and Dave Barry, and all the staff at Collins Gann McCloskey and Barry, who supported me throughout my term. It has always been my philosophy that a President, as with any good leader, puts the interests of the organization he leads above his own. You need incredible partners to support such sacrifices, and I am blessed to have the partners I do. Perhaps most of all, I thank my wife, Kathy, and all my family, for being there for me while I careened from one NCBA function to another during most of the term of my presidency (at least until we were all forced to stay at home).

Now, our President-Elect and the other members of the Executive Committee will pick up and carry the ball forward. I wish the very best for them. I will carry the memory of my term, and of so many of you I so enjoyed working with, in my heart forever. It was one of the greatest privileges of my career to have served as your President. I look forward to seeing you all at Domus in the near future and, ultimately, for many years to come.

Nassau Lawyer welcomes articles written by members of the Nassau County Bar Association that are of substantive and procedural legal interest to our membership. Views expressed in published articles or letters are those of the authors alone and are not to be attributed to *Nassau Lawyer*, its editors, or NCBA, unless expressly so stated. Article/letter authors are responsible for the correctness of all information, citations and quotations.

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Matrimonial Law

Are They Married? Secular Courts Evaluating Religious Weddings

There are many sections of the New York State Domestic Relations Law which concern the steps to be taken to become married. Section 13 of the law speaks of the need to obtain a marriage license. Section 11 of the DRL sets forth the requirement that each marriage be solemnized and explains who is empowered to solemnize a marriage, while Section 13 of the law explains the required form or ceremony necessary for solemnization of marriages.

A License Isn't Everything

Most relevant to this article is DRL §25, which reads, in pertinent part, as follows:

> Nothing in this article contained shall be construed to render void by reason of a failure to procure a marriage license any marriage solemnized between persons of full age . . . .

This particular law has been interpreted by the courts to mean that the failure to obtain a marriage license from the government does not render void a marriage properly solemnized through religious ritual.

For instance, in a Queens County case entitled *Persad v. Balram*, the parties were married in a ritual which complied with the requirements of the Hindu faith.[1] When the wife sued for divorce in the Queens County Supreme Court, the husband argued that there was no marriage license, and therefore no marriage. This argument was rejected by the court, which determined that the parties intended to be married, had a valid religious ceremony, and were therefore married.

You Can't Have It Both Ways

In *Ahmed v. Ahmed*,[2] an appellate court decision which emanated from Westchester County, the parties participated in a religious ceremony only. When the husband was sued for divorce in the secular court, he raised the defense that there was no marriage license, and that he intended to be married only religiously, not civilly. His motion to dismiss the case failed. The court found that the parties' participation in a valid religious ceremony was sufficient to create a New York State marriage.

In *Hirsh v. Stern*,[3] a case out of the Nassau County Supreme Court, a valid Jewish religious ceremony was performed but, again, no marriage license was procured. Here, the husband argued that he and his wife never intended to be married in the first place. It was his contention that the marriage ritual was not meant to be a real marriage but was only an attempt to deceive members of the community who disapproved of the parties' non-marital relationship. This argument failed, as the court determined that the husband had in no way submitted evidence to cast doubt on the validity of the marriage.

Jurisdictional Issues

Mark I. Plaine

Some of the cases decided in this realm concern issues between different jurisdictions. A common challenge which has been raised exists where the divorce proceedings are commenced in New York after the marriage occurred elsewhere. In *Amsellem v. Amsellem*,[4] the parties were married in an Orthodox Jewish ceremony in France. No marriage license was obtained. Thereafter, the parties moved to New York. Divorce proceedings were initiated by the wife in the Nassau County Supreme Court.

The husband argued that the marriage was invalid, in that French law required that the parties complete a civil ceremony in addition to the religious ceremony. In ruling on the husband's motion to dismiss the divorce proceeding, the court noted that (a) the parties participated in a religious ceremony, (b) the parties had five children together; (c) the parties lived together as husband and wife for 10 years; and (d) they filed joint tax returns together. The husband's motion was denied as he had failed to offer sufficient evidence to persuade the court that the parties were not married.

Another decision involving cross-jurisdictional issues evolves out a case entitled *Matter of Farraj*.[5] Here the parties were married in New Jersey under Islamic law. No marriage license was obtained. The parties moved to New York, and thereafter the husband died. In the estate proceeding a question arose as to whether these parties were ever husband and wife in the first place. An argument was raised against the wife that New Jersey law required not only a religious ceremony, but also that the parties procure a marriage license.

After reviewing the facts of the case, the court found that New York law should apply. Here, the parties had intended for New York to be their place of residence, and they lived in New York as husband and wife. The only reason that the ceremony was performed in New Jersey was that, under Islamic law, it had to be held in the locale where the bride's eldest living relative resided. Hence, the New York court ruled in favor of the wife, and treated her as the late husband's spouse under New York law.

Secular Standards for Clerical Authorities

When other arguments fail, efforts have been made to void a marriage by questioning the authority of the officiant. In a 2014 decision out of the New York County Supreme Court, *Ponorovskaya v. Stecklow*, the court was faced with the question as to whether the ceremony was presided over by a qualified individual.[6]

Here the parties were wed on the beach. The court noted that the ceremony was performed under a chuppah (ritual canopy) "consistent with that of a Jewish wedding." Certain Hebrew prayers were recited, and there was a glass-breaking ritual.

However, there was no Rabbi present, and the ceremony was instead overseen by the husband's cousin, who was a dentist. Evidently, this man had attained the status of an ordained minister, by paying a fee and obtaining a certificate on the website of an organization known as the Universal Life Church (often referred to as the "ULC"). No marriage license was obtained. The parties represented themselves to be single when filing tax returns. There were no witnesses and no Ketubah (Jewish marriage contract).

All of this was too much for the court to possibly treat this as a marriage. In reaching his decision to declare the marriage void, Justice Matthew F. Cooper discussed, among other things, the growing trend to receive clerical ordination over the internet. This might be in the form of a ULC minister or as a Dudeist priest (apparently such a person follows the philosophy of the character known as "the Dude" in the cult film *The Big Lebowski*).

In his decision, Justice Cooper opined as follows:

> Getting married is a serious decision . . . .
> The New York courts that have found a marriage valid despite the absence of a marriage license appear to have based their decisions on the great significance of a marriage performed and solemnized in accordance with established religious ritual and practice. This significance may be trivialized when the wedding is conducted by the bride's cousin who is a Dudeist Priest or the groom's college roommate who just received his ULC ordination on the day of the wedding.

A Meeting of the Minds

Having already "cut his teeth" in this perplexing area, Justice Cooper decided yet another case one year later dealing with a questionable marriage. In *Devorah H. v. Steven S.*, the parties were involved in what purported to be an Orthodox Jewish wedding.[7] However, no marriage license was obtained. The wife claimed they were married, a fact which the husband denied.

Each party had previously been divorced and had children. The parties were intent on living together, and they sought the services of a Rabbi who had offered to assist them in finding an apartment. An evidentiary hearing was held, during which the court heard testimony from each party and the Rabbi.

The evidence at the hearing indicated that the parties needed a larger apartment to house themselves and the "wife's" children. The Rabbi required that the parties engage in a marriage ceremony on the spot. He testified that he could not condone unmarried parties living together in violation of religious law. A "bare bones" ceremony was conducted, and the Rabbi directed the parties to obtain a marriage license forthwith. However, they never did so.

Following the ceremony, the parties' lived together. The "wife" received public assistance as an unmarried mother. The parties filed separate tax returns and the "wife" described herself as "unmarried" in pleadings connected with other lawsuits in which she was engaged. Although the parties were listed as husband and wife in a synagogue application, the "husband" testified that this was done to obtain a cheaper membership rate.

The court acknowledged that under DRL §11 and §25 a marriage must be solemnized, but the failure to obtain a license does not undo the nuptials. However, in order to gain a complete picture of what had occurred, Justice Cooper focused on DRL §10, which defines marriage as "a civil contract" which requires the "consent of the parties" to marry. Based upon the facts established at the hearing, the court was not convinced that the parties ever intended to marry. Instead, Justice Cooper concluded that they merely intended to involve themselves in a "live-in partnership." As such, there could be no marriage under the laws of the State of New York.

The Devil Is in the Details

Each of the cases cited above contains unusual and perplexing circumstances. In order to unravel whether, in fact, a marriage exists, requires the practitioner to sort through a maze of facts, law, and religious rituals to attempt to arrive at a workable conclusion.

Mark I. Plaine is an attorney in Forest Hills, specializing in matrimonial law. He is a member of the NCBA and Queens County Bar Association, and a fellow of the American Academy of Matrimonial Lawyers.

1. 187 Misc. 2d 711 (Sup.Ct., Queens Co. 2001).
2. 55 A.D. 3d 516 (2d Dept. 2008).
3. 83 A.D. 3d 783 (Sup.Ct., Nassau Co. 2011).
4. 189 Misc. 2d 27 (Sup.Ct., Nassau Co. 2001).
5. 72 A.D. 3d 1082 (2d Dept. 2010).
6. 45 Misc. 3d 597 (Sup.Ct., N.Y. Co. 2014).
7. 49 Misc. 3d 630 (Sup.Ct., N.Y. Co. 2015).

COVID-19

Businesses Are Interrupted—but Are They Covered by Business Interruption Insurance?

Danielle B. Gatto

Editors' Note: As this article is being published, the New York State Legislature and Congress of the United States may propose additional mechanisms to address COVID-19-related business losses. Insureds and their counsel should carefully watch for further developments.

Virtually every company in New York State has been impacted by Governor Andrew Cuomo's Executive Orders requiring all nonessential New York workers to stay home,[1] and by the COVID-19 pandemic more generally.

Many of those same New York companies also have business interruption insurance (also known as business income insurance). This type of insurance is typically found in the property and casualty portion of commercial insurance policies. However, the coverage scope of each policy can vary in certain critical ways and can have numerous wrinkles, any of which may expand, limit, or exclude potential coverage for a company's loss of business relating to the pandemic.

Physical Loss or Damage Caused by A Covered Cause of Loss

The standard "business interruption" terms and conditions provide, in sum and substance, that the insurer will pay for the insured's loss of business income where:

1. there is a suspension or reduction of operations,
2. caused by physical loss or physical damage, and
3. resulting from a "covered cause of loss" or "peril".

The typical example is that, after a fire at the insured's premises, the insured will suspend operations of the business and the insurer will provide coverage for the loss of business and additional expense incurred while the insured is remediating the damage caused by the fire.

Whether the COVID-19 pandemic is a "covered cause of loss" (or "peril") that causes or results in property damage is undecided. It is, however, already the subject of at least one lawsuit in Illinois. In *Big Onion Tavern Group, LLC, et al. v. Society Insurance, Inc.*, owners and operators of restaurants and movie theaters have filed an action against their insurer seeking coverage relating to their forced closures, which the insurer has denied based on the contention that the actual or alleged presence of COVID-19 does not constitute a physical loss or damage.[2]

Based on existing precedent, however, business interruption coverage would likely be implicated where, for example, several employees at a company's workplace test positive for COVID-19 (all of whom were physically in the office during the incubation period) and the company was required to shut down operations to remediate the property with a third-party specialist vendor as a result of the presence of this dangerous contaminant at the workplace (thus establishing the requirement of property damage). For example, in *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, the New York County Supreme Court held that the presence of noxious dust and other particles in the air and on surfaces in the plaintiff's offices, which were from the collapse of the World Trade Center towers on September 11, 2001, "would constitute property damage under the terms of the policy."[3]

In the absence of these types of facts to support "some form of actual, physical damage to the insured premises," it does not appear likely that business interruption coverage would be implicated based on the existence of COVID-19. Such was the case in *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, where the Southern District of New York held that there was no insurance coverage for a law firm that had no electricity at its office for several days during a power outage because of the absence of physical damage.[4] Certainly, it will be an uphill battle where the policy has limiting coverage language because it is the "policyholder that bears the initial burden of showing that the insurance contract covers the loss."[5]

Loss Caused by Civil Authority Order

Other insurance policies may contain "civil authority" provisions which provide, in sum and substance, that a policyholder will be covered for loss of business income sustained when access to the insured's premises is "specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area" of the policyholder's property.[6]

In order to trigger coverage, the insured must demonstrate that:

1. an order of a civil authority was issued (i.e., Governor Cuomo's Executive Orders),
2. the order prohibits access to the covered business, and
3. there was a covered cause of loss to property in the immediate area of the covered business (i.e., another nearby business suffered damages from infected COVID-19 employees).

In addition, the civil authority order must typically be in response to property damage that has already taken place, not merely in anticipation of potential future damage. For example, in the aftermath of the 9/11 terrorist attacks, the Second Circuit held in *United Air Lines, Inc. v. Insurance Co. of the State of Pennsylvania* that United Air Lines did not have a claim for loss of business resulting from the halting of flights, even though the government shut down nationwide air service for several days, because this decision was made "based on fears of future attacks."[7]

Of course, the particular policy language itself may create issues for coverage. For example, in *Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.*, the District of South Carolina dismissed a claim for breach of contract filed by an auto repair shop against its insurer arising from its evacuation, and loss of business, which evacuation was ordered by the governor of South Carolina ahead of a hurricane.[8] The policy in *Kelaher* provided that for coverage to exist the subject order of civil authority prohibiting access to the described business premises had to have been issued "because of damage or destruction of property adjacent to the described premises by the perils insured against." Because the civil authority order in *Kelaher* did not have a connection, link, or nexus to existing damage or destruction of adjacent property when it was issued, the court dismissed the insured's claims.

Conversely, in *Assurance Co. of Am. v. BBB Serv. Co.*, where a state of local emergency was issued based on, among other things, that the "storm had been causing damage in its path,…the storm was headed to Brevard County, and the anticipated impact of the

See BUSINESS INTERRUPTED, Page 8

COVID-19

The Future of a Virtual Courthouse

Editor's Note: The New York State Courts' response to the coronavirus pandemic is continually evolving. For the latest developments, visit the NCBA website, www.nassaubar.org. Our website also hosts recordings of "virtual town hall" meetings held during the crisis by various Administrative Judges with our members.

You are sitting in Court on Wednesday waiting for your case to be called and remember that your daughter asked you to cook her favorite meal on Friday night. You pull out your phone—Instacart or Peapod will do your grocery shopping for you and deliver it right to your door—and return to scrolling through the latest headlines. At the end of your conference, each attorney consults an electronic calendar to choose a new date. Although you thought the 28th was free, you see that your calendar was updated remotely upon receiving a fax scheduling a Preliminary Conference on another matter, so you choose another date.

As you get into your car, you pull up an app and tap in a quick coffee order for pick-up on your way back to the office.

When you arrive home that night after a busy day, your sneezing son informs you that his allergy prescription ran out so you pull up the virtual urgent care webpage and schedule a video visit with a medical provider.

Not long after you log out—paying the co-pay electronically, of course—your phone receives a notification from the pharmacy indicating that your son's prescription is ready and your doorbell rings with your Grubhub food delivery.

You ask Siri to send a text to your spouse asking them to pick up the prescription on the way home.

As we start the third decade of the 21st century, technology is ubiquitous in our daily lives.

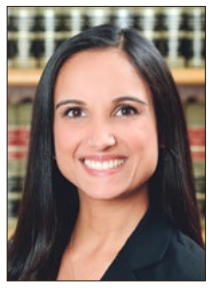
Expanding Virtual Access to the Courthouse

In May 2017, we published an article detailing the expansion of electronic filing for Temporary Orders of Protection in the Family Court through the "Remote Access Temporary Order of Protection Project." This was a pilot program designed pursuant to Family Court Act § 153-c, which allows petitions for temporary orders of protection to be filed by electronic means and permits litigants to appear and orders to be issued ex parte by audio-visual means. Over the past three years, use of remote access for temporary orders of protection has seen a slow and steady increase, allowing victims of domestic violence to access the judicial system from nursing homes, advocacy group offices, domestic violence shelters, and police precincts.

We concluded the May 2017 article by leaving the reader to contemplate some rhetorical questions: will litigants eventually be able to use videoconferencing for all emergency applications in Family Court? Will the ability to use virtual filing lead to an influx of petitions, further burdening Family Court dockets that are already strained? Will videoconferencing be used as a sword instead of a shield? The recent COVID-19 pandemic has forced our hand to seriously and more expeditiously consider the answers to those questions. New York State courts are implementing remote access protocols by the day in response to the continuing statewide business restrictions.

On March 31, 2020, Nassau County Administrative Judge Norman St. George issued an Administrative Order and accompanying Memorandum implementing Chief Judge Janet DiFiore's plan to dramatically decrease courthouse traffic by creating completely virtual courthouses using videoconferencing via the "Skype for Business" application. While the virtual courthouse is in session, only a Clerk is physically present in each Court to handle all the paperwork and oversee the virtual process. The Clerk forwards a Skype link to everyone involved in a proceeding (including the litigants, Judge, Court staff, and interpreter, if necessary) so they may participate from either their home or office computer or by telephone. At the conclusion of each proceeding, the Judge directs the Clerk regarding the completion of necessary paperwork, including issuing orders.

Jill M. Goffer



Joy Jankunas

On April 13, 2020, remote access protocols in the Courts expanded to address non-essential pending cases. Chief Administrative Judge Lawrence K. Marks released a memo detailing a Court's authority to hold conferences in order to address, inter alia, discovery disputes and decide motions.

Virtual Access in the Post-Pandemic Era

Certainly, virtual court appearances and proceedings save time (for both attorney and litigants), reduce security risks, and eliminate litigants' anxiety over the loss of time from work and the need for childcare. In this day and age, many people use smartphones, tablets, and other remote technology tools in their everyday lives, minimizing the Court's concern that a litigant may be unable to appear virtually. As Administrative Judge St. George noted in his March 31, 2020 Memorandum, the technology is "familiar…, simple and straightforward."

However, we need to consider the potential downside. Virtual appearances may reduce opportunities for early settlement; the common practice of hallway negotiations will disappear and as result likely increase the number of trials and lengthen the time to resolve cases. Also, remote access may also lessen the impact of the "intimidation factor." Will a payor spouse be less inclined to abide by a court order if he or she does not need to face and explain why support payments for example have stopped to that person in the black robe? Will an unintended consequence of making the Court more easily accessible lessen a litigant's respect for the judicial process and diminish the impact of court orders?[1]

Our local justice system is currently equipped with the proper technology for remote access litigation. In Nassau County, television screens and computers are set up in every courtroom to facilitate Skype testimony. The Suffolk County Courthouse maintains mobile carts to ensure that every courtroom can have remote technology installed if and when virtual communications are needed. Notwithstanding the tools in place, there is hesitation to consider unfettered virtual access in matrimonial litigation.

On April 6, 2020, we spoke with Justices Jeffrey A. Goodstein, Supervising Judge of the Matrimonial Center in Nassau County, and Andrew A. Crecca, Supervising Judge of the Matrimonial Parts of Suffolk County, to explore liberal remote access in years to come. Both Judges are familiar with remote access (having used same for witness testimony), recognized the difference between conferencing virtually versus in person when you have clients present, and noted a current judicial preference to have people [present] where you are close to them and you get to interact with them on a personal basis.

Before the March 2020 expansion of remote access in response to the COVID-19 pandemic, New York State placed strict limits on electronic appearances compared to more liberal jurisdictions such as California which strongly encourages remote appearances and engages the services of a commercial service provider (CourtCall) to facilitate state-wide remote access.[2]

Such appearances in New York family law matters are governed by Family Court Act sections 433 (relating to child support), 531-a (relating to paternity), and 580-316 (relating to support and paternity proceedings under UIFSA) and Domestic Relations Law section 75-j(2) (relating to custody and neglect3 proceedings brought under the UCCJEA). According to the Bill Jacket that accompanied FCA §§ 433 and 531-a when they were passed in 2000, the legislation establishing electronic court access was "introduced at the request of the Chief Administrative Judge" and enacted to "accommodate the interests of litigants and witnesses by sparing them unnecessary appearances in Family Court."[4]

However, both FCA §580-316 and DRL§75-j apply only to out-of-state parties or witnesses and do not contain provisions for the electronic testimony of those residing in New York State. Both FCA§§ 433 and 531-a are more expansive, providing for the possibility of electronic testimony: (1) where a party or witness resides in a county that is non-contiguous to that of the Family Court where the case is pending, (2) where a party or witness is presently incarcerated, or (3) where the Court determines that it would be "an undue hardship for such party or witness to testify…at the Family Court where the case is pending."

However, except for FCA §580-316, which states that "a tribunal of this state shall permit [emphasis added]"[5] a qualifying party or witness to testify via electronic means, the Court is given broad discretion in determining whether to permit electronic testimony.[6] A review of the limited case law regarding this issue reflects that in practice, such approval may be difficult to secure absent a showing of necessity[7] or exceptional circumstances.[8] Although technological development has facilitated a greater acceptance of remote participation by litigants in judicial proceedings, Courts maintained hesitations because of the effect electronic testimony may have on the trier of fact to determine the witness's credibility.[9]

Conclusion

With the implementation of the Administrative Orders, the accessibility of electronic testimony and virtual appearances has been forced upon us and our judicial system. The process of E-filing is becoming more commonplace practice in matrimonial matters. Changes and adjustments are being made daily to expand and improve the Court's response to the pandemic—it is possible that by the time this article is published there may be answers or even more questions. While we cannot predict the future, it is a virtual certainty that this "new normal" will push the Judicial system to forever adapt to the technology at hand .

In times of crisis, even the most traditional people and institutions must adapt to move forward. Sometimes, we find that the new way is better than the way before. As a result of the accommodations and emergency protocols established to navigate this crisis, perhaps we can achieve increased access to justice through Courts that "extend beyond courthouse walls."[10]

> As Judges Crecca and Goodstein stated: Access to justice always involves the concept of allowing people to participate in the process and have access to the courts. There is no question, when we come out of this, we will be in a better spot to provide access to people who might not have otherwise had access to the courts.

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1. John Greacen, *Remote Appearances of Parties, Attorneys and Witnesses – A Review of Current Court Rules and Practices*, Self-Represented Litigation Network, March 17, 2017, available at https://bit.ly/2UX8o7h.
2. California State Civil Rules, Rule 3.670.
3. *In re Thomas B.*, 139 AD3d 1402, 1404 (4th Dept 2016).
4. N.Y. Bill Jacket, 2000 A.B. 7162, Ch. 475.
5. FCA §580-316(f).
6. *Matter of Jaydalee P.*, 156 A.D.3d 1477, 1478 (4th Dept. 2017)(upholding denial of mother's application to appear electronically in neglect proceeding where she moved to Michigan less than one month before the trial date).
7. *Melissa S. v Allen S.*, 54 Misc.3d 684, 690 (Queens Co. Fam. Ct. 2016)(upholding denial of husband's application to participate by telephone where he voluntarily departed the state and did not establish an "inability to appear or genuine necessity").
8. *Pamela N. v. Aaron A.*, 159 A.D.3d 452, 453 (1st Dept. 2018)(upholding denial of father's request to testify by videoconference where he claimed not to have the funds to travel to New York). *See also Ulster County Support Collection Unit on Behalf of Beke v. Beke*, 170 A.D.3d 1347, 1348 (3d Dept. 2019)(upholding finding of default where father's application to give electronic testimony because he could not afford to travel to New York had been rejected by Family Court).
9. *UFISA Suffolk County Department of Social Services v. Grassi*, 6 Misc.3d 1028(A)(Fam. Ct., Suffolk Co. 2005); *Melissa S v. Allen S.*, 54 Misc. 3d 684 (Queens Co Fam Ct. 2016).
10. *Call to Action: Achieving Civil Justice for All – Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee*, National Center for State Courts, 2016, available at https://bit.ly/2wqNzYg.

General Law

The Elimination of Mental Health Questions from the NYS Bar Application

On March 26, 2020, Chief Judge Janet DiFiore announced that mental health-related questions are to be removed from the state bar application effective immediately. New York now becomes the eleventh state to remove such questions from the state bar application.

Chief Judge DiFiore acknowledged that numerous studies have established that, while an ever increasing number of law students are suffering from mental health and substance abuse issues, the presence of mental health inquiries on the bar application often prevents students from getting the help that they need.[1] The Chief Judge credited the New York State Bar Association for spearheading the drive to remove mental health questions from the bar application.

While the issues surrounding the inclusion of mental health questions on the bar examination have long been discussed in New York, prior substantive attempts to amend the bar application have not been fruitful. This all began to change rapidly beginning in early 2019.

In February 2019, the Conference of Chief Justices adopted a resolution urging its members and bar admission authorities to eliminate from bar admission applications all questions relating to the mental health history of bar applicants and instead to use questions that focused only on the applicant's conduct. Immediately thereafter, Henry Greenberg, the then newly elected President of the NYSBA, assembled a Working Group of attorneys from different legal disciplines and backgrounds to examine whether Question 34 of the New York application, which asks about mental health history, diagnosis, and treatment, needed to be reworded or removed from the application.

Specifically, Question 34 asks if the applicant has "any condition or impairment including, but not limited to, a mental, emotional, psychiatric, nervous or behavioral disorder or condition, or an alcohol, drug or other substance abuse condition or impairment or gambling addiction, which in any way impairs or limits your ability to practice law?" If the applicant responds that they do have such a condition, the application then prompts the individual to explain in detail the nature of the challenge. The application also asks if the individual receives ongoing treatment or support for their condition.

Maureen C. Kessler

After examining a series of problematic issues related to Question 34, the 22-member Working Group issued its report entitled *The Impact, Legality, Use and Utility of Mental Disability Questions on the New York State Bar Application*.[2]

The Working Group recommended that Question 34 should be eliminated and replaced with a question that focused solely on an applicant's conduct and behavior. Specifically, the Working Group concluded that: (1) law students today feel more stress and experience more mental health issues than ever before as a result of crushing student debt and an uncertain job market, in addition to the demands of law school, (2) the Americans with Disabilities Act, and regulations promulgated thereunder, prohibit the screening of candidates based on mental disability, and, (3) there is compelling evidence that Question 34 is unnecessary in accomplishing the goal of identifying applicants whose mental conditions make them candidates for special scrutiny.

In advocating for the report's recommendations, President Greenberg stated: "The hard truth is that stigma around mental illness remains a significant barrier to treatment within the legal profession, and society at large…. There is compelling evidence that mental health questions on bar applications are ineffective and unnecessary, and several states have already done away with them."

On October 7, 2019, the Board of Directors of the Nassau County Bar Association ("NCBA") met to consider whether to lend its support for the Working Group's recommendations. After a discussion led by NCBA President Richard Collins, the Board unanimously voted to do so. A copy of the NCBA's letter of support was one of several appended to the adopting resolution. On November 2, 2019, the NYSBA's House of Delegates voted to adopt the Working Group's report.

Immediately thereafter, others took up the very important cause. On November 4, 2019, New York State Senator Brad Hoylman introduced legislation that would prohibit bar application questions which asked applicants about their mental health or history of substance abuse. In addition, the deans of fourteen of New York's fifteen law schools submitted a letter to the Office of Court Administration supporting the elimination of Question 34. Meanwhile, numerous law students gathered to engage their collective power to pressure for change. An untold number of news articles regarding the potential change appeared in legal and other publications. These efforts, coupled with many others, resulted in Chief Judge DiFiore's decision to eliminate Question 34 and to instead focus only on an applicant's conduct.

Going forward, the relevant question will read as follows: "Within the past seven years, have you asserted any condition or impairment as a defense, in mitigation or as an explanation for your conduct in the course of any inquiry, any investigation, or any administrative or judicial proceeding by an educational institution, government agency, professional organization, or licensing authority or in connection with an employment disciplinary or termination procedure?" Thus, reasonable inquiry concerning an applicant's mental health history will be limited to those cases where the applicant has asserted such as a defense or explanation in designated proceedings within the past seven years.

NYSBA President Henry Greenberg responded to the Chief Judge's announcement that mental health questions were to be removed from the bar application by stating: "Today marks a historic moment in addressing the mental health crisis facing the legal profession…. Future generations of New York lawyers no longer need to live in fear that bravely and smartly seeking treatment for mental health issues could one day derail their careers."

Maureen C. Kessler has been practicing corporate and securities law for many years, and is a long-standing member of the NCBA Lawyer Assistance Program.

1. In fact, a 2014 ABA study found that while 42% of respondents said they needed help in the preceding year with emotional and mental health problems, less than half of those respondents received counseling. Forty-five percent of those not seeking help cited a potential threat to bar admission as the cause. *See* Jerome M. Organ, David B. Jaffe & Katherine M. Bender, Ph.D., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. Legal Educ. (Autumn 2016) at 1, 116–56.
2. Available at https://bit.ly/3clUtxm.

Business Interrupted ...

Continued From Page 6

storm if it reached Brevard County," the Court of Appeals of Georgia held that the insured had a valid loss of business income claim against its insurer arising from "action of civil authority that prohibits access to your premises due to direct physical loss of or damage to property, other than at the 'covered premises.'"[9]

Explicit Inclusions or Exclusions and All-Risk Policies

An exclusion based on viruses, epidemics, pandemics, communicable disease or the like will potentially defeat a claim for coverage. For example, in *Bamundo, Zwal & Schermerhorn, LLP v. Sentinel Ins. Co*., the Southern District held that there was no coverage available based on the "civil authority" provision.[10] While there was an order of a civil authority manding the insured's property be evacuated ahead of Superstorm Sandy, the "Covered Cause of Loss" as defined in plaintiff's policy excluded the loss due to flooding and thus there was no coverage. Therefore, it is important that the policy at issue be reviewed carefully to determine if there is any exclusion relating to viruses, epidemics, pandemics, communicable disease or the like.

Some policies, however, may contain endorsements that provide for explicit coverage for, among other things, viruses. These policies will clearly be the most likely to result in successful insurance claims, assuming physical damage or loss to property can be established.

There are also "all-risk" (also known as Special Cause of Loss Form) policies (which may have the exclusions discussed above), which may also prove useful in pursuing a COVID-19 claim "Under an all-risk policy, 'losses caused by *any* fortuitous peril not specifically excluded under the policy will be covered.'"[11]

For example, in *Spindler v. Great Northern Insurance Company*, the Eastern District of New York granted summary judgment in favor of the insured on a property damage claim caused by two boats that collided into structures and fixtures on plaintiff's property during Superstorm Sandy.[12] Accordingly, in the absence of an exclusion for losses arising from viruses, pandemics, communicable disease or the like, and assuming that the insured can otherwise sufficiently establish some type of physical damage or loss to its property (or neighboring properties if a civil authority order provision applies), the all-risk policy may cover losses caused by viruses, such as COVID-19.

Potential Help from Albany

New York lawmakers are attempting to retroactively expand business interruption claims caused by COVID-19. In the bill proposed in the New York State Assembly on March 27, 2020, "every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption, shall be construed to include among the covered perils under that policy, coverage for business interruption during a period of a declared state of emergency due to the coronavirus disease 2019 (COVID-19) pandemic." The New York bill would apply to policies in force by March 7, 2020 and issued to businesses with fewer than 100 full-time employees as of that date. However, it is unclear what the likelihood is that this bill will be passed (and, in any event, it raises a number of constitutional issues).

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1. Executive Order No. 202.14 (Apr. 7, 2020), available at https://on.ny.gov/3e66KaU.
2. No. 1:20-cv-02005 (N.D. Ill.) (filed Mar. 27, 2020).
3. 6 Misc. 3d 1037(A), 800 N.Y.S.2d 356 (Sup. Ct., N.Y. Co. 2005).
4. 17 F. Supp. 3d 323, 331 (SDNY 2014).
5. *See Roundabout Theatre Co. v. Continental Cas. Co.*, 302 A.D.2d 1, 6 (1st Dep't 2002).
6. *Bamundo, Zwal & Schermerhorn, LLP v. Sentinel Ins. Co*., No. 13-CV-6672 RJS, 2015 WL 1408873, at *4 (SDNY Mar. 26, 2015) (in the context of Superstorm Sandy, the plaintiff-insured was pursing claim against defendant-insurer based upon loss of business under the "civil authority provision" of its insurance policy).
7. 439 F.3d 128, 134 (2d Cir. 2006).
8. No. 4:19-CV-00693-SAL, 2020 WL 886120 (D.S.C. Feb. 24, 2020).
9. 265 Ga. App. 35, 36 (2003).
10. No. 13-CV-6672 RJS, 2015 WL 1408873, at *4 (SDNY Mar. 26, 2015).
11. *Spindler v. Great Northern Insurance Co*., No. CV 13-5237(JS)(GRB), 2016 WL 921646, at *5 (EDNY Feb. 2, 2016), *report and recommendation adopted*, 2016 WL 899266 (EDNY Mar. 9, 2016) (quoting *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co*., 472 F.3d 33, 41 (2d Cir. 2006))
12. *Id.*

General Law

Legal Responses to the Growing Menace of Cyberharassment and Digital Torts

The Internet is increasingly a primary source of information, entertainment, and engagement. Users around the globe are free to participate in discussions, and share news, opinions, and reviews on a myriad of platforms. These virtual communications are often anonymous, and in many cases, vulgar. However repugnant, with rare exceptions, online speech is constitutionally protected free speech. The First Amendment prevents the government from restricting expression based on "its message, its ideas, its subject matter, or its content."[1]

Notwithstanding the broad protections, the First Amendment does not allow communications that are defamatory or destructive to individuals, nor subject to copyright protection. Nor can someone invade a person's privacy by publicizing photographs or videos of sexual activity without consent. Online bullying is increasingly recognized as a civil rights violation, because these crimes disproportionately affect women and minorities, damaging their ability to express themselves in public, their employment prospects and their sense of personal safety.

The more serious and actionable forms of online bullying are known as cyberstalking, and revenge porn (defined as sexually explicit images that are publicly shared online without consent of the pictured individual). Other crimes include theft of intellectual property, online impersonation, and identity theft, which affect individuals, businesses and government entities.

In this article, we will address the growing menace of cybercrimes, and the legal responses, both civilly and criminally.

The Limits of Free Speech Protection

Until recently, there were inadequate responses and remedies under the law regarding abusive online activity. Websites, businesses, and aggregators who hosted or shared the communications were specifically exempted from defamation claims and afforded nearly full protection pursuant to the Communications Decency Act, which broadly protects interactive service providers (ISPs) from liability for user-generated content.[2] Because of this protection, individuals had virtually no recourse when it came to objectionable and even defamatory posts.

Over the past decade, there has been an increasing realization that the Internet's dark corners, with anonymous posts that live forever in cyberspace, can cause real psychological, emotional, and financial harm to individuals. From the hacking and sharing of celebrity nude pictures, to embarrassing posts used as blackmail or revenge against former romantic partners or aspiring politicos, the Internet has become a breeding ground for abuse and bullying of vulnerable groups, including teenagers, LGBTQ, minorities and women. Abusive trolls are able to inflict great harm while remaining anonymous, escaping meaningful repercussions.

Cyberbullying

The use of the Internet or other electronic means to stalk or harass an individual, a group, or an organization is against the law. Cyberbullying is the use of electronic communication and other technology to harass a person, typically by sending messages of an intimidating or threatening nature. Harassment does not have to mean direct communication between the perpetrator and the victim. Technology is used to intentionally and repeatedly mistreat the victim. It is usually done anonymously, via text messaging, social media, gaming apps, or another online forum.

Victims and perpetrators are both children and adults, and include men and women from all ages and socioeconomic backgrounds. As with schoolyard bullying, the mistreatment of the victim provides a release for those that are angry and vindictive. But what makes it worse online is that anonymity and the lack of consequences brings out the worst behavior. Moreover, cyber bullying can actually be an addictive behavior.

Jacqueline Harounian

Cyberstalking is a form of cyberbullying; the terms are often used interchangeably in the media. Both may include false accusations, insulting messages, defamation, slander, and libel. Cyberstalking can take the form of an ex sending pictures and videos, threatening to disseminate them to friends and family. Cyberstalking may also include monitoring, identity theft, threats, vandalism, solicitation for sex, or gathering information that may be used to threaten or harass. Cyberstalking is often accompanied by real-time or offline stalking. Both forms of stalking may be criminal offenses.[3]

Stalking is a continuous process, consisting of a series of actions, each of which may be entirely legal in itself. Technology ethics professor Lambèr Royakkers defines cyberstalking as perpetrated by someone without a current relationship with the victim. Royakkers describes the effects as abusive:

> [Stalking] is a form of mental assault, in which the perpetrator repeatedly, unwantedly, and disruptively breaks into the life-world of the victim, with whom he has no relationship (or no longer has), with motives that are directly or indirectly traceable to the affective sphere. Moreover, the separated acts that make up the intrusion cannot by themselves cause the mental abuse, but do taken together (cumulative effect).[4]

If they are not stopped, stalkers become emboldened, and they will try to repeat the abusive behavior. The Internet has made these perpetrators more compulsive and impulsive, because there is an immediate outlet for angry emotions. The abuser has tremendous power over the victim, and this power is used to control the victim, without ever saying a word or inflicting assault.

Cyberbullying produces emotional and psychological harm on a new level, because unlike traditional bullying or defamation, it is free of any time, location, or limitations of identity. It can take the form of blog posts, comments on websites, social media, or chat rooms. Other forms are malicious and defamatory business reviews. It can include the installation of malware that searches computers for sexually explicit photographs, or using web cams and computer microphones. The perpetrator then contacts the victim and threatens to release embarrassing photographs or videos.

With the advent of face swapping and "deep fake" videos, the risks and consequences are even worse. Sophisticated cyberstalkers can create fake profiles or websites to taunt their victims and harm their personal and professional reputation. Hackers can gain access into a user's iCloud or Gmail account to steal intimate pictures that can be sold and posted online. Once an image is posted, the harmful effect on the victim is multiplied. Pictures and videos can be shared, reposted, screenshotted, and cached. Content can easily migrate and metastasize across the Internet and around the world.

Online bullying is destructive to relationships and families. Whether it takes the form of photos or malicious statements, the words and images cannot be easily erased. Harassment has been recognized as a stressor in the lives of victims, with teens and women especially vulnerable as targets. Psychologists have begun to examine the issue beyond the lens of just a cultural problem and more through the lens of a threat to physical and mental health. Victims can suffer lifelong physical illness and mental health issues including PTSD, anxiety, depression, and even suicide.

For the public at large, cyber harassment may not feel like a real crime. It can be difficult to understand the scope of the problem, because the Internet is so amorphous with parameters that are constantly changing. Law enforcement, schools, and local governments do not have the resources to go after the perpetrators. The pain experienced by victims is not virtual. It is real.

Using Copyright Law Protection

The first line of defense against unauthorized use of content and hacked photographs may be federal copyright law. After all, the subject of most photographs is also the creator of the image. Copyright establishes a legal method for victims to remove their images and to target websites that refuse to comply with takedown notices. Copyright law also provides for monetary damages.

As the authors of their "selfies," the vast majority of victims own the copyright of their images.[5] Neither Congress nor the United States Supreme Court have ever addressed the copyright issue when it comes to pornography. But like the author of a legal treatise, the author of a selfie retains the exclusive rights to reproduction and display of their "work." Dissemination without consent would be a violation of copyright law.

A victim or his or her lawyer can send a formal letter demanding a "take down" of the image or content. Take down notices usually cite the Digital Millennium Copyright Act of 1998,[6] and request removal of the image. The takedown demand must be served to every single website, search engine, and platform that is hosting the image. To take it a step further, the attorney can serve a subpoena to seek disclosure regarding the location of the website server. Since images proliferate so swiftly, takedown notices must be filed with each site separately.

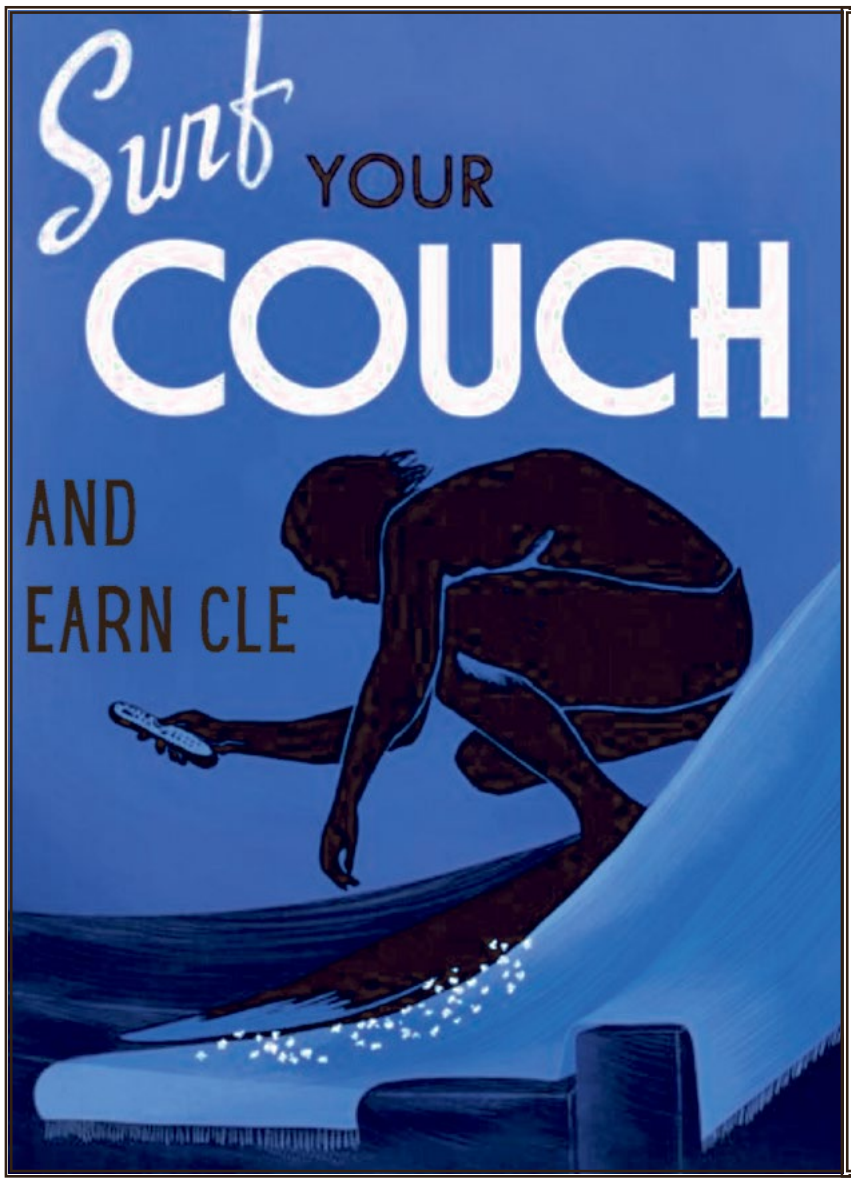
Stopping a viral image can be tedious and expensive. If the request for takedown is not

See CYBERHARASSMENT, Page 17

For CLE related to COVID-19, please visit nassaubar.org/CLE for upcoming programming.

The Academy staff is processing hundreds of CLE forms each week. To streamline efforts, please send all forms to **academy@nassaubar.org** as opposed to an individual staffer. In addition, we ask that forms be sent in batches, instead of individually. Thank you for your patience and cooperation.

Until we can be six feet closer, be safe and be well.



Running a law practice is never easy, even in the best of times.

COVID-19 has forced many to rethink how they conduct the practice of law. It has never been more important and more crucial to be up-to-date on information that could affect your law practice.

The Academy welcomes proposals for 50 minute lunchtime programs related to COVID-19 and the practice of law. All programs would be done remotely via Zoom and are recorded.

If you are interested in presenting, please contact Jennifer Groh, Director of the Nassau Academy of Law, at jgroh@nassaubar.org.

The Nassau Academy of Law is proud to offer **CLE on Demand**, a new way to earn your CLE credit from the convenience of your desktop, laptop, phone, or tablet. We will continue to update and add more programs.

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I'm a newly admitted attorney. Can I take advantage of the service? Newly admitted attorneys can view the programs that offer professional practice credits. Skills credits and ethics credit are not available via our on-demand service as this format does not allow for audience questions during the program.

What is the cost for the on-demand service? On-demand titles are free to current NCBA members as a new member benefit.

Where can I find the on-demand page on your website? Please visit nassaubar.org and click on CLE. There will be a drop-down link for CLE on Demand.

General Law

Brooklyn's Lion in Winter

"If an Article III judge can't be himself and have a sense of his person, who in the world can?" —Jack Weinstein

On February 12, 2020 the inevitable happened. It was nevertheless a shock to the system, a genuine passing of the guard. At ninety-eight, Jack Weinstein, United States District Judge in the Eastern District of New York, retired from active service. If a tree does grow in Brooklyn, then he was a mighty oak.

After nearly 53 years on the federal bench, time has finally caught up with Judge Weinstein. Perhaps lamenting the rigors of age, he said: "I just about used up my reserves of energy and I felt that I could not go on and have the assurance that I could give full attention and full energy to each one of the litigants."[1]

Somehow it seemed that he would manage to go on forever. Judge Weinstein's caseload has now been reassigned; the wheels of justice will continue to turn. But things won't be the same at Cadman Plaza without him.

Deeply committed to the human dignity of every person appearing in his court, his has been an exceptional and yes, a controversial, career. Lawyer, teacher, scholar, jurist. By any measure, Jack Weinstein is a man for all seasons, even if his rulings are not to everyone's tastes.

A Lifetime of Public Service

During the 1990's, Weinstein was acknowledged as the "the most important federal judge of the last quarter century."[2] Since then, he has valiantly defied the actuarial tables adding luster to that designation. But to his critics, who have questioned his activism as a siting judge, "he is the epitome of judicial power run amok."[3]

Rudy Carmenaty

Belying his rather pronounced New York accent, the Judge was actually born in Wichita. But he is all Brooklyn, having come of age in the borough during the1930's and 1940's. A member of the "Greatest Generation," he endured the hard, bitter-sweet years of the Depression followed by military service in World War II.

In his case, he worked his way through Brooklyn College, mostly on the Brooklyn waterfront, and then saw action in the Pacific while serving in the Navy. Returning from the war, Lt. Weinstein attended Columbia Law School graduating in 1948. He would return to Columbia as a member of the faculty.

Prior to his appointment in 1967,[4] Weinstein firmly established himself in the New York legal firmament. He became a noted authority on the rules of evidence and of civil procedure, spent a few years as the Nassau County Attorney, was an advisor to the New York State Constitutional Convention, and contributed to Thurgood Marshall's briefs in the landmark case *Brown v. Board of Education*.[5]

From the start, Weinstein was a maverick on the federal bench. He was a judge who charted his own path, pushing the boundaries of the law much in the tradition of the liberal Warren Court of the 1960's. Certainly, few at the District Court level have had such an impact, and fewer still were so willing to buck the traditional confines associated with their given position within the legal hierarchy.

Courting Controversy

Weinstein's puckish independence is well-documented. As he himself once observed, "[i]f the Court of Appeals disagrees with me or somebody else disagrees with my rulings, it doesn't bother me…. I don't feel I have to justify myself to anybody but myself."[6] If Weinstein has been anything, he has been consistent, ever faithful to his interpretations of the law in spite of reversals from appellate judges.

Weinstein is also a study in contrasts. The Judge unpretentiously preferred presiding in his courtroom wearing a business suit.[7] Well-known for his empathy toward defendants from impoverished backgrounds, he could be exacting on counsel. Early on he embraced the role of a hard-working, compassionate judge with gusto.

Judge Weinstein was never shy in exercising his discretion. As one wag put it, "God has been seeing a psychiatrist lately because He thinks He is Jack Weinstein."[8] Evidently not everyone is enamored of the manner in which he runs his courtroom or of his determinations. "Society in this country is changing, so the law has to be adjusted"[9] was Weinstein's response to such critiques.

Customarily, a trial judge's decisions affect only the parties before him. But Weinstein's rulings have had a much-wider consequence. Professor Bennett Capers has observed that in his written opinions the Judge "seems to have a larger audience in mind. He seems to be saying, look at what's going on."[10]

Weinstein is better known than just about any other federal district judge. The sheer number of matters that have appeared before him over the course of more than half-a-century have ranged from the standard to the sublime. Often in the headlines, he has had more than his share of celebrated trials.

But it was his exceptionally deft handling of class-action tort litigation where his acumen, indeed his particular brand of genius, came to the fore. In the 1980's, Weinstein creatively orchestrated the creation of an historic $180 million settlement fund to address claims by service members arising from the military's use of Agent Orange in the Vietnam War.[11]

This innovation proved a milestone in his career and set the paradigm for all subsequent class-action matters involving a variety of products alleged to have caused wide-spread public harm.[12] The Agent Orange settlement provides perhaps the most clear-cut example of the difference that Judge Weinstein has made as part of the federal judiciary.

Of equal import are the cases that Judge Weinstein has refused to take on. Notably, he refused to hear criminal drug prosecutions in protest of the mandatory sentencing laws which he thought were excessively punitive. Weinstein has throughout his judicial service elicited controversy for his various stances.

A Contested Legacy

In many ways, for good or ill, Weinstein has been at the center of one fundamental and ever-vexing question: what is the proper role of a judge in our federal system? Once confirmed, federal judges, barring impeachment, serve for life. Certainly, Weinstein has exemplified this particular provision of Article III.

But the question remains, just how far can a judge be consistent with his vison of justice without running afoul of the Constitution? Many have found Judge Weinstein's "liberal activism" difficult to sustain. Even those who have lauded him, recognize the inherent danger posed by "some of his judicial techniques if applied by a less talented and scrupulous judge."[13]

One's view of his judicial legacy may unfortunately depend upon the prism by which one views the nation's fractured politics. Whenever politics and the cherished notion of an independent judiciary intersect, it makes for a volatile mix that is always problematical.

Yet such debates are best left for another day. For whether one agrees with him or not, there is little doubt that Jack Weinstein has changed the landscape of American law. His decisions have been consequential and his contribution to federal jurisprudence has been nothing short of monumental.

Of further import, all concur that Jack Weinstein is a remarkable man who has served with honor and distinction. He has done so as much by his many decisions and innovations, as by the dynamic way he has performed his duties.

More than an accomplished federal judge, a laudable achievement by any measure, Jack Weinstein is an institution in Brooklyn. The legal profession should well-note his retirement for it represents a transition of epic proportions.

Rudy Carmenaty is a Deputy County Attorney and the Director of Legal Services for the Nassau County Department of Social Services.

1. Noah Goldberg, *After legendary 53-yar career, Brooklyn Federal Judge Jack Weinstein hangs up his robe at 98*, New York Daily News (February 12, 2020).
2. Robert Kolker, *High Caliber Justice*, at http://nymag.com. This particular comment was made by Alan Dershowitz.
3. William Glaberson, *Dressing Down Lawyers, and Dressing Up Gigante*, New York Times (July 20, 1997).
4. Weinstein was appointed by President Lyndon Johnson.
5. Goldberg, *supra* n.1.
6. Kolker, *supra* n.2.
7. West's Encyclopedia of America Law, *Weinstein, Jack Bertrand.*
8. Glaberson, *supra* n.3
9. Melanie Hicken, *America's oldest workers: Why we refuse to retire!* The activist judge, at www.moneycnn.com.
10. Feuer, *The 96-Year-Old Brooklyn Judge Standing Up to the Supreme Court*, June 14, 1018 at www.wral.com.
11. West's Encyclopedia of America Law, *supra* n.7.
12. *Id*.
13. Kolker, *supra* n.2

ASSISTANCE PROGRAM ...

Continued From Page 1

run to an unhealthy escape, acknowledge the situation and remember that we have been through difficult times before and have gotten through it! We are more resilient than we give ourselves credit for.

Strengthen Self Care

Self-care is very important during this time. Eat as many nutritious foods as possible. Use moderation with junk food. Exercise for 15-30 minutes a day if possible. Getting outside to walk is also great! On our website at nassaubar-lap.org, there are links to online yoga and other workout programs you can do at home. In addition, try to get 6-8 hours of uninterrupted sleep. Take breaks to meditate or relax. Give yourself permission to take time for yourself. The next urgent task will be there whether you take that time to meditate or walk, the difference is you will be in a better frame of mind to handle it. Quantity of work does not equate to quality of work. If you don't make time for yourself, then others are running your agenda and burnout is more likely…especially under these conditions.

Reach Out to Others

This is really more of a physical isolation than a social isolation. We can still socialize. Modern technology allows us to interact in real time via video platforms like Facetime, Zoom, Skype, Google Duo and many more. Be creative. People are having scheduled family calls, games and meals online together. NCBA committee meetings are also meeting on Zoom.

Be of Service to Others

Being of service to others take focus away from the self and increases self-esteem. Scientific studies have shown we experience a decrease in stress, anxiety, and depression after helping others.

Do Something That You Enjoy

Jigsaw puzzles, gardening, and models are popular for this or just getting lost in a good series or movie. There are links to several activities that can take your mind off your worry and you can learn something new. There are tours of National Parks, museums, Broadway shows and much more.

Gratitude List

Make a gratitude list every day. Taking five minutes at the start of every day to list the important things in your life you are grateful for helps to start the day on an emotionally healthy note. Stop and take a few minutes to inventory how you are feeling before running to the next task.

In addition to the services LAP is offering during this pandemic, LAP continues to provide confidential help to the legal profession addressing a wide range of problems including, alcohol and substance abuse; depression; stress and anxiety; other addictive behaviors such as gambling and eating disorders; compassion fatigue and vicarious trauma; ADD/ADHD; burnout; and anger management.

LAP provides outreach and education to law firms, legal departments, judges, and law schools to recognize symptoms of substance abuse and mental health problems, including suicide prevention and intervention. LAP presentations can be tailored specifically to managing officers, partners, and human resources to: discuss how LAP services assist in the early identification and treatment of afflicted attorneys; create strategies to improve lawyer wellbeing based upon recommendations for legal employers by the National Task Force on Lawyer Well-Being; and review the Model Policy for Law Firms addressing Impairment which was developed by the NYSBA LAP, and adopted by the Nassau County Bar Association.

LAP services include:

- Comprehensive assessment and evaluation.
- Crisis Intervention.
- Treatment planning.
- Professional and Peer Supportive Counseling.
- Case Management.
- Monitoring: LAP's Monitoring Program assists law school students, bar applicants, practicing attorneys, and suspended and disbarred attorneys seeking reinstatement to establish a history of rehabilitation and recovery.
- Referrals to expert treatment programs and professionals.
- Consultation to legal employers.
- Education and training to the bar and bench.

This crisis will end. We will eventually resume our lives with a new gratitude for all that we once took for granted, however some will still be struggling. Many attorneys will have lost jobs and lost clients, while others will be struggling to rebuild their practices. Law students set to graduate will be navigating uncertain futures. In addition to providing professional and peer support, the Lawyer Assistance Program will be here to help them make that transition. The LAP will be restarting its Un/Under Employment Support Group to assist attorneys who are struggling to find work, rebuild their practices, and network with other attorneys.

LAP and the Lawyer Assistance Committee are here to help you. Visit our website at nassaubar-lap.org. All communication with LAP and Lawyer Assistance Committee members is strictly confidential pursuant to Judiciary Law Section 499.

There is no shame in having a problem, but there is in doing nothing about it. Please call or email.

Beth Eckhardt, LCSW, PhD., LAP Director, (516) 512-2618, Helpline: 1-888-408-6222, eeckhardt@nassaubar.org

Henry E. Kruman, Chair, Lawyer Assistance Committee, (516) 697-2062, HenryKruman@Krumanlaw.com

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In Brief

Marian C. Rice

During this time of social distancing and working remotely, **Ronald Fatoullah** of Ronald Fatoullah & Associates, has been holding weekly "Dialogue and Discussion With The Attorneys," events to answer legal and financial questions during this challenging time. Mr. Fatoullah publicized the upcoming changes to Home Care Medicaid in New York State, effective October 1, and the firm has also partnered with other businesses to cover relevant topics such as the importance of completing the 2020 Census.

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

Virginia A. Kawochka, Administrator at Forchelli Deegan Terrana LLP ("FDT"), is a Co-Chair of the NCBA newly-introduced Legal Administrators Committee with **Dede S. Unger,** Firm Administrator at Barket Epstein Kearon Aldea & LoTurco, LLP. The NCBA Legal Administrators Committee provides a forum for these professionals to share information, learn about updates to HR and labor law, gain knowledge about topics relevant to their position and network with other administrators.

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

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

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

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

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

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Committee Reports

Construction Law

Meeting Date: April 14, 2020
Chair: Michael D. Ganz

The committee held a Zoom meeting in which COVID-19's impact on the construction industry and its legal practitioners was discussed, including the impact of NYS Executive Order 202.6 and its cessation of New York construction projects except those defined as essential or emergency non-essential projects. Also discussed were issues related to the stoppage of court functions, the filing of mechanic's liens, and discovery obligations.

Michael J. Langer

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

TEN TIPS ...

Continued From Page 3

Case issues dictate the selection of the expert. It is critical to keep in mind that traditional CPA forensic consultants will likely not practice extensively, if at all, in complex valuations. There is a crucial dichotomy amidst the alphabet soup of credentials for CPAs and non-CPA valuation consultants. Attorneys should press their own financial experts in screening the best fit for a case.

Address Asset Concerns Early On

Consideration of complex assets should begin as early as possible in a matrimonial action. The need for early detection may sound overly simplistic but too often is left until the eleventh hour. Advanced planning avoids a rushed decision based on delayed financial analysis and harried legal drafting. The proverbial speed test "to seal the deal" is not suited to a complex asset scenario.

Consideration of Distribution History and Regularity of Dividend Payouts

Assets with a distribution history tend to have less volatility, all other factors equal. Numerous empirical studies have highlighted how a regular distribution history minimizes price movements, or volatility, for public equities.[5] Dividends are also a sign of financial health and play a significant role in investment returns.

Certain complex assets also incorporate the dividend payout ratio in the valuation model of the asset itself. Complex assets, such as options and warrants, utilize the dividend pay-out in either the Black-Scholes Method or Binomial Method, two leading methods for valuing complex assets such as private options and warrants. A normalized dividend pay-out ratio is a critical variable in the analysis of these assets.

Payout ratio assumptions and volatility assumptions in the valuation of options and warrants should be scrutinized.

The Waterfall Structure/Read the Shareholders' Agreement

The current proliferation of technology companies and venture capital, coupled with the expansion of private equity in the last five to seven years, has fostered waterfall ownership structures inherent to certain investment types or industries. The ability of crowdsourcing to drive outside capital raises has also propelled more dilution of ownership. Waterfall ownership structures are multi-layered ownership tranches that feature a wide array of preferred equity, common equity, and debt. The arrangements are dominant in tech firms that are often deep in various share class investments but usually short on cash liquidity. Waterfall tranches often have warrants and options that are well junior to other securities. There is a need for a complete grasp of all capital tranches since the liquidation preferences of all the complex assets are interrelated.

An understanding of the priority of claims in analyzing where the spouse's interest resides within the capital deck is another factor for consideration. Valuators assist in analyzing the waterfall structure with a valuation procedure of reading the agreements and perform the spreadsheet buildout of the waterfall. Valuators refer to this work as a "situation scan" to help decipher if there is any value at all for investments in private businesses that have struggled or are overly diluted. Examples generally include money-losing tech companies where there are millions of out-of-the-money options, warrants, and other securities.

Nancy E. Gianakos is a partner at Reisman, Peirez, Reisman, Capobianco LLC in Garden City and may be reached at (516) 746-7799 or ngi-anakos@reismanpeirez.com.

Justin Kuczmarski, MBA, CPA, CVA, CIRA, ABV, CEIV, CFF is the President of NAV Valuation & Advisory LLC. NYC and may be reached at (212) 418-1234 or Justin@NAVvaluation.com.

1. 19 N.Y.3d 46 (2012).

2. International Glossary of Business Valuation Terms, Nat'l Assn. of Certified Valuators and Analysts (June 8, 2001), available at https://bit.ly/2XHXdku.

3. *Zelouf Intl.Corp v. Zelouf*, 47 Misc.3d 346 (Sup.Ct., N.Y. Co. 2014).

4. *Id. See* note 1. *Cf. Agranoff v. Miller*, 791 A.2d 880, 896 (Del. Ct. Chancery, New Castle Co. 2001).

5. Weil, Dan, Why Dividend Stocks Are Popular Again, *Wall Street Journal*, (Mar. 3, 2019), available at https://on.wsj.com/2RHzpJM.

CYBERHARASSMENT ...

Continued From Page 9

met, the victim could threaten exposure to legal liability, i.e., a lawsuit. Pursuant to copyright law, there is up to $150,000 in statutory money damages for each instance of willful infringement.

Most websites do not want to be involved in the conflict between two parties, or other civil lawsuits. As a result, when they are served with a takedown request, they will often delete the offending material. However, it must be recognized that takedown notices don't always work.

Order of Protection

Family Court in New York has jurisdiction to resolve disputes between co-parents, spouses, former romantic partners, and extended family members. The Family Court, Supreme Court and Criminal Courts all have concurrent jurisdiction to grant relief with regard to harassment and bullying in various forms. In all of these courts, victims can obtain orders of protection and stay away orders pursuant to New York statutes.[7] Harassment laws require the perpetrator to communicate with the victim in a way that is likely to cause "annoyance" or "alarm." A single text or image can constitute harassment. To be found guilty of stalking, the perpetrator must intentionally engage in a course of conduct that is likely to cause fear of some material harm.

The uploading of the image and the subsequent viral spread is akin to an ongoing or repetitive act. The Internet repeats the single act to the point where it is deemed harassment. If there is a violation of the order and it is reported to law enforcement, arrest and incarceration can result. Stalking and harassment (both online or offline) at the end of a romantic relationship can be dealt with by calling 911 and engaging with law enforcement, or by filing a petition in Family Court. Restraining orders can be issued if there are excessive texts or phone calls.

New Criminal Statutes Regarding Sexual Privacy and Revenge Porn

According to one survey, one in ten former partners threaten to post revenge porn, i.e., sexually explicit images of their exes online, and an estimated 60% of those follow through.[8] Up until recently, existing tort laws, like Family Court, copyright, harassment and privacy laws were not enough to combat revenge porn.

In July 2019, Governor Cuomo signed a statewide law providing relief for victims. This is the strongest law in the country to defend victims of hacking, leaking, and other online assaults, and it opens the door for removal of sexual images, in the same way as child pornography, obscenity, or copyright protected materials. In general, victims of revenge porn are not looking for tort law remedies of money damages and civil penalties. Most of them want the images to be removed forthwith. But the new law gives victims the ability to pursue civil cases too.

Images posted to social media or disseminated in other ways cause shame and embarrassment. Victims of revenge porn suffer humiliation and extreme emotional distress. In many cases, the fallout includes depression, job loss, and addiction.

Jacqueline Harounian, is a partner in Wisselman, Harounian & Associates in Great Neck. Her practice focuses on matrimonial and family law. She is Co-Chair of the Nassau Women's Bar Matrimonial Committee, and a member of the WBASNY statewide Domestic Violence Committee.

1. *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002).
2. 47 USC §230(c).
3. https://en.wikipedia.org/wiki/Cyberstalking.
4. *Id.*
5. 17 USC § 201 (2012).
6. https://bit.ly/3aXzBwb.
7. https://bit.ly/3c3ET9p.
8. https://www.apa.org/monitor/2014/01/jn.

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Long Island Business News is working tirelessly to keep our communities informed as the effects of COVID-19 continue to impact Long Island and our world.

However, no one works harder than the men and women on the front lines — our doctors, nurses, medical staff and first responders who risk their lives each day to protect our society. Thank you for your dedication to your craft and your community.

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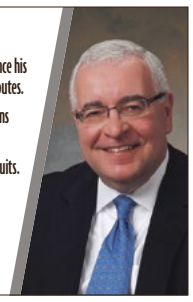

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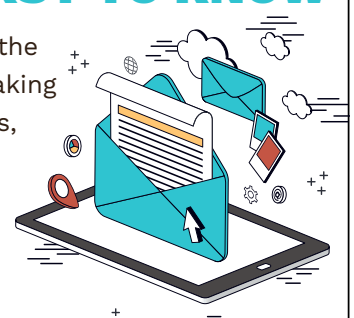

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