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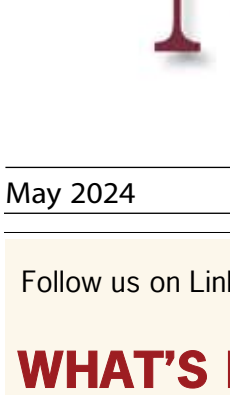
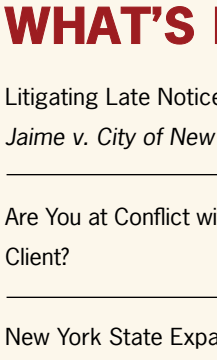
WHAT'S INSIDE

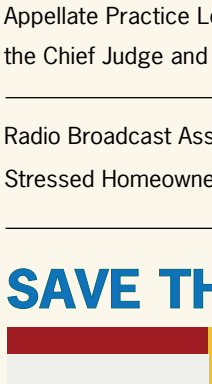
SAVE THE DATE



LAW DAY DINNER
THURSDAY, MAY 9
pg.12



ANNUAL MEETING
TUESDAY, MAY 14
Cover



INSTALLATION CEREMONY
TUESDAY, JUNE 4
See pg.15

WE CARE Fundraises to Help the Community

On March 21, 260 attorneys, judges, court staff and other WE CARE supporters filled Domus to attend Dressed to a Tea—Country Western Style. Guests enjoyed festive music, fun food and a shared goal to give back to the community. The highlight of the sold-out evening was the spirited fashion show. Dressed in cowboy hats and casual and formal attire, court clerks and court officers modeled spring fashions from Fox's of Mineola and Mur-Lees of Lynbrook clothing stores.

Guests also vied for raffle prizes, ranging from designer handbags to sporting and entertainment experiences.

Leading up to the event, WE CARE conducted a clothing drive to collect gently used clothing to donate to two local social service agencies, the EAC Network and the Interfaith Nutritional Network (INN).

The annual charity event is a collaboration between WE CARE and the Nassau County Women's Bar Association to raise money to fund scholarships and community grants to be distributed by the two organizations. This year's event raised $62,000 through sponsorships, ticket sales and the raffle. To learn more about WE CARE or to make a donation, visit www.thewecarefund.com.







Photos by Hector Herrera

FOR NCBA MEMBERS

NOTICE OF
NASSAU COUNTY BAR ASSOCIATION
ANNUAL MEETING

May 14, 2024 | 7:00 p.m.

Domus | 15th & West Streets | Mineola, NY 11501

Proxy statement will be sent by electronic means to the email address provided by the Member and posted on the Association's website. The Annual meeting will confirm the election of NCBA Officers, Directors, Nominating Committee members, and Nassau Academy of Law Officers.

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

Samuel J. Ferrara
Secretary

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Joseph R. Feehan	Andrew B. Seiken	Mary P. O'Reilly
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SESSIONS INCLUDE

Day 1

- Selecting the Right Cloud Infrastructure for the Family Office
- Litigating Trusts in Surrogate's Court
- New York State Income Tax Planning on the Sale of a Business
- Top 10 Simple Things Every Advisor Can Look For to See if Their Clients' Estate Planning is on Track
- Maximizing the Basis Step Up on Negative Capital Account Partnership Interests in Grantor Trusts
- Insights into the Current Trends of Guardianship Litigation
- Elder Abuse: Tackling Fraud in the Family

Day 2

- Navigating the Different Forms of Charitable Remainder Trusts and Using Trust to Defer the Gain on the Sale of an Asset
- Tax Professional Panel hosted by NCCPAP
- Using Installment Sales to Non-Grantor Trusts
- Taxation of Debt Restructuring, Workouts and Bankruptcy
- Hot Topics in Estate Planning
- 1031 Replacement Property Options
- Ethics: Tax Opinion Policies and Procedures

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From the President

Sanford Strenger

"Five hundred twenty-five thousand, six hundred minutes. Five hundred twenty-five thousand moments so dear. Five hundred twenty-five thousand, six hundred minutes. How do you measure, measure a year?" These lyrics from playwright Jonathan Larson's masterpiece Rent resound in my mind as write this, my last president's article for the *Nassau Lawyer*. This past year having the honor of serving as NCBA President has been filled with "Seasons of Love" for me as a result of all the support and caring I have received from so many within and outside our Association.

I wholeheartedly thank, my Executive Committee, Rosalia Baiamonte, Daniel Russo, James Joseph, Maxine Broderick and Sam Ferrara and our amazing Executive Director Elizabeth Post for the many hours, emails and texts exchanged between us, as we collaboratively worked to implement my vision for the NCBA this year, as well as addressing the multitude of day-to-day issues that arose in running an influential and the largest suburban bar association in the nation. From the special flowers which decorated the podium at my installation last year as a tribute to my recently deceased wife, to the sage wisdom and practical knowledge unselfishly shared, our EC was a family, and I will always cherish our bond of friendship.

This was a transformative year at the NCBA. New staff members in all of NCBA's many arms served in either their inaugural year or assumed their positions during the Bar year. We had Stephanie Ball pick up and run with the ball, energizing our already renowned Academy of Law. Madeline Mullane expanded our pro-bono efforts and, with her staff, made our Mortgage Foreclosure Program the program to emulate throughout the state. The work of Lindsay Boorman as Deputy Director of the Assigned Defender Plan, with Director Bob Nigro's extensive institutional knowledge, is heralding a new era in the NCBA providing indigent legal services, as a new electronic case management and payment system is implemented. Further, the ACDP worked with affinity bar associations to expand the diversity of our defender panel.

Through the leadership of Past President Baiamonte, our Lawyers Assistance Program received a needed infusion of funding. LAP Director Elizebeth Eckhardt and Committee Chair Daniel Strecker used this infusion to expand needed services by addition of staff and services. We kept the spotlight on LAP and the importance of properly funding it by not only running innovative fundraising but by NCBA Board of Directors passing a first in the state resolution calling for a permanent funding mechanism for LAP through the addition a minor $10 increase in the biannual attorney registration fee. The resolution was adopted by the Suffolk County Bar Association, and I brought it to the President of the NYS Bar Association. We met with and advocated to the top leadership of OCA—Chief Administrative Judge Zayas, his first deputy, Nassau's own, the Hon. Norman St. George, and the OCA Executive Director—the importance of fully funding LAP and obtained commitments from them to do so and to explore the Nassau call for statutory permanent funding of LAP. I must thank Deputy Administrative Judge of New York State Norman St George for his never-ending support this year.

Our long-serving staff, especially Stephanie Pagano, went above and beyond to make sure NCBA ran smoothly while new staff members were on boarded and existing staff were on leave. This past year the NCBA has focused internally on upgrading its technology. We have negotiated and are in the process of implementing an entirely new back-office database system that will greatly and efficiently expand NCBA's operations. Part of this upgrade will be a new website with enhanced payment processing and CLE capabilities. Stay tuned. We have heard our membership and are cognizant of the need for hybrid meeting options. New technology is on order to make the hybrid experience better. There are no thanks large enough for the efforts of Hector Herrara. He lovingly keeps Domus looking its best and is everywhere all at once.

I am very proud that Domus was so alive this year. There was terrific buzz of multiple meetings being held simultaneously and innovative programs being offered. I am especially proud that in September Domus hosted a first in the state day-long symposium on diverse legal issues faced by veterans. We brought together multiple stakeholder groups, educated them, and created networking opportunities. This successful program would not have been possible without Gary Port and Madline Mullane's efforts. A goal of my presidency was to place a focus on our supporting our veterans. Keeping with this focus, the keynote speaker of our symposium, State Commissioner of Veteran Services, Vivian DeCohen, will be the Liberty Bell Award recipient this Law Day on May 9.

Domus had the honor of hosting NYS' new Chief Judge Rowan Wilson twice! He was keynote speaker and lectured at an Academy program on appellate advocacy in criminal matters held at Domus and broadcasted to legal aid attorneys throughout the state. He also provided the keynote address at our Pro Bono recognition event. NCBA's Access to Justice efforts were unparalleled this year and I thank Justice Conrad Singer, James Joseph, and Madeline Mullane for their leadership.

I must thank Nassau County's outstanding judiciary for their support of our Association this past year. Administrative Judge Vito DeStefano was a regular speaker at Domus and always an advocate for our members, as were other administrative judges and our Nassau County Surrogate. NCBA is very lucky to have a judiciary who are not only learned but are supportive and engaged with this Association. I had the privilege to be included and speak as a representative of this Association at many events in the courthouse. I am thankful for those opportunities, especially the chance to speak at the court's Holocaust Remembrance Day. This year saw a rise in antisemitic and other hate directed at religious and ethnic groups. I am proud it did not permeate our walls and that this Association took stands to help address this hate. Our Diversity & Inclusion Committee held meaningful programs. We actively partnered with the Legal Aid Society, the Safe Center, and Nassau Suffolk Legal Services. Our community outreach was phenomenal, thanks to Ira Slavit and others. NCBA was recognized with an award by The Safe Center for its community efforts.

We also conducted outreach to the area law schools and supported mentoring programs and competitions at all educational levels. 48 diverse local high school teams were engaged in NCBA's HS Mock Trial competition. I had the pleasure of judging in this competition and was inspired by the students.

A prime theme of my presidency this Bar year was for it to be a year of member engagement. The efforts of so many made the fulfillment of this goal possible. I thank Past President Greg Lisi for spearheading monthly networking events. BBQ at the Bar, Holiday Party, and other events were re-envisioned and well attended. By the time this issue of the *Nassau Lawyer* is in circulation we will have had our re-envisioned Dinner Gala at the Cradle of Aviation Museum. NCBA is also starting its celebration of its 125th anniversary. We held a fun and well attended kickoff gameshow night. I thank the 125th Committee led by President Elect Dan Russo for their efforts and look forward the continuing celebration culminating in November's event.

The inaugural year of our Asian American Attorney Section has been a triumph. The Lunar New Year Celebration was a historic event and I thank Jennifer Koo and her committee, especially Byron Chou. NCBA has also reached out to the affinity bars and run joint programs strengthening our ties. There were so many amazing programs put on by our 52 Committees. I thank the Chairs and committees for making

NCBA the association looked up to throughout the nation.

I would be remiss if I did not thank Micheal Ratner and the Academy of Law for the multitude and innovative CLEs that occurred this year which thousands attended. NCBA is one Bar and our Board of Directors also serve as the Directors of the Assigned Defender Plan, the Academy of Law and members of our Foundation. I thank each of my directors for your service, support, and friendship this past year. We tackled important issues and did so collaboratively. Each of NCBA Past Presidents always made themselves available to me and I thank each of you for your help and guidance. Peter Levy and Peter Mancuso, I could not have navigated this year with your sage support, thank you.

Being one Bar includes the Nassau Bar Foundation and the incredible WE CARE Fund. I attended the WE CARE Advisory Board meetings and was continually in awe of the efforts of its members in raising funds and their diligence in providing grants to worthy nonprofits who desperately need support. The events run by WE CARE—from the golf outing to Dressed to a Tea, to Las Vegas Night—brought vitality to the Bar. Thank you Joseph LoPiccolo and Jeffrey Catterson for your leadership and each of the Advisory Board Members, both attorneys and layman, for your support of this worthy cause.

Thank you to my partners, Micheal Blaymore, Craig Gruber and the staff of our small law firm for your unwavering support this past year as I attended to my duties at NCBA.

So, how do I measure this past year. To return to Mr. Lason's words: "In daylights, in sunset, in midnights, in cups of coffee, in inches, in miles, in laughter, in strife . . .", I measured it in friendships, warm moments, in standing shoulder to shoulder with caring individuals, it has been seasons of love and I humbly thank you for this opportunity and look forward to continue seeing you at Domus as we strive to provide access to justice and support our legal colleagues and the Nassau County community for the next 125 years and beyond.

FOCUS: LITIGATION

Litigating Late Notice of Claim After *Jaime v. City of New York*

Christopher J. DelliCarpini

In *Jaime v. City of New York*, the Court of Appeals recently held that just because public employees intentionally injured someone does not mean that their employer has "actual knowledge" of their malfeasance—a critical factor in any application for leave to serve a late notice of claim against that employer.[1]

This may seem to raise the bar for such applications to an absurd degree; how does an employer know anything but through its employees? A closer look at the facts and reasoning in *Jaime*, however, reveals valuable guidance for counsel litigating either side of an application for late notice of claim.

Late Notice of Claim and "Actual Knowledge"

The right to sue the state and any municipality is defined by statute. No such right existed at common law, as Justice Cardozo observed: "[t]he state is not liable for the torts of its agents and contractors unless such liability has been assumed."[2] But the Court of Claims Act and the General Municipal Law (GML) created that right and defined it, as the court had previously observed: "[w]ith the State's waiver of sovereign immunity and subsequent interpretation extending that waiver to all civil divisions of the State, the Legislature saw fit to enact limitations on time and procedure for maintaining actions against the government."[3]

The statutes that permit claims against municipalities also require service of a notice of claim. General Municipal Law § 50-i(1) provides that no one may bring a personal injury claim against "a city, county, town, village, fire district or school district" without having: (1) served a notice of claim: (2) pleaded that service was made and that the claim has not been settled; and (3) sued within one year and 90 days, or two years for wrongful death claims.[4] As the court explained in *Jaime*, the purpose of the notice of claim is to enable the municipality to "promptly investigate and preserve any relevant evidence."[5]

Plaintiffs must serve the notice of claim within 90 days after the claim arises, but the GML also authorizes the courts to grant extensions. General Municipal Law § 50-e(1) imposes the 90-day deadline, but Section 50-e(5) provides that, upon application, courts may in their discretion extend the time to serve notice of claim up to the statutory limitations period.

When considering applications for leave to serve late notice of claim, courts are to consider "all other relevant facts and circumstances" and Section 50-e(5) lists several of them, but one consideration is primary:

> [i]n determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one of this section or within a reasonable time thereafter.

Jaime: Actual Knowledge Must Be Proven, Not Presumed

In *Jaime*, the court also decided *Orozco v. City of New York*, which raised similar questions of what an injured person must do to show "actual knowledge."

Orozco began in July 2020, when Adan Orozco petitioned for leave to serve late notice of claim, alleging false arrest and imprisonment among other torts occurring "on or about" August 13, 2018, though the charges were dismissed and he was released in December of that year.[6] As to actual knowledge, he argued: "[a] municipality, like the City of New York, necessarily acquires notice of any event through its employees, as the City, itself, is considered a person capable of being sued through a legal fiction and is obviously incapable of acquiring notice of any event."

Orozco succeeded in the trial court and before the Appellate Division. In a lengthy decision, Justice Dakota Ramseur of New York County Supreme Court granted the petition: "[W]here the police department conducted an extensive investigation in which the District Attorney's Office joined, knowledge of the essential facts constituting the claims within the statutory period can be imputed to the City."[7] The First Department affirmed, holding that actual knowledge is presumed where "[the City's] employees participated and were directly involved in the conduct giving rising to petitioner's claims and are in possession of records and documents relating to the incident."[8]

Jaime began in May 2021, when Luis Jaime filed his petition based on alleged assaults by corrections officers at Rikers Island between June 2019 and October 2020.[9] Represented by the same attorney as Orozco, he made largely identical arguments, including that "[r]espondent City cannot dispute its acquisition of the knowledge of the essential facts, because Petitioner's claims are predicated directly upon the intentional and unlawful acts of respondent's employee corrections officers."

Jaime also succeeded in the trial court and on appeal. Kings County Supreme Court granted the petition,[10] and the First Department affirmed, citing *Orozco* and holding: "[r]espondent's claimed lack of actual knowledge is refuted by the fact that the officers who allegedly assaulted petitioner or witnessed the incidents would, as respondent's employees, have had immediate knowledge of the events giving rise to this dispute."[11]

The Court of Appeals granted the City leave to appeal and reversed in both cases, holding that the trial courts abused their discretion.

The court first clarified whose knowledge would constitute actual knowledge: "[g]enerally, knowledge of essential facts as to time and place by an actor in a position to investigate will suffice."[12] Imputing actual knowledge in every intentional tort would undermine the purpose of notices of claim, the court held, "because not every employee's knowledge will necessarily afford the municipality an opportunity to commence a prompt investigation."[13] The court also held that "mere possession or creation of... records does not ipso facto establish... 'actual knowledge.'"[14]

Whether a qualifying employee had that knowledge is a fact-specific inquiry, but the court held that granting leave was an abuse of discretion here because neither Jaime nor Orozco offered any evidence that anyone in a position to investigate had knowledge.

Orozco's petition was unsupported by evidence, not even an affidavit from him. The petition was verified by his attorney, but a verified pleading "has evidentiary value only if the verifier has personal knowledge of the facts."[15] Jaime offered copies of grievances that he had filed while detained at Rikers Island—but none of them had anything to do with the incidents alleged in his multiple proposed notices of claim.[16]

"Without any competent evidence," the court held, "the trial court was unable to undertake a fact-specific inquiry into whether the City acquired actual knowledge through any of its employees."[17] The court also accepted no excuses for this lack of evidence. Orozco could have sought the City's records by serving with his petition a notice under CPLR 409(a). And if, as Jaime alleged, he

complained in the infirmary after his assault or feared retaliation were he to complain, he could have said as much in an affidavit.

The court reversed rather than remand either case, as Orozco offered absolutely no evidence to support a grant of leave to serve late notice of claim, and even Jaime's excuses, if proved, "would not by itself support a discretionary extension of time."[18]

Judge Rivera concurred as to Orozco but dissented as to Jaime, who "alleged that his post-assault treatment at the Rikers infirmary generated medical reports regarding his injuries, which are in the City's possession" and who identified the responsible officers. This, she found, "supports a conclusion that the City had actual knowledge."[19]

Proving Prima Facie Actual Knowledge

To be sure, *Jaime* makes it harder to show actual knowledge than had the court adopted the "per se rule" of the First Department.[20] But the decision does offer considerable guidance on how to meet this burden.

The first lesson is that petitioners must offer some proof to support the exercise of judicial discretion in their favor. This absence of evidence led the court to not just reverse, but to deny remand; what would the trial courts review on a second go-round?

Jaime later explains that a person seeking leave to serve late notice of claim before commencing an action must do so in special proceeding under CPLR Article 4, where "the court applies settled summary judgment standards."[21] The court later suggests how Orozco might have met that burden here:

> The evidence of actual knowledge need not be exhaustive, provided the petitioner meets the applicable evidentiary burden. Orozco might have submitted his own affidavit, copies of papers that her filed in the underlying criminal proceeding, decisions of the criminal court, or other relevant evidence.

Thus *Jaime* suggests that an affirmation from the petitioner might even suffice.[22] Even if these petitioners did not know whose knowledge they had to prove to meet their burden, testimony as to who knew what might have given some reason to remand for further findings. As Judge Rivera commented, "[h]ere, under the majority's analysis, all that may have been missing was a declaration from Jaime that he told the infirmary staff that his injuries were caused by a corrections office."[23]

Jaime also suggests that a petitioner can proceed without waiting for the municipality to produce records. The court conceded that "the contents of records in a municipality's possession may sometimes be sufficient to demonstrate that a municipality acquired actual knowledge of the essential facts constituting the claim within a reasonable time."[24] But the court also indicated that "If papers 'necessary to consideration of the questions involved' are in the possession of the municipality, the petitioner may demand the papers produced by serving a notice with the petition" under CPLR 409(a).[25]

This might be particularly useful when the claims sound in medical malpractice or other unintentional torts. Rather than wait for a response to a HIPAA of FOIL request, petitioners could commence their special proceeding with their own affirmation and what proof they have on-hand. What will be particularly important, however, is a factual basis for identifying the relevant documents in the municipality's possession—and again, an affirmation from the petitioner would be better than nothing.

Jaime may set the standard for actual knowledge higher than we understood it to be, but it has set this standard clearly. An affirmation of counsel clearly will not suffice, but an affirmation from the petitioner with sufficient detail and all available documentary evidence might do the trick. Furthermore, the unavailability of documents in the municipality's possession is no reason to delay the application.

1. ___ N.Y.___, 2024 N.Y. Slip Op. 01581, 2024 N.Y. LEXIS 406 (Mar. 21, 2024).
2. *See Murtha v New York Homeopathic Med. Coll. & Flower Hosp.*, 228 N.Y. 183, 185 (1920).
3. *Bender v. NYCHHC*, 38 N.Y.2d 662, 667 (1976).
4. Exceptions apply for 9/11-related claims, *see* GML § 50-i(4), and for conduct constituting certain sex crimes against children, *see* GML § 50-i(5).
5. 2024 N.Y. LEXIS 406 at *8.
6. *Orozco v. City of New York*, 155631/2020 (Sup.Ct., N.Y. Co.), NYSCEF 1.
7. *Orozco*, 155631/2020, NYSCEF 8 at 4 (quoting *Grullon v. City of New York*, 222 A.D.2d 257, 258 (1st Dept 1995)).
8. *Orozco v. City of New York*, 200 A.D.3d 559, 560 (1st Dep't 2021).
9. *Jaime v. City of New York*, 806290/2021E (Sup.Ct., Bronx Co.), NYSCEF 1.
10. *Jaime*, 806290/2021E, NYSCEF 12.
11. *Jaime v. City of New York*, 205 A.D.3d 544 (1st Dep't 2022).
12. *Jaime*, 2024 N.Y. LEXIS 406 at *10.
13. *Id.*
14. *Jaime*, 2024 N.Y. LEXIS 406 at *10 (quoting *Wally G. v. NYCHHC*, 27 N.Y.3d 672, 677 (2016)).
15. *Jaime*, 2024 N.Y. LEXIS 406 at *13.
16. *Id.* at *17.
17. *Id.* at *13.
18. *Id.* at *19.
19. *Id.* at *26 (Rivera, J., dissenting in part).
20. *Id.* at *20–21 (Rivera, J., dissenting in part).
21. *Id.* at *12.
22. Of course, no one need submit an affidavit any more, when an affirmation is just as acceptable. *See* CPLR § 2106.
23. Jaime, 2024 N.Y. LEXIS 406 at *27 (Rivera, J., dissenting in part).
24. *Id.* at *10.
25. *Id.* at *12.

Christopher J. DelliCarpini is an attorney with Sullivan Papain Block McManus Coffinas & Cannavo PC in Garden City, representing plaintiffs on appeal in personal injury matters. He is also an Assistant Dean of the Nassau Academy of Law. He can be reached at cdellicarpini@triallaw1.com.

FOCUS: CONFLICT OF INTEREST

Are You at Conflict with Your Client?

Cynthia A. Augello

After practicing law in the same area for many years, conflicts of interest issues inevitably arise. Some conflicts are obvious while some are less obvious. Some conflicts are waivable while some are not. The legal system hinges on trust. Clients entrust lawyers with sensitive information and rely on their undivided loyalty to achieve the best possible outcome.

Conflict of interest rules are the bedrock of maintaining this trust, ensuring lawyers prioritize client interests and avoid situations that could compromise their judgment. Regardless, conflicts of interest are a serious ethical issue that can cost an attorney a lot more than a client if they are not careful. This article delves into the intricacies of lawyer conflict of interest rules in New York, providing a comprehensive guide for lawyers and clients alike.

What Is a Conflict?

Generally, a lawyer cannot handle a matter if it creates a situation where the attorney's judgment could be clouded, or they may be tempted to utilize confidential information from one client to benefit another. Conflicts can occur between two or more current clients, between a current and former client or imputed conflicts where one lawyer in a firm has a conflict and it spreads to the entire firm in certain circumstances.

As to current clients, a conflict exists if a lawyer represents clients with opposing interests in the same or a similar matter. Where former clients are involved, a lawyer generally cannot take a case against a former client if it involves confidential information learned during the previous representation. Here, there are some exceptions, but informed written consent from the former client is required.

In the situation where one lawyer in a firm has a conflict, it can be imputed to the entire firm, depending on the circumstances. There are ways to address this issue, such as creating a barrier between the conflicted lawyer and the rest of the firm, but it requires careful consideration.

The Rulebook: New York Rules of Professional Conduct

The primary source for guidance concerning conflicts of interest in New York is the New York Rules of Professional Conduct (NYRPC). Rule 1.7, titled "Conflict of Interest: Current Clients," lays the foundation.[1] It prohibits lawyers from representing clients with "differing interests," where the lawyer's judgment on behalf of one client could be adversely affected by their representation of the other.

The rule outlines various scenarios that could constitute a conflict, including:

- Directly Opposing Interests: Representing a plaintiff and defendant in the same lawsuit is a clear conflict.
- Material Limitations: If a lawyer's loyalty to one client might limit their ability to zealously advocate for another, a conflict exists.
- Confidential Information Risk: When representing multiple clients and there's a chance confidential information from one could be used to the advantage of another, it's a conflict.

Rule 1.9, "Conflict of Interest: Former Client," addresses situations involving past clients. It restricts lawyers from taking a case against a former client if it involves "confidential information" learned during the previous representation.[2] This rule protects sensitive client information and prevents its misuse against the former client.

Any attorney unsure about whether a potential conflict exists, it is always best to consult with the New York State Bar Association ("NYSBA") or another ethics expert.

There Is a Conflict, Now What?

The lawyer-client relationship thrives on trust and undivided loyalty. However, situations arise where a potential conflict of interest might impede this ideal. While the NYRPC establishes clear boundaries, there are exceptions that allow for representation despite potential conflicts. This is where conflict waivers enter the picture.

Conflict waivers are a complex tool in the lawyer's ethical toolbox. While they can offer a way to proceed with representation in certain situations, they should be used with caution and only after careful consideration of the ethical implications. Open communication, informed client consent, and a commitment to client protection are paramount.

Attorneys must navigate a tightrope between client needs and the ethical boundaries established by the NYRPC. By understanding both the conflict-of-interest rules and the nuances of conflict waivers, lawyers can make informed decisions that uphold the integrity of the legal profession and safeguard the trust of their clients.

The Power (and Peril) of Conflict Waivers

A conflict waiver, also known as a conflict-of-interest waiver, is a written document where a client consents to a lawyer's representation despite a potential conflict. However, for a waiver to be valid, specific conditions must be met.[3]

- Full Disclosure: The lawyer must disclose all relevant information about the conflict, including its nature, potential consequences, and the availability of alternative representation. This ensures the client makes an informed decision.
- Client Understanding: The client must demonstrate an understanding of the implications of the waiver, including the potential risks to their case. Clear and concise language with ample opportunity for questions is crucial.
- Voluntary Consent: The client's consent must be voluntary and without coercion. The lawyer cannot pressure the client to waive their conflict rights.

Types of Conflict Waivers

There are three main types of conflict waivers in New York.[4]

- Specific Waivers: These waivers target a specific conflict, clearly outlining the nature of the potential issue and the client's consent to proceed.
- Blanket Waivers: These waivers cover all future conflicts that are not "substantially related" to the current matter. Their broad scope requires careful consideration and may not be enforceable in all situations.
- Substantially Related Waivers: These waivers attempt to waive future conflicts that are "substantially related" to the current matter. The enforceability

of such waivers is highly contested and generally discouraged due to potential ethical concerns.

Ethical Considerations and Limitations

While conflict waivers offer a potential solution, they are not a magic bullet. Ethical considerations and limitations abound:

- Lawyer's Independent Judgment: Can the lawyer maintain independent judgment despite the potential conflict?
- Client Protection: Does the waiver truly protect the client's best interests, or does it prioritize the lawyer's convenience?
- Future Conflicts: Can a client effectively waive their rights to challenge future, unforeseen conflicts?
- Unequal Bargaining Power: Clients may feel pressured to waive conflicts due to the lawyer's superior knowledge and position of power.

These concerns highlight the importance of ethical practice. Lawyers should only seek waivers when they believe they can competently represent all clients involved and the waiver truly protects client interests.[5]

When Waivers Might Be Inappropriate

There are situations where conflict waivers might be inappropriate or unenforceable[6]:

- Substantial Conflict: If the conflict is so severe that it compromises the lawyer's ability to provide competent representation, a waiver likely won't be sufficient.
- Former Client Information: A waiver cannot waive a former client's right to prevent the use of confidential information they shared with the lawyer in a prior representation.
- Client Misunderstanding: If the client doesn't fully understand the conflict or its implications, the waiver may be invalidated.

In such instances, declining representation or seeking client consent to withdraw may be the most ethical course of action.

The Role of the New York State Bar Association

The New York State Bar Association (NYSBA) provides guidance and ethical opinions on conflict waivers. These opinions offer valuable insights, but they are not binding legal precedent. It is crucial for lawyers to consult the NYRPC and relevant case law when assessing the validity and appropriateness of a conflict waiver.

Practical Considerations for Using Waivers

If a lawyer decides to pursue a conflict waiver, certain steps should be taken to ensure compliance with the applicable rules.

- Drafting the Waiver: The waiver document should be drafted in clear and concise language, avoiding legal jargon. It should explicitly outline the nature of the conflict, the client's consent to proceed despite the conflict, and an acknowledgment of the potential risks involved.
- Client Consultation: The lawyer should engage in a thorough consultation with the client, explaining the conflict, the purpose of the waiver, and answering any questions the client may have.
- Independent Counsel: In some cases, it might be advisable for the client to seek independent legal counsel to review the waiver before signing. This can help ensure the client understands the implications and has the opportunity to make an informed decision.
- Maintaining Documentation: The lawyer should retain a signed copy of the waiver in their client file for future reference.

Alternatives to Conflict Waivers

In certain situations, alternatives to conflict waivers might be preferable:

- Referral to Another Lawyer: If the potential conflict is significant, referring the client to another lawyer with no conflict may be the most ethical course of action.
- Screening Mechanisms: In some circumstances, law firms may implement screening mechanisms to isolate a conflicted lawyer from the rest of the team working on the case. However, these mechanisms require strict adherence to ethical guidelines and may not be appropriate in all situations.
- Client Decision-Making Power: Ultimately, the decision of whether to proceed with representation despite a conflict rests with the client. Lawyers should empower clients by providing clear information and respecting their informed decisions.

The choice between using a conflict waiver or exploring alternative solutions requires careful consideration of the specific situation, the potential risks involved, and the best interests of all parties.

Consequences of Ignoring Conflicts: Why They Matter

Ignoring a conflict of interest can have severe consequences for lawyers. Potential repercussions include:

- Disciplinary Action: The NYSBA can impose sanctions ranging from reprimands to disbarment for ethical violations, including conflicts of interest.
- Malpractice Lawsuits: Clients who suffer harm due to a lawyer's conflict-related negligence may file malpractice lawsuits seeking damages.
- Reputational Damage: Ethical violations can severely damage a lawyer's reputation, making it difficult to attract and retain clients.

These consequences highlight the importance of scrupulously adhering to the conflict of interest rules. When in doubt, seeking guidance from ethics experts within the NYSBA or consulting experienced legal colleagues is paramount.

Beyond the Rules: Maintaining Ethical Client Relationships

While the NYRPC serves as the legal framework, maintaining ethical client relationships goes beyond simply following the rules. Here are some additional best practices:

- Open Communication: Fostering open communication with clients about potential conflicts builds trust and allows for informed decision-making.
- Declining Representation: When a conflict arises, declining representation might be the most ethical course of action, even if the client consents to continued representation.
- Maintaining Confidentiality: Maintaining strict confidentiality practices within the firm further minimizes the risk of an ethical breach.

Conflict Beyond Representation: Business Transactions and Lawyer Self-Interest

The NYRPC extends its reach beyond direct client representation. It also governs situations where a lawyer's personal or business interests could conflict with their professional duties.[7]

- Business Transactions with Clients: Lawyers must avoid business transactions with clients unless the transaction is fair and reasonable, and the client is advised to seek independent legal counsel. This protects clients from potentially exploitative situations.
- Gifts from Clients: While small gifts are generally permissible, lawyers should be cautious of accepting anything that could create an appearance of impropriety or undue influence by the client.
- Lawyer as Witness: Lawyers should not act as both advocate and witness in the same case. This creates a conflict as it potentially limits their ability to zealously advocate for their client.

Emerging Issues and the Evolving Landscape

The legal profession is constantly evolving, and new conflict of interest issues are continually emerging. Here are some areas to watch:

- Technology and Information Sharing: The rise of cloud computing and electronic communication necessitates robust data security protocols to prevent inadvertent disclosure of confidential client information.
- Social Media: Lawyers must navigate the potential conflicts that arise when interacting with clients or potential clients on social media platforms.
- Multijurisdictional Practice: Lawyers practicing in multiple jurisdictions must be mindful of the potential for conflicts arising from differing ethical rules across jurisdictions.

Staying informed about these evolving areas is crucial for lawyers to maintain ethical compliance.

Safeguarding Trust Through Vigilance

Lawyer conflict of interest rules in New York form a vital safeguard for the attorney-client relationship. By understanding the NYRPC, navigating exceptions with informed consent, and adhering to best practices, lawyers can maintain ethical conduct and prioritize client trust. Ultimately, a commitment to vigilance and ethical practice ensures that the legal system remains a fair and just forum for all.

1. https://www.nycourts.gov/legacypdfs/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

Cynthia A. Augello is the founding member of the Augello Law Group, PC, where she practices Education Law. She is also the Editor-in-Chief of the *Nassau Lawyer* and Chair of the NCBA Publication's Committee. Cynthia can be contacted at caugello@augellolaw.com.

FOCUS:
LABOR AND EMPLOYMENT

New York State Expands Protections for Job Applicants, Employees, and Freelance Workers

Seema Rambaran

Late in 2023, New York State saw an influx of laws that strengthened labor and employment protections for job applicants, employees, and freelance workers. These changes include: (1) an amendment to the New York Labor Law ("NYLL") § 201 to include the social media privacy law (the "Law") and (2) the enactment of the Freelance Isn't Free Act (the "Act"). Both laws are effective in 2024 and require immediate employer attention to secure compliance.

Social Media Protections for Employees and Applicants

Under Article 7 of the NYLL, effective March 12, 2024, employers are now prohibited from asking employees or applicants to (1) provide login details or other access information for "personal [social media] accounts," (2) access those accounts in the employer's presence, or (3) reproduce photographs, video, or other information from those accounts.[1] The only employers not covered by the Law are law enforcement agencies, fire departments, and department of corrections and community supervision.[2]

The Law defines a "personal account" as "an account or profile on an electronic medium where users may create, share, and view user-generated content, including uploading or downloading videos or still photographs, blogs, video blogs, podcasts, instant messages, or internet website profiles or locations that is used by an employee or an applicant exclusively for personal purposes."[3]

Prior to the enactment of the Law, New York State law did not prevent employers from requesting or requiring an employee or applicant to disclose login information for the employee or applicant's personal social media account. As such, some company policies governing social media, permitted the employer to require, as a condition of employment, that an employee disclose login information to personal social media accounts, such as X, Facebook, and Instagram.

However, employers may have been deterred from doing so based on state discrimination and retaliation laws which essentially prohibit discrimination and retaliation against an employee for an employee's membership in a protected class—information easily gleaned from an applicant or employee's personal social media account. Further, employers were likely dissuaded from doing so based upon the provisions of NYLL § 201-D, which prohibits an employer from discriminating or retaliating against an employee based upon their off-duty activities—so long as such activities were lawful.

Retaliation is strictly prohibited by the Law—that is, an employer may not terminate, discipline, penalize or threaten to do same if an employee refuses to disclose any information specified in the Law related to an employee's personal social media account.[4] Similarly, an employer may not refuse to hire or fail to hire any job applicant simply because an applicant refuses to disclose such information.[5]

Not surprisingly, the Law recognizes and codifies that an employer still owns access to (1) any nonpersonal accounts issued to employees that provide access to an employer's internal computer or information system and (2) any electronic communication devices that an employer pays for but permits an employee to use for business purposes.[6]

The Law does not prohibit an employer from requiring employees to disclose access information for an account provided by the employer that is used for business purposes ("employer accounts") or an account known to an employer to be used for business purposes (i.e. a company's LinkedIn account).[7] Also, employers may take action necessary to comply with a court order.[8] Some of the law's exceptions require prior notification to the employee and/or agreement by the employee.[9]

The Law provides employees and job applicants with a private right of action. However, an employer may assert as an affirmative defense to such action that the employer acted to comply with requirements of federal, state, or local law.[10] For example, as it relates to broker-dealers, where the Financial Industry Regulatory Authority ("FINRA") requires firms to monitor registered representatives' social media posts, including posts made on personal social media accounts where those posts may be viewed as offering investment advice, arguably, an employer accused of violating the new social media privacy law may have an affirmative defense to such monitoring.[11] Given the newness of the law, it is yet to be seen how courts will interpret this provision.

Freelance Isn't Free Act

Effective August 28, 2024, the Act provides certain independent contractors with contractual protections in the State, similar to those already afforded to freelancers under New York City law. "Freelance worker" is defined, in part, as "any natural person or organization composed of no more than one natural person, whether or not incorporated or employing a trade name, that is hired or retained as an independent contractor by a hiring party…"[12]

Thus, the Act aims to protect freelancers operating in the form of a one-person shop. However, this could raise issues for companies that hire individual freelancers operating as a limited liability company or under a trade name where the freelance worker does not disclose that he/she is actually a one-person operation. The definition excludes construction contractors, licensed medical professionals, sales representatives under Labor Law § 191-a, or attorneys or any person engaged in the practice of law.[13]

The Act defines "hiring party" as any person or entity (other than a federal, state, or municipal governmental agency or authority) that retains a freelance worker to provide any service.[14] Under the Act, freelance workers (1) paid a minimum of $800 on a single project or (2) who have provided multiple services to the hiring party within a 120-day period equal to or exceeding $800 in the aggregate, are entitled to a written contract.[15]

The law details some of the required information in such contract, which includes (1) the parties' names

and mailing addresses, (2) itemization and value of services rendered, (3) the rate, method, and date of compensation (or how the date of compensation will be determined); and (4) the date by which the freelance worker must provide a list of services rendered to be compensated.[16] Such contract must be retained by the hiring party for at least six years.[17] Failure to do so, could result in significant monetary implications.

In addition, the Act also entitles freelance workers to timely payment of compensation in full. Specifically, freelance workers must be paid on or before the date when payment is due under the terms of the written contract, but no later than 30 days after the completion of the freelancer's services.[18] The Act does not provide further guidance as it relates to when a freelancer's services may in fact be completed. As such, a hiring party may want to consider including in any written contract more information related to a freelance worker's date of completion of services. Freelance workers are also now protected against unlawful discrimination, harassment, retaliation, intimidation, discipline, or denial of opportunity.[19]

Action against a hiring party for failure to comply with the Act may be initiated in several ways and may be prosecuted concomitantly. Freelancers who believe that a hiring party may have violated the Act may file a complaint with the New York State Department of Labor ("DOL").[20] The DOL has jurisdiction to investigate such complaint and, if appropriate, assess civil and criminal penalties against the hiring party.[21]

Freelancers also have a private right of action under the Act for a hiring party's failure to provide a written contract, non-payment, and/or retaliation, which, if a freelance worker prevails, may entitle such worker to damages.[22] For example, a successful action in which a freelancer proves a hiring party's failure to enter into a written contract may result in nominal statutory damages of $250.[23] However, in an action for a hiring party's failure to provide a contract and non-payment under the contract, a prevailing freelancer may be entitled to the amount owed under the contract, double damages, injunctive relief, attorneys' fees, costs, and other such remedies, as may be appropriate.[24] Where a hiring party is believed to be engaged in a pattern or practice of violation of the Act, the NYS Attorney General may commence an action on behalf of the state.[25]

Notably, the Act contains a two-year statute of limitations on claims related to a hiring party's failure to provide or comply with the Act's requirements related to a written contract.[26] The Act also contains a separate six-year statute of limitations on claims related to a hiring party's failure to provide compensation and on retaliation, discrimination, and/or harassment claims.[27]

Employer Next Steps

What should employers do to ensure compliance with these new laws? Employers should review policies and update their practices accordingly. Employers should also provide training to managers on implementation of these new laws and update internal applicant, employee, and/or freelance worker templates that touch on the issues raised in these new laws.

As it relates to the social media privacy law specifically, employers may want to implement a routine program for monitoring internal hiring and recruitment procedures to ensure compliance with the Law. In relation to the use of freelancers, employers may want to draft a template contract consistent with the new law as well as develop records retention policies for maintenance of signed contracts that align with the six-year record keeping requirement.

Ultimately, employers should mark their calendars, prepare to address issues that may arise under these new laws, and keep an eye out for relevant DOL guidance.

1. N.Y. Lab. Law §§ 201-i2(a)(i) – (iii).
2. N.Y. Lab. Law § 201-i(6).
3. N.Y. Lab. Law § 201-i(d).
4. N.Y. Lab. Law § 201-i(3)(a).
5. N.Y. Lab. Law § 201-i(3)(b).
6. N.Y. Lab. Law § 201-i(2)(b); see also N.Y. Lab. Law § 201-i(5)(a)(i).
7. N.Y. Lab. Law § 201-i(5)(a)(ii) - (iv).
8. N.Y. Lab. Law § 201-i(5)(a)(iv).
9. N.Y. Lab. Law § 201-i.
10. N.Y. Lab. Law § 201-i(4).
11. N.Y. Lab. Law § 201-i(5)(b).
12. N.Y. Lab. Law § 191-d(c).
13. N.Y. Lab. Law § 191-d(c).
14. N.Y. Lab. Law § 191-d(d).
15. N.Y. Lab. Law § 191-d(c).
16. N.Y. Lab. Law § 191-d(3)(a).
17. N.Y. Lab. Law § 191-d(3)(d).
18. N.Y. Lab. Law § 191-d(3)(a)(iv); N.Y. Lab. Law § 191-d(2)(a)(ii).
19. N.Y. Lab. Law § 191-d(4).
20. N.Y. Lab. Law § 191-d(5)(a).
21. N.Y. Lab. Law § 191-d(5)(b).
22. N.Y. Lab. Law § 191-d(7)(a).
23. N.Y. Lab. Law § 191-d(7)(b)(i) and (v).
24. N.Y. Lab. Law § 191-d(7)(b)(ii)(B).
25. N.Y. Lab. Law § 191-d(3)(d).
26. N.Y. Lab. Law § 191-d(8)(a)(i).
27. N.Y. Lab. Law § 191-d(7)(b)(iv).

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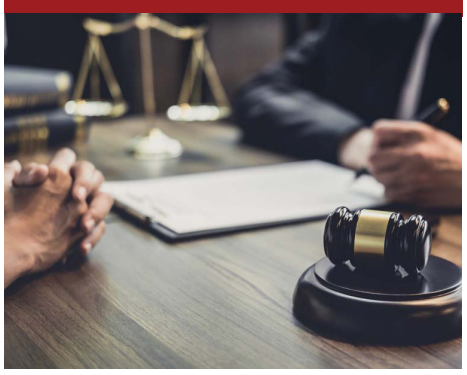
FOCUS: LITIGATION



Bad Moon Rising—The Advantageous Demand for Successive Summary Judgment Relief

Ian Bergström

The filing of summary judgment applications is a useful mechanism to acquire accelerated judgment determining whether civil liability should be imposed pursuant to CPLR 3212. Litigants and attorneys may misuse the summary judgment doctrine. The trial court has broad discretion to grant or deny summary judgment applications. Basically, litigants cannot file more than one summary judgment application under New York State civil practice. If the trial court denies the initial summary judgment application before competition of discovery, then the movant may experience prejudice attempting to avoid civil liability. The successive summary judgment doctrine enables litigants to file more than one summary judgment application pursuant to CPLR 3212. The motivation in practicing civil litigation should be to win.

The Structure of Motion Papers

Practically, litigants filing summary judgment applications are urged to demand such relief by means of notice of motion, rather than order to show cause. The filing of an order to show cause should be reserved for circumstances legitimately determined a "genuine emergency …."[1] The summary judgment doctrine is a routine method utilized to demand accelerated judgment of the legal issues pending before the trial court pursuant to CPLR article 32.[2]

The summary judgment doctrine is one of the many methods utilized to demand dismissal of legal theories under CPLR article 32.[3] Although litigants and attorneys are passionate about the outcome of their matter pending before the judiciary, the judicial determination whether the civil lawsuit should be dismissed as a matter of law is not an "emergency" warranting the filing of an order to show cause.[4]

The filing of notices of motion demanding summary judgment are believed to be strategically advantageous for litigants because the movant can file reply papers responsive to the opposition papers that the opposing party files to challenge legitimacy of the summary judgment application.[5] Generally, the filing of orders to show cause do not permit the movant to file reply papers.[6] CPLR 2214 does not authorize the filing of reply papers moving by means of order to show cause.[7] The trial court schedules the return date and controls the calendar regarding orders to show cause.[8]

The filing of notices of motion facilitates greater flexibility for the parties to schedule and reschedule return dates affording sufficient time to file opposition papers and reply papers pursuant to CPLR 2214 and the trial court part rules and procedures. If self-represented litigants and attorneys are complying with the professionalism standards, then the filing of motion practice should be smooth sailing.

The movant is required to set forth the requisite notice informing the opposing party about the statutorily required date to file and serve opposition papers pursuant to CPLR 2214.[9] New York State Courts Electronic Filing ("NYSCEF") system requires the movant to check the box affirming that the notice of motion sets forth the requisite timeframe to file opposition papers pursuant to CPLR 2214(b). Otherwise, NYSCEF does not process the motion practice.

Litigants are required to set forth their requested summary judgment "relief" within the "notice of motion … and … concluding section of a memorandum of law" pursuant to the uniform civil rules for the supreme court and the county court.[10] The uniform civil rules for the supreme court and the county court are not "legislative[]" creatures, but rather the "Chief Administrative Judge['s]" implementation of "rules" that "advisory committees" promulgate.[11] Regardless, the litigant is required to structure the nature of the requested relief within the notice of motion or order to show cause for the judiciary to adjudicate same. The judiciary does not magically grant summary judgment relief pursuant to CPLR 3212. The judiciary should not be confused with Sorcerer Mickey Mouse.[12]

CPLR 3212

The statutory basis of summary judgment applications is CPLR 3212. The various legal standards moving for summary judgment are set forth under CPLR 3212. The trial court may mandate the filing of summary judgment motions "be … after the close of discovery."[13] However, the movant is statutorily permitted to move for summary judgment after joinder of issue.[14] Despite the prehistoric phraseology, the joinder of issue simply means the opposing party filed their answer responsive to the petition or complaint pursuant to CPLR article 30.[15]

Assuming arguendo the movant files their summary judgment application before the trial court certifies the lawsuit ending the discovery phase, the trial court has broad discretion to deny the application for various reasons, such as lack of discovery to sufficiently render a determination upon the merits.[16] Generally, litigants are permitted to file summary judgment applications once.[17] The movant is expected to proffer all "competent evidence" and cite governing precedent proving entitlement to summary judgment within the sole summary judgment application.[18]

The Successive Summary Judgment Doctrine

John Fogerty warned, "I see earthquakes and lightning. I see bad times today."[19] The mere filing of a summary judgment application does not automatically establish entitlement to such relief, regardless of whether the law favors movant. If the movant risks the filing of a summary judgment application shortly after commencement of the lawsuit, then the movant may be unnecessarily forced into settlement or trial upon denial of the summary judgment application. Although the trial court may err, the movant incurs substantial expenses appealing the trial court determination.

The Second Department declared that a "narrow exception" exists regarding "the successive summary judgment rule …."[20] The trial court has discretion to permit the movant to file a second (2nd) summary judgment application with "leave to renew in the interests of fairness and justice," whereby the initial summary judgment application is denied before the lawsuit is certified and scheduled to proceed with trial.[21]

The trial court is required to specify within the determination denying the initial summary judgment that the movant is permitted to file the successive summary judgment application with "leave to renew" enabling same.[22] Otherwise, the movant generally cannot file the successive summary judgment application. Litigants and attorneys are urged to specifically set forth the request for judicial permission to file the successive summary judgment motion within their notice of motion as an alternative ground for relief preserving such opportunity if the trial court denies the initial application.

In *J.T. v. F.I. News, Inc.*, the Supreme Court, Nassau County denied the successive summary judgment

application because defendants did not satisfy their burden establishing entitlement to such relief.[23] Defendants filed the successive summary judgment application contending that the materials contained within the "underlying criminal case file" should be deemed "newly discovered evidence" warranting entertainment of the application. Defendants received materials responsive to the Freedom of Information Law ("FOIL") request sent to the Office of the Suffolk District Attorney. The trial court determined that defendants were charged with knowledge the "file existed before they moved for summary judgment the first time" because the "FOIL request" was sent "before" the initial summary judgment application was filed.

In *Holcombe v. Kexing Zheng and Uber Technologies, Inc.*, the Supreme Court, Queens County rendered the decision and order "grant[ing]" summary judgment against co-defendant Kexing Zheng because plaintiff proffered testimonial evidence proving that "a rear-end collision" caused the car accident at issue.[24] However, the trial court denied the summary judgment application as to co-defendant Uber Technologies, Inc. because "completion of discovery" was necessary to assess potential tortious liability. The Supreme Court, Queens County "granted" judicial permission for plaintiff to file the potential "successive summary judgment motion" pursuant to CPLR 3212.

In *Hernandez v. Green Team USA, LLC*, the Supreme Court, Nassau County "[d]enied" the summary judgment application because the parties did not complete depositions and "issues of fact exist[ed] …."[25] The triable issues of fact pertained to whether defendant(s) negligently caused the car accident at issue. The trial court sua sponte "remind[ed]" the parties that the potential filing of a "successive summary judgment motion[]" requires judicial "permission upon proper showing."

In *Gordillo-Jimenez v. Mr. Kabob Restaurant, Inc.*, the Supreme Court, Queens County exercised "judicial notice … that [defendant(s)] filed two prior motions for summary judgment."[26] A different justice of the Supreme Court "denied" the two applications. The movant did not "present good cause" setting forth the purported propriety of the "third" successive summary judgment application. The trial court flatly denied the third summary judgment application.

The movant is advised to limit their potential successive summary judgment application to one, rather than multiple applications. The belief is that the litigant lacks credibility and persuasion incessantly filing successive summary judgment applications. The filing of a successive summary judgment application affords litigants the opportunity to aggressively contest civil liability as a matter of law pursuant to CPLR 3212. Litigants and attorneys are tasked with the role of advocating their respective interests, not the judiciary.[27] The specific demand for judicial permission to file a successive summary judgment application is essential to preserve such opportunity. Litigants and attorneys should not pray the judiciary sua sponte grants judicial permission to file the potential successive summary judgment application. "Ask and [you] shall receive …."[28]

1. See 22 NYSCRR § 202.8-d.
2. See CPLR 3212.
3. See *generally* CPLR article 32.
4. See 22 NYSCRR § 202.8-d; see *also* CPLR 3212.
5. See CPLR 2214(b).
6. See 22 NYCRR § 202.8-d.
7. See CPLR 2214(a)-(d).
8. See *Santoro v. LeVinson*, 2023 N.Y. Misc. LEXIS 27765, *1, Index No.: 611895/2020 (Sup. Ct., Nassau Co. 2023) (J. Kapoor).
9. See CPLR 2214(b).
10. See 22 NYCRR § 202.8-a(a); see *also HDFC v. 660 Tiffany St. LLC*, 2023 N.Y. Misc. LEXIS 6336, *6, Index No.: 802977/2022E (Sup. Ct., Bronx Co. 2023) (J. Brigantti) (*citing* 22 NYCRR § 202.8-a(a)).
11. See Estate of Ziegel, 2023 N.Y.L.J. LEXIS 969, File No.: 2015-4928/F (Sur. Ct., Queens Co. 2023) (J. Kelly).
12. See Walt Disney's Fantasia (Walt Disney Productions 1940).
13. See *Ezzi v. Domino's Pizza LLC*, 74 Misc. 3d 217, 223 (Sup. Ct., Richmond Co. 2021) (J. DiDomenico).
14. See CPLR 3212(a).
15. See *Deutsche Bank National Trust Co. v. Augustin*, 155 A.D.3d 823, 824 (2d Dept. 2017).
16. See *Ardizzone v. Summit Glory LLC*, 2018 N.Y. Slip Op 33280(U), *9 (Sup. Ct., N.Y. Co. 2018) (J. Freed); see *also Torres v. Kalmar*, 136 A.D.3d 457 (1st Dept 2016).
17. CPLR 3212; *Elie v. City of NY*, 33 Misc. 3d 958, 959-60 (Sup. Ct., Queens Co. 2011) (J. Kerrigan); *Levitz v. Robbins Music Corp.*, 17 A.D.2d 801 (1st Dept. 1962).
18. CPLR 3212; *Elie*, 33 Misc. 3d at 959-60; *Levitz*, 17 A.D.2d 801; *Gonzalez v. American Oil Co.*, 42 A.D.3d 253, 254 (1st Dept 2007); *Kistoo v. City of New York*, 195 A.D.2d 403, 404 (1st Dept. 1993); *Zhou v. Brown*, 2011 N.Y. Slip Op 34137(U), *4 (Sup. Ct., Bronx Co. 2011) (J. Brigantti); *Warner v. Historic Hudson River Heritage Development Co.*, 235 A.D.2d 987, 988-9 (3d Dept. 1997); *Foresite Props. v. Halsdorf*, 172 A.D.2d 929, 930 (3d Dept. 1991).
19. See Creedence Clearwater Revival, *Bad Moon Rising*, Green River (1969), Fantasy Records.
20. See *Wells Fargo Bank, N.A. v. Osias*, 205 A.D.3d 979, 981-2 (2d Dept. 2022); see *also Aurora Loan Servicers v. Yogev, 194 A.D.3d 996, 997 (2d Dept. 2021)*.
21. See *Fischer v. Am. Biltrite, Inc.*, 184 A.D.3d 446, 447 (1st Dept. 2020).
22. See *Fernandez v. Eleman*, 25 A.D.3d 752, 753 (2d Dept. 2006).
23. See *J.T. v. F.I. News, Inc.*, 78 Misc. 3d 1229[A], 2023 N.Y. Slip Op 50385(U), *3-4 (Sup. Ct., Nassau Co. 2023) (J. Singer).
24. See *Holcombe v. Kexing Zheng and Uber Technologies, Inc.*, 2019 N.Y. Misc. LEXIS 10115, *2-3, Index No.: 704357/2019 (Sup. Ct., Queens Co. 2019) (J. Latin).
25. See *Hernandez v. Green Team USA, LLC*, 2023 N.Y. Misc. LEXIS 28974, *2-3, Index No.: 612642/2022 (Sup. Ct., Nassau Co. 2023) (J. Quinn).
26. See *Gordillo-Jimenez v. Mr. Kabob Restaurant, Inc.*, 2023 N.Y. Misc. LEXIS 8017, *6, Index No.: 711943/2022 (Sup. Ct., Queens Co. 2023) (J. Lancman).
27. See Ian Bergström, *Framed – The Party Presentation Principle*, Nassau Lawyer (February 2023), p. 8, *available at* https://www.nassaubar.org/wp-content/uploads/2023/01/Nassau-Lawyer-February.pdf.
28. See John 16:24 (Holy Bible).

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

NASSAU ACADEMY OF LAW

May 8 (HYBRID)

Dean's Hour: Remembering the Munich 1972 Olympics as the Paris 2024 Olympics Are Set to Begin by Rudy Carmenaty, Esq.

12:30PM

1.0 CLE credit in Professional Practice

The 2024 Olympics in Paris are nearly here. The Olympics are ready for a splashy comeback after two Covid-era games. But the festivities in Paris are shadowed by security fears and geopolitical tumult. Rudy tells the story of the XX Olympic Games held in Munich, West Germany from August 26 to September 11, 1972. The 1972 Summer Olympics were designed to showcase a New Germany, one that was peaceful, and the first ten days of athletic competition were an affirmation of the Olympic spirit. But the West German's strict adherence to this motif would only compound the tragedy that unfolded.

Guest Speaker:

Rudy Carmenaty, Esq., serves as Deputy Commissioner of the Nassau County Department of Social Services. Prior to his appointment, Rudy was Bureau Chief in the Office of the Nassau County Attorney and was Director of Legal Services for the Nassau County Department of Social Services and the Department of Human Services

NCBA Members FREE; Non-Member Attorney $35

May 14 (HYBRID)

Dean's Hour: Vicarious Trauma, and Attorney Well-Being and Ethical Issues

With the NCBA Lawyers Assistance Program (LAP)

12:30PM

1.0 CLE credit in Ethics

The term vicarious trauma (VT) was coined by researchers seeking to describe the profound, cumulative shift in world view that occurs in professionals when they work with individuals who have experienced trauma. These professionals notice that their fundamental beliefs about the world are altered and possibly damaged by repeated exposure to traumatic material. This threatens the ability to practice law effectively and ethically. Under New York Rules of Professional Conduct Rule 1.16 (b)(2), a lawyer shall withdraw from the representation of a client when the lawyer's physical or mental condition materially impairs the ability to represent the client. Our speakers will discuss how VT can affect the lawyer's ability to represent their client ethically.

Guest Speakers:

Elizabeth Eckhardt, LCSW, PhD, Director, NCBA Lawyers Assistance Program (LAP)
Anabel Bazante, Esq., NCBA Lawyers Assistance Committee

NCBA Members FREE; Non-Member Attorney $35

May 21 (HYBRID)

Dean's Hour: Substance Abuse Prevention

With the NCBA Lawyers Assistance Program (LAP) and NCBA Lawyer Assistance Committee

12:30PM

1.0 CLE credit in Professional Practice

This CLE program focuses on substance abuse and related issues which affect a surprising and disproportionate number of legal professionals. The program will raise awareness about the challenges of identifying the initial behaviors which indicate abuse of alcohol, drugs and even prescription medication. We will discuss how to identify these issues, how to address them, and how to prevent them from happening in the first place. The consequences of such behavior can constitute an attorney's breach of ethical or legal obligations resulting in possible disciplinary actions. Dan Strecker, Esq., and Dr. Elizabeth Eckhardt will discuss the confidential resources LAP has available for attorneys struggling with substance abuse.

Guest Speakers:

Elizabeth Eckhardt, LCSW, PhD, Director, NCBA Lawyers Assistance Program
Dan Strecker, Esq., Chair, NCBA Lawyer Assistance Committee, and a partner with Harris Beach, where he defends toxic tort and product liability claims, and additionally concentrates in the areas of complex commercial litigation, government compliance, and white-collar defense/internal investigations.

NCBA Members FREE; Non-Member Attorney $35

PROGRAMS CALENDAR

WELL-BEING WEEK IN LAW | MAY 6-10, 2024

May 28 (IN PERSON ONLY)

What is Generative AI and How Can AI Be Used Ethically in Legal Research?

With the NCBA Defendant's and Plaintiff's Personal Injury Committees and Corporate Partner LexisNexis

LexisNexis®

5:30PM Wine and Cheese Reception
6:30PM Program
1.0 CLE credit in Skills and 1.0 credit in Ethics

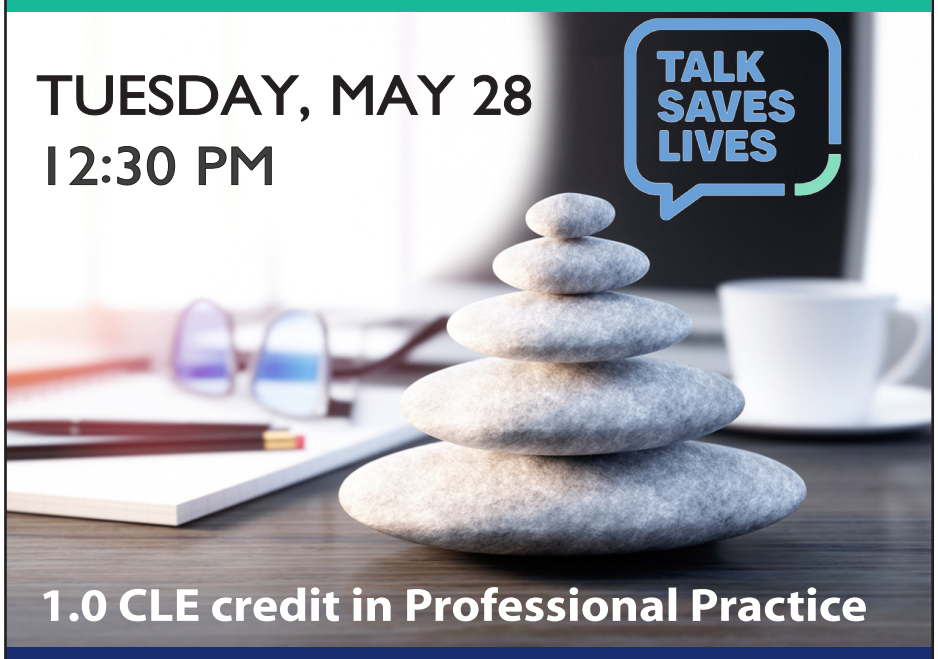
Lawyers make their living looking for answers to legal questions, and if they do not know the answers, they strive to find them for their clients. With the daily technological advances and the 2023 *Avianca Case of AI hallucination*, is there a way for Generative AI to redeem itself and become useful in legal practice? Generative AI presents a viable and ethical tool for attorneys to use. To view this landscape in a different way, if use of Generative AI can truly assist our clients, then do we owe an ethical obligation to our clients to explore the utility of Generative AI?

In this presentation, which is geared towards attorneys who are curious about Generative AI, but not necessarily experienced with its utility, the panel will discuss what Generative AI can do, and whether attorneys can optimize efficiency without compromising client confidentiality. The discussion will tackle ethical considerations in using technology to zealously represent your clients; address common fears, misconceptions, limitations, and capabilities of Generative AI; and explain that although AI can enhance research and draft initial documents, it cannot replace the nuanced strategic decision-making required in legal practice. An interactive Q&A session will follow.

Guest Speakers:
Megan Negron, Esq., LexisNexis Solutions Consultant for the New York Metropolitan Area
William T. Prest., Esq., LexisNexis Solutions Consultant for the New York Metropolitan Area
Maria Janella Y. Loaiza, Esq., is the founder of Loaiza Law Firm PLLC, a general practice firm handling personal injury, immigration, and appeal. Janella is licensed to practice in New York, Washington, DC, and Maryland.
Brian Gibbons, Esq., is a trial attorney and Managing Partner at Wade Clark Mulcahy LLP's Long Island office, located in Carle Place. Brian's practice focuses on property and casualty defense, insurance coverage, and fraud investigation.

NCBA Members FREE; Non-Member Attorney $70

Dean's Hour: Suicide Prevention Education with LAP (HYBRID)



With the American Foundation for Suicide Prevention Long Island Chapter

"Talk Saves Lives: An Introduction to Suicide Prevention" is a community-based presentation that covers the general scope of suicide, the research on prevention, and what people can do to fight suicide. *Talk Saves Lives* is a 60-minute educational program that provides participants with a clear understanding of this leading cause of death, including the most up-to-date research on suicide prevention, and what they can do in their communities to save lives. Participants will learn common risk factors and warning signs associated with suicide, and how to help themselves and others safe. Topics covered include:

- **Scope of the Problem:** The latest data on suicide in the U.S. and worldwide.
- **Research:** Information from research on what causes people to consider suicide, as well as health, historical, and environmental factors that put individuals at risk.
- **Prevention:** An understanding of the protective factors that lower suicide risk, and strategies for managing mental health and being proactive about self-care.
- **What You Can Do:** Guidance on warning signs and behaviors to look for, and how to get help

GUEST SPEAKERS: Christopher Tafone, Esq., Associate General Counsel, Corebridge Financial, Inc.
Elizabeth Eckhardt, LCSW, PhD, Director, NCBA Lawyers Assistance Program

NCBA Members FREE; Non-Member Attorney $35

FOCUS: LAW AND AMERICAN CULTURE

What Has Robert Moses Wrought?

Rudy Carmenaty

The advent of David Hare's *Straight Line Crazy* with Ralph Fiennes has stirred a myriad of memories about Robert Moses.[1] Not all of them pleasant. Still, there can be little doubt the physical plane which we all inhabit was molded by this one man's fertile imagination. This Moses all but parted the seas.

At a time when New York was the most consequential city in the world, Moses was its "*master builder*."[2] Moses wielded so much raw power, that he quite literally orchestrated the urban/suburban panorama of the present-day five boroughs and its surrounding environs.

It could be argued, with some justification, Moses envisioned the greater New York area as his personal "*canvas*,"[3] a domain whose contours he alone could shape according to the dictates of what he believed properly constituted contemporary urban living.

Moses is credited with single-handedly moving the middle-class from the city to the suburbs. This is a bit of an overstatement. All the same, Moses built the foundations that made the commuter lifestyle on Long Island viable after World War II.

In his heyday, Moses' reach was of epic proportions. His vision, and his unique ability to effectuate that vision, touched tens of millions of people, as he transformed hundreds of thousands of square miles, in what continues to be the nerve center of commerce and culture in this country.

A product of Yale, Oxford, and Columbia, Moses was born into a wealthy German-Jewish household in 1888. His milieu referred to itself somewhat self-consciously as "*Our Crowd*."[4] These were prominent families linked by finance, social ties, and an abiding sense of noblesse oblige.

Moses began as a "goo-goo," a good government type. His mantra was that individuals, and later that public works, should advance strictly on the basis of their intrinsic merit. An abrasive personality, he felt he was in a paramount position to decide these issues.

His considerable ability caught the eye of Governor Al Smith. Moses and Smith were a study in contrasts. One was Jewish, well-educated, privileged. The other was Irish, streetwise, folksy. It somehow worked, solely because Smith gave Moses carte blanche.

A doer, not a dilettante, Moses realized what he really needed was the influence to bring his ideas to fruition. He became a man possessed by this insight. Moses had a penchant for procuring power and the compulsion to dominate others, regardless of rank.

From Al Smith to Franklin Roosevelt, from Tom Dewey to Nelson Rockefeller, Moses dealt, on his own terms, with governors from both parties. He horse traded with every mayor from Fiorello LaGuardia to John Lindsay. He outlasted all of them, all that is, except Rockefeller and Lindsay.

Moses was not a politician. In fact, he was a failed politician. He could not get elected dogcatcher. His one campaign for public office, his rather obnoxious bid for the governorship in 1934, resulted in a landslide for Herbert Lehman.

To his credit, Lehman didn't fire Moses afterwards. For Moses' threat to resign generally proved sufficient to keep most office holders in check. It was only when Nelson Rockefeller finally called his bluff that Moses' veneer of infallibility began to dissipate.[5]

Moses was definitely imperious. As an urban planner, he was peerless. Moses proved himself invaluable to a slew of politicians securing a reputation for "*getting things done*."[6] Being appointed instead of elected, he had the advantage of never having to answer to the voters.[7]

Whenever a bridge or a tunnel opened, the politicos took their bows. When controversy arose, Moses offered them convenient cover. As Moses steamrolled his way across New York, he accomplished what the people's elected representatives could not.

The inconsistencies abound. A Republican in a Democratic town, Moses was an elitist in an era that extolled the common man. He nevertheless managed to seize the gearshifts of government like a Soviet apparatchik. Moses ran the entire region's infrastructure.

Moses applied his power effectively, some would say ruthlessly, to a degree unheard of in a democracy. So how did he do it? Befitting his academic pedigree, Moses was adept at crafting laws which created public authorities, semi-autonomous entities designed to promote a specific state interest.

This hegemony over the bureaucratic machinery was the source of his power. The fount of his control came from the dozen or so parallel posts he held. An example, Moses was the Commissioner of the NYC Department of Parks, while also serving as Chairman of the NYS Council of Parks.

On Long Island, he held the presidencies of the Jones Beach Parkway Authority, the Long Island State Park Commission, and the Bethpage State Park Authority. Taken together, these titles and a litany of others provided him with an unassailable perch.

These positions afforded him control. He could also issue bonds bringing in a steady stream of revenue. All of which pales in comparison to the real locus of Moses' financial wherewithal, the Triborough Bridge & Tunnel Authority, which he ran with an iron hand as its chairman.

The Triborough Bridge, which arterially links Manhattan, the Bronx, and Queens, is traversed by millions of New Yorkers. When cars crossed, a nickel would be dropped in the hopper. These nickels added up to millions of dollars in tolls collected.

These tolls provided the capital Moses needed with very little oversight.[8] He could thus sidestep the state legislature or the Board of Estimate to finance his projects. In all fairness, it should be said that Moses was scrupulously honest. He drew a single salary. Money per se meant little to him.

His real compensation came in the currency of power. Moses got what he desired most—the ability to build. Moses was responsible for Jones Beach State Park (his first major endeavor and an indisputable triumph), the Lincoln Center for the Performing Arts, and Shea Stadium, among other landmarks.

His impact was staggering. Moses developed more than six-hundred thousand miles of paved roads, six hundred playgrounds, twenty thousand acres of parkland, and twenty-five thousand housing units in high-rise towers encompassing hundreds of acres of city blocks.[9]

Moses' ascendency began during the New Deal. As federal monies poured in, Moses put people to work. In spite of FDR's enmity, even the President swallowed his pride and recognized Moses was simply too able a man to lay fallow.

The Triborough Bridge was the first of a dozen toll bridges. In its wake came the Whitestone Bridge, the Throg's Neck Bridge, and the Verrazano Narrows Bridge. The Verrazzano is an engineering marvel, a suspension bridge linking Brooklyn to Staten Island straddling 4,000 feet.

Likewise, he surfaced the roadways leading to and from these bridges, be it the Westside Highway, the Belt Parkway, the Brooklyn-Queens Expressway, or the notorious Cross-Bronx Expressway. On Long Island, Moses built countless parkways, making a once thorny terrain accessible.

Moses held fast and never relinquished the idea that mobility was the indispensable element in modern life, the internal combustion engine its sine-qua-non. This motif demanded that roads, tunnels, and bridges be constructed.

Famously, Moses did not drive his own car. Yet, he did have a bevy of chauffeurs at his disposal twenty-four hours a day, and he often conducted his business from the backseat of his limousine.[10]

During the immediate post-war years, Moses' sway, as NYC's construction coordinator, was comparable to that of a pharaoh. Moses could condemn land by fiat under Title One of the Federal Housing Act of 1949.[11] He had built this edifice, and the imperatives he espoused were considered irrefutable.

Notwithstanding, Moses' methods eventually came into question. The press and public which lauded him for Jones Beach turned-on him a generation later. When Moses began demolishing ethnic enclaves for his highways, his heavy-handed tactics came into sharp relief.

Moses was not above cruelty. Disdainful of detractors, Moses is quoted as saying: "I raise my stein to the builder who can remove ghettoes without removing people as I hail the chef who can make omelets without breaking eggs."[12]

The Cross-Bronx Expressway is a case in point. In 1953, thousands lost their homes in East Tremont to make way for a one-mile stretch of thoroughfare.[13] The human costs were now readily apparent as an entire neighborhood disappeared from the map.

By the 1960s, Moses had exercised power for far too long and far too harshly. His plans for a Mid-Manhattan Expressway, cutting through Washington Square Park, resulted in wide-spread opposition. This time he was threatening to displace not the urban poor but the well-heeled.[14]

The blocking of the Mid-Manhattan Expressway was a shattering eruption of grassroots activism. Jane Jacobs, who led the protests, offered a diametrically different vision. In her book, *The Death and Life of Great American Cities*, she argued that neighborhoods were the lifeblood of the urban experience.

Jacobs provided the antithesis to all that Moses stood for and she help loosen his unquestioned grip on power. Yet his downfall took the single-minded

energies of Governor Rockefeller and Mayor Lindsay. Fierce intramural rivals, both men found common cause in ridding themselves of Moses.

Realizing money was what was undergirding his empire, Rockefeller and Lindsay managed to undercut the twin pillars of his regime: his control over federal funds and the tolls derived from the Triborough Bridge & Tunnel Authority.

Rockefeller and Lindsay wanted to bail out the NYC subway. This was anathema to Moses' thinking. Lindsay used Moses' haughtiness as a ruse and removed him from having any say regarding federal highway monies. Yet the real coup de grâce came from Albany.

The Legislature passed a bill that merged and granted management of the bridges and tunnels administered by the Triborough Bridge & Tunnel Authority to the Metropolitan Transportation Authority.[15] This could have invited unwanted and protracted litigation.

Impairing the duties owed bondholders is inherently fraught with legal liability. The ace held collectively by Rockefeller and Lindsay was that the lion's share of those bonds were held by the Chase Manhattan Bank. David Rockefeller, the governor's brother, just happened to be the bank's chairman.

David Rockefeller had no intention of standing in the way of Nelson Rockefeller's ambitions. Particularly since David needed, and got, Nelson's backing for the proposed World Trade Center towers in lower Manhattan. The Chase Manhattan Bank took no action.

Moses could have supported smaller bondholders. Although Moses complained about the merger in the press, ever the Machiavellian he schemed instead and cut a side deal. It was agreed, he would step down as chairman and become a consultant after the takeover.

He resigned as agreed. Moses was named a consultant to the MTA as promised. It was however an honorific title stripped of any real heft. This was the first time, and the last time as it turned out, that Moses had been outfoxed. Moses's rule collapsed like a house of cards.

Rendered impotent, Moses lived until 1981. Even in his forced retirement, his yearning to build never left him. He may well have fallen into obscurity. The publication of Robert Caro's *The Power Broker* in 1974 eliminated all possibility of that happening. The book became a source of immortality and of infamy.

This massive, well-documented, and scathing tome exposed Moses as an unaccountable and malignant bureaucrat. While still esteemed by some, Moses, some forty-odd years after his passing, instinctively elicits a hostile response. To those he displaced, he remains a bully indifferent to human suffering.

Conservationists have long criticized his construction projects for their ecological effect. One of the ironies to arise from his nearly untrammeled reign as master builder is that it is almost impossible today to get anything built in or around New York on such a scale.

History has painted Moses, most damning of all, as a bigot. He is accused of creating obstacles that kept African Americans from the suburbs. It is alleged that by building low bridges on his parkways, inaccessible to public transport, Moses hindered minorities from coming to Nassau and Suffolk counties.[16]

Was he a villain or a visionary? Attempting to put Moses in perspective is a thankless task. Time has rendered the question largely academic. His story, in large measure, is the story of the last century. Moses surely left his stamp on the topography of the landscape and our lives.

What Robert Moses has wrought is all around us and most likely will endure in perpetuity. The possibility of there being another Robert Moses, one who would alter or undo what the original achieved, appears exceedingly remote. The residue of Robert Moses will be with us so long as there is a New York.

1. David Hare, *Straight Line Crazy*, (1st Ed. 2022). The genesis of this article is found in *Robert Moses, the man who rebuilt New York, a CBS Sunday Morning* profile by correspondent Martha Teichner, at https://www.youtube.com.
2. Paul Goldberger, *Robert Moses, Master Builder, is Dead at 92*, New York Times (July 30, 1981) at https://archive.nytimes.com.
3. *CBS News, Robert Moses, the man who rebuilt New York*, CBS (October 23, 2022) at https://www.cbsnews.com.
4. Goldberger, *supra.*
5. *Id.*
6. *Id.*
7. CBS News, *supra.*
8. Goldberger, *supra.*
9. Robert Gore-Langton, *The psychopath who wrecked New York*, Spectator (March 19, 2022) at https://spectator.co.uk.
10. Robert Young, *5 NYC Haunts of Power Broker Robert Moses, 4. Robert Moses' Limousine*, Untapped New York at https://untappedcities.com.
11. *The American Housing Act of 1949* (Pub.L. 81-171).
12. Goldberger, *supra.*
13. CBS News, *supra.*
14. *Id.*
15. Robert Caro, *The Power Broker, Robert Moses and the Fall of New York* (1st Ed. 1974); see Part VII *The Loss of Power* for a detailed account of Moses' downfall.
16. Thomas J. Campanella, *Robert Moses and His Racist Parkway*, Explained, Bloomberg.com (July 9, 2017) at https://www.bloomberg.com.

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

FOCUS: APPELLATE

Appellate Practice Lessons from the Chief Judge and More

Adrienne Flipse Hausch

"Just tell me the story."

So began the keynote address of Chief Judge Rowan Wilson at the extraordinary two-day seminar on appellate brief writing co-sponsored by the Nassau Academy of Law and New York State Office of Indigent Legal Services.

Judge Wilson's framing of the issues, methodology and goals of appeals to his court were echoed by the other speakers over the two days of the program, who included Kent Moston, Legal Training Director of the Suffolk County Legal Aid Society; author and attorney David Feige; Tehra Coles, Executive Director of the Center for Family Representation, and Christine Waer, its Managing Director of Litigation; and Andrea Hirsch, former Supervisor of the New York City Criminal Appeals Bureau

Judge Wilson's "keynote" was more than a pep talk. It, and all aspects of the seminar, were practical pointers on how to get appellate courts to hear what you, as a litigant or counsel for a litigant, want to say about your case that is now in the unenviable position of appeal.

Don't Write Like a Lawyer!

Judge Wilson explained that the Court of Appeals is overwhelmed by its stock in trade and does not want—or have the ability—to try and figure out why you are before that court. "Just tell the story."

Use plain English, the Chief Judge explained, as if the court had a twelfth grade education. Refer to people by name—not "defendant" or "appellant." Keep to the topic—and put topic sentences in your manuscript. And more than anything—give the facts. Go back to the beginning and clearly and succinctly explain why you are before the court.

Although the advice might seem obvious, even some of the participants appeared to challenge the judge as the participants broke out into small group workshops and some continued to insist that their erudite language and intense legal argument were what should be presented.

With a smile on his face, Judge Wilson advised that we would do much better as appellate counsel if our briefs were "punchy" and grabbed the attention of the reader.

Don't Just Recite the Facts—Argue Them!

Judge Wilson also suggested that we use the facts *before* we tried to apply the law. He suggested that the facts can make the reader decide then and there that you should win your appeal.

And when using precedent, dig into the facts of precedent. If your adversary has cited a string of decisions without explaining how they support their side, that's a good indication that those decisions contain some basis on which to distinguish them. Take the opportunity to point out what your adversary has either overlooked or omitted!

Don't Avoid Unfavorable Precedent—Confront It!

Judge Wilson also advised that writers not run from unfavorable precedent but deal with it—and do not, under any circumstances, wait for oral argument to attack anything that is contrary to your position of the case.

Indeed, anyone who has spent any time in appellate courts waiting to argue has likely heard another attorney get interrupted by the panel with a question that raises the unfavorable precedent or a particularly inconvenient fact. All the more reason to prepare the panel with a well thought-out written argument on which you're ready to follow up in oral argument.

Tell A (Good) Story!

And, always "remember that you are telling a story."

David Fiege, who now writes television scripts, emphasized that the story is key to making your readers understand why you are appealing an adverse decision of the lower court.

He explained that as a television script writer, he was obliged to get a lot of information into very few words and suggested that that should be the goal of those writing appellate briefs, a concept that was echoed and supported by all of the speakers.

Feige also explained that the writing should be consistent with a "theme" that becomes the basis for your appeal.

How to write a compelling argument was also the topic of the small group workshops which were conducted throughout the program and which dovetailed with the topics covered by the speakers.

Brainstorm Before You Write!

Kent Mosten suggested that "brainstorming" is a good way to assure that every angle for appeal is considered. This approach was taken in the workshops where preliminary statements were prepared by participants and critiqued by others in the group.

Brainstorming is not always intuitive for appellate litigators. When you routinely litigate in the same area of law, common issues frequently arise, and it can be tempting to save time by framing your latest brief the way you framed the last brief. But a few minutes starting from scratch, without preconceptions, can help you identify wrinkles that haven't appeared in previous cases, or to approaches that you haven't considered before.

Be Unafraid to Advocate for Your Client!

Coles and Waer also emphasized that nothing should intimidate the writer of the brief. Were many of those who sought to appeal adverse decisions because their view of the case was "unpopular," many of our seminal decisions and basic principles of law would not be in existence today.

Manufacturing courage can be vital for appellate practitioners, as we often do not choose our cases. Rather they come to us from litigators and trial attorneys, and we must do our best with the arguments available, however solid their legal and factual bases. This courage may require us to confront candidly the shortcomings of our argument—the panel will expect us to—but we can do so while emphasizing our stronger points.

"Questions Presented" Should Present the Answer, Too!

Andrea Hirsch believes that her technique of "reading and reading and reading" about the issues and exploring the law as it is essential to being able to articulate the issues that the appellant wants the court to consider.

Hirsch opined that the statement of the questions presented is key to the success of the appeal and she believes that our ability to pose those questions is the longest and hardest part of the appellate process.

The Story Continues....

This program, which offered ten CLE credits to in-person participants, followed an intensive format which has been used by Indigent Legal Services in the past and proved to be a viable, if not tiring, approach to the topic.

Extensive written materials were provided by NCBA Corporate Sponsor Printing House Press. Each speaker provided his or her approach to appeals.

The universal opinion of those who participated in the program was that it was one of the best and most useful programs ever presented by the Nassau Academy of Law. The participants were also impressed by the substantial and enthusiastic participation of Chief Judge Wilson.

The take away from the program, well beyond the solid educational components, was that listening to our clients, studying to understand the basics, and learning to tell the story, were the keys to not only successful brief writing but to the basic understanding of the person of a legal advocate that we dismissively call "lawyers."

Adrienne Flipse Hausch is the principal attorney of Adrienne Flipse Hausch & Associates, a litigation firm that concentrates in family and matrimonial law, criminal defense, and guardianship. She can be reached at (516) 741-2000.

LAP Walkathon

More than 100 walkers joined the Lawyer Assistant Program (LAP) Second Annual Walkathon at Jones Beach on Saturday, April 6. The event raised $12,000 to help provide free and confidential assistance to lawyers, judges, law students and their family members who are struggling with addiction and mental health issues. LAP thanks the many sponsors and walkers for their support and participation in making the event a major success!

Photos by Liz Post and Beth Eckhardt

Past President Dinner

Past and future presidents gathered at Domus on April 3rd to celebrate the contributions and leadership of the NCBA's former presidents during the Bar Association's 125th year.

Photos by Hector Herrera

FOCUS: HOUSING

Radio Broadcast Assists Financially Stressed Homeowners

Madeline Mullane and Christina Versailles

Nassau County Bar Association member and longtime radio host Ken Landau's radio show, "Law You Should Know," recently greeted NCBA Mortgage Foreclosure Assistance Project's Senior Attorney & Settlement Conference Coordinator, Christina Versailles, in a program designed to "Help Homeowners Facing Foreclosure." The show is a regularly featured program on NCC Radio where Landau hosts knowledgeable guests who are experts in a multitude of areas of the law—including criminal, trust & estates, and real estate—and discuss the individual's right to sue and what to do if you are sued in virtually every area of law.

During the half-hour episode, Versailles and Landau discussed a range of topics relating to the mortgage foreclosure process; what to do when you are served; pitfalls to avoid; as well as the free resources that the Project can provide to Nassau County residents. Landua asked Versailles questions regarding the options available to homeowners, and how they can access the services provided by the Project, which operates as part of the larger group of agencies known as the HOPP (Homeowner Protection Program) Network.

The Project—as well as the 80+ other housing and legal service providers under the HOPP umbrella—is funded by New York State and overseen by the New York State Attorney General's Office, and provides free foreclosure prevention services so that Nassau County homeowners do not lose their home due to lack of knowledgeable advocacy about the foreclosure process and the options available to them.

The Project provides daily, limited scope representation for the day at Nassau Supreme Court in Mineola, for pro se defendants in residential mortgage foreclosure matters, as well as those facing residential tax lien foreclosure settlement conferences. Attorneys from the Project are also seated at a table outside the foreclosure part in Nassau Supreme most mornings and afternoons, Monday to Thursday, to provide general foreclosure-related information and further referrals for the HOPP network and community and legal resources.

The Mortgage Foreclosure Assistance Project is always seeking attorney volunteers to assist with its efforts in serving the community, including volunteering at Nassau Supreme Court in Mineola, as well as other clinics and community events throughout the year. The Project also accepts law student volunteers, interns, externs, Pro Bono scholar placements, and those looking to complete their pro bono 50-hour requirement. For more information on how to join the efforts of the Project, please contact Christina Versailles at cversailles@nassaubar.org.

"Law You Should Know" is aired on 90.3 WHPC Nassau Community College (NCC) Radio. It broadcasts episodes live on NCC radio WHPC's website ncc.edu/studentlife/whpcradiostation. The program is available for listening in podcast format through the NCC website at www..NCCradio.org or by searching for WHPC on the iHeartRadio app.

Madeline Mullane, Esq. is the Director of the NCBA's Mortgage Foreclosure Assistance Project, as well as Director of Pro Bono Attorney Activities. She can be contacted at mmullane@nassaubar.org.

Christina Versailles, Esq. is the Senior Attorney and Settlement Conference Coordinator for the NCBA Mortgage Foreclosure Assistance Project. She can be contacted at cversailles@nassaubar.org.

Thank You

TO 2023 PRO BONO VOLUNTEERS

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Anand Ahuja, Esq.
Taniesha S. Allen, Esq.
Alfred Amadio
Marilyn Quinn Anderson, Esq.
Howard Arber, Esq.
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Jennifer Koo, Esq.
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Martha Krisel, Esq.
Susanna Laruccia, Esq.
John Lehr, Esq.
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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.

Michael Cardello announced that Moritt Hock & Hamroff expanded its Trust & Estates practice to include a new Domicile Planning Group to address the issues associated with this growing trend. The group counsels clients to ensure their choice of domicile is properly planned and maintained for both income tax and estate tax purposes.

Futterman, Lanza & Pasculli, LLP was celebrating its 20th anniversary as an elder law and estate planning firm started in Smithtown. **Mark R. Blaustein, CPA, Esq**. has joined the firm as Of Counsel expanding the firm's Garden City office now located at 1325 Franklin Avenue, Suite 235, Garden City.

Cheryl L. Katz, an estate litigation Partner at Forchelli Deegan Terrana LLP, was appointed by Hon. Joseph A. Zayas to be a member of the state-wide Surrogate's Court Advisory Committee. **Gerard R. Luckman**, a Partner and Chair of the firm's Bankruptcy & Corporate Restructuring practice group, was elected President of the Institute of Management Accountants' (IMA) Long Island Chapter.

Effective March 27, New York State will expand its Move Over Law in that drivers must now move over for all vehicles that have broken down by the side of the road, including passenger vehicles. **Ira S. Slavit**, Partner, Levine & Slavit PLLC, a personal injury attorney and a road safety advocate, is reminding people to lower their speed and keep their distance from any disabled vehicles.

Rebecca Sassouni, Of Counsel to Wisselman Harounian Family Law, presented "Striking a Balance: Where Mental Health and Restorative Practices Intersect with Student Disciplinary Hearings" during a plenary session at the Nassau and Suffolk Academies of Law Annual School Law Conference.

Cullen and Dykman LLP proudly announces the addition of **Erin A. O'Brien** as Partner in the firm's Corporate Department. Erin's arrival fortifies the firm's tax certiorari practice, elevating its capabilities to deliver exceptional legal services in this specialized area.

Meltzer, Lippe, Goldstein & Breitstone, LLP is proud to announce that Ronald Fatoullah & Associates, a leading Elder Law firm serving the New York metropolitan area, has joined the firm. **Ronald Fatoullah**, a pioneer in the elder law field who has devoted over 35 years to the practice, will be the Chair of the firm's Elder Law Practice Group.

The ABA's Toxic Torts and Environmental Law (TTEL) Committee, part of the ABA's Tort Trial & Insurance Practice Section, recently published its Spring 2024 review edited by Harris Beach Partner **Daniel Strecker**. The firm's Senior Counsel **Jessica Molinares Kalpakis** recently participated in a moot court national competition as a judge at Touro Law School.

Kathleen Wright will be the recipient this year of the Nassau County Women's Bar Association's Rona Seider, Esq. Award, which is presented at the discretion of the Board of Directors for exemplary service to women and the law.

Vishnick McGovern Milizio (VMM) is pleased to announce the establishment of a new bankruptcy practice, headed by counsel **Thomas Weiss** and that **Jordan M. Freundlich** has been promoted to partner and is the new head of the firm's Trust and Estate Litigation and Appellate practices. VMM also extends a warm welcome to **Helen L. Tuckman**, a new associate in the firm's Wills, Trusts, and Estates Practice. VMM congratulates partner **Joseph Trotti**, head of the firm's Litigation Department and the Matrimonial and Family Law practice, for receiving the NCBA 2023 "Access to Justice" award for his pro bono service, and managing partner **Joseph Milizio** on being honored with a *Long Island Business News (LIBN)* 2024 Diversity in Business Award, as well as being named to LIBN's Long Island Business Influencers: Law 2024. VMM partner **Avrohom Gefen**, head of the firm's Employment Law and Commercial Litigation practices, published an article in *LIBN* explaining the DOL's new classification of employees vs. independent contractors and the inadvertent liabilities that could result from misclassification.

Robert S. Barnett and **Gregory L. Matalon**, founding partners of Capell Barnett Matalon & Schoenfeld, LLP, have been named Top Lawyers of Long Island by the *Long Island Herald*. Barnett is presenting on May 23, 2024, at the annual New York State Society of CPAs Estate Planning Conference, on "Elder Law Planning, Related Income Tax Aspects and Current Issues in Trust Design."

Bond, Schoeneck & King, PLLC, is pleased to announce that **Eugene R. Barnosky**, **Mara N. Harvey** and **Lauren Schnitzer**, formerly partners at Lamb & Barnosky, LLP, have joined the firm at its Melville office.

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Access to Justice	Hon. Conrad D. Singer and James P. Joseph
Alternative Dispute Resolution	Suzanne Levy and Ross J. Kartez
Animal Law	Harold M. Somer and Michele R. Olsen
Appellate Practice	Amy E. Abbandondelo and Melissa A. Danowski
Asian American Attorney Section	Jennifer L. Koo
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Awards	Rosalia Baiamonte
Bankruptcy Law	Gerard R. Luckman
Business Law Tax and Accounting	Varun Kathait
By-Laws	Samuel J. Ferrara
Civil Rights	David A. Bythewood
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Condemnation Law & Tax Certiorari	Michael P. Guerriero
Construction Law	Anthony P. DeCapua
Criminal Court Law & Procedure	Christopher M. Casa
Cyber Law	Thomas J. Foley and Nicholas G. Himonidis
Defendant's Personal Injury	Jon E. Newman
District Court	Bradley D. Schnur
Diversity & Inclusion	Sherwin Safir
Education Law	Syed Fahad Qamer and Joseph Lilly
Elder Law, Social Services & Health Advocacy	Lisa R. Valente and Mary Beth Heiskell
Environmental Law	Kenneth L. Robinson
Ethics	Mitchell T. Borkowsky
Family Court Law, Procedure and Adoption	James J. Graham, Jr.
Federal Courts	Stephen W. Livingston
General, Solo & Small Law Practice Management	Scott J. Limmer and Oscar Michelen
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New Lawyers	Byron Chou and Michael A. Berger
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Publications	Cynthia A. Augello
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Supreme Court	Steven Cohn
Surrogate's Court Estates & Trusts	Michael Calcagni and Edward D. Baker
Veterans & Military	Gary Port
Women In the Law	Melissa P. Corrado and Ariel E. Ronneburger
Workers' Compensation	Davin Goldman

TUESDAY, MAY 7
Women in the Law
12:30 p.m

WEDNESDAY, MAY 8
Access to Justice
12:30 p.m.

Medical-Legal
12:30 p.m.

Matrimonial Law
5:30 p.m.

THURSDAY, MAY 9
Senior Attorneys
12:30 p.m.

MONDAY, MAY 13
New Lawyers
12:30 p.m.

Association Membership
12:30 p.m.

TUESDAY, MAY 14
Education Law
12:30 p.m.

Labor & Employment Law
12:30 p.m.

Intellectual Property
12:30 p.m.

WEDNESDAY, MAY 15
Ethics
5:30 p.m.

6:00 p.m.
Diversity & Inclusion

THURSDAY, MAY 16
Business Law, Tax & Accounting
12:30 p.m.

Family Court Law, Procedure, & Adoption
Spring Luncheon
12:30 p.m.

FRIDAY, MAY 17
Sports, Entertainment & Media Law
12:30 p.m.

MONDAY, MAY 20
Commercial Litigation
12:30 p.m.

TUESDAY, MAY 21
Surrogate's Court Estates & Trusts
5:30 p.m.

WEDNESDAY, MAY 22
Cyber Law
12:30 p.m.

District Court
12:30 p.m.

Elder Law, Social Services & Health Advocacy
12:30 p.m.

Asian American Attorney Section
Paint & Sip Night
5:30 pm.

TUESDAY, JUNE 4
Women in the Law
12:30 p.m.

WEDNESDAY, JUNE 5
Real Property
12:30 p.m.

THURSDAY, JUNE 6
Hospital & Health Law
8:30 a.m.

Publications
12:45 p.m.

Community Relations & Public Education
12:45 p.m.

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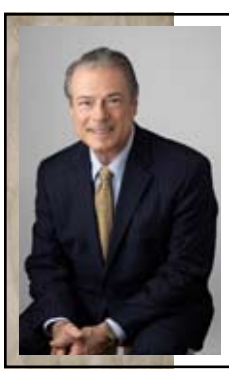

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