Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

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SAVE THE DATE

JUDICIARY NIGHT

Thursday, October 21, 2021

5:30 p.m. at Domus

See insert and page 6

OPEN HOUSE

Thursday, October 28

3:00 PM to 7:00 PM

Volunteer lawyers needed to give virtual consultations. See pg. 6

WHAT'S INSIDE

OF NOTE

NCBA Member Benefit—I.D. Card Photo

Obtain your photo for Secure Pass Court ID cards

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UPCOMING PUBLICATIONS

COMMITTEE MEETINGS

Thursday, November 4, 2021, at 12:45 PM

A Little Rain Won't Stop Us! — NCBA BBQ at the Bar 2021

After over a year of being unable to hold in-person events, a little wind and rain was not going to stop the NCBA from holding its Annual BBQ at the Bar celebration, where attorneys, judges, paralegals, legal administrators, law school students, and recent graduates gather for an evening of socializing and traditional BBQ favorites like hot dogs, hamburgers, and sliced watermelon. After an unforeseen weather forecast showed wind and rain for the duration of the day, the event was promptly moved indoors. Face masks with the NCBA logo were made available to all attendees.

The Great Hall of the NCBA was transformed into a buzzing networking area, where NCBA Corporate Partners, including AssuredPartners Northeast, Champion Office Suites, Investors Bank, MPI Business Valuation & Advisory, Opal Wealth Advisors, PrintingHouse Press, Realtime Reporting, Inc., Tradition Title Agency, and vdiscovery, set up marketing booths with fun giveaways like wine openers and goodie bags with chocolate bars and pretzels, and information about their companies and the services they can offer members and prospective members. Familiar faces were also found in the Great Hall, as each department of the NCBA was there to greet attendees, promote upcoming NCBA programs and events, and provide information about each department.

The BBQ is the perfect opportunity to reconnect with colleagues and meet new ones. For law students and recent graduates, the BBQ is a chance to make a first impression on potential future bosses and colleagues and make professional connections. Despite the weather, the BBQ was nothing short of a valuable networking experience for NCBA Corporate Partners, Members, prospective members, law students, and graduates alike.

This year's featured event sponsor, represented by Director of Business Development Kerri Winans Kaley, was Encore Luxury Living—a brand-new independent living community for those 55 and over, where residents can experience a country club atmosphere; services such as housekeeping, meals served daily, transportation via private car, and a calendar of social events are included in monthly rent.

After a fun evening of networking, attendees were invited into the recently re-opened dining room to enjoy BBQ favorites, beverages, and snacks prepared by the NCBA in-house caterer Esquires Catering, Inc. The dining room is now open again for lunch daily from 12:00 PM to 2:00 PM serving a variety of a la carte and buffet items with health standards in place—a great place to take clients and colleagues for lunch. Esquires Catering, Inc. is also available to cater private events at the Nassau County Bar Association for NCBA Members and sponsored guests. For questions or to cater a private event, call (516) 414-0879.

The NCBA would like to thank this year's BBQ at the Bar Sponsor Encore Luxury Living, Corporate Partners, Members, and Prospective Members who attended the BBQ despite the weather, and those who donated nonperishable food items that were donated to Island Harvest for families in need.

We look forward to seeing you at our upcoming events this year, including Judiciary Night on October 21. See details in the insert of this issue.

If you are not a member of the NCBA and would like to join, contact Membership Coordinator Donna Gerdik or Membership Coordinator Stephanie Pagano at (516) 747-4070 ext. 1206 or 1230. You can also join online at www.nassaubar.org. We look forward to seeing you at the NCBA!

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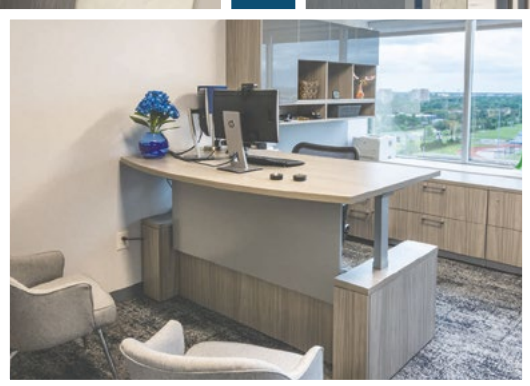

Forchelli Deegan Terrana LLP renovated and expanded its office to occupy the entire - 50,000 square foot - top floor of The OMNI in Uniondale.

The renovation includes cutting-edge technology, expanded meeting space, ergonomic features and enhanced employee dining facilities giving both FDT staff and clients the Firm Advantage.

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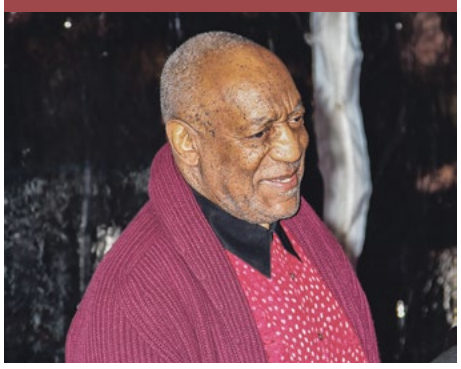
FOCUS: CRIMINAL LAW

Commonwealth v. Cosby: An Overview



Andrea M. DiGregorio and Tammy J. Smiley

Once known as "America's Dad" for his portrayal of the affable Dr. Huxtable in the 1980s' sitcom *The Cosby Show*, William Henry Cosby has amassed numerous awards in the entertainment field, including seven Emmys, nine Grammys, two Golden Globes, four NAACP Image Awards, ten People's Choice Awards, and the 1969 Hasty Pudding Theatrical's honor for "Man of the Year." Cosby's legacy, however, may well not be for his mark in the performing arts: indeed, his Kennedy Center Honor in 1998 for lifetime achievement in the performing arts has been rescinded, as was his 2009 Mark Twain Prize for American Humor. Rather, Mr. Cosby may now be more remembered for his sordid plummet into the criminal justice system following an avalanche of accusations against him for sexual assault made by nearly five dozen women.

Of the numerous complaints, however, only one, made by Andrea Constand, formed the basis of a criminal prosecution against Mr. Cosby. That prosecution occurred in Pennsylvania and was initiated, through a re-opened criminal investigation, by District Attorney Risa Vetri Ferman. Ms. Constand contended that, in January 2004, Mr. Cosby had drugged, and then sexually assaulted, her. Mr. Cosby denied having engaged in unlawful sexual conduct. Cosby's first trial, in 2017, ended in a mistrial after the jury announced it was deadlocked. Upon retrial, in 2018, the prosecution presented new and additional evidence: five women were called as witnesses, each of whom testified that they too had been sexually assaulted by Mr. Cosby. The allegations of those women were not the basis of a criminal prosecution, but rather were introduced to show that Mr. Cosby's actions against Ms. Constand were not the result of mistake or accident, but rather were part of a common plan, scheme, or design (concepts similarly recognized in New York under the *Molineux* rule).[1] This time, Cosby was convicted. But, in a divided opinion in *Commonwealth v. Cosby*,[2] Pennsylvania's highest state court reversed Mr. Cosby's conviction, finding that he had been denied due process. However, as the majority found, that due process violation did not originate from any occurrence at trial, but rather stemmed from a pre-trial event: District Attorney Bruce Castor's promise in 2005 not to bring any criminal charges against Mr. Cosby regarding Ms. Constand's allegations. This article will examine the *Cosby* decision and whether key determinations made by the Pennsylvania Supreme Court might have also been made by New York courts applying New York law.

The Promise Not to Prosecute

Central to the majority's holding that a due process violation had occurred was its finding that an "unconditional promise" not to prosecute had been made by then-District Attorney Castor. However, that finding was not without criticism: Justice Saylor, in his dissenting opinion, disagreed that an unconditional promise had been made.[3] Moreover, the same claim that brought relief to Cosby from two judges on the State's high court was rejected by the trial judge and again rejected by a unanimous panel of the State's intermediate appellate court. Examination of the facts may indeed point to some ambiguity and reason to question why the majority felt compelled to vacate Cosby's criminal conviction.

More specifically, after investigating Ms. Constand's allegations, D.A. Castor determined that there was insufficient evidence to bring a successful prosecution against Mr. Cosby. But, seeking "some measure of justice" for Ms. Constand, D.A. Castor decided that the Commonwealth of Pennsylvania would decline to prosecute Mr. Cosby for the matter involving Ms. Constand, thereby subjecting Mr. Cosby to testify in Ms. Constand's future anticipated civil lawsuit without the ability to invoke the Fifth Amendment right against self-incrimination. D.A. Castor reasoned that Mr. Cosby would be unable to invoke the Fifth Amendment in the civil proceeding because no criminal charges would be brought against him regarding Ms. Constand's claims. D.A. Castor memorialized his decision not to prosecute in a press release, wherein he stated that he "declines to authorize the filing of criminal charges" in regard to the Constand matter.

It was this press release that the majority opinion considered to be an unconditional promise not to prosecute, despite the fact that the trial court—which had held a pre-trial hearing on Mr. Cosby's habeas corpus petition that challenged the lawfulness of his prosecution—had found that there was "no agreement or promise not to prosecute…only the exercise of prosecutorial discretion [not to prosecute]."[4] The dissent agreed with the trial court's finding that there had been no unconditional promise not to prosecute, and reasoned that the "operative" language in the press report that "District Attorney Castor declines to authorize the filing of criminal charges in connection with this matter" was a "conventional public announcement of a present exercise of prosecutorial discretion by the temporary occupant of the elected office of district attorney that would in no way be binding upon his own future decision-making processes, let alone those of his successor."[5]

Detrimental Reliance on The Promise Not To Prosecute

The promise not to prosecute was not, by itself, sufficient to establish a violation of Mr. Cosby's due process rights. Rather, the majority held, it was Mr. Cosby's reasonable, detrimental reliance on that promise which resulted in fundamental unfairness. More specifically, the court found that Mr. Cosby had relied upon the non-prosecution "guarantee" to his detriment when he submitted to four civil depositions—without once invoking his Fifth Amendment right—and provided incriminating statements that were subsequently used by Castor's successor to convict Mr. Cosby of the same criminal offenses that Mr. Cosby had previously been induced to believe were "off the table."[6] And, the State's high court further held that such reliance was "reasonable," another important factor in determining that a due process violation had occurred. In reaching its conclusion of detrimental reliance, the court referred to some contract-law principles (including that of promissory estoppel), as well as case law involving plea bargains wherein a prosecutor was found to have "an affirmative duty" to honor all promises made in exchange for the defendant's plea.[7] Here, too, it bears noting that the majority opinion was not necessarily dictated as a matter of law. Indeed, the intermediate appellate court unanimously agreed with the trial court that "it was not reasonable for [Cosby] to rely on Mr. Castor's promise."[8]

Formulating An Appropriate Remedy

Having interpreted the record and supposed "promise" differently than the courts before it, the majority found that a due process violation had

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We Are an Exclusive Club...for Everybody! You Should Be a Part of It

FROM THE PRESIDENT

Gregory S. Lisi

The Nassau County Bar Association is one of the largest suburban bar associations in the country with nearly 4,000 members. However, there are many attorneys here in Nassau County who are not members. I have spoken to a number of these attorneys and asked why? The most common reasons I have heard is they do not have the time, or they are too nervous to just "show up."

I understand the time requirements of being a modern-day attorney (and adult and parent) but I try to explain that the NCBA saves time. We give FREE CLE programs during lunch. You have to eat lunch and earn CLE credit, so why not multitask? You have to network to get new business. The NCBA has many networking programs that provide the opportunity to meet potential clients and referral sources instead of spending time reaching around in the dark for these opportunities. For example, on October 19, the NCBA Diversity & Inclusion Committee will host a tribute to the Hon. Constance Baker Motley—the first African American woman admitted to the Bar of the United States Supreme Court—with a networking cocktail hour beforehand.

Further, we have committees in every area of law, including your area, which not only provides networking but the invaluable resource of other attorneys in the very area you practice or are looking for a job in. The members of this great Bar Association are always happy to help other members, pointing them in the right direction with a case or legal research that can save much time over reinventing the wheel with each new question a client calls you about.

Further, we provide a Lawyer Referral Information Service (LRIS) where we screen potential clients so members of the LRIS panel do not have to spend time on someone who may need a different kind of attorney or does not have the funds to afford one. In addition, we have numerous social activities planned, from small lunches and dinners, to golf and baseball games, and everything in between. Plus, we provide probono and charitable opportunities from a trusted source so you can know where your services are needed the most without having to research it. Rather than costing time, the NCBA saves time for our members in many ways.

Often, my little "we actually save time" discussion is persuasive. However, I then get the second concern—the NCBA can look like an intimidating bunch. As I said, we are the largest suburban bar association in a big, beautiful building, whose members include judges, elected officials, big-time litigators, giants of the legal profession, and the movers and shakers of Nassau and other counties.

Some people see us of a monolithic entity that they would have a hard time breaking into. I was surprised to hear these sentiments because I know that the members of this Bar Association are some of the most friendly and compassionate humans I have ever met. However, I then remember my worries when I was starting out. The impression—real or not—is there and I have thought of and asked others about ways to combat this misperception. We have since then come up with a few ideas.

New Member Liaisons

At NCBA events like the BBQ at the Bar and the Annual Dinner Gala, we have assigned members of the Board of Directors and Chairs of our committees to be liaisons to new members who wish to attend. Liaisons will introduce you to other members and help "break the ice" while getting to know them. When you sign up for an NCBA event, you can ask for a liaison, or call the NCBA at (516) 747-4070 and I will make the introduction myself.

Attorneys Who Are Returning to the Profession After Time Away

Another concern brought to my attention is attorneys who have come back to the profession after taking time off to start a family, for health reasons, or because they moved from another part of the country. These attorneys often feel that they are a bit behind their contemporaries in getting to know colleagues and can be unsettled by attending NCBA networking events. They feel that the average attorney does not understand the issues they are facing as they return to practicing law. To help those facing this transition, NCBA Directors Faith Getz Rousso, Adrienne Flipse Hausch, and I have formed a panel to meet with attorneys one on one who are returning to the profession.

We will have small lunches, perhaps with just one panel member, myself and/or the chair of the committee the attorney is interested in, and the returning attorney, at Domus. We can introduce the person to the NCBA and a few of its members on a much more personal basis. This will open the door of the NCBA just a little wider for people returning to the profession.

Upcoming Events New Members Should Take Part In

We are planning some exciting events that will introduce new members to the NCBA in an approachable and less formal setting. Further, we have new attorney "liaisons" as I discussed above that can be assigned to new members to introduce them to attorneys in their fields of interest. These liaisons include NCBA Members Steve Dalton, Lisa Casa, Ira Slavit, Danielle Visvader, and Marcus Monteiro, all of whom will meet with new members at Bar events and can be contacted by phone or email beforehand.

Upcoming events that new members can take advantage of include a discussion on "Hanging a Shingle" in October; a "Judicial Lunch" where new members can sit at a small table with a judge or two to ask questions; and the "Holiday Celebration," an NCBA tradition held in December.

Lunch with the President

Every Wednesday at 12:30 PM, I go to lunch by myself at our beautiful building we call Domus, located at 15th and West Streets in Mineola. Everyone is welcome to join me for lunch. Our in-house caterer is excellent and serves a variety of buffet and a la carte items like sandwiches and salads. You can always come to lunch with the President to discuss the NCBA, tour the building, and hear about member benefits.

Every leader of the NCBA was once a new attorney who was nervous, and even intimidated, about their first time at the Bar. We know how it feels and we will do everything we can to make you feel as comfortable as possible. Look for these events that I mentioned, and many others throughout the Bar year. Remember, feel free to call me or any of the liaisons so you can have a friend at the NCBA who can go with you to these events or just meet you for lunch at Domus. I know it can be a bit daunting to go into a new situation, but it will be the best professional move you will ever make.

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FOCUS: SEPTEMBER 11, 2021 ASSISTANCE

Understanding Important September 11 Assistance Programs

Beth N. Jablon

It is hard to believe that this year marks the 20th anniversary of the September 11, 2001 terrorist attacks. That day will forever be etched in our minds. By now, most of us know someone who suffers from, or sadly, succumbed to, a 9/11 related injury. Thus, it is important to know the details of the two September 11th assistance programs administered by the federal government that currently exist, and the difference between those two programs, in order to properly advise potential clients.

Federal Assistance Programs

Over the last decade there were three important pieces of legislation enacted. The first one was on January 2, 2011, when President Obama signed into law H.R. 847, the *James Zadroga 9/11 Health and Compensation Act of 2010* ("Zadroga Act").[1] This was a two-part piece of legislation that was originally set to last for only five years. Title I established the World Trade Center Health Program ("WTCHP"), a federally funded medical monitoring and treatment program, and Title II reactivated and reopened the September 11th Victim Compensation Fund ("VCF") (which originally existed from 2001 through 2004). The WTCHP opened its doors on July 1, 2011 and the reactivated VCF opened in October 2011.

Thereafter, on December 18, 2015, President Obama signed into law a bill reauthorizing the *James Zadroga 9/11 Health and Compensation Act of 2010*. The new law, the *James Zadroga 9/11 Health and Compensation Reauthorization Act of 2015,*[2] extended the WTCHP until September 30, 2090, and extended the VCF for another five years, until December 18, 2020.

And finally, on July 29, 2019, President Trump signed into law H.R. 1327, *The Never Forget the Heroes: James Zadroga, Ray Pfeifer, and Luis Alvarez Permanent Authorization of the September 11th Victim Compensation Fund.*[3] The VCF Permanent Authorization Act extended the VCF's claim filing deadline from December 18, 2020, to October 1, 2090, and appropriated such funds as may be necessary to pay all eligible claims. These three pieces of legislation were huge wins for the 9/11 community.

Since both programs have now been permanently extended and will remain available through most of 2090, it makes sense to familiarize yourself with their similarities and differences. Even though there is some overlap in criteria for both programs, there are a few distinctions to be aware of.

Applying for Assistance

First and foremost, even though they were created under the same legislation, the World Trade Center Health Program ("WTCHP") and the September 11th Victim Compensation Fund ("VCF") are separate programs, with their own separate application process and with distinct eligibility criteria, that are administered by different federal government agencies.

The WTCHP is administered by the National Institute for Occupational Safety and Health ("NIOSH"), part of the Centers for Disease Control and Prevention ("CDC"), which in turn, is part of the U.S. Department of Health and Human Services ("HHS"). The VCF, on the other hand, is administered by the U.S. Department of Justice. A common misconception that people have is that being in one program automatically means that they are registered in the other program. That is simply not the case.

The WTCHP is a federal medical monitoring and treatment program for first responders and survivors that covers both physical and psychological conditions. You can find the list of covered conditions at https://www.cdc.gov/wtc/conditions.html. The criteria for eligibility into the WTCHP as a non-responder "survivor" means that person was either :

1. Present in the dust or dust cloud on September 11, 2001; or
2. Lived, worked or went to school south of Houston Street, including a very small part of Brooklyn, contained within a 1.5-mile radius of the former WTC complex, between September 11, 2001, and July 31, 2002.

Furthermore, the WTCHP certification process assesses the duration of the exposure, in order to causally connect a particular injury to that person's exposure. Depending on when the date of the first exposure is, there is specific criteria regarding the minimum amount of hours of exposure needed for presumed causation of the injury that will result in a certification.

The VCF, on the other hand, provides financial compensation for physical injuries (not psychological conditions), illnesses or deaths that happened as the result of the 9/11 terrorist attacks. Generally speaking, the geographic zone for presence at site is south of Canal Street in Manhattan only, or on routes of debris removal, which is a smaller area than what is permitted by the WTCHP for enrollment into their program. Furthermore, the "presence at site" exposure time frame is also slightly smaller, being from September 11, 2001, through May 30, 2002, rather than through July 31, 2002. The VCF does not require a minimum amount of hours of exposure; it just requires being present south of Canal Street at any point between September 11, 2001, and May 30, 2002.

Vague and conclusory details about presence exposure will not suffice on a VCF claim. To successfully prove presence at site, one must provide documents that contain as much specific detail as possible about where they were located (specific addresses); when they were in the exposure zone (specific dates); and why they were in the exposure zone (specific activities). The best evidence is independent third-party verification and contemporaneous documents (i.e., employer letter for example). Affidavits or witness presence statements are less desirable but may be accepted.

So why does all of this matter? Because the key to a successful VCF claim is meeting the criteria for enrollment into the WTCHP and having enough exposure in the NYC exposure zone so that the WTCHP will "certify" your condition as being 9/11 related. If the WTCHP does not certify a specific condition, the VCF will not compensate you for it. It is as simple as that. Whatever injuries are certified by the WTCHP are the same conditions that the VCF will find a claimant eligible for. Additionally, the VCF makes no distinction between survivors or responders when it comes to claim evaluation and calculating a monetary award. The WTCHP, on the other hand, does make the distinction when it comes to enrollment applications and the locations for treatment.

Help Is Still Available

So, today, both the WTCHP and the VCF are set to continue through most of 2090. Unlike the VCF, there is no "registration" process for the WTCHP. It is only an application process. Timely registration with the VCF depends on individual circumstances, but generally

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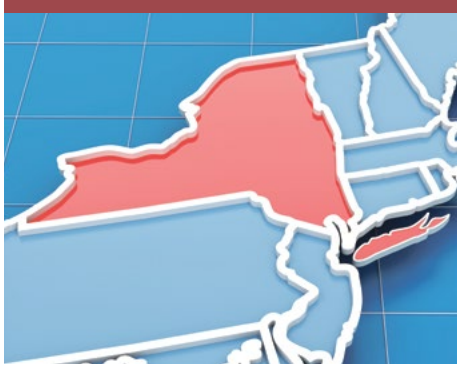
Beth N. Jablon is an associate of Sullivan Papain Block McGrath Coffinas & Cannavo P.C. in Garden City, which is currently handling more than 4,000 claims in the September 11 Victim Compensation Fund.

FOCUS: IMPEACHMENT IN NEW YORK STATE

The New York State of Impeachment



Thomas McKevitt

Most people, and likely most attorneys, are familiar with the impeachment procedure under the federal constitution. This is not only because people are far more familiar with the US Constitution, but because there have been four impeachment trials of American Presidents, including two in less than two years.

However, for the second time in over a dozen years, the duly elected Governor of the State of New York has resigned from office due to scandal. Both Governors Eliot Spitzer and Andrew Cuomo left office under the threat and distinct possibility that they would be impeached and removed from office.[1] Although only one New York Governor has actually been removed from office through impeachment, in light of the recent events, it is an appropriate time to examine the procedure for impeachment in New York and whether the time is ripe for reform.

English Origins

The concept of impeachment comes from England, where the first impeachments were thought to have taken place during the reign of Edward II, who ruled from 1327-1377. The procedure was firmly established during the time of Henry IV from 1399-1413.[2] The concept was developed in order for Parliament to have some check on the power of the monarchy.

Due to the doctrine of sovereign immunity, Parliament could not control the King himself. But it could have some control over the ministers and friends he employed to carry out his duties.[3] Under the English procedure, the House of Commons would initiate the impeachment process, and the trial would be held in the House of Lords where conviction would be by a simple majority vote.[4]

The number of impeachment trials through the centuries would increase and decrease depending on how powerful Parliament was at the time. Although there was no codified standard for impeachment, in more than seventy-five percent of the cases, the basis was either "treason" or "high crimes and misdemeanors."[5]

Colonial Precedents

In the American colonies in the seventeenth and eighteenth centuries, colonial assemblies used impeachment procedures as a means of expressing grievance against the sovereign's appointed rulers and ministers. Although they lacked the actual authority to remove officers, it was a method of political protest.[6] As the American Revolution progressed, state constitutions adopted, and nearly all of them contained, provisions for the impeachment of officials. The grounds for impeachment varied from state to state, ranging from "mal-administration" to "mal and corrupt conduct" and "misdemeanor and default."[7]

U.S. Constitution

The United States Constitution provides that the President, Vice-President, and all Civil Officers of the United States may be impeached and removed from office for conviction of "Treason, Bribery, or other high Crimes and Misdemeanors"[8] and may be impeached by a majority vote of the House of Representatives.[9] A trial is then held in the United States Senate, presided over by the Chief Justice of the United States. A conviction requires a two-thirds vote.[10] Judgment of an impeachment trial shall "not extend further than removal from office, and disqualification to hold and enjoy any Office of honor, Trust or Profit of the United States."[11]

New York Constitutions

The only court specifically provided for in the first New York State Constitution of 1777 was the Court for the Trial of Impeachments and Correction of Errors. This Court was composed of the President of the senate, the senators, the chancellor and three justices of the Supreme Court. As there was no Appellate Division or Court of Appeals at this time, one of the functions of this court was to correct errors made by lower courts. The grounds for impeachment were "mal or corrupt conduct."[12] The Assembly was given the responsibility of impeaching officers, but at this time, a two-thirds vote was required, and this same fraction was required by the impeachment court

See IMPEACHMENT, Page 21

Thomas McKevitt is Special Counsel to Sahn Ward, LLP in Uniondale, and is the former Minority Leader Pro Tempore of the New York State Assembly.

FOCUS: LITIGATION

Preserve Video or Face the Consequences in Premises Liability Cases

Andria Simone Kelly

Video surveillance can often make or break a premises liability case. Surely, the best proof that an accident occurred and how it occurred is the video surveillance. Video surveillance, however, could potentially show that no accident occurred at all, that the accident was staged, that someone other than the defendant created the alleged condition, or that the defendant did not have notice of the alleged condition.

In *Savino v. The Great Atlantic and Pacific Tea Co., Inc.,*[1] which involved the disclosure and potential spoliation of video surveillance by the defendant supermarket, the lower court recognized that "[i]n a fast-developing technological age, where cell phones and texting devices are used handily not only to talk and send messages, but also to photograph, the usefulness of a video surveillance tape to help get at the truth of a disputed factual issue is undebatable and undeniable."[2] Clearly, a case that on its face appears defensible, can quickly become "a loser" if the video surveillance is not preserved or not preserved properly.

The penalty for failure to preserve video can be serious and can, as indicated, impact a viable defense. "Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126."[3] The responsible party may be sanctioned by the striking of its pleading. However, where the evidence lost is not vital to the case or its destruction is not prejudicial, the sanction of striking a pleading would be extreme. In that instance, a lesser penalty or no sanction at all may be appropriate.[4] The cases are fact sensitive, and the sanction ordered is in the discretion of the court.[5]

On a Motion for Spoliation Sanctions, the moving party must establish that: (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a "culpable state of mind," which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party's claim or defense.[6] "[I]n the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices."[7] The problem, of course, is determining when a premises owner is on notice of specific claim.

Most defense counsel are not involved in claims pre-suit and the burden is on the premises owner to retain video upon notice of an accident claim. In this regard, the premises owner should have a clear policy as to the preservation of video and this policy should be shared with and followed by its employees.

The best practice, of course, would be to search for video immediately after an accident is reported. If video exists, the video of the actual accident, as well as a reasonable period of time before and after the accident, should be preserved. If video of the accident does not exist, the search for the video should be well documented with notes saved as to who searched for the video, what the video retention period is, when the search was conducted, how the search was conducted and what the search revealed. An explanation as to why no video exists should also be noted (i.e., no camera coverage, camera broken, etc.).

In instances where a claimant or his attorney requests that specific portions of the video be maintained, the premises owner should best comply with the request. If the request is unreasonable and/or burdensome, a telephone call to the claimant's attorney in an attempt to narrow the preservation request would be worthwhile. Any agreement to narrow the request should be confirmed in writing.

Even in a situation where the video is preserved pre-suit, the defendant can face a spoliation sanction. If the defendant preserved some video or establishes that it acted in good faith

See VIDEO, Page 15

Andria Simone Kelly is a partner with Cullen and Dykman LLP in Garden City in the firm's General Tort and Insurance Litigation department. She has over 25 years' experience handling a wide variety of cases in the New York courts, including representing large retailers in premises liability, construction, New York Labor Law, and property damage cases.

FOCUS: SOCIAL MEDIA FOR THE WORKPLACE

Drafting an Effective Workplace Social Media Policy

Cynthia A. Augello

Now that so many employees have been working remotely and will continue to do so for the foreseeable future, businesses of all sizes are realizing the importance of creating and updating social media policies. According to a 2019 Pew Research Center survey, nearly three-quarters of all working adults in the United States use social media before, during, and after work each business day.[1] Employers and employees benefit from clear guidelines about what is and is not appropriate online behavior, as those lines have likely become somewhat blurred. Although the National Labor Relations Board (NLRB) has had some employer-friendly decisions in approval of social media policies in the last few years,[2] it is important to tread carefully, aiming to develop a policy that achieves the company's legitimate business interests without compromising its employees' NLRA rights. Given the recent change in majority at the NLRB, such policies going forward will likely be reviewed more strictly.

Legal Implications and Considerations

Because social media is such a powerful tool used by employers and employees alike, employers may be inclined to monitor and/or respond to employees' social media posts. There are generally three areas of law that should guide employers in this regard.

Section 7 of the NLRA protects discussions by employees concerning wages, hours, and other terms and conditions of employment on social media.[3] The NLRA protects both unionized and nonunionized employees, however, it does not protect supervisors. For social media activity to be protected by the NLRA, it must be concerted: involve more than one person.[4] By definition, social media activity is almost always concerted, which means that employees' rights to post comments on social media about their terms and conditions of employment are protected. Some employee speech is not protected by the NLRA, such as political speech that is unrelated to employment. For example, a social media exchange where one employee attempts to convince another employee to vote for a specific candidate would not be protected.[5] In contrast, however, if the employee was attempting to convince the other employee to vote for a specific candidate because of that candidate's promises of an increased minimum wage, this activity may be protected under the NLRA.[6]

Contrary to popular belief, the First Amendment does not typically protect employee speech in the private workplace.[7] Certain states, however, have extended specific free speech protections to employees by statute. New York's off-duty conduct law, Labor Law § 201-d, prohibits employers from discriminating against an employee because of their political activities or legal recreational activities outside of work hours, so long as they occur off the employer's premises and without use of the employer's equipment. For example, an employee's social media post indicating participation in a political rally outside of working hours could not form the basis of adverse action in New York.[8] The law does not, however, protect activities that create a material conflict of interest related to the employer's trade secrets, proprietary information, or other business interests.[9]

Contents of an Effective Social Media Policy

It is important to consider the individuals involved in drafting, monitoring, and enforcing the company's social media policy. As such, it is important to create a team including legal, human resources, executives, information technology, and marketing.

For example, legal would likely take the lead in drafting the policy and informing the company of the legal aspects of what can and not be stated and/or enforced. Human resources would ensure the policy is in line with the other policies within the company, like anti-discrimination and harassment policies, and computer and personal device policies. They also can offer insight into recruitment procedures and policies—after all, it is common for potential employees to scour social media to research a company prior to accepting employment. Moreover, as human resources will likely have the job of training new hires on the social media policy, investigating violations thereof, and answering questions related thereto, the HR input is important in the drafting stage.

An effective social media policy should have the following elements:

- **Who?** It is important to decide if the company wants its employees speaking on its behalf (e.g., brand/product promotion) in general or if it only wants certain employees/roles to be able to do so. Make it clear in the policy who may speak on behalf of the company whether it is official or unofficial.
- **Acceptable conduct and content.** What does the company want or not want employees to post online? For example, does the company want employees engaging with one another in the comments of a company post? Does the company want an employee giving its opinion on a company product with or without identifying themselves as an employee?
- **Other policies.** The company may want their social media policy to directly reference or incorporate its other policies including the sexual harassment policy, discrimination policy, computer use policy, etc.
- **Regulations, legal restrictions and sensitive information.** The policy should clearly inform employees of the kinds of content they can and cannot post per industry regulations.
- **Procedure for conflict or crisis.** The policy should be clear as to what an employee should or should not do in conflict or crisis situations. Employees should also be aware of who they should reach out to if they have questions/concerns or are directly contacted concerning a conflict or crisis (e.g., public relations issues).
- **Encourage and support participation.** If the company encourages employees to engage in social media, the policy should explain that their participation in social media can help them build their personal brand, help the company recruit new employees, and assist the company's sales and marketing activities. The policy should then encourage employees to share why they enjoy working for the company, how they feel supported in their role, advancement stories, and customer testimonies about the company's products or services.
- **Investigation Procedures and Possible Sanctions.** Just as in most workplace policies, a social media policy should describe the procedure by which the company will investigate any reported violations of the policy and potential sanctions if a violation is found. Having a written procedure will help ensure that the same procedure is used each time a

See DRAFTING, Page 24

Cynthia A. Augello is the Principal of the Law Offices of Cynthia A. Augello representing companies of all sizes in labor and employment law matters. She is also the Vice Chair of the Publications Committee of the Nassau County Bar Association.

FOCUS: LITIGATION

Learning from Experience: Summary Judgment Under the New Uniform Rules

Bruce Cohn and Christopher J. DelliCarpini

In the eighteen months since the Uniform Rules were amended in February 2020, the changes to summary judgment motion practice have proven a challenge. We have all learned how to comply with these new rules, as well as how to use them to advocate more effectively. We're not done learning, but it's not too early to share what we've learned so far.

The Statement of Material Facts, and the Response

The biggest change to summary judgment motion practice was the requirement in Uniform Rule 202.8-g(a) of "a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." Likewise, subsection (b) requires in opposition papers "a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried." The rule makes clear that the statement should be separate from counsel's affirmation—and New York State Courts Electronic Filing System's (NYSCEF) drop-down document list indicates that the opposition response should be separate as well.

Practitioners in federal court were familiar with such statements,[1] but the rest of us were unsure just how to craft them. Some attorneys have erred on the side of thoroughness, submitting statements recounting every fact that is material to any aspect of the litigation. The more facts one includes, however, the more likely it is that the nonmovant will find one that is in dispute, jeopardizing the motion.[2] That puts the movant in the awkward position of having to admit in reply that one of their facts really isn't so material after all. A more prudent approach might be to state just the facts that are material to the motion, rather than the entire *res gestae*.

The response cannot follow the format, common in answers, of simply enumerating in one paragraph all the material facts that are either disputed or undisputed. Rather, each response must be a separately numbered paragraph, and each disputed fact "must be followed by citation to evidence submitted in support of or in opposition to the motion."[3] In fact, "[e]ach numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted unless specifically controverted by a correspondingly numbered paragraph" in the response.[4]

Though not required, nonmovants might consider block-quoting each asserted material fact before each response, to spare the court from having to flip between documents to know what is or is not in dispute. Also, to avoid ambiguity, additional facts in the response are best put in paragraphs numbered sequentially after the last numbered paragraph in the statement.

Counsel can take comfort in the fact that the new word limits on court documents Uniform Rule 202.8-b do not apply to the statement or the response. Rather the rule applies only to "affidavits, affirmations, briefs and memoranda of law" offered in support, opposition, or reply. Indeed, a word limit for a statement of material facts makes as little sense as it would for a pleading.

An interesting question is whether a cross-motion for summary judgment requires a statement of material facts that is separate from the cross-movant's response to the movant's statement. It would seem that where the movant is the object of the cross-motion, no separate statement would be necessary; the relevant facts could be included in the cross-movant's response. But where the cross-motion is brought against a party other than the movant, is that party entitled to a separately identified statement of facts material to the cross-motion? New York courts have yet to decide this particular matter, leaving aside the propriety of a cross-motion against a nonmovant.[5] Federal district courts have faced this situation, however, and rather than denying a cross-motion on such grounds, have considered the undisputed facts in the statement and the response.[6]

The Affirmation and Exhibits

The requirement of a separate statement of material facts has left some attorneys wondering what was left to include in counsel's affirmation. In fact, the new rule allows us to tailor the affirmation to its best purpose: presentation of the evidence in a way that supports our argument. Think of the statement or the response as the building blocks from which we construct our factual argument, much as we arrange the presentation of witnesses and exhibits at trial. We can then simply cite to the statement or response, without having to reiterate the proof for each fact. Certain facts may still need to be proven up in the affirmation, however, like those supporting the admissibility of evidence.

Therefore, whether supporting or opposing summary judgment, the affirmation should generally contain:

- a restatement of the relevant claims or affirmative defenses
- the facts for or against the admissibility of evidence
- the facts supporting the party's position, with reference to the statement, response, or both
- the highlights of any expert opinions about those facts
- a conclusion that segues from these factual arguments to the legal arguments in the memorandum

Exhibits are essential for any summary judgment motion or opposition, but some exhibits need not be attached to motion papers, as CPLR 2214(d) makes clear:

> [e]xcept when the rules of the court provide otherwise, in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the docket numbers on the e-filing system.

For example, one can simply cite to *NYSCEF 123 ("Amended Complaint") ¶ 10* rather than e-file a document that is already in the court's online file. Indeed, citation to redundant exhibits could lead to confusion.

The Memorandum

The current Uniform Rules implicitly discourage the "speaking affirmation," which combines factual averments and legal argument. As mentioned above, the word limits apply to discrete documents rather than the entire package of motion papers; affirmations and memoranda each can run up to 7,000 words, or 4,200 in reply. A generous limit, but the rule clearly contemplates separate documents and gives counsel every reason to reserve the affirmation for the facts and the memorandum for argument. This also means that the certification of compliance with word limits should be a separate page at the end of each affirmation or memorandum, rather than a separately filed collective certification.[7]

Think of the memorandum as the closing argument, showing the legal significance of the facts already established. If the affirmation relies on the facts proven in the statement or the response, then the memorandum relies on the presentation of the facts in the affirmation. We can therefore cite back to the affirmation rather than reiterate the factual "argument" by citing to the statement or response.

Conclusion

This article is merely the authors' observations and opinions, based on their experiences thus far litigating summary judgment motions under the current rules. Others' experiences will differ, as may their conclusions. If we are to improve our practice, then we all should share our experiences and discuss the most efficient and effective ways to present these complex motions. We hope that this article inspires conversations about just how we can use these rules to improve our respective practices and the practice of law in general.

1. *E.g.*, S.D.N.Y. & E.D.N.Y. Local Civ. R. 56.1.
2. *See Friends of Thayer Lake LLC v. Brown*, 27 N.Y.3d 1039, 1043 (2016)("Summary judgment is inappropriate in any case where there are material issues of fact in dispute or where more than one conclusion may be drawn from the established facts.")
3. 22 NYCRR § 202.8-g(d).
4. 22 NYCRR § 202.8-g(c).
5. *See Daramboukas v. Samlidis*, 84 A.D.3d 719, 721 (2d Dept. 2011).
6. *E.g, Moradi v. Morgan*, ___F.Supp.3d ___, 2021 WL 1092584 (D. Mass. Mar. 22, 2021); *O'Shea v. Childtime Childcare, Inc.*, 90 Fair Empl.Prac.Cas. (BNA) 1152, 2002 WL 3178936 (N.D.N.Y. Dec. 2, 2002).
7. 22 NYCRR § 202.8-b(c).

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Bruce Cohn is an attorney in private practice and former VP and Senior Counsel at NYU Winthrop Hospital. He is also Vice-Chair of the NCBA Medical-Legal Committee. He can be reached at medlaw72@optonline.net.

FOCUS: LAW AND AMERICAN CULTURE

Rudy Carmenaty

Float Like a Butterfly While Stung by the Bees: The Trials & Tribulations of Muhammad Ali

When will they ever have another fighter who writes poems, predicts rounds, beats everybody, makes people laugh, makes people cry, and is as tall and extra-pretty as me? In the history of the world from the beginning of time, there's never been another fighter like me.

—Muhammad Ali

Muhammad Ali is an icon for his unsurpassed skills as a boxer and for his principled stance on behalf of his religious beliefs. He broke down barriers with his fists, his charisma, and his convictions. Frankly, no athlete was so gifted, so defiant or so out-spoken.

In the ring, Ali was like poetry in motion. He also displayed a facility with the English language that manifested itself with aplomb. Part pugilist, part poet, Muhammad Ali's significance transcends the sporting world. Ultimately, the nation's highest court could not deny either his status as a conscientious objector nor the potency of his character.

But such veneration was not always the case. After winning the heavyweight title in 1964, he changed his name from Cassius Clay and joined the Nation of Islam. Two years later, citing his Muslim beliefs, Ali refused induction into the Armed Forces during the Vietnam War. He became a pariah, denounced in the media, prosecuted by the government.

Convicted for violating the Uniform Military and Training Act,[1] Ali underwent an enforced exile from prizefighting which cost him three years in his athletic prime. He later unadvisedly prolonged his career. This decision no doubt contributed to his Parkinson's disease, only accentuating his sacrifice, and adding poignancy to his story.

After the Fifth Circuit Court of Appeals upheld his conviction, not once but twice, the Supreme Court would unanimously and unexpectedly rule in Ali's favor in *Clay v United States*.[2] The resulting per curium opinion may appear anticlimactic, but Ali's ordeal in the courts was as momentous as any of his bouts.

War is against the teachings of the Quran. I'm not trying to dodge the draft.
We are not supposed to take part in no wars unless declared by Allah or The Messenger.

—Muhammad Ali

Ali, then known as Clay, registered for the draft in his native Louisville. Local draft boards under the Selective Service System determined eligibility for exemptions and deferments. Initially classified 1-A, he was reclassified as Class 1-Y (Ali was disqualified from military service due to scoring poorly on the Armed Forces aptitude test) only to be reclassified a third time as 1-A in 1966.[3]

A draft board's decision was subject to administrative review by a board of appeals. Hearings were conducted by a judge, involving an FBI investigation and a Justice Department recommendation.[4] Ali, while resident in Louisville, applied for conscientious objector status and when it was denied he appealed.

To be classified a conscientious objector, three conditions needed to be satisfied:

1. The individual must object to all wars;
2. The individual must be sincere in their beliefs;
3. The individual's objections are predicated on religious belief, or comparable moral convictions.[5]

Ali's beliefs were based on the teachings of Elijah Muhammad, the 'Messenger of Allah' and the Nation of Islam's leader. Muhammad's pronouncements expressly forbade any Muslim from participating in a war not declared by Allah. Ali's administrative hearing went before Judge Lawrence

See MUHAMMAD ALI, Page 23

Rudy Carmenaty serves as a Bureau Chief in the Office of the Nassau County Attorney, is the Director of Legal Services for the Nassau County Department of Social Services, and the Language Access Coordinator for the Nassau County Executive. He is also Co-Chair of the NCBA Publications Committee and Chair of the Diversity and Inclusion Committee.

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How Not to Put Your Clients in "Jeopardy": What is, "Update Their Employee Handbooks?"
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Accounting for Attorneys
5:30-7:30PM
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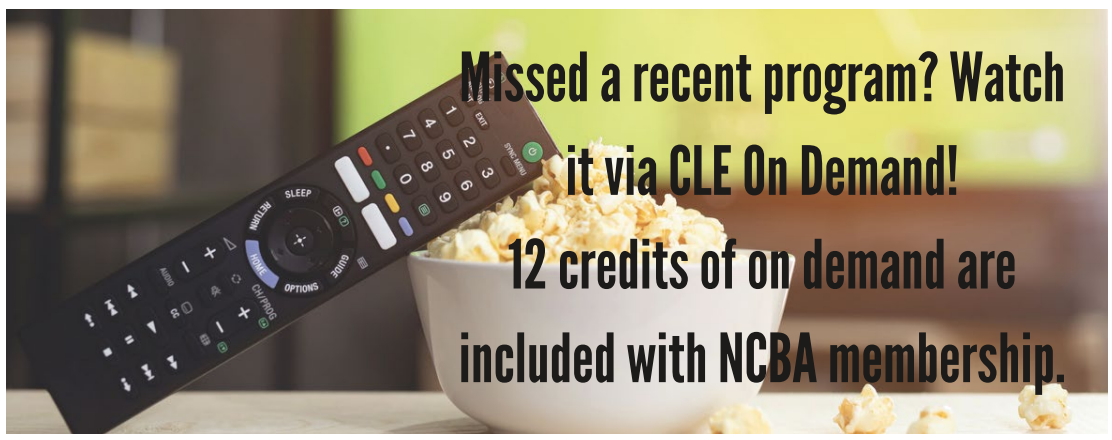

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October 22, 2021
Criminal Law and Procedure Update 2021
With the NCBA Criminal Courts Law and Procedure Committee, the Assigned Counsel Defenders Program Inc. of Nassau County, and the Suffolk Academy of Law
Program sponsored by NCBA Corporate Partner PHP
1:00-4:00PM
2.5 credits in professional practice; .5 in ethics

Cosby…

Continued From Page 3

occurred, and then considered what remedy was appropriate. Again turning to contract law and cases involving plea bargains, and reflecting on constitutional principles of "fundamental fairness," the court assessed under what circumstances "specific performance" (here, the non-prosecution promise) should be applied. Noting, inter alia, that (1) the non-prosecution guarantee had come from the individual who was empowered to implement that promise (as opposed to emanating from someone who could not, such as a police officer), (2) D.A. Castor's machinations effectively "forced Cosby to participate against himself in a civil case in a way that Cosby would not have been required to do had he retained his constitutional privilege against self-incrimination," and (3) a multi-million-dollar settlement was reached as a result of Cosby being compelled to provide incriminating evidence, the majority held that specific performance of Castor's non-prosecution promise was "the only remedy that comports with society's reasonable expectations of its elected prosecutors and our criminal justice system."[9] In so holding, the majority rejected the remedy—espoused by Justice Doughtery in his concurring/dissenting opinion—of prohibiting, in a criminal prosecution, the use of Mr. Cosby's inculpatory statements that had been made during the civil depositions.

Same Result In New York?

Whether New York courts would have reached the same decision as the Pennsylvania Supreme Court is debatable. Of course New York, like Pennsylvania, is acutely mindful that criminal defendants are entitled to due process and its prosecutors are legally and ethically obligated to deal fairly with defendants.[10] However, there are other aspects of the *Cosby* decision which might have been approached differently by New York courts.

To begin, the *Cosby* decision finding the prosecution to have been barred from its inception, occurred after the conclusion of two separate lengthy trials (the first having resulted in a mistrial) involving the very personal testimony of sexual assault victims and the expenditure of significant judicial, jury venire, and prosecutorial resources. In New York, by contrast, Article 78 of the CPLR permits challenges to be raised pre-trial where there is clear legal right to relief and the prosecution or trial court is acting in excess of its authority in such a manner as to implicate the legality of the entire proceeding.

Moreover, in reviewing claims on their merits, New York appellate courts generally give deference to the factual findings of the trial courts, and New York's highest state court does not review affirmed factual findings in criminal cases that are supported by evidence in the record.[11] Pennsylvania has similar principles.[12] And, although the *Cosby* majority set forth its recognition that "reviewing courts are not fact-finding bodies" and appellate courts are limited to "determining whether there is evidence in the record to justify the trial court's finding," the majority nonetheless—as noted by the dissent—seemed to mostly ignore the trial court's "explicit" factual finding that there was "no agreement or promise not to prosecute." Instead of paying heed to that factual finding, the Pennsylvania majority focused on the trial court's finding that "D.A. Castor's actions amounted only to a unilateral exercise of prosecutorial discretion," and then held that it was not bound by the lower court's legal determinations that derived from that finding. And, in employing that reasoning, the majority framed the relevant question as "whether, and under what circumstances, a prosecutor's exercise of his or her charging discretion binds future prosecutors' exercise of the same discretion."[13]

Another difference may be the extent to which the Pennsylvania court relied on contract law to solve criminal law issues. Such extensive reliance is not typically seen in New York criminal cases.[14]

The ultimate holding in the case—that the only remedy consistent with the due process violation was dismissal of the charges and enforcement of the promise not to prosecute—also might not be the outcome in New York. Rather, as proffered in the dissenting/concurring opinion by Justice Dougherty, the appropriate remedy would likely be suppression of the statements Mr. Cosby made at the depositions. Such a determination in New York might be foreshadowed by the Monroe County case of *People v. Brown*.[15] There, a prosecutor promised two individuals that they would not be prosecuted for certain crimes if they provided statements regarding those incidents and cooperated in the prosecution of other named defendants. Based upon that promise, the two individuals provided statements. However, the District Attorney later claimed that those individuals had reneged on their cooperation promise (which was disputed by those individuals) and, therefore, brought criminal charges against those informants. The *Brown* court held that the proper remedy in that case was suppression of the statements, reasoning that those statements had been made in reliance on the non-prosecution promise, and the prosecutor's subsequent decision to bring changes resulted in those statements being made involuntarily within the meaning of Penal Law § 60.45.[16] However, in *Brown*, the parties had joined in an agreement, whereas in the *Cosby* prosecution there was no agreement between the parties but only a unilateral statement of intention articulated in a press release.

Conclusion

The *Cosby* case presents a "constellation of…unusual conditions," and therefore its precedential value—even in Pennsylvania—although uncertain, is likely to be extremely limited. What may well be its lasting legacy, though, is its chronicling of the downfall of Bill Cosby based upon his repeated attacks on physically helpless women as devised in his "unique sexual assault playbook."[17]

1. *People v. Molineux*, 168 N.Y. 264 (1901).
2. 2021 WL 2674380, 252 A.3d 1092 (Pa. 2021).
3. 2021 WL 2674380 at *45 (Saylor, dissenting).
4. *Id.* at *11.
5. *Id.* at *45 (Saylor, dissenting).
6. *Id.* at *27, *41.
7. *Id.* at *28-*30, *36.
8. *Id.* at *23.
9. *Id.* at *38.
10. *See, e.g., People v. Novak*, 30 N.Y.3d 222 (2017); *People v. Colon*, 13 N.Y.3d 343, 349 (2009).
11. *People v. Williams*, 36 N.Y.3d 156, 163 (2020)
12. 2021 WL 2674380 at *25.
13. *Id.* at *25 (cleaned up), *27, *46 (Saylor, dissenting).
14. *See, e.g., People v. Selikoff*, 35 N.Y.2d 227, 238 (1974) ("Application to plea negotiations of contract law is incongruous. The strong public policy of rehabilitating offenders, protecting society, and deterring other potential offenders presents considerations paramount to benefits beyond the power of individuals to 'contract'.").
15. 123 Misc. 2d 983, 983–84 (Sup. Ct. Monroe Co. 1984).
16. *Id.* at 985.
17. 2021 WL 2674390 at *28 (quoting *Commonwealth v. Cosby*, 224 A.3d 372, 402 [Pa. Super. 2019]).

NCBA Committee Meeting Calendar October 5, 2021 - November 4, 2021

Please Note: Committee Meetings are for NCBA Members. Dates and times are subject to change. Check www.nassaubar.org for updated information.

IMMIGRATION LAW
George Terezakis
Tuesday, October 5
5:30 p.m.

ANIMAL LAW
Kristi L. DiPaolo
Tuesday, October 5
6:00 p.m.

REAL PROPERTY
Alan J. Schwartz
Wednesday, October 6
12:30 p.m.

PUBLICATIONS
Andrea M. DiGregorio/ Rudolph Carmenaty
Thursday, October 7
12:45 p.m.

COMMUNITY RELATIONS & PUBLIC EDUCATION
Ira S. Slavit
Thursday, October 7
12:45 p.m.

CIVIL RIGHTS
Bernadette K. Ford
Tuesday, October 8
12:30 p.m.

MEDICAL-LEGAL
Christoper J. DelliCarpini
Wednesday, October 9
12:30 p.m.

ALTERNATIVE DISPUTE RESOLUTION
Michael Markowitz/Suzanne Levy
Wednesday, October 9
12:30 p.m.

MATRIMONIAL LAW COMMITTEE
Jeffrey Catterson
Wednesday, October 9
5:30 p.m.

INTELLECTUAL PROPERTY
Frederick J. Dorchak
Thursday, October 14
12:30 p.m.

MUNICIPAL LAW
Judy L. Simoncic
Thursday, October 14
12:30 p.m.

PLAINTIFF'S PERSONAL INJURY
David Barry
Tuesday, October 19
12:30 p.m.

WOMEN IN THE LAW
Edith Reinahrdt
Tuesday, October 19
12;30 p.m.

ELDER LAW SOCIAL SERVICES HEALTH ADVOCACY
Ariella Gasner/Suzanne Levy
Tuesday, October 19
5:30 p.m.

DIVERSITY & INCLUSION
Rudolph Carmenaty
Tuesday, October 19
5:30 p.m.

BUSINESS LAW, TAX & ACCOUNTING
Jennifer Koo/Scott Kestenbaum
Wednesday, October 20
12:30 p.m.

ASSOCIATION MEMBERSHIP
Michael DiFalco
Wednesday, October 20
12:45 p.m.

LEGAL ADMINISTATOR
Virginia Kawochka/Linda Tierney
Thursday, October 21
8:30 a.m.

APPELLATE PRACTICE
Jackie Gross
Thursday, Octobe 21
12:30 p.m.

DISTRICT COURT
Roberta Scoll
Friday, October 22
12:30 p.m.

NEW LAWYERS
Steven Dalton
Wednesday, October 27
5:30 p.m.

IMMIGRATION LAW
George Terezakis
Wednesday, November 3
12:30 p.m.

REAL PROPERTY
Alan J. Schwartz
Wendesday, November 3
12:30 p.m.

PUBLICATIONS
Andrea M. DiGregorio/ Rudolph Carmenaty
Thursday, November 4
12:45 p.m.

COMMUNITY RELATIONS & PUBLIC EDUCATION
Ira S. Slavit
Thursday, November 4
12:45 p.m.

Video…

Continued From Page 7

and provides a reasonable explanation for not preserving video, a lesser sanction, such as a negative inference charge at the time of trial, or no sanction at all, may be appropriate.

In *Guarisco v. King Kullen Grocery Co., Inc.,*[8] the plaintiff sent a letter to the defendant five days after the accident requesting that all video for the 24-hour period prior to the accident be preserved. A demand for the video for that period was also made by the plaintiff after the suit was commenced. In response, the defendant exchanged video surveillance for a period of 35 minutes before the accident through approximately one hour and a half after the accident. The defendant contended that this was all the video that was preserved and that it followed its standard practice for the preservation of the video even though it was aware of the plaintiff's letter prior to preserving the video. It should be noted that this video showed the plaintiff creating the condition.

Although the plaintiff in *Guarisco* established that the full 24 hours of video should have been preserved, the court found that he failed to show that the full video was critical to the prosecution of his case. The court further found that the defendant's actions were not willful; however, the excuse for not preserving the full video was not reasonable. Rather than striking the defendant's answer or precluding the defendant from offering evidence to refute the plaintiff's claim of notice or precluding defendant from offering the surveillance video into evidence, the court directed that an adverse inference charge be given at the time of trial as to the requested portion of the video that was not preserved.[9]

Similarly, in *Delgiorno v. Buonadonna Shop Rite LLC*,[10] the court found that the defendant's preservation of 48 minutes of video footage did not comply with plaintiff's demand, but it did show the plaintiff's accident, and did not entirely deprive the plaintiff of the ability to prove her case. As such, the court found that the appropriate spoliation sanction was an adverse inference charge to be given at the time of trial with respect to the missing video.

Defense counsel are usually retained after a lawsuit is commenced which can be years after the accident occurred. Immediately upon assignment of a premises case, defense counsel should investigate whether video was preserved. If video was preserved, how much video was preserved, what was the basis for only preserving a certain amount, and what was the video preservation policy. If video was not preserved, what was the video retention period and is it too late to obtain video, why was the video not preserved, and was there any camera that would have captured the loss location. Further, defense counsel should determine whether any video preservation letter was received and complied with by the premises owner.

While a defendant may not be able to escape a spoliation sanction for failing to preserve video, the Second Department has held that striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct and thus, the courts must "consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness."[11] Where a plaintiff is not prejudiced by the failure to preserve video and can prove her case by other means such as witness testimony and photographs, the likelihood of the defendant's answer being stricken is remote.[12]

Preservation of video surveillance should not be taken lightly by premises owners. As soon as the premises owner has notice of an accident it should make efforts to preserve video. Further, if presented with a letter of preservation from claimant, it should comply with the preservation request. Once a suit is started, defense counsel should immediately investigate the video preservation issue and be prepared to respond to plaintiff's demands for video. Although acting reasonably and in good faith and following procedure may not eliminate a spoliation sanction, it will likely result in the lesser penalty, or no sanction, and greater chance of success at trial.

1. *Savino v. The Great Atlantic and Pacific Tea Co., Inc.,* 22 Misc.3d 792 (Sup. Ct., Queens Co. 2008).
2. *Id.*
3. *Holland v. W.M. Realty Mgt., Inc.*, 64 A.D.3d 627, 629 (2d Dept. 2009).
4. *Klein v. Ford Motor Co.*, 303 A.D.2d 376 (2d Dept. 2003)*(citations omitted).*
5. *Ortega v. City of New York*, 9 N.Y.3d 69 (2007).
6. *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543 (2015).
7. *Aponte v. Clove Lakes Health Care & Rehabilitation Ctr., Inc.*, 153 A.D.3d 593, 594 (internal quotation marks omitted).
8. *Guarisco v. King Kullen Grocery Co., Inc.*, 2014 N.Y. Slip Op. 33516(U) (Sup. Ct., Nassau Co. 2014).
9. *Id.*
10. *Delgiorno v. Buonadonna Shop Rite, LLC*, No. 600605/15, 2016 WL 10676147, at *3 (Sup. Ct., Suffolk Co. May 5, 2016).
11. *Iannucci v. Rose*, 8 A.D.3d 437 (2d Dept. 2004).*See Favish v. Tepler,* 294 A.D.2d 396, 397 (2004).
12. *Giuliano v. 666 Old Country Road, LLC*, 100 A.D.3d 960 (2d Dept. 2012) (Supreme Court improvidently exercised its discretion in striking answer of defendant based on spoliation of evidence, i.e., video of accident, where plaintiff's ability to prove her case without video was not fatally compromised.).

October is Pro Bono Month

Words from our Pro Bono Volunteers

Pro Bono Awareness Week is recognized annually in the month of October. Each year, the Nassau County Bar Association (NCBA) Mortgage Foreclosure Project enlists the help of generous NCBA Member attorneys who volunteer their time and expertise to ensure that all residents of the Nassau County community have access to legal assistance. We asked our pro bono volunteers their thoughts and input on what volunteering to provide pro bono legal services has meant to them or how it may have positively impacted their lives.

"Volunteering was a way for me to give back for all the good fortune I have experienced in my professional and personal life." ***—Anne Rosenbach***

"Volunteering at the NCBA has allowed me to use my legal skills in order to pursue my passion to help people who desperately require assistance, so that they can rebuild their lives after suffering through a major tragedy." ***—Seth M. Rosner***

"Volunteering my legal services in the Foreclosure Settlement Part at the Nassau Supreme Courthouse as part of the NCBA's Access to Justice Program is the best use of my skills and experience. I get the opportunity not only to represent homeowners facing the foreclosure of their home and attempting to come to a resolution to prevent that outcome—but I also get the opportunity to explain the process to them, guide them and answer their questions—all in an effort to take away the unknown."
—Maryanne Foronjy Pederson

"As attorneys we cannot lose sight of how fortunate we are and how important our roles are not just in assisting our clients but also in assisting others who are less fortunate. Our volunteer work is a tribute to our profession." ***—Warren S. Hoffman***

"I've been an NCBA pro bono volunteer for the past 10 years. It's rewarding to provide help and comfort to those who lack funds to hire counsel or simply don't know where to turn for representation. Legal issues are stressful, but the inability to access counsel due to finances adds to the anxiety. Pro bono clients leave our offices and clinics feeling relieved and supported. Sometimes explaining a client's options or assisting with a basic matter can bring a tremendous relief to someone in need. NCBA volunteers truly care about our community members and it's important to recognize our members' compassion and commitment to helping others."
—Adam D'Antonio

"There are people out there that are in bad shape. They need some access to competent legal help. While I'm no expert in Landlord Tenant work, I know enough to help. Helping people through the many pitfalls of litigation is very satisfying. I have a really nice feeling when I leave court about having purpose for these people. Money isn't important to acquire this emotion. It comes from a pure commitment to help." ***—Michael LoRusso***

"I have been volunteering my time for many years now. I do so because it is an obligation I have not so much because I am an attorney, but because I am a citizen of Nassau County. Often my volunteer efforts lead to a good feeling because I help someone in need. But sometimes, a case can lead to my being angry because of the behavior of an attorney, judge or client. More importantly, regardless of whether I feel good or bad about a case, I know that my efforts in a small way contributes to the health of my community."
—David M. Lira

"I was taught to live a certain way as a child and when I was in law school, I heard the same lesson: that as an attorney it is my obligation to see that justice is done for all people and we each have to help in whatever way we can. Working through the NCBA and the organizations with which we are affiliated we can make sure that our resources are used to help the neediest in our community no matter what the issue because we can make sure that the right lawyer with the right skills is connected to the right client."
—Adrienne Hausch

"Attorneys are expected to provide pro bono services. We have a monopoly on the practice of law. If we don't do it, no one else can!" ***—Stuart P. Gelberg***

"It's been a rewarding experience hearing all the appreciation our clients have for the bar association's pro bono program. Opportunities such as open house are the reason I keep my Nassau Bar Association membership active and I'm overjoyed to be able to give back to the association which provides its members with so much." ***—Matthew Weinick***

"When I left 38 years of private and in house practice in 2010, I'd represented only defendants, overwhelmingly corporate clients, never individual plaintiffs, and done little if any pro bono work. When Gale Berg at the NCBA gave me my first opportunity to work pro bono as part of the Empire State Foreclosure project, my approach, as I evolved from there, was based on my own work and life experience. I lacked most if not all counseling skills of my colleagues—so on many occasions, I told clients, "I'm going to help you, I'm a good lawyer. But no tears with me. No time for sorrows, I don't do that." I look everyone in the eye—man and woman, black and white, and no one ever walked away. So as far as I know, no complaints to Gale or others. What I lacked in the "crying towel" (a concept from the great 1950s film High & the Mighty), I made up as a litigator with a focus on law and facts no matter the subject matter, plus I am a good problem solver and don't want a client to feel he or she is missing anything. I was named by NCBA a "Champion of Justice" in 2013 and noted by NYSBA for the hours of my pro bono service two years later. As my PT career in ADR developed, I was not able to spend as much time on pro bono work, which by the way, does favors to no one, rather assists me professionally, keeps me on my toes, plus I meet wonderful new colleagues!" ***—William J.A. Sparks***

"I volunteer with the NCBA (Mortgage Foreclosure Project and Student Mentor Program) because it allows me to use my particular set of skills to try to serve others. While I may not be able to help someone fix a broken computer or learn to shoot a three-pointer, I may be able to help them keep their home or learn to stay focused academically. Volunteering has also helped me gain perspective. It has forced me to slow down and appreciate things I normally take for granted, including that I have the luxury of time to devote to volunteering. Seeing other people persevere under very difficult circumstances has been inspiring and humbling." ***—Robert Plosky***

"I have been volunteering with Roberta Scoll in Landlord/Tenant Court for about 10 years. I am very fortunate to be living the life I am living. There are many people who are less fortunate."
—James C. Markotsis

"I volunteer because those who do cannot afford an attorney due to income should be given representation to level the playing field somewhat."
—Richard T. Walsh

"It is an honor to work with the Legal Service Center, The Safe Center LI in representing women and children of Nassau County who are victims of domestic violence. The lawyers at The Safe Center are dedicated professionals and first-class lawyers with a deep commitment to their clients. Sheppard Mullin has an ingrained culture of public service and pro bono work. We are proud to be a part of the mission of The Safe Center."
—Robert S. Friedman

"Helping others with their legal work makes me feel re-energized and recommitted to the law. Pro bono work reminds me that I am practicing law to help people and this thought and energy carries over into my regular practices as well." ***—Jon Michael Probstein***

"Having the ability to give back—to help people in need—is one of the reasons that I became an attorney. When I'm helping someone in need, giving advice, or just listening— I'm in reality getting much more than I'm giving (but don't tell anyone that!)" ***—Jaime D. Ezratty***

"Pro bono work is the oil in the machine of equal justice for all, including those disadvantaged. Without the oil to keep the machine going, the entire community is adversely affected, as a community's averaged values/worth/level of education and intelligence is as high as the most disadvantaged, and the machine will not work without it. Also, when an attorney helps someone who cannot afford to hire one, it is felt on a multi-general level, including the children who observe the help firsthand." ***—Amarilda B. Fligstein***

"I always imagined myself as a lawyer changing the world and helping others. NCBA's Pro Bono program lets me help others and change the world, or at least make it a little better, one client at a time. It's a pleasure and privilege to be able to participate in the Pro Bono program!"
—Elan Wurtzel

"I am motivated to volunteer because I believe that access to legal representation and legal advice is not available to so many and helping people in need is part of why I became an attorney. Volunteering is supposed to be a selfless act for the benefit of others, yet I do feel a sense of purpose and reward in knowing that I am giving back to my community and those in need. Volunteering, in small or large ways, whatever is possible for each attorney, should be seen as an inherent part of our legal careers and I hope more attorneys take advantage of the opportunity."
—Stacey Ramis Nigro

"The job of a criminal defense attorney is to be the voice of that person who is at the lowest point of his/her life and to make sure the system doesn't roll over them. There are many ways you can protect someone from having a devastating result forever. It is always a great relief when you are able to return a person to freedom. I do not see a better opportunity to help the community by volunteering in the pro bono programs offered by the Nassau County Bar Association."
—Jonathan (Gianni) Karmily

"Volunteering at the foreclosure clinics and providing pro bono services has provided me with a professional satisfaction unlike what I get from assisting paying clients. Helping someone who may have nowhere else to turn for assistance with a problem that seems insurmountable is a great feeling. It also reminds me of the importance and value of having a law degree and that we can use it to make the world a little bit of a better place now and then." ***—Adam L. Browser***

"I'm most proud of my partner, Henry Mascia who gained asylum for a girl who was arrested at the border. She became an honors student at a Long Island high school and is now an honors student at a local college. My partner changed her life, and the lives of her descendants."
—Alan Rutkin

"My law license has given me a lifetime of rewards, few more satisfying than the pro bono work I do for the large portion of fellow citizens who cannot navigate the legal system due to circumstances beyond their control. How can I justify my privileges without paying back society for the good fortune I have had? Touching the lives of people without financial compensation makes a bold statement about oneself and lawyers in general. Almost all my pro bono clients explicitly said they were inspired to pay my kindness forward to others. Karma exists. Volunteer. Feel better. Improve the world and yourself." ***—Chuck McEvily***

"During my 50 years, or so, career I basically represented business clients who sometimes said thank you but often showed their appreciation with a prompt check and left it there. At the clinics, the clients usually expressed their thanks by multiple handshakes and verbal thank you. This made volunteering very rewarding"
—Gerald Goldstein

"I am a Civil Litigator. Civil litigation is adversarial. I transfer stress from my client to my adversary. On a "good day" I make my adversary cry. These last six or seven years I have been volunteering at the Nassau County Bar Association foreclosure clinic. At the clinic I primarily counsel people, hoping to relieve their stress. The attendees, who mostly, through no fault of their own, find themselves facing loss of their homes, or related problems (There but for the Grace of G-D...) are desperate for help. Besides cleansing the soul, there are more tangible rewards from pro bono service. Pro bono work allows me to help people sleep at night. And believe it or not, the gratitude expressed by some whom I've helped, is enough to make me cry (in a good way). Also, the comradery and new friends made with the people who volunteer or work at the clinic is very rewarding. Further, aside from the occasional free CLE on related law, you actually get CLE credits just for pro bono work, an appreciated reward. Notwithstanding, the best reward is just going home at the end of the day knowing, because of my pro bono work, some unfortunate family will have a better night and maybe a chance at a better future"
—Standford Kaplan

"I believe that it's every lawyer's obligation to give back by helping people who cannot afford the basic legal services they need. Pro bono work also is an opportunity to learn new areas of the law that you might not come across in your everyday practice. For me, doing pro bono has been a win-win."
—Laura J. Mulholland

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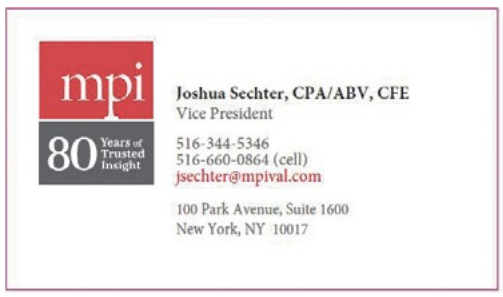

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Please consider donating $100 to help WE CARE provide a boxed dinner with all the trimmings to be delivered to local families in need on Thanksgiving this year.

Contact Bridget Ryan at bryan@nassaubar.org or (516) 747-4070 ext. 1226.

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September 11...

Continued From Page 5

speaking, if a person is not enrolled in the WTCHP and/or not certified by the WTCHP for a specific 9/11 related condition, then the time with which to register with the VCF has not started to run. In addition, as stated before, enrolling in the WTCHP does not mean you are registered with the VCF and vice versa. You must do them separately.

So, if you know of someone who may have had toxic exposure in the aftermath of 9/11, who was south of Canal Street on 9/11, or lived, worked, or went to school in the exposure zone during the required time period but does not have any current symptoms or a diagnosis, they should not wait to gather presence at site documentation. The challenge of obtaining corroborating documentation of presence at site will only get harder and harder as the years pass, so all are urged to get that documentation together now.

For more information about the September 11th Victim Compensation Fund, visit www.vcf.gov, or call the VCF Helpline at 855-885-1555. You can register through the website.

For more information about the World Trade Center Health Program, visit www.cdc.gov/wtchp. The application for enrollment into the program is available through the website. You can also call 888-982-4748.

1. Pub. L. No. 111-347, 124 Stat 3623. The Zadroga Act is codified in 42 USC § 300mm et seq.
2. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat 2242. The act amended 42 U.S.C. §§ 300mm through300mm-61.
3. Public Law 116-34, 133 Stat 1040 (codified in scattered sections of 49 USC).

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Ann Burkowsky, Editor

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In Brief

Donna J. Turetsky of Certilman Balin Adler & Hyman, LLP, a Partner in the firm's Trusts and Estates and Elder Law Practice Groups, has been named to the 2022 Best Lawyers. **Desiree M. Gargano**, an Associate in the Employment Law and Litigation Practice Groups at the firm, was named to the 2022 Best Lawyers, "Ones to Watch."

Ronald Fatoullah of Ronald Fatoullah & Associates has been recognized by Best Lawyers© in America in the 28th edition for 2022 for the practice areas of Elder Law, Litigation—Trust & Estates and Trust & Estates. In addition, Associate Attorney, **Marilyn Q. Anderson**, was honored by Schneps Media as a *Queens Power Woman* for her outstanding contributions to her clients and the community.

Stephanie M. Alberts of Forchelli Deegan Terrana LLP was appointed Co-Chair of the NCBA Surrogate's Court Estates and Trusts Committee. She will serve a two-year term.

For the tenth consecutive year, **Richard N. Tannenbaum** of Richard N. Tannenbaum, P.C., a matrimonial and family law firm in Garden City, has been named to the 2021 Super Lawyers List.

Theresa A. Driscoll, a partner at Moritt Hock & Hamroff, has been named by *Long Island Business News* as a member of its Top 50 Most Influential Women in Business for 2021.

Karen Tenenbaum, LL.M. (Tax), CPA, tax attorney, was added to the "Top 50 Women—Hall of Fame" by Long Island Business News. She was also recently featured in "Who's Who: Women in Professional Services" in *Long Island Business News*. She presented "Changing State Residency for Tax Purposes" for Strafford. Karen was also interviewed by Attitude Financial Advisors about COVID-19, telecommuting, and taxes. As Chair of the Tax Law Committee, Karen moderated two panels for the Suffolk County Bar Association, "Everything You Need to Know About Partnership Law" and "Financial and Legal Aspects of Today's Estate Planning Landscape." Karen also moderated "How to Run and Grow Your Law Firm: Collection/Getting Paid" and "Technology, Privacy and Communication" for the Suffolk Academy of Law—How to Run Your Business Series.

Marian C. Rice

Hearing Officer **Elena Greenberg** of NAM (National Arbitration and Mediation) participated on a CLE panel titled "ADR in Divorce: Fast-Tracking Resolutions" to the American Bar Association.

Erica B. Garay, mediator and arbitrator at Garay ADR Services will be a panelist and moderator of the New York State Bar Association's Dispute Resolution Section's Domestic Arbitration Committee's December 14, 2021, program "Expert Testimony on Damages and Valuation in Arbitration—the Expert Witness and Arbitrator's Perspective."

Vishnick McGovern Milizio was a proud sponsor of the NCBA WE CARE Golf and Tennis Classic fundraiser on September 20, in support of children, elderly, and others in need throughout Nassau County. VMM partner **Avrohom Gefen**, head of the firm's Employment Law and Commercial Litigation practices, was interviewed in *Bloomberg Law* on September 2 about the new anti-sexual harassment laws in Texas and what can be expected in other states and on the federal level. On September 3, Mr. Gefen's *Law360* Expert Analysis column was published, titled "Cuomo Scandal Highlights Risks of Workplace Bullying." Partner **Richard Apat**, head of VMM's Personal Injury and Real Estate Litigation practices, appeared on the *CBS New York* 5 o'clock news on September 3 to discuss the tenant eviction moratorium and the predicament of small landlords. On September 21 Mr. Apat led a virtual CLE for Bronx County Bar Association members titled "Understanding and Litigating Adverse Possession and Easements." VMM partner **Constantina Papageorgiou**, a member of the Wills, Trusts, and Estates and Elder Law practices, was a guest panelist on the AARP Long Island/Herald Inside LI joint webinar on September 22, "Living 50 Plus: 10 Steps to A Better Retirement."

Jeffrey D. Forchelli, Managing Partner of Forchelli Deegan Terrana LLP (FDT) welcomes **John P. Gordon** to the firm's Real Estate and IDA practice groups as an Associate.

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

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

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

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

LAWYER WELLNESS CORNER
Reflect and Connect

October is National Depression Education and Awareness Month

According to the Depression and Bipolar Support Alliance, about 14.8 million adults in the U.S. are affected by Major Depressive Disorder. Some symptoms of depression include:

- Depressed mood, loss of pleasure in all or most activities, weight/appetite change, change in sleep and activity, fatigue and loss of energy, lack of concentration, feelings of guilt or worthlessness, and suicidal thoughts.

Below are are a few other facts you may not know about Major Depressive Disorder:

1. Depression has different triggers.
2. Some depression is genetic, but not all.
3. It affects your physical body.
4. Depressed people may not look depressed.
5. Exercise can help manage depression.

If you or someone you know has been suffering from several of these symptoms lasting two weeks or more, they need to see a medical professional as soon as possible.

If you would like to make a donation to LAP or learn about upcoming programs, visit nassaubar.org and click on the "Lawyer Assistance Program" page on the home screen.

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*The NCBA Lawyer Assistance Program is directed by Beth Eckhardt, PhD, and the Lawyer Assistance Committee is chaired by Jacqueline A. Cara, Esq. This program is supported by grants from the WE CARE Fund, a part of the Nassau Bar Foundation, the charitable arm of the Nassau County Bar Association, and NYS Office of Court Administration. *Strict confidentiality protected by § 499 of the Judiciary Law.*

We Welcome the following New Members

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Impeachment…

Continued From Page 6

for conviction.

The 1821 New York State Constitution changed the requirement for impeachment from two-thirds to a simple majority. However, it strengthened the standard for acts that constituted "high crimes and misdemeanors" seemingly reflecting the standard in the federal constitution. However, the 1846 Constitution deleted the "mal and corrupt" and "high crimes and misdemeanor" requirement, although this definition now appeared in statute.[13]

The Judiciary Committee of the New York State Assembly confronted issues related to impeachment in an 1853 report. It determined that a person could not be impeached who was not currently in office, and that a person could not be impeached for offenses conducted prior to taking office.[14]

Impeachment of Governor Sulzer

William Sulzer was an attorney active with Tammany Hall, the powerful Democratic Party Machine. Sulzer was elected to five terms in the New York State Assembly from 1890 to 1894, eventually serving as Speaker of the Assembly.[15] He was then elected to the United States House of Representatives for nine terms from 1894 to 1912. With the support of Tammany Hall, he was elected Governor of New York in 1912.

However, upon taking office, Sulzer immediately styled himself as a reformer, promoting ideas such as open party primaries and refusing to appoint individuals favored by Tammany to office. He quickly fell into disfavor with Charles Murphy, the "boss" of Tammany Hall. Murphy used his influence to have the New York State Assembly investigate Sulzer with an eye towards impeachment.[16]

A joint legislative committee known as the Frawley Commission was formed to investigate Sulzer's actions regarding the use of patronage and vetoes. The Frawley Commission eventually expanded its investigation into Sulzer's campaign finances when he was running for Governor.[17] Articles of impeachment were adopted for filing false campaign receipts and expenditures, using campaign funds for personal use, bribing witnesses testifying before a legislative commission, and bribing an assemblyman to vote on a bill.[18]

After the trial in the impeachment court, Sulzer was convicted in October for filing false reports on campaign expenditures and one count of suppressing evidence, but exonerated on the rest of the counts.[19] On October 18, 2013, the court voted to remove Sulzer as Governor by a vote of 43 to 12, but chose not to bar him from future office.[20] Sulzer than ran for his old Assembly seat and was elected just three weeks after being removed from office. Sulzer then ran for Governor in 1914 on both the Prohibition Party and American Party lines and lost, thus ending his political career. [21]

Current New York Impeachment Standard

Under the current New York State Constitution, impeachment is included under Article VI, which is titled "Judiciary." The section is titled "Court for trial of impeachments; judgment" and is treated much like other courts, such as the Court of Claims, County Court, and Family Court.[22] The Constitution provides that the Assembly by a majority of its members has the power of impeachment.

The actual "Court" is composed of the New York State Senate, and also the judges of the Court of Appeals. However, when a Governor is on trial, neither the Lieutenant-Governor nor the temporary president of the Senate (usually the Majority Leader) shall be members of the court, presumably since it would be a conflict of interest as they are in the line of succession.[23] During the time that a Governor is impeached, the Lieutenant-Governor acts as the Governor.[24]

However, the Constitution is not the sole authority on impeachment. Article 240 of the Judiciary Law also contains clarifications and procedures. The most notable is section 240, which states that the jurisdiction of the Court for the Trial of Impeachments is "for all civil officers of the state" for "willful and corrupt misconduct in office."[25]

However, it is not further defined as to what misconduct qualifies, leaving it in the hands of the Court to make that determination. This article also requires that the trial be held no sooner than thirty and not more than forty days upon the delivery of the impeachment articles from the Assembly.[26] It also provides that members of the Senate who serve on the impeachment court shall be paid the same salary as an associate judge of the Court of Appeals for the same time of service.[27]

The question recently was debated as to whether it was possible to impeach an official who has already resigned from office, which the Assembly speaker answered in the negative. Although it was not publicly elaborated as to the reasoning, a close look at the New York State Constitution's language demonstrates how that determination was arrived at. The language states:

> Judgment in cases of impeachment shall not extend further than removal from office, **or** removal from office **and** disqualification to hold and enjoy any public office of honor, trust, or profit under this state.[28]

This language appears to give the Court of Impeachment only two distinct options: removal from office **or** removal from office and disqualification from holding future office. Although some argue that the Assembly should continue to impeach Andrew Cuomo in order to prevent him from holding future office, the Constitution only allows that option if in the same proceeding the official could be removed from office. Once the individual is no longer an office holder, it appears that future disqualification is no longer an option.

A criticism of New York's impeachment process is that it is broad and vague. There is no definition that precisely constitutes impeachable conduct, and leaves a great deal of discretion to the Legislature as to what is a violation.[29] Due to recent events, now is the proper time to reevaluate whether the current standard should remain. Hopefully another situation will not arise in the near future which forces the impeachment procedure to be contemplated.

1. Peter Elkind, *Rough Justice: The Rise and Fall of Eliot Spitzer* 260 (2010).
2. John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 Fordham L. Rev. 1 (1970).
3. John Dunne and Michael Balboni, *New York's Impeachment Law and the Trial of Governor Sulzer: A Case for Reform*, 15 Fordham Urban L.J. 567 (1987).
4. Feerick, *supra* note 2, at 5.
5. *Id.* at 7.
6. Dunne and Balboni, *supra* note 3, at 572.
7. Feerick, *supra* note 2, at 14.
8. U.S. Const. art. II, § 4.
9. U.S. Const. art. I, § 2, cl. 5.
10. U.S. Const. art I, § 3, cl. 7.
11. U.S. Const. art I, § 3, cl. 7.
12. N.Y. Const. of 1777 ¶ 33.
13. Dunne and Balboni, *supra* note 3, at 577.
14. *Id.* at 579.
15. *Id.* at 569.
16. Peter J. Gaille, *Ordered Liberty: A Constitutional History of New York* 190 (1996).
17. Dunne and Balboni, *supra* note 3, at 581.
18. Gaille, *supra* note 16, at 190.
19. *Id.* at 190.
20. Matthew L. Lifflander, *The Impeachment of Governor Sulzer* 308 (2012).
21. *Id.* at 314.
22. N.Y. Const. art. VI, § 24.
23. *Id.*
24. N.Y. Const. art. IV, § 5.
25. Jud. Law § 240.
26. Jud. Law § 245.
27. Jud. Law § 248.
28. N.Y. Const. art. VI, § 24.
29. Dunne and Balboni, *supra* note 3, at 589.

BBQ at the Bar 2021
















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Muhammad Ali…

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Grauman, who became convinced of Ali's sincerity.[6]

The Justice Department however recommended a rejection of Ali's appeal. The appeals board complied, but failed to state any rationale. The ambiguity of the appeals board's determination provided the basis for the Supreme Court's decision in 1971. But for the time being, Ali's 1-A classification remained in place. Ali relocated to Texas.

Ali arrived for his scheduled induction in Houston on April 28, 1967.[7] His name was called, first as Cassius Clay, then as Muhammad Ali, and then a third time. He was required to take a step forward and, in doing so, would be inducted. Ali declined to move on all three occasions. The repercussions were swift in coming.

The World Boxing Association took his title away and the New York State Athletic Commission, without the benefit of any hearing, suspended his boxing license.[8] Ali's trial in the Southern District of Texas resulted in a conviction on June 20, 1967 after only twenty minutes of jury deliberations.[9] Judge Joe McDonald Ingraham sentenced him to five years in prison and a $10,000 fine, the maximum under the law.[10]

I didn't want to submit to the army and then, on the Day of Judgment, have God say to me, 'Why did you do that?' This life is a trial, and you realize that what you do is going to be written down for Judgment Day.

—Muhammad Ali

Ali, ordered to turn in his passport, was unable to box at home or abroad. He remained free on bail pending his appeals. At the Fifth Circuit, a three-judge panel affirmed the district court.[11] Ali then sought a hearing before the Supreme Court. In 1969, the Justices were unwilling to grant certiorari.

In a twist of fate, the government then acknowledged that various criminal convictions, Ali's among them, involved improper government wiretaps[12] With the Court's decision in *Alderman v United States*, all such convictions, based on now illegally obtained evidence, might consequently be rendered invalid.[13] This quirk would buy Ali a second bite of the apple.

The Supreme Court remanded the case back to the trial court. Judge Ingraham ruled the government's actions had no bearing on Ali's 1967 conviction.[14] The Court of Appeals again affirmed. Ali returned to the Supreme Court. This time certiorari was granted. It should be noted at every stage of these proceedings, Ali lost before each court he appeared.[15]

Oral argument did not go auspiciously, as Ali's counsel Chauncey Eskridge found it difficult to answer unequivocally whether Ali would be willing to fight on behalf of his fellow Muslims.[16] The one bright spot occurred when Solicitor General Irwin Griswold stipulated as to both Ali's sincerity and that his objections were predicated on religious belief.[17]

With the government conceding two of the three criteria, Ali's case hinged on whether he was either selective or categorical in his opposition. If he was being selective, then his conviction must be affirmed. That Ali said publicly he would engage in a "theocratic" or a "defensive" war if declared by Allah did not help his position.

In conference, the vote went against Ali. Justice Marshall having recused himself, only three Justices — Brennan, Douglas, Stewart — were willing to reverse the Fifth Circuit while a majority, consisting of Chief Justice Burger, Justices Black, Harlan, White, and Blackmun, voted to affirm.[18]

The 5-3 majority saw Ali's actions as not being based on a general aversion to participating in all wars. Ali's fate appeared sealed. His conviction would stand, and he faced incarceration pursuant to Judge Ingraham's 1967 sentence.

Some people thought I was a hero. Some people said that what I did was wrong.
But everything I did was according to my conscience. I wasn't trying to be a leader.
I just wanted to be free.

—Muhammad Ali

John Marshall Harlan, a conservative patrician, emerged as Ali's unlikely champion. Assigned the writing of the majority opinion, Harlan's initial reading of the law and the facts favored affirming the conviction. But then something extraordinary happened that altered the entire dynamic. Ali was poised for yet another comeback.

One of Harlan's clerks, Thomas Krattenmaker, was tasked with preparing a draft. Sympathetic to Ali, Krattenmaker had read Elijah Muhammad's *Message to the Blackman in America*.[19] He made the connection between Ali's professed religious beliefs and conscientious objectors protected under prior case law.

The "holy war" Ali would be willing to fight was something of an abstraction conditioned on a divine declaration, the likelihood of which was exceedingly remote.[20] Accordingly, Ali in fact was religiously opposed to fighting in any earthly conflict. His professed willingness to participate in a "holy war" was, effectively, immaterial.

This justification had previously been given credence. In 1955, the Court affirmed the rights of Jehovah's Witnesses in *Sicurella v United States*.[21] The Court ruled that their commitment to engage in "theocratic" warfare does not exclude a Jehovah's Witness from conscientious objector status.

Harlan had already made up his mind when Krattenmaker brought his findings to the Justice's attention. Harlan, after thoughtful study, agreed that Ali was sincerely opposed to all wars after gaining an understanding of the doctrines enunciated by Elijah Muhammad. Harlan's switch resulted in a 4-4 deadlock.

Harlan circulated a draft, which if accepted by a majority, might have conferred on the Black Muslims a presumptive conscientious objector exemption.[22] Such a precedent could enable African-Americans to evade military service by joining the Nation of Islam. This prospect most likely prevented the other four justices from joining with Harlan.

I am America. I am the part you won't recognize. But get used to me. Black, confident, cocky; my name, not yours; my religion, not yours; my goals, my own; get used to me.

—Muhammad Ali

A 4-4 deadlock would prove a defeat for Ali. His conviction would be affirmed without an opinion. Having exhausted all of his appeals, Ali again faced defeat. Then Justice Potter Stewart came forward with a solution to resolve the stalemate.

Justice Stewart offered his own draft reversing Ali's conviction on a narrow basis that would prove to be satisfactory for all eight voting members of the Court.[23] Stewart's line of reasoning provided the justices, who had just voted to affirm his conviction, with a way to rule in Ali's favor without addressing the thorny questions raised by Harlan.

Stewart looked to Ali's administrative appeal in Kentucky from 1966. The Kentucky Appeals Board denied Ali's application without providing any explanation for its determination of his draft status. As such, the Court could not ascertain whether the appeals board had improperly relied on criteria the government had now conceded during oral argument.[24]

This vagueness regarding the appeals board offered a neat solution. As the Court had also ruled in *Sicurella* that if there is an *"error of law by the Department [of Justice], to which the Appeal Board might naturally look for guidance on such questions, [the error] must vitiate the entire proceedings, at least where it is not clear that the Board relied on some legitimate ground."*[25]

On June 28, 1971, after losing in March to Joe Frazier at Madison Square Garden, Ali won for the first time before any court that heard his case.[26] A unanimous per curiam opinion was issued. The ruling would apply to Ali alone, overturning his conviction but setting no legal precedent. The decision did not address the merits of Ali's claims.

Rather, the ruling, written by Stewart, reversed the lower court's guilty verdict on a technicality rooted in *Sicurella*. The Court held since the Kentucky appeals board gave no reason for its denial of a conscientious objector exemption, it was impossible to ascertain the actual basis of the board's determination. Concurrences were issued by Harlan and William O. Douglas.

On June 28, 1971, after losing in March to Joe Frazier at Madison Square Garden, Ali won for the first time before any court that heard his case.[26] A unanimous per curiam opinion was issued. The ruling would apply to Ali alone, overturning his conviction but setting no legal precedent. The decision did not address the merits of Ali's claims.

Ali's resilience affirmed his grace outside the ring. Whatever one may have thought about the Nation of Islam or the Vietnam War, Ali grew in stature in direct proportion to the price he personally paid. In 1974, he regained the heavyweight crown by knocking out George Foreman in Zaire. Seven years after being deprived of his title, Ali's triumph would be complete.

1. 65 stat. 75 Sec. (6)(j)(1951).
2. 403 U.S. 698.
3. Adam Pollack, *The United States v Muhammad Ali*, at adampollacklaw.com.
4. Marty Lederman, *Muhammad Ali, conscientious objection and the Supreme Court's struggle to understand "jihad" and "holy war": The Story of Cassius Clay v United States,* (June 8, 2016) at www.scotusblog.com.
5. Winston Bowman, *United States v Clay: Muhammad Ali's Fight Against the Draft*, (2018) at www.fjc.gov.
6. *Id.*
7. Lederman, supra.
8. Ali sued and regained his New York boxing license, see *Muhammad Ali v Division of State Athletic Commission*, 316 F.Supp. 1246 (SDNY 1970).
9. Bowman, supra.
10. *Id.*
11. *Clay v United States*, 397 F.2d 901 (5th Cir. 1968).
12. Lederman, supra
13. 394 U.S. 165 (1969).
14. *United States v Clay*, 386 F.Supp. 926 (1969).
15. Bowman, supra.
16. *Id.*
17. *Id.*
18. Lederman, supra.
19. *Id.*
20. *Id.*
21. 348 U.S. 385 (1955).
22. Lederman, supra.
23. *Id.*
24. *Id.*
25. *Sicurella*, supra.
26. Bowman, supra.

Drafting…

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violation is reported and will help to avoid claims of inconsistent behavior.

Responding to Social Media Posts

Given the prevalence of employees' use of social media, employers may be inclined to monitor their employees' social media activity, but they should be aware of the potential legal pitfalls of doing so. This issue could also arise unintentionally. For example, employees –including supervisors—will sometimes "friend" or "follow" each other. This permits these employees to see and comment on each other's posts. What happens when a subordinate's post violates a policy and later claims their supervisor was monitoring them?

An employer must be careful when monitoring its employees social media posts. As will be discussed below, certain activity is legally protected and sometimes there is a fine line that must not be crossed. The NLRA protects social media activity even if it is profane. Employers may only take action in response to social media activity that is discriminatory, threatening or defamatory unless it otherwise violates lawful workplace policies. Employers will need to carefully consider the specific circumstances on a case-by-case basis should such instances arise.

The NLRA prohibits employer surveillance of employees' union activity or discussions of terms and conditions of employment if it will interfere with employees' exercise of Section 7 rights. Supervisors therefore cannot search the social media pages, photos and friends of union members or supporters, or solicit feedback from employees about a union's private social media group. Moreover, the Electronic Communications Privacy Act of 1986 affords privacy protections to certain electronic communications.[10] Although the law was enacted before social media even existed, courts have applied it to protect unauthorized access of employee social media accounts. This law would likely not prevent an employer from obtaining information in the public domain about an employee.

Political speech and activity in the workplace is a recurring source of employer concern, for a number of reasons. First, when these discussions or activities occur during working hours, they can impact performance, productivity, or even cross the line into un-lawful bullying or harassment. Additionally, if the employer is a tax-exempt organization, certain political speech can also implicate the organization's tax-exempt status. Many tax exempt-organizations are subject to significant restrictions on lobbying and political activities in exchange for the public subsidy that they receive. For example, a 501(c)(3) organization may lose its tax-exempt status if it engages in political campaign activities or if it appears a substantial part of its activities involve lobbying.

Speech by an employee that constitutes political campaign or lobbying activity may be attributed to the organization if it can be inferred that an employee's speech is made as a representative of the organization or that the speech has been ratified by the organization. This could happen, for example, if an employee, using their own social media account that the employee also uses to engage in speech on behalf of the organization, engages in lobbying activity by urging followers to contact their state representative to advocate for the adoption or rejection of proposed legislation. A company's social media policy should address such concerns.

The Takeaway

There is some irony to a social media policy being written on paper and distributed to employees in an era where everything is online. However it is distributed, employers should strive to keep their social media policies up to date and effectively communicated to their employees.

Employees are likely going to be on social media during and off of work hours whether or not employers want them to be. Having a well-thought out social media policy is the best practice to ensure employees know what they should and should not do and to protect employers in the event an employee violates said policy.

1. Andrew Perrin and Monica Anderson, *Share of U.S. adults using social media, including Facebook, is mostly unchanged since 2018*, Pew Research Center (Apr. 10, 2019), available at https://pewrsr.ch/3jTKm9H.
2. *Medic Ambulance Svce, Inc.*, 70 NLRB No. 65 (Jan. 4, 2021).
3. *See e.g., Shamrock Foods Co.*, 369 NLRB No. 40 (July 29, 2020); Bemis Co., 370 NLRB No. 7 (August 7, 2020).
4. https://bit.ly/3yYsXRw.
5. *Eastex v. NLRB*, 437 U.S. 556, 564-65 (1978).
6. https://bit.ly/3yYsXRw.
7. *Wickersham v. City of Columbia*, 481 F.3d 591, 597 (8th Cir. 2007) (First Amendment protects citizens from government, not private, action).
8. NYLL §201-d.
9. *Id.*
10. 18 USC §§ 2510–2523.