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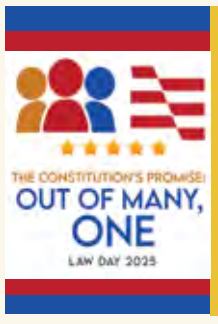
## SAVE THE DATE




**LAW DAY 2025**
**THURSDAY, MAY 1**
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**ANNUAL DINNER GALA**
**SATURDAY, MAY 10**
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**ANNUAL MEETING**
**TUESDAY, MAY 13**
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# Law Day Keynote Speaker, Ret. U.S. Army Major Gerald Gangaram, Embodies the Constitution's Promise: *Out of Many, One*

**Melissa A. Danowski**

The Nassau County Bar Association (NCBA) will host its annual Law Day Awards Dinner—exploring the theme of *The Constitution's Promise: Out of Many, One*—on Thursday, May 1, 2025, at Domus. In keeping with tradition, this year's annual event will feature a buffet dinner, keynote speaker, and recognition of three honorees for their dedication and commitment to the legal community.

Retired U.S. Army Major Gerald Gangaram is this year's keynote speaker. Major Gangaram's inspirational story and dedication to public service embodies the American Bar Association's Law Day theme:

> The Constitution enshrines our collective responsibility to one another, and the 2025 Law Day theme urges us to take pride in a Constitution that bridges our differences to bring us together as a united nation. Our civic lives tie us together as one "We," whether through legislative efforts that serve the common good, through military service, or by working together, every day, to fulfill the promise of E pluribus unum, or "Out of many, one."

Major Gangaram is widely recognized as a war hero for his commendable service during "Operation Enduring Freedom" in Afghanistan. Raised by a single immigrant mother in a low-income area of Queens, New York City, he overcame adversity through relentless self-improvement, ultimately earning numerous medals throughout his career as an Apache attack helicopter pilot.

He graduated from the U.S. Military Academy at West Point in 2007 with a BS in Geospatial Information Sciences. In 2012, Major Gangaram was an Executive Officer who led soldiers and officers into combat during Operation Enduring Freedom in Afghanistan, held responsible for aerial security in Afghanistan's south, and flew hundreds of combat hours on numerous missions. A results-oriented manager with a servant leader mentality, he ensured his people continually developed and remained the Army's greatest asset.

Following his deployment, Major Gangaram was chosen to command the Firebirds—the world's largest attack company. As a result of his proven track record for team building and exemplary command, the Army extended his command and selected him to become an Army Strategist. Required to obtain a master's degree for his new role, he moved to Washington D.C., where he graduated Suma Cum Laude from Georgetown University with his MBA and from George Washington University with a Leadership and Management certificate. His final assignment was as Strategic Planner in the Pentagon's Department of the Army Directorate of Strategy, Plans, and Policy.

His awards include the Meritorious Service Medal, the Air Medal, the Army Commendation Medal with Valor, the Army Senior Aviator Badge, and the Combat Action Badge.

Major Gangaram's story is one of resilience and grit. In Afghanistan, he withstood enemy fire and combat. He worked tirelessly to protect his fellow soldiers. After suffering a severe maxillofacial fracture and traumatic brain injury, Gerald woke with profound memory loss, and had to relearn how to walk, speak, and even recall his name. Through years of medical treatment and therapy, Major Gangaram achieved a remarkable recovery. With a firm belief in his calling to be a servant leader, he continued dedicating his life to public service.

Now retired from the military after eleven years of distinguished active-duty service, Major Gangaram works at the Bill of Rights Institute as Vice President of Civic Leadership Development. The Bill of Rights Institute is a nonprofit educational organization dedicated to providing free civics education that helps students examine the story of our country and exercise the skills of citizenship.

In this role, he works with leaders in corporate, military, and community sectors to rally support for robust civic and history education so that students and educators can continue to live the ideals of a free and just society. He explained: "I want all young people to learn about America's story and how to successfully engage in their communities and our nation. I wouldn't be the man I am today if not for the power of education in my own life, and am excited to further the Bill of Rights Institute's mission of ensuring all students have access to a quality civic and history education regardless of their ZIP code."

See LAW DAY 2025, Page 23

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# Consider the NCBA In 2025

FROM THE PRESIDENT

**Daniel W. Russo**

If you are reading this and don't otherwise get the *Nassau Lawyer* every month, you are likely not a member of the Nassau County Bar Association. First, thanks for taking the time to do so. Publishing the *Nassau Lawyer* monthly is no easy task and the women and men who take the time to write the articles and assemble the paper deserve all the credit in the world for doing so. Second, if you have gotten this far, please keep reading as I try my best to convince you to become a member of the NCBA, one of the largest suburban bar associations in the country.

Twice a year (April and October), the *Nassau Lawyer* goes not only to the approximately 3,700 members of the NCBA but also to every registered lawyer in Nassau County, at last count close to 12,000 strong. So, shamelessly, I am going to use my next 600 words or so to convince some of you to consider joining the NCBA family. The NCBA celebrated its 125th anniversary in 2024 and I am extremely honored to be president during its quasquicentennial year. While the NCBA still holds onto some of its cherished traditions, it continues to adapt and grow with the changing needs of our members, the legal profession and the community that we so proudly serve.

Beginning with the obvious benefits of membership, look no further than the NCBA Academy of Law (NAL), under the new leadership of Director, Natasha Dasani. The NAL continues to provide members with nuts-and-bolts CLEs in all practice areas as well as cutting-edge programs relevant to the ever-changing technological world we live and practice in. For those of you who haven't checked in for a while, unlimited CLEs are now a part of your membership dues. That's right, you don't pay extra for CLEs anymore, they're all included.

In addition to the NAL, the committees at the NCBA are livelier than they have been in some time. Like a lot of other aspects of our profession, it took some time after the pandemic for the committees to get back to meeting regularly, holding CLEs on relevant topics, and advising the rest of the Association on updates in specific areas of the law. I am happy to say that the lifeblood of the NCBA is as active as ever and looking for new members to keep the momentum going. Chances are, if you practice law in New York or have an interest in the legal world today, the NCBA has a committee for you. If it doesn't, become a member, find some like-minded people and come before the Board of Directors to pitch a new one.

Of course, you can't discuss the NCBA without talking about its unmatched charitable work, otherwise known as the WE CARE Fund. WE CARE has been in existence since 1988 and in 37 years has raised and distributed over $6,000,000 in charitable grants to over one hundred organizations in need. The members who lead WE CARE have one goal in mind, to improve the lives of children, the elderly, and all of those in need throughout our community. If you are looking to give back and aren't sure where to start, the WE CARE Fund is always working on its next big event and sure could use your help.

Whether attending a CLE, joining a committee or volunteering at a WE CARE event, getting involved in the NCBA guarantees meeting many of Nassau's best and brightest attorneys and local business leaders. Whether you come to Domus once a week or twice a year, the networking opportunities that come with being a member of the NCBA are truly special. Further, in addition to the "natural networking" that being a member provides, the NCBA recently began hosting evenings dedicated to that very purpose, for members to meet, get to know one another and hopefully begin business relationships. If you're an attorney practicing law in Nassau County, becoming a member of the NCBA isn't simply a social decision, it is a business necessity.

Last, but not least, and a reason to become a member that is often overlooked, is the fact that the NCBA lends a voice to our members and the profession of law that otherwise does not exist. Local bar associations don't simply educate and raise funds for charities (both vital roles that the Association fills), it also gathers the women and men of our profession to discuss, debate and, when necessary, publicly opine on a variety of social and legal issues of the day. With a membership that includes big and small law firms, private and government attorneys, law professors and law students, when issues in our profession arise that need to be debated and discussed, the NCBA gives our membership, our profession, a voice.

If you've read this far and are not a member, I hope, for all the reasons explained above and for so many more, you will consider joining the NCBA. I promise there is something there for everyone to enjoy. On behalf of the NCBA, we are looking forward to seeing some new faces at Domus in the months to come.

**Daniel W. Russo**
President, Nassau County Bar Association 2024-2025
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**FOCUS: COMMERCIAL LITIGATION**

# Pleading of Alternative or Supplemental Claims Upon a Breach of Contract

**John P. McEntee**

When a contract dispute arises, a party seeking to enforce its contractual rights will often assert non-contract claims to provide potentially alternative sources of recovery. But there is a risk that the assertion of such claims will increase the likelihood of the action getting bogged down by motion practice challenging the sufficiency of these claims. If it is true that the "p" in plaintiff stands for "push," as a law school professor of mine once observed,[1] a critical goal for the action must be to avoid unnecessary delays. This begins with ensuring that non-conclusory facts are alleged in support of the required elements of each claim.[2] This article will discuss how alternative claims can be pleaded upon a breach of contract.

## Pleading Alternative Claims Generally

Federal Rule of Civil Procedure 8(d)(2) authorizes pleading alternative theories of relief, providing that "[a] party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient."

New York Civil Practice Law & Rule ("CPLR") § 3014 likewise authorizes the pleading of alternative claims, providing that "[s]eparate causes of action or defenses shall be separately stated and numbered and may be stated regardless of consistency" and "may be stated alternatively or hypothetically," while CPLR § 3017 states "relief in the alternative … may be demanded." This right is founded on the premise that "'[a] party can't predict what [discovery will unearth and] the fact finding will be and is entitled at the pleading stage to introduce into the case everything [the party has] got.'"[3]



In *Cohn v. Lionel Corp.*, a party seeking to enforce a written guarantee against a corporation alleged in successive causes of action that the person executing the guarantee did so as a corporate officer or alternatively as an agent for a disclosed principal.[4] The New York Court of Appeals upheld the denial of the pre-answer motion to dismiss, noting that a "plaintiff is entitled to advance inconsistent theories in alleging a right to recovery."[5] In *Mitchell v. New York Hospital*, a defendant brought separate causes of action for contribution and contractual indemnity against a third-party defendant despite being inconsistent theories of recovery, with the Court of Appeals again recognizing the right of a party to assert inconsistent theories of relief.[6]

Applying these general principles, the court in *Aboulissan v. Kingsland 79, LLC* recognized the plaintiff's right to bring alternative claims for an express easement and a prescriptive easement,[7] the court in *Hall v. City of Buffalo* recognized the plaintiff's right to simultaneously plead claims for intentional and negligent infliction of emotional distress,[8] and the court in *George v. Sparwood Realty Corp* found the defendant could deny the fact of plaintiff's employment while alternatively pleading worker's compensation coverage (applicable only to employees) as plaintiff's exclusive remedy.[9] In addition to pleading alternative theories of relief, a pleader may also be able to allege inconsistent facts, where, for example, it does not know which of several defendants caused the injuries at issue.[10]

Despite this statutory and case support for alternative pleading generally, there are established limitations on a pleader's ability to assert tort claims in addition to contract-based claims upon a breach of contract.

## Pleading of Breach of Contract and Tort Claims

There is no recognized cause of action for negligent performance of a contract regardless of whether the contract is for goods or for services.[11] This is because breach of contract is not a tortious act, as tort claims arise from a duty imposed on individuals as a matter of social policy while contract claims arise from duties imposed on individuals consensually.[12] Yet contract and tort claims connected to and dependent on the contract alleged to have been breached are often pled simultaneously. This can be done, though, only if a legal duty independent of the contract exists and that duty "spring[s] from circumstances extraneous to, and not constituting elements of, the contract."[13]

In practice, it can sometimes be difficult to predict where the dividing line will be drawn between permitted and non-permitted tort claims arising out of a breached contract. As one federal court observed, "courts interpreting New York law have struggled [with] determining the circumstances under which 'a party to a contract may be held liable in tort to another party thereto as a result of some clash in the contractual relationship.'"[14]

In *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, a construction contractor on a railway improvement project asserted claims for breach of contract, quasi-contract, fraud, negligence and gross negligence against the railroad, alleging the defendant provided flawed engineering designs, which required substantial changes during the course of construction, failed to obtain the rights to necessary properties, and failed to locate and move various utility lines, which interfered with the construction.[15] In granting the railroad's motion to dismiss the negligence claims, the New York Court of Appeals stated:

> "Here, plaintiff has not alleged the violation of a legal duty independent of the contract. In its cause of action for gross negligence, plaintiff alleges that defendant failed to exercise 'due care' in designing the project, locating utility lines, acquiring necessary property rights, and informing plaintiff of problems with the project before construction began. Each of these allegations, however, is merely a restatement, albeit in slightly different language, of the 'implied' contractual obligations asserted in the cause of action for breach of contract . . . . Moreover, the damages plaintiff allegedly sustained as a consequence of defendant's violation of a 'duty of due care' in designing the project were clearly within the contemplation of the written agreement, as indicated by the design change and adjusted compensation provisions of the contract. Merely charging a

> breach of a 'duty of due care', employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim."[16]

*Clark-Fitzpatrick* is just one of many cases applying the general rule that a "a plaintiff may not transmogrify [a] contract claim into one for tort,"[17] but there are many examples of cases where courts have found tort claims to be properly pleaded alongside contract claims.

*Hamlet at Willow Cr. Dev. Co., LLC v. Northeast Land Dev. Corp.*[18] is a particularly good example of a permissible tort claim arising from a breached contact. In *Hamlet*, an excavation agreement provided that the excavator would haul away "all excess material pursuant to the approved plan," that it "shall not over excavate," and that the excavation and removal would be limited to a specified number of cubic yards.[19] Despite this contractual limitation, the excavator removed substantially more landfill than specified under the contract.[20] The property owner sued both in contract and in tort, namely, conversion, for the over-excavation, alleging (i) the excavator removed more fill than permitted under the contract, and (ii) the excavator exercised unauthorized dominion over the excess fill removed from the property in violation of the owner's property rights.[21]

The court first recognized that a "claim of conversion cannot be predicated on a mere breach of contract."[22] It found, though, that the duty not to over-excavate rested on separate duties owed by the excavator to the landowner, one arising from breach of the excavation contract and one arising from the unauthorized exercise of dominion over the excess fill. It therefore upheld the excavator's tort liability for conversion of the excess fill in addition to liability for breach of the excavation agreement.[23]

In *North Shore Bottling Co., Inc. v. Schmidt & Sons, Inc.*, the plaintiff beer distributor entered into an oral agreement with a beer "manufacturer" whereby the distributor became the exclusive distributor in Queens County for the manufacturer for as long as the manufacturer sold beer in the New York metropolitan area.[24] After resolving a statute of frauds defense, the New York Court of Appeals addressed the tort claim alleging the manufacturer had conspired to give the sales territory to others once the distributor had established a market for the beer in the territory, which the distributor claimed was a conspiracy to defraud the distributor. The Court found the tort claim was sufficiently independent of the claim for breach of the oral agreement to sustain the denial of the motion to dismiss the tort claim.[25]

In *Hargrave v. Oki Nursery, Inc.*, a vineyard purchased wine grape vines from a nursery, which represented the vines "would be healthy, free of disease, and suitable for wine production," yet the complaint alleged the vines were diseased and incapable of bearing fruit of adequate quality or quantity for the vineyard's commercial wine production."[26] The vineyard asserted claims for breach of contract and fraud, with the nursery arguing the vineyard could not convert a claim for breach of a contractual representation into a tort claim just "by applying the fraud label."[27] The Second Circuit Court of Appeals sustained the fraud claim, though, finding that "the complaint sets forth all the elements of an action in tort for fraudulent representations" and that the vineyard could "recover in tort whether or not [it] has a valid claim for breach of contract."[28]

Because it can sometimes be difficult to predict when tort claims arising from a contractual relationship will be sustained, it is critical, when pleading a tort claim alongside a breach of contract claim, to identify the duty independent of the contract purportedly giving rise to tort liability and plead non-conclusory facts establishing each of the tort's elements. This is because, as the Court of Appeals observed, "merely charging a breach of a 'duty of due care,' and employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim."[29]

There are other examples of pleading limitations on alternative claims where a contract is alleged to have been breached. For example, a complaint alleging breach of contract may also allege a quasi-contract claim for unjust enrichment, particularly if there is uncertainty as to the pleader's ability to sustain a claim for breach of contract.[30] Where there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute in question, an alternative quasi-contract cause of action can be maintained in addition to a claim for breach of contract.[31] But where there is an express agreement governing the subject matter of the claim, an alternative quasi-contract claim based on unjust enrichment will be dismissed.[32]

Given the limitations imposed on pleading tort claims arising out of a contractual relationship, a pleader can potentially avoid delay or worse by researching the availability and required elements of tort-based claims as an alternative or supplement to claims for breach of contract.

1. The corollary, it was observed, is that the "d" in defendant stands for delay.
2. A good source for these claim elements is the New York Pattern Jury Instructions-Civil (Thomson Reuters, 2025 ed.), which provides black-letter law with helpful commentary.
3. *Brown v. Riverside Church in the City of NY*, 231 A.D.3d 104, 111 (1st Dep't 2024), quoting David D. Siegel & Patrick M. Connors, New York Practice § 214 at 400 (6th ed. 2018).
4. *Cohn v. Lionel Corp.*, 21 N.Y.2d 559, 562-63 (1968).
5. *Id.* at 563.
6. 61 N.Y. 2d 208, 218 (1984).
7. 179 A.D.3d 878, 880 (2d Dep't 2020).
8. 151 A.D.3d 1942, 1944 (4th Dep't 2017).
9. 34 AD2d 768, 768 (1st Dep't 1970).
10. *Dunnigan v. Syracuse Mem. Hosp.*, 19 A.D.2d 944, 944 (4th Dep't 1963).
11. *Johnson City Cent. School Dist. v. Fidelity & Deposit Co. of Md.*, 226 A.D.2d 990, 993 (3d Dep't 1996); see *Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp.*, 725 F. Supp. 656, 659 (N.D.N.Y. 1989) ("[W]hen citing the general proposition that a simple breach of a contract is not actionable as a tort, New York courts generally do not distinguish between contracts for goods and contracts for services").
12. *Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D.2d 50, 55 (1st Dep't 1988); *Esposito v Tsunis*, 2011 N.Y. Misc. LEXIS 4435, * 17 (Sup Ct, Suffolk County, Sept. 6, 2011).
13. *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 389 (1987).
14. *Niagara Mohawk*, 725 F. Supp. at 659, quoting Apple Records, 137 A.D.2d at 55.
15. *Clark-Fitzpatrick*, 70 N.Y.2d at 385.
16. *Id.* at 389-90.
17. *Hargrave v. Oki Nursery, Inc.*, 636 F.2d 897, 899 (2d Cir. 1980).
18. 64 AD3d 85 (2d Dep't 2009).
19. *Id.* at 113.
20. *Id.*
21. *Id.*
22. *Id.* at 112.
23. *Id.* at 115.
24. 22 N.Y.2d 171, 174 (1968).
25. *Id.* at 180.
26. *Hargrave*, 636 F.2d at 898.
27. *Id.*
28. *Id.* at 899.
29. *Clark-Fitzpatrick*, 70 N.Y.2d at 390.
30. *See, e.g., Canzona v. Atanasio*, 118 A.D.3d 837, 838-39 (2d Dep't 2014).
31. *Pappas v. Tzolis*, 20 N.Y.3d 228, 234 (2012); *Cox v. NAP Constr. Co., Inc.*, 10 N.Y.3d 592, 607 (2008); *ISS Action, Inc. v. Tutor Perini Corp.*, 170 A.D.3d 686, 689-690 (2d Dep't 2019).
32. *Clark-Fitzpatrick*, 70 N.Y.2d at 388; *Matter of Toyota Lease Trust v. Perfection Auto Serv., Inc*, 230 A.D.3d 1323, 1324 (2d Dep't 2024); *Hamrick v. Schain Leifer Guralnick*, 146 A.D.3d 606, 607 (1st Dep't 2017); *King's Choice Neckwear, Inc. v. Pitney Bowes, Inc.*, No. 09-CV-3980, 2009 U.S. Dist. LEXIS 119934, 2009 WL 5033960, at *7 (S.D.N.Y. Dec. 23, 2009) ("Unjust enrichment may be plead in the alternative where the plaintiff challenges the validity of the contract; it may not be plead in the alternative alongside a claim that the defendant breached an enforceable contract."), *aff'd*, 396 F. App'x 736 (2d Cir. 2010).

**John P. McEntee**, the Co-Managing Shareholder of the Long Island office of global law firm Greenberg Traurig, is a Past President of the NCBA and Past Chair of the Commercial Litigation Committee. He can be reached at John.McEntee@gtlaw.com.

**FOCUS: APPELLATE LAW**

# Reptile Theory in the Courtroom: Countering Trial Tactics and Preserving the Record for Appeal

**Melissa A. Danowski and Alexandra Sanchez**

At trial, "zealous advocacy and creative lawyering" are both expected and welcome.[1] However, the bounds of permissible advocacy are not limitless. It has always been the rule that verdicts should be based only on the law and the evidence.[2] Appeals to prejudice or passion "have no place in a trial."[3] Attorneys exceed the broad bounds of permissible argument when they make statements or employ tactics that improperly influence the jury and prejudice the opposing party.[4] Litigants who employ such tactics risk possible reversal of a favorable trial outcome.[5]

Experienced trial attorneys are familiar with the "Golden Rule," which prohibits asking jurors to place themselves in the shoes of a party to decide a case based on how they themselves would want to be treated.[6] An obvious violation of this rule is when counsel asks the jury to "sit in the shoes of this poor plaintiff"[7] or "consider how they would have felt if they 'were in [the victim's] shoes.'"[8] This type of argument is prohibited because it encourages jurors to substitute their personal feelings for an objective evaluation of the facts. Given attorneys' familiarity with the "Golden Rule," and the obvious nature of such arguments, violations of the rule are increasingly rare. In its place, more nuanced and inconspicuous tactics have emerged, such as "Reptile" theory tactics.

## "Reptile" Theory Tactics

The reptile theory was coined by trial consultant David Ball and trial attorney Don Keenan in their book *Reptile: The 2009 Manual of the Plaintiff's Revolution*.[9] The trial tactics promoted in the book draw on the work of neuroscientist Paul D. MacLean who theorized that the most primitive part of the human brain—the brainstem or "reptilian brain"—is responsible for instinctive thoughts of self-preservation and survival.[10] The concept is that appealing to juror's reptilian brains can trigger instincts of self-preservation to dominate and override logical and fair thinking.[11]

Reptile tactics are another iteration of the age-old attempt to improperly evoke jurors' emotions during trial. In describing use of the reptile theory in litigation, one court stated: "it amounts to a not very subtle violation of the so-called 'Golden Rule' through the back door."[12]

The *Reptile Manual* promotes trial tactics that use fear to "impel[] the juror to protect himself and the community."[13] In practice, this is executed by framing the defendant's conduct as a threat. For example, the chapter on closing arguments instructs trial attorneys to focus not on the specific case, but instead on how defendants created a "community danger" and to show jurors that the result of their verdict will be either to suppress or encourage that danger.[14]

Critics of reptile tactics argue that they shift the focus away from the trial evidence and inject punitive themes into the case, often when punitive damages are not even claimed. Reptile tactics are prejudicial because they obscure the governing standards of liability. Instead of holding a defendant to the standard of reasonable care,[15] reptile tactics suggest the standard is higher than what the law requires. Many have theorized that reptile tactics are at least partially responsible for increasing runaway jury verdicts.[16]

The Appellate Division has not yet squarely ruled that reptile tactics at trial are prohibited, though many decisions have prohibited these same tactics without specific reference to the reptile theory.[17] Numerous courts in other jurisdictions have explicitly prohibited reptile tactics, noting that they are prejudicial to the defense.[18]

### Objections and Preservation of Arguments for Appeal

Often reptile tactics can be anticipated whether through past experience with opposing counsel or based on the tenor of questioning at pre-trial depositions. In such instances, defense counsel should file motions in limine to preclude reptile tactics at trial. Some judges and practitioners believe that such motions are premature. However, because a key component of reptile tactics encourages the plaintiff to elicit defense objections, failing to preemptively preclude such tactics may lead to the uneven playing field such tactics are meant to create. As stated in the *Reptile Manual*, "[a] defense objection will imply there's something to hide."[19] Therefore, even if the court were to sustain an objection at trial, there is a risk of irreparable prejudice once the jury gets the impression that the defense is hiding something.

Regardless of pre-trial practice, if plaintiff's counsel attempts to assert a reptile argument at trial, the defense must promptly object. The Appellate Division will refuse to entertain arguments on appeal when a timely objection is not made at trial.[20] When no objection is interposed, a new trial may only be directed when the remarks are so "pervasive, prejudicial or inflammatory" so as to deprive a party of a fair trial."[21]

# What type of procrastinator are you?

**THE PERFECTIONIST:** Unrealistic expectations, too much attention to details
**THE WORRIER:** All-or-nothing mindset and analysis paralysis
**THE DREAMER:** Great ideas but lacks execution and follow-through
**THE DEFIER:** Negative view of what others expect from you

***Small action is forward movement.***

**Tips**

- **Set manageable, realizable goals.**
- **Commit to five minutes of targeted effort. Even if it's opening the file to read your final notes, you have begun.**
- **Create single tasks or small chunks of work that can be completed.**
- **Bounce back from a lost day. Make a short list of things to do the following day and then let it go.**
- **Allocate a specific date and time for recurring activities.**
- **Take something off your list permanently that is unrealistic or unnecessary.**
- **Count backward from five and then dive in!**
- **Change your mindset: The next 10 minutes are going to go by whether I accomplish a task or not. I may as well do something!**
- **Use the nothing alternative. You either do the task at hand, or you do nothing at all. No alternative distractions or busy work.**

**The NCBA Lawyer Assistance Program provides confidential assistance to lawyers, judges, law students, and their immediate family members. For more information about LAP programs and services, contact Elizabeth Eckhardt at eeckhardt@nassaubar.org.**

Defense counsel should also propose a tailored curative jury instruction requiring the jury to disregard the argument. Curative instructions will not always cure the biases of the jurors.[22] However, the request should still be made because the appellate court may refuse to consider an argument regarding the failure to give, or the adequacy of a given curative instruction, in the event that the argument was not raised at trial.[23] Further consideration should be given to moving for a mistrial, particularly when the remarks are not isolated.[24]

Notably, improper remarks during summations will not always rise to the level of warranting a mistrial. Just last year, the Second Department in *Yakubov v. Gaft* held that a "defendant's contention that the plaintiff's counsel made inflammatory and prejudicial remarks in his opening statement and on summation is unpreserved for appellate review, as defendant's counsel did not object to the comments, did not request curative instructions at the time the remarks were made, and did not move for a mistrial."[25] In *Yakubov*, plaintiff's counsel referred to the defendant as a "liar" on at least eighteen occasions.[26] The Second Department held that even if the defendant had sufficiently preserved the issue, the remarks were "fair comment on the evidence" and "not so prejudicial as to have deprived defendant of a fair trial."[27]

### Conclusion

Successfully challenging reptile tactics at trial, in post-trial motions, or on appeal requires demonstrating that the arguments not only exceeded permissible bounds of fair comment, but that they also materially affected the fairness of the trial and outcome of the case.[28] Raising this issue early and often is crucial to provide the trial court with an opportunity to contemporaneously rule on impermissible trial tactics. As a matter of course, defense counsel should immediately object, request a curative instruction, and consider moving for a mistrial before the jury returns its verdict.[29] Though Yakubov shows there is a high bar to getting a new trial, failing to preserve the issue may result in an automatic loss, while reptile tactics continue to run rampant.

1. *People v. Trump*, 82 Misc.3d 1233(A) (Sup. Ct., N.Y. Co. 2024).
2. *Cattano v. Metropolitan St. Ry. Co.*, 173 N.Y. 565, 571 (1903).
3. *Id.* at 571.
4. *See, e.g., Nelson v. Bogopa Service Corp.*, 123 A.D.3d 780, 781 (2d Dept 2014) (ordering new trial where plaintiff's counsel's summation was "inflammatory and unduly prejudicial, depriving the defendants of a fair trial").
5. CPLR 4404(a).
6. *See Marcoux v. Farm Service and Supplies, Inc.* 290 F. Supp 2d 457, 463 (S.D.N.Y. 2003).
7. *Dailey v. Keith*, 306 A.D.2d 815, 816 (4th Dept. 2003).
8. *People v. Cassala*, 130 A.D.3d 1252, 1257 (3d Dept. 2015).
9. David Ball & Don Keenan, *Reptile: The 2009 Manual of the Plaintiff's Revolution* (Balloon Press 2009).
10. *Id.* at p.13–14, 147.
11. *Id.* at p.19.
12. *Berry v. Wisconsin Cent. Ltd.*, 21-CV-220-WMC, 2022 WL 3576203, at *8 (W.D. Wis. Aug. 19, 2022).
13. *Id.* at 19.
14. *Id.* at 147–48.
15. Restatement (Second) of Torts §283; *Bethel v. NYCTA*,, 92 N.Y.2d 348, 353 (1998).
16. Zandra E. Foley, *Defending Damages At Trial*, 108 ADVOCTX 44 (2004); Joseph Moriarty, *Fighting Back Against the Rise in Nuclear Verdicts*, 65 NO. 1 DRI For Def. 19, 21 (Jan. 2023).
17. *See Norton v. Nguyen*, 49 A.D.3d 927, 930 (3d Dept. 2008) ("[I]t is inappropriate to refer to the jury as the 'conscience of the community'").
18. *E.g., Luo v. Rodriguez*, No. BC648850, 2019 WL 3246680, at *1 (Cal. Super. June 11, 2019); *Sifuentes v Savannah at Riverside Condominiums Assoc., Inc.*, No. CACE 13-02964-21, 2015 WL 12803937, at *1 (Fla. Cir. Ct. May, 20, 2015) (precluding plaintiff from using "Golden Rule" or "Reptile" arguments during voir dire).
19. *Reptile, supra* n.9, at p.58.
20. *Horton v. Smith*, 51 N.Y.2d 798, 799 (1980). See also CPLR 4017; CPLR 5501(a)(3).
21. *Yu v. NYCHHC*, 191 A.D.3d 1040, 1040 (2d Dept. 2021).
22. *Valenti v. Gadomski*, 203 A.D.3d 783 (2d Dept. 2022).
23. *De La Rosa v. Nelson Avenue Holdings*, 199 A.D.3d 513, 513 (1st Dept 2021).
24. *Ortiz v. Jaramillo*, 84 A.D.3d 766, 766 (2d Dept. 2011).
25. *Yakubov v. Gaft*, 231 A.D.3d 1099 (2d Dept. 2024); *see also Abe v. NYU*, 180 A.D.3d 420, 421 (1st Dept. 2020) ("[p]laintiff's contention that defendants' trial counsel engaged in a pattern of rhetoric and misstatements that confused the jury is unpreserved, and we decline to review it in the interest of justice… were we to review it, we would find it unavailing.").
26. *Yakubov v. Gaft*, No. 2023-00599, Respondent's Brief, 2023 WL 11905288, at *10 (2d Dept. August 2, 2023).
27. *Yakubov*, 231 A.D.3d at 1101.
28. *Nieves v. Clove Lakes Health Care and Rehab., Inc.*, 179 A.D.3d 938, 940–41 (2d Dept. 2020).
29. *Celentano v. Manheim Services Corp.*, 258 A.D.2d 493, 494 (2d Dept. 1999); *Brennan v. City of New York*, 108 A.D.2d 834, 837 (2d Dept. 1985).

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**FOCUS: FREEDOM OF INFORMATION LAW**

# "Reasonably Described": The Procedural FOIL Exemption

**Bryan Barnes**

### Separate FOIL Exemption to "Reasonably Describe" Records

The traditional list of exemptions under the New York Freedom of Information Law ("FOIL") are contained in Public Officers Law ("POL") § 87(2). However, there is another informally recognized exemption contained in POL § 89(3)(a), which requires that every FOIL request must be "reasonably described."[1] Regulations elaborate on this requirement, stating that "[r]equests for records are to be made in accordance with FOIL and *reasonably describe* the records sought, including applicable dates, titles, names, and other identifying information that will assist the department to locate the requested records."[2] Therefore, when an agency denies a FOIL request on the ground that the request does not "reasonably describe" the record sought, under the requirements of POL § 89(3)(a), , the agency determines that the request was insufficient for the purpose of locating and identifying the document or documents requested.[3]

As stated in the Court of Appeals case *Konigsberg v. Coughlin*,[4] the failure of a requester to "reasonably describe" the records sought "is a ground for nondisclosure that is entirely separate from the exemption provisions under section 87 (2) of the Public Officers Law."[5] The statute places the initial burden on the person or entity making the FOIL request to reasonably describe the record sought.[6] But, if a FOIL request is denied on the ground that the record sought is not "reasonably described," the burden shifts to the agency to demonstrate why the description is insufficient for the purpose of locating and identifying the requested document.[7]



### Reasonably Describe as a Means of Locating the Requested Records

The requirement that the FOIL request must "reasonably described" the record sought is mainly for the purpose of allowing the government agency to locate the requested record.[8] In order for an agency to deny a FOIL request on the basis that the requested record was not reasonably described, the agency must demonstrate that the description is insufficiently vague or overbroad.[9] A request that is vague or overbroad necessarily prevents an agency from focusing its search.

On that note, case law, as well as advisory opinions from the Committee on Open Government, has stated that compliance with the "reasonably described" requirement should be determined with consideration given to the agency's specific system of filing or indexing its records.[10] It has been held that, under certain circumstances, an agency had a valid reason for denying a FOIL request "when [the records were] not indexed in a manner that would enable the identification and location of documents."[11]

This consideration regarding the manner in which a record is filed or indexed mainly applies to paper records as opposed to records stored electronically, given the advent of electronic word-search mechanisms.[12] In cases involving electronically stored records, "the agency must show 'that the descriptions provided are insufficient for purposes of extracting or retrieving the requested document[s] from the virtual files through an electronic word search…[by] name or other reasonable technological effort.'"[13] However, the rules governing FOIL do not explicitly differentiate between records stored in paper format and those in electronic format, and a failure to provide a reasonable description of the records sought may present the same obstacles no matter what the record's format.[14]

### *Lane v. County of Nassau*

In a decision dated January 15, 2025, the Second Department rendered a decision on the "reasonably described" requirement in the case *Lane v. County of Nassau*.[15] The subject FOIL request was made in December 2020 and requested certain records from the Nassau County Police Department databases.[16] The Legal Bureau for the Nassau County Police Department ("NCPD") denied the FOIL request on the ground that the requestor did not "reasonably describe" the specific database to which he was referring.[17] The unsuccessful FOIL requestor subsequently brought an Article 78 proceeding in the Nassau County Supreme Court. The court agreed with the NCPD's position that the records sought had not been reasonably described, and denied the branch of the petition that sought to compel disclosure of the records, and denied the branch of the petition that sought attorney's fees and litigation costs.[18]

The requestor appealed, and the Second Department, disagreeing with the Nassau County Supreme Court, reversed that lower court by holding that it could not be determined, as a matter of law, that the Petitioner had not "reasonably described" the requested records. The Second Department also rejected the lower court's conclusion that the request was "vague" or "unlimited,"[19] and noted that pursuant to governing regulations, agency personnel are required to "assist persons seeking records to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing the record."[20]

The Second Department further held that there was no evidence that, before denying the request, the NCPD had made any effort to work with the Petitioner to precisely define the request for records.[21] For that reason, the Second Department ordered that the matter be remitted to the Nassau County Supreme Court for further proceedings.[22]

### Conclusion

The primary purpose behind the requirement under POL § 89(3)(a) that a record requested pursuant to FOIL must be "reasonably described" is to assist the responding agency to locate the record sought and, thus, comply with the request.[23] This requirement to "reasonably describe" has oftentimes implicated the similar but separate inquiry of whether compliance with the request can be accomplished with a reasonable degree of effort.[24] As has been seen in the *Lane* case discussed above, there are regulations in place that require the responding agency to attempt, if possible, to work with the requester to identify the records being sought.

Based on the Second Department's holding in the recent *Lane* decision decided in mid-January of this year, the current interpretation of the "reasonably describe" requirement is that denial on this ground shouldn't be granted without at least some attempt to narrow and specify the request for records. It is still an open question as to how much of an attempt there needs to be to fulfill the obligations under FOIL, but the fact remains that there needs to be some degree of scrutiny.

1. POL § 89(3)(a).
2. 23 NYCRR § 3.5(b).
3. *See Reclaim the Records v. New York State Dept. of Health*, 185 A.D.3d 1268, 1269 (3rd Dept. 2020).
4. *Konigsberg v. Coughlin*, 68 NY2d 245 (1986).
5. *Coughlin*, 68 N.Y.2d at 251.
6. *Lost Lake Holdings LLC v. Hogue*, 2024 NY App. Div. LEXIS 5564, *3 (3rd Dept. 2024).
7. *Hogue*, 2024 NY App. Div. LEXIS at *3.
8. *See Reclaim the Records*, 185 A.D.3d at 1269.
9. *Goldstein v. Incorporated Vil. Of Mamaroneck*, 221 A.D.3d 111, 119 (2nd Dept. 2023).
10. *Goldstein*, 211 AD3d at 119; *see also* Comm. on Open Govt FOIL-AO-18748 (2011])
11. 185 A.D.3d at 1272.
12. 211 A.D.3d at 199.
13. *Id.* at 119, *quoting Pflaum v. Grattan*, 116 A.D.3d 1103, 1104 (3rd Dept. 2014).
14. *Id.* at 1273; *see also Data Tree, LLC. v. Romaine*, 9 N.Y.3d 454, 464 (2007).
15. *Lane v. County of Nassau*, 226 N.Y.S.3d 118 (2d Dept. 2025).
16. *Id.* at 120.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 120-21; 21 NYCRR § 1401.2(b)(2).
21. *Id.* at121.
22. *Id.*
23. *Goldstein*, 221 A.D.3d at 118.
24. *Id.* at 119.

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# Guide to New York Evidence

**Hon. William C. Donnino**

Is there a text of New York's law of evidence written in code format? Yes, it exists in the Guide to NY Evidence ("GNYE") produced by a committee of present and former judges and published by the New York Unified Court System at www.nycourts.gov/judges/evidence/.

The GNYE has twelve articles. The first ten parallel the articles of the Federal Rules of Evidence ("FRE"); included in the articles are all of New York's most important rules of evidence, civil or criminal, whether set forth in a statute or case law. Those twelve articles are:

1: General Rules & Court's Role
2: Judicial Notice
3: Presumptions, Inferences & Prima Facie Evidence
4: Relevant Evidence: Defined, Limits, & Types
5: Privileges
6: Witnesses & Impeachment
7: Opinion Evidence
8: Hearsay
9: Authenticity & Identification
10: Best Evidence Rules
11: Real & Demonstrative Evidence
12: Preservation & Appellate Review

Like the FRE, the GNYE sets forth the rule in bold face type, followed by a Note that identifies the source of the rule and any applicable nuance(s).

An example of the "code format" is in the rule for Excited Utterance:

**"8.17. Excited Utterance**

**A statement about a startling or exciting event made by a participant in, or a person who personally observed, the event is admissible, irrespective of whether the declarant is available as a witness, provided the statement was made under the stress of nervous excitement resulting from the event and was not the product of studied reflection and possible fabrication.**

**Note**

"This rule is derived from the formulations of the exception as stated by the Court of Appeals. (*See e.g. People v Johnson*, 1 NY3d 302, 306 [2003] . . .."

That Note continues, reporting other applicable cases and their key holdings. A Note will also identify any applicable nuance(s).

There are benefits for consulting the GNYE even when a rule of evidence is set forth in a statute. The GNYE Note may supply information about a statutory rule that may not be found elsewhere. If there is more than one statute on a particular subject[1] or a common law rule that survives a statute,[2] the GNYE will combine the applicable statutes, or statute and common law, in one rule. And if a Court of Appeals decision has specially affected the meaning of a statute, the GNYE rule will include that in its rule and identify its source in the Note.[3]

Publication of the GNYE only on the internet allows for fairly immediate updating when a statute or case law requires the addition of a rule or the updating of an existing rule. No hard-copy book on evidence can be updated in that short a timeframe.

For those more familiar with the FRE, a chart, listing the FRE and the parallel GNYE rule is provided. Notably, there are more GNYE rules than there are FRE. Thus, a federal practitioner may even find a GNYE rule helpful in New York federal court. Thus, for example, the United States Supreme Court in *Hemphill v New York*, 595 US 140, 155 [2022] noted:

> "If a court admits evidence before its misleading or unfairly prejudicial nature becomes apparent, it generally retains the authority to withdraw it, strike it, or issue a limiting instruction as appropriate. See, *e.g.*, Fed. Rule Evid. 105; *New York State Unified Court System, Guide to New York Evidence Rule 1.13(1)* ('Absent undue prejudice to a party, a judge may revisit his or her own evidentiary rulings during trial')." (emphasis added).

Four indices make finding an applicable rule easy. Those indices include: an alphabetical listing of the rules; an alphabetical listing of key words of a rule; an alphabetical listing of cases cited in the Notes; and a table of statutes. And of course, each of these indices identify the rule where the listed item may be found.

1. *E.g.* GNYE rule 3.26 [Marriage Certificate]; GNYE rule 4.35 [Identification of a defendant].
2. *E.g.* GNYE rule 3.20 [Public Record or Document]; GNYE rule 8.36 [Prior Testimony in a Civil Proceeding].
3. *E.g.* GNYE rule 8.08 [Business Records].

**Hon. William C. Donnino** is a retired Justice of the Supreme Court and Co-chair of the Unified Court System Guide to New York Evidence committee. He can be reached at wdonnino@outlook.com.

**FOCUS: PERSONAL INJURY**

# Custody Dispute: The Court of Appeals Expands Municipal Liability to Children in Foster Care

**Christopher J. DelliCarpini**

In *Weisbrod-Moore v. Cayuga County*, the Court of Appeals recently held "that municipalities owe a duty of care to the children the municipalities place in foster homes because the municipalities have assumed custody of those children."[1]

This decision clearly expands municipal liability to a new class of plaintiffs, who now are exempted from the general requirement to plead and prove a special duty. What is less clear is whether *Weisbrod-Moore* has opened the door to even more prospective plaintiffs.

### The Requirement of a "Special Duty"

Municipal liability in New York was created by statute. The Court of Claims Act waived sovereign immunity for the state and its subdivisions, making them liable "in accordance with the same rules of law applicable to individuals and corporations."[2] Yet a thicket of statutes now qualifies and conditions municipal liability, including filing prerequisites and statutes of limitation particular to such claims.[3]

The scope of that liability, however, has been significantly limited by the courts. As the Court recently restated in *Ferreira v. Binghamton*, "plaintiffs must establish that a municipality owed them a special duty when they assert a negligence claim based on actions taken by the municipality acting in a governmental capacity."[4]

This special duty, the Court also held, can arise in any of three circumstances: "(1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition."[5]

As the Court held in *Cuffy v. City of New York*, however, such a duty arises from four elements: "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking."[6]

A split arose in the Appellate Division, however, over whether plaintiffs allegedly injured while in foster care had to plead and prove a special duty.

The Second Department held that "where ... a plaintiff asserts causes of action to recover damages for harm suffered by a foster child due to the negligent performance of a governmental function and alleges facts sufficient to show that the defendant municipal agency assumed legal custody over that child, that plaintiff need not prove any additional facts in order to satisfy the special duty rule."[7] The Third Department shared this view.[8]

The First Department, however, held that such a plaintiff "was required to establish the existence of a special duty in one of the three ways specified by the Court of Appeals."[9] The court held that the situation was controlled by *Sean M. v. City of New York*, in which the Court of Appeals "required proof of a special duty for a tort claim involving a child injured at a daycare provider where the provider was regulated by the City, but the City did not have physical custody of the children."[10]

The Fourth Department in *Weisbrod-Moore* shared the view of the First Department, setting up a resolution of this split by the Court of Appeals.

### Weisbrod-Moore: Legal Custody Obviates Special Duty

In *Weisbrod-Moore*, the plaintiff sued the County under the Child Victims Act, alleging that while in foster care she suffered "horrific abuse" at the hands of her foster parent.[11] Rather than answer, the County moved to dismiss on grounds that the plaintiff failed to plead a special duty.[12]

The Supreme Court denied the motion, but the Fourth Department reversed.[13] The court found first that the Social Services Law created no private right of action, and then it found that the plaintiff also failed to plead the four *Cuffy* elements.[14] The Court of Appeals granted leave to appeal and reversed the Fourth Department.[15]

The majority opinion, written by Judge Troutman, distinguished the County's case law against a special relationship: "none of the plaintiffs in those cases were in the custody of the government."[16] Rather, the injured child plaintiffs had been in the custody of family members. In Ms. Weisbrod-Moore's situation, however, the County had placed her with a foster parent. "By assuming custody of plaintiff, and thus assuming the authority to control where and with whom plaintiff lived ... the County necessarily assumed a duty to her beyond what is owed to the public generally."[17]

The majority also explained that this duty can continue when a child leaves a municipality's physical custody. The Court had held in *Pratt v. Robinson* that "The duty owed by a school to its students ... stems from the fact of its physical custody over them."[18] In *Weisbrod-Moore*, the Court distinguished *Pratt*, however, because a child who has left their school "passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child's protection."[19] Ms. Weisbrod-Moore alleged negligent placement in the foster home and supervision of that placement, a breach of "exactly the type of duty that flowed from the kind of custody and control the County possessed over plaintiff."[20]

Judge Singas, in a lengthy dissent with which Judge Garcia concurred, objected to the majority's expansion of municipal liability.

She argued that the Court's decision in *McLean v. City of New York* controlled here and required pleading and proof of a special duty.[21] The special duty requirement limits liability to where the municipality has undertaken a duty to a particular individual, Judge Singas contended, but the County's duty to Ms. Weisbrod-Moore was no different than its duty to any other foster child. She also found that there was no reason here for the Court to create an exception to the special duty requirement.

Judge Singas also argued that physical custody, not legal custody, was the critical distinction from *Pratt*. "Similar to students leaving the 'orbit' of a school," she wrote, "municipalities

relinquish day-to-day physical custody and control of foster children when they are placed with foster parents, even if municipalities retain legal custody."[22] Judge Singas also warned that this decision would make municipalities liable to other classes of person in legal but not physical custody, like persons on probation.[23] She also faulted the majority for refusing to consider the County's governmental immunity defense at this stage.[24]

Lastly, Judge Singas warned of the policy implications of this decision. "Today, this Court, in essence, codifies a new private right of action that the legislature has heretofore declined to create."[25] She feared how municipalities might reallocate resources to account for this "open-ended liability of enormous proportions," and even speculated that municipalities will now be more reluctant to remove children from abusive or neglectful family situations, or might revert to orphanages rather than place children foster homes.[26]

### Municipal Liability After *Weisbrod-Moore*

The most direct implication of *Weisbrod-Moore* is that plaintiffs alleging municipal negligence in placement or supervision of children in foster care need neither plead nor prove a special duty. Rather than hold that foster care meets the requirements of a special duty, the Court appears to have held that the foster care situation is an exception to the general requirement altogether.[27]

The Court was careful to state, however, that the increase in exposure here was limited. "'Like other duties in tort,' however, 'the scope of the [government's] duty to protect [foster children will be] limited to risks of harm that are reasonably foreseeable.'"[28]

The Court did not reach the County's governmental function immunity defense, which covers "the exercise of discretionary authority during the performance of a governmental function."[29] However, "The weight of appellate authority in this state does not recognize governmental immunity where recovery is predicated on negligence in the supervision of care provided by foster parents to a child placed in their custody."[30]

But what does the decision mean, if anything, for municipal liability in other contexts? What exempted Ms. Weisbrod-Moore from the special duty requirement was that she was in the "legal custody" of the County, regardless of physical custody. Who else fits that description?

The majority in *Weisbrod-Moore* did not dispel Judge Singas's concern that persons on probation or parole, who are also in legal custody but not physical custody, might have a cause of action for negligence in their placement or supervision. Municipal liability to third parties injured by a person on probation or parole absent proof of a special duty, however, has already been rejected by the courts.[31] But children in child custody proceedings[32] or declared Persons in Need of Supervision or "PINS,"[33] as well as juveniles in prehearing custody[34] might also be excepted from the special duty rule.

Whether *Weisbrod-Moore* is an example of "ad hoc exceptions to the special duty/special relationship rule" as Judge Singas put it,[35] or the usual case-by-case evolution of the common law, we could see the principles behind the majority open the courts to further classes of plaintiffs in the future.

1. 2025 N.Y. Slip Op. 00903, *1 (2025).
2. *Ferreira v. City of Binghamton*, 28 N.Y.3d 298, 307–08 (2022) (quoting *Florence v. Goldberg*, 44 N.Y.2d 189, 195 (1978)).
3. See Court of Claims Act Article II; GML Article 4.
4. 28 N.Y.2d at 304.
5. 28 N.Y.2d at 310 (quoting *Applewhite v. Accuhealth, Inc.*, 21 N.Y.3d 420, 426 (2013)).
6. 69 N.Y.2d 255, 260 (1987).
7. *Adams v. Suffolk County*, 234 A.D.3d 1, 3 (2d Dep't 2024).
8. *Grant v. Temple*, 216 A.D.3d 1351, 1352–53 (3d Dep't 2023).
9. *Q.G. v. City of New York*, 222 A.D.3d 443, 444 (1st Dep't 2023).
10. *Id.*
11. *Weisbrod-Moore*, 2025 WL 515393 at *1.
12. *Id.*
13. *Weisbrod-Moore v. Cayuga County*, 216 A.D.3d 1459 (4th Dep't, 2023).
14. *Id.* at 349–50.
15. *Weisbrod-Moore v. Cayuga County*, 41 N.Y.3d 908 (2024).
16. *Weisbrod-Moore*, 2025 N.Y. Slip Op. 00903, at *4.
17. *Id.*
18. 39 N.Y.2d 554, 560 (1976).
19. *Id., quoted in Weisbrod-Moore*, 2025 N.Y. Slip Op. 00903, at *4.
20. *Weisbrod-Moore*, 2025 N.Y. Slip Op. 00903, at *5.
21. *Weisbrod-Moore*, 2025 N.Y. Slip Op. 00903, at *9 (Singas, J., dissenting) (citing *McLean*, 12 N.Y.3d 194, 197 (2009)).
22. *Id.* at *10 (Singas, J., dissenting).
23. *Id.* at *11 (Singas, J., dissenting).
24. *Id.*
25. *Id.* at *12 (Singas, J., dissenting).
26. *Id.* at *13 (Singas, J., dissenting).
27. *Weisbrod-Moore*, 2025 N.Y. Slip Op. 00903 at *2.
28. *Id.* at *5 (quoting *Sanchez v. State*, 99 N.Y.2d 247, 253 (2002)).
29. *Turturro v. City of New York*, 28 N.Y.3d 469, 479 (2016).
30. *Sean M. v. City of New York*, 20 A.D.3d 146, 160 (1st Dep't 2005). *Accord Adams*, 234 A.D.3d at 17.
31. *Tarter v. State*, 68 N.Y.2d 511 (1986); *Brinkerhoff v. County of St. Lawrence*, 70 A.D.3d 1272 (3d Dep't 2010).
32. See Domestic Relations Law § 75-a.
33. See *Matter of Brian KK*, 84 A.D.2d 901 (3d Dep't 1981).
34. See *In re Darren H.*, 179 Misc.2d 130 (Family Ct., Kings Co. 1998).
35. *Id.* at *11 (Singas, J., dissenting) (quoting *McLean*, 12 N.Y.3d at 204).

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# NASSAU ACADEMY OF LAW

## April 7 (IN PERSON ONLY)

**An Evening with the Guardianship Bench 2025**

*With the NCBA Elder Law, Social Services & Health Advocacy Committee and sponsored by*

5:30PM Dinner and Cocktails; 6:30 Program
2.0 CLE credits in Professional Practice
Member $70; Non-Member $85; Court Staff $40

Jurists from Nassau, Suffolk, Kings and Queens Counties will participate in an hour-long meet and greet, followed by a round-table discussion of guardianship practice and procedure.

**Guest Speakers:**
**Hon. Arthur M. Diamond (Ret.)**, Moderator; **Hon. Maria Aragona** (Kings County); **Hon. David J. Gugerty** (Nassau County); **Hon. Chris Ann Kelley** (Suffolk County); **Hon. Gary F. Knobel** (Nassau County); **Hon. Lee A. Mayersohn** (Queens County); **Hon. Bernice D. Siegal** (Queens County); and **Hon. Marian R. Tinari** (Suffolk County)

NCBA Member $70; Non-Member Attorney $85;
Court Support Staff $40 **(pre-registration required)**

## April 22 (Hybrid)

**Dean's Hour: The New Beneficial Ownership Information Report—Everything You and Your Client Need to Know**
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

Most entities must report their beneficial ownership information (BOI) to the Financial Crimes Enforcement Network (FinCEN) under the Corporate Transparency Act (CTA). This presentation will explain who must report, what must be reported, any exceptions to the reporting requirements and how to ensure that you and your clients are compliant with the reporting requirements under the CTA.

**Guest Speaker:**
**Katherin Valdez-Lazo,** Vishnick McGovern Milizio LLP, Business & Transactional Law Practice Group

## April 24 (In Person Only)

**Assisted Outpatient Treatment (AOT) in New York: Guidance for Practitioners and Families**
*With the NCBA Community Relations & Public Education and Mental Health Law Committees*
5:30PM–7:00PM
1.0 CLE Credit in Professional Practice
FREE to NCBA Members and the Public

This CLE program will cover the New York Assisted Outpatient Treatment (AOT) law—also known as "Kendra's Law"—that authorizes court-ordered mental health treatment in the community. The panelists will share their roles and perspectives, providing an overview of the law, the criteria for participation in the AOT program, the procedure for evaluating eligibility and obtaining the court order, and discussing the variety of mental health services available under the AOT treatment plan.

**Guest Speakers:**
**Moderator Jamie A. Rosen**, Meister Seelig & Fein PLLC, Partner and Mental Health Law Group Chair
**Justice David J. Gugerty**, Nassau County Supreme Court and Member, NYS Judicial Task Force on Mental Illness
**Joanne Oweis,** Bureau Chief for Social Services and Deputy County Attorney, Office of the Nassau County Attorney at the Nassau County Department of Social Services
**Dr. Alexander Bardey**, Forensic Psychiatrist
**Dr. Efraim J. Keisari**, Private Practice Clinical and Forensic Psychiatrist
**Jamie Butchin, Esq.**, Mental Hygiene Legal Service, Second Department

## April 25 (Hybrid)

**Dean's Hour: The Art of Persuasion—Telling a Good Story**
*With the NCBA Appellate Practice Committee*
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

Every dispute has two sides, shaped by distinct perspectives, motivations, and experiences. Effective persuasion harnesses the power of storytelling. This presentation explores the process of crafting persuasive and engaging narratives through a structured storytelling framework.

**Guest Speakers:**
**Assistant Professor Jeremy Miguel Weintraub** teaches Legal Analysis, Writing, and Research at Hofstra University School of Law.
**Associate Professor Maryam Franzella** teaches legal writing at Hofstra University School of Law.

## May 5 (Hybrid)

**Dean's Hour: Family Regulation's Consent Problem**
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

In New York and across the nation, virtually every child welfare investigation includes a search of a family's home. Though these searches are often referred to as "home evaluations" or "home

# PROGRAM CALENDAR

assessments," they are searches under the Fourth Amendment, and subject to the constraints of the Fourth Amendment. This session will explain the constitutional limits on home evaluations in child welfare investigations, including the limits on tactics agencies can use to obtain consent.

**Guest Speaker:**
**Anna Arons**, Assistant Professor of Law, St. John's University School of Law

## May 6 (In Person Only)

**Homes Hijacked: Exposing Deed Fraud**
*With the NCBA Community Relations & Public Education Committee*
5:00PM—7:00PM
1.0 CLE Credit in Professional Practice
FREE to NCBA Members and the Public

Members of the Nassau County Bar Association, Nassau County Clerk's Office, and the Nassau County District Attorney's Office will talk about New York's adoption of the Uniform Partition of Heir's Property Act, the implication of deeds now being transferred upon death, and the prosecutorial enforcement of deed theft crimes. This program is open to attorneys and Nassau County residents who want to learn more about how to protect one of their most valuable assets—their home.

**Guest Speakers:**
**Andrew B. Bandini**, Mauro Lilling Naparty LLP
**Amy Abbandondelo**, Sherwood & Truitt Law Group, LLC
**Maureen O'Connell,** Nassau County Clerk
**Moriah Adamo**, Abrams Fensterman, LLP

## May 8 (Hybrid)

**Dean's Hour: A Level Playing Field or a New Challenge?—Panel Discussion on DRL §237**
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

New York's DRL §237 aims to protect individuals by ensuring that certain agreements—particularly prenuptial agreements—are fair, transparent, and enforceable. But does it level the playing field or create new obstacles for businesses and individuals alike? Join us for a panel discussion exploring the purpose behind DRL §237 and its impact on representation of monied and non-monied spouses in matrimonial cases.

**Guest Speakers:**
**Irene Angelakis**, Law Offices of Irene Angelakis, P.C.; **Elaine Colavito**, Afran & Russo, P.C.; **Andrea Brodie**, Meister Seeling & Fein; and **Allyson Burger**, Berkman Bottger Newman & Schein, LLP

## May 13 (Hybrid)

**Dean's Hour: Estate and Trust Income Tax Planning and Design for Attorneys**
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

This lecture will discuss Form 1041 Income Tax planning and will include: distributable net income (DNI) and distributions; §199A calculations; expense allocations and final regulations under §67(e); income tax traps; and business entities and passive activities.

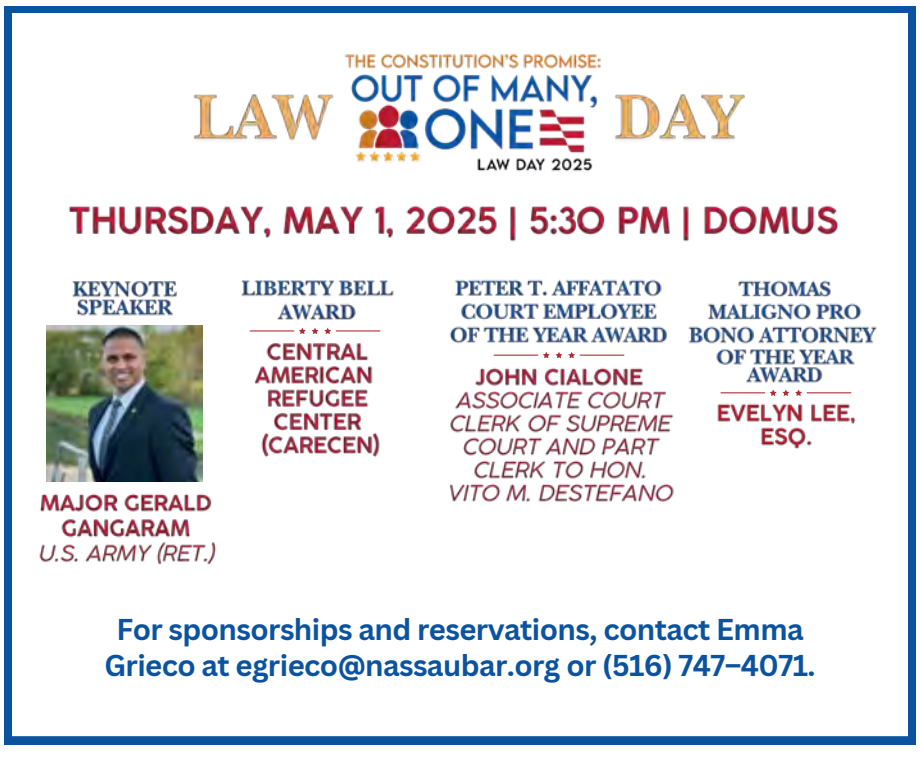
**Guest Speakers:**
**Robert S. Barnett** and **Gregory L. Matalon,** Capell Barnett Matalon & Schoenfeld LLP

## May 15 (Hybrid)

**Dean's Hour: Fakes, Forgeries and Frauds—The Howard Hughes Hoax**
12:30PM
1.0 CLE Credit in Professional Practice
NCBA Member FREE; Non-Member Attorney $35

In January of 1972, author Clifford Irving confessed to authorities that along with his wife Edith, he had perpetrated the most fantastic literary hoax of the 20th century. To the tune of over a million dollars, Irving had swindled his publisher McGraw Hill and Time-Life for what he claimed to be an as-told-to autobiography of the reclusive billionaire Howard Hughes. The book was a pure fabrication. Perhaps the most audacious and brazen con job in the history of American publishing, the Howard Hughes Hoax was a mass media sensation. The ensuing scandal resulted in indictments and guilty pleas for violations of American and Swiss law.

**Guest Speaker:**
**Rudy Carmenaty,** Deputy Commissioner of the Nassau County Department of Social Services and the Department of Human Services



**FOCUS: EDUCATION LAW**

# The Ivory Tower Under Scrutiny: Navigating Legal Minefields in Higher Education

**Cynthia A. Augello**

Institutions of higher education, once perceived as bastions of intellectual freedom and sheltered spaces, are increasingly facing a complex web of legal challenges. From student rights and faculty governance, to financial accountability and technological advancements, the modern university operates within a landscape fraught with potential litigation. This article delves into some of the most prominent legal issues impacting higher education today, exploring the evolving legal frameworks and their implications for universities, faculty, and students alike.

## Student Rights and Responsibilities: A Shifting Landscape

The relationship between universities and their students has transformed significantly, moving beyond the traditional concept of *in loco parentis* to a more contractual and rights-based model.

- ***Due Process and Disciplinary Proceedings.*** Universities are obligated to provide students with fair disciplinary procedures, including adequate notice, an opportunity to be heard, and impartial decision-making.

  The landmark case *Dixon v. Alabama State Board of Education* (1961)[1] established the requirement of due process in student expulsions. Recent debates surrounding campus sexual assault and Title IX[2] compliance have further emphasized the importance of procedural fairness and the need for clear, unbiased investigations.

  *The Intersection of Title IX and Due Process.* The 2020 Title IX regulations, while aiming to strengthen due process, introduced complex procedural requirements that universities struggled to implement. The recent shift back towards the 2020 regulations has caused more confusion. Balancing the rights of the accused with the needs of the complainant remains a significant challenge. Universities must ensure that investigations are thorough, impartial, and conducted in a timely manner, while also providing support and resources to all parties involved. Litigation related to Title IX often centers on allegations of procedural errors, bias, or inadequate investigations.

- ***Freedom of Speech and Expression.*** The First Amendment's protection of free speech extends to public universities, albeit with limitations. Issues surrounding controversial speakers, hate speech, and student protests continue to generate legal scrutiny.

  The line between protected speech and disruptive or harassing conduct remains a subject of ongoing legal interpretation. Universities must balance the rights of individuals to express their views with the need to maintain a safe and inclusive learning environment.

  *The Boundaries of Free Speech.* The "marketplace of ideas" concept, while central to academic freedom, is often tested by controversial speakers and student protests. "Hate speech" remains a particularly challenging area, as courts have generally held that even offensive speech is protected unless it constitutes a "true threat" or incites imminent violence. Social media has added an additional layer of complexity, as online speech can quickly escalate and spread beyond campus boundaries.

- ***Privacy and Data Security.*** With the proliferation of online learning and the collection of vast amounts of student data, privacy concerns have become paramount. The Family Educational Rights and Privacy Act (FERPA)[3] governs the disclosure of student educational records, while state and federal data breach notification laws impose obligations on universities to protect sensitive information. The increasing use of artificial intelligence and learning analytics raises further questions about data ownership and ethical use.

  *Digital Privacy and Data Security.* The increasing reliance on online learning platforms, student information systems, and data analytics has created a vast trove of sensitive student data. Universities must ensure compliance with FERPA, state data privacy laws, and industry best practices. Cybersecurity threats, such as ransomware attacks and data breaches, pose a significant risk to student privacy and institutional reputation. The use of AI in education, while offering potential benefits, raises concerns about algorithmic bias, data security, and the ethical implications of automated decision-making.

- ***Accessibility and Disability Rights.*** The Americans with Disabilities Act (ADA)[4] and Section 504 of the Rehabilitation Act[5] mandate that universities provide reasonable accommodations to students with disabilities. This includes physical accessibility, assistive technologies, and modifications to academic requirements. Litigation in this area often focuses on the definition of "reasonable accommodation" and the extent to which universities must modify their programs to meet the needs of diverse learners.

## Faculty Governance and Academic Freedom: Balancing Rights and Responsibilities

The traditional concept of academic freedom, protecting faculty members' rights to teach, research, and express their views without undue interference, is facing new challenges in the context of increasing institutional oversight and public scrutiny.

- ***Tenure and Employment Rights.*** Tenure, designed to protect academic freedom, remains a contentious issue. Litigation related to tenure denial or revocation often centers on allegations of procedural irregularities, discrimination, or violations of contractual rights. The rise of contingent faculty and the decline of tenure-track positions have also fueled legal debates regarding employment security and academic freedom.

  *The Changing Nature of Academic Employment.* The rise of adjunct faculty and the decline of tenure-track positions have raised concerns about job security, academic freedom, and the quality of instruction. Universities must address the challenges of providing fair compensation, benefits, and professional development opportunities for contingent faculty. The debate over tenure continues, with some arguing that it provides essential protection for academic freedom, while others contend that it creates barriers to innovation and accountability.

- ***Intellectual Property and Research Misconduct.*** Ownership of intellectual property generated through university research is a complex area, involving issues of patent rights, copyright, and technology transfer. Allegations of research misconduct, such as plagiarism, data fabrication, or conflicts of interest, can lead to disciplinary actions and legal challenges. Universities must establish clear policies and procedures for addressing these issues.

  *Intellectual Property and Technology Transfer.* Universities must develop clear policies and procedures for managing intellectual property generated through faculty research. Technology transfer, the process of commercializing university research, raises complex issues of patent rights, licensing agreements, and revenue sharing. Conflicts can arise between the university's mission of disseminating knowledge, and the desire to gain profit from research.

- ***Freedom of Speech and Extramural Utterances.*** While academic freedom protects speech within the faculty member's area of expertise, the extent to which it extends to extramural utterances (public statements outside the academic context) is less clear. Courts have generally recognized that universities can regulate faculty speech that is demonstrably harmful to the institution or its mission. However, balancing institutional interests with faculty members' First Amendment rights remains a delicate task.

- ***Shared Governance and Faculty Roles.*** Universities are increasingly facing legal challenges related to the scope of faculty involvement in institutional decision-making. Disputes often arise over the interpretation of shared governance principles and the allocation of authority between faculty, administration, and governing boards. The increasing influence of administrators and governing boards has led to concerns about the erosion of faculty autonomy.

## Financial Accountability and Compliance: Navigating Regulatory Complexity

Universities are subject to a complex web of financial regulations and compliance requirements, particularly in areas such as research funding, student financial aid, and tax-exempt status.

- ***Research Funding and Grant Compliance.*** Universities that receive federal research funding are subject to stringent regulations regarding grant administration, financial reporting, and conflict of interest. Violations of these regulations can lead to substantial penalties and reputational damage.

- ***Student Financial Aid and Title IV Compliance.*** The administration of federal student financial aid programs, such as Pell Grants and student loans, is governed by Title IV of the Higher Education Act. Universities must comply with numerous regulations regarding eligibility, disbursement, and reporting.
- ***Tax-Exempt Status and Unrelated Business Income.*** Universities, as tax-exempt organizations, must comply with Internal Revenue Service (IRS) regulations regarding unrelated business income tax (UBIT) and charitable contributions. Activities that generate revenue but are not substantially related to the university's educational mission may be subject to taxation.
- ***Endowment Management and Fiduciary Duties.*** Universities with large endowments are subject to fiduciary duties regarding the management and investment of these funds. Lawsuits alleging mismanagement or breach of fiduciary duty can arise from investment losses or deviations from donor intent.

**Technology and Innovation: Addressing New Legal Frontiers**

The rapid pace of technological innovation has created new legal challenges for universities, particularly in areas such as online learning, intellectual property, and cybersecurity.

- ***Online Learning and Accessibility.*** The growth of online learning has raised questions about accessibility, quality assurance, and intellectual property. Universities must ensure that online courses and programs comply with ADA and Section 508[6] accessibility requirements.

  *Challenges of Online Learning.* Ensuring quality and accessibility in online education remains a significant challenge. Universities must address issues such as student engagement, academic integrity, and the use of technology to enhance learning outcomes. The digital divide, the gap between those who have access to technology and those who do not, can exacerbate inequalities in higher education.
- ***Intellectual Property and Digital Resources.*** The use of digital resources, such as online journals, databases, and software, raises complex issues of copyright infringement and fair use. Universities must develop clear policies and procedures for managing intellectual property in the digital environment.
- ***Cybersecurity and Data Breaches.*** Universities are increasingly targeted by cyberattacks, which can result in the theft of sensitive student and faculty data. Universities must implement robust cybersecurity measures and comply with data breach notification laws.

  *Cybersecurity and Data Protection.* Universities must invest in robust cybersecurity measures to protect sensitive student and faculty data. Data breaches can lead to significant financial losses, reputational damage, and legal liability. Universities must also comply with data privacy regulations, such as the GDPR[7] and state equivalents.
- ***Artificial Intelligence and Algorithmic Bias.*** The use of artificial intelligence in areas such as admissions, student advising, and research raises concerns about algorithmic bias and discrimination. Universities must ensure that AI systems are developed and used in a fair and ethical manner.

  *AI and the Future of Higher Education.* The use of AI in education has the potential to transform teaching, learning, and research. However, universities must address the ethical implications of AI, such as algorithmic bias, data privacy, and the potential for job displacement. The legal framework for AI is still developing, creating uncertainty for universities.

**Emerging Issues and Future Challenges**

Beyond the established areas of legal concern, universities are facing a range of emerging issues that will shape the future of higher education law.

- ***Diversity, Equity, and Inclusion (DEI).*** Legal challenges to affirmative action policies and DEI initiatives are on the rise, forcing universities to re-examine their strategies for promoting diversity and inclusion.

  *The Aftermath of the Supreme Court's Affirmative Action Decision.* Universities are exploring alternative strategies for achieving diverse student bodies, such as focusing on socioeconomic factors, geographic diversity, and individual experiences. The legal challenges to DEI initiatives are likely to continue, with potential lawsuits targeting programs related to diversity training, faculty hiring, and student support services. The definition of what is considered illegal discrimination is being heavily litigated.

  *Balancing DEI with Academic Freedom.* Universities must create inclusive environments that respect diverse viewpoints and promote open dialogue, while also protecting the principles of academic freedom and freedom of speech. The line between protected speech and discriminatory harassment can be difficult to draw. Universities must develop clear policies and procedures for addressing incidents of bias and discrimination, while also ensuring that all members of the campus community feel safe and respected.
- ***State Level Legislation.*** State level legislation is changing rapidly and is very different from state to state.
- ***Mental Health and Student Well-being.*** The increasing prevalence of mental health issues among students has placed new demands on universities to provide support services and address legal concerns related to liability and confidentiality.
- ***Internationalization and Global Partnerships.*** Universities are expanding their international reach through global partnerships, study abroad programs, and online education. These activities raise legal issues related to foreign regulations, data privacy, and cross-border transactions.
- ***The Future of Accreditation.*** The role of accreditation in ensuring quality and accountability in higher education is being debated, with calls for greater transparency and innovation.

In conclusion, the legal landscape of higher education is constantly evolving, requiring universities to adapt their policies and practices to meet new challenges. By staying informed about legal developments and proactively addressing potential risks, universities can protect their institutional integrity, ensure the rights of their students and faculty, and advance their mission of teaching, research, and public service. The legal issues discussed above represent a fraction of the challenges that higher education faces, and the future will undoubtedly bring new and unforeseen legal complexities. It is crucial for Universities to have strong legal counsel, and robust internal compliance programs to navigate the ever-evolving legal landscape.

1. 294 F.2d 150 (5th Cir. 1961).
2. 20 U.S.C. §§ 1681-1688; 34 C.F.R. Part 106.
3. 20 U.S.C. § 1232g; 34 C.F.R. Part 99.
4. 42 U.S.C. §§ 12101 et seq.
5. 29 U.S.C. § 794.
6. 29 U.S.C. § 794d.
7. Regulation (EU) 2016/679.

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

**FOR NCBA MEMBERS**

NOTICE OF

NASSAU COUNTY BAR ASSOCIATION

**ANNUAL MEETING**

May 13, 2025

7:00PM

Domus

15th & West Streets

Mineola, NY 11501

Proxy statement will be sent by electronic means to the email address provided by the Member and posted on the Association's website.

The Annual meeting will confirm the election of NCBA Officers, Directors, Nominating Committee members, and Nassau Academy of Law Officers.

Deanne M. Caputo

Secretary

**FOCUS: COMMERCIAL LITIGATION**

# Trials in the Commercial Parts: The Judges Speak Out

**Paul F. Millus**

Commercial litigation is complex and expensive—which clients know only too well. Most cases are settled prior to trial, but usually not until after extensive and costly discovery or, if everything falls into place, a decision on a motion for summary judgment motion that may end the carnage. But sometimes, and not as often as with other areas of practice, commercial matters go to trial to be resolved at a bench trial or with the help of a jury.

Every litigator approaches a case with the understanding that, short of settlement or summary dismissal, only a verdict will settle the parties' differences. Hopefully counsel for each of the parties has planted that seed in their client's minds long before they must be the bearer of bad news that they must begin preparation for trial and the client must cancel that vacation to Portugal. But what of trying in a commercial part? What actions decided on by counsel or taken by the court will streamline the proceedings? How does your assigned judge handle trials? What evidentiary pitfalls must you be ready for so that you can ensure that every piece of relevant and convincing evidence is found to be admissible? Conversely, have you done everything you can to prevent evidence which you have determined to be irrelevant, lacking foundation for admission or outright overly prejudicial from being offered by the other side and admitted for consideration by the fact finder?

To get a better gauge on trial and evidentiary issues, this writer went to the source, speaking with numerous judges serving in the Commercial Parts in Suffolk, Nassau, New York, Queens and Kings Counties to get their views on trials conducted in their parts and discuss the trial process and evidentiary issues that arise in the matters tried before them. The jurists were kind enough to give their views and offer some insights into their approach at trial

The commercial litigation bar will be happy to hear that the judges who participated in these discussions all found that the commercial litigators appearing before them were well prepared and often were able to reach agreements resolving evidentiary disputes. That is not to say, however, that it is always seamless. But, for the most part, the attention to details and preparation long before the opening statements are made has served these attorneys well and made the judge's job far easier.

On the pre-trial front, preparation is made consequentially more consistent and predictable because of Section 202.70 of the Uniform Rules for the Supreme Court and the County Court which sets forth the Rules of the Commercial Division of the Supreme Court. Rules 25, 26, 27, 28, 29, 30(c)(d), 31, 32, 32-a, and 33 focus on trial preparation and rules for conducting the proceeding. The judges stressed the importance of compliance with these rules but two particular ones stood out: Rules 27 and 28.

Generally, the judges noted the importance of not only identifying exhibits for discussion as per Rule 28, which addresses the process of pre-marking exhibits, but also carefully *evaluating* them well before identification, because the failure to do so could result in unnecessary motions in limine as outlined in Rule 27. According to the judges consulted, consideration of all aspects of the particular exhibits in terms of their relevance and what the practitioner must do to ensure their admission should be determined prior to, and discussed at, the pre-marking of exhibits. It is at this time that—hopefully—a consensus can be reached, thus avoiding expensive in limine practice.[1] But the requirement that in limine motions be filed at least ten days prior to trial does not mean that there will never be an evidentiary dispute at trial. As such disputes will occur often enough, a lawyer's keen familiarity regarding the rules of evidence will not only lead that attorney to prevail in an evidence dispute, but will give the court confidence when addressing other evidence issues that this attorney can be trusted and, in a way, is a reliable resource for the court when evaluating such matters.

One such issue was of particular note in the matter of *Riconda v. Liberty Insurance Underwriters, Inc*. ("Liberty Case"). The history of the proceeding and the underlying facts were complicated, but the evidentiary issue encountered is worthy to acknowledge. In this case where the defendant sought to set aside the verdict rendered or for a new trial, significantly the plaintiff had commenced an earlier partially related lawsuit against another party.

In the verified complaint in that action, the plaintiff alleged certain "facts" but took a position in the Liberty Case at trial directly contrary to the allegations in the prior lawsuit. Defendant objected—preserving its rights. And when the time came for defendant to flesh out its argument, the court set aside the verdict invoking the doctrine of judicial estoppel, stating that "[i]t is a well settled principle of law in our state that a party who assumes a certain position in a legal proceeding may not thereafter, simply because his interests have changed, assume a contrary position."[2] This is but one instance where an evidentiary issue was of supreme importance to the outcome of the matter.

As for the evidentiary issues that come up and are resolved at the in limine level, for the most part, many of the judges stressed 100% mastery of the business records exception to hearsay. Indeed, while most commercial practitioners were reported to be well at ease introducing business records, there were instances where that was not the case. Thus, a reminder is warranted.

The requirements to establish the exception to the hearsay rule is mandated in CPLR 4518 and in case law, to wit: (i) the records must be made in the regular course of business; (ii) the records must be the product of routine recording, such that, the records must be made routinely and on a repetitive basis by people acting in the regular course of their work; (iii) the records must have been made at the time of the acts or occurrences described therein or within a reasonable time thereafter; and (iv) the records must be made by a person who has personal knowledge of the acts or occurrences described and is under a business duty to report them.

In terms of financial transactions, acts or occurrences are recorded by one person or company and then transmitted to or incorporated into another company's records. Importantly, "it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted."[3] However, a custodian of records, while familiar with the record keeping practices of a party, may not be enough.

While a custodian may have personal knowledge of how records were maintained and that it was the party's standard business practice to record and maintain all records within the party's systems, the custodian may not be able to confirm that he had personal knowledge of the acts, events or conditions which were recorded in the business records. Thus, relying on someone else's recordation of the acts, events or conditions leaves the door open to properly question whether that third person was under a business duty with respect to any recorded acts, events or conditions.[4] Accordingly, while it may seem axiomatic, as the very foundation of the commercial part cases invariably rely on business records of all sorts, success or failure may hinge on the practitioner's knowledge of the exception through and through.

Another evidentiary issue that has come up in the trial of commercial matters is the parol evidence rule. Generally, it is clear that if the four corners of writing in question show no ambiguity, there is no room for court to search for unstated intent by resorting to extrinsic evidence. However, there are some exceptions. For example, ill-written contractual merger clauses will not preclude the use of parol evidence to establish a fraudulent inducement claim.[5]

As there are many commercial matters that allege not only breach of contract but also fraud claims, where a complaint states a cause of action for fraud, the parol evidence rule is not a bar to showing fraud either in the inducement or in the execution "despite an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made."[6] However, without an accompanying claim based in fraud, practitioners are left to their litigation and argument skills to convince the court of an ambiguity in the written words of the contract.

Some other points made in conversations with the judges are notable. A judge conveyed that lawyers before him sometimes make certain statements in front of the jurors that can result in a curative instruction being required as their statements were inconsistent with the evidence presented. This essentially negates what the lawyer was trying to accomplish and calls into question his/her credibility—which is not good to say the least.

Another point—it is a certainty that eventually all commercial trial parts will be "smart courtrooms." The technology streamlines the trial and immerses the jury into the case that could not be done by simply publishing an exhibit to the jury with each one looking at the document for seconds. The watchword for practitioners in terms of their use

of the new technology is practice, practice, practice. There is nothing more embarrassing than having to fumble with the technology, testing the patience of the bench and the jury.

Finally, it is always recommended to the litigant to observe how the court tries a case prior to the litigant appearing before that judge for trial. Judges are very different with how they conduct trials. Some have expressed a proactive approach in terms of achieving justice, which may include sustaining an objection to a question that was never objected to by opposing counsel. For other jurists, they feel their duty is not to advocate as that is the attorney's job. As one judge put it "obedience is the essence of law" and each player in the courtroom has their role and duty. If each performs that duty in a manner consistent with the law and their respective ethical obligations, justice will be done.

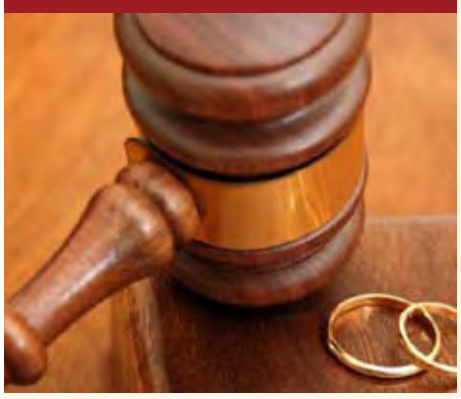
In sum, Commercial Part judges probably expect the same thing from the attorneys trying a case before them that all other judges in other parts do . . . but . . . maybe . . .a little bit more.

1. It should be noted that several judges emphasized the importance of disclosing documents before trial or that practitioner runs the risk of preclusion. The emphasis was particularly on civility and overall fairness while recognizing the need for zealous advocacy.
2. *Riconda Liberty Mutual Underwriters, Inc.*, Index No 3655/2012 (Sup. Ct. Suffolk County Sep. 7, 2018), *aff'd* 187 A.D.3d 1081, 131 N.Y.S.3d 170 (2d Dep't 2020).
3. *See RDM Capital Funding, LLC v. Shoegod 313 LLC*, 83 Misc.3d 1272, 215 N.Y.S.2d 302 (Sup. Ct. Kings County 2024); (In this case, the court found that an email ostensibly from the plaintiff to the defendant confirming that a wire transfer had been sent was not a business record capable of satisfying the exception. As the court put it, "[t]o authenticate the wiring of money, there needs to be authentication of evidence of such from the financial institution which wired the money—not the entity upon whose behalf the money was wired. Thus, as "[t]he key to admissibility of the record is that it carries the indicia of reliability ordinarily associated with business records" the court found that nothing in the record confirmed in a manner consistent with the business record exception to the hearsay rule that an actual wire transfer took place.
4. *Seamless Capital Group, Inc. v. Bryan A. Anthonys Design LLC.*, 84 Misc. 3d 1236, 220 N.Y.S.2d 922 (Sup. Ct. Kings Co. 2024).
5. *IBM v. GlobalFoundries U.S. Inc.*, 204 A.D.3d 441, 167 N.Y.S.3d 13 (1st Dep't 2022) citing *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 184 N.Y.S.2d 599 (1959).
6. *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 321, 184 N.Y.S.2d 599 (1959).

**Paul F. Millus** is a Member at Meyer, Suozzi, English & Klein, P.C. and former chair of the NCBA Labor & Employment Law Committee. He can be reached at pmillus@msek.com.

**FOCUS: MATRIMONIAL LAW**

# New York Equitable Distribution: Monetizing Domestic Violence



**Nancy E. Gianakos**

The enactment of the New York "Equitable Distribution Laws" in June 1980 heralded the recognition of marriage as an economic partnership. Early drafts of the legislation explicitly ruled out "marital fault" as a factor for consideration in property distribution; however, the final draft enacted seemingly resolved the legislative dispute over complete extrication of marital fault from judicial consideration with the enactment of a "catch-all factor" in both maintenance and property distribution provisions of the statute, leaving it to discretion of each of the four judicial departments to decide the applicability of marital fault until an amendment enacted in April 2020, effective May 3, 2020.[1]

In 1984, in *Blickstein v. Blickstein*, the Second Department held that marital fault of a party as a factor generally had no place in a just and proper consideration by a court in the equitable distribution of marital assets pursuant to the equitable distribution statute, Domestic Relations Law ("DRL") section 236(B)(5)(d), martial fault being inconsistent with the underlying assumption of marriage as an economic partnership.[2] In that case, the trial court awarded *all* of the marital property to the plaintiff based upon the defendant's misconduct, which consisted solely of his abandonment of the plaintiff—sufficient grounds for plaintiff to obtain a divorce but not for the court to consider in distributing the parties' marital assets. The court opined that such consideration of fault is very difficult to evaluate in the context of marriage and may, in the last analysis, be traceable to the conduct of both parties, citing Schenkman, *1981 Practice Commentary*.[3] Notably, the appellate court in that decision left the door open for exceptions such as "egregious misconduct."

The next year, in *O'Brien v O'Brien*,[4] a Court of Appeals' decision citing *Blickstein* upheld the trial court that refused to entertain fault as a factor under the catch-all provision of the DRL and excluded evidence of the defendant's marital fault. However, the court did opine that though in this instance marital fault is not "a just and proper factor" for consideration pursuant to the catch-all factor of DRL 236(B)(5)(d),[5] it is a factor on rare occasions in cases of egregious spousal misconduct, especially conduct that "shocks the conscience of the court."

For the next few decades, marital fault such as adultery, excessive drinking, verbal harassment and physical abuse, as well as threatening to kill a spouse,[6] did not rise to the level of shocking the court's conscience. The catch-all factor that gave broad discretion in equitable distribution to the court in fashioning a just and fair distribution of marital assets lay dormant and unresponsive to insidious spousal misconduct, domestic violence.

In April 2020, the Legislature changed the landscape of equitable distribution for matrimonial litigants with the amendment to DRL § 236B (5)(d) with factor (14), adding domestic violence as a mandatory factor for consideration by the matrimonial courts in all four departments. A spouse meeting the definition of victim of domestic violence as set forth in Social Services Law § 459-a would no longer bear the onerous burden of proving marital fault sufficient to "shock the conscience" of the court for consideration of his or her spouse's misconduct in determining equitable distribution.

The 2020 amendment, DRL § 236 B (5)(d)(14), provides: a court shall consider

> "…whether either party has committed an act or acts of domestic violence, as described in subdivision one of section four hundred fifty-nine-a of the social services law, against the other party and the nature, extent, duration and impact of such acts or acts…" (emphasis added).

Social Services Law § 459-a defines "victim of domestic violence" as:

> "…any person over the age of sixteen, any married person or any parent accompanied by his or her minor child or children in situations in which such person or person's minor child is a victim of an act which would constitute a violation of the penal law, including, but not limited to acts constituting disorderly conduct, harassment, aggravated harassment, sexual misconduct, forcible touching, sexual abuse, stalking, criminal mischief, menacing, reckless endangerment, kidnapping, assault, attempted assault, attempted murder, criminal obstruction of breathing or blood circulation, strangulation, identity theft, grand larceny or coercion; and (i) and such acts or acts have resulted in actual physical or emotional injury or have created a substantial risk of physical or emotional harm to such person or such person's child; and (ii) such act or acts are alleged to have been committed by a family or household member…"

This amendment gives the court broad discretion to consider "the nature, extent, duration and impact of such acts or acts."[7] Domestic violence is also a factor considered in maintenance awards. However, there the court has less latitude in its determination since a nexus must exist between the acts by one party against the other and the acts must be shown to have inhibited or continued to inhibit a party's earning capacity or ability to obtain meaningful employment. "Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law."[8]

### Post-2020 Amendment: Significant Distributions Awarded Spousal Victims of Domestic Violence

The cases where domestic violence has been a considered factor in equitable distribution since the effective date of the amendment demonstrate the recognition by the courts of the impact of domestic violence upon the spouse, emotionally, financially and psychologically, as reflected in the significant increase in distribution awards to the victim. However, the evidentiary matters implicated to prove domestic violence were not addressed by the Legislature in the 2020 amendment. The reported decisions, such as in the case below, provide some guidance where the court in determining equitable distribution relied upon the credibility of the victim, prior findings of domestic violence by the spouse in a custody trial and the court observed a party's behavior during litigation.

In the 2022 case of *J.N. v. T.N.*,[9] the court, in consideration of Factor 14 under DRL § 236B(5)(d), awarded the wife 85% of the marital estate due to domestic violence committed

against her by the husband. There the court found that the husband engaged in persistent verbal and emotional abuse throughout the marriage and the litigation; he berated and degraded the wife continuously, including calling her diseased, calling her an unfit parent, and alleging meritless claims of domestic violence by the wife to her family; threatened to take custody of the children; and defamed her as a sitting member to her board of directors. His behavior throughout the marriage constituted harassment, especially domestic violence as that term is defined in the Social Services Law.

Notwithstanding the wife was the "monied spouse" with a successful career in finance, the court found that the husband's actions resulted in actual emotional injury and created a substantial risk of harm to the wife, which "… negatively impacted her professional reputation and career and threatened her ability to make a living."[10] The court took note of the effects of the husband's abuse throughout the marriage and during litigation; "… in this regard, and by necessity the trial record goes beyond financial matters. It includes the testimony and documents from the custody trial, including a domestic violence finding, and …efforts of Husband to delay and sabotage the financial trial…" The wife's credibility at trial clearly underscored her allegations of domestic violence by the husband for this court.

Courts, in addition, may address spousal misconduct in application of the egregious conduct standard to marital fault in fashioning an equitable distribution award such as in the 2023 case of *Mohamed V Abuhamra*.[11] There, the court based its decision on credibility determinations made at trial where the husband hid bank accounts, transferred funds and emptied safe deposit boxes; schemed with his brother and a friend to under report his income as well as disregarded court orders to preserve assets which resulted in 100% of the known assets to be distributed to the wife.

Even after the passage of the 2020 amendment, the past continues to hamstring trial courts in their determination of equitable distribution as in *Gary G. v Elena AG.*,[12] a 2024 decision of Judge Jeffrey S. Sunshine of Kings County. There, the application of the controlling law as it existed at the time of the commencement of the action, September 24, 2015, resulted in the marital misconduct of the spouse escaping an adjustment in the distribution of marital assets, failing to meet the standard of "egregious conduct." The alleged offensive conduct of the defendant-husband (an attorney) included poking the wife in the eye, causing her to require a cornea operation, punching her in the nose so as to cause a nosebleed, and grabbing her arm so tightly that visible bruising resulted—all of which the husband denied.

The decision cited cases *at that time* that failed to establish "egregious conduct" and those where egregious conduct was found—attempting to murder a spouse in front of the parties' children and hiring a hitman to kill a spouse. Underscoring precedential constraints imposed upon the trial courts at that time is the judicial view of marital misconduct set forth by the Court of Appeals as late as 2010 in *Howard S. v Lillian*,[13] that "at a minimum, in order to have any significance at all, egregious conduct must consist of behavior that falls well outside the bounds of the basis for an ordinary divorce action." (emphasis added).

The impact of the 2020 Amendment no doubt imports a change of view.

### Post-2020 Amendment: Discovery of Marital Fault

Similarly, the Legislature gave no guidance as to discovery regarding marital fault in the language of the 2020 amendment and as a result the trial courts must look to existing discovery rules for guidance.

In the 2024 decision, *A.S v A.B.*,[14] Judge Sunshine distinguishes the prohibition of discovery regarding marital fault in matrimonial proceedings from discovery of marital fault for purposes of the court's mandatory consideration of domestic violence for purposes of equitable distribution.

Specifically, in that case, the evidence sought was information regarding a tracking device from a nonparty allegedly placed upon the wife's car by the husband. The unauthorized use of such a device is considered stalking in the fourth degree, a class B misdemeanor under Penal Law Section 120.45(2). The court noted that "… even if the DA allegedly declined to prosecute, the victim may still seek the information in a separate civil proceeding—and a violation of the Penal Code is often the basis for a civil order of protection in a Family Court or Matrimonial proceeding."

Further, the 1994 Family Protection and Domestic Violence Intervention Act was enacted to give the "fullest protections of our civil and criminal laws" to victims of family offenses. If an act constitutes a basis for a civil order of protection, the court concludes it would also constitute a basis if proven, to consider in…. equitable distribution due to statutory amendment.

Equitable distribution is an issue that the court must decide in a contested divorce. Fourteen statutory factors are enumerated as well as a catch-all factor that provides the court discretion to take into account any other factor the court finds just and proper in determining equitable distribution. Since it is incumbent upon the court to consider the effects of domestic violence, the information requested from non-parties in this instance, based on the allegations and the facts presented, is relevant according to the court and is, therefore, well within the general compulsory disclosure provisions of the Domestic Relations Law.

### Future Litigation

New York enacted "no fault divorce" in 2010 in Domestic Relations Law§ 170(7), and with its passage, grounds based upon "fault" basically disappeared. It took many years for the Legislature to free the courts of the contentiousness bred by fault grounds. Marital fault, in its ugliest form, domestic violence, presents as no less taxing upon courts in determining equitable distribution under the 2020 Amendment.

1. The Economics of Marital Fault: Part I and II, N. Gianakos, *Nassau Lawyer* (October 2005 and February 2006).
2. *Blickstein v Blickstein*, 472 N.Y.S.2d 110 (1984).
3. McKinney's Cons. Laws of NY, Book 14 Domestic Relations Law, C236B:13, p160, 1983-1984 Pocket Part.
4. *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985) The Defendant-doctor filed for divorce, two months after he was licensed to practice after a nine-year marriage to plaintiff, who in fact supported him and the family during his years of study. The case is known for declaring a medical license "marital property" subject to equitable distribution separate and apart from a professional practice. Note: Subsequent amendment to the DRL eliminated the license as marital asset for equitable distribution.
5. Domestic Relations Law section 236[B][5][d][10]-factor 10 "…any other factor which the court shall expressly find to be just and proper."
6. *Nolan v Nolan*,486 N.Y.s.2d415 (3d Dep't 1985); *Pacifico v Pacifico*,475 N.Y.S.2d 952(4thDep't,1984.
7. *Id.*
8. DRL § 236B[6][e][1][g].
9. 77 Misc.3d 894, 2022 NY Slip Op 22310 (Sup Ct, NY Co 2022).
10. *Id* 933.
11. 203 N.Y.S.3d 455, (4th Dep't 2023).
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14. 84Misc.3d 692 (Kings, County, 2024).

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## In Brief

The *Nassau Lawyer* welcomes submissions to the IN BRIEF column announcing news, events, and recent accomplishments of its current members. Due to space limitations, submissions may be edited for length and content. PLEASE NOTE: All submissions to the IN BRIEF column must be made as WORD DOCUMENTS.

**Ronald Fatoullah**, Chair of the Elder Law Practice Group at Meltzer, Lippe, Goldstein & Breitstone, LLP., and Partner to the firm's Trusts & Estates Practice Group, presented a CEU for social workers and geriatric care managers entitled "Post-Acute Care Concerns for Social Workers." **Fatoullah** and **Debby Rosenfeld**, Counsel to the firm's Trusts & Estates and Elder Law Practice Groups, are both presenting "New York Medicaid Lookback Rules and Planning 2025" for the National Business Institute on April 10.

Abrams Fensterman LLP proudly announces that **Carolyn Reinach Wolf**, Executive Partner and Director of the firm's Mental Health Law practice, has been named a 2025 Health Care Hero by Long Island Business News in the Mental Health category.

Capell Barnett Matalon & Schoenfeld LLP Partners **Yvonne R. Cort** and **Robert S. Barnett** will be speaking in April at the National Conference of CPA Practitioners Post Tax Season Decompression Roundtable. **Barnett** and Partner **Gregory L. Matalon** will be presenting "Estate and Trust Income Tax Planning and Design for Attorneys" at the Nassau Academy of Law's Dean's Hour on May 13. **Cort** has been appointed as Co-Chair of the Education Committee for the Annual Accounting and Tax Symposium, to be held in November 2025. The Symposium is typically attended by several hundred tax professionals.

**Gerard R. Luckman**, a Partner and Chair of Forchelli Deegan Terrana LLP's Bankruptcy & Corporate Restructuring practice group, was recently appointed an inaugural Advisory Board Member of St. John's University School of Law's Center for Bankruptcy Studies.

# Dressed to a Tea

**On March 20, the WE CARE Fund and the Nassau County Women's Bar Association held their annual fundraiser, Dressed to a Tea, at the Sand Castle in Franklin Square. Over 425 guests "escaped to Margarita Isle" to enjoy an entertaining evening filled with a fashion show, giveaways, and over a 100 raffle prizes.**


Photos by Hector Herrera

**FOCUS: LAW AND AMERICAN CULTURE**

# When Mickey Silenced Popeye

**Rudy Carmenaty**

*The French Connection* is more than a thriller. Garnering the Academy Award as the Best Picture of 1971, half a century later it continues to enthrall audiences with its riveting depiction of undercover police work. That the film was based on an actual drug bust only enhances its authenticity.

At the heart of the movie is Jimmy "Popeye" Doyle. The character was based on the real-life exploits of NYPD narcotics detective Eddie "Popeye" Egan. As depicted by the late Gene Hackman in an Oscar-caliber performance, Popeye is a man obsessed with imposing his vision of law and order on the streets of New York.

Doyle is a tough-as-nails cop, completely fearless. He will stop at nothing to get his man. A compulsive figure on the order of Melville's Captain Ahab, Popeye is a driven professional. He has no family or home life to speak of. All he has is his job and his dedication to it.

Hackman conveys Doyle's inherent contradictions. On the one hand, Popeye is unwavering and incorruptible. On the other, Popeye can be vicious and bigoted. Egan, who was on location as a technical advisor, was looking over Hackman's shoulder throughout the filming to make sure the actor got the part of Popeye just right.

*The French Connection* makes the point that to combat the drug scourge, society needs men like Popeye. Men who are on a par with and as ruthless as the criminals they are pursuing. As the movie's promotional tag line makes all too clear—*Doyle is bad news—but a good cop*.[1]

A cinematic landmark, *The French Connection* was selected by the Library of Congress for the National Film Registry because of its cultural, historic and aesthetic significance. The only question that remains is in what form or version will *The French Connection* be preserved?

This is not an idle inquiry. In fact, what happened to this film in 2023 should give not only film afficionados, but anyone interested in the artistic heritage of this country reason for concern. The threat to the integrity of *The French Connection* finds its genesis four years earlier.

In March 2019, after sixteen months of intense negotiations, The Walt Disney Company consummated a deal acquiring 21st Century Fox for $71.3 billion.[2] 21st Century Fox had been formed in 2013 as a spin-off from the partition of the entertainment and the media assets once held by Rupert Murdoch's News Corp.

The purchase was dictated by Disney's unquenchable need for programming. In 2017, Disney secured a controlling interest in the streaming service BAMTech Media for a combined total of $2.58 billion, paid out in two separate transactions [3] The following year, Disney mounted its own streaming service, which became Disney+.

With its acquisition of 21st Century Fox, Disney gained ownership of the 20th Century Fox film and television libraries. The value of these collections alone justified the 2019 deal with Murdoch. Fox's movie catalog is noteworthy and dates back to the golden age of Hollywood.

The upshot is that Disney now holds the copyright to *The French Connection*. Known the world over for family friendly entertainment, Disney finds itself in an awkward position. After all, Mickey Mouse is its emblem/brand ambassador. How can Mickey Mouse be seen streaming films intended for mature audiences.

Adding to this dilemma, Disney has been accused of going "woke" by catering to present-day politically tinged sensibilities. This has earned Disney a rather Orwellian reputation when it comes to the censoring of content. Everything from cartoons to full-length features have had scenes cut or altered for various reasons.

Disney not only edits, erasing subject matter that could under any rubric be deemed as offensive, but it also withholds from distribution entire films which current sensibilities find troubling. For instance, *Song of the South* (1946), with its outdated racial stereotypes, has not been rereleased in over forty years.

When not editing scenes or locking away films in their vaults, Disney on Disney+ began placing content warnings on its classic fare. In 2019, the first such content warning appeared:

> *This program is presented as originally created. It may contain outdated cultural depictions*.[4]

The language making up the content warning was greatly expanded upon in 2020:

> *This program includes negative depictions and/or mistreatment of people or cultures. These stereotypes were wrong then and are wrong now. Rather than remove this content, we want to acknowledge its harmful impact, learn from it and spark conversation to create a more inclusive future together. Disney is committed to creating stories with inspirational and aspirational themes that reflect the rich diversity of the human experience around the globe.*[5]

This February, however, Disney took a step back. In response to cultural shifts and anti-DEI initiatives promulgated by the Trump administration, viewers will now see a watered-down content warning, reminiscent of the one from 2019, on Disney+:

> *This program is presented as originally created and may contain stereotypes or negative depictions.*[6]

Disney is at liberty to disseminate as well as tamper with *The French Connection* as it sees fit. Disney also licenses the movie to other streaming platforms, including The Criterion Channel. The Criterion Channel is a home distribution subscription service devoted to showing film classics.

In May 2023, viewers watching the film on Criterion got quite a jolt. A jarring jump cut occurs at 09:42 minutes into *The French Connection*, pruning six seconds of footage and eliminating a crucial expository element.[7]

This clumsy edit occurs in a scene between Doyle and his partner "Cloudy" Russo at the police precinct. The edited version removes a moment that reveals Popeye's inner motivations as, in character, he employs the "N"-word:

> Popeye: *"You dumb guinea."*
> Cloudy: *"How the hell did I know he had a knife?"*
> Popeye: *"Never trust an "N" word."*
> Cloudy: *"He coulda been white."*
> Popeye: *"Never trust anyone."*[8]

This exchange is the only scene missing from the original.

Doyle is a pugnacious personality. His words and actions have been characterized, even by the standards of 1971, as racist. Black audiences viewing the film during its initial release cited the honesty in the portrayal. African Americans felt this exchange confirmed what they had always suspected about the racial attitudes of white cops.[9]

Just prior to the edit, Doyle can be seen bullying a black suspect, asking him if "he picked his feet in Poughkeepsie." Later, Doyle rousts a bar in Harlem filled with black patrons. He punches a black informant in the face. Throughout the movie, Popeye is seen hassling and intimidating African Americans without compunction.

These glaring scenes of outright bigotry remain untouched, while the six seconds were cut. Why? Was it solely the use of the "N"–word that Disney objected to? How ironic, Popeye is silenced for articulating one offensive word but not for his torrent of offensive behavior.

It can be argued the deleted sequence gives context to Popeye's prejudices. Doyle may well be a racist, but what animates him goes beyond color. He is a man possessed, and his obsessions come to consume him. All that Popeye has left by the film's end is his own paranoia. He literally trusts no one, either black or white.

In making this specific cut, Disney manages to undercut an understanding of Popeye's true nature. At the same time, it diminishes some of the subtle intensity that Hackman brought to the role. Even more infuriating, no notice or disclaimer was provided. The edit was done surreptitiously, without any acknowledgement.

The edited version of *The French Connection* premiered on May 12, 2023, at a screening at the Aero Theatre, a revival house in Santa Monica.[10] It has been subsequently streamed

on Criterion, iTunes, Apple, MAX, Amazon and also shown in this form on Turner Classic Movies.[11]

Nor was this cute bit of censorship limited to streaming platforms or repertoire movie houses. Those unlucky enough to buy a digital file of the film, who had not already downloaded it to their device prior to the cut being made, discovered they had purchased the abridged version regardless of when they had bought the movie.[12]

Adding insult to injury, this suppression was done exclusively for domestic consumption. Disney+ in the UK and Canada streamed the unaltered version.[13] Was this done to address American sensibilities? And is removing content without explanation the best way to deal with legitimate apprehensions over revolting language?

Criterion, for its part, stated it streamed the content that Disney provided.[14] Yet, it also failed to alert their viewers. A faux pas, to say the least, for a service devoted to promoting the cinema. Throughout the ensuing controversy, Disney remained silent offering no answers, never admitting responsibility.

The best that one can surmise is that Disney's excision of *The French Connection* was a business decision, pure and simple. So that revenue derived from streaming or otherwise exhibiting the movie is not impaired by the uttering of a racist remark. Disney apparently engaged in cinematic revisionism in pursuit of profit.

At the same time, Disney was protecting its brand. Its pattern has been to avoid controversy by not platforming problematic material. Disney also is quick to apologize for its perceived past sins. Moreover, it should be noted Disney's actions don't give rise to a violation under the First Amendment, since the government did not take part in the decision.

The Walt Disney Company presently has possession of properties that did not originate under founder Walt Disney or his corporate successors. Disney, in its current incarnation, could earn a great deal of goodwill if it acknowledged a fiduciary responsibility as the de-facto steward of a significant share of the nation's film heritage.

Such an acknowledgment, however, appears unlikely. Interestingly enough, those associated with film preservation were also uncharacteristically acquiescent.[15] Perhaps this was out of fear of Disney's commanding position in the entertainment firmament. Online commentators were far less circumspect in their responses.

They vented on social media with a vengeance. "This s**** is insidious" said one cinephile, "and their license gives them the right to alter it no matter what."[16] It led to a grass-roots revolt. Movie lovers on the internet got the story out, raised a fuss, rallied their fellow film fans, and shamed Disney into eventually capitulating.

It also appears Disney did not act alone. The film's director William Friedkin may have played a part. The censored version is listed as 2021 William Friedkin V2.[17] This indicates Fiendkin either effectuated or assented to the cut. Friedkin died in August 2023. He never commented publicly on the matter.

Friedkin always maintained he was telling it like it was. Friedkin sought to "portray policing as he saw it and leave it to audiences to decide for themselves, not to valorize or critique it."[18] If Friedkin did agree to having his film butchered, then who protects the intrinsic merit of *The French Connection* as first realized?

Whether for profit or done for the noblest of intentions, this deceitful editing of *The French Connection* is Orwellian censorship at its most maddening. Disney's preemptive erasing of content goes beyond the merely troubling. That corporations can freely expunge art confirms that George Orwell was remarkably prescient.

Disney, after considerable criticism, did discreetly discontinue streaming the edited version a few months later. In the tradition of Orwell's 1984, Disney never announced the original version was back in circulation, just as it never drew attention to the edit when it was first made.

The entire episode was conveniently flushed down the "memory hole." In this digital age, there is no sure way, absent holding on to a hard copy, of protecting the integrity of *The French Connection* or any film. Viewers are subject to the caprices of those who control the digital distribution.

Our film heritage is in the hands of business interests which can nip and tuck at content with impunity. As consumers, and as cinephiles, we must remain ever vigilant. As witnessed in this instance, public pressure did prevail over the corporation's impulse to censor. Mickey tried to silence Popeye, and thankfully the rat failed.

*This article is dedicated to Fred and Sara Dorchak, two generations of outstanding lawyers, as well as two generations of dear friends who inspired this article.*

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## Law Day 2025

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Major Gangaram, along with his service dog Echo, is deeply committed to his work at the Bill of Rights Institute and ensuring that all students have the opportunity to learn about and internalize principles of good citizenship. More information on the Bill of Rights Institute can be found at billofrightsinstitute.org.

Annual awards will be given at this year's dinner. The Liberty Bell Award is presented to an individual or organization who has heightened public awareness, understanding and respect for the law. This year's Liberty Bell Award is presented to Central American Refugee Center (CARECEN). "CARCEN performs a tremendous service to New York State and Long Island through its work with immigrants and noncitizens," wrote Law Professor Alexander Holtzman, Director of the Deportation Defense Clinic at Hofstra Law. "In doing so, CARECEN daily teaches its clients, volunteers, and the next generation of immigrant advocates the importance of U.S. law, courts, and the duties and responsibilities of U.S. citizens and noncitizens alike."

The Peter T. Affatato Court Employee of the Year Award, named after the NCBA past president, is awarded to an individual who demonstrates professional dedication to the court system. This year's recipient is John Cialone, Associate Court Clerk of the Supreme Court and Part Clerk to District Administrative Judge Vito M. DeStefano. Cialone transferred to the County Court in Nassau County in 2002 after serving in Supreme Court Criminal Term in both New York and Queens Counties. "John is an exemplary worker, always going above and beyond his required duties," wrote Judge DeStefano in nominating Cialone. "He has been and continues to be an essential part of my staff."

This year's Thomas Maligno Pro Bono Attorney of the Year Award will be presented to Evelyn Lee, Esq., in recognition of her commitment to the furtherance of pro bono legal services. Lee was barred in England before she was admitted to the New York bar in June 2024. "Since the first week of her admission, she has been appearing weekly for the Mortgage Foreclosure Assistance Project in Nassau Supreme, working closely with Referee Provenzano, volunteers and interns," according to Madeline Mullane, Director of the Mortgage Foreclosure Assistance Project and Pro Bono Attorney Activities.

To purchase sponsorships and tickets for the Law Day Dinner, fill out the insert in this issue of *Nassau Lawyer* or contact Emma Grieco at events@nassaubar.org or (516) 747-4071.

**Melissa A. Danowski** is a Member of Mauro Lilling Naparty LLP in Woodbury and is Co-Chair of the NCBA Appellate Practice Committee and the Community Relations & Public Education Committee. She is also a member of the Defendant's Personal Injury Committee. She can be reached at mdanowski@mlnappeals.com.

# 2024-2025 Sustaining Members

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

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# Portrait Dedication Ceremony

On March 20, the Nassau County Courts held the portrait dedication ceremony for retired Justice of the Supreme Court, Hon. Arthur M. Diamond. The NCBA commissions portraits for elected Nassau County Supreme Court justices upon their retirements from the Bench and the portraits hang in the Calendar Control Courtroom of the Supreme Court.


Photo by Hector Herrera

# NCBA 2024-2025 Corporate Partners

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## NCBA Corporate Partner Spotlight

# CALENDAR | COMMITTEE MEETINGS

## COMMITTEE CHAIRS

| | |
|---|---|
| Access to Justice | Hon. Maxine Broderick and Rezwanul Islam |
| Alternative Dispute Resolution | Ross J. Kartez |
| Animal Law | Harold M. Somer and Michele R. Olsen |
| Appellate Practice | Amy E. Abbandondelo and Melissa A. Danowski |
| Asian American Attorney Section | Jennifer L. Koo |
| Association Membership | Adina L. Phillips and Ira S. Slavit |
| Awards | Sanford Strenger |
| Bankruptcy Law | Gerard R. Luckman |
| Business Law Tax and Accounting | Raymond J. Averna |
| By-Laws | Deanne M. Caputo |
| Civil Rights | Patricia M. Pastor |
| Commercial Litigation | Christopher J. Clarke and Danielle Gatto |
| Committee Board Liaison | James P. Joseph |
| Community Relations & Public Education | Ingrid J. Villagran and Melissa A. Danowski |
| Conciliation | Salvatore A. Lecci |
| Condemnation Law & Tax Certiorari | Robert L. Renda |
| Construction Law | Adam L. Browser |
| Criminal Court Law & Procedure | Christopher M. Casa and Amanda A. Vitale |
| Cyber Law | Thomas J. Foley and Nicholas G. Himonidis |
| Defendant's Personal Injury | Jon E. Newman |
| District Court | Bradley D. Schnur |
| Diversity & Inclusion | Hon. Maxine Broderick and Hon. Linda Mejias-Glover |
| Education Law | Liza K. Blaszcyk and Douglas E. Libby |
| Elder Law, Social Services & Health Advocacy | Lisa R. Valente and Christina Lamm |
| Environmental Law | John L. Parker |
| Ethics | Mitchell T. Borkowsky |
| Family Court Law, Procedure and Adoption | Tanya Mir |
| Federal Courts | Michael Amato |
| General, Solo & Small Law Practice Management | Jerome A. Scharoff |
| Grievance | Robert S. Grossman and Omid Zareh |
| Government Relations | Michael H. Sahn |
| Hospital & Health Law | Kevin P. Mulry |
| House (Domus) | Steven V. Dalton |
| Immigration Law | Pallvi Babbar |
| In-House Counsel | |
| Insurance Law | Michael D. Brown |
| Intellectual Property | Sara M. Dorchak |
| Judicial Section | Hon. Gary F. Knobel |
| Judiciary | Dorian R. Glover |
| Labor & Employment Law | Marcus Monteiro |
| Law Student | Bridget M. Ryan and Emma P. Henry |
| Lawyer Referral | Gregory S. Lisi |
| Lawyer Assistance Program | Daniel Strecker |
| Legal Administrators | |
| LGBTQ | Jess A. Bunshaft |
| Matrimonial Law | Karen L. Bodner |
| Medical Legal | Bruce M. Cohn |
| Mental Health Law | Jamie A. Rosen |
| Municipal Law and Land Use | Elisabetta Coschignano |
| New Lawyers | Byron Chou and Michael A. Berger |
| Nominating | Rosalia Baiamonte |
| Paralegal | |
| Plaintiff's Personal Injury | Giulia R. Marino |
| Publications | Cynthia A. Augello |
| Real Property Law | Suzanne Player |
| Senior Attorneys | Stanley P. Amelkin |
| Sports, Entertainment & Media Law | Ross L. Schiller |
| Supreme Court | Steven Cohn |
| Surrogate's Court Estates & Trusts | Michael Calcagni and Edward D. Baker |
| Veterans & Military | Gary Port |
| Women In the Law | Melissa P. Corrado and Ariel E. Ronneburger |
| Workers' Compensation | Craig J. Tortora and Justin B. Lieberman |

## MONDAY, MARCH 31

*District Court*
*12:30 p.m.*

## WEDNESDAY, APRIL 2

*Real Property Law*
*12:30 p.m.*

## THURSDAY, APRIL 3

*Hospital & Health Law*
*8:30 a.m.*

*Dr. Irina Gelman, Commissioner of Health for the Nassau County Health Department, will be discussing her experiences and legal issues faced by the Health Department.*

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

*Publications*
*12:45 p.m.*

## TUESDAY, APRIL 8

*Labor & Employment Law*
*12:30 p.m.*

## WEDNESDAY, APRIL 9

*Commercial Litigation*
*12:30 p.m.*

*Matrimonial Law*
*5:30 p.m.*

*Hon. Joseph H. Lorintz, Carol A. Melnick, Esq., and Jessica C. Giugliano, Esq. will speak on "Navigating the Intersection of Family Law and Education: Understanding Issues Relating to Matrimonial Orders and Agreements and Their Implementation."*

## THURSDAY, APRIL 10

*Association Membership*
*12:30 p.m.*

*Intellectual Property*
*12:30 p.m.*

## WEDNESDAY, APRIL 16

*Ethics*
*5:30 p.m.*

*Insurance Law*
*6:30 p.m.*

## TUESDAY, APRIL 22

*Plaintiff's Personal Injury*
*12:30 p.m.*

*Surrogate's Court Estates & Trusts*
*5:30 p.m.*

*Diversity & Inclusion*
*6:00 p.m.*

## WEDNESDAY, APRIL 23

*General, Solo & Small Law Practice Management*
*12:30 p.m.*

*Business Law, Tax & Accounting*
*12:30 p.m.*

## THURSDAY, APRIL 24

*Construction Law*
*12:30 p.m.*

*Education Law*
*12:30 p.m.*

## THURSDAY, MAY 1

*Hospital & Health Law*
*8:30 a.m.*

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

*Publications*
*12:45 p.m.*

## TUESDAY, MAY 6

*Women in the Law*
*12:30 p.m.*

## WEDNESDAY, MAY 7

*Real Property Law*
*12:30 p.m.*

## THURSDAY, MAY 8

*Law Student*
*5:30 p.m.*

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