Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

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SAVE THE DATES

WE CARE
Children's Festival
Wednesday, February 21, 2018
At Domus
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NASSAU ACADEMY OF LAW
Bridge the Gap
Saturday & Sunday, March 3-4, 2018
At Domus
Details coming soon

WE CARE
Dressed to a Tea
Thursday, March 22, 2018
At Domus
Details coming soon

NASSAU ACADEMY OF LAW
Hon. Elaine Jackson Stack
Moot Court Competition
March 27 & 28, 2018 at Domus
Details to follow

LAW DAY
Framework for Freedom
Thursday, May 3, 2018 5:30 p.m.
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119TH ANNUAL NCBA DINNER DANCE
Saturday, May 12, 2018
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WHAT'S INSIDE

Labor & Employment Law/ Immigration Law

NCBA Member Benefit - I.D. Card Photo
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UPCOMING PUBLICATIONS COMMITTEE MEETINGS

at the Bar Association

Thursday, Feb. 1, 2018 12:45 p.m.
Thursday, March 1, 2018 12:45 p.m.

Three Ways to Improve Your Productivity in 2018

By Allison C. Shields

A new year is a clean slate – an opportunity to start over, make improvements in your practice, and develop new habits to improve productivity. How can you get more done in less time in 2018? Here are three ideas.

Prioritize

Productivity expert David Allen has observed that productivity boils down to determining how best to deal with all of the things you have to manage and learning how to focus. But first you need to know what to focus on. Too often, lawyers fall into the trap of expending time and energy on the wrong things because they seem urgent or simply because something happens to be in front of them, even if they aren't important. These include the ringing telephone, e-mail notification, or colleague interruption. But when you are always reacting, you are putting others' priorities ahead of your own.

Before taking on a task or allowing an interruption, ensure that it has a legitimate purpose (i.e.,

See PRODUCTIVITY, Page 17

A MEMBER BENEFIT

Get the Employment Advantage Through NCBA's Legal Job Board

By Valerie Zurblis

Looking for a job or want to advance your legal career? Need to hire local talented attorneys? Members can make the employment connection on Nassau County Bar Association›s Job Board, a web-based service exclusively for the legal industry, including lawyers, paralegals, assistants and office help. Members who are seeking employment can see the newest postings three days before they are open to the public. In addition, members' resumes are listed first in all searches. For employers, in addition to the online listings, job openings are published in the *Nassau Lawyer* and *Long Island Business News*.

NCBA's Job Board distinguishes itself from generalist job boards in a number of ways, including:

A highly targeted focus on employment opportunities in all aspects of the legal sector on Long Island, New York City and the tri-state area.

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An advanced Job Alert system that notifies candidates of new opportunities matching their own pre-selected criteria.

Access to career resources and job searching tips and tools.

NCBA's Job Board is easy to use and open to the public. Go to the NCBA home page at nassaubar.org, click on "For The Profession," and scroll down to "Jobs." As an NCBA member, you can immediately review jobs, post your resume and set job alerts and list new job openings. There is no charge for job seekers. Employers can list job openings for just $99 for 30 days, much lower than other online services.

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County Court
Hon. Christopher G. Quinn
Hon. Tammy S. Robbins

Family Court
Hon. Eileen C. Daly-Sapraicone
Hon. Linda K. Mejias

District Court
Hon. Maxine S. Broderick
Hon. Elizabeth M. Fox-McDonough
Hon. David W. McAndrews
Hon. Anthony W. Paradiso

Family Court and District Court Judicial Induction Ceremony
Friday, January 12, 2018 at 2:00 p.m.
Participating in the Induction Ceremony:
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Hon. Mejias
Hon. Broderick
Hon. Fox-McDonough

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Labor & Employment Law/ Immigration Law

Uber Drivers: Employees or Independent Contractors?

There was a time when everyone knew the difference between an employee and an independent contractor. An employee went to the office or factory, worked his eight hours for an employer (and only one employer), had his taxes deducted from his paycheck, and was paid two weeks' vacation. The classic independent contractor was the plumber who came to the customer's home (or business) in his own truck. The plumber told you when he chose to come, arrived when it was convenient for him, wholly dictated the price, used his own tools and waited to be paid on the spot. He then left, never to be seen again until the next leaky pipe.

Paul F. Millus

The Rise of the Alternative Worker

The determination as to who is an employee and who is an independent contractor has become less clear over the years, mainly due to the expansion of the "alternative workforce" versus the employee workforce. This expansion was partly caused by the way businesses ran their operations to stay competitive in the global marketplace. In the 1970's and 1980's, recessions led to the downsizing of employee-rich bureaucracies leading companies to rethink their business models to include temporary workers, who may have been employed by someone, but were not employees in the place where they worked – they were part of an independent contractor force.

The next shoe to drop was globalization. The rise of technology and less costly transportation methods led to offshore production. Businesses simply could not afford a large employee workforce, and hiring workers on an ad hoc basis lowered their bottom lines and increased their profitability. As of 2010, more than 10,000,000 workers, comprising 7.4 percent of the U.S. workforce, were classified by the Bureau of Labor Statistics as independent contractors, and another 4,000,000 worked in alternative work arrangements in which they were legally classified as independent contractors for one or more purposes. In that year, "alternative" workers, as they were called, accounted for approximately $626 billion in personal income, or about one in every eight dollars earned in the U.S.

The Common Law Tests

So, what is the law as it pertains to the employee versus the independent contractor conundrum? In 1926, the U.S. Supreme Court opined regarding who could be identified as an independent contractor in *Metcalf & Eddie vs. Mitchell*. In that case, the Court used well-established common law as its guide. In examining the performance of the contract at issue, the Court looked to whether (i) the performance of the contract involved the use of judgment and discretion on the part of the worker; and (ii) the worker was required to use his best professional skill to bring about the desired result. Thus, the Court concluded, if the worker enjoyed "liberty of action," it "excludes the idea that control or right of control by the employer which characterizes the relation of employer and employee and differentiates the employee or servant from the independent contractor." The key factor in these cases was level of control exerted by the putative employer.

New York courts apply the same common-law right-to-control test to determine whether a worker is an employee in several contexts. In *Bynog v. Cipriani Group, Inc.*, the New York Court of Appeals identified five factors "relevant to assessing control, includ[ing] whether the worker (1) worked at his own convenience; (2) was free to engage in other employment; (3) received fringe benefits; (4) was on the employer's payroll; and (5) was on a fixed schedule."

Then, there is the "economic reality test," which is applied in connection with Fair Labor Standard Act ("FLSA") cases, which focuses on "the totality of the circumstances." In those cases, the "ultimate concern ...[is] whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves." The courts rely on several factors that are relevant in determining whether individuals are employees or independent contractors. These factors are derived from the Supreme Court's decision in *United States v. Silk* and include (1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit or loss and their investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship; and (5) the extent to which the work is an integral part of the employer's business.

Uber Drivers: Misclassified Employees?

In this complex world, it is impossible to make a snap determination as to who is an independent contractor

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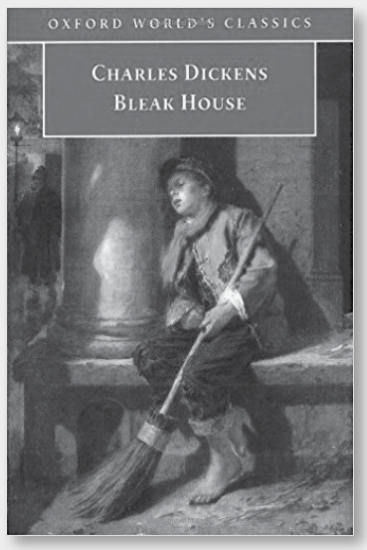
LESSONS LEARNED

FROM THE PRESIDENT

Steven G. Leventhal

Years ago, I represented the defendant in a defamation action brought by one local political figure against another based on statements made in a campaign leaflet. After a series of recusals, the case finally found a judge willing to accept the assignment. I moved for summary judgment, citing *New York Times Co. v. Sullivan* and its progeny. Shortly after the motion was served, I received a call from my adversary who informed me that one of the authorities that I cited had been overruled. I was struck by his decision to call me rather than embarrass me by informing the court of my error. I immediately advised the court of the subsequent appellate history. I have never forgotten the courtesy and professionalism of my adversary in quietly bringing the matter to my attention, and permitting me to correct my error without embarrassment. I learned an important lesson from him. Even as adversaries, we remain colleagues.

On another occasion, I was appointed to serve as a village attorney. Although I already had an extensive background in the field of government ethics, this was my first engagement as general counsel to a local municipality. As I contemplated the challenges ahead, my phone rang. Another village attorney had read news reports of my appointment, and called to offer his professional and moral support. Previously, I had only a passing acquaintance with the attorney, from occasional encounters on opposing sides in the hotly contested practice of election law. Yet he reached across the aisle to offer his assistance to me, whom he barely knew, and then only as an adversary.



I am a better lawyer today for my active participation in the Association, where I have learned so much from so many. The collegiality among our members is the greatest benefit of bar membership.

WE TOO

The resonance of the "me too" movement provides us with an opportunity to examine our own history, progress made, and work still to be done.

Let us remember. In 1937, the Nassau County Bar Association rejected the membership applications of five women and, the following year, amended its by-laws to expressly exclude women. By 1951, the Second World War had come and gone, resulting in profound changes to our society, and women were admitted to the Association. In 1994, we elected our first woman president, **Grace Moran**, and last year awarded Grace the distinguished service medallion. In 2007, we elected our first African American president, **Lance Clark**.

Today, we are enriched by the active participation of a diverse membership and an increasingly diverse bar leadership. In September, we established an LGBTQ committee, co-chaired by President-Elect **Elena Karabatos** and **Joseph Milizio**. This month, we established a Diversity and Inclusion committee, with Family Court Judge **Linda Mejias** and District Court Judge **Maxine Broderick** as Chair and Vice-Chair, respectively. In September, we hosted a reception for our partners across the spectrum of specialty bars. A second meeting is planned for the spring to encourage collaboration among the richly diverse bar associations, each of which represents an important part of the legal community.

THE GENIUS OF DICKENS: FROM *BLEAK HOUSE*

Collegiality and inclusion humanize the justice system and help make it responsive to the needs of the people that it serves. Here, for a glimpse at a justice system lacking in humanity, and to brighten your cold winter day, is a passage from Dickens. I hope you enjoy it.

> London. Michaelmas term lately over, and the Lord Chancellor sitting in Lincoln's Inn Hall. Implacable November weather. As much mud in the streets as if the waters had but newly retired from the face of the earth, and it would not be wonderful to meet a Megalosaurus, forty feet long or so, waddling like an elephantine lizard up Holborn Hill. Smoke lowering down from chimney-pots, making a soft black drizzle, with flakes of soot in it as big as full-grown snowflakes—gone into mourning, one might imagine, for the death of the sun. Dogs, undistinguishable in mire. Horses, scarcely better; splashed to their very blinkers. Foot passengers, jostling one another's umbrellas in a general infection of ill temper, and losing their foot-hold at street-corners, where tens of thousands of other foot passengers have been slipping and sliding since the day broke (if this day ever broke), adding new deposits to the crust upon crust of mud, sticking at those points tenaciously to the pavement, and accumulating at compound interest.
>
> Fog everywhere. Fog up the river, where it flows among green aits and meadows; fog down the river, where it rolls defiled among the tiers of shipping and the waterside pollutions of a great (and dirty) city. Fog on the Essex marshes, fog on the Kentish heights. Fog creeping into the cabooses of collier-brigs; fog lying out on the yards and hovering in the rigging of great ships; fog drooping on the gunwales of barges and small boats. Fog in the eyes and throats of ancient Greenwich pensioners, wheezing by the firesides of their wards; fog in the stem and bowl of the afternoon pipe of the wrathful skipper, down in his close cabin; fog cruelly pinching the toes and fingers of his shivering little 'prentice boy on deck. Chance people on the bridges peeping over the parapets into a nether sky of fog, with fog all round them, as if they were up in a balloon and hanging in the misty clouds.
>
> Gas looming through the fog in divers places in the streets, much as the sun may, from the spongey fields, be seen to loom by husbandman and ploughboy. Most of the shops lighted two hours before their time—as the gas seems to know, for it has a haggard and unwilling look.
>
> The raw afternoon is rawest, and the dense fog is densest, and the muddy streets are muddiest near that leaden-headed old obstruction, appropriate ornament for the threshold of a leaden-headed old corporation, Temple Bar. And hard by Temple Bar, in Lincoln's Inn Hall, at the very heart of the fog, sits the Lord High Chancellor in his High Court of Chancery.
>
> Never can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition which this High Court of Chancery, most pestilent of hoary sinners, holds this day in the sight of heaven and earth.

HAPPY NEW YEAR

Best wishes to all for a happy, healthy and rewarding New Year. I look forward to seeing you at Domus as we meet the challenges ahead.

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Labor & Employment Law/ Immigration Law

Second Circuit Revisits Issue of Sexual Orientation Under Title VII

The Second Circuit Court of Appeals sat en banc in September of last year to hear a seminal case that will determine whether Title VII's prohibition against sex discrimination includes discrimination based on sexual orientation. The Second Circuit was called upon to revisit the issue after previously finding the statute not to prohibit such discrimination.[1]

James G. Ryan

The current case, *Zarda v. Altitude Express,*[2] which has generated national attention, comes at a time where there is a split in the circuits—now that the Seventh Circuit has held that claims of sexual orientation discrimination are actionable under Title VII.[3] The *Zarda* case also comes at a time when sexual orientation discrimination in the workplace has become a prominent social issue. *Zarda* is also interesting because of the unusual role of the federal government in the case since the Equal Employment Opportunity Commission (the "EEOC") and the Department of Justice (the "DOJ") have asserted their opinions in amicus curiae briefs. In a bit of irony, each agency has taken the opposite stance on this issue, resulting in an interesting dynamic of the United States Government being on opposing sides in the same case.

Zarda v. Altitude Express

Zarda involved a skydiving instructor who alleged that he was terminated from his position due to his sexual orientation. Donald Zarda had frequently informed his female participants that he was gay so as to relieve the awkward tensions that may exist while being strapped closely to the female client. On one such occasion, Zarda had informed a female client and subsequently, the client's boyfriend called Zarda's employer to complain about the disclosure.[4]

The case reached the Second Circuit, which affirmed the district court's dismissal of Zarda's Title VII claims.[5] The Second Circuit refused to overturn precedent as set forth in *Simonton v. Runyon*,[6] which held that sexual orientation discrimination is not prohibited by Title VII.[7] It cautioned that only a court sitting en banc in its entirety could overturn *Simonton*.[8] In response to the *Zarda* court's invitation, the Circuit then agreed to review *Zarda* (and necessarily *Simonton*) en banc in May.

As a result of its decision to hear the case en banc, the Circuit put *Simonton* at the center of this civil rights issue. On one side, proponents of gay rights likely view *Simonton* to be an outdated case that should be overruled in light of the changing legal landscape, whereas opponents of gay rights likely view *Simonton* to be binding precedent in line with a majority of the nation's circuits and a proper interpretation of Title VII's scope that does not overstep the boundaries between legislative and judicial powers.[9]

Simonton involved a postal worker who was subjected to a hostile work environment because of his sexual orientation.[10] Despite the Second Circuit's characterization of the discrimination as "morally reprehensible[,]" the court nevertheless found that Congress' failure to pass proposed legislation that would have expanded Title VII to cover sexual orientation discrimination to be indicative of Congress' intent on this issue.[11] However, 17 years later, the Second Circuit's granting of an en banc review of *Zarda* now places *Simonton* at risk of being overruled.

The EEOC vs. The DOJ

The EEOC filed its amicus brief upon invitation by the court and the DOJ filed its amicus brief shortly thereafter.[12] The EEOC claims a stake in the case as the agency charged with enforcing Title VII in the private sector, and the DOJ's interest in the case is premised on its position as a federal employer.[13]

The EEOC argues for *Simonton* to be overruled.[14] Its somewhat bootstrapped stance is premised on its own 2015 decision, *Baldwin v. Foxx*,[15] in which the EEOC essentially held for the first time that claims of discrimination based on sexual orientation are inherently claims of discrimination based on sex.[16] Being that claimants of Title VII violations must first exhaust their administrative remedies before a court will hear their case, the EEOC's *Baldwin* decision was one of the most significant developments regarding the legal rights of gay individuals since the Supreme Court's landmark decision in *Obergefell v. Hodges*,[17] which legalized gay marriage.[18]

In *Baldwin*, the EEOC found that discrimination based on sexual orientation was inherently linked to sex-based considerations or forms of gender stereotyping—reasoning that such discrimination could not be understood without taking into consideration the sex of the employee himself. The EEOC also developed an argument based on associational discrimination where it drew a parallel to associational race discrimination.[19]

In essence, Title VII prohibits an employer from taking action against an employee based on that employee's association with someone of another race. Thus, an employee who is being

See ORIENTATION, Page 20

Labor & Employment Law/ Immigration Law

Padilla-Based Motions to Vacate Criminal Convictions

Where deportation is a near-certain collateral consequence of a conviction, a non-citizen criminal defendant is entitled to advice about the immigration consequences of his guilty plea from his criminal defense attorney under the Sixth Amendment's right to counsel clause.[1] But to succeed on a motion to vacate a conviction for counsel's failure, a defendant needs to show prejudice.[2]

Michelle Caldera-Kopf

Last term, the Supreme Court held, in *Lee v. United States,*[3] that counsel's incorrect assurance that defendant Jae Lee would not be deported as a result of his plea of guilty to a crime that actually triggered mandatory deportation did prejudice the defendant. Even with "almost"[4] no chance of winning at trial, a defendant could reasonably insist on going to trial, where acquittal presents his only hope for avoiding deportation.[5] Now, in virtually every instance where a defendant claims that she would not have accepted a plea bargain that impairs her immigration status, but rather would have chosen to risk conviction and a longer sentence at trial, a court should find that the defendant has shown prejudice.

A Duty to Advise on Immigration

The Supreme Court takes seriously defense counsel's obligation to provide immigration advice to a criminal defendant, despite the protestations of some that deportation is only a collateral consequence and therefore outside the duties of defense counsel.[6] New York courts also recognize the requirement that an attorney provide "meaningful representation," as viewed in totality, at the time of representation.[7] Although New York courts look to "the fairness of the process as a whole" when considering prejudice, in recent cases courts have found this standard satisfied where defendant claims she would have elected trial rather than plead guilty to a crime which triggers negative immigration consequences.[8] Defense counsel must protect her clients as well as her own reputation, by taking seriously the duty to advise about immigration consequences.

What can defense counsel do to avoid the possibility of embarrassment and damage to her reputation that comes from being the subject of a successful ineffective assistance of counsel claim? This article offers some advice to minimize the risk.

Padilla-based 440 Motions

New York Criminal Procedure Law § 440.10(h) permits a defendant to seek to vacate a judgement obtained in violation of the defendant's state or federal constitutional rights. Those constitutional rights include the right to effective assistance of counsel protected by the Sixth Amendment,[9] and the right to immigration advice from criminal defense counsel.[10] New York Courts will grant 440 motions premised on four specific failures under *Padilla*: failure to investigate, failure to analyze, failure to negotiate, and failure to advise. Therefore, defense counsel should perform each of these duties, and keep file records of her efforts.

Failure to Investigate

Defense counsel must investigate the immigration status of each client. Counsel must begin every attorney-client relationship by asking, "where were you born?" Then, counsel must follow up that question to accurately identify a client's current immigration status. It is absurd to expect a criminal defendant to volunteer information about immigration status, because only a defendant who already understands the relevance of immigration status to the criminal case would receive the advice *Padilla* guarantees.[11] Defense counsel must take the initiative to learn her clients' immigration status, regardless of accent, appearance, or the use of an interpreter.

An attorney is nevertheless entitled to rely upon her client's claims about immigration status. A Queens County judge found an attorney's representation was not ineffective where a non-citizen client claimed to be a citizen of the United States and therefore did not receive immigration advice, even though the claim was false.[12] Every attorney should therefore ask every client her place of birth and current immigration status, and keep a record of the question and the client's response.

Failure to Analyze

Defense counsel must then understand the specific risk to the client presented by the charges she faces, her immigration status, and any potential plea offer.[13] Depending on an immigrant's status in the United States, a particular criminal charge may trigger removal proceedings, trigger mandatory detention, prevent the assertion of defenses to removal, bar naturalization, or have no impact on the immigrant's status. Immigration law is complex, but Courts have not excused a defender's failure to grasp the complexities.

The Ninth Circuit has explained that "where deportation is virtually certain . . . advice of a generalized risk of deportation is insufficient."[14] In *People v. Abdullah*, the Second Department found ineffective a defender who erroneously believed that her client would qualify for a defense to removal called Cancellation of Removal, when in fact the plea constituted an aggravated felony, which triggers removal and bars all defenses.[15] Defenders must understand not only the classification of a particular New York offense under immigration law, but also the consequences of such classification before advising a client to take a plea. Where a defender is not knowledgeable about immigration law, she must seek expert assistance.[16]

See *PADILLA*, Page 18

Labor & Employment Law/ Immigration Law

The Dish on Split Shifts and On-Call Time

The vast number of regulations and technicalities that make up New York's labor law make it very difficult for employers to know if they are fully compliant. Further complicating matters is the fact that New York employers must also ensure that they are in compliance with federal labor law under the Fair Labor Standards Act (FLSA). The sheer number and complicated nature of these labor regulations cause many employers to overlook some of the lesser known laws. Non-compliance, even if accidental, can cost an employer large sums of money in the form of liquidated damages, attorneys' fees and interest.

Cynthia A. Augello

Ryan Soebke

Two of the more ambiguous labor law provisions New York employers encounter are those dealing with "on-call" time and "split shifts." Employers often encounter difficulties determining what qualifies as on-call time, how to document such time, and how such time impacts overtime payments to employees. Better understanding of these provisions can go a long way to helping employers avoid expensive legal claims from employees for unpaid wages.

On-Call Time

Classifying whether an employee should be compensated for on call time can be difficult for employers due to the very fact-based nature of the analysis. On-call time is utilized by employers in a number of industries such as healthcare, building maintenance, and IT support. However, there is no hard and fast rule for employers to follow in determining whether an employee must be paid for on-call time. This could cause employers to face claims from employees for unpaid wages if they are not careful.

Both the FLSA and the New York Codes, Rules, and Regulations (NYCRR) have provisions dealing with on-call time.[1] Luckily, these rules contain similar language and have been interpreted similarly by the courts. Both provisions require employers to compensate employees while they are "on-call" at their place of employment or at a place required by the employer. Things get tricky, however, where an employee is not required to be in a certain place while on-call but could be called to work at any time. The question then becomes do employees have to be paid for all the time they are waiting to be called to work or only the time they actually work.

What Makes an Employee Truly On-Call?

If an employee makes a claim for unpaid on-call time compensation under the FLSA, courts will generally look at whether the employee's time was spent for the benefit of the employer.[2] In making this determination courts analyze whether the employee's periods of inactivity are so short and unpredictable that they cannot use the time effectively for their own purposes, even if they are allowed to leave their place of employment or socialize with others.[3] If an employee is not required to remain on the employer's premises, and is only called to work infrequently, their on-call time is not compensable.[4] Further, an employee's time is not compensable if said employee only has to leave word as to where he can be reached and is not confined to a particular area.[5]

The New York Department of Labor (DOL) conducts a similar analysis under the NYCRR. The DOL makes a distinction between "on-call" time, which is compensable, and "subject to call" time which is not.[6] Similar to the analysis under the FLSA, the DOL looks at whether employees are confined to a certain space or are free to leave during the time they are not actually working.[7] The DOL states that an employee's time is more likely to be considered "subject to call" if he only needs to be reachable by a cell phone or if he is not expected to respond to assignments immediately.[8]

Utilizing On-Call Time Effectively

In addition to being fully aware of the above factors, there are other measures employers can take to ensure that their use of on-call shifts is effective. Employers should have a defined on-call time policy that encompasses the factors discussed above so it is clear what time is compensable and what time is not. Employers should also consider rotating the employees that are on-call to reduce overtime payments as well as preventing employees from burning out. It should also be noted that compensation for on-call time does not apply to salaried, exempt employees. Thus, employers looking to limit on-call compensation all together should consider only using salaried/exempt employees.

Split Shifts

Properly accounting for split shifts is another area in which employers struggle. At the outset, it should be noted that there is no provision regarding split shifts under the FLSA. Instead, split shift wage orders are covered solely under each state's individual labor laws. The New York DOL defines a split shift as "a schedule in which the working hours required or permitted are not consecutive" not including a break of one hour or less.[9] Should an employee work a split shift, New York requires such employee to be paid for one additional hour at the minimum wage.[10] As many employers are probably already aware, the regular minimum wage in New York is set to gradually increase over the next few years, which will therefore increase the amount employers must pay employees who work split shifts.[11]

Split shifts are particularly useful in industries, such as restaurants and transportation, where business can predictably be very busy at one time but slow at another. For example, a restaurant may schedule a waiter to work a couple of hours during lunch then let him go home during the afternoon and return during dinner. Using a split shift allows an employer to be appropriately staffed while busy, but not incur the costs of paying excess wages to employees while business is slow.

Some good news for employers in the hospitality industry is that, under New York law, the provision on split shift pay does not apply to them. Businesses in the hospitality industry are governed under 12 NYCRR § 146, which is separate from the provisions governing businesses generally, and includes most restaurants and hotels. This section of the code makes no mention of extra pay for employees working a split shift.[12] Therefore, the restaurant owner in the example above would not have to pay his/her employee an extra hour at the minimum wage for working a split shift whereas an employer in the transportation industry, for example, would.

Given the ever evolving nature of labor law in New York and the expense of non-compliance, employers must stay up to date on the latest changes to the law and ensure they are in compliance with current laws.

Distinguishing Split Shifts from Spread of Hours

Further complicating matters is a separate additional rate that some employees may qualify for known as "spread of hours" pay. Spread of hours is defined as "the interval between the beginning and end of an employee's workday."[13] This includes any time the employee is working, on a break, or off duty entirely.[14] Under 12 NYCRR § 142-2.4, if an employee's spread of hours in a day exceeds ten, such employee must be paid an additional hour at the minimum wage, the same as if they worked a split shift. This concept may be confusing to some employers because often times an employee who works a split shift will also work a spread of hours over ten.

To further illustrate this point, where an employee works a shift from 11 a.m. until 1 p.m., leaves work and returns to work from 5 p.m. until 10 p.m., this employee has clearly worked a split shift but has also worked a spread of hours over ten since his work day started at 11 a.m. and finished at 10 p.m. Employers should be aware that even though an employee in this situation has worked both a split shift and for a spread of hours greater than 10, the employee is only entitled to one extra hour of pay at the minimum wage, not two.[15]

An important point is that while employers in the hospitality industry do not have to pay employees extra for working a split shift, they are subject to spread of hours pay.[16] For example, if the employee in the preceding paragraph worked in a restaurant, while he would not be eligible for additional pay for working a split shift, he would be eligible for spread of hours pay. Therefore, employers in the hospitality industry should monitor employees' spread of hours when scheduling split shifts and be aware when employees are entitled to additional pay.

Split Shifts and Wages

Another unclear aspect of the regulation on split shifts/spread of hours is whether the regulation applies to all nonexempt workers or just those who earn the minimum wage. The regulation states that "[a]n employee shall receive one hour's pay at the minimum hourly wage rate, *in addition to the minimum wage required*."[17] Courts have differed in their interpretation of this part of the regulation.[18]

The majority of courts have adopted the interpretation given by the New York DOL in its opinion letters.[19] The DOL has stated that it looks at the total wages an employee earns in a day and compares it to what the employee would have earned that day if paid the minimum wage plus and additional hour. If the employee's wages are higher, then the employer is not required to pay additional split shift/spread of hours compensation.[20] Most courts have found this to be the correct interpretation, reasoning that the extra pay was meant to be an addition for those only making the minimum wage.[21] The New York DOL has clarified, however, that this interpretation does not apply to employees in the hospitality industry who are entitled to spread of hours pay regardless of whether they make more than the minimum wage.[22]

Given the ever evolving nature of labor law in New York and the expense of non-compliance, employers must stay up to date on the latest changes to the law and ensure they are in compliance with current laws. Diligence in this area will go a long way to preventing litigation in the future.

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1. 29 CFR § 785.17; 12 NYCRR § 142-2.1.
2. *Owens v. Local No. 169, Ass'n of W. Pulp & Paper Workers*, 971 F.2d 347, 350 (2d Cir. 1992).
3. *Keun-Jae Moon v. Joon Gab Kwon*, 248 F. Supp. 2d 201, 229, (2002) (holding an employee's on-call time to be compensable where he was frequently called to work but socialized with friends while waiting).
4. *See Vega v. Trinity Realty Corp.*, 2015 U.S. Dist. LEXIS 159524, *17 (holding an employee's on-call time to not be compensable where he was only called to work on off hours four times a month).
5. 29 CFR § 785.17.
6. New York State Department of Labor- 2008 Dep't. of Lab. RO-08-0127.
7. *Id.*
8. *Id.*
9. 12 NYCRR § 142-2.17.
10. 12 NYCRR § 142-2.4.
11. 12 NYCRR § 142-2.1.
12. *See generally* 12 NYCRR § 146.
13. 12 NYCRR § 142-2.18.
14. *Id.*
15. 12 NYCRR § 142-2.4(c).
16. 12 NYCRR § 146-1.6.
17. 12 NYCRR § 142-2.4.
18. *See Doo Nam Yang v. ACBL Corp.*, 427 F. Supp. 2d 327, (S.D.N.Y. 2005) (holding that employee who made more than the minimum wage was entitled to spread of hours pay).
19. New York State Department of Labor- 2007 Dep't. of Lab. RO-07-0009.
20. *Id.*
21. *Heng Chan v. Triple 8 Palace, Inc.*, 2006 U.S. Dist. LEXIS 15780, *76 (S.D.N.Y. 2006).
22. Hospitality Wage Order Frequently Asked Questions, N.Y Dep't of Labor, https://www.labor.ny.gov/legal/counsel/pdf/hospitality-wage-order-frequently-asked-questions.pdf.

ON PROFESSIONAL RESPONSIBILITY

Task Force Takes Criminal Law Practitioners To Task

By Tammy J. Smiley and Andrea M. DiGregorio

The New York State Justice Task Force was created in 2009 by then-Chief Judge Jonathan Lippman to establish procedures to reform and improve New York's criminal justice system. The mission of the Justice Task Force is "to promote fairness, effectiveness, and efficiency in the criminal justice system; to eradicate harms caused by wrongful convictions; to further public safety; and to recommend judicial and legislative reforms to advance these causes throughout the State of New York." The Task Force's work has led to reforms including statutory changes to the procedures used to conduct eyewitness identifications and interrogations, and post-conviction access to DNA testing.[1]

In February 2017, the Task Force published a *Report on Attorney Responsibility in Criminal Cases*, and focused on ways to address misconduct by prosecutors and defense counsel, as both parties' conduct can lead to wrongful convictions.[2] Some of the Task Force's recommendations would expose attorneys to increased scrutiny and the potential for disciplinary action, would effectively subject practitioners to court-ordered compliance with ethical and other best-practice obligations, and could have repercussions on office management and required training. This article examines some of the Task Force's recent recommendations, and the implications for criminal law practitioners.

Misconduct

As a threshold matter, and evidently in recognition that some of its suggestions could subject practitioners to disciplinary proceedings, the Task Force advocates that the term "misconduct" be reserved for instances when an attorney engages in conduct that "violates a law, ethical rule, or standard, either with the *intent* to do so or with a *conscious disregard of doing so*, and where there is no good-faith reason for having done so."[3] This exacting definition was deemed necessary to distinguish between conduct resulting from good-faith error, for which no disciplinary measure might be warranted, and more serious acts, for which disciplinary action might be appropriate.

Second, to address a perception that misconduct is underreported, the Task Force encourages that wrongdoing be exposed with greater frequency, and that data collected by the Office of Court Administration and Grievance Committees on misconduct should be aggregated, analyzed, and publicized.[4] According to the Task Force, the standard for attorneys reporting wrongdoing should be more encompassing than the standard set forth in New York's Rules of Professional Conduct 8.3(a). Wrongdoing should be reported in situations where an attorney or judge "*know*s or is aware of a *high probability* based on credible evidence" that another lawyer has engaged in misconduct, rather than only (as required by the Rules of Professional Conduct) when a lawyer "*knows* that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer . . . ." [5]

The public, too, should report wrongdoing. The Task Force recommends that New York's Grievance Committees disseminate information to the public explaining the Committees' function and the procedures for filing a complaint.

Third, District Attorneys' offices and "institutional defense providers" should develop and implement written internal procedures for how allegations of error and misconduct against their staff lawyers will be processed and reviewed, how appropriate corrective actions will be implemented, and when to report misconduct (whether that of their own or other lawyers) to disciplinary authorities. The written procedures should be made publicly available.

Fourth, despite an unsuccessful legislative push for a prosecutorial oversight commission,[6] the Task Force recommends that the Grievance Committees -- rather than a separate entity -- should investigate claims of prosecutorial, as well as defense-counsel, misconduct. Grievance Committee members should receive specialized training on criminal law standards, proactively review court decisions for findings of attorney malfeasance (such as prosecutorial misconduct or ineffective assistance of defense counsel), and undertake investigations whenever such a finding has been made.

Fifth, ongoing education and training should be provided to prosecutors and defense attorneys to keep them abreast of recent case law and ethical obligations. To meet this recommendation, solo practitioners should be provided with free Continuing Legal Education courses. The Task Force does not mention that prosecutorial offices and institutional defense providers should also be provided with free Continuing Legal Education ("CLE"), but seems to imply that such offices arrange their own training and educational programs at their own expense. Whether private law firms should receive free CLE to meet the Task Force's training and educational recommendations was not addressed.

The sixth, and perhaps most noteworthy of the Task Force's recommendations, is that courts issue orders that, effectively, require criminal law practitioners to adhere to their ethical, case-law required, and other best-practice obligations. This recommendation was adopted by the Uniform Court System in a memorandum dated November 6, 2017, by which all judges exercising criminal jurisdiction are required to issue an order to the prosecutor and defense attorney reminding them of their obligations throughout their representation of either the State of New York or their clients, respectively.

A Model Order

The model order approved — but not mandated — for the courts' use, is drawn from the Task Force recommendation that the District Attorney, as well as the Assistant District Attorney responsible for the case, be ordered to timely provide the defense with information favorable to the defense, such as exculpatory information and information that mitigates the degree of the defendant's culpability.[7] Such information includes material that shows impairment of a witness's ability to perceive, recall, or recount events (including impairment resulting from mental illness, physical illness, or substance abuse), evidence of benefits provided to a witness in connection with the witness's testimony, prior inconsistent statements made by a witness, a witness's uncharged criminal conduct, a witness's prior convictions, a witness's motive to inculpate the defendant, a witness's bias against the defendant or in favor of the complainant or prosecutor, a non-identification of the defendant by a witness to the crime, and evidence implicating another person as the perpetrator.[8] Willful and deliberate defiance of the order would expose a prosecutor to personal sanctions.[9]

Defense counsel too are subject to a court-issued order. Such order should remind the defense counsel of his or her professional obligations to confer with the client about the case, timely communicate to the client all plea offers, provide reasonable advice about the advantages and disadvantages of the plea offer, advise the client about the potential sentence ranges in the case, ensure that a non-citizen client receives competent advice about immigration consequences as required by *Padilla v. Kentucky*,[10] perform a reasonable investigation of the case (such as visiting the crime scene, interviewing witnesses, consulting experts, inspecting exhibits and all discovery material, and subpoenaing pertinent material), possess or acquire a reasonable knowledge of and familiarity with criminal procedural and evidentiary law, keep the client informed about all significant developments in the case, comply with the requirements of the New York State Rules of Professional Conduct regarding conflicts of interest, timely notify the court if a possible conflict of interest exists,[11] and comply with statutory notice requirements contained in the Criminal Procedure Law.[12]

In sum, although the Task Force's report is comprised of recommendations, not requirements, the information set forth therein is instructive on what may constitute best practices for a criminal law practitioner. Reversals of convictions based on prosecutorial misconduct or ineffective assistance of defense counsel surely do not well serve the public or a defense client. New York already requires that a practitioner acquire CLE credits, including ethics credits. For the criminal law attorney, the additional focus on criminal law education and training suggested by the Task Force could certainly be considered a practical and common-sense extension of New York's CLE requirements. And, the new requirement placed on criminal judges to issue orders that govern the conduct of both prosecutors and defense counsel will hopefully go a long way in ensuring fundamental fairness in our criminal justice system that will render it even more likely to achieve reliable results.

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1. *See, e.g.,* Task Force Recommendations entitled (1) Electronic Recordings of Custodial Interrogations (January 2012), (2) Improving Eyewitness Identifications (February 2011), and (3) Post-Conviction Access to DNA Testing and Databank Comparisons (January 2012), all of which are included in the Recommendations section of the Justice Task Force website, published at http://www.nyjusticetaskforce.com/recommendations.html.
2. Available at http://www.nyjusticetaskforce.com/pdfs/2017JTF-AttorneyDisciplineReport.pdf.
3. *See Report on Attorney Responsibility in Criminal Cases* ("*Report*"), p. 3 (emphasis added).
4. The data should include the type (*e.g.*, prosecutorial or defense misconduct), nature (*e.g.*, discovery-related), and number of complaints received and reviewed, and any resulting determination.
5. *See Report*, p. 4; Rules of Professional Conduct 8.3(a).
6. *See* S. 24 (NY 2015-2106 Regular Sessions); Glenn Blain, *New York Lawmakers Push Bill To Create Commission That Reviews Complaints Against District Attorneys* (June 12, 2016), http://www.nydailynews.com/news/politics/n-y-pols-push-law-beef-oversight-district-attorneys-article-1.2670990.
7. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *People v. Geaslen*, 54 N.Y.2d 510 (1981).
8. *See* Model Order annexed as Exhibit C to Memorandum from Chief Administrative Judge dated November 6, 2017, regarding Trial Court Orders to Prosecution and Defense ("Model Order"); Report Appendices B and C.
9. *Id.*
10. 559 U.S. 356 (2010).
11. *See, e.g.*, Rules of Professional Conduct 1.7 and 1.8.
12. *See* CPL §§ 250.10, 250.20, and 250.30; *see* Model Order.

Labor & Employment Law/ Immigration Law

Is the DREAM Over? What Counsel Must Know

Michael Kohler

Predicting that the Trump administration was going to increase worksite enforcement investigations as a cornerstone of its immigration policy was not exactly a prophetic statement. Immigration enforcement was, and remains, a priority of this administration, and worksite enforcement investigations are a relatively simple, safe, and efficient way, from the government's perspective, in which to address the issue. With the stated goal of removing the "magnet" that attracts undocumented immigrants to the United States, Acting Director of U.S. Immigration and Customs Enforcement (ICE), Thomas Homan, stated on October 16, 2017, that "the number of inspections in work site operations," will significantly increase in the next fiscal year, "by four to five times."[1]

Immigration and employment attorneys should be prepared for an increase in calls from clients who become the subject of such an investigation, also called a "silent raid." That term refers to the commencement of an employment verification investigation by service of an immigration enforcement subpoena [2] demanding the production of all an employer's I-9 Forms[3] and payroll records.

The Mandatory Form I-9

Form I-9's use is mandated by the federal government and requires employers to verify the identity and employment eligibility of all their employees. Once the requested documentation is presented to ICE, a lengthy review takes place and civil monetary penalties, and in egregious cases, criminal charges, may follow in the event of errors, omissions, and discrepancies in the I-9 Forms presented. Yearly reviews of an employer's I-9 verification procedures are important as is strict compliance with the Form's handbook published by the U.S. Citizenship and Immigration Service (USCIS). [4]

Form I-9 is divided into three distinct sections. Part 1 is completed by the employee on or before the first day of work and asks the employee to provide information about his identity and immigration status. Part 2 is completed by the employer, or its designated representative, no later than 3 business days after the employee begins work for pay. Part 2 is the certification section where the employer physically examines the original documents provided by the employee and records required information, such as document title, issuing authority, document number and expiration date on the form.

Parts 1 and 2 are completed for each Form I-9, whereas Part 3 is used in fewer situations and will be discussed in detail below. Employers are mandated to retain completed I-9 Forms for their employees for three years, or one year from the date of employment termination, whichever is later.

Part 3: Handle With Care

One often overlooked aspect of the employment verification process is proper completion and updating of Part 3, entitled "Reverification and Rehires." This section must be completed when an employee's employment authorization expires ("reverification"), or when an employee is rehired within 3 years of the date the Form I-9 was originally completed ("rehires"), or if the employee has a legal name change.[5]

However, in most situations, the completion of Part 3 is never necessary and in fact can be improper. For example, when employees establish through documentation that they are permitted to work without temporal limitation, such as with U.S. citizens and lawful permanent residents, reverification is not required and can be considered discriminatory.[6] But, when an individual has presented an employment authorization document (EAD)[7] limited to a finite period of time, timely reverification is necessary to ensure his authorization has been extended by the USCIS and that he remains eligible to work in the United States. Employers and H.R. professionals are advised to 'flag' the Form I-9s in need of reverification and timely request updated documentation from such employees so there is no lapse in employment authorization.

DACA Issues

Issues relating to reverification of employees have become more prevalent in recent years due to the Deferred Action for Childhood Arrivals (DACA) program. DACA was created on June 12, 2012, under the Obama administration, when then Secretary of the Department of Homeland Security Janet Napolitano issued a Memorandum entitled, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children."[8] DACA enabled individuals who met certain criteria, such as arrival in the United States under the age of 16 and not above the age of 30 at time of application; continuous residence in the U.S. since June 12, 2007; school attendance by current students or attainment of a high school diploma or G.E.D.; and only minor criminal offenses, if any, to apply for "deferred action" status.

Deferred action status, which was granted in two-year increments, was a recognition by the Obama administration that individuals that met the above criteria were not an enforcement priority and therefore would not be a target of enforcement actions seeking their removal from the United States, despite their lack of current lawful immigration status. Significantly, applicants who were granted DACA status, like any other individuals granted deferred action status, were permitted to apply for employment authorization.[9] Employment authorization was granted to these individuals, under category "C33," while they maintained DACA status, and therefore needed to be renewed every two years.

As a result, since August 2012, when the program commenced, nearly 800,000 young adults, referred to as "Dreamers," who were brought to this country as children and through no fault or decision of their own, for the first time received authorization to legally work in the United States. DACA recipients could obtain driver's licenses, attend school, serve in the military and become gainfully employed residents of this country.

DACA To Expire

On September 5, 2017, Attorney General Jeffrey Sessions announced for the Trump administration that the DACA program was being terminated based on his recommendation [10] to acting Department of Homeland Security Director Elaine Duke. Duke's Memorandum formally rescinded the June 2012 Napolitano Memorandum.[11] Duke's Memorandum stated that an individual's valid DACA status would not be rescinded or repealed, but rather, just left to expire, and no new, initial applications for DACA would be accepted by the USCIS. Her Memorandum set an October 5, 2017 deadline for any renewal application to be filed for individuals whose DACA status expired before March 5, 2018.[12]

Because of this decision by the Trump administration, employers can expect their DACA-recipient employees to lose their ability to lawfully work in the United States within the next several months, as of the date of the expiration of their DACA status, as evidenced by the date on their EAD card. As mentioned above, the I-9 Form of any DACA recipient would be 'flagged' and in need of Part 3 - reverification, but because of the decision to repeal DACA, these individuals will become unable to present valid employment authorization once their current DACA status expires unless they obtained lawful status through other means.

The Pending Dream Act and DACA Losses

To remain compliant with U.S. immigration law, employers would no longer be permitted to lawfully employ these individuals. And, as of this writing, while the bipartisan, bicameral Dream Act[13] remains pending in Congress, DACA recipients will not only lose their employment authorization, but will also lose their protection from being removed from the United States.

The legal status of DACA recipients is sure to remain fluid and in a state of flux. Confusion and ambiguity will probably and unfortunately be the norm over the next several months and years while the fate of these young adults is decided by the politicians in Washington, and then likely the courts. Immigration counsel should ensure employers' compliance with their employment verification responsibilities, while DACA recipients should closely consider potential alternative paths to lawful immigration status.

Immigration and employment attorneys should be prepared for an increase in calls from clients who become the subject of such an investigation, also called a "silent raid."

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1. ICE chief pledges quadrupling or more of workplace crackdowns, http://www.cnn.com/2017/10/17/politics/ice-crackdown-workplaces/index.html.
2. INA § 274A(e)(2), 8 U.S.C. § 1324(e)(2); 8 C.F.R. § 287.4.
3. https://www.uscis.gov/i-9.
4. U.S. Citizenship and Immigration Services, M-274, Handbook for Employers: Guidance for Completing Form I-9 (Employment Eligibility Verification Form), 2013 (rev. 07/14/2017).
5. https://www.uscis.gov/i-9-central/complete-correct-form-i-9/completing-section-3-reverification-and-rehires.
6. *Id*.
7. Form I-766.
8. https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as- children.pdf.
9. 8 C.F.R. § 274a.13.
10. https://www.justice.gov/opa/speech/file/994651/download.
11. https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca.
12. *Id*.
13. S.1615, 115th Cong., 1d Sess., 163 Cong. Rec. 4116 (daily ed. July. 17, 2017).

Labor & Employment Law/ Immigration Law

Ban the Box: An Equal Playing Field But More Regulations for Employers

New York City is often known for being the most restrictive area in the state when it comes to regulations for employers. Consistent with this history, in August 2017, New York City implemented a new set of regulations, aimed at eliminating bias in the hiring process. This latest regulation is known as New York City's Fair Chance Act (FCA).[1] The FCA first took effect in 2015, and its accompanying regulations, which took effect on August 5, 2017, aim to eliminate bias in hiring otherwise qualified individuals with criminal histories by preventing employers from requesting information from job applicants about any past criminal arrests and convictions before extending an offer of employment.

Lisa M. Casa

While the FCA was enacted to eliminate discrimination and place all job applicants on an even playing field, it increases regulations, and any business employing people in New York City must be sure that its hiring practices comply with these new regulations. Failure to follow these regulations will subject employers to potential litigation, and administrative enforcement by the New York City Commission on Human Rights.

In August 2017, a class action litigation was filed against the Barclay's Center in the Eastern District of New York[2] alleging that the company that runs the Barclay's Center violated the FCA when hiring employees to service the sports and entertainment arena. This is likely just the first lawsuit of its kind to be filed, as there is an increased push across the country to pass similar ban the box laws.

Fair Chance Act

Under the FCA, during the hiring process, an employer may not advertise, either directly or indirectly, that an applicant is disqualified due to an arrest or criminal conviction. Additionally under the FCA, an employer may not make any inquiry into an applicant's criminal history or pending arrest prior to extending a conditional offer of employment. In this way, the FCA aims to place all applicants, regardless of their criminal history, on an equal playing field, and to eliminate any biases in the hiring process. Applicants who may have otherwise been wrongfully overlooked because of their criminal histories are now on the same footing as applicants that do not have a criminal background.

Fair Chance Process

Although the FCA eliminates any inquiry about an applicant's criminal history during the initial phase of the hiring process, it does permit an employer to inquire into an applicant's criminal history once a conditional offer of employment has been extended. However, if the employer is going to rescind the offer of employment because of an applicant's prior criminal history, it may only do so after undergoing a rigorous analysis known as the Fair Chance Process, and the applicant must be given an opportunity to review the employer's analysis, and provided with an opportunity to rebut the employers' analysis. [3]

When an employer is evaluating whether to rescind a conditional offer of employment based on an applicant's criminal history, it must determine whether there is a direct relationship between the applicant's conviction history and the job to which he has applied. In order to find a direct relationship, the "employer, employment agency, or agent thereof must first draw some connection between the nature of the conduct that led to the conviction(s) and the position." The other circumstance under which an offer of employment may be rescinded is where employing the applicant would involve an unreasonable risk to the "property or to the safety or welfare of specific individuals or the general public."

However, before an employer may rescind a conditional offer of employment either under the "direct relationship" or "unreasonable risk" exceptions, it must conduct an analysis looking to the eight factors listed in Article 23-A of the New York State Correction Law (Corr. Law) 753, to determining whether the criminal conviction has a direct relationship to the positon, or whether hiring the applicant would pose an unreasonable risk to the safety and welfare of the general public. These eight factors are:

A. That New York public policy encourages the licensure and employment of people with criminal records;
B. The specific duties and responsibilities necessarily related to the prospective job;
C. The bearing, if any, of the conviction history on the applicant's or employee's fitness or ability to perform one or more of the job's duties or responsibilities;
D. The time that has elapsed since the occurrence of the criminal offense that led to the applicant or employee's criminal conviction, not the time since arrest or conviction;
E. The age of the applicant or employee when the criminal offense that led to their conviction occurred;
F. The seriousness of the applicant's or employee's conviction;
G. Any information produced by the applicant or employee, or produced on the applicant's or employee's behalf, regarding their rehabilitation and good conduct; and
H. The legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public.[4]

If the employer decides to rescind the conditional offer of employment, either because there is a direct relationship between the conviction and the position, or the applicant poses a direct threat, the employer must provide the applicant with a copy of its analysis, and any of the underlying documentation considered in making the determination, which is known as the Fair Chance Notice. The Applicant must be provided with at least three business days to respond to the employer's determination, during which time the conditional offer of employment must remain open.

All employers should keep a detailed written record of the analysis undertaken under of the Corr. L Art. 23-A, because a failure to follow the analysis is a *per se* violation of the Act.[5] Further, failing to undergo the above analysis creates a rebuttable presumption that the employer violated the FCA.

Additionally, it is a per se violation of the FCA to take any adverse employment action due to what the FCA defines to be "non-convictions." Non-convictions are defined by the FCA as any criminal action, not currently pending, which was concluded in one of the following ways:

1. Termination in favor of the individual, as defined by CPL 160.50, even if it is not sealed.
2. Adjudication as a youthful offender, as defined by CPL 720.35, even if not sealed;
3. Conviction of a non-criminal violation that has been sealed under CPL 106.55; or
4. Convictions that have been sealed under CPL 160.58.

Although an employer should proceed with caution when considering an applicant's criminal background, it is important to note that the FCA does not "prevent an employer…from taking adverse action against any employee or denying employment to any applicant for reasons other than such employee or applicant's arrest or criminal conviction record."[6] Accordingly, an employer is not prevented from taking any adverse actions against an employee or applicant for any reason unrelated to the employee or applicant's criminal background.

Exemptions

While the FCA applies to all employers who employ at least four employees in New York City, it does provide for certain exemptions.[7] As with most anti-discrimination statutes, exemptions are considered narrowly. Legal Guidance published by the New York City Commission on Human Rights provides that employers planning to use an exemption should inform applicants of the exemption they believe applies, and keep record of their use for a period of five (5) years.

New York State Correction Law

It is not just New York City's employers who should be cautious when using an employee's criminal history when taking any adverse employment actions. While the FCA explicitly provides that no inquiry can be made about an applicant's criminal history until after a conditional offer of employment is made, and requires employers to provide rejected applicants with the Fair Chance Notice, the non-discrimination provisions and eight factors to consider before taking any adverse employment action against an employee are set forth of the New York State Corr. Law §§ 752 and 753. These sections apply to all employers in New York State, and were enacted in 1976 "to reverse the long history of employment discrimination against" people with criminal records by "eliminating many of the obstacles to employment."[8] In this way, all employers should proceed with caution when basing any adverse employment action on an employee or applicant's criminal history.

Fair Credit Reporting Act

Additionally, any employer who uses information obtained in a background check that was prepared by any third-party vendor may be subject to liability under the Fair Credit Reporting Act (FCRA). Under the federal FCRA, if an employer obtains any information, either a credit or background check, from a third-party consumer reporting agency, the employer must provide written notice that the employer is obtaining information about the applicant's criminal or credit history, and advise the applicant or employee that this information may be

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Labor & Employment Law/ Immigration Law

Overview of Prevailing Wage Law and Litigation

The minimum wage and overtime provisions under federal and New York law affect all employers, but construction firms are subject to an additional, unique wage scheme in the form of prevailing wages. The New York Labor Law (NYLL) § 220(3) provides that the wages paid to laborers, workmen, and mechanics on public works construction projects may not be less than "the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work . . . is to be situated, erected or used."[1] Similar requirements appear in the federal Davis-Bacon Act,[2] but this article discusses the New York statute only. Regardless of their source, prevailing wage laws effectively establish a series of occupation-dependent and locality-dependent minimum wages for the various classes of workers on certain public improvement construction projects.

John Caravella

Prevailing Wage Rate Defined

The "prevailing rate of wage" is defined in detail in the NYLL and takes into account the rate negotiated for various trades in collective bargaining agreements in the locality where the public work is located in order to determine the wages applicable to the public improvement contract.[3] The prevailing rates for each class of workers on a project are determined in advance by the fiscal officer, the Commissioner of Labor or, on public works performed for a city with a population in excess of one million people, the municipality's comptroller, and are incorporated into the specifications for the public work.[4] Theoretically, contractors should therefore have access to the prevailing wages required on a public work project, but inadvertently, and sometimes intentionally, contractors have failed to pay the required prevailing wage, which has generated substantial litigation.

Does Prevailing Wage Apply?

A threshold issue that has often been litigated is whether the prevailing wage provisions of the NYLL bear upon a particular project. For the provisions to apply, "(1) the public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics; and (2) the contract must concern a public works project."[5]

In one interesting case, *County of Suffolk v. Coram Equities, LLC*, the Second Department ruled that the construction of a building, only part of which was to be leased to a municipality for a public use, did not constitute a public work under the NYLL.[6]

In another interesting case, *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, the First Department was called upon to decide whether the repair of vessels owned by municipalities and their agencies, including the City of New York, constituted a public work subject to prevailing wages.[7] The court found that the contract was not subject to the prevailing wage law, noting that "the prevailing wage law is limited to those workers employed in the construction, repair and maintenance work of fixed structures, and does not apply to workers who are servicing a commodity owned by [a public entity]."[8]

A Deferential Standard for Violations

Where the prevailing wage law applies, the fiscal officer in charge of the particular public work is the first resort for determinations whether a violation has occurred, and a body of case law has arisen reviewing these determinations. As in traditional Article 78 review of the determinations of agencies, the courts generally defer to the judgment of the fiscal officer, as long as it is supported by substantial evidence.[9] While the violation must be more than accidental to subject the contractor to penalties, "it is not necessary to prove an intent to defraud; all that is required is proof that the employer knew or should have known that it was violating the prevailing wage laws."[10]

While the standard may seem permissive, the courts will look to all surrounding circumstances before accepting a contractor's claim that a violation was accidental. For example, an employer's lengthy experience with public works projects may be cited as supporting a determination that its violation was willful so as to warrant penalties,[11] and a history of prevailing wage violations on the part of an employer may contribute to such a finding as well.[12] Because of the deferential standard, the fiscal officer's determination of a prevailing wage violation is generally upheld.

Consequences of Violations

Violations of the prevailing wage law bring with them a range of consequences. The NYLL sets forth criminal penalties for violations of the

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Labor & Employment Law/ Immigration Law

The Faithless Servant Doctrine: An Olden Law for Modern Times

In today's modern era of bad news about one's company going digitally viral in a nanosecond (good news still travels by foot), a company's ethical reputation can be shattered in the public eye—even before it can get its public relations firm on speed dial—by employee acts of, among other things, serial sexual harassment, corruption, internal hacking and the dissemination of trade secrets. In some situations, despite the proven proverbial villainy, the alleged employee perpetrator not only walks away unscathed, but actually parachutes right into golden pastures. But need this really be the case? In New York, the answer to that question is a resounding "no" and, should employers choose to wield it, there is a powerful legal doctrine that can be implemented with a vengeance.

Howard M. Miller

The Doctrine Explained

In New York, the faithless servant doctrine is more than one hundred years old. Its specific purpose is to go beyond compensating the employer, and to create a Damoclean deterrent to an employee's disloyalty and misconduct. This doctrine, a subspecies of the duty of loyalty and fiduciary duty, requires an employee to forfeit all of the compensation he/she was paid from his/her first disloyal act going forward irrespective of whether the employer can establish any actual damages. The forfeiture of compensation can include not just salary, but also the value of benefits and deferred compensation such as stock options and insurance in retirement. In addition to compensation forfeiture, a faithless servant may be subject to punitive damages and reimbursement of the employer's investigative costs.

The doctrine applies to a wide-array of employee misconduct, including unfair competition,[1] sexual harassment,[2] insider-trading,[3] theft,[4] diversion of business opportunities,[5] self-dealing in connection with the sale of high value art[6] and off-duty sexual misconduct.[7] The doctrine can also make for a potent counterclaim in an employment case (such as a Labor Law or FLSA action) brought by a disloyal employee.[8] Indeed, the credible threat of such a counterclaim can be effective in informing a *reasonable* settlement.

As the faithless servant doctrine becomes more well-known, the full breadth of its power continues to be litigated. Specifically, just how much retribution can this doctrine garner? Disloyal employees have argued that forfeiture under the doctrine should be limited to a so-called "task-by-task" apportionment. Under this now rejected argument, if an employee earns for example $300,000 a year and steals $50,000 over five months in four separate transactions, the remedy is a return of the stolen funds and a salary forfeiture of a day's pay on each of the four days of misconduct. But, whatever superficial appeal this argument may have, once the employee steals, the doctrine kicks in full force. There is no apportionment—the forfeiture is total.

The Doctrine Applied

For example, in *William Floyd Union Free School District v. Wright*,[9] the Second Department rejected the task-by-task apportionment argument, holding: "[w]here, as here, defendants engaged in repeated acts of disloyalty, complete and permanent forfeiture of compensation, deferred or otherwise, is warranted under the faithless servant doctrine." The forfeiture in that case included all salary and deferred compensation including paid health and life insurance in retirement. Turning back to our hypothetical, the faithless servant doctrine requires not only the return of the $50,000 stolen but also forfeiture of all of the salary paid to the employee after the first theft and any related deferred compensation, such as contractual payments owed upon retirement.

Despite *William Floyd*, disloyal employees have tried in earnest to limit the scope of the forfeiture. In June 2016, the Appellate Division, Third Department, added strength and vigor to the faithless servant doctrine in a case where an employee committed repeated acts of theft. In *City of Binghamton v. Whalen*,[10] the court reaffirmed the strict application of the faithless servant doctrine: "[w]e decline to relax the faithless servant doctrine so as to limit plaintiff's forfeiture of all compensation earned by the defendant during the period of time in which he was disloyal." The court specifically noted that the faithless servant doctrine is designed not merely to compensate the employer but to create a harsh deterrent against disloyalty by employees.

Indeed, going back more than one hundred years, courts have recognized that "[i]t has been said that the reason for these rigid rules respecting agents is that all temptation shall be removed from one acting in a fiduciary capacity to abuse his trust or seek his own advantage in the position which it affords him." *Robert Reis & Co. v. Volck*[11].

Given today's headlines, it is important to know that seeking "advantage in the position which it affords him" includes the position of power from which unconscionable sexual harassment springs. In *Astra USA Inc. v. Bildman*, in upholding a $7 million complete forfeiture arising out of sexual harassment, the court aptly stated: "[f]or New York … *the harshness of the remedy is precisely the point*."[12]

As the faithless servant doctrine becomes more well-known, the full breadth of its power continues to be litigated.

For all of its potency, the faithless servant doctrine remains somewhat sparsely used. This could be a combination of it still not being widely known or that it simply seems too good to be true. No matter what the reason, employees would be well-served by adhering to its underlying edicts of mandated loyalty and fidelity. Put another away, the faithless servant doctrine is alive and well in New York and courts have demonstrated no appetite for weakening it.[13]

Howard Miller is a member of Bond, Schoeneck & King and is co-chair of the firm's School Districts Practice Group. He is listed in Best Lawyers in America for Education Law and New York Super Lawyers for Employment and Labor Law. His complete bio and contact information can be found at http://www.bsk.com/people/howard-m-miller.

1. *Maritime Fish Products, Inc. v. World-Wide Fish Products, Inc.*, 100 A.D.2d 81 (1st Dept. 1984).
2. *Astra USA Inc. v. Bildman*, 455 Mass. 116 (2009).
3. *Morgan Stanley v. Skowron*, 2013 WL 6704884 (S.D.N.Y. 2013).
4. *William Floyd Union Free School District v. Wright*, 61 A.D.3d 856 (2d Dept. 2009).
5. *Art Capital Group, LLC v. Rose*, 149 A.D.3d 447 (1st Dept. 2017).
6. *Schulhof v. Jacobs*, Index No. 157797/2013 (Sup. Ct. New York Co. 2017).
7. *Colliton v. Cravath, Swaine & Moore, LLC*, 2008 WL 4386764 (S.D.N.Y. 2008).
8. *Libreros v. Gallo*, Index No. 3623/2016 (Sup. Ct. Queens Co. 2016).
9. 61 A.D.3d 856 (2d Dept. 2009).
10. 141 A.D.3d 145 (3d Dept. 2016).
11. 151 A.D. 613 (Trial Term, N.Y. Co. 1912).
12. 455 Mass. at 136 (emphasis added).
13. *See In Re Blumenthal*, 32 A.D.3d 767 (1st Dept. 2006) (imposing forfeiture of all compensation where defendant made systemic, unauthorized money transfers to himself and his wife: "[W]e decline the invitation to abolish the faithless servant doctrine, which has long been the law of this State.").

BOX ...

Continued From Page 10

used to make decisions about his or her employment. If the employer will be taking any adverse action based on the information found in the credit or background report, the employer must provide the applicant with notice including a copy of the consumer report, and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act." This provides the applicant with an opportunity to review the report and correct or explain any negative information. After any adverse employment action is taken, the employer must advise the applicant either orally, or in writing:

1. That he or she was rejected because of the information in the report;
2. The name, address and phone number of the company who sold the report;
3. That the company selling the report did not make the hiring decision, and cannot give a specific reason for it; and
4. That he or she has a right to dispute the accuracy and completeness of the report, and to get an additional free report from the reporting company within 60 days.

The Barclay's Center Cases

The class action styled *Kelly v. Brooklyn Events Center, LLC, et al.,* which is currently pending in the Eastern District of New York, perfectly illustrates the liability an employer will face if it fails to follow the requirements and the Fair Chance Act and Fair Credit Reporting Act, and have a blanket policy not to hire any applicants with a criminal history. In *Kelly,* plaintiff, Felipe Kelly, is an African-American Latino from the Bronx with a prior criminal conviction. Kelly applied for and was offered a conditional offer of employment at the Barclay's Center.

After running a criminal background check, Kelly's offer of employment was rescinded; however, Kelly was not provided with a copy of the background check, or with the Fair Chance Notice, outlining the analysis undertaken under the Corr. Law Art. 23 explaining why his prior criminal conviction precluded him from employment at the Barclay's Center. Kelly then filed a class action against Barclay's Center on behalf of himself and all others similarly situated who were wrongfully denied employment and not provided with the requisite notices under the FCA and FCRA. The *Kelly* case illustrates the potential cost that employers face if they fail to follow the appropriate procedures and fail to provide the requisite notices when taking any adverse employment actions based on an applicant's criminal history.

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1. N.Y.C. Admin. Code 8-107(11-a).
2. *Kelly v. Brooklyn Events Center, LLC, et al.,* No. 1:17-cv-4600 (E.D.N.Y. filed Aug. 4, 2017).
3. NYC Admin. Code 8-107(11-a(2)(b)).
4. NY Corr. Law §753 Article 23-A.
5. §2-04(a)(5) of the Regulations.
6. NYC Admin. Code §8-107(11-a)(c).
7. NYC Admin. Code § 8-107(11-a)(e).
8. Governor's Bill Jacket, 1976, Ch. 931 Memorandum of Senator Ralph J. Marino & Assemblyman Stanley Fink in Support of S. 4222-C and A. 5393-C.

Labor & Employment Law/ Immigration Law

Social Media Posts as Protected Employee Activities

In April 2017 the Second Circuit held that an obscene work-related Facebook post made by an employee can be considered protected speech under the National Labor Relations Act.[1] Strange as it might seem, in *NLRB v. Pier Sixty, LLC* the court held that an employee can utilize vulgarities against employer on a social media platform so long as the employee includes language encouraging other employees to unionize.

By Cory H. Morris and Zachary Segal

Pier Sixty is one of many cases recognizing that water cooler speech may have moved to the Internet. As the Second Circuit considered it, employers should avoid using condescending or derogatory language towards employees in the workplace. Once employers set an example, an employee's use of such language may be found to be not so unprecedented or opprobrious to lose NLRA protection.[2]

Free Speech in Cyberspace

The predominant free speech forum seems to have become the Internet. In *Packingham v. North Carolina,* the Supreme Court held: "A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more."[3] The Supreme Court recently held that "cyberspace…and social media in particular" are some of the "most important places (in a spatial sense) for the exchange of views." In striking down a law that prevents sexual offenders from accessing, inter alia, Facebook, the Supreme Court stated that "the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be."[4]

In examining the language and holding in *Pier Sixty,* one should be mindful of the backdrop set by Justice Anthony Kennedy, stating that the internet contains the "principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge."[5]

In contrasting the speech in *Packingham* and *Pier Sixty,* the speaker examined by the Supreme Court praised G-d and Jesus, while the *Pier Sixty* speaker was a bit more vocal in exploring realms of human thought and speaking in the public square. Realizing these vulgarities were accessible beyond his immediate facebook network, the speaker in *Pier Sixty* took down speech that can be compared to what is likely heard around the water cooler.

While "[h]uman experience teaches that not everything learned at the water cooler, so to speak, finds its way into institutional files or is readily acknowledged upon questioning,"[6] Facebook, and other internet social media, leaves a paper trial. Rather than "chilling water-cooler conversations,"[7] the social media forum seems to be embraced by all.

Still, while protecting speech in the workplace by an employee to an employer is not necessarily new,[8] albeit limitations remain.[9] For instance, speech that occurs not "as a citizen on a matter of public concern"[10] but rather as "pursuant to [one's] official duties"[11] does not entitle public employees to receive first amendment protections. In regards to the labor organization and the internet, the pro union, albeit vulgar, message provides employee protection.

Pier Sixty: Business Disruption as the Test

Previous NLRB decisions, and courts reviewing NLRB decisions, have held in favor of employees terminated or suspended directing vulgar language at an employer when the obscene remark was not made in the presence of other employees.[12] Conversely, when the vulgar or obscene comment is made in the presence of other employees, neither the NLRB nor courts have been as forgiving.[13] However, Hernan Perez changed that when he posted on Facebook a profanity-laced tirade against his boss by name, ending with "Vote YES for the UNION!!!!!!!"[14]

Perez worked at Pier Sixty, a catering company in New York City, for thirteen years. In early 2011, there was talk among Pier Sixty employees about unionizing. On October 25, 2011, Perez was working an event and his boss, in his usual condescending tone, told Perez and others "[t]urn your head that way [towards the guests] and stop chitchatting[.]"[15] About forty-five minutes later, Perez, on an authorized break, let the world know what how he felt about his employer through the popular social media platform, Facebook. Three days later Perez deleted the post. The day before, however, Pier Sixty employees had unionized. An internal investigation was commenced and, on November 9 Perez was terminated.

The day he was fired, Perez filed charges with the NLRB against Pier Sixty alleging he was fired "in retaliation for "protected concerted activities." On December 15, 2011, another Pier Sixty employee filed a similar claim with the NLRB so the NLRB consolidated the cases. The Administrative Law Judge ruled that Pier Sixty violated Sections 8(a)(1) and 8(a)(3) of the NLRA "by discharging Perez in retaliation for protected activity."

In reaching its decision that Perez's comments were protected under the NLRA, the Second Circuit explained, "although vulgar and inappropriate, [Perez's statement] was not so egregious as to exceed the NLRA's protection. Nor was his Facebook post equivalent to a "public outburst" in the presence of customers and thus can reasonably be distinguished from other cases of "opprobrious conduct."[16]

Other cases of opprobrious conduct were measured by the *Atlantic Steel* test, which is used to determine if an employee crossed the line: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labour practice.[17]

In *NLRB v. Starbucks,* the court determined the *Atlantic Steel* test was not applicable because the employee, while off-duty, made an obscene comment to an employer in front of customers[18] rather than around the proverbial water cooler.[19] The court remanded it to the NLRB because it was a question of first impression. It thus follows that the determinative issue in cases applying the test, or determining whether obscene language towards an employer regarding union activity is protected, is where the comment was made.[20]

Conclusion: How Long Can This Speech Be Free?

Although the Second Circuit declined to determine whether obscene speech in front of customers has NLRA protection, it held obscene language "in front" of the world does. Where line from the water cooler and the world begins and ends is rapidly evolving.

Generally, when evaluating whether an employee's use of social media has NLRA protection, courts apply the "totality of the circumstances" test, which considers the following factors:

- any evidence of antiunion hostility
- whether the conduct was provoked
- whether the conduct was impulsive or deliberate
- the location of the conduct
- the subject matter of the conduct
- the nature of the content
- whether the employer considered similar content to be offensive
- whether the employer maintained a specific rule prohibiting the content at issue
- whether the discipline imposed was typical for similar violations or proportionate to the offense.21

But, Pier 60 did not challenge the Board's findings under the test, so the court did not address its validity.[22] The court did, however, discuss the location of Perez's comments, which provides the best insight into its holding:

> [T]he "location" of Perez's comments was an online forum that is a key medium of communication among coworkers and a tool for organization in the modern era. While a Facebook post may be visible to the whole world, including actual and potential customers, as Pier Sixty argues, Perez's outburst was not in the immediate presence of customers nor did it disrupt the catering event.[23]

While this holding has obvious implications for those practicing employment law, could it also be a signal that our nation's courts want to define Facebook, and other social media forums, due to the increased usage of them? Legal commentators note that "This ruling will provide significantly greater protection for comments, profane and otherwise, directed at employers on social media."[24] As the Supreme Court recently explained, "[s]ocial media allows users to gain access to information and communicate with one another about it on any subject that might come to mind."[25]

Social media's unlimited access to information and communication, according to the Supreme Court, provides everyone—including registered sex-offenders—with an outlet for "speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.[26] Of course organized labor should enjoy such an outlet but why not public employees? Such speech can no longer be limited to the water cooler as our society continues to becoming increasingly more active, if not dependent, on social media platforms.

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Zachary Segal is a 2L at Touro Law Center. Prior to law school he worked for the Aleph Institute, where he advocated for religious and humanitarian rights of inmates from his home in Canada.

1. *National Labor Relations Board v. Pier Sixty, LLC,* 855 F.3d 115, 124 (2d Cir. 2017).
2. *Id.*
3. 582 U.S. ____, 137 S.Ct. 1730, 1735 (2017).
4. *Id.* at 1736.
5. *Id.* at 1737.
6. *Johnson v. Nyack Hosp.,* 169 F.R.D. 550, 556 (S.D.N.Y. 1996).
7. *Oliver Wyman, Inc. v. Eielson,* No. 15 CIV. 5305 (RJS), 2017 WL 4403312, at *6 (S.D.N.Y. Sept. 29, 2017).
8. *Atlantic Steel Co.,* 245 NLRB 814, 819 (1979) ("There is an exception to this rule for statements which are so opprobrious as to make the employee unfit for further service").
9. *See Lee-Walker v. New York City Dept. of Educ.,* No. 16-4164-cv (2d Cir. Oct. 17, 2017).
10. *Garcetti v. Ceballos,* 547 U.S. 410, 418 (2006).
11. *Weintraub v. Bd. of Educ.,* 593 F.3d 196, 203 (2d Cir. 2010).
12. Atlantic *Steel Co.,* 245 NLRB 814, 819 (1979) (Employee, not knowing his boss was present, was terminated for telling his union representative that his boss was a "lying s.o.b." was in violation of NLRA); *Alcoa, Inc.,* 352 N.L.R.B. 1222, 1226 (2008) (NLRB ruled for employee who was suspended for pointing at his supervisor, during a grievance meeting, saying, "If you tell this egotistical f—er to quit talking to people the way he does, this wouldn't happen"); *Stanford New York LLC,* 344 N.L.R.B. 558, 558-59 (2005 (NLRB ruled for employee who, while discussing joining the union with a union representative in a private room, called his supervisor a "f—ing son of a bitch").
13. *Verizon Wireless,* 349 N.L.R.B. 640, 642-43 (2007) (NLRA protection lost when employee continuously used vulgar language in the presence of other employees, even though the language was a result of frustration associated with union activity).
14. *Pier Sixty,* 855 F.3d at 119.
15. Id. at 118.
16. *Id.* at 125.
17. Atlantic *Steel Co.,* 245 NLRB 814, 819 (1979). *See also supra* nn. 4 & 5.
18. *Id.* at 80 ("Because we conclude that the Atlantic Steel test is inapplicable to an employee's use of obscenities in the presence of an employer's customers, we face one further issue in this case: whether an employee's outburst in which obscenities are used in the presence of customers loses otherwise available protection if the employee is off duty although on the employer's premises").
19. *Id.* at 80.
20. *NLRB v. Starbucks Corp.,* 679 F.3d 70, 79 (2d Cir. 2012) ("In the context of outbursts containing obscenities uttered in the workplace, the Board has regularly observed a distinction between outbursts under circumstances where there was little if any risk that other employees heard the obscenities and those where that risk was high").
21. *Pier Sixty,* 855 F.3d at 126 n.38.
22. *Id.* at 123-24.
23. *Id.* at 125.
24. Martin Flumenbaum, Brad S. Karp, Determining 'Opprobrious' Conduct Under the National Labor Relations Act, Expert Analysis, New York Law Journal Vol. 257 No. 103 (Wednesday May 31, 2017).
25. *Id.* at 1737.
26. *Id.*

Program Calendar

JANUARY 2018

January 11, 2018
Dean's Hour: Social Security Basics Every General Practitioner Should Know
This program is sponsored by NCBA Corporate Partner Champion Office Suites
*Sign-in and Networking*12:30;
Program 1-2PM
1 credit in professional practice or skills

January 17, 2018
A View From the Guardianship Bench: A Tri-County Question and Answer Session (Cocktail Hour and Seminar)
With the NCBA Elder Law Committee
Cocktail hour 5:30-6:30PM
Program 6:30-8:30PM
2 credits in professional practice or skills

January 18, 2018
Critical Ethical Consideration Lecture Series Presents: Dean's Hour: Ethics—Year in Review
This program is sponsored by NCBA Corporate Partner Champion Office Suites
*Sign-in and Networking*12:30;
Program 1-2PM
1 credit in ethics

January 23, 2018
Dean's Hour: Best Practices to Avoid Malpractice Claims and Grievances
With the NCBA Ethics Committee
This program is sponsored by NCBA Corporate Partner Champion Office Suites
*Sign-in and Networking*12:30;
Program 1-2PM
1 credit in ethics

January 24, 2018
Fundamentals of Fair Housing
With the NCBA Mortgage Foreclosure Project
This program is sponsored by National Standard Abstract LLC
5:30-8:30PM
3 credits in professional practice or skills

**** This program satisfies the new CLE rule for experienced attorneys effective July 1, 2018 ****

CHANGE TO EXPERIENCED ATTORNEY BIENNIAL CLE REQUIREMENT TO INCLUDE ONE CREDIT HOUR IN DIVERSITY, INCLUSION AND ELIMINATION OF BIAS – Experienced attorneys due to re-register on or after July 1, 2018 must meet this requirement. **

January 30, 2018
Dean's Hour: New York Insurance Construction Defects
With the NCBA Insurance Law and NCBA Construction Law Committees
*Sign-in and Networking*12:30;
Program 1-2PM
1 credit in professional practice

January 31, 2018
Why Cybersecurity Is Failing – and What to Do About It
*Sign-in and Networking*12:30;
Program 1-2PM
This program is sponsored by NCBA Corporate Partner AssuredPartners Northeast, LLC/ CBS Coverage
Program is free to attend. Optional 1 CLE credit available for purchase of $30. CLE credit is free for current Domus Scholars. This program also qualifies for **skills**.

FEBRUARY 2018

February 1, 2018
Dean's Hour: Shaking Up the Financial Industry - A Primer on Bitcoin and Other Cryptocurrencies
With the NCBA Corporation, Banking and Securities Law Committee
*Sign-in and Networking*12:30;
Program 1-2PM
1 credit in professional practice or skills

February 2, 2018
Dean's Hour: Detecting Deception in Litigation and at Trial
With the NCBA Criminal Court Law & Procedure Committee and the Assigned Counsel Defender Program, Inc. of Nassau County
Sign-in and Networking 12:00;
Program 12:30-2:00PM
1.5 credits in professional practice or skills

February 6, 2018
Dean's Hour: Creating Brand Awar for Your Law Firm
This program is sponsored by NCBA Suites
Sign-in and Networking 12:30;
Program 1-2PM
1 credit in professional practice or sk

February 6, 2018
Accounting for Attorneys
Program presented with NCBA Cor
6:00-8:00PM
2 credits in professional practice or sl

February 7, 2018
Legal Malpractice Update 2018
5:30-8:30PM
3 credits in ethics

February 8, 2018
Dean's Hour: The Ethics of Talking
With the NCBA Ethics Committee
This program is sponsored by NCBA Champion Office Suites
*Sign-in and Networking*12:30; *Program* 1
1 credit in ethics

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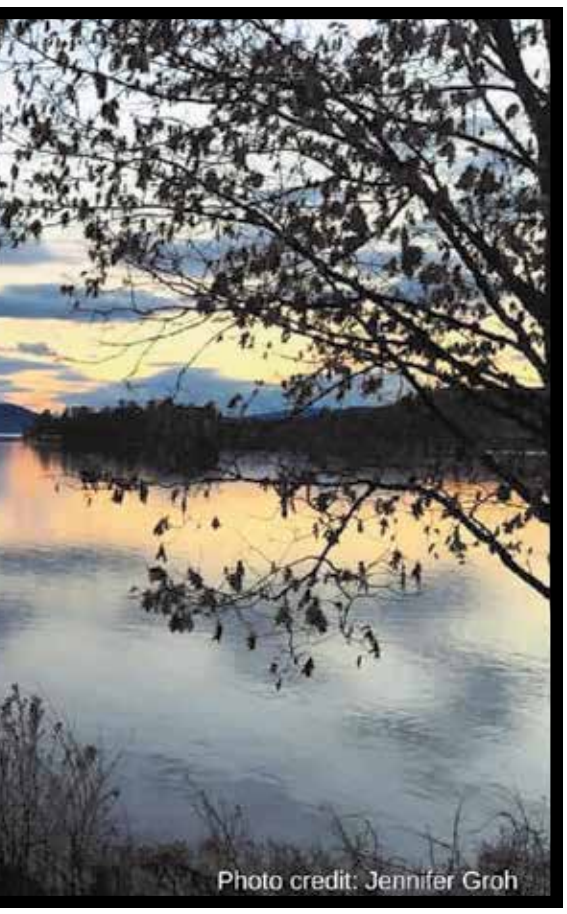

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Jan 18	DH: Ethics - Year in Review		1.0		1	$30	$40	FREE	N/A
Jan 23	DH: Best Practices to Avoid Malpractice		1.0		1	$30	$40	FREE	N/A
Jan 24	Fundamentals of Fair Housing	3.0		√	3	$115	$155	FREE	N/A
Jan 30	DH: NY Insurance Construction Defects	1.0			1	$30	$40	FREE	N/A
Feb 1	DH: Shaking Up the Financial Industry	1.0		√	1	$30	$40	FREE	N/A
Feb 2	DH: Detecting Deception	1.0		√	1	$30	$40	FREE	FREE
Feb 6	DH: Creating Brand Awareness	1.0		√	1	$30	$40	FREE	N/A
Feb 6	Accounting for Attorneys	2.0		√	2	$80	$115	FREE	N/A
Feb 7	Legal Malpractice Update		3.0		3	$115	$155	FREE	N/A
Feb 8	DH: Ethics of Talking to the Press		1.0		1	$30	$40	FREE	N/A
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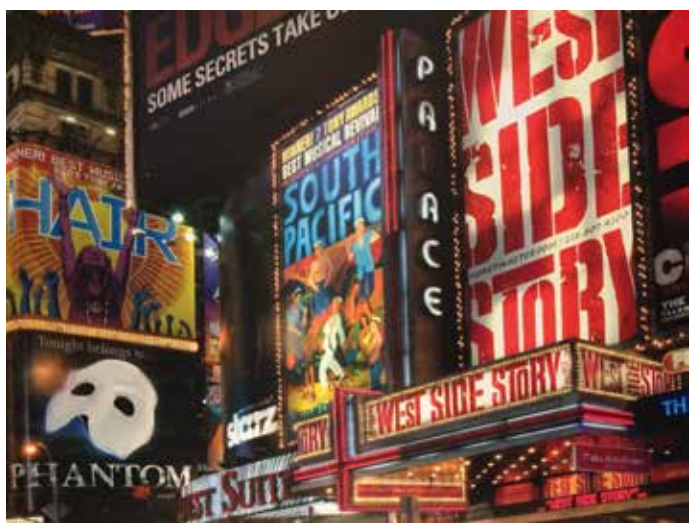

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PRODUCTIVITY ...

Continued From Page 1

it helps to advance your goals or your clients' goals). Next, focus on the outcome or anticipated result of the task rather than on the task itself. High-value activities are those that make the biggest impact, often while using the fewest resources. If a task has an important purpose and a high-value result, make it a priority.

If a task isn't high value, consider whether it should take precedence over other tasks based on the amount of time and energy you have available to devote to it, because it is old, or has an impending deadline. Ask yourself whether the task can be delegated to someone else—especially someone who may be able to accomplish it better, cheaper, or faster than you can.

Using this method can help you more easily determine which activities and clients to take on and which to pass by—at least for now. It will help you stay on track and avoid being distracted by every new idea or opportunity that comes your way, you can decide quickly and easily what deserves your attention.

Set External Deadlines

When you have a scheduled meeting with a client or a hearing date for a motion, somehow the work gets done on time. Those deadlines create urgency and provide a framework within which to structure your activities. But what about those activities that are important to reaching your goals, but don't have built-in deadlines? Those tasks tend to get carried on a never-ending to-do list. To avoid putting these tasks on the back burner perpetually, create your own deadlines.

List the steps you need to accomplish to reach the goal or complete the project. Then set deadlines for each step (or at least for the first step). For example, if one of your goals is to redo your website, steps could include things like choosing a web host, hiring a web designer, deciding on a style, developing a list of pages for the site, creating the content for each page, etc.

Choose a deadline for each action step, but don't stop there. Make the deadline an external one; just because you've assigned a deadline to a task doesn't mean you'll meet it. Deadlines and to do lists that remain private are easy to ignore because they are internal – you're the only one that knows about them. To improve your chances of meeting the deadline, make it external by publicizing it or sharing it with others to make it real. By sharing your deadline with someone else and asking them to hold you accountable for accomplishing your goals, you'll increase your odds of reaching those goals.

The nature of your goal will determine who to share it (and the deadline) with. Sometimes it's an attorney or staff member within your office. Other times, a consultant or colleague is more appropriate. Often, sharing your goals and deadlines with clients is the most effective.

Schedule Time to Get Work Done

Don't let yourself be overwhelmed or paralyzed by the amount of work you need to accomplish. All of your deadlines, whether built-in or self-created, belong on your calendar along with court appearances, closings, client meetings or other appointments. Once you've outlined your most important tasks and action steps, add them to your calendar as well. But tracking the deadlines alone isn't enough.

To avoid doing everything at the last minute, you must also schedule time to do the work. Block the time on your calendar to write the motion papers, review your website copy or develop a plan for the client's case. If something is important enough to put on a "to do" list, it's important enough to make it an appointment in your calendar.

Develop daily and weekly plans of action. First, decide every day (or week) which actions or tasks are the most important and make sure those take center stage in your day. Don't let smaller, less important activities get in the way. Calculate the amount of time each activity will take to accomplish. Don't be stingy with your estimate; estimating too little time will add stress and confusion to your schedule.

Next, decide when you will perform that activity and schedule it on your calendar. Be flexible. Don't schedule every minute of every day. Leave room for the "chaos factor;" emergencies, crises, and unforeseen circumstances are sure to arise. Plan for the unexpected, or just for downtime.

Build a cushion into your deadlines. If you think you can get the document to the client within a week, give the client a date two weeks ahead. That way, if the unexpected happens, you can still deliver on time. And if the chaos factor doesn't hit, you'll have impressed the client with your exceptional response time - or you can take some time to enjoy yourself. If you do have to rearrange your schedule, find another place on your calendar to reschedule the task so it isn't forgotten.

Create "do not disturb" time. Give each task your full attention. Close your office door, turn off email notifications, mute your phone and tell your staff not to interrupt. Blocking out uninterrupted work time will help you complete tasks faster.

Finally, choose a time each week to review the work you need to accomplish and create a plan for the upcoming week. As part of your weekly review, ensure that your plans cover all aspects of your practice, including marketing, management, administration, business development and client work.

Consciously prioritizing, setting deadlines and using your calendar wisely instead of merely reacting will help you have a more productive 2018. Happy New Year!

Allison C. Shields is the President of Legal Ease Consulting, Inc., providing consulting services to lawyers on productivity, marketing, practice management and business development. She is the co-author of How to Do More in Less Time: The Complete Guide to Improving Your Productivity and Increasing Your Bottom Line, among other books. She can be reached at Allison@LegalEaseConsulting.com.

PADILLA ...

Continued From Page 6

Failure to Mitigate

Next, defense counsel must negotiate with the prosecutor to minimize the risk of negative immigration consequences. The right to effective assistance of counsel extends to plea negotiations.[17] The Supreme Court has not yet resolved the question, raised in *Lee*, whether counsel commits a cognizable error where she fails to bargain for an immigration-safe plea.[18] However, under New York law, defenders must bargain for a plea deal that does not result in certain deportation,[19] preserves eligibility to raise defenses in removal proceedings, or protects eligibility for other immigration benefits.[20] Defenders must identify an immigration-safe or -safer plea, and seek the People's agreement. Often a plea to another subsection of the same offense as charged, or a sentence reduction of a single day will both protect a client's immigration status and satisfy prosecutors concerned with punishment proportional to the offense.

Failure to Advise

Finally, defense counsel must advise her client of any plea offer[21] and inform her of the actual immigration consequences that acceptance of the plea will trigger.[22] This duty to communicate with a client about the immigration consequences the defender has investigated, analyzed, and tried to mitigate underscores and makes tangible the immigrant defendant's right to effective assistance of counsel. Only an informed client can decide what action to take: to accept a plea deal or risk a trial. Only the defendant can weigh the costs to her of losing her family, livelihood, and the freedoms America has to offer, against the potential consequences of a conviction after trial, including any jail sentence. The Supreme Court has called deportation the loss of "all that makes life worth living;"[23] defense counsel is thus obliged to protect her clients from deportation based on a conviction where possible.

Possible Reverse Padilla Claim

A trial is by its nature uncertain. While trial may be a criminal defendant's only glimmer of hope of avoiding the negative immigration consequences of a conviction,[24] choosing trial in the face of an immigration-safer alternative may also lead to an immigration-based claim of ineffective assistance. This novel reverse-*Padilla* claim has yet to be tested. But, in *Lafler v. Cooper,*[25] the Supreme Court held that counsel's failure to convey a plea offer that would result in significantly less jail time was ineffective assistance of counsel, despite the attorney's view, shared with the client, that the prosecutor's evidence was not sufficient for a verdict of guilt. Time will tell if the analogous claim in the immigration context, that a defender failed to advise a client to accept a plea offer that would be immigration-safer than the likely outcome of a trial, would be approved by a court.

Standard Immigration Warning No Bar to Ineffective Assistance Claims

New York law requires judges to ensure due process by giving an immigration warning in all felony cases.[26] The Second Department has extended that obligation to judges hearing misdemeanors.[27] A defense attorney's obligation to provide accurate immigration advice may require the lawyer to explain why his advice that a bargained for plea is immigration-safe remains so *despite* a judge's later warning.

The Supreme Court explained this dilemma in *Lee*: "Only when Lee's counsel assured him that the judge's statement was a "standard warning" was Lee willing to proceed to plead guilty."[28] The Court went on to note that, despite other courts' findings, "there has been no suggestion here that the sentencing judge's statements at the plea colloquy cured any prejudice from the erroneous advice of Lee's counsel."[29] Because a judge's required immigration warning is generalized rather than specific, it may also be inaccurate or misleading. Therefore, it cannot substitute for counsel's duty to effectively represent her client by investigating, analyzing, negotiating, and advising her client of the particular immigration consequences she actually faces.

Nevertheless, a judge's failure to provide the immigration warning required by the New York Court of Appeals in *Peque*,[30] and extended by the Second Department in *Bello,* provides a separate basis for a motion to vacate on due process grounds.

Michelle Caldera-Kopf is the Padilla Attorney at the Long Island Regional Immigration Assistance Center. She provides free, case-specific, immigration advice to members of the Nassau County Assigned Counsel Defender Plan.

1. *Padilla v. Kentucky*, 559 U.S. 356 (2010).
2. *Strickland v. Washington*, 466 U.S. 668 (1984).
3. *Lee v. U.S.*, 137 S. Ct. 1958 (June 23, 2017).
4. *Id.*, at 15 (discussing the potential value to a defendant of uncertainty at trial).
5. *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985).
6. *See, e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 388 (Scalia & Thomas, JJ., dissenting); *Lee v. U.S.*, 137 S. Ct. 1958 (June 23, 2017) (Alito & Thomas, JJ., dissenting).
7. *People v. Baldi*, 54 N.Y.2d 137, 147 (1981); *People v. Caban,* 5 N.Y.3d 143, 156 (2005) (quoting *People v. Benevento*, 91 N.Y.2d 708, 714 (1998).
8. *People v. Abdallah*, 153 A.D.3d 1424 (2d Dept. 2017).
9. *Strickland v. Washington*, 466 U.S. 668 (1984).
10. *Padilla v. Kentucky*, 559 U.S. 356 (2010).
11. *People v. Picca,* 97 A.D.3d 170 (2d Dept. 2012).
12. *People v. Seegobin*, NYLJ LEXIS 2703 (Sup. Ct., Queens Co. Aug. 9, 2017).
13. *People v Baldi,* 54 N.Y.2d 137, 146 (1981); *People v. Droz,* 39 N.Y.2d 457 (1976) ("what constitutes effective assistance is not and cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation").
14. *U.S. v. Rodriguez-Vega*, 797 F. 3d 781, 787 (9th Cir. 2015).
15. *People v. Abdallah,*153 A.D.3d 1424 (2d Dept. 2017).
16. *Id.* at 1 (defender's assertion that he reached out to the Immigrant Defense Project, a well-known provider of crim-imm expertise, was no substitute for defender's duty to effectively represent).
17. *Lafler v. Cooper*, 132 S. Ct. 1375, 1384 (2012); *People v. Moore*, 141 A.D.3d 604, 605-606 (2d Dept. 2017) (counsel ineffective for failure to bargain for a sentence that would result in the same amount of prison time, but would trigger no mandatory immigration consequences.)
18. *Lee v. U.S.*, 137 S. Ct. (June 23, 2017).
19. *People v. Guzman*, 150 A.D.3d 1259 (2d Dept. May 31, 2017).
20. *Abdallah*,153 A.D.3d 1424 ("Counsel admittedly did not pursue a plea . . . with the same sentence, which . . . would not have carried any immigration consequences to the defendant because he did not know that there was any difference").
21. *Missouri v. Frye*, 132 S,Ct. 1399 (2012).
22. *Padilla v. Kentucky*, 559 U.S. 356 (2010).
23. Ng Fung Ho v. White, 259 U.S. 276 (1922).
24. *Lee v. U.S.*, 137 S. Ct. at *1966.
25. 132 S. Ct. 1376 (2012).
26. *People v. Peque*, 22 N.Y.3d 168 (2013).
27. *People v. Bello (Jose),* 55 Misc. 3d 152(A) at 2-3 (June 2, 2017).
28. *Lee v. U.S.*, 137 S. Ct. at 1968.
29. *Id.*
30. *Peque*, 22 N.Y.3d 168.

UBER ...

Continued From Page 3

and who is an employee. Thus, misclassification lawsuits have grown at a record pace. As of 2015, the number of wage and hour cases filed in federal court rose to 8,871, up from 1,935 in 2000, most pertaining to misclassification, including misclassifying workers as independent contractors when they are later found to be employees. That correlates to an increase of 358 percent, compared to the federal judiciary's overall intake volume, which rose only a total of about seven percent over the same period.

Nowhere is the trend toward expanding misclassification litigation more apparent than when it comes to a company such as Uber. At first blush, Uber would seem to have a classic independent contractor relationship with its drivers. Let's look at the basic facts: An Uber driver drives his/her own vehicle, obtains his/her own insurance, maintains that vehicle, drives when and where and for how long he/she desires. The driver is not issued any equipment by Uber and uses his/her own cell phone to access customers. Moreover, an Uber driver can drive for its competitor, Lyft, at any moment the driver wishes. It would seem the Uber driver has "liberty of action," noted by the Court in *Metcalf*, and, thus, would not be considered an employee.

However, some courts and administrative agencies have ruled otherwise. In *Berwick v. Uber Technologies, Inc.*, the first California decision to hold that Uber misclassified drivers as independent contractors, the California Labor Commissioner ruled that the Uber drivers bringing a class action were employees and not independent contractors. The Commissioner's focus was on control.

Contrasting the factors listed above that would seem to contradict such control, the Commissioner found that Uber was involved in virtually every aspect of the operation. First, drivers can only avail themselves of Uber's customers by utilizing Uber's app. Next, Uber conducts driver background checks, sets the drivers' compensation, and monitors drivers' performance through customer reviews. Finally, *Berwick* held the work performed by the drivers was "integral" to the regular business of Uber – which is axiomatic.

Likewise, in June 2017, the New York State Unemployment Insurance Appeal Board held that three complainants were employees, stating, "Uber exercised sufficient supervision and control over substantial aspects of their work as Drivers," similar to the analysis and holding in *Berwick*. One of the factors considered by the Commissioner was that "Uber did not employ an arms' length approach to the claimants" that the Commissioner believed would be present in a typical independent contractor relationship.

This raises interesting questions. Yes, Uber set the rates that could be charged and set certain conditions for drivers to follow, but one must assume some rules are necessary to establish consistency of the business model to attract and maintain customers for Uber and the drivers. Uber could not exist if it simply provided a means for drivers to pick up a passengers and left it to them to figure out the price of the service. However, what is an element of control, and sometimes what constitutes "control," can be in the eye of the beholder.

Other Courts: Drivers Are Not Employees

There have been decisions to the contrary. In *McGillis v. Department of Economic Opportunity,* the Third District Court of Appeal of Florida upheld an administrative decision finding drivers were not employees.

On the issue of "control" the court acknowledged that "both employees and independent contractors 'are subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on simply the result to be obtained or extends to the means to be employed.'" Citing authorities, the court reasoned that if control is confined to results only, there is generally an independent contractor relationship, and if control is extended to the means used to achieve the results, there is generally an employer-employee relationship.

In *Saleem v. Corporate Transportation Group*, the Second Circuit addressed black car drivers in New York who were asserting claims against owners of black car "base licenses" and affiliated entities, pursuant to the FLSA. Like Uber, the black car drivers "possessed considerable autonomy in their day-to-day affairs." They could determine when and how often to drive, without providing any notice to the Defendants, and they were at *liberty* to—and did—accept or decline jobs that were offered. In the end, the court found that the drivers were independent contractors, noting "[w]hile Defendants did exercise direct control over certain aspects of the CTG enterprise, they wielded virtually no influence over other essential components of the business, including when, where, in what capacity, and with what frequency Plaintiffs would drive."

What is the difference between the black car drivers in *Saleem* and the cases where Uber has been found to be an employer? The answer is very little. However, the law, like life, is nuanced. If the question is what constitutes control for purposes of making such a determination, one small factor could turn the tide either way. The real question is: has the economy and technology so changed that the normal paradigms we all think we understood regarding the nature of work and what it means to be "employed" mandate that a new way of looking at such concepts is in order-one way or the other?

Paul F. Millus is a Member of Meyer, Suozzi, English & Klein, P.C. and practices in the Litigation and Employment Law Departments.

1. *The Rise of the Supertemp*, Jody Greenstone Miller and Matt Miller Harvard Business Review, May 2012.
2. *The Role of Independent Contractors in the U.S. Economy*, Jeffrey A. Eisenach, American Enterprise Institute; NERA Economic Consulting: December 1, 2010.
3. *Metcalf & Eddie vs. Mitchell*, 269 U.S. 514, 522 (1926).
4. *Smith v. CPC Int'l, Inc.,* 104 F.Supp.2d 272, 275 (S.D.N.Y.2000) ("[T]he common law test of agency discussed in *Darden* is the same test applied by New York courts in addressing a variety of employer-employee relationships.").
5. *Bynog v. Cipriani Group, Inc.*, 1 N.Y.3d 193, 198 (2003).
6. *Brock v. Superior Care*, 840 F.2d 1054, 1059 (2d Cir. 1988); *see also Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) ("'[E] conomic reality' rather than 'technical concepts' is to be the test of employment." (*quoting United States v. Silk*, 331 U.S. 704, 713 (1947)).
7. *United States v. Silk*, 331 U.S. 704 (1947).
8. *Why Wage and Hour Litigation is Skyrocketing,* Washington Post, November 25, 2015.
9. *Berwick v. Uber Technologies*, no. 11-46739 EK, 2015 WL 4153765 (Cal. Dept. Lab. June 3, 2015).
10. *In the Matter of AK, JH and JS v. Uber,* ALJ case No. 016-23858, New York State Unemployment Insurance Appeal Board (June 9, 2017).
11. *McGillis v. Department of Economic Opportunity*, 210 So.3d 220 (FDCA 3d Dist. 2017).
12. *Saleem v. Corporate Transportation Group, Ltd.*, 854 F.3d 131 (2d Cir. 2017).
13. *Id.*

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The Nominating Committee welcomes applications for nominations to the following Nassau County Bar Association offices for the 2018-2019 year:

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Mineola, NY 11501
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Martha Krisel, Chair, Nominating Committee
email: spalley-engel@nassaubar.org

Deadline for all nominations:

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ORIENTATION ...

Continued From Page 5

terminated because he or she is in an interracial marriage, for example, would violate Title VII because it inherently involves consideration of the employee's own race. Taking this line of reasoning and applying it to sex discrimination, the EEOC found that discrimination based on sexual orientation was discrimination due to the employee's association with someone of the same sex—a consideration that also took account of the employee's own gender.[20]

A third line of reasoning that the EEOC relied upon was that of gender stereotyping in which norms of heterosexuality are the premise by which discrimination based on sexual orientation arises.[21] This argument is based on the notion that gender stereotypes of men and women extend beyond characterizations of femininity or masculinity and encompass ideas of who men and women should date or marry.[22] Thus, under this theory, discrimination against an employee because of his or her sexual orientation is discrimination based on the belief that the employee should be romantically involved with someone of the opposite sex.

In support of Zarda's claim before the Second Circuit, the EEOC asserts the same three arguments from *Baldwin* in its brief to the court.[23] In addressing the court's distinction between discrimination based on gender stereotyping and sexual orientation discrimination, the agency criticizes such a distinction to be "unworkable and [one] lead[ing] to absurd results."[24] The EEOC's asserted absurdity is based on the current legality behind the paradox of an employee being able to be terminated based on his sexual orientation while he enjoys the fundamental right to marry that is recognized in *Obergefell*.[25]

Rather than taking an interpretive focus, the DOJ's amicus brief places great attention on congressional action and inaction. Asserting that Title VII currently does not encompass discrimination based on sexual orientation, the DOJ argues that the issue is one for Congress to determine and not the courts. It emphasized that Congress had previously defined the scope of sex discrimination by including discrimination based on pregnancy through enactment of the Pregnancy Discrimination Act, but has yet to include sexual orientation in its amendments to Title VII thus far.[26]

The DOJ finds additional support for congressional intent in Congress' refusal to enact legislation prohibiting sexual orientation discrimination in the workplace even though such legislation has been proposed. Furthermore, the agency articulates an argument based on a statutory construction theory, highlighting Congress' enactment of a number of other statutes where sexual orientation discrimination is listed as a separate category from sex discrimination, demonstrating congressional recognition of the two to be distinct categories and the ability to separate the two concepts in its legislation.[27]

According to the DOJ, sex discrimination does not occur unless persons of different genders are treated discriminatorily.[28] Thus, under this theory, sex discrimination is absent where gay men and straight men are treated differently. In response to the EEOC's argument that sexual orientation discrimination inevitably involves gender stereotyping, the DOJ argues that it is not always the case that gender stereotyping plays a role in the employer's decision, rather, the employer's notions about morality may be the reasoning behind the discrimination.[29]

Other Indications and Developments

Although it is generally difficult to predict how an en banc panel will decide, recent cases may provide some indication as to how the Second Circuit will rule this time. In the month prior to the *Zarda* decision, Chief Judge Robert A. Katzmann emphasized in *Christiansen v. Omnicom Group, Inc.*[30] that the evolving legal landscape warranted the revisiting of *Simonton* at a proper time in the future.[31]

A curious case arising out of the Southern District may also foretell the future of *Zarda*. The Southern District in *Philpott v. New York*[32] (decided only a month after *Zarda*) held that sexual orientation discrimination claims can be brought under Title VII.[33] The district court stated that "[t]he law with respect to this legal question is clearly in a state of flux, and the Second Circuit, or perhaps the Supreme Court, may return to this question soon."[34]

Similar to the current case of *Zarda*, the Seventh Circuit has also decided the issue en banc in *Hively v. Ivy Tech Community College of Indiana*[35] to resolve the same issue of whether precedent should be overruled.[36] The Seventh Circuit stated that "bizarre results ensue from the current regime" where "Due Process and Equal Protection Clauses of the Constitution protect the right of same-sex couples to marry[.]"[37] Important to note is the Seventh Circuit's attention to the line of Supreme Court cases from *Romer v. Evans*[38] to *Obergefell* that clarify and expand gay rights.[39] It seems that the *Hively* court views such precedent to set the tone for what may be decided if the issue were to reach the Supreme Court.

Regardless of the Second Circuit's forthcoming decision in *Zarda*, to clarify the scope of sex discrimination under Title VII, it is likely that the Supreme Court will have to act as the final arbiter of this issue.

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Thank you to Judy Lu, a law clerk with Cullen and Dykman LLP, for her assistance with this article.

1. *Simonton v. Runyon*, 232 F.3d 33, 36-37 (2d Cir. 2000); 42 USC § 2000e-2.
2. *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017), *rehearing en banc granted* (2d. Cir. 2017).
3. *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 351-352 (7th Cir. 2017).
4. *Zarda*, 855 F.3d at 79-80.
5. *Id.* at 84.
6. *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000).
7. *Zarda*, 855 F.3d at 80, 82; *Id.* at 35.
8. *Zarda*, 855 F.3d at 82.
9. *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 340 (7th Cir. 2017).
10. *Simonton*, 232 F.3d at 34.
11. *Id.* at 35.
12. En Banc Brief of Amicus Curiae Equal Employment Opportunity Commission in Support of Plaintiffs/Appellants and in Favor of Reversal at 8, *Zarda v. Altitude Express*, No. 15-3775 (June 23, 2017).-
13. Brief for the United States as Amici Curiae Supporting Respondents at 1, *Zarda v. Altitude Express*, No. 15-3775 (July 26, 2017).
14. *EEOC Brief*, *supra* note 12, at 10.
15. *Baldwin v. Foxx*, EEOC DOC 0120133080, 2015 WL 4397641 (July 15, 2015).
16. *Baldwin v. Foxx*, EEOC DOC 0120133080, 2015 WL 4397641, at *5 (July 15, 2015).
17. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2604-2605 (2015).
18. *Id.*
19. Baldwin, 2015 WL 4397641, at *5-7.
20. *Id.* at 6-7.
21. *Id.* at 7, 10.
22. *Hively*, *v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 346-347 (7th Cir. 2017); *Id.* at 7-8.
23. *EEOC Brief*, *supra* note 12, at 10.
24. *EEOC Brief*, *supra* note 12, at 20.
25. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2604-2605 (2015).
26. *DOJ Brief*, *supra* note 13, at 2, 3.
27. *DOJ Brief*, *supra* note 13, at 3, 12, 13.
28. *DOJ Brief*, *supra* note 13, at 4.
29. *EEOC Brief*, *supra* note 12, at 10; *DOJ Brief*, *supra* note 13, at 18-19.
30. *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195 (2d Cir. 2017) (Katzmann, J., concurring).
31. *Id.* at 202.
32. *Philpott v. New York*, 252 F. Supp. 3d 313 (S.D.N.Y. 2017).
33. *Id.* at 317.
34. *Id.* at 316.
35. *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017).
36. *Id.* at 342-343, 350-351.
37. *Id.* at 342; *EEOC Brief*, *supra* note 12, at 22.
38. *Romer v. Evans*, 517 U.S. 620 (1996).
39. *Hively*, 853 F.3d at 349-350.

Pro Bono Attorney of the Month

Sandra Stines

BY GAIL BRODER KATZ

The Safe Center ("TSCLI") is proud to begin 2018 by highlighting the efforts of Sandra Stines. Ms. Stines has frequently said "If you need my help just let me know. I'm usually in Family Court anyway." And she means what she says. Since joining the Pro Bono Project in 2012 she has represented six TSCLI clients in Nassau County Family Court.

Ms. Stines graduated from the State University of New York at Plattsburgh with a B.S. in Child/Family Services and earned her J.D. at the City University of New York School of Law in 1998. Since 2005, Ms. Stines has maintained a solo family, matrimonial, and education law practice. As a member of the Second Department Attorney for Children Panel and 18-b Panel she represents children in custody, visitation, family offenses, abuse, neglect, juvenile delinquency, and PINS cases. As a member of the Part 36 Panel she represents children in Supreme Court custody cases. In addition, she provides representation at Committee on Special Education (CSE) proceedings.

Prior to opening her own practice, Sandra was a Senior Staff Attorney with Queens Legal Services in the HIV unit. There she was responsible for drafting wills, stand-by guardianships, and health care proxies. She provided direct representation in landlord-tenant, family, housing, estate, predatory lending and foreclosure cases. Her duties also included supervising the paralegal staff and conducting legal seminars for social service providers and clients.

Ms. Stines began her career as a Staff Attorney with Hudson County Legal Services, representing low-income clients in landlord-tenant cases including issues of rent stabilization and housing discrimination. Sandra has extensive experience representing the indigent and underserved members of the community. This is especially useful when representing Safe Center clients as she brings a true working knowledge of how to best represent clients in such particularly contentious and emotional proceedings.

Ms. Stines provides pro bono services because she has a special compassion for those who cannot afford the expense of litigation. Pro bono work gives her an opportunity to help others and put her skills to good use. As she so eloquently put it, "I've been fortunate enough to be given a skill and I want to share it with others."

Sandra's favorite part of volunteering is just being there for people who are going through a difficult period in their lives and making a difference for them. Family law is very emotionally charged and so she finds it extremely gratifying to be able to help those in dire predicaments. She strives to make the experience less negative for her clients and hopes to be a stable source of advocacy for them in a very adversarial and often hostile environment. Clients often thank her for taking the time to truly listen to their questions, worries and concerns about their particular situations. This is a true testament to her skills and kindness as clients often express their frustration because they don't feel they are 'being heard' by their other counsel.

When Ms. X, a TSCLI client, was contacted about this article and asked if she was willing to share a few words about her pro bono attorney, Sandra Stines, she readily agreed. Ms. X was thrilled that Ms. Stines was going to be the Nassau Lawyer Pro Bono Attorney of the Month. She feels that an attorney of her caliber and kindness should be honored for her pro bono representation of those who cannot afford to retain a lawyer, but desperately need one.

Mr. X was physically, emotionally and financially abusive to Ms. X, frequently in front of their son. Even after the divorce the abuse continued. She has had to deal with endless litigation in Supreme Court, Family Court and Criminal Court. Last year he filed yet another Petition in Family Court and received a Temporary Order of Protection ("TOP") against Ms. X. She was at her wit's end, but luckily Ms. Stines readily agreed to take her case. Sandra successfully got the Petition dismissed and the TOP vacated. However, she clearly let her know that she believes they will back in court and she will represent her, when and if the need does in fact arise. Ms. X was grateful for both Ms. Stines' forthrightness and the results she achieved.

Ms. X. went through many difficult years and had a few different attorneys throughout all the multiple cases with her ex-husband. She strongly believes that Ms. Stines was put into her life for a reason. She felt truly supported throughout the process, specifically by the way Sandra centered her and laid out her options clearly and succinctly. Ms. X. so appreciates the fact the Ms. Stines truly listens to her and her concerns, but is able take the emotions out and give it to her straight. She said that because Ms. Stines really understands domestic violence she knows how to best steer her clients to the right resolution.

In addition to her private practice and pro bono work with TSCLI, Sandra is very active in the Nassau County Bar Association ("NCBA") having served as a Director 2012-2015 and as a current member of the We Care Advisory Board. She also Chairs and/or is a member of numerous committees at the NCBA. In addition, Ms. Stines has frequently lectured, presented and/or planned CLE programs on a variety of Family Law related issues for the NCBA. She has published articles in the Nassau Lawyer on these topics. Besides educating others, she is always seeking to expand her knowledge and sharpen her skills and has taken many courses in pursuit of that goal.

Sandra Stines is the embodiment of what we all look for in an attorney. She is truly an asset to the lawyers and litigants in our community. Ms. X summed it up best when she said "Ms. Stines is a great individual and a great lawyer. She really gives back to her community which is so, so needed." And while Ms. X hopes not to need Ms. Stines' services in the future, she would be thrilled to be represented by her again. Ms. Stines has more than earned the honor of being named the first Pro Bono Attorney of the Month for 2018. Please join TSCLI in congratulating her and recognizing her invaluable contributions to those who need her most.

Gail Broder Katz, Esq. is the Pro Bono Project Coordinator for The Safe Center LI (formerly Nassau County Coalition Against Domestic Violence.) She can be contacted at GBroderKatz@tscli.org or 516-465-4700 for information about the Project and how you can help.

ALTERNATIVE DISPUTE RESOLUTION:

It's Time to Have That Conversation With Your Client

By: Donna-Marie Korth and William J.A. Sparks

As of January 1, 2018, two recent amendments to the Commercial Division Rules shall come into effect. These rules, amendments to Rules 10 and 11, are designed to encourage alternative dispute resolution of commercial cases. Specifically, the amendment to Rule 10, which is titled "Certification Relating to Alternative Dispute Resolution," states in relevant part that "counsel for each party shall also submit to the court at the preliminary conference and each subsequent compliance or status conference…a statement…certifying that counsel has discussed with the party the availability of alternative dispute resolution mechanisms…and stating whether the party is presently willing to pursue mediation at some point during the litigation." (emphasis added).

Clearly, the amendment to Rule 10 mandates that attorneys whose cases are or will be in the Commercial Division, discuss with their clients the availability/possibility of alternative dispute resolution mechanisms (collectively "ADR"). This amendment may have significant impact upon the commercial litigation landscape. No more is ADR something that "may" be discussed far into the offing in commercial cases, long after the discovery process, and possibly into the trial phase. Rather, ADR must now be discussed in the nascent phase of all commercial cases.

Because of the burgeoning costs of taking a commercial case from pleading to trial, it behooves counsel to enlighten their clients as to the possibilities of resolution -- long before they engage in protracted and costly litigation. This is all the more so with the exploding costs of electronic discovery.

The new rule amendment fosters communication between attorneys and clients about alternatives to the usual discovery and trial practice, and requires attorneys to certify that such discussion has been had. In the event that a party is willing to consider ADR at the preliminary conference stage, then the amendment to Rule 11 kicks in. Rule 11 entitled "Discovery" states in relevant part that the order will "include[] in all cases in which the parties certify their willingness to pursue mediation pursuant to Rule 10, provision of a specific date by which a mediator shall be identified by the parties for assistance with resolution of the action." (emphasis added)

Because the parties are free to select a mediator and to specify a date to identify same in the preliminary conference order, attorneys are encouraged to consider utilizing the Nassau County Bar Association ("NCBA") panels of Mediators and Arbitrators. In order to access the panels, one need only log into the NCBA website at www.nassaubar.org, and go to the "Alternative Dispute Resolution" tab. The user will be able to view a listing of the approved Mediators and Arbitrators on the panels. If interested, one can then propose use of the panel(s) in general and/or of specified panel members in particular in the preliminary conference order. Notably, the panel members have been screened by the NCBA Judiciary Committee, and have experience in particular practice areas as noted in the individual bios obtainable from the ADR Administrator. In addition, the fees of the NCBA ADR Panels are competitive, and may be found to be lower than many other private ADR providers offered elsewhere.

What is significant about the impact of the rule amendments is that it is no longer "taboo" for attorneys to discuss ADR with their clients at either the client intake or early stages of the case. Clearly, attorneys no longer have to be concerned that disclosure of the availability of ADR somehow telegraphs a weakness in the case to the client, or that she/she lacks confidence in the client's position, or is not willing or able to zealously represent them.

The amendments to Rules 10 and 11 comport with certain of the Federal Court Local Rules which similarly require counsel to discuss ADR with their clients and adversaries. *See, e.g.,* Southern District Local Rule 83.9 (by which the court can order or parties can consent to mediation or judicial settlement conference) and Eastern District New York Local Rules 83.7 and 83.8 (by which the Court can order or the parties can consent to arbitration or mediation). Further, Rule 3 of the Commercial Division Rules continues to permit the Court to direct, or counsel to seek, the appointment of a mediator at any stage of the litigation.

As Co-Chairs of the NCBA ADR Committee, we are very pleased that the amendments to Rules 10 and 11 will operate to implement the possibility of ADR early on in commercial cases; however, ADR should not be considered in commercial cases only. It is hoped that these rules will encourage wide-spread use of ADR, and will be similarly adopted and applied in other practice areas as well.

These ADR amendments to the Commercial Division Rules could ultimately save litigants significant time, money, and aggravation, and may help the already overburdened court system with its continued quest to administer swift justice.

Donna-Marie Korth and William J.A. Sparks are the Co-Chairs of the Alternative Dispute Resolution Committee of the Nassau County Bar Association.

Thank you for supporting the NCBA PRO BONO CAMPAIGN

The Nassau County Bar Association gratefully acknowledges the generosity of its members for supporting the valuable and essential work of the Mortgage Forclosure Project.

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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.

The American Bar Association has published "Cross Examination – A Primer for the Family Lawyer", authored by NCBA Past-President and WE CARE founder **Stephen Gassman**, a partner in Gassman Baiamonte Gruner, P.C.

Laurie B. Kazenoff and **Michelle E. Espey** of Moritt Hock & Hamroff LLP were keynote speakers at NCCPAP's Long Island Tax Symposium, speaking on "The United States Tax Court: What You Need to Know." Ms. Kazenoff was also a featured speaker at the Nassau Bar Association Tax Law Committee on "The United States Tax Court: Working with IRS Counsel" and spoke at the Nassau County Bar Association's "To Deduct or Not to Deduct: Income Tax Deductions and Deduction 'Mistakes.'"

Karen Tenenbaum, **Jennifer Ann Wynne**, **Lance E. Rothenberg** and

Marian C. Rice

Hana Boruchov of the Melville-based firm Tenenbaum Law, P.C. have been asked to present "Don't Lose Your Restaurant Because of Unpaid Taxes: What You Need to Know" at the International Restaurant and Foodservice Show of New York. Ms. Wynne and Ms. Boruchov also spoke at the NYSSCPA, Nassau Chapter 65th Annual All Day Tax and Estate Conference on NYS Tax Collections and Controversies.

Douglas M. Nadjari, a partner at Uniondale, NY-based Ruskin Moscou Falitschek P.C. practicing in the firm's Health Law Regulatory, White-Collar Crime Defense and Litigation Departments, has been elected Chairman of the Board of Directors of the Long Island-based hunger-relief organization Island Harvest Food Bank.

Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP is pleased to announce partner **Peter Skelos'** co-written article, "The Digital Footprint After Death?" was published in the *The Suffolk Lawyer* and the *New York Real Estate Journal* published **Lisa Casa's** article, "Are Agents, Brokers and Salespersons Independent Contractors?" **Andrea Tsoukalas** was honored by the *Long Island Press* with the Long Power Woman award and **Kristin McGrath Seibert** joined the Firm as an associate.

Deborah E. Kaminetzky is pleased to announce a change in the firm name to Kaminetzky Law & Mediation, P.C. focusing its practice on mediation, prenuptial and postnuptial agreements, estate planning and small business advising. Ms. Kaminetzky was recently made a member of the Long Island Chapter of NADP (National Association of Divorce Professionals) in the mediator category.

Sahn Ward Coschignano, PLLC has announced that **Joshua D. Brookstein**, an Associate with the firm, and **Tom McKevitt**, the firm's Counsel and member of the New York State Assembly, helped present a free public education seminar titled "The 411 on Local Government: Working through Zoning, Building, and Parking Issues" sponsored by the Nassau County Bar Association providing an overview of the purpose and process of applying for building permits and variances on Long Island.

Bond, Schoeneck & King PLLC is pleased to announce that three of their Garden City attorneys have been selected for inclusion in *The Best Lawyers in America® **2018:*** **Howard Miller** (labor and employment), **Mark Reinharz** (labor and employment) and Best Lawyers' 2018 Long Island Labor Law – Management "*Lawyer of the Year*" - **Terry O'Neil**. Mr. O'Neil's practice includes collective bargaining, arbitration, employment discrimination and litigation, class actions and wage and hour matters.

Gary A. Wagner and **Daniel F. Doman** of Wagner, Doman & Leto, P.C. is pleased to announce that the firm's name has been changed to Wagner, Doman, Leto & DiLeo, P.C.

Chris McDonough has become Special Counsel to the law firm of Foley Griffin LLP in Garden City. Mr. McDonough practices in the areas of attorney grievance defense, judicial conduct defense, law school discipline, bar exam issues, admission to practice and re-admission to practice. Mr. McDonough's firm, McDonough and McDonough LLP, will continue

See IN BRIEF, Page 25

NCBA Committee Meeting Calendar • Jan. 16 - Feb. 15

Questions? Contact Stephanie Pagano (516) 747-4070 spagano@nassaubar.org

Please Note: Committee Meetings are for NCBA Members. Dates and times are subject to change.

Check website for updated information: www.nassaubar.org

CRIMINAL COURT LAW & PROCEDURE
Tuesday, January 16
12:30 p.m.
Daniel Russo

GENERAL, SOLO AND SMALL LAW PRACTICE MANAGEMENT
Tuesday, January 16
12:30 p.m.
Maxine Broderick

NEW LAWYERS
Tuesday, January 16
6:30 p.m.
Jamie Rosen/John Stellakis

ATTORNEY/ACCOUNTANTS
Wednesday, January 17
12:30 p.m.
Alisa Geffner/Jennifer Koo

INTELLECTUAL PROPERTY
Wednesday, January 17
12: 30 p.m.
Ariel Ronneburger

EDUCATION LAW
Wednesday, January 17
12:30 p.m.
John Sheahan

CIVIL RIGHTS
Thursday, January 18
12:30 p.m.
Kristina Heuser

SURROGATES COURT ESTATES & TRUSTS
Thursday, January 18
5:30 p.m.
Sally Donahue/Dennis Wiley

VETERANS & MILITARY LAW
Tuesday, Januuary 23
12:30 p.m.
Gary Port

CORPORATION BANKING AND SECURITIES LAW
Wednesday, January 24
6:00 p.m.
Chandra Ortiz

ALTERNATIVE DISPUTE RESOLUTION
Friday, January 26
12:30 p.m.
Donna-Marie Korth/William J.A. Sparks

SENIOR ATTORNEY
Monday, January 29
12:30 p.m.
Joan L. Robert/George Frooks

ANIMAL LAW
Tuesday, January 30
6:00 p.m.
Marilyn Genoa/Matthew Miller

WOMEN IN THE LAW
Wednesday, January 31
12:30 p.m.
Christie Jacobson

HOSPITAL & HEALTH LAW
Thursday, February 1
8:30 a.m.
Douglas Nadjari

PUBLICATIONS
Thursday, February 1
12:45 p.m.
Rhoda Andors/Anthony Fasano

COMMUNITY RELATIONS & PUBLIC EDUCATION
Thursday, February 1
12:45 p.m.
Moriah Adamo

ETHICS
Monday, February 5
5:30 p.m.
Kevin Kearon

REAL PROPERTY LAW
Wednesday, February 7
12:30 p.m.
Patick Yu/Rebecca Langweber

SURROGATES COURT ESTATES & TRUSTS
Wednesday, February 7
5:30 p.m.
Sally Donahue/Dennis Wiley

LABOR & EMPLOYMENT
Tuesday, February 13
12:30 p.m.
Christopher Marlborough

CRIMINAL COURT LAW & PROCEDURE
Tuesday, February 13
12:30 p.m.
Daniel Russo

ASSOCIATION MEMBERSHIP
Wednesday, February 14
12:45 p.m.
Adam D'Antonio

ATTORNEY/ACCOUNTANTS
Thursday, February 15
12:30 p.m.
Alisa Geffner/Jennifer Koo

Nassau County Bar Association Opposed Enactment of Proposed Federal Tax Reform

The Nassau County Bar Association Board of Directors voted to oppose the tax reform bills passed by the House of Representatives and the US Senate at its December meeting. In doing so, the Association joined the entire bi-partisan Long Island Congressional Delegation and both United States Senators from New York.

New York is among the states with the highest tax burden. The House and Senate bills would eliminate the itemized deductions for state and local income tax. NCBA President Steven G. Leventhal noted that "the proposed tax reform legislation could have a significant adverse impact on the Long Island economy."

At the meeting, Tax Law Committee Co-Chair Brad Polizzano gave a brief overview of the legislation's impact on corporate and individual income tax rates, changes in standard deductions and how law firms could be affected.

Leventhal noted, "As the voice of the local legal community, it is imperative for our Bar Association to be an important part on the discussion of issues important to our members, the legal profession and the community," Leventhal said.

Committee Reports

District Court

Meeting Date: 11/28/17

Chairs: Jaime Ezratty

Michael J. Langer

Committee members engaged in a discussion about various pending legislative bills, including the proposal to require an enforcement officer involved in a tenant removal warrant execution to make arrangements for domestic pets, and the proposal to amend the General Obligations Law with respect to powers of attorney.

The committee will be inviting Susan Katz Richman, Esq., Chief of the District Court Law Department, to an upcoming meeting to discuss committee concerns on important topics, including issues that arise with proposed default judgments when an untimely Answer is filed, a request to add a "check box" to short form orders indicating that no further 72 hour notice is needed to avoid having the Court inadvertently decline such relief, and access to Law Department memoranda when an Order to Show Cause, presented for signature, is rejected.

Tax Law

Meeting Date: 11/30/17

Co-Chairs: Michelle Espey, Brad Polizzano

The committee sponsored a Dean's Hour program with the Nassau Academy of Law entitled "Discovery and Dollars – Using Tax Returns as a Litigation Tool." Panelists Suzanne LoBiondo, CPA, a tax preparer, and Nannette Watts, CPA/ABV/CFF, a forensic accountant, highlighted information that can be gleaned from personal and business tax returns, and provided valuable insight into the process of reviewing tax returns during discovery or as part of any audit or other legal matter.

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

IN BRIEF ...

Continued From Page 24

to provide risk management and consulting to lawyers and law firms on all matters relating to the practice of law, as well as providing ethics opinions and expert witness testimony.

Ronald Fatoullah of Ronald Fatoullah & Associates led a long term care/Medicaid planning workshop at the New York Public Library in New York City for seniors and their families. The firm's managing attorney, **Elizabeth Forspan** presented to the Mashadi Youth Committee in Great Neck about the importance of estate planning for parents of young children and children with disabilities.

Catalano Gallardo & Petropoulos, LLP is pleased to announce that **Christopher T. Rogers** has been named a partner of the Firm. Mr. Rogers practices in the areas medical malpractice, nursing home liability, products liability, church and charitable institution liability, legal malpractice, construction law, premises liability, and complex personal injury litigation at the trial and appellate level.

PLEASE E-MAIL YOUR SUBMISSIONS TO: nassaulawyer@nassaubar.org with subject line: IN BRIEF

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

For Information on
LAWYERS' AA MEETING
Call the NCBA
Lawyer Assistance Program
Director
516-512-2618

ASSOCIATION NEWS

(l-r) John Christopher, Michael DiFalco, John Stellakis and Terrence Tarver were joined by members of the United States Marine Corps at the Annual Holiday Party of the Nassau County Bar Association New Lawyers Committee and the New York State Bar Association Young Lawyers Section, 10th District. This event is held for the benefit of the Marines Toys for Tots Foundation. Thank you to all who attended and supported this worthy cause.

WAGE LAW ...

Continued From Page 11

prevailing wage provisions, ranging from a misdemeanor offense to a felony offense depending upon the amount underpaid.[13] A construction firm convicted of two prevailing wage violations within five years may be required to disgorge profits and may be barred from collecting monies due and owing on its contract or subcontract.[14] Moreover, the statute empowers the fiscal officer, after a hearing on an alleged violation, to impose a civil penalty of up to 25% of the amount found to be due.[15] Finally, a contractor that fails to pay prevailing wages may be precluded on public policy grounds from enforcing the contract.[16]

As if the possibility of criminal prosecution, fines, and forfeiture of contract monies were not daunting enough, contractors and subcontractors may also be subject to liability directly to employees for failing to pay prevailing wages. The NYLL allows employees to bring action against the contractor, subcontractor, and the surety on the project's payment bond for unpaid wages, supplements, and interest,[17] although courts have consistently held that unpaid or underpaid employees on public works projects exhaust their administrative remedies by applying to the fiscal officer in charge of the project for a determination that wages are due before resorting to judicial remedies.[18] On the other hand, employees on public works projects have been acknowledged to be third-party beneficiaries of the contracts between their employers and municipalities, so they may still bring a common law cause of action for breach of contract, regardless of their exhaustion of administrative remedies, provided they are pleaded in adequate detail.[19]

It seems clear, both from the NYLL itself and the body of case law surrounding prevailing wage violations, that New York public policy favors holding contractors to a high standard of prevailing wage compliance. All but the most inadvertent violations are deemed willful, and the consequences of such willful violations are severe. Judging from the frequency of violations occurring in the case law, compliance with the prevailing wage law has presented consternation to construction firms, but ultimately the choice of whether to take on public improvement projects and incur those requirements may be a business consideration that contractors must decide before bidding on public work projects.

It seems clear, both from the NYLL itself and the body of case law surrounding prevailing wage violations, that New York public policy favors holding contractors to a high standard of prevailing wage compliance.

John Caravella is a construction attorney and formerly practicing project architect. The Law Office of John Caravella, P.C., represents architects, engineers, contractors, subcontractors, and owners in contract preparation, litigation, and arbitration in New York and Florida. He is an arbitrator for the American Arbitration Association Construction Industry Panel. He can be reached by email at John@LIConstructionLaw.com or at (516) 462-7051.

1. NYLL § 220(3).
2. 40 USC § 3142.
3. NYLL § 220(5)(a).
4. NYLL §§ 220(3)(c) and (5)(e).
5. *County of Suffolk v. Coram Equities, LLC*, 31 A.D.3d 687 (2d Dept. 2006).
6. *Id.*
7. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 95 A.D.3d 297 (1st Dept. 2012).
8. *Id.*
9. *Matter of Central City Roofing Co., Inc. v. Musolino*, 136 A.D.3d 1186 (3d Dept. 2016).
10. *Id.*
11. *Id.*
12. *Matter of Consolidated Masonry Contrs. v. Angello*, 2 A.D.3d 997 (3d Dept. 2003).
13. NYLL § 220(3)(d)(i).
14. NYLL § 220(3)(d)(iii).
15. NYLL § 220(8).
16. *Alpha Interiors, Inc. v. Tulger Constr. Corp.*, 101 A.D.3d 660 (2d Dept. 2012).
17. NYLL § 220-g.
18. *See, e.g., Brandy v. Canea Mare. Contr., Inc.*, 34 A.D.3d 512 (2d Dept. 2006).
19. *Maldonado v. Olympia Mech. Piping & Heating Corp.*, 8 A.D.3d 348 (2d Dept. 2004).

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