Nassau Lawyer

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NCBA COMMITTEE MEETING CALENDAR
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SAVE THE DATES

WE CARE SENIOR CITIZEN'S THANKSGIVING LUNCHEON
Thursday, November 23, 2017
11:00 a.m.-1:00 p.m.
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NCBA HOLIDAY CELEBRATION
Thursday, December 7, 2017
6:00 p.m. at Domus
No Charge for this Event
Members and their families invited
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WE CARE
Gingerbread University
Saturday, December 9, 2017
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NCBA Member Benefit - I.D. Card Photo
Obtain your photo for Secure Pass Court ID cards at NCBA Tech Center

Only For New Applicants
Cost $10 • December 12, 13 & 14, 2017
9 a.m.- 4 p.m.

Upcoming Publications Committee Meetings
Thursday, Dec. 14, 2017 12:45 p.m. at Domus
Thursday, Jan. 4, 2018 12:45 p.m. at Domus

OCTOBER 10, 2017

Past Presidents Room Dedicated in Honor of Frank and Marie Santagata

The Frank J. and Marie G. Santagata Past Presidents Room was dedicated on October 10, 2017. (l-r) Maureen Dougherty, Hon. Marie G. Santagata and NCBA President Steven G. Leventhal. Photos by Hector Herrera

"Thank you for the honor of naming this room after us, but it really isn't just about the two of us. It's about this building, the traditional Toast to Domus and everything for which the Bar Association stands. Our building is a key part of NCBA's history."
Hon. Marie G. Santagata

By Valerie Zurblis

The Nassau County Bar Association would not be the outstanding exemplar for the legal profession were it not for the vision and efforts of NCBA's Past Presidents. Every attorney who has held the Bar's highest office, from Founding President Augustus N. Weller in 1899 through the current President, Steven G. Leventhal, has inspired members to strive to be the best.

To honor these men and women and acknowledge their incredible contributions to the Bar's legacy, the Nassau County Bar Association recently unveiled the Frank J. & Marie G. Santagata Past Presidents Room. This new meeting space is now available for all members to meet and work together to continue to advance the mission of the Bar Association and to serve members, the legal profession and the public.

Due to the generosity of Hon. Marie G. Santagata, the room was named in honor of Frank J. Santagata, who served as NCBA President from 1983-1984, and Judge Santagata. At the dedication ceremony on October 10, NCBA President Leventhal noted, "Translated from Italian, the name Santagata means, of course, Saint Agatha, one of the most venerated of Christian martyrs. But here at Domus, the name Santagata has another meaning. Here it is synonymous with professionalism, dignity

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(l-r) Maureen Dougherty, President Leventhal and Marie Santagata cut the ribbon to officially dedicate the new Presidents Room.

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Criminal Law

Supreme Court Casts Forfeiture Law Expectations into Doubt

The U.S. Supreme Court is setting its sights toward federal forfeiture law, and cracks are beginning to appear where expectations had been settled. A Supreme Court decision, a petition for certiorari, a concession from the government, and a statement from Justice Clarence Thomas signal that fundamental issues of forfeiture law may be re-examined.

Kevin P. Mulry

Criminal prosecutors in the Second Circuit and throughout the country have typically sought forfeiture money judgments against all defendants for the proceeds obtained by all members of a criminal conspiracy. Thus, minor players in a conspiracy with significant assets could find themselves jointly and severally liable for a forfeiture money judgment well in excess of the proceeds they actually received from their crime. Courts had held these defendants to be jointly and severally liable for all proceeds of the criminal conspiracy.[1]

Honeycutt v. United States

The Supreme Court recently took this sweeping tool away from the government in *Honeycutt v. United States*.[2] In *Honeycutt*, the Court held that the drug forfeiture statute, 21 U.S.C. § 853, only permits a forfeiture money judgment for property a defendant actually acquired as part of the crime, not all proceeds of the conspiracy.

In *Honeycutt*, defendant Terry Honeycutt managed sales and inventory at his brother's hardware store. The brothers were prosecuted for conspiring to sell iodine with the knowledge that it was being used to manufacture methamphetamine. The government sought a forfeiture money judgment of $269,751.98, constituting the hardware store's profits. The defendant's brother pled guilty and agreed to forfeit $200,000. The government sought and obtained a forfeiture money judgment against defendant Terry Honeycutt for $69,751.98, even though he did not personally benefit from the hardware store's profits. The Sixth Circuit held that the conspiring brothers were "jointly and severally liable for any proceeds of the conspiracy," joining several circuits in an expansive view of criminal forfeiture.[3]

Justice Sotomayor's opinion in *Honeycutt* strictly followed the language of 21 U.S.C. § 853, which mandates forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of" certain crimes. The Court concluded that the provisions of the statute limit forfeiture to property the defendant himself actually acquired, not property obtained by other conspirators. The Court held that the plain text of the statute and the limitation of forfeiture to property acquired or used by the defendant "foreclose joint and several liability for co-conspirators."[4]

Honeycutt significantly curtails the government's forfeiture power, limiting its reach to proceeds acquired by a defendant, as opposed to all criminal proceeds. The Supreme Court's strict statutory analysis in *Honeycutt* may also guide the decision in a case the Court could take up this term.

Lo v. United States

The issue in a pending petition for certiorari, *Lo v. United States*, is whether the government may seek a criminal forfeiture money judgment at all, an issue not raised in *Honeycutt*. Henry Lo pled guilty to mail and wire fraud and admitted to fraudulently obtaining over $2.2 million. The trial court ordered a forfeiture money judgment of $2,232,894.[5]

The *Lo* Petitioner raises a simple argument: courts cannot impose criminal punishment in the absence of statutory authority, and there is no statutory authority for a criminal forfeiture money judgment. In opposing certiorari, the government frames the petitioner's argument correctly, that courts are statutorily limited to forfeiting specific assets and cannot impose forfeiture money judgments. The government does not, however, cite to specific statutory language allowing for the imposition of a forfeiture money judgment. Instead, it argues that the courts of appeal have repeatedly upheld forfeiture money judgments.[6] In addition, it points to the statutory provision permitting forfeiture of substitute assets where directly forfeited assets are unavailable. The government asserts that the substitute assets

See FORFEITURE, Page 8

A LAUGHINGSTOCK?

"We also have to come up with punishment that's far quicker and far greater than the punishment these animals are getting right now. They'll go through court for years. And at the end, they'll be -- who knows what happens. We need quick justice and we need strong justice -- much quicker and much stronger than we have right now. Because what we have right now is a joke and it's a laughingstock. And no wonder so much of this stuff takes place."

– Donald Trump, reacting to the October 31, NYC terror incident.

FROM THE PRESIDENT

Steven G. Leventhal

"The Part I took in Defence of Cptn. Preston and the Soldiers, procured me Anxiety, and Obloquy enough. It was, however, one of the most gallant, generous, manly and disinterested Actions of my whole Life, and one of the best Pieces of Service I ever rendered my Country. Judgment of Death against those Soldiers would have been as foul a Stain upon this Country as the Executions of the Quakers or Witches, anciently. As the Evidence was, the Verdict of the Jury was exactly right."

–John Adams, reflecting on the Boston Massacre trial.

Image courtesy Library of Congress

There is a great and desperate need for improvement in our system of justice. Disparities of wealth and race, overwhelming caseloads, and crowded prisons, all demand vigilant efforts at reform. But overall, our justice system is the envy of the world and a crowning achievement of western civilization. As Churchill said of democracy, it is the worst system in the world – except for all the others.

On March 5, 1770, a group of British soldiers fired into a mob, killing five civilians, in what came to be known as the Boston Massacre. Three weeks later, the soldiers and four civilians were indicted. The incident was a flashpoint for anti-British propaganda, including a widely distributed engraving by Paul Revere depicting the commanding officer, Captain Preston, ordering his men to fire. The soldiers could not find a lawyer willing to undertake their defense, until a thirty five year old patriot, future founding father and eventual second President of the United States, John Adams, accepted the case. In doing so, Adams risked his career and the safety of himself and his family.

The trials were delayed to allow public sentiment to cool. Seven months later, the trial of Captain Preston began. It lasted six days, a very long time for a murder trial of that era. Captain Preston's defense was that he did not order his men to shoot. Twenty three defense witnesses testified that the soldiers were intimidated and provoked by the crowd. It was uncertain who shouted the word "fire". The jury was sequestered, and Preston was acquitted upon a finding of "reasonable doubt", an early, if not the earliest, application of that standard of proof.

The other soldiers were tried a month later. Adams asserted that they fired in self-defense and not, as the prosecution argued, in revenge for months of abuse and harassment. Six soldiers were acquitted, and four were convicted of the lesser charge of manslaughter, thereby escaping the death penalty. Another month later, the civilian defendants were acquitted after prosecution witnesses were found to have perjured themselves.

Oliver Wendell Holmes famously said that the life of the law is not logic, it is experience. Experience warns against fashioning an expedited procedure for the prosecution of defendants that we believe are guilty.

AS THE HOLIDAYS APPROACH

"At this festive season of the year, Mr. Scrooge," said the gentleman, taking up a pen, "it is more than usually desirable that we should make some slight provision for the Poor and destitute, who suffer greatly at the present time. Many thousands are in want of common necessaries; hundreds of thousands are in want of common comforts, sir."

"Are there no prisons?" asked Scrooge. "Plenty of prisons," said the gentleman, laying down the pen again. "And the Union workhouses?" demanded Scrooge. "Are they still in operation?" "They are. Still," returned the gentleman, "I wish I could say they were not." "The Treadmill and the Poor Law are in full vigour, then?" said Scrooge. "Both very busy, sir." "Oh! I was afraid, from what you said at first, that something had occurred to stop them in their useful course," said Scrooge. "I'm very glad to hear it."

– Dickens, A Christmas Carol, 1843.

As the holidays approach, our thoughts turn to the less fortunate among us. In considering your own charitable giving, I hope that you will remember WE CARE. Throughout the year, our members contribute their time and resources to raise funds and award grants to local charities that bring relief to needy members of our community. Of course, your donations will be gratefully accepted. But so will your participation at heartwarming events such as our Thanksgiving luncheon for seniors who would otherwise do without, and our holiday festival for less privileged children. For a special holiday treat, bring your children or grandchildren to Gingerbread University at which they can add candy decorations to their own gingerbread houses.

NOS IMPORTA – WE CARE

In our continuing support of hurricane relief efforts on the devastated island of Puerto Rico, WE CARE has donated nine gift cards, each in the amount of $500, to Puerto Rican law students studying at Touro Law School while the island law schools are closed, so that they may purchase winter coats and other personal necessities.

The Nassau County Bar Association has contributed $1,000 toward the purchase of a generator by the island bar association, El Colegio de Abogados de Puerto Rico. On November 29, the Nassau Academy of Law will present a CLE program, to share the knowledge that we gained in our recovery from Super Storm Sandy, and to help train island lawyers in the representation of storm victims. We are collecting nonperishable food items and packaged dry goods for delivery to island communities in need.

Best wishes to all for a happy and healthy Thanksgiving holiday.

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Criminal Law

The Student Defendant

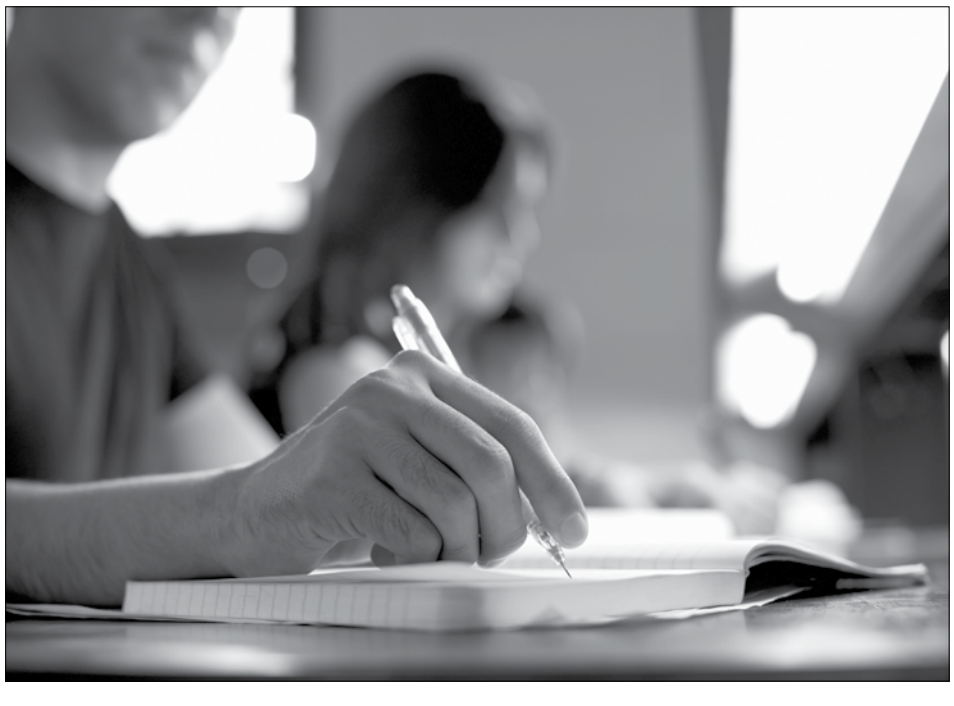
Just days after a Bronx high school student was stabbed to death in class on September 27, 2017, a 13-year-old boy brought a gun to his Bronx middle school.[1] Fortunately, the gun was unloaded and school safety agents recovered it from the boy's backpack. Police responded, secured the gun, and arrested the student.

Joseph Lilly

Nicole Donatich

Sadly, these incidents highlight the growing presence of weapons in our schools. From July 1 through September 30, 2017, police recovered 328 weapons at New York City Public Schools, a 48% increase from last year during the same time.[2]

As demonstrated by the story above, discovery of a weapon (or drugs) in school can quickly turn a student into *a student defendant*. It is well settled that "while children assuredly do not shed their constitutional rights … at the schoolhouse gate, … the nature of those rights is what is appropriate for children in school."[3] Thus, searches in school present a unique constitutional analysis, particularly when law enforcement is involved or present during the search.



The Reasonable Suspicion Standard for School Searches

The legal standard governing student searches conducted by school officials was established by the United States Supreme Court in *New Jersey v. TLO*.[4] The Court held that students are entitled to the protections of the Fourth Amendment against unreasonable searches, even when the search is conducted in the school setting by school officials. However, the Court also recognized that the unique nature of the school setting does not require strict adherence to the probable cause requirement normally associated with criminal defendants. Proceeding from this premise, the Court held that "the legality of the search of a student should depend simply on the reasonableness, under all the circumstances, of the search."[5]

In *Matter of Gregory M.*, the New York State Court of Appeals held that the reasonable suspicion standard established in *TLO* was also appropriate under the State Constitution.[6] Before *TLO*, the Court of Appeals had long recognized that students were protected from unreasonable searches.

In *People v. Scott* the court observed that because the unique role that teachers play, "they are, to a degree, like parents."[7] However, the court also noted that "[i]n exercising their authority and performing their duties, public school teachers act not as private individuals but perforce as agents of the State." As such, the court went on to hold that, "children may not be equated with adults for all constitutional purposes," but they are still protected from "random causeless searches."

The Court of Appeals concluded that evidence obtained by a school official in violation of the student's right to be protected from unreasonable searches, can be a basis for suppressing such evidence in a subsequent criminal prosecution. Specifically, the court noted that "when the drastic consequences flowing from State action occur, then the behavior of agents of the State may be circumscribed by similar limitations which cir-

See STUDENT, Page 21

Photo by Hector Herrera

NCBA 85th Annual Holiday Celebration

Celebrate the Season at Domus!

There are many events at Domus throughout the year, but the Holiday Celebration is truly a family occasion. Rejoice in the simple pleasure of sharing a fun evening with friends and colleagues. Members are encouraged to bring their children and grandchildren to hear seasonal music, listen to the spirited "Wassail" storytelling told by the President-Elect and enjoy the holiday fare by The Cloak Room. Plus, goody bags for the kids!

The Holiday Celebration will be held on Thursday evening, December 7th at 6:00 p.m. There is NO CHARGE to attend the event, but pre-registration is requested.

We ask that each guest or family bring a new, unwrapped toy to the event to be distributed by WE CARE to the less fortunate children in Nassau County.

Come celebrate with us!

Watch for your invitation in the mail. To register for the Holiday Celebration or for more information please contact the Special Events office at (516)747-4070 x226 or events@nassaubar.org.

The Nassau County Bar Association
cordially invites its members and their families
to capture the spirit of the holiday season at the

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Criminal Law

Challenging the Use of Portable Breath Test Results as Prima Facie Proof of Intoxication

In the typical prosecution for driving while intoxicated, the results of a standard chemical breath test are *prima facie* evidence that the defendant had a blood alcohol content above the statutory threshold. However, where the court has suppressed the chemical test reading, the prosecution may seek to admit the reading of portable breath test (PBT), which is often administered as part of the standard field sobriety testing, as *prima facie* evidence of intoxication or impairment. Despite the weight of appellate authority to the contrary, some trial courts have admitted PBT readings in support of the prosecution's *prima facie* case. This article will discuss the arguments defense counsel should consider when confronted with an application to admit PBT readings as *prima facie* evidence of intoxication or impairment.

Peter B. Skelos and Robert J. Brunetti

The Controlling Authority

As a threshold, it is important to note that all trial courts in New York are bound by the decisions of the Appellate Division and the Court of Appeals.[1] The controlling appellate authority, as articulated in *People v. Kulk*, *People v. Thomas*, and related cases, is that the results of portable breath tests may be used to establish probable cause, but are inadmissible at trial.[2] In the absence of relevant authority from the Court of Appeals or the Appellate Division department in which the trial court hearing the application sits, the trial court and the Appellate Term are bound to adhere to judicial precedent established "by the Appellate Division of another department until the Court of Appeals" or the relevant Appellate Division "produces a contrary rule."[3]

Misapplication in Recent Cases

Recent court holdings that portable breath test results are admissible as part of the prosecution's *prima facie* case, such as *People v. Brockington* and *People v. Turner*, on which *People v. Brockington* erroneously relies, do not reflect a correct application of the controlling authority of judicial hierarchy.[4]

The court in *People v. Brockington* determined that VTL § 1195 commands the result that a field breath test be admitted into evidence.[5] The *Brockington* court failed to recognize that the VTL distinguishes a field breath test (a/k/a "portable breath test") from a chemical breath test. Section 1195 should be read together with VTL §1194(2)(a). Both sections make reference to "*blood-alcohol content*," whereas § 1194(1)(b) provides that a *breath test* administered under that section is used to make a preliminary determination whether alcohol has been *consumed*. Because the language of § 1195 tracks the section of the VTL that references chemical breath tests (§1194(2)(a)) and not the section that authorizes field breath tests (§ 1194(1)(b)), it is clear that VTL § 1195 was not meant to apply to the field breath tests authorized by VTL § 1194(1)(b). The *Brockington* court's determination that VTL § 1195 does not distinguish "among portable breath tests, the infra-red stationary breath tests that take place in the police precinct, or any other test" and therefore, PBT test results may be admitted pursuant to VTL § 1195 as long as the test was properly administered,[6] is a misreading of the statute.

The Field Test vs. the Chemical Breath Test

Notably, unlike the chemical tests set forth in VTL § 1194(2), the VTL § 1194(1)(b) "*Field testing"* is not described as a *chemical* breath test. Because § 1194(1)(b) provides that if the results of the *breath test* indicate that alcohol has been *consumed* by the motorist, then the officer may request the motorist to submit to a *chemical breath test* (VTL § 1194(2)(a)(2)), it is evident that the legislature meant for the *field* breath test to be used only as an investigative tool to determine whether further inquiry or arrest is warranted. If the *field* breath test was intended to be an evidentiary test to be used as part of the prosecution's case in chief, there would be no purpose for the chemical tests authorized under VTL §1194(2)(a). The purpose of the *field breath test* is merely to determine whether the motorist has *consumed* alcohol, not to provide evidentiary proof of the *quantitative* amount consumed.

VTL § 1194(2), reiterates that the purpose of a *breath test* is to determine whether alcohol has been *consumed*,[7] whereas the *chemical breath test* is to be utilized to *determine blood-alcohol content*.[8] This subdivision repeats the instruction that the *breath test* may serve as a predicate for the *chemical breath test*, further indicating the evidentiary distinction between a *field breath test* and a *chemical breath test*.[9]

Due Process Implications

Section 1194(2)(b)(1)(C) similarly distinguishes between *chemical* breath tests and *field* breath tests in its command that before a police officer may administer a *chemical* breath test, the operator of the motor vehicle must be advised of the consequences of a refusal to submit to the test and the consequences if the chemical test reading is in excess of the statutory limit. There is no such notice required in advance of *field* testing. Thus, there are due process implications if the *field* breath test is utilized as evidence to convict, in the absence of notice that the consequences if the results of the PBT are in excess of the statutory limit, or the sanctions that may be imposed in the event the operator refuses to cooperate with the police officer's request to submit to a PBT.[10, 11] Without the proper advisement, a motorist does not have the same informed opportunity to decide whether to refuse to submit to a PBT.[12]

The Conforming Products List

The distinction between *field* breath tests used for screening purposes and *chemical* breath tests used as evidentiary proof is also employed in the context of federal driving while intoxicated regulations,[13] and the D.O.T.'s transportation workplace drug and alcohol testing program().[14] This is significant because the D.O.T. has promulgated the Conforming Products List, which has been effectively adopted by the New York State Department of Health (D.O.H.) to inform the selection of devices for approval under VTL § 1194(4)(c). The D.O.H. is required to "issue and file rules and regulations approving satisfactory techniques or methods of conducting chemical analyses of a person's blood, urine, breath or saliva." [15]

Some courts have relied on the inclusion of PBTs on the Conforming Products List to establish their reliability.[16] This reliance is misplaced, because the Conforming Products List includes both alcohol screening devices, which, like field breath tests, determine only "whether an employee *may* have a prohibited concentration of alcohol in a breath or saliva specimen," *and* alcohol confirmation devices, which, like chemical breath tests, provide "*quantitative data about the alcohol concentration*".[17] In order to qualify as a confirmatory devices to provide quantitative evidentiary proof of intoxication the testing device must meet six additional testing standards beyond those required of a screening device.[18] Many PBTs do not meet all of the standards for use in confirmatory alcohol testing, failing the first three of the six enumerated standards.[19] Accordingly, it is important to check the list to determine whether the device in question meets the more stringent standards.

The D.O.T. does not permit the use of the results from such portable devices as evidentiary proof beyond screening purposes notwithstanding their presence on the Conforming Products List. If the PBT device used on your defendant is not authorized to perform a federal confirmatory test, which is the D.O.T.'s blood-alcohol content test analogous to the VTL §1194(2)(a) chemical breath test, mere reference to the Conforming Products List cannot be a basis for finding that the PBT device is generally accepted as a reliable device to quantitatively prove intoxication.

Appellate courts have declined to consider the inclusion of the Alco-Sensor FST on the Conforming Products List as a sufficient basis on which to establish its reliability for determining blood

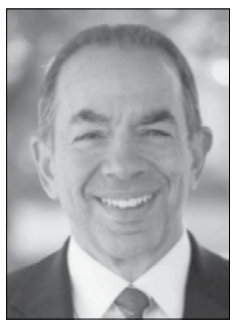
See INTOXICATION, Page 21

Criminal Law

Lost, Found and Stolen – The Nexus

An infrequently noted section of the Personal Property Law may impact the question of whether a "finder" of "lost" property can subsequently be prosecuted for "larceny" of the property under Penal Law.

The larceny offenses under Penal Law Article 155 range from petit larceny, a class A misdemeanor (Penal Law §155.25), to grand larceny in the first degree, a class B felony (Penal Law §155.42).



Kenneth L. Gartner

Penal Law § 155.05(1) provides that "[a] person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains, or withholds such property from an owner therefor."

Penal Law §155.05(2)(b) provides that "larceny can be committed by the finder of lost property." Larceny "includes a wrongful taking, obtaining, or withholding of another's property, with the intent prescribed in subdivision one of this section," if the person "exercises control over property of another which he knows to have been lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or the nature or amount of the property, without taking reasonable measures to return such property to the owner."

Personal Property Law § 252 provides that a finder of lost property has ten days within which to return the property to the owner of the property, to the police, or to "the person in possession of the premises where the property or instrument was found." If the person fails to return the property within the allotted time, they may be guilty not of larceny under Penal Law Article 155, but a separate and independent, unclassified criminal misdemeanor, under Personal Property Law § 252(3), carrying a penalty of up to six months imprisonment.

To establish a criminal violation of Personal Property Law § 252, it is not necessary to establish the intent to "deprive" another, or to "appropriate" the property, but merely a "refusal" to comply with § 252's "return" requirement, or "willful neglect" to comply.

The interplay between these two statutes in cases where the property was initially lost may impact the sustainability of a larceny prosecution.

Does Personal Property Law § 252 effectively define what "reasonable measures" are under Penal Law §155.05(2)(b), at least in terms of the temporal framework? Is an arrest and prosecution for larceny, where the property allegedly stolen was initially lost, but ten days have not elapsed, "in conflict with NY Personal Property Law § 252 which provides for a ten-day period to turn in to proper authorities any found property?"

The question was answered "yes," by *People v. Arroyo*,[1] (dismissed, in the interests of justice, a larceny charge brought against a defendant for taking into his possession, and not immediately turning over to police, an unattended bag containing electronic gear which had been intentionally left on a subway platform as part of a "sting" operation). *Accord, People v. Gonzalez*[2] (dismissing, in the interests of justice, a larceny charge brought against the defendant for taking into his possession, and not immediately turning over to police, a bag containing a laptop from the sidewalk, where it was similarly left as part of a "sting" operation. Because both of these cases resulted, though, in dismissals "in the interests of justice," rather than on the merits, the issue was not actually directly addressed and resolved other than in *dicta*.

In *People v. Washington*,[3] the Appellate Term reversed a conviction for larceny. The Appellate Term rejected the argument that the property was only returned after a request, and that the defendant had evinced a desire to permanently deprive the complaining witness of the property. The Appellate Term held:

Since the wallet was either lost or misplaced by the owner, defendant's momentary taking possession thereof did not constitute a larceny (see, Personal Property Law § 252). Moreover, when asked by complainant for the wallet, defendant promptly presented it to him without objection or denial. Thus, no crime had been committed.

In *People v. Moore*,[4] the Appellate Division found that the People's evidence at trial that a complaining witness's wallet disappeared while he was on a subway train, and was recovered from the defendant by two police officers later that evening, was insufficient to support a conviction for larceny, and reversed it. The Appellate Division held that calling "intent" "a question of credibility" cannot excuse the absence of evidence where "[t]he only circumstantial evidence of the defendant's guilt was his possession of the [lost object] at the time of his arrest," where there is a "reasonable innocent explanation," and where "the gaps in the People's evidence can only, impermissibly, be filled by conjecture." Similar results are seen in Appellate Division decisions in *People v. Keelan*[5] (complainant did not know that her wallet was gone until hours after she had last used it; evidence that defendant was found in possession of complainant's wallet insufficient; larceny conviction reversed); and *People v. McFarland*[6] (complainant left her purse behind in a shopping cart; defendant finder's apprehension while in possession of it, in sufficient; conviction reversed).

These Appellate Division decisions do not necessarily amount to an acceptance of the interpretation that there can be no Penal Law larceny prosecution unless the ten-day period of Personal Property Law §252 has been exceeded. However, they do indicate that Personal Property Law §252 – by providing a ten-day window for finders to return property before a criminal penalty will attach - establishes a presumption, which the People will be required to overcome – at both the pleading and proof stages. The presumption is that unless the ten-day period for return afforded by Personal Property Law §252 has been transgressed, to sustain a Penal Law prosecution or conviction for larceny with respect to initially lost property, there must be sufficient evidence beyond a reasonable doubt to support an intent by the finder to permanently deprive the owner of, or appropriate, the lost property (*see,* Penal Law §§155.00[3] and [4], respectively). A "reasonable innocent explanation" may be all that is necessary to overcome this demonstration.

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1. 12 Misc.3d 1003, 1005 (Criminal Ct., Kings Co. 2006).
2. 2011 WL 6413863 (Criminal Ct., N.Y. Co. 2011).
3. 2001 WL 1807737, at *1 (App. Term, 2d Dept. 2001).
4. 291 A.D. 336 (1st Dept. 2002).
5. 189 A.D.2d 625 (1st Dept. 1993).
6. 181 A.D.2d 1007 (1st Dept. 1992).

FORFEITURE ...

Continued From Page 3

provision necessarily contemplates the entry of a forfeiture money judgment establishing the value of the proceeds of criminal activity.[7]

The government's brief in opposition to a grant of certiorari makes an important concession: that enforcement of a forfeiture money judgment is limited by the provisions of the applicable forfeiture statutes. The government will no longer assert, as it has at times, that a forfeiture money judgment can be satisfied from any assets of the defendant, under federal debt collection statutes or other remedies. Instead, assuming a forfeiture money judgment is available, it may only be enforced by forfeiting specific property that is subject to forfeiture, either directly or under the substitute asset provision.[8]

While this is a step back for the government, it may present only a procedural rather than a substantive hurdle. If a forfeiture money judgment can be imposed, the government will likely be able to satisfy the requirements of the substitute asset provision conditions and forfeit non-tainted assets up to the value of the forfeiture money judgment.

If the Justices accept certiorari in *Lo*, they are likely to examine the statutory basis for a criminal forfeiture money judgment very closely, following the rationale in *Honeycutt*. In any event, whether or not the Court grants the petition, at least one Justice seems eager to give forfeiture law a critical analysis.

Leonard v. Texas

In March, the Supreme Court denied certiorari in *Leonard v. Texas*. However, Justice Clarence Thomas issued a separate Statement. His Statement framed the issue before the Court as a fundamental one: "whether modern civil-forfeiture statutes can be squared with the Due Process Clause and our Nation's history?"[9]

James Leonard had been stopped for a traffic infraction on a known drug corridor. Police found a safe in the truck, and heard conflicting stories from Leonard and his passenger. They obtained a search warrant and retrieved $201,100 from the safe. Texas initiated a civil forfeiture action alleging the money was substantially connected to narcotics sales. Texas prevailed at the trial level and on appeal. The Texas courts rejected petitioner Lisa Leonard's innocent owner defense, that the cash was from a home sale in Pennsylvania.

Justice Thomas's Statement began with the proposition that modern civil forfeiture statutes are designed to punish the owner of property used for criminal purposes. He noted that civil forfeiture proceedings: 1) allow the government to seize property without pre-deprivation process; 2) may or may not include a defense for innocent owners; and 3) often lack procedural protections such as a jury trial and a heightened standard of proof. He said forfeiture is "widespread and highly profitable," and the government's ability to keep forfeited funds provides a strong incentive to bring such claims. Forfeiture "frequently targets the poor and other groups least able to defend their interests in forfeiture proceedings."[10]

Early statutes at the founding of the republic allowed for limited civil forfeiture, and Justice Thomas noted that this historical practice has been cited to support civil forfeiture precedents. He questioned, however, whether the historical practice actually does sustain the Constitutionality of modern civil forfeiture law. First, historical forfeiture laws were narrower than current ones, in specific subject areas and limited to instrumentalities of crimes rather than criminal proceeds. Second, he questioned the historical basis for civil forfeiture decisions, noting that some early cases indicated that *in rem* forfeitures were criminal in nature and may have required proof beyond a reasonable doubt.[11]

The petitioner in *Leonard* raised her argument for the first time in the Supreme Court, so Justice Thomas agreed with the denial of certiorari. He concluded, however, with an ominous comment for supporters of broad asset forfeiture by the government: "Whether this Court's treatment of the broad modern forfeiture practice can be justified by the narrow historical one is certainly worthy of consideration in greater detail."[12]

Advice For Practitioners

The Supreme Court could be on a path to dismantle settled expectations on Federal forfeiture law. Practitioners should preserve all forfeiture arguments, even those seemingly foreclosed by Second Circuit law, as the underpinnings of some of these precedents may be shaken loose by the Supreme Court.

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1. *See, e.g., United States v. Benevento*, 836 F.2d 129, 130 (2d Cir. 1988) (per curiam).
2. *Honeycutt v. United States*, 137 S. Ct. 1626 (2017).
3. *Honeycutt*, 137 S. Ct. at 1630-31.
4. *Honeycutt*, 137 S. Ct. at 1633.
5. *United States v. Lo*, 839 F.3d 777, 782-83 (9th Cir. 2016).
6. *See., e.g., United States v. Awad*, 598 F.3d 76, 78-79 (2d Cir.), *cert. denied*, 562 U.S. 950, and 562 U.S. 1054 (2010).
7. http://www.scotusblog.com/wp-content/uploads/2017/09/16-8327-BIO.pdf.
8. http://www.scotusblog.com/wp-content/uploads/2017/09/16-8327-BIO.pdf, at 20-21.
9. *Leonard v. Texas*, 137 S. Ct. 847, 847 (2017).
10. *Leonard*, 137 S. Ct. at 848.
11. *Leonard*, 137 S. Ct. at 848-50.
12. *Leonard*, 137 S. Ct. at 850.

Criminal Law

ON ETHICS

Obligations of Prosecutors and Defense Attorneys to Prevent False Testimony

As officers of the court, attorneys are charged with the duty to ensure that evidence and testimony presented to the court are truthful. As counsel for their clients, attorneys are also charged with the duty to provide competent and zealous representation. These two duties conflict when a witness or a criminal defendant intends to offer false evidence or perjured testimony.

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However, it is well-settled that the ethical obligation to provide competent and zealous representation cannot be relied upon to justify the use of perjured testimony or false evidence. Accordingly, attorneys have certain ethical obligations when confronted with a situation where a witness offers or intends to offer false testimony in a criminal case.

Duty to Prevent False Evidence and Testimony

Permitting the use of evidence or testimony the attorney knows to be false, or merely turning a blind eye towards evidence or testimony the attorney believes to be false, is unethical, and cannot be justified by the duty to provide competent and zealous representation. The duty to provide competent and zealous representation is "limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth."[1]

These limitations require that an attorney bear the responsibility of "preventing false or perjured testimony and calling only those witnesses whom he believes to be truthful witnesses testifying to facts as they understand them to be[.]"[2] An attorney must not elicit testimony from a witness that the attorney knows or believes to be false.[3]

Attorneys are also charged with an "active affirmative duty to protect the administration of justice from perjury and fraud, and that duty is not performed by allowing his subordinates and assistants to attempt to subvert justice and procure results for his clients based upon false and perjured testimony."[4]

Duties under Rules 3.3 and 3.4

Rule 3.4 of the New York Rules of Professional Conduct expressly prohibits attorneys from "knowingly us[ing] perjured testimony or false evidence," and "participat[ing] in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false."[5] Any attorney who participates in the use or creation of false evidence or perjured testimony, including eliciting from a witness testimony that the attorney knows or believes to be false, is subject to disciplinary sanctions.

For example, if an attorney whose client is charged with possession of stolen property suggests that the client testify falsely by denying knowledge that the property was stolen, that attorney would be subject to sanctions, such as suspension from the practice of law.[6]

The duty to *prevent* frauds upon the court also includes *disclosing* frauds upon the court. If the attorney discovers that evidence or testimony given by a witness is false, the attorney has a duty to disclose it to the court.[7] Rule 3.3(a) of the New York Rules of Professional Conduct states that attorneys "shall not knowingly…offer or use evidence that the lawyer knows to be false."[8]

Rule 3.3(a) also requires that if an attorney, client, or witness offers evidence that the attorney knows to be false, or if the client intends to engage in "criminal or fraudulent conduct related to the proceeding", the attorney "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[9] Pursuant to Rule 3.3(c), this obligation applies "even if compliance requires disclosure of information otherwise protected" as confidential under Rule 1.6.[10] Accordingly, the duty to prevent frauds upon the court trumps the duty of confidentiality, and, when disclosing frauds upon the court, an attorney must disclose even confidential information.

These rules apply to all attorneys, including prosecutors and defense attorneys alike.

Prosecutors

Prosecutors are held to high standards of conduct in criminal cases, and are duty-bound to seek justice above all else. As Justice Sutherland stated in *Berger v. United States*:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[11]

In keeping with the fact that the goal of prosecutors is to do justice, a prosecutor is obligated to prevent her witnesses from giving false testimony and is obligated to correct false testimony if she knows that the witness has given false testimony.[12]

Criminal Defense Attorneys

Just as the law imposes limitations on the methods by which a prosecutor may prove her case, the law also imposes limitations on the methods by which criminal defense attorneys may zealously represent their clients.

The duty of a defense attorney to competently and zealously represent his client must be "circumscribed by his or her duty as an officer of the court to serve the truth-seeking function of the justice system."[13] While defense attorneys must pursue all reasonable means to represent their clients' interests, an attorney must not go so far as to present or permit the use of evidence in court that the attorney knows or believes to be false.[14]

Criminal defense attorneys potentially face a unique ethical dilemma where a client with a right to testify wishes to testify falsely. Although a defendant in a criminal case has a right to testify on his own behalf,[15] that right does not include a right to commit perjury.[16]

Accordingly, the duty of attorneys to refrain from participation in a witness's effort to commit perjury applies even if the witness is a criminal defendant. A criminal defense attorney confronted with such a situation "must contend with competing considerations – duties of zealous advocacy, confidentiality and loyalty to the client on the one hand, and a responsibility to the courts and our truth-seeking system of justice on the other."[17]

Guidance on Balancing Duties

Fortunately, the Supreme Court of the United States and the New York Court of Appeals have provided guidance on how to balance these duties without violating either. If a defense attorney is faced with a client who intends to commit perjury, the attorney is ethically obligated to take action to prevent such false evidence being presented to the court.

First, the attorney bears the initial responsibility to attempt to dissuade the client from pursuing the unlawful course of action.[18] In *Nix v. Whiteside*, the Supreme Court held that the defense attorney acted appropriately by admonishing his client that he would seek to withdraw from representation and disclose his perjury to the court if he testified falsely.[19]

If the client insists on giving perjurious testimony, despite such an admonishment, the attorney may seek to withdraw from the case.[20] However, the Court of Appeals has noted that a substitution of counsel may do nothing to resolve the problem of receiving perjurious testimony, and could even facilitate the fraud that the defendant wishes to perpetrate upon the court.[21]

The Court of Appeals has held that if the attorney cannot dissuade the defendant from giving perjurious testimony, the attorney – who still has a duty to honor the defendant's right to testify on his own behalf – "should refrain from eliciting the testimony in traditional question-and-answer form and permit defendant to present his testimony in narrative form."[22] To satisfy the duty to prevent and disclose frauds upon the court, the attorney should also inform the court of the defendant's perjury.[23]

Furthermore, the attorney must refrain from using the perjurious testimony in making arguments to the court or to a jury.[24]

Cases from the Court of Appeals

Two cases from the Court of Appeals illustrate how defense attorneys can properly balance their duties when confronted with a client who intends to commit perjury. In *People v. DePallo*, the Court of Appeals held that a defense attorney properly balanced these duties by notifying the court that his client had offered perjured testimony and refusing to use that testimony in his closing argument to the jury.[25] Similarly, in *People v. Andrades*, the Court of Appeals held that a defense attorney acted properly when he disclosed to the court that his client's intent to testify at a pre-trial suppression hearing created an ethical problem, from which the court inferred that the defendant intended to testify perjuriously.[26]

In reaching its holding, the *Andrades* court noted that a client's intent to commit a crime – such as perjury – is not a protected confidence or secret.[27] In both cases, the Court of Appeals held that the defendants were not deprived of their rights to effective assistance of counsel, and that the defense attorneys did not violate client confidentiality by disclosing the defendants' perjurious intentions to the court.[28] Accordingly, a defense attorney whose client intends to commit perjury should follow this course of action, to ensure that he does not violate his obligations to his client or to the court.

In criminal cases, prosecutors and defense attorneys alike must act lawfully and ethically, and must respect the fundamental principle of justice that a trial is a search for the truth. When confronted with a difficult situation where a witness for the prosecution or the defense intends to offer false evidence or testimony, including the uniquely challenging situation created when a criminally-charged client intends to testify perjuriously, the law demands that all attorneys honor the duties owed to the court and the justice system.

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1. *Nix v. Whiteside*, 475 U.S. 157, 166 (1986).
2. *In re Schapiro*, 144 A.D. 1, 9 (1st Dept. 1911).
3. *People v. Salquerro*, 107 Misc. 2d 155, 156 (Sup. Ct. N.Y. County 1980).
4. *In re Robinson*, 136 N.Y.S. 548, 551 (1st Dept. 1912).
5. 22 NYCRR 1200, Rule 3.4(a)(4)-(5).
6. *In re Alderman*, 80 A.D.2d 184 (2d Dept. 1981).
7. *People v. DePallo*, 96 N.Y.2d at 441; *citing Nix*, 475 U.S. at 168-170.
8. 22 NYCRR 1200, Rule 3.3(a)(3).
9. 22 NYCRR 1200, Rule 3.3(a)(3) – (b).
10. 22 NYCRR 1200, Rule 3.3(c).
11. *Berger v. United States*, 295 U.S. 78, 88 (1935).
12. *People v. Steadman*, 82 N.Y.2d 1, 8 (1993).
13. *People v. DePallo*, 96 N.Y.2d 437, 441 (2001).
14. *Nix*, *supra*; *People v. Andrades*, 4 N.Y.3d 355 (2005); *In re Malone*, 105 A.D.2d 455, 458 (3d Dept. 1984).
15. *Rock v. Arkansas*, 483 U.S. 44 (1987).
16. *United States v. Dunnigan*, 507 U.S. 87, 96 (1993); *Harris v. New York*, 401 U.S. 222, 225 (1971).
17. *DePallo*, 96 N.Y.2d at 440.
18. *Nix*, 475 U.S. at 169-170; *Andrades*, 4 N.Y.3d at 360; *DePallo*, 96 N.Y.2d at 441.
19. *Nix*, 475 U.S. at 171.
20. *Andrades*, 4 N.Y.3d at 360.
21. *DePallo*, 96 N.Y.2d at 442, *citing Salquerro*, 107 Misc. 2d at 157-158.
22. *Andrades*, 4 N.Y.3d at 360.
23. *DePallo*, 96 N.Y.2d at 441, *citing Nix*, 475 U.S. at 168-170.
24. *Andrades*, 4 N.Y.3d at 360.
25. *DePallo*, 96 N.Y.2d 437.
26. *Andrades*, 4 N.Y.3d 355.
27. *Id.* at 361-362 (2005) (citations omitted).
28. *Id.* at 360; *DePallo*, 96 N.Y.2d at 442.

Criminal Law

Criminal Defenders Stand Between Local Law Enforcement and the Deportation Pipeline

By now, most criminal defense attorneys say, "I know, I know," when reminded that in 2010, the U.S. Supreme Court imposed an obligation to provide immigration advice to non-citizen clients charged with criminal offenses. In *Padilla v. Kentucky*,[1] the high court held that a criminal defender must provide advice to non-citizen clients about deportation consequences of any conviction, and a defense lawyer's prejudicial failure to do so will support a claim of ineffective assistance of counsel.

Michelle Caldera-Kopf

But since *Padilla* was decided, the obligation to provide immigration advice has evolved. Advice must be particularized and specific to the client's situation. The Supreme Court has recently held that even where risk of conviction at trial is great due to overwhelming evidence of guilt, defenders prejudice their clients by providing erroneous advice.[2]

New York law also requires judges to ensure due process by giving an immigration warning in all felony cases.[3] The Second Department has extended that obligation to judges hearing misdemeanors.[4] A criminal defender may be his client's only hope of avoiding deportation.

Two Types of Risk

Non-citizen clients face two types of risk, and criminal defenders must advise and seek to mitigate both types.

The first is the risk of triggering deportation or other adverse legal consequences, such as forfeiting eligibility for naturalization, lawful permanent residence, or other defenses to deportation under the immigration law. To mitigate these risks, counsel must investigate their clients' immigration status, understand the potential immigration consequences, negotiate with prosecutors to mitigate the risks, and properly advise clients of the impending immigration consequences.

Second is the practical risk of detention and deportation by Immigration and Customs Enforcement (ICE), the odds of which greatly increase as a result of contact with local law enforcement. This article will focus on the more practical risks of detention and deportation as a result of contact with law enforcement in Nassau and Suffolk Counties.

Recent changes in immigration enforcement policies, and increased collaboration between local law enforcement and immigration authorities, have magnified the risk of detention and removal that every non-citizen faces. Immigration authorities collect data on the immigration status of all convicted aliens incarcerated in state prisons and local detention centers throughout the United States, pursuant to President Trump's Executive Order on "Enhancing Public Safety in the Interior of the United States."[5] Under their own internal policies, local police notify Immigration and Customs Enforcement (ICE) of every non-citizen arrest for a crime.

While the police promise not to report witnesses or victims of crimes, local law enforcement makes no such guarantees to criminal suspects. Even a traffic stop can lead to arrest and detention by ICE.[6] Local police notify ICE irrespective of the non-citizen's immigration status, so tourists, lawful permanent residents and undocumented immigrants face the same risk of reporting if arrested for a crime.

ICE and the Legal Process

ICE can begin to set in motion the legal process of deportation or visa revocation at the moment of a non-citizen arrestee's first contact with law enforcement. All immigrants thus need to understand and assert their constitutional rights in any encounter with law enforcement. All attorneys need to advise their immigrant clients about these risks. Defense counsel must be prepared once a client has come to the attention of immigration authorities to avoid making a bad situation even worse, and to negotiate a safer outcome where possible.

ICE now prioritizes for removal any undocumented person who has any criminal conviction, or any "unresolved" criminal charge.[7] Any undocumented criminal defendant may be taken into ICE custody and required to appear before an Immigration Judge to defend against deportation. Even if an undocumented defendant is released on his own recognizance at arraignment or as the criminal case proceeds, ICE may come to the defendant's home, work, or neighborhood as a result of notification from police of the arrest.

But even after a conviction, a defense to deportation may be viable. Families who anticipate potential ICE contact can utilize resources found on websites of various not-for-profit agencies; these resources can be shared with immigrant clients who have had contact with the criminal justice system.[8]

ICE Holds

Furthermore, the sheriffs in both Nassau and Suffolk Counties honor administrative requests (called immigration detainers or "ICE holds") from ICE to detain non-citizens for up to 48 hours after they would otherwise be released. ICE and local law enforcement bodies and governments around the nation have been found liable in federal court for constitutional violations as a result of their collaboration on immigration detainers.[9] Nevertheless, both the Suffolk and Nassau Sheriffs continue to honor detainers. A lawsuit against the Suffolk County Sheriff is currently pending in federal court in the Eastern District of New York.[10]

One judge of the Supreme Court in Nassau County held that an ICE detainer accompanied by an order of deportation was a sufficient basis for continued detention. However, that decision was not appealed to a higher court before it became moot, and other Nassau County courts have found the opposite.[11]

Often, an immigration detainer has already been lodged by ICE with local law enforcement by the time a defendant is arraigned, as a result of the notification by local police. In this situation, a defendant will enter ICE custody if released by the court on his own recognizance at arraignment, or once the criminal charges have been resolved and the defendant has completed any sentence.

If bail is set before a detainer is lodged, and the defendant is held in custody during the criminal prosecution, immigration agents working in the Nassau and Suffolk jails will try to interview the defendant and make a determination about whether or not to lodge a detainer. Defense counsel should prepare clients to assert their constitutional rights in these interviews. Immigration detainers will be issued in any case where ICE determines that a defendant is already deportable or may become a priority for removal as a result of a conviction.

Where a defendant enters ICE custody during the pendency of state criminal charges, these charges will be dismissed if the defendant is not returned to the court by ICE and the time limits for prosecution expire.[12] However, a defendant with unresolved criminal charges may not be granted bond by an immigration judge nor be able to defend against charges of deportation.

What happens in Immigration Court after a defendant enters ICE custody depends on the outcome of the defendant's criminal charges. Certain criminal convictions trigger mandatory detention, meaning that a non-citizen is not entitled to release while his immigration case is litigated.[13] Furthermore, certain criminal convictions and admission of some types of conduct bar defenses that might otherwise be available in immigration court. A defendant with a prior order of removal will be deported without any further hearing unless he presents a credible fear of persecution. Appointed counsel representing non-citizens should reach out to immigration experts as early as possible to discuss these immigration consequences.

Michelle Caldera-Kopf is the Padilla Attorney at the Long Island Regional Immigration Assistance Center (LIRIAC). There, she provides no cost consultations and training to appointed counsel for indigent defendants about the immigration consequences their non-citizen clients face. Members of the 18(b) Panels in Nassau and Suffolk Counties can reach out to the LIRIAC at 631-853-7807 or LIRIAC@sclas.org to initiate a consultation.

1. 559 U.S. 356 (2010).
2. *Lee v. United States*, No. 16-327 (June 23, 2016).
3. *People v. Peque*, 22 NY3d 168 (2013).
4. *People v. Bello (Jose),* 2017 NY Slip Op 50769(U) (June 2, 2017).
5. Exec. Order No. 13768, 82 Fed. Reg. 8799 (2017).
6. Hector Manuel Ramos, "Immigrant Advocates Protest Man's Deportation After Traffic Stop," Newsday, Aug. 30, 2017, available at (http://www.newsday.com/long-island/nassau/rally-for-salvadoran-man-who-faces-deportation-1.14099513).
7. Supra., n.5 at § 5.
8. See https://www.immigrantdefenseproject.org/resources2/.
9. E.g., *Morales v. Chadbourne*, No. 14-1425 (1st Cir. July 17, 2015) (ICE agents not entitled to qualified immunity because necessity that detainers comply with 4th Amendment clearly established in 2009); *Galarza v. Szalzaczyk*, 12-3991 (3rd Cir. March 4, 2013) (ICE detainers are non-binding requests such that a county will incur liability for policy of detaining people on that basis); *Miranda-Olivares v. Clackamas County*, 2014 WL 1414305 (D. Or. 2014) (county liable for 4th Amendment violations); *Moreno v. Napolitano*, No. 11 Civ. 05452 (N.D. Ill. Aug. 11, 2011) (ICE detainers violate federal statutes).
10. *Orellana Castaneda v. U.S. Dept, of Homeland Sec.*, No. 2:17 Civ. 04267 (E.D.N.Y. filed July 18, 2017).
11. Order(s) and Decision(s) on file with author, decided July 31, 2015 and December 3, 2015.
12. CPLR § 30.30.
13. 8 USC § 1226(c).

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5. *Id.*
6. Id. (quoting *People v. Bigelow,* 66 N.Y.2d 417, 423 (1985)).
7. *Harris v. City of New York,* 2017 NY Slip Op 06527, 2017 N.Y. App. Div. LEXIS 6514 (Sept. 20, 2017).
8. *Broughton v. State,* 37 N.Y.2d 451, 457 (1975), *quoted in Torres,* 26 N.Y.3d at 760.
9. *Antonious,* 250 A.D.2d at 559.
10. *De Lourdes Torres,* 26 N.Y.3d at 760.
11. *Smith-Hunter v. Harvey,* 95 N.Y.2d 191, 196–97 (2000).
12. *See Martin v. City of Albany,* 42 N.Y.2d 13, 17 (1977).
13. *See Hopkinson v. Lehigh V.R. Co.,* 249 N.Y. 296, 300 (1928), *cited in Torres,* 26 N.Y.3d at 762.
14. *E.g., Lepore v. Town of Greenburgh,* 120 A.D.3d 1202 (2d Dept. 2014).
15. *See Gearity v. Strasbourger,* 133 A.D. 701 (1st Dept. 1909).
16. *See Donnelly v. Nicotra,* 55 A.D.3d 868 (2d Dept. 2008).
17. *Johnson v. Kings County DA's Office,* 308 A.D.2d 278, 285 (2d Dept. 2003).
18. *E.g., Sanabria v. State,* 29 Misc.3d 988 (Ct. Claims 2010).
19. *Charnis v. Shohet,* 2 A.D.3d 663 (2d Dept. 2003).
20. *Karen v. State,* 111 Misc.2d 396 (Ct. Claims 1981).
21. Court of Claims Act § 10(3).
22. General Municipal Law § 50–e.
23. CPLR 215(3).
24. *Burlett v. County of Saratoga,* 111 A.D.2d 426, 427 (3d Dept. 1985).
25. *Papa v. City of New York,* 194 A.D.2d 527, 531 (2d Dept. 1993).
26. *Clark-Fitzpatrick, Inc. v. LIRR,* 70 N.Y.2d 382, 386 (1987).
27. *Broughton,* 37 N.Y.2d at 459.
28. 308 A.D.2d 278 (2d Dept. 2003).
29. *Id.* at 280–82.
30. *Id.* at 283.
31. Among the state law claims dismissed was one for abuse of process, which cannot be supported by allegations of negligence. *Id.* at 288–89.
32. *Id.* at 290.
33. *Id.* at 290–91.
34. *Id.* at 292.
35. *Id.*
36. *Id.* at 293.
37. *Id.* (quoting *City of Canton v. Harris,* 289 U.S. 378, 388 (1989)).
38. *Id.* at 294.
39. *Id.* at 295–96 (citing *Ramos v. City of New York,* 285 A.D.2d 284 (1st Dept. 2001)).
40. *See Okure v. Owens,* 816 F.2d 45 (2d Cir. 1987); *Georges v. City of New York,* 12-CV-6430 (CBA), 2013 U.S. Dist. LEXIS 5386 (E.D.N.Y. Jan. 14, 2013).
41. *Felder v. Casey,* 487 U.S. 131, 138 (1988); *Wanczowski v. New York,* 186 A.D.2d 397 (1st Dept. 1992).

Criminal Law

Claims by the Exonerated for False Imprisonment and Malicious Prosecution

Our colleagues among the criminal defense bar refer to us clients who were arrested without probable cause or detained longer than the law or circumstances warranted. These clients may have claims against law enforcement for false imprisonment, malicious prosecution, or even federal civil rights violations. Answering a few questions at the outset can reveal whether such claims are viable.

Christopher J. DelliCarpini

False Imprisonment

A plaintiff seeking damages for an injury resulting from a wrongful arrest and detention "may not recover under broad general principles of negligence … but must proceed by way of the traditional remedies of false arrest and imprisonment."[1]

To prove false imprisonment or false arrest, the plaintiff must demonstrate: (1) the defendant intended to confine the plaintiff; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and (4) that the confinement was not privileged.[2]

Cases have been dismissed for lack of intent to confine, where the defendants merely provided information to the police.[3] Cases have also been dismissed where the plaintiff had been so intoxicated that he could prove neither consciousness of confinement nor that he failed to consent.[4] Often, however, the element of privilege is the only one in dispute.

An act of confinement is privileged if it stems from a lawful arrest supported by probable cause.[5] "Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed" by the suspected individual, and probable cause must be judged under the totality of the circumstances.[6] Where a court issues a search warrant, there is a presumption of probable cause; a plaintiff rebuts the presumption by establishing that the officer procured the warrant based upon his or her own false or unsubstantiated statements.[7]

Malicious Prosecution

The tort of malicious prosecution requires: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff; (2) the termination of the proceeding in favor of the accused; (3) the absence of probable cause for the criminal proceeding; and (4) actual malice.[8] There is no cause of action in New York for negligent prosecution.[9]

For purposes of the tort, a prosecution may be commenced or continued by the police if they falsified evidence "in substantial furtherance of a criminal action against the plaintiff."[10] Favorable termination includes dismissal on "speedy trial" grounds, but not where the charge is withdrawn or the prosecution abandoned pursuant to a compromise with the accused.[11]

The additional requirement of malice makes such claims more difficult to prove than false imprisonment. A particularly egregious lack of probable cause, however, may permit an inference of malice.[12] Evidence of malice may also prove the absence of probable cause, as where an investigator or prosecutor falsified or withheld evidence in order to suggest probable cause.[13]

Defendants, Deadlines and Damages

Proper defendants on claims for false arrest or malicious prosecution are commonly police officers and State troopers, and through respondeat superior their State or local employers.[14] Private individuals can be defendants, for example, when a store causes a customer to be arrested for shoplifting.[15] Merely providing information to the police, however, will not support a claim for either tort.[16] District Attorneys and ADAs also enjoy immunity for acting in their judicial capacity, that is, prosecuting and presenting the State's case.[17] The State of New York also can be sued where the tortfeasors are within the NYS Department of Correctional Services, for example, when an inmate's release date was miscalculated and detention improperly extended.[18]

A claim for false imprisonment accrues when the confinement terminates,[19] and a claim for malicious prosecution accrues on the trial court's dismissal.[20] Such claims are subject to the 90-day time limit for filing a notice of intention to file a claim, where the claim is against the State;[21] or a notice of claim where the defendant is a municipality.[22] Unlike other claims against such defendants, however, claims for false imprisonment and malicious prosecution are subject to a limitations period of only one year.[23]

"Generally, a plaintiff in a malicious prosecution action may recover damages for the direct, natural and proximate results of the criminal prosecution, including those for suffering arrest and imprisonment, injury to reputation and character, injury to health, well-being and feelings, and counsel fees and expenses in defending the criminal prosecution."[24] Plaintiffs must, however, make an objective showing of damages, including damage to reputation.[25] The Court of Appeals has held that the State and its subdivisions are immune to punitive damages.[26]

Where a plaintiff successfully establishes liability for false imprisonment, damages will be measured only to the time of arraignment or indictment, whichever occurs first. Those damages will not include attorney's fees expended in the subsequent defense of the criminal prosecution; such damages are properly attributable to the tort of malicious prosecution.[27]

Federal Claims

Where improper arrest or prosecution violates constitutional rights, Federal law provides a remedy. Under 42 USC § 1983 "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." Proving such claims, however, requires more than finding impropriety in an isolated arrest or prosecution, as illustrated by the Second Department in *Johnson v. Kings County DA's Office*.[28]

In *Johnson* the plaintiff had been arrested on a fugitive warrant from South Carolina. Despite repeated protestations and a habeus petition, he was detained for 24 days before the DA's office finally requested from South Carolina a photograph and fingerprints of the subject of the warrant. The photograph did not depict the plaintiff, so the charges were then dismissed.[29]

The plaintiff sued the police, the City and the District Attorney's office, alleging state law claims but also a violation of his rights under the Fourth, Fifth, and Fourteenth Amendments.[30] The defendants were denied summary judgment by the trial court, but on appeal the Second Department dismissed all claims except for those alleging constitutional violations.[31]

The first lesson of *Johnson* is that Section 1983 claims "must allege a substantive constitutional violation with specificity."[32] Where an individual is arrested or detained by mistake, there is ordinarily no constitutional violation. Even an honest mistake can rise to a constitutional violation over time, however, if law enforcement has failed "to take readily available steps to verify the identity of an arrestee."[33]

In *Johnson* the court held that this was an issue of fact, given the length of detention; the obvious discrepancies between the plaintiff and the fugitive's description; the plaintiff's repeated protestations; and the ease with which the District Attorney's office obtained the subject's photograph and fingerprints when it finally requested them.[34] That the initial arrest was authorized by CPL § 570.4 was of no moment; state law cannot justify a constitutional violation, and in this case CPL § 570.46, which prohibits inquiring into the guilt or innocence of the subject of an out-of-state warrant, expressly authorized inquiry "for the purpose of identifying the person held as the person charged with the crime."[35]

The second lesson of *Johnson* is that a municipality can be liable under Section 1983 only when the municipality itself caused the constitutional violations alleged. The District Attorney's office was immune from liability, and the City could not be liable for individuals' conduct through respondeat superior. If the DA's office set policy that led to constitutional violations, however, then the City could be held liable.[36]

Tracing case law from the Supreme Court's decision in *Monell v. Department of Social Services of City of New York,* the *Johnson* court characterized the plaintiff's federal claims as alleging a "failure to train" or "failure to supervise," which triggers liability when "the failure to train amounts to deliberate indifference to the rights of persons with whom municipal employees come into contact."[37] In *Walker v. City of New York* the Second Circuit reduced this theory to three pleading requirements:

- the policymaker knows "to a moral certainty" that employees will encounter a given situation;
- the situation presents employees with a difficult choice that training would have made easier, or there is a history of employees mishandling the situation; and
- the wrong choice by the employee will frequently result in the deprivation of a citizen's constitutional rights.[38]

The *Johnson* court found that the plaintiff did allege these elements, and furthermore that the DA's failure to train employees to handle such situations was not a judicial decision but a management or policy decision.[39] Thus while neither the DA nor his employees could be held liable for the mistakes that led to the plaintiff's detention, the City (or county, outside of New York City) could.

Though the issue did not arise in *Johnson,* the limitations period for Section 1983 claims brought in New York courts is three years.[40] Furthermore, New York's notice of claim requirement does not apply to Section 1983 claims.[41]

Threshold Questions

With the above in mind, counsel can use the following questions to evaluate potential claims for false imprisonment, malicious prosecution, or civil rights violations, or at least identify areas for further inquiry:

- When was the client released, or the case dismissed?
- Was the arrest supported by probable cause, or a valid warrant?
- What evidence was offered to justify prosecution or continued detention?
- Who made the arrest, or supplied the evidence to justify prosecution?
- Did the person at fault act on their own, or were they following official policy?
- What are the injuries, *e.g.,* days in detention, lost income, harm to reputation?

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1. *Antonious v. Muhammad,* 250 A.D.2d 559, 559–60 (2d Dept. 1998)(quoting *Boose v. City of Rochester,* 71 A.D.2d 59, 62 (4th Dept. 1979).
2. *See De Lourdes Torres v. Jones,* 26 N.Y.3d 742, 759 (2016). *Cf. Budgar v. State,* 98 Misc.2d 588 (Ct. Claims 1979)("[E]very false arrest is itself a false imprisonment, with the imprisonment commencing with the arrest.").
3. *E.g., Defilippo v. County of Nassau,* 183 A.D.2d 695, 696–97 (2d Dept. 1992).
4. *E.g., Parvi v. Kingston,* 41 N.Y.2d 553, 562 (1977).

See EXONERATED, Page 10

Criminal Law

Interrogating a Student in a School Setting

Being questioned by the police is almost always a frightening experience. It can be just as traumatizing when questioning is conducted by school administrators.

Scott J. Limmer

Students often think, "I'm innocent. I have nothing to hide." Unfortunately, innocence is no defense to those interrogation tactics that are designed to elicit confessions of guilt. Those tactics twist words, turn the truth on its head, and produce results that can be used against students in disciplinary proceedings or criminal prosecutions.

Interrogation Training

In a school setting, interrogations might be conducted by a police officer who is summoned to the school by administrators. They might also be conducted by a law enforcement officer assigned to the school, sometimes known as a liaison officer or school resource officer (SRO).

Police officers as well as school administrators may adopt strong interrogation techniques. One news source reports that hundreds of school administrators employ an interrogation technique, the Reid technique, described as "a nonviolent but psychologically rigorous process that is designed … 'to obtain an admission of guilt.'"[1] This technique includes baiting the subject with supposedly incriminating evidence, asking his or her opinion on potential punishment and not letting up if the student starts to react emotionally.[2]

The technique also claims to teach educators to determine from a student's "body language" whether the student is lying.[3] Television shows notwithstanding, studies prove that using body language to decide whether an answer is truthful is about as reliable as flipping a coin.[4]

Yet some educators become convinced that when (for instance) a student looks up and to the left, the student is lying (when in fact, the student might be searching her memory or trying not to cry). Administrators may be told that slumping or slouching is a sign of lying, when slouching is practically a lifestyle for many teens.[5]

Serious questions need to be asked about the wisdom of training administrators to perform the job of police officers.

The Perils of Interrogation

Unfortunately, interrogation tactics that are designed to obtain an admission of guilt, too often obtain an admission even when the student is not guilty.[6] When an innocent person is persuaded that punishment is inevitable, a false confession and expression of remorse is may be seen as the best way to minimize punishment for something that the accused did not do.

Coercive interrogation techniques may also cause the accused to doubt his or her own innocence. One recent study concluded that coercive interrogation can cause the accused "to visualize and recall detailed false memories of engaging in criminal behavior."[7]

The risk of false confessions is a concern when the subject of the interrogation is a minor or a young adult. Young people are more deferential to authority, and more easily persuaded by intimidation and other coercive tactics, than older people. As one reporter wrote, "[y]oung people tend to be impulsive, suggestible, poor at risk assessment, and lacking an appreciation for long-term consequences—characteristics that make them vulnerable to false confession."[8]

It isn't surprising that, according to The Innocence Project, more than a third of criminal exonerations involving minors have involved false confessions.[9] Reid training may contribute to that problem because, as one study found, administrators who receive interrogation training are more likely to believe false confessions and less likely to recognize that coercive interrogation of suggestible subjects produces false confessions.[10]

What is a Student to Do?

Students are not always aware that they have the right to remain silent, and school administrators are reluctant to advise them of that right. In some cases, administrators do not believe the right applies to students.

The law is regrettably muddled regarding the extent to which constitutional rights apply to students in a school setting. Still, there are some basic principles that students and administrators should understand.

The Right to Remain Silent

Miranda v. Arizona requires the police to tell a suspect that the suspect has certain rights, including the right to remain silent and the right to have an attorney present during questioning.[11] The police are only required to give a *Miranda* warning if two conditions exist. First, the police intend to question the suspect. Second, the suspect is in custody.[12]

Sometimes a person is "in custody" even if the person has not been arrested. The general standard is that a person is "in custody" when no reasonable person would believe that she is free to walk away from the police officer.[13]

The right to remain silent exists whether or not a *Miranda* warning is given. Unless a suspect has been warned, however, the suspect might not be aware of the right or might not realize that remaining silent is the best course of action.

Miranda in the Classroom

When a student is interrogated in a school, whether the student is "in custody" is often unclear. An adult teacher who is called into a principal's office and questioned might well feel free to leave, while a student in the same situation is much more likely to believe that leaving is not an option.

The Supreme Court has required courts to apply the definition of "custody" from the student's perspective.[14] When the student is called to the principal's office, questioned by a police officer in that office with the door closed, and is not told that he is free to leave at any time, a court might conclude that the interrogation was custodial. A reasonable student who is questioned by a police under those circumstances would rarely feel free to leave.

Still, there is no strict rule that applies in every situation. A court will consider the student's age, but will also consider other factors (such as the student's maturity and factors that either heighten or lessen the coercive nature of the setting) in deciding whether a *Miranda* warning was required.[15]

Miranda and Interrogations by Administrators

The *Miranda* decision arose in the context of a police interrogation. The requirement of a *Miranda* warning is strongest when the interrogation is conducted by an officer who is summoned to the school. Courts will generally apply the *Miranda* decision to interrogations conducted by a school resource officer (SRO) who works for the police department.

Interrogations in school settings are increasingly conducted by school administrators. Do they have the same obligation as a police officer to precede a custodial interrogation with a *Miranda* warning?

In many contexts, courts have limited the constitutional rights that are available to students, particularly in elementary and secondary education. The right to free speech, to freedom of the press, and to be free from searches conducted without a warrant have all been restricted in a school setting. School officials can search a locker because (courts have reasoned) the locker belongs to the school, not the student, and the need to maintain discipline in a school outweighs the privacy rights of the student.[16]

Still, the Constitution imposes obligations upon the government to protect the constitutional rights of all individuals, including students. In public schools, at least, school administrators are hired by the government to exercise governmental authority. School administrators are not police officers, but when they carry out a police function (by, for instance, interrogating a student suspected of a crime), there is good reason to think that they should be bound by the same constraints that apply to police officers, including the obligation to give a *Miranda* warning.

Unfortunately, most courts have concluded that the same rationale they use to justify the curtailment of other rights by school officials — the need for discipline in a school setting and the fact that schools operate in a parental role while school is in session — also relieve school officials of the obligation to give students a *Miranda* warning before interrogating them.[17]

Even when a law enforcement officer is present, a fact that heightens the coercive nature of the interrogation, some courts have decided that no *Miranda* warning is needed if the administrator, rather than police officer, conducts the interrogation.[18] Some courts have reached that conclusion even if the administrator is acting as the police officer's mannequin, asking questions that were fed to the administrator by the officer.[19] The general rule, however, is that an administrator who is acting at the direction of a law enforcement officer must give a *Miranda* warning before interrogating a student who would not feel free to leave.[20]

Miranda and Voluntariness

Interrogations are sometimes coercive, resulting in confessions that are not only involuntary but false. Providing a *Miranda* warning before an interrogation at school should be a key safeguard to assure that admissions may be used as evidence in court. Omitting a *Miranda* warning strengthens a student's argument that her statements cannot be used against her because they were the product of coercion rather than a voluntary decision to answer questions.

The right to remain silent exists whether or not a Miranda warning is given. Unless a suspect has been warned, however, the suspect might not be aware of the right or might not realize that remaining silent is the best course of action.

Students who face an interrogation at school are in a difficult situation. Whether or not they receive a *Miranda* warning, students have the right to remain silent. That right is useless if it is not exercised. In most situations, students should insist on speaking to their parents, a lawyer, or both before answering questions about potential wrongdoing. That is the only way they can be sure of protecting their right to be free from coerced confessions, and of avoiding the false confessions that coercive interrogations may produce.

Scott J. Limmer concentrates his practice on criminal defense and college disciplinary law. He is also the co-host of the podcast "Reboot Your Law Practice," which can be found at www.lawreboot.com. Scott can be reached at Scott@Limmerlaw.com

1. Douglas Starr, *Why Are Educators Learning How to Interrogate Their Students?*, The New Yorker (Mar. 25, 2016), https://goo.gl/pqeNxM.
2. *Id.*
3. *Id.*
4. Joe Navarro, *The Truth About Lie Detectio*n, Psychology Today (Mar. 15, 2012), https://goo.gl/93heXJ.
5. Starr, *supra.*
6. Melissa B. Russano, Christian A. Meissner, Fadia M Narchet, & Saul Kassin, *Investigating True and False Confessions Within a Novel Experimental Paradigm,* Psychological Science, June 1, 2005 at 481-486.
7. Julia Shaw & Steve Porter, *Constructing Rich False Memories of Committing Crime*, Psychological Science, Jan. 14, 2015, at 291–301.
8. Starr, *supra* n.2.
9. Garrett, *supra* n.6.
10. Drake Bennett, *The Dark Science of Interrogation*, Bloomberg (Feb. 12, 2015), https://goo.gl/qJSg6T.
11. *Miranda v. Arizona,* 384 U.S. 436 (1966).
12. *Oregon v. Killitz,* 651 P.2d 1382, 1383 (Or. Ct. App. 1982).
13. *Thompson v. Keohane,* 516 U.S. 99, 112 (1995).
14. *J.D.B. v. North Carolina,* 564 U.S. 261, 275–76 (2011).
15. *Id.*
16. *New Jersey v. T.L.O.,* 469 U.S. 325, 342 (1985).
17. *Id.*
18. *Commonwealth v. Snyder,* 597 N.E.2d 1363, 1369 (Mass. 1992).
19. *J.D. v. Commonwealth,* 591 S.E.2d 721, 723 (Va. Ct. App. 2004).
20. *Snyder,* 597 N.E.2d at 1369.

Criminal Law

Sealing of Criminal Records: Apply Alone, at Your Own Risk

On October 7, 2017, Criminal Procedure Law (CPL) § 160.59 went into effect. This section of the CPL deals specifically with "Sealing of Certain Convictions.[1]"

Seth I. Koslow

Section 160.59 provides that a form application must be made available to defendants so that they may apply for sealing on their own.

This article endeavors to explain what convictions can and cannot be sealed, how to apply for sealing of a conviction, what factors courts consider when reviewing an application for sealing and what happens when sealing is granted. The article also points out where the pitfalls lie.

Some Offenses Cannot Be Sealed

Criminal Procedure Law § 160.59(1)(a) seems to define what offenses can be sealed.[2] However, in reality, this section actually defines what offenses cannot be sealed, thus rendering all other "crimes[s] defined in the laws of this state" eligible for sealing.[3] So what crimes under the Penal Law *cannot* be sealed?

- Sex Offenses defined in Art. 130
- Sexual Performance by a Child Offenses defined in Art. 263
- Felony Homicide, Abortion and Related Offenses (not Misdemeanors) defined in Art. 125
- Violent Felony Offenses defined in § 70.02
- Any Class A Felony Offense
- Felony Conspiracy Offenses (not Misdemeanors) defined in Art. 105, so long as the underlying offense is not an offense that can be sealed
- Attempts to Commit an Offense, if it is a felony to attempt to do so, and the offense attempted, if completed, would not be eligible[4]
- Offenses listed in Art. 6C of the Correction Law, which require registration as a sex offender

Essentially, this section of the CPL allows all but the most serious of offenses to be sealed. In other words, even if a person has a felony conviction, provided it is does not fall into one of the categories listed above, that conviction can be sealed under this new law. While § 160.59 allows for the sealing of most types of criminal convictions, it limits the number of convictions a person can have sealed. Subdivision (2)(a) mandates that "a defendant who has been convicted of up to two eligible offenses but not more than one felony offense may apply" for sealing.[5]

For example, a person convicted of Assault in the Third Degree and Petit Larceny can apply to have both convictions sealed because both charges are misdemeanors and both are eligible for sealing. Similarly, a person convicted of Assault in the Third Degree and Grand Larceny in the Third degree could also apply for sealing, since only one of those convictions is a felony and both convictions are eligible for sealing.

Another point relevant for attorneys and defendants is that subdivision (1)(a) provides "where the defendant is convicted of more than one eligible offense, committed as part of the same criminal transaction… those offenses shall be considered one eligible offense.[6]" This is especially important when, for example, a defendant in Nassau County, who is required to plead guilty to a Felony Aggravated Unlicensed Operation of a Motor Vehicle and a misdemeanor Driving While Under the Influence of Alcohol also has a previous conviction for Misdemeanor Possession of a Controlled Substance. In this scenario, the defendant would still be permitted to apply for sealing even though he or she was convicted of more than two eligible offenses.

Application for Sealing

In order to apply for sealing, CPL § 160.59 requires certain documentation. The documents required include a certificate of disposition; a sworn statement from the defendant indicating if the client has, has not or will not be applying for sealing of other eligible convictions (remember, no more than two convictions can be sealed); a copy of any other applications for sealing that have been previously made; a sworn statement as to the conviction(s) for which sealing is being requested; and finally, a sworn statement of the reasons why the court should grant sealing.[7]

After the application is completed it, along with supporting documentation, must be filed with the court and a copy of the application must be served on the District Attorney's Office in the county or counties where the conviction(s) occurred.[8] The District Attorney's Office will then have 45 days to notify the court if he or she objects to the sealing.[9] In general, the application will be assigned to the same judge that levied the sentence for the conviction(s).[10] However, if more than one application is filed, those applications will be assigned to County or Supreme Court.[11]

Upon receipt of the application the court will then request fingerprint based criminal history records of the defendant (including sealed records) to determine if that person is, in fact, eligible for sealing.[12] It should also be noted that CPL § 160.59 authorizes the courts to review criminal history from the Federal Bureau of Investigation regarding convictions in other jurisdictions.[13]

Subdivision 3 of CPL § 160.59 provides eight situations which will require immediate denial of a defendant's application. Those situations include if the defendant is required to register as a sex offender pursuant to article Six C of the Correction Law; the defendant has already obtained sealing for the maximum number of convictions allowable under CPL § 160.58; the defendant has already obtained sealing for two eligible offenses; the requisite time period has not elapsed (at least ten years since the imposition of sentence for latest conviction); the defendant has an open arrest or pending charges against him or her; the defendant was convicted of any crime after the date of entry of judgement for the last conviction that sealing is being applied for; failure to provide a sworn statement as to the reasons why a the court should grant sealing; or the defendant has been convicted of two or more felonies (or more than two crimes).[14] Once the application has been received by the court and it has been determined that the application need not be denied outright, for any of the reasons stated previously, the court will wait the requisite 45 days for the District Attorney to file an objection. If the District Attorney does file an objection the court *must* grant a hearing on the application.[15]

While CPL § 160.59 does not indicate how the hearing is to proceed, it does state that the court shall conduct a hearing "in order to consider any evidence offered by either party that would aid the sentencing judge in his or her decision whether to seal the records of the defendant's convictions.[16]" The statute, however, fails to define how the hearing is conducted, what evidence can be introduced and what rules apply to such a hearing. In the event that the District Attorney's Office does not object to the application, it becomes the province of the judge to determine if sealing should be granted.[17] Subdivision 7 of CPL § 160.59 provides some relevant factors that the court may consider. The factors that the court may consider include everything from the amount of time that has elapsed since the defendant's last conviction to the impact sealing will have on public safety.[18] If a defendant is successful and a judge or court orders the defendant's records to be sealed, all official records and papers relating to the arrest and conviction are sealed. Or are they? Subdivision 8 indicates that records related to any arrest or conviction "shall be sealed and not made available to any person or public or private agency *except as provided for in subdivision nine of this section….*[19]" The question becomes, who can see records after they are sealed? Pursuant to subdivision 9, sealed records will be made available to the defendant (or the defendant's designated agent); any state or local agency that is responsible for the issuance of gun licenses (if the defendant has applied for a gun license); prospective employers (if the defendant has applied for a job as a police or peace officer); the Federal Bureau of Investigations and "qualified agencies."[20] A qualified agency is defined in Executive Law § 835, but essentially, qualified agencies include most law enforcement agencies.[21]

Finally, §160.59 of the Criminal Procedure Law provides that a person's right to apply for sealing cannot be waived as part of a plea agreement.[22] In other words, a District Attorney cannot condition a plea bargain on a person promising not to apply for sealing in the future. It should be noted that convictions that are sealed are still considered for the purposes of enhancing penalties. Furthermore, if a prior conviction is an element of a charged crime, then a sealed conviction would still be considered.[23]

Criminal Procedure Law § 160.59 allows for the sealing of most convictions. The new law specifically requires that a form application be made available to defendants so they may apply for sealing on their own. The statute contains countless nuances and intricacies.

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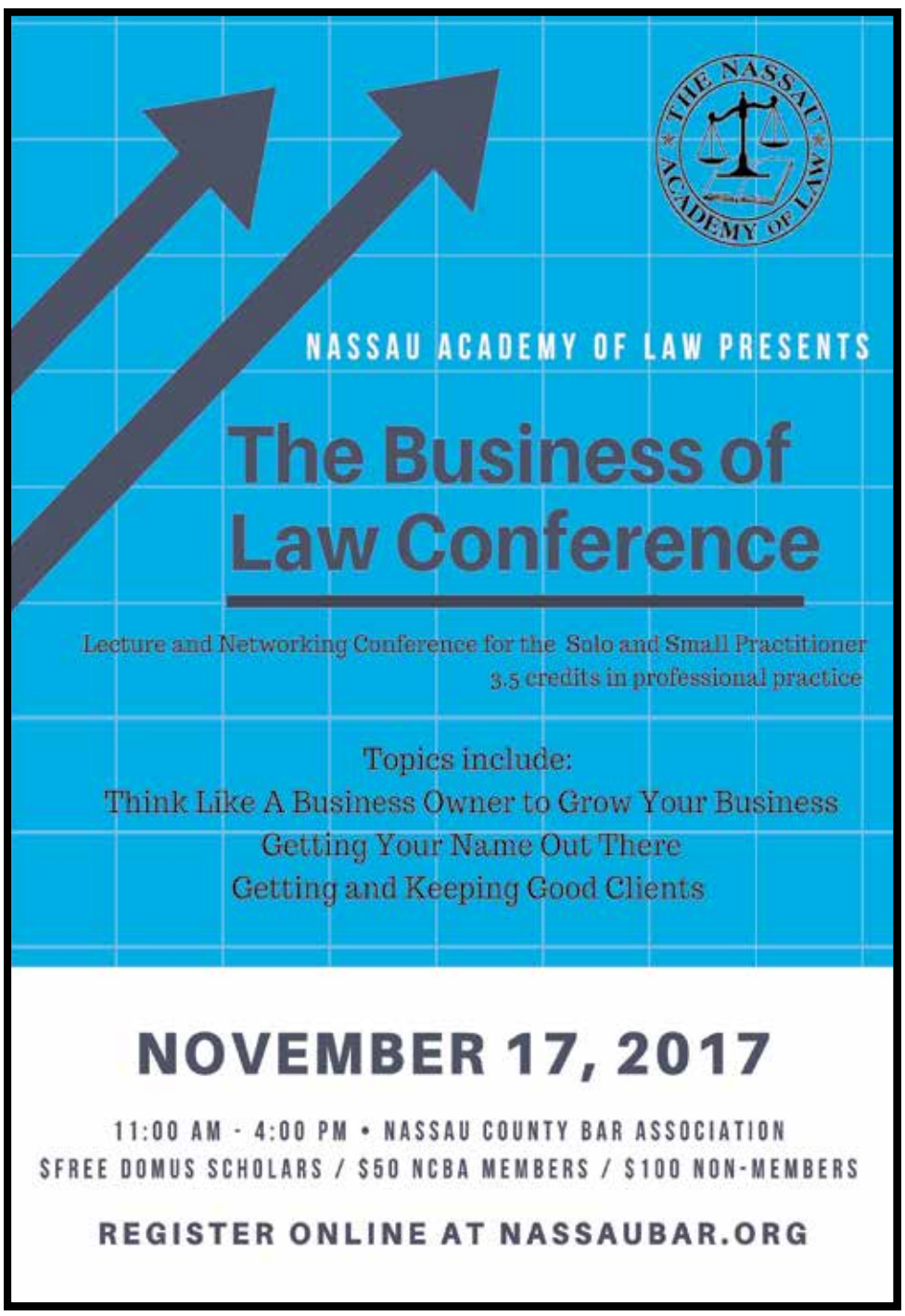
1. See: CPL § 160.59.
2. *Id.*
3. *Id.*
4. For example: Attempted Murder is a felony, and had the Defendant completed the crime (Murder) he would not be entitled to sealing. Therefore, the attempt conviction is not sealable.
5. CPL § 160.59(2)(a).
6. CPL § 160.59(1)(a).
7. CPL § 160.59(2)(b).
8. CPL § 160.59(2)(c).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. CPL § 160.59(2)(d).
14. CPL § 160.59(3)(a)-(h).
15. CPL § 160.59(6).
16. *Id.*
17. CPL § 160.59(7).
18. *Id.*
19. CPL § 160.59(8)(emphasis added).
20. CPL § 160.59(9)(a)-(e).
21. Exec. Law § 835.
22. CPL § 160.59(11).
23. CPL § 160.59(10).

Program Calendar

NOVEMBER 2017

November 17, 2017
11:00 am – 4:00 pm
Business of Law Conference : Lecture and Networking Conference for the Solo and Small Practitioner
This program is sponsored by:
NCBA Corporate Partner Champion Office Suites
Tradition Title Agency, Inc
All Covered – IT Services from Konica Minolta
DoctorPromo Promotions
Northwestern Mutual
NGH Group, Inc.
3.5 credits in professional practice. Lunch is included.

Registration fees:
$FREE Domus Scholar Circle
$100 NCBA Members
$150 Non-Members
Program is also open to law firm administrators. Please call 516.747.4464 to register.



November 21, 2017
Dean's Hour: Preventing Fraud in the Law Firm Setting
With the NCBA General, Solo and Small Law Practice Management Committee
Sign-in 12:30PM; Discussion 1:00-2:00PM
1 credit in ethics

November 28, 2017
Alphabet City: JD and LGBTQ Issues***
With the NCBA Family Court Law and Procedure Committee and the Assigned Counsel Defender Plan Inc. of Nassau County
5:30-8:30PM
3 credits in professional practice
** This program satisfies the new CLE rule $1500.22 for experienced attorneys to include one credit hour in diversity and elimination of bias effective July 1, 2018. Experienced attorneys due to re-register on or after July 1, 2018 must meet this requirement.

November 29, 2017
Rise 'n' Shine (Out to Lunch) Lecture Series Presents:
New Partnership Audit Regulations Require Changes For ALL Partnerships
With NCBA Corporate Partner Baker Tilly LLP
Sign-in 12:30PM
Discussion 1:00-2:00PM
Program is free to attend. Optional CLE/CPE credit available for purchase $30/each type. CLE credit is free for current Domus Scholars. Must pre-register. 516.747.4464 or academy@nassaubar.org

November 30, 2017
Dean's Hour: Discovery and Dollars – Using Tax Returns as a Litigation Tool
This program is sponsored by NCBA Corporate Partner Giorgenti Custom Suits
With the NCBA Tax Law Committee
Sign-in 12:30PM; Discussion 1:00-2:00PM
1 credit in professional practice or skills

November 30, 2017
The 411 on Local Government - Working through Zoning, Building, and Parking Issues (Seminar name changed from Dealing with Local Government)
With the NCBA Community Relations and Public Education Committee
6:30-8:00PM
Program is free to attend.
Optional 1.5 CLE credit available for purchase of $30. CLE credit is free for current Domus Scholars.
This program also qualifies for **skills** credit for newly admitted attorneys.

DECEMBER 2017

December 6, 2017
Dean's Hour: New York Paid Family Leave Benefits Law
With the NCBA Women in the Law Committee
Sign-in 12:30PM
Discussion 1:00-2:00PM
1 credit in professional practice or skills

December 8, 2017
Annual School Law Conference 2017
With the NCBA Education Law Committee
Conference will be held at the Nassau County Bar Association
Sign-in 8:30AM;
Program 9:00-3:30PM
5.5 credits in professional practice
*Domus Scholar Circle not applicable for this program.
Registration fee includes electronic link to material. Print material $25 additional

December 11, 2017
Income Tax Exemptions
With the NCBA Community Relations and Public Education Committee
6:30-8:00PM
Program is free to attend.
Optional 1.5 CLE credit available for purchase of $30. CLE credit is free for current Domus Scholars.
This program also qualifies for **skills** credit for newly admitted attorneys. Must pre-register.

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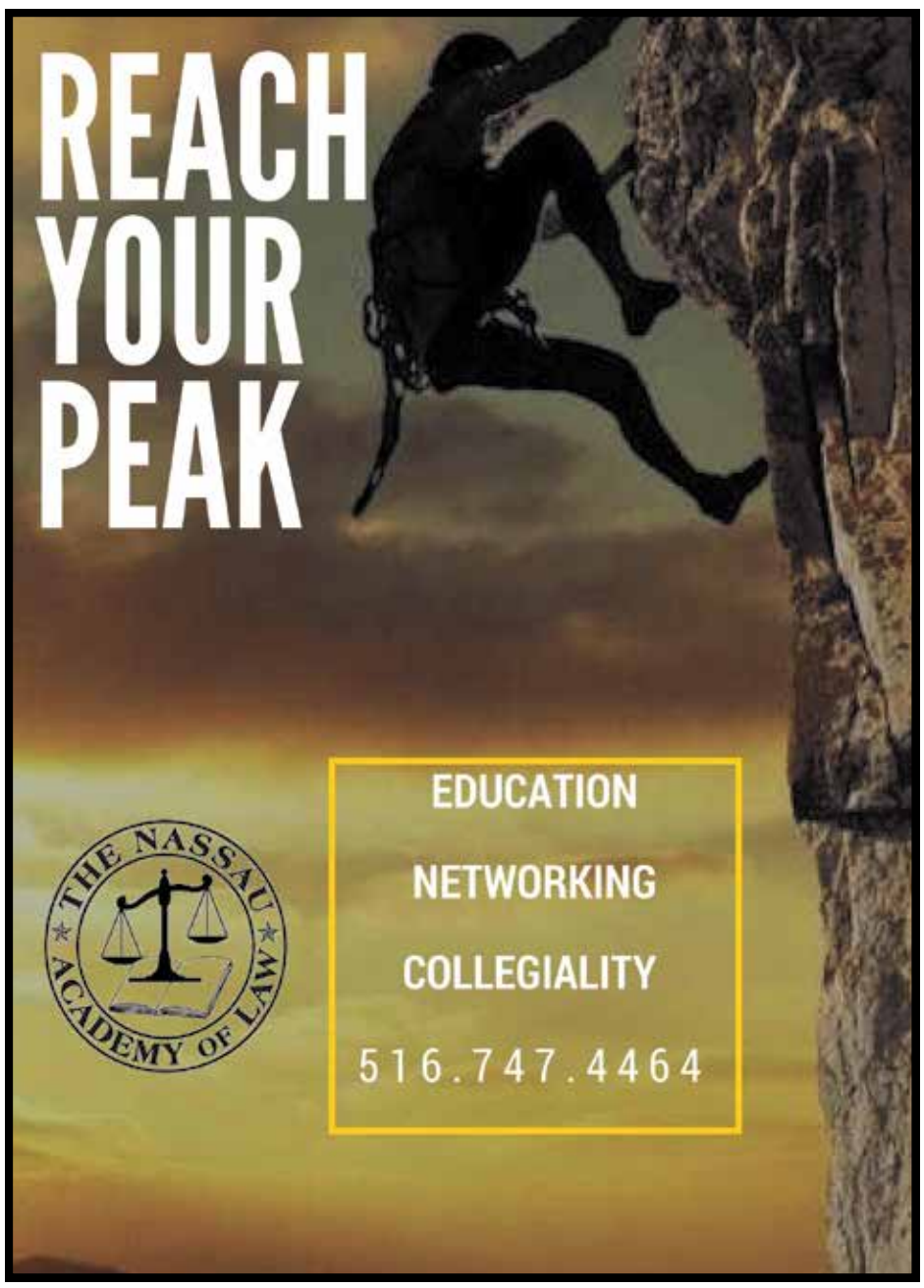

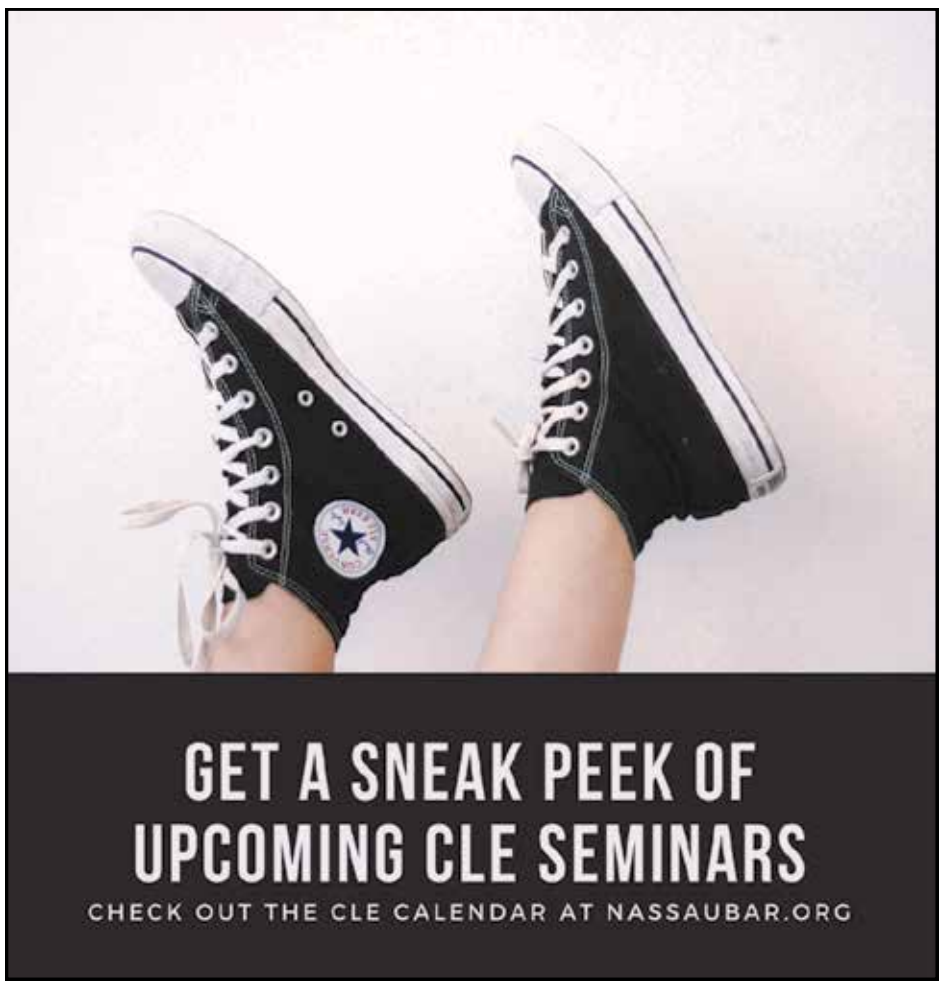

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Criminal Law

CPLR Update: Amendment to CPLR §503(a) Provides an Additional Venue Option for Personal Injury Plaintiffs

On October 20, 2017, Governor Cuomo signed legislation amending the Civil Practice Law and Rules (CPLR) §503(a) thereby availing plaintiffs of an additional option for venue when commencing an action.[1] The amended law, which applies to actions commenced after October 23, 2017, more closely resembles venue rules for causes of action against municipalities and public authorities where the location of an injury may dictate venue.[2]

John Coco

Under the amended CPLR §503(a), plaintiffs may now designate venue based upon the location where the cause of action arose, in addition to the county of a party's residence when the action is commenced. While this article focuses solely on personal injury litigation, the new law applies to commercial and other cases as well.

CPLR §503(a) was amended to read as follows (new language in italics):

CPLR §503(a) Generally. Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; *the county in which a substantial part of the events or omissions giving rise to the claim occurred;* or, if none of the parties then resided in the state, in any county designated by the plaintiff. A party resident in more than one county shall be deemed a resident of each such county.[3]

Benefits to Parties, Witnesses, & Courts

Prior to this amendment, New York residents were required to designate venue in a county of a party's residence when the action was commenced.[4] This restriction could result in deleterious effects for all involved in the litigation.

For example, assume an individual is injured in a motor vehicle collision in Queens County when the defendant, Donna, crashes into the plaintiff, Paul, on Queens Boulevard. Further assume that both Paul and Donna reside in Suffolk County. A man emerging from his apartment witnesses the crash, and an NYPD officer responds.

Under the amended CPLR §503(a), Paul could designate Queens County for trial.[5] This additional option is equitable for all parties, witnesses, and could even benefit the courts.

Firstly, under the prior CPLR §503(a), Paul *must* commence his action in Suffolk County, regardless of where the collision occurred. This prior rule precluded a Queens jury from hearing the case, even though a Queens jury is more familiar with Queens traffic and the perils of Queens Boulevard. A jury's familiarity with the accident scene would equitably serve both Paul and Donna's interests, and is now an option for Paul under the new law.

Secondly, this amendment provides for the convenience of witnesses to an accident. In our example, the police officer works in Queens, and the eyewitness lives in Queens. Here, a Queens County trial would be more convenient for both the police officer and witness than a Suffolk County trial. It stands to reason that witnesses to an accident often live or work near an accident scene.

Lastly, a particular court may be overburdened, while another has a lighter caseload. Paul can designate venue simply based upon where his case will resolve most expeditiously. This serves to ease congestion in busy courts, and may generally hasten litigation throughout New York.

Conclusion

The CPLR §503(a) amendment is a significant and equitable change in the law. This amendment avails parties of better equipped juries, is more convenient for witnesses, and may accelerate litigation throughout New York.

John Coco is Chair of the Plaintiff's Personal Injury Committee at NCBA and founder of the Law Offices of John Coco, a personal injury firm. John can be reached at 516-224-4774 or jcoco@johncocolaw.com.

1. The Bill, S6031/A8032 was sponsored by Senator Michael H. Ranzenhofer and Assembly member Linda B. Rosenthal.
2. *See* CPLR §§ 504, 505.
3. CPLR §503(a) as amended effective as of October 23, 2017.
4. CPLR §503(a) also allows a plaintiff to designate a county for venue when none of the parties to the action reside within the state.
5. Under CPLR §503(a), the Plaintiff can choose the county of residence of a party for venue. This portion of the CPLR §503(a) remains unchanged.

DEDICATED ...

Continued From Page 1

and class."

"Thank you for the honor of naming this room after us, but it really isn't just about the two of us," Judge Santagata responded. "It's about this building, the traditional Toast to Domus and everything for which the Bar Association stands. Our building is a key part of NCBA's history."

"The Nassau County Bar Association energizes our members every single day." she commented. "At Domus, we can talk about our families and areas of the law. We may be adversaries in court, but at Domus we're all colleagues."

Modernizing For Today's Needs

The Presidents Room replaces the Tech Center, which was created in 1994 to provide hands-on training for members to learn the latest computer skills and legal research techniques. Advancements in technology eventually superseded this use. Last year, newly elected Board Member Maureen Dougherty volunteered to join a task force, along with fellow board member Michael A. Markowitz and Executive Board Member Richard D. Collins, to make recommendations on how to revitalize the room and obtain the needed funding. "Because of her love of the law and her involvement with and service to the Bar Association for many decades, we decided to approach Judge Santagata," Dougherty said. The Task Force accomplished three objectives: it created additional space to meet the growing needs of the membership, commemorated the contributions of NCBA's Past Presidents and provided the necessary funding to complete the project. On October 10, President Leventhal, Judge Santagata and Dougherty cut the ceremonial ribbon to officially open the Frank J. & Marie G. Santagata Past Presidents Room.

A Visionary Leader

Frank Santagata served as NCBA President from 1983-1984. He led the Association in establishing the nationally lauded pro bono Volunteer Lawyers Project in partnership with Nassau Suffolk Law Services. Last year, the Project handled more than 1200 cases in Nassau County, assisting approximately 3,200 residents in practice areas including eviction prevention, landlord-tenant, matrimonial and family law, consumer protection and bankruptcy.

Past President Santagata also led the Association in establishing arbitration tribunals in what is now NCBA's Alternative Dispute Resolution program, and he incorporated the NCBA Speakers Bureau into the Nassau Academy of Law.

Having served as a Westbury Village Justice for 30 years, and as president of the Nassau County Magistrates Association from 1978-1979, Frank Santagata remains a singular role model for the judges of the village courts. In 1997, the Magistrates named their highest award in his honor, the Frank J. Santagata Award for Ethics, Professionalism and Devotion to Equal Justice Under the Law.

After his death in 1996, the Nassau County Bar Association established the Frank J. Santagata Distinguished Past President Award to recognize past presidents who continue to provide service and leadership for three or more years after their term as president.

A Legal Pioneer

Hon. Marie Santagata is well-known as a champion of justice in Nassau County and as a legal pioneer for women, the Bar Association and the community. Before there was a public defender system in New York, Judge Santagata organized lawyers to represent indigent youthful defendants in district court. As Supervising Judge of all criminal courts in Nassau County, she instituted time and cost-saving innovations still in use today.

Judge Santagata founded and served as the first chair of the Nassau County Youth Board. She wrote booklets to explain legal issues for young people and on how to close a law practice for lawyers near retirement and families of lawyers unable to do so themselves. She served as the first Executive Director of the Nassau County Crime Council and developed programs to assist and rehabilitate criminal defendants. She was also instrumental in establishing a criminal justice program at C.W. Post. At NCBA, she was the first woman to serve as Chair of the Grievance Committee and the first woman to serve on the Board of Directors.

In recognition of her great impact on the administration of justice in Nassau County and her dedicated service to the professional public, in 1998, the NCBA presented Judge Santagata with its highest award, the Distinguished Service Medallion.

Leadership History

The Past Presidents Room displays 30 portraits from M. Hallstead Christ (1970-1971) to Joel Asarch (1999-2000). (The more recent Past Presidents' portraits are displayed in the main lobby hallway.) One section is dedicated to Frank Santagata with photos and articles on his many accomplishments.

"Marcus Christ's portrait used to hang over the fireplace in the Great Hall," Judge Santagata remembered. "He always said that, as lawyers, we should never appear before a group of people without giving a message. Frank always gave the same message: that our Constitution, Bill of Rights and our system of justice are the envy of the world. My message is always different and present to the moment."

Judge Santagata listed 3 current issues NCBA members should examine - privatization of the jails, the proposed New York State constitutional convention, and how to bring back public confidence in their leaders. "You have to pressure the people who have power to make sure the candidates for office have a record for serving the public and not their own aggrandizement," she emphasized.

An active member of the Nassau Bar Association for 56 years, Judge Santagata's devotion is evident, always encouraging members to step forward to make a difference.

"I know what it means for a Bar member to work all day, and then come here to discuss and contemplate weighty problems and to make decisions," she said. "I am truly proud to be a member of this Association."

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Light The Night Walk is a fund-raising campaign of The Leukemia & Lymphoma Society (LLS) which brings together families and communities to honor blood cancer survivors, as well as those lost to the diseases. The event shines a light on the importance of finding cures and providing access to treatments for blood cancer patients. (photo by Hector Herrera)

Criminal Law

The Cost of Incarceration Education: Education Yes, a Job...Maybe

On August 8, 2017, Governor Andrew Cuomo and Manhattan District Attorney Cyrus Vance Jr. announced a $7.3 million award to fund college classes at 17 New York State prisons over the next five years.[1] This investment in college-level education and reentry services in New York prisons will create more than 2,500 seats for college-level education and training for incarcerated New Yorkers. Reducing criminal behavior through college-level education programs at prisons is a part of Governor Cuomo's "Right Priorities Initiative," a "common sense criminal justice reform package." The new measure utilizes criminal asset forfeitures to help expand higher education inside prisons.[2]

Nicole Lubell

The Right Priority at the Right Price?

Supporters of the expenditure argue that providing education in prisons is crucial in preparing for successful reentry into the community, reducing the rate of recidivism, and improving public safety.[3] Furthermore, rehabilitation and reintegration are arguably fundamental benchmarks of our corrections system's success. In this vein, prisons can and should serve to yield productive members of society: those who can provide support and care both for their families and communities. Education offers the opportunity for real life post-incarceration change, not only reintegration with new skills, knowledge and even a degree, but critically important, a new-found confidence and hope for the future.

Some argue that prisoner education is an improper use of funds and will not have the benefits asserted. Specifically, they claim that while education for prisoners is laudable, it should not come before the education of children. One assemblyman noted that, "[s]o many middle-class families struggle to make ends meet in this state, let alone sending their children to college. We should be focusing on assisting them."[4] Furthermore, despite the benefits of prison education, not everyone reforms. Within five years of release, about three-quarters of released prisoners are rearrested.[5]

Irrespective of inmate education expenditure validity, only post-incarceration employment opportunities and success can dictate its true efficacy.

New Legislation For Sealing Criminal Records

On October 7, 2017, with an eye toward providing to persons with criminal histories the best possible chance at future employment, the New York legislature enacted a new section, § 160.59, to Criminal Procedure Law.[6] Under the new law, courts will have discretion to seal up to two convictions, only one of which may be a felony, for all crimes other than sex offenses and class A violent felonies.[7] A 10-year waiting period, running from the date of conviction or release from prison, applies.[8] Record sealing makes unavailable to any person or public or private agency, all official records concerning arrests, prosecutions and convictions.[9]

Gaps in the "Sealed" Envelope

Sealing is not an automatic right under all circumstances, and thus does not guarantee a favorable employment outcome. Accordingly, the law does not provide for the sealing of criminal records to individuals convicted of more than one felony;[10] individuals who have exceeded the maximum allowable number of "sealings" under the law;[11] or those with pending charges or who have been convicted after the last conviction for which sealing is sought.[12]

Further, certain factors, subject to judicial discretion, can impact sealing and subsequent employment chances. Particularly relevant factors include the impact of the sealing upon the defendant's rehabilitation and his or her successful and productive reentry and reintegration into society, as well as the impact of the defendant's record on public safety and the public's confidence in the defendant's respect for the law.[13]

Finally, despite their sealed status, criminal records remain available to "qualified agencies," including courts, corrections agencies, federal and state law enforcement for law enforcement purposes and police officer employment screening, state agencies issuing firearm licenses, and to the FBI for firearm background checks. And as a practical matter, the record sealing law does not negate the accessibility of criminal records via the internet and through private record-keeping businesses.

Administrative Remedies

Aside from record-sealing state legislation, persons with prior criminal histories seeking employment may take advantage of administrative remedies, including a Certificate of Relief from Disabilities[14] or a Certificate of Good Conduct (CGC). [15] These certificates' purpose is to restore rights and to effectuate the public policy of encouraging the licensure and employment of convicted individuals.[16] Essentially, they relieve "any forfeiture or disability," and "remove any barrier to employment that is automatically imposed by law by reason of conviction of the crime or the offense."[17] However, some practitioners argue that "the certificate program is of limited value, in part because some courts are disinclined to certify rehabilitation as early as sentencing, and in part because employers and others are unwilling to rely on them."[18]

"Banning the Box" and Other "Fair Chance" Policies

As part of a large, national movement of "fair chance" policies, the "Ban the Box," campaign, so named for seeking to remove the employment application check box regarding one's criminal conviction history, delays the background check inquiry until later in the hiring process. The campaign has arguably been a major impetus behind the creation of the New York sealing legislation. In its wake, over 150 cities and counties have instituted laws prohibiting any line of initial questioning with respect to prior convictions. [19]

Alongside the "Ban the Box" campaign, the 2015 New York City Fair Chance Act prohibits all employers in the city from asking about a job applicant's conviction record until after a job offer is made. Also concurrent with the Criminal Procedure Law and public policy changes, the Human Rights Law, N.Y. Exec. Law § 296(16), prohibits its public and private employers and occupational licensing agencies from asking about, or taking adverse action (i.e. denying employment or licensure) because of any arrest that did not result in a conviction, or that terminated as a youthful offender adjudication; or that resulted in a sealed conviction, including violations, infractions, and misdemeanors and felonies sealed under the 2009 Drug Law Reform Act. While not the subject of extensive analysis here, important to mention is the U.S. Equal Opportunity Commission Enforcement Guidance, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*,[20] a resource for further inquiry.

Opponents to "Ban the Box" and other employment fair chance policies argue that interviewing and hiring individuals with criminal backgrounds should be at the sole discretion of the employer,[21] opining that reliance on such practices can be wasteful, unproductive and jeopardize workplace safety.

Article 23-A and Negligent Hiring Liability

The Human Rights Law also makes it an unlawful discriminatory practice to deny employment in violation of Article 23-A of the Corrections Law.[22] Specifically, Section 752 of the Corrections Law makes it unlawful for public employers, occupational licensing authorities, and private employers with more than ten employees, to deny or terminate employment or licensure based on a previous conviction.

But exceptions to this rule apply where there is a "direct relationship" between one or more of the previous criminal offenses and the specific license or employment sought or where the issuance of the license, or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.[23]

The law further mandates that prospective private employers and public agencies consider a plethora of relevant factors before issuing a decision with respect to granting or denying employment. Because a failure to properly consider such factors places the employer at risk of liability, this is yet another reason an employer may hesitate to pursue a prospective employee with past criminal history.[24] It should be noted that the prohibitions provided by Article 23-A do not apply if employment disqualification is mandated by law, and the person has not received an administrative certificate for good conduct or relief from disability, which create a presumption of rehabilitation.

Getting What We Pay For

The extent to which incarceration educational funding will impact future employment opportunities is largely unknown. Certainly, recent law developments and social programs support a trend toward giving formerly incarcerated individuals, and those with criminal histories, the best chance possible to succeed. However, workplace, community safety and best use of funds remain primary concerns. The efficacy of incarceration educational spending will best be determined by close studies of those individuals who have received such education, and their subsequent employment success. It is the hope that despite the risk of recidivism, many individuals now educated with a new skill or academic degree, will start on a clean slate. They offer the promise of becoming productive society members who can not only support themselves and their families, but also contribute meaningfully to their community. Money aside, there can be no better education and deterrent to future crime than sharing real-life success stories, which will undoubtedly provide hope to those without it.

Nicole Lubell is a former Assistant Public Defender and Assistant City Attorney. She is an appointed member of the New York City Bar Corrections and Community Reentry Committee and its Educational subcommittee. Currently, she serves as the Settlement Conference Coordinator for the Nassau County Bar Association Pro Bono Mortgage Foreclosure Project.

1. *John Jay's Prisoner Reentry Institute to serve as Education and Reentry Coordinator for State College-In-Prison Reentry Program;* http://www.jjay.cuny.edu.
2. *Governor Cuomo and Manhattan District Attorney Vance Announce Award Recipients of $7.3 Million Investment in College-Level Education and Reentry Services for New York State Prisons*; https//www.governor.ny.gov/news/governor-cuomo-and-manhattan-district-attorney-vance-announce-award-raecipients-7.3-miillion.
3. *Education from the Inside, Out: The Multiple Benefits of College Programs in Prison* http//www.correctionalassociation.org/resource/education-from-the-inside-out-the-multpe-benefits-of-college-progras-in-prison/.
4. http//www.wicz.com/story/36093161/crouch-says-he-does-not-support-cuomos-plan that-offers-college-courses-to-prisoners/.
5. *CONFER: Ban the Box with Education Not Regulation* http://www.niagara-gazette.com/opinion/confer-ban-the-box.
6. NB: The law addresses adult criminal convictions and history only.
7. Crim. Proc. Law §160.59(2)(a).
8. Crim. Proc. Law § 160.59(5).
9. Crim. Proc. Law §160.59(8).
10. Crim. Proc. Law § 160.59(3)(h).
11. Crim. Proc. Law § 160.58.
12. Crim. Proc. Law §160.59(3).
13. Crim. Proc. Law § 160.59(7).
14. Correct. Law §§ 701-703.
15. *Id*. at §§703-a,703-b.
16. Restoration of Rights Project; http://ccre-sourcecenter.org citing *People v. Adams*, 193 Misc.2d 78 (Sup. Ct., Kings Co. 2002).
17. Correct. Law §§ 701-703.
18. *Id*. at 13.
19. *Ban the Box: U.S. Cities, Counties and States Adopt Fair Hiring Policies* http://nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide.
20. Number 915.002, April 25, 2012.
21. *CONFER* at 2.
22. Restoration of Rights Project; http://ccre-sourcecenter.org at 20.
23. *Id*. at 20.
24. *Id*. at 21 citing *Acosta v. Department of Education of City of New York*, 16 N.Y. 3d 309, 320 (2011).

INTOXICATION ...

Continued From Page 7

alcohol content.[20] *People v. Krut* and *People v. Palencia*, both decided after the Alco-Sensor FST was included on the Conforming Products List in 2003, explained that the reliability of PBTs to establish intoxication is not "generally accepted" in the scientific community.

Nonetheless, certain courts have relied on *People v. Hampe* as authority for the determination that the presence of a PBT device on the Conforming Products List is sufficient to establish reliability.[21] However, the device at issue in *Hampe* was not a field breath test device, but rather the BAC Verifier, which was administered under the controlled conditions of a police station[22] and uses infrared energy absorption rates to measure the *quantity* of alcohol in the breath.[23] Absent rigorous control over the testing environment, which goes to the heart of the reliability of the chemical tests utilized in central-testing units, there can be no presumption of reliability simply because of the inclusion of a field breath test on the Conforming Products List.

Thus, the trial courts which have abandoned appellate precedent in favor of a reading of the VTL which requires admission of PBT results to establish intoxication misapprehend the statutory scheme. When the VTL is viewed in its entirety, and the rules promulgated thereunder are examined in light of the federal regulatory scheme, which they mirror, PBTs should not be admissible as *prima facie* evidence of intoxication.

Peter B. Skelos is a partner at Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP and a mediator and arbitrator at National Arbitration and Mediation; Robert Brunetti is a founding partner at Brunetti Ascione, PLLC. The authors thank Kelly E. Lester, a third year student at New York University School of Law, for her invaluable assistance in preparing this article.

1. *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663 (2d Dept. 1984).
2. *People v. Kulk*, 103 A.D.3d 1038 (3d Dept. 2013); *People v. Thomas*, 12 A.D.2d 73 (4th Dept. 1986), *aff'd* 70 N.Y.2d 823 (1987); *see also People v. Krut*, 133 A.D.3d 781 (2d Dept. 2015); *People v. Palencia*, 130 A.D.3d 1072 (2d Dept. 2015).
3. *See Mountain View Coach Lines, Inc.*, 102 A.D.2d at 664-65; *People v. Brisotti*, 169 Misc.2d 672 (App. Term 1st Dept. 1996), *lv denied* 89 N.Y.2d 940.
4. *People v. Brockington*, 51 Misc.3d 1211(A) (N.Y. Co. Crim. Ct. 2016); *People v. Turner*, 47 Misc.3d 100 (App. Term 1st Dept. 2015).
5. *Brockington*, 51 Misc.3d 1211(A), at *3.
6. *Id.* at *1.
7. VTL § 1194(2)(a)(2).
8. VTL § 1194(2)(a).
9. *Compare* VTL § 1194(1)(b), *with* VTL § 1194(2)(a)(2).
10. The Court of Appeals has also held that a defendant facing an alcohol-related charge arising out of the operation of a motor vehicle has a qualified right to counsel. *See, e.g.*, *People v. Washington*, 23 N.Y.3d 228 (2014). If the results of a PBT were admissible, a police officer in the field would have to permit the detained operator to call counsel from the roadway prior to the administration of a PBT. This is an impractical obligation, but one that would be necessary if the PBT were to be placed on the same evidentiary plateau as the result of a chemical breath test and admissible as *prima facie* proof of intoxication.
11. *See People v. Santana*, 31 Misc. 3d 1232(A) (N.Y. Co. Crim. Ct. 2011).
12. *See* VTL § 1194(2)(b), (c), (d) (authorizing sanctions for refusing a *chemical test* and describing the procedural mechanisms for challenging the impositions of such sanctions).
13. *see* 32 CFR § 634.35.
14. *see* 49 CFR § 40.3.
15. VTL § 1194(4)(c).
16. *See, e.g.*, *Turner*, 47 Misc.3d at 101; *Brockington*, 51 Misc.3d 1211(A), at *2.
17. 49 CFR § 40.3 (emphasis added).
18. 49 CFR § 40.231(b).
19. *Id.*
20. *See People v. Krut*, 133 A.D.3d 781 (2d Dept. 2015); *People v. Palencia*, 130 A.D.3d 1072 (2d Dept. 2015).
21. *People v. Hampe,* 181 A.D.2d 238 (3d Dept. 1992); *see, e.g.*, *Turner*, 47 Misc.3d at 101; *Brockington*, 51 Misc.3d 1211(A), at *2.
22. By contrast, PBTs, like the Alco-Sensor FST, use electrochemical fuel cell sensors instead of infrared technology and are administered in the field.
23. *Hampe*, 181 A.D.2d at 239-40.

STUDENT...

Continued From Page 5

cumscribe them in an adult frame of reference." As such, "if there is not sufficient cause, the exclusionary rule must be applied in a criminal prosecution to evidence obtained illegally."

Searches by School Resource Officers

School resource officers (sometimes referred to as school safety agents or officers) are sworn law enforcement agents and have "all the powers of a regular police officer," including the right to search and arrest students.[8] The National Association of School Resource Officers estimates that the number of school police officers and school resource officers in our nation's schools is between 14,000 and 20,000.[9]

Since *Gregory M.*, New York courts have continued to apply the *TLO* reasonable suspicion standard to searches conducted by school resource officers. Specifically, the courts have held that the reasonable suspicion standard will apply provided that the officer was performing a school-related function when conducting a search.

For instance, in *Matter of Steven A.*, a school safety agent seized a box cutter from a student.[10] The safety agent was a civilian employee of the police department and was assigned exclusively to school security. The First Department held that the seizure was appropriate and the actions of the safety agent were subject to the same reasonable suspicion standards enunciated in *TLO* even though the safety agent was employed by the police department. The court emphasized that the agent's seizure of the weapon was proper, "particularly in light of the urgency of interdicting weapons in schools."

The court in *In re Ana E.* applied a similar analysis to the search of a book bag by a school safety officer.[11] Similar to the school safety agent in *Steven A.*, the school safety officer in *Ana E.* was a peace officer under the supervision of the police department. The officer was asked to search a female student's book bag after she participated in a violent fight in school and threatened to make the other student bleed. After the fight was broken up, a school counselor grew suspicious of the bag's contents and expressed her concerns to the school principal. The principal contacted a school safety officer, who searched the bag and found a knife.

The court ruled that the search was appropriate pursuant to the reasonable suspicion standard because school authorities initiated the investigation that led to the search.

The Presence and Influence of Police

In *Vassallo v. Lando*, the U.S. District Court for the Eastern District of New York addressed the question of how police presence and influence may effect a search by school officials.[12] In *Vassallo*, school officials initiated and directed the search of a student who was suspected of starting a fire in a school bathroom. The principal informed the student that if he refused to consent to the search of his backpack, "he would call a police officer to conduct the search by force." When the student refused to consent to an initial search of his backpack, the school principal called a Nassau County Police Officer to the school.

Once the police officer arrived, the student handed over his backpack to the principal. The principal searched the backpack in the presence of the officer and discovered marijuana seeds. The principal suspected that the student was in possession of marijuana and told the student to lift up his shirt, take off his shoes and socks and lift up his pant legs. The police officer told the student to follow the principal's instructions or he would be forcibly searched. The student followed the principal's directions and a quantity of marijuana was recovered from his waistband. The officer arrested the student for possession of marijuana.

The Eastern District ruled the search appropriate under the reasonable suspicion standard from *TLO*, finding that school authorities made the initial decision to interview and search the student, and only summoned the police officer for backup after the student refused to consent to the search. The court cited to similar concerns enunciated in *Steven A.* and *Ana E.*, explaining that the reasonable suspicion standard was appropriate because, "to hold otherwise, would potentially discourage school administrators from seeking the assistance and expertise of the police in a school's effort to address criminal and potentially dangerous situations that may be rapidly unfolding on school property."[13]

Thus, in the Eastern District, *TLO*'s reasonable suspicion standard applies to school searches involving law enforcement, so long as the decision to investigate, detain and search was made by school officials in pursuit of a school-related function, including school security and safety.

When Contraband in School Constitutes A Crime

Contraband recovered from students during a search conducted by school officials often constitutes a basis for discipline for violating a school rule. However, what if the items recovered constitute evidence not only of a violation of school rules, but of a crime? May the recovered items be used in a criminal prosecution or juvenile delinquency proceeding?[14] Generally, the answer is yes.

If the search satisfies the *TLO* reasonable suspicion standard discussed above, the evidence will likely be admissible in a subsequent criminal or delinquency proceeding.[15] For instance, in *Gregory M.*, the Court of Appeals ruled that a gun found in a student's book bag was lawfully recovered pursuant to the reasonable suspicion standard, and thus was admissible against the student in a subsequent juvenile delinquency proceeding.[16]

This raises an interesting discussion of the legal role of school personnel. On the one hand, it has long been established that school teachers and administrators stand in *loco parentis* based upon the fact that "…a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians [citation omitted]."[17] At the same time, school officials are also recognized as being representatives of the State.[18]

The contrasting role of the school official as a government representative, as opposed to the student's parent away from home, is well illustrated in *People v. Overton*.[19] In that case, three detectives came to school with a warrant to search two students and their lockers. One student's locker was searched after the school vice-principal opened it with his master key, and marijuana cigarettes were recovered in the ensuing search.

However, the warrant for the search of the locker was later found to be invalid. Nevertheless, the search was upheld after the court found that the vice-principal had consented to the search. In doing so, the court pointed out that school buildings and property are owned by the Board of Education, and the vice-principal operated the school as the Board's representative. As such, the vice-principal could lawfully consent to the search of the locker, and any contraband recovered used in a subsequent prosecution.

Takeaway: Schools Must Balance Roles and Interests

Cases like *TLO* and *Scott* demonstrate the balancing act performed by school administrators and resource officers when managing the concurrent roles of parent surrogate and government official. *TLO*'s reasonable suspicion standard acknowledges this dual role; the Court explained, "[a]gainst the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds."[20]

Ultimately, students and parents should be aware that while a student does not shed his constitutional rights at the school house gate, a search conducted by *TLO* standards which produces evidence of a crime, may lead to criminal, and not simply disciplinary consequences.

Joseph Lilly, Esq. is an associate at Frazer & Feldman, LLP, practicing education law in Garden City, New York.

Nicole A. Donatich, Esq. is an associate at Frazer & Feldman, LLP practicing education law in Garden City, New York.

1. Erica Byfield, *Boy, 13, Arrested After Gun Found in Backpack at Bronx Middle School: NYPD*, NBC News New York (Oct. 5, 2017), https://goo.gl/zxSsDd.
2. Rocco Parascandola, *Surge in number of weapons found in NYC schools*, New York Daily News (Oct. 3, 2017), https://goo.gl/issXmv.
3. *Vassallo v. Lando*, 591 F.Supp.2d 172 (E.D.N.Y. 2008).
4. *New Jersey v. TLO*, 469 U.S. 325 (1985).
5. *Id.*
6. *Matter of Gregory M.*, 82 N.Y.2d 588 (1993).
7. *People v. Scott*, 34 N.Y.2d 483 (1974).
8. Josh Sanburn, *Do Cops in Schools Do More Harm Than Good?*, TIME (Oct. 29, 2015), https://goo.gl/liqjnk.
9. *Id.*
10. *Matter of Steven A.*, 308 A.D.2d 359 (1st Dept. 2003).
11. *Matter of Ana E.*, 2002 WL 264325 (Sup. Ct., N. Y. Co. 2002).
12. 591 F.Supp.2d 172 (E.D.N.Y. 2008).
13. *Id.* at 194.
14. As compared to a criminal prosecution, a juvenile delinquency proceeding is a fact- finding adjudication to determine whether a child has committed an act, which, if committed by an adult, would constitute a crime.
15. *See Matter of Steven A, supra*; *Matter of Ana E., supra.*
16. 82 N.Y.2d at 592-94.
17. *Mirand v. City of New York,* 84 N.Y.2d 44, 49 (1994).
18. *Mandell v. Bd. of Educ.*, No. 28121/96, 1996 WL 34571253 (Sup. Ct., Nassau Co. 1996).
19. *People v. Overton*, 24 N.Y.2d 522 (1969).
20. *TLO*, 469 U.S. at 340.

ASSOCIATION NEWS

HISPANIC HERITAGE CEREMONY

At the Hispanic Heritage Ceremony on Friday, October 6th, at the Supreme Court in Mineola, Hector Herrera from the Nassau County Bar Association and David L. Majias, Esq. were honored. (l-r) NCBA President Steven G. Leventhal, NCBA President and Honoree Hector Herrera.

NCBA PAST PRESIDENT HONORED

A. Thomas Levin, Past President of NCBA and NYSBA, received the Barbara J. Merhman Commitment to Justice Award from Nassau Suffolk Law Services. Jeffrey Seigel, Executive Director Nassau Suffolk Law Services, presented the award. Photo by Hector Herrera

NCBA Committee Meeting Calendar • Nov. 13 - Dec. 20, 2017

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

We are pleased to announce the formation of the LGBTQ and Mental Health Committees of the Nassau County Bar Association and invite you to participate. Please contact Stephanie Pagano at spagano@nassaubar.org if you would like to be a member of these committees.

Attorney/Accountants
Monday, November 13
12:30 p.m.
Alisa Geffner/Jennifer Koo

Construction Law
Monday, November 13
12:30 p.m.
Michael Ganz

Plaintiff's Personal Injury
Tuesday, November 14
12:30 p.m.
John Coco

Criminal Court Law & Procedure
Tuesday, November 14
12:30 p.m.
Daniel Russo

Labor & Employment Law
Tuesday, November 14
12:30 p.m.
Christopher Marlborough

Bankruptcy
Wednesday, November 15
12:30 p.m.
Matthew Spero

Intellectual Property
Wednesday, November 15
12:30 p.m.
Ariel Ronneburger

Adoption Law
Thursday, November 16
12:30 p.m.
Martha Krisel

Veteran's and Military Law
Monday, November 20
12:30 p.m.
Gary Port

Commercial Litigation
Monday, November 20
12:30 p.m.
John McEntee

General, Solo and Small Law Practice Management
Tuesday, November 21
12:30 p.m.
Maxine Broderick

Medical-Legal
Monday, November 27
12:30 p.m.
Alan Clark

Animal Law
Tuesday, November 28
12:30 p.m.
Marilyn Genoa/Matthew Miller

District Court
Tuesday, November 28
12:30 p.m.
Jaime Ezratty

Elder Law Social Services & Health Advocacy
Tuesday, November 28
5:30 p.m.
Kathleen Wright/Danielle Visvader

Women In The Law
Wednesday, November 29
12:30 p.m.
Christie Jacobson

Education Law
Wednesday, November 29
12:30 p.m.
John Sheahan

Alternative Dispute Resolution
Thursday, November 30
12:30 p.m.
Donna-Marie Korth/William J.A. Sparks

Ethics
Monday, December 4
5:30 p.m.
Kevin Kearon

Real Property Law
Wednesday, December 6
12:30 p.m.
Patrick Yu/Rebecca Langweber

Hospital & Health Law
Thursday, December 7
8:30 a.m.
Douglas Nadjari

Community Relations & Public Educaiton
Thursday, December 7
12:45 p.m.
Moriah Adamo

New Lawyers
Monday, December 11
6:30 p.m.
Jamie Rosen/John Stellakis

Plaintiff's Personal Injury
Tuesday, December 12
12:30 p.m.
John Coco

Labor & Employment Law
Tuesday, December 12
12:30 p.m.
Christopher Marlborough

Association Membership
Wednesday, December 13
12:45 p.m.
Adam D'Antonio

Matrimonial Law
Wednesday, December 13
5:30 p.m.
Jennifer Rosenkrantz

Civil Rights
Thursday, December 14
12:30 p.m.
Kristina Heuser

Publications
Thursday, December 14
12:45 p.m.
Rhoda Andors/Anthony Fasano

Commercial Litigation
Friday, December 15
12:30 p.m.
John McEntee

Veteran's and Military Law
Monday, December 18
12:30 p.m.
Gary Port

Intellectual Property
Monday, December 18
12:30 p.m.
Ariel Ronneburger

General, Solo and Small Law Practice Management
Tuesday, December 19
12:30 p.m.
Maxine Broderick

Elder Law Social Services & Health Advocacy
Tuesday, December 19
12:30 p.m.
Kathleen Wright/Danielle Visvader

Animal Law
Tuesday, December 19
6:00 p.m.
Marilyn Genoa/Matthew Miller

Women In The Law
Wednesday, December 20
12:30 p.m.
Christie Jacobson

Alternative Dispute Resolution
Wednesday, December 20
12:30 p.m.
Donna-Marie Korth/William J.A. Sparks

NCBA New Members

We welcome the following new members

Attorneys

Katie A Barbieri
Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP

John C. Barrera
Barrera Legal Group

Jennifer Burgess

Michael S. Flynn

Jeffrey Fox
Law Offices of Jeffrey Fox, PLLC

Samantha Fried

Ross J. Kartez
Ruskin Moscou Faltischek, PC

Scott J. Kreppein
Quatela Chimeri, PLLC

Ramy Louis
Nassau County District Attorney's Office-Main

Jennifer Maldonado

Holly C. Meyer
The Law Office of Maggio & Meyer PLLC

Brian Mittman
Markhoff & Mittman, PC

Shogik Oganisyan

Sandra Pendrick
Certilman Balin Adler & Hyman, LLP-LI

Madison Porzio
Vishnick McGovern Milizio LLP

Zachary I. Riyaz
The Law Offices of Zachary I. Riyaz, P.C.

Rory Shectman

Joseph J. Villapol
Kudman Trachten Aloe LLP

Mark E. Weinberger

Students

Melissa Anne Bohl
Megan A. Carnes
Nicolas Daleo
Maria DiSpigno
Randall V. Forbes
Jurianne Deidre Franqui
Victoria Claire Hall-Swartz
Timothy P. Hatfield
Shamina Khanom
Robert James Luby
Cristen C. McGrath
Shereen N. Menwer
Steven Pambianchi
Craig I. Pavel
Ashley Nicole Prinz
Brianna Grace Ryan
David Santana
Pierinna M. Servat
Spencer D. Shapiro
Rebecca L. Stein
Brianna Vaughan
Conor Wiggins
Leah M. Winfield

In Memoriam

Brian R. Fishkin

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

LAW DAY 2018

Law Day 2018 ★ 60th Anniversary
SEPARATION OF POWERS
Framework for Freedom

AWARD NOMINATIONS REQUESTED

Liberty Bell Award

Do you know someone in Nassau County whose efforts on behalf of law and justice deserve the recognition symbolized by the Nassau County Bar Association's prestigious Liberty Bell Award? The Award honors an individual or organization outside the legal profession whose community service advances and strengthens the American system of freedom under law. With this Award, the Association recognizes efforts and achievements which meet some or all of the following criteria:

- promoting better understanding of the Constitution and the Bill of Rights;
- encouraging greater respect for law and the courts;
- stimulating a deeper sense of individual responsibility so that citizens recognize their duties as well as their rights;
- contributing to the effective functioning of institutions of government;
- and fostering a better understanding and appreciation of the rule of law.

Peter T. Affatato Court Employee of the Year Award

NCBA is seeking nominations for the Court Employee of the Year Award, named in honor of the "Dean of the Bar" Past President Peter T. Affatato. The Award recognizes a non-judicial employee of any court located in Nassau County who:

- exhibits professional dedication to the court system and its efficient operation, and,
- is exceptionally helpful and courteous to other court personnel, members of the bar, and the many diverse people whom the court system serves.

The Liberty Bell Award and the Court Employee of the Year Award will be presented at the 2018 Law Day celebration.
Nominations should be submitted with supporting documents not later than **November 20, 2017** to:
Hon. Ira B. Warshawsky
Law Day Committee Chair
Nassau County Bar Association
15th & West Streets
Mineola, NY 11501

IN BRIEF

Meyer, Suozzi, English & Klein, P.C. is pleased to share that thirteen of its attorneys have been named as 2017 New York Super Lawyers and Rising Stars. The Supter Lawyers are: **Donnalynn Darling**, Personal Injury – General, **Patricia Galteri**, Estate Planning & Probate, **Thomas Levin**, State/ Local & Municipal, Land Use/Zoning, **Edward J. LoBello**, Bankruptcy, **Paul F. Millus**, Employment & Labor, Business Litigation, **Kevin Schlosser**, Business Litigation, **Thomas R. Slome**, Bankruptcy, Business/Corporate, Business Litigation. Rising Stars are: **Michael J. Antongiovanni**, Business Litigation, Real Estate, Appellate and **Lauren B. Grassotti**, Business Litigation.

Medical malpractice attorney, **Stephen E. Erickson** of Pegalis & Erickson, LLC, has been named the 2018 "Lawyer of the Year" by *Best Lawyers in America*© for Plaintiff's Personal Litigation in Long Island, the only plaintiffs' personal injury lawyer on Long Island to receive this year's award.

Russell I. Marnell, a New York Matrimonial and Family Law Attorney, has been selected to the 2017 New York Metro Super Lawyers List.

Capell Barnett Matalon & Schoenfeld is proud of its attorneys who have been selected as 2017 New York Metro Super Lawyers and Rising Stars including **Yvonne Cort,** Taxation, Super Lawyer and **Albert Dumaual**, Tax and Estate Planning and **Monica Ruela,** Elder Law/Estate Planning and Probate, Rising Stars.

Marian C. Rice

Alexander T. Coleman from the Borrelli & Associates team has earned a spot on the 2017 Super Lawyers Rising Stars list based on his work representing plaintiffs in workplace lawsuits.

Ronald Fatoullah of Ronald Fatoullah & Associates was a featured guest on the Project Independence radio show where he spoke about the ins and outs of community-based Medicaid.

Karen Tenenbaum, of Tenenbaum Law, P.C., Tax Attorneys in Melville, was quoted in the Long Island Business News article "Home is Where the Hurricane Isn't: Irma Creates Tax Turbulence for Snowbirds". Ms. Tenenbaum and **Jennifer Ann Wynne** and other attorneys will be speaking at the Long Island Tax Symposium about Residency and Tax Collections.

Golden, Wexler & Buatti, P.C. is pleased to announce that **Joel G. Wexler** has been named by his peers as a 2017 New York Metro Super Lawyer for the fourth consecutive year and fifth time overall. Mr. Wexler concentrates in representing lenders in residential and commercial real estate transactions. He also represents buyers, sellers, landlords and tenants in all phases of real estate.

Jeffrey D. Forchelli, managing partner of Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP, has received an ICON Award from *Long Island Business News* and was recently selected by his peers for inclusion in *The Best Lawyers in America* 2018 in real estate.. Sixteen partners from the firm have been chosen by their peers as 2017 *New York Super Lawyers*® including **Jeffrey D. Forchelli, Daniel P. Deegan, John V. Terrana, Joseph P. Asselta**, **Frank W. Brennan**, **Kathleen Deegan Dickson**, **Gregory S. Lisi**, **Alexander Leong**, **Gerard R. Luckman, Mary E. Mongioi, Peter R. Mineo**, **Judy L. Simoncic**, **Peter B. Skelos, Jeffrey G. Stark** and **Russell G. Tisman.** Seven attorneys were named to the *New York Rising Stars*® SuperLawyers list: **Douglas W. Atkins**, **Stephanie M. Alberts**, **Nathan R. Jones**, **Danielle B. Gatto**, **Robert L. Renda** and **Allison Rosenzweig.**

Sandra N. Busell, a partner at Certilman Balin, who is also a Certified Public Accountant, was named to the 2017 Super Lawyer list. She concentrates her practice in the areas of trusts, guardianships, Supplemental Needs Trusts, and the protection of Medicaid benefits in regard to the elderly and special needs children and adults. Twelve attorneys at Certilman Balin were named to this year's New York Metro Super Lawyers list, and six were named to the Rising Stars List.

Joel M. Greenberg, a partner at the Greenberg, Dresevic, Iwrey, Kalmowitz, & Pendleton Law Group, a division of The Health Law Partners, P.C., has been selected as a Super Lawyer in the field of health law for the 7th consecutive year.

Five Wisselman & Associates attorney have been named to 2017 *New York Super Lawyers*® the *New York Rising Stars*® lists including **Jerome A. Wisselman** (Super Lawyer 2009, 2014-2017) and **Amanda Rose Green** (Rising Star).

Brian Andrew Tully, Partner/Founder, Tully Law, P.C., has been certified as a Member of the Lawyers of Distinction. Mr. Tully was also recognized by Super Lawyers in the practice areas of Elder Law and Estate Planning & Probate for the seventh straight year. In addition, Mr. Tully has earned his Expert Network Distinguished© Lawyer Badge based on the panel's review of his career and contributions to the profession and the community.

David Abeshouse is pleased to announce that for the seventh year, he has been honored as one of the New York Metro area SuperLawyers in the field of Alternative Dispute Resolution (ADR) Law.

Ten Sullivan Papain Block McGrath & Cannavo P.C attorneys have been designated 2017 *New York Super Lawyers*® including NCBA Past President **Christopher T. McGrath** and **Robert G. Sullivan**. **Deanne Caputo** has been acknowledged as a *New York Rising Star*®. Mr. McGrath has also been included in Super Lawyers Top 100 Lawyers in the New York Metro area

Marc Hamroff, managing partner at Moritt Hock & Hamroff, has announced that the construction law firm of Goldberg & Connolly has brought its highly regarded practice to MH&H. With its attorneys, all of whom will be joining the firm, Goldberg & Connolly brings its leadership in the construction law industry, having represented a broad array of construction businesses in both the private and public sectors.

Vincent J. Russo, Managing Shareholder and founder of Russo Law Group, P.C., has been named a Top 100 Metro Super Lawyer. Mr. Russo has been designated a Super Lawyer in the Elder Law field since 2007. Partner **Marie Elena Puma** has also been designated a Super Lawyer for the second consecutive year and associate **Eric J. Einhart** has been named a New York Metro Rising Star also for the second year.

The American Bar Association has announced a new book release entitled "Cross Examination: A Primer for the Family Lawyer", authored by **Stephen J. Gassman**, NCBA Past President and

See IN BRIEF, Page 25

Lunch With the Judges

The Nassau County Bar Association's New Lawyers/Judges lunches provides the unique opportunity for newer practitioners to get to know judges outside the courtroom. Moritt Hock & Hamroff sponsors the informal lunch series. On October 27, new lawyers met with (seated 2nd from left to right) Hon. Joy Watson, Hon. Denise Sher and Hon. Erica Prager. New attorneys who would like to attend the next lunch are encouraged to contact Donna Gerdik at dgerdik@nassaubar.org. Photo by Henry Guerra

Pro Bono Attorney of the Month

BY SUSAN BILLER

Michael A. Rich, Esq.

This month, Nassau Suffolk Law Services Volunteer Lawyers Project (VLP), along with the Nassau County Bar Association (NCBA) honor a long-standing stalwart of the Landlord/ Tenant Attorney of the Day Program: Michael A. Rich, Esq. Rich has been representing low income clients in District Court through the VLP for over 15 years, and has donated over 48 hours this year alone. This is the second time he has been recognized with this honor.

The Attorney of the Day Program, supervised by VLP Staff Attorney Roberta Scoll, assists hundreds of indigent and disabled men, women and children in Housing Court to prevent homelessness. Many of the cases are holdover or nonpayment matters. Most tenants appear pro se, and are severely disadvantaged by lack of counsel. The courts are overburdened trying to administer justice. Given the lack of affordable housing in this region, eviction may place families at severe risk of becoming homeless.

This project allows attorneys to volunteer to represent these individuals for a four hour session once a week, a month or as frequently as they choose. This past year, Rich has actively represented 21 individuals or families, defending or forestalling evictions. The goal is to preserve housing or at least give the tenants sufficient time to secure alternative housing and avoid shelter placement or homelessness.

In nearly every matter, Rich has been able to dismiss the eviction or negotiate a stipulation of settlement which either provides for the client's tenancy to continue, or allows additional time for them to seek alternative housing for their families. This type of assistance involves direct advocacy and engagement with the local community. It is a way to empower others and help those who have no place else to go.

Rich graduated from Brooklyn Law School in 1974, after pursuing a Master's degree in Biology and a rewarding 11 year career teaching junior high school science. After his admission to the New York Bar in 1975, he immediately opened a private general practice, and ultimately focused on real estate and business transactions.

When asked about why he joined the VLP, Rich noted: "I simply wanted to give back. The clients I assist show me a different world. I am often amazed at how families can survive on the brink of homelessness. I enjoy helping these clients keep a roof over their children's heads."

Rich credits the work he has done in Landlord Tenant Court with helping him gain valuable courtroom exposure. Most importantly, the experience helps "…sharpen my ability to think on my feet and come up with novel negotiating solutions. The key to success in law is the learned skill of analyzing a situation and negotiation."

Rich is cognizant that the VLP always needs more volunteers, and faithfully assists on at least two to three cases each month. "I never let lack of time be an excuse. I just make the time because I know how important this work is."

Roberta Scoll, Staff Attorney and coordinator of the Project, nominated Rich for the honor of Pro Bono Attorney of the Month for his determination to help clients as well as his long-standing dedication. She comments, "His ability to assist so many clients in landlord tenant cases is what contributes to the Project's continued success. We are so grateful to him and the many other generous attorneys who give of their time."

In addition to practicing law, Rich believes it is important to make the time to have other interests or activities to de-stress. Rich plays golf, devotes many hours a week working out and loves spending time with his wife, children and six grandchildren.

In light of his professionalism and dedication, we are proud to honor Michael Rich, Esq., as our most recent Pro Bono Attorney of the Month.

The Volunteer Lawyers Project is a joint effort of Nassau Suffolk Law Services and the Nassau County Bar Association, who, for many years, have joined resources toward the goal of providing free legal assistance to Nassau County residents who are dealing with economic hardship. Nassau Suffolk Law Services is a non-profit civil legal services agency, receiving federal, state and local funding to provide free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care, and services to special populations such as domestic violence victims, disabled, and adult home residents. The provision of free services is prioritized based on financial need and funding is often inadequate in these areas. Furthermore, there is no funding for the general provision of matrimonial or bankruptcy representation, therefore the demand for pro bono assistance is the greatest in these areas. If you would like to volunteer, please contact Susan Biller, Esq. 516-292-8100, ext. 3136.

Committee Reports

Senior Attorneys

Meeting Date: 9/25/17

Chairs: George Frooks and Joan L. Robert

Various topics of interest were discussed and many subjects were suggested as potential substantive programs, including ethical issues when dealing with individuals with diminished capacity, retainer agreements and fee disputes, and tax and other considerations for individuals who are residents of more than one state.

The next meeting is scheduled for October 30, 2017 at 12:30 p.m. The expected topic of discussion to be regarding the process of obtaining mortgages and reverse mortgages when the home is owned by a trust and/or with a life estate.

Women in the Law

Meeting Date: 9/27/17

Chair: Christie R. Jacobson

Featured speaker Dyan Finguerra-DuCharme, Esq., delivered a lecture on the topic of "How to Create Work-Life Balance and Avoid Burnout," where helpful tips for finding a work-life balance in the legal profession were given.

Michael J. Langer

Medical-Legal

Meeting Date: 10/4/17

Chair: Alan W. Clark

Nassau County Supreme Court Justices Denise L. Sher and Randy Sue Marber, along with Principal Law Clerk Mili Makhijani, Esq., delivered a presentation on the court's perspective of discovery issues encountered by parties in civil cases and possible solutions. The prepared materials also included initiatives and standards from Judge Janet DiFiore, Chief Judge of the New York State Court of Appeals, for achieving excellence in the court system, and case law discussing discovery of incident reports, quality assurance and computer data for medical records. Also discussed were problems in the exchange of medical authorizations, the delay in conducting depositions and the need for more communication between counsel involving the court when necessary early on to resolve discovery disputes expeditiously, with suggestions discussed to assist in the expediting of medical malpractice litigation.

Labor and Employment

Meeting Date: 10/10/17

Chair: Christopher Marlborough

The committee meeting featured a presentation by Gregory Lisi, Esq., and Lisa Casa, Esq., regarding the validity of indemnification agreements under the Fair Labor Standards Act.

The next meeting is scheduled for November 14, 2017. Committee member Brian Libert, Esq., will discuss employment law as it relates to municipal employers.

Plaintiff's Personal Injury

Meeting Date: 10/10/17

Chair: John Coco

The committee held a CLE presentation given by Fred Cohen, Esq., which included a discussion regarding tips for business management, updated office services and software which can assist in the generation of documents and the organization of files and medical records, and a connected tasks and calendaring system.

Real Property Law

Meeting Date: 10/11/17

Chair: Patrick Yu

Louis Vlahos, Esq., delivered a CLE presentation on the tax implications of liquidating partnership interests. Various other items of business were discussed, including the NCBA brick program, the raising of recording fees in Nassau County and new title regulations being enacted.

The next meeting is scheduled for November 8, 2017, at 12:30 pm, which will feature a CLE presented by Appellate Land Services.

New Lawyers

Meeting Date: 10/16/17

Co-Chairs: Jamie A. Rosen, Esq. and John C. Stellakis, Esq.

Allison Rosenzweig, Esq., presented a lecture entitled "Corporate Law Overview" which focused on a young associate's role in corporate matters such as entity formation, preparing governance documents, and mergers and acquisitions. Susan Katz Richman, Esq., WE CARE Advisory Board Member, spoke to our members about WE CARE, specifically the Leukemia & Lymphoma Society's Light the Night event, being held on Saturday, October 21, 2017, at 5:30 p.m., at Eisenhower Park.

The next meeting is scheduled for November 6, 2017, at 6:30 p.m.

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

senior partner of Gassman Baiamonte Gruner, P.C.

Douglas M. Lieberman, a partner at Markotsis & Lieberman, P.C., has been named a 2017 Metro New York Super Lawyer in Business Litigation. This is his fourth consecutive award.

The Law Office of Vessa & Wilensky, P.C. is proud to announce that for a 3rd straight year, all of its attorneys, **Michael P. Vessa**, **Kenneth B. Wilensky** and **Philip M. Vessa**, have been named to the New York Times Super Lawyers list.

Carolyn Reinach Wolf, Executive Partner and Director of the Mental Health Law Practice at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP led sessions at the Concurrent Round Tables at the New York State Bar Association, Elder Law and Special Needs Section, Fall Meeting, entitled: Mental Illness in Guardianship Legal Matters.

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

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

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

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.

NCBA Hosts Another Successful Open House

Desiree Lovell Fusco provides pro bono trusts and estates assistance to a Nassau resident at the Open House. Photo by Henry Guerra

The public was once again invited to bring any legal questions to the Nassau County Bar Association. At the Open House held October 26, more than 67 volunteer attorneys met one-on-one with approximately 120 Nassau residents to unwind complicated legal issues and provide guidance, counsel and referrals.

Since 2011, NCBA has hosted the Open House, the pro bono clinic for the public, with Nassau Suffolk Law Services and The Safe Center LI. Help is provided on a myriad of issues, including mortgage foreclosure, matrimonial and family, bankruptcy, labor and employment, trusts and estates and immigration.

"The Open House was a great success," remarked Joseph Harbeson, Co-chair of the Access to Justice Committee. "The people who came for our help were appreciative of all the time the volunteer attorneys gave them. Hopefully we were able to resolve some of their problems or send them in the right direction."

Open House Volunteer Attorneys

Sherri Adamson
Marjorie Adler
Anand Ahuja
Lorena Alfaro
Stanford Altschul
Sharon Azmon
Patrick Binakis
Lois Bladykas
Michael Borrelli
Adam Browser
Russell Burcheri
Michelle Caldera-Kopf
Jeffrey Catterson
Michelle Cuevas
Jay Davis
Adele Deerson
Michael DiBello
James Ezratty
Anthony Falanga
Joanne Fanizza
Donna Fiorelli
Kamini Fox
Emily Franchina
Edward Fregosi, Jr
George Frooks
Stuart Gelberg
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Jim Glass
Dorian Glover
Gerald Goldstein
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Cheryl Kreger-Grella
S Robert Kroll
Bryce Levine
David Lira
Gregory Lisi
Desiree Lovell Fusco
Bruce McBrien
Andrew Meaney
David Mejia
Jeff Morgenstern
Stacey Nigro
Thomas O'Rourke
Chandra Ortiz
Gregory Pandolfo
Alan Pearl
Marc Roberts
Ken Robinson
Lee Rosenberg
Seth Rosner
Jason Rothman
David Saed
Lawrence Schaffer
Michael Schoenberg
Elizabeth Schulman Kranz
Kyce Siddiqi
Heather Siegelman
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