Queens BAR BULLETIN

Queens County Bar Association | qcba.org | 90-35 148th Street, Jamaica, NY 11435 | 718-291-4500

April 2023 | Volume 90, No. 7

LGBTQ+ Bench Cards

BY. HON. JAMES L. HYER, JUSTICE OF THE SUPREME COURT

In early 2022 I was appointed Chairperson of the 9th Judicial District Access to Justice Committee which I reorganized into a number of Subcommittees, including the LGBTQ+ Subcommittee with one of the goals of that Subcommittee being the creation of an LGBTQ+ Bench Card. By way of reference, Bench Cards are promulgated by the New York State Office of Court Administration and consist of a one-page letter size document, which are available in hard-copy laminated form and electronically in the court intranet, and provide the judiciary and non-judicial staff with information about a particular subject area (how to work with court interpreters, assisting hearing impaired court users, part 36 fiduciary guides, etc.).

The Committee prepared the LGBTQ+ Bench Card in mid-2022 in consultation with a number of stakeholders including the Richard C. Failla LGBTQ Commission of the New York State Courts. The Bench Card was then adopted by the New York State Courts Office of Court Administration and distributed virtually via OCA Broadcast on October 31, 2022 with the Office of Justice Initiatives plan to distribute laminated hard-copy Bench Cards to all judges in the State of New York at the Village, Town, City, County, Family, Surrogate, Supreme, Court of Claims and Appellate Courts. The OCA Broadcast read:

"In the service of our mission, the UCS is committed to operating with integrity and transparency, and to ensuring that all who enter or serve in our courts are treated with respect, dignity, and professionalism. In furtherance of our mission, the Office for Justice Initiatives is pleased to share the attached UCS Benchcard and Best Practices for Judges that provides information and guidance when using LGBTQ+ inclusive language and pronouns, with an emphasis on how to respectfully interact with transgender court users. The Benchcard was developed by the Ninth Judicial District Access to Justice Committee LGBTQ+ Subcommittee. Words used in court – whether by a judge or anyone else – matter, as does a respectful and inclusive tone. By using inclusive language judges and other court personnel can ensure that all participants in the legal process will feel that they are being treated equally and with respect. It isn't always easy. The connotations of some terms have changed over time – and they continue to evolve. What was once acceptable now can suggest insensitivity or bias. To stay up to date, we recommend judges consult the *Stylebook Supplement on Lesbian, Gay, Bisexual, & Transgender Terminology*, published by the National Lesbian and Gay Journalists Association (https://www.nlgja.org/stylebook/terminology/). While the legal landscape for LGBTQ+ relationships and parents has evolved dramatically in recent years, be mindful that there are still unique struggles and challenges faced by LGBTQ+ individuals and many may still not have access to the necessary resources to formalize relationships to each other or their children."

The Committee then communicated with the New York State Bar Association ("NYSBA") President and LGBTQ Law Section, ("Section") pertaining to the Bench Card with the request that both consider preparing a Report and Resolution for the NYSBA House of Delegates wherein NYSBA would support the Bench Card along with a policy of encouraging other court jurisdictions to adopt similar Bench Cards in their respective court systems. The Section prepared a "Report and Resolution of the NYSBA's LGBTQ Law Section in Support of the New York State Unified Court System's UCS Bench Card and Best Practices for Judges Using LGBTQ+ Inclusive Language and

CONTINUED ON PAGE 11

Table of Contents

The Docket

Being the official notice of the meetings and programs listed below. Due to unforeseen events, please note that dates listed in this schedule are subject to change. More information and changes will be made available to members via written notice and brochures. Questions? Please call 718-291-4500.

CLE Seminar & Event listings

APRIL 2023	
Friday, April 7	*Good Friday – OFFICE CLOSED*
Tuesday, April 18	Academy of Law Committee Mtg - 1:00 pm
Tuesday, April 18	**CLE:** Equitable Distribution Update – Pt 1 - 5:30 pm
Thursday, April 20	**CLE:** CPLR Update 2023 - 5:30 pm
Tuesday, April 25	**CLE:** Equitable Distribution Update – Pt 2 - 5:30 pm
Wednesday, April 26	LGBTQ+ Committee Meeting - 1:10 pm
MAY 2023	
Thursday, May 4	Annual Dinner & Installation of Officers at Terrace on the Park
Tuesday, May 9	**CLE:** Update on Search & Seizure - 1:00 pm
Wednesday, May 10	**CLE:** Coop & Condo Legal Update - 6:00 pm
Thursday, May 11	EVENT: LGBTQ+ Happy Hour Mixer with NYC Bar Assn - 6:00 pm
Wednesday, May 17	Family Law Committee Dinner at Bourbon Street Restaurant - 5:30 pm
Wednesday, May 24	**CLE:** Ethics Update – Pt 1
Monday, May 29	*Memorial Day – OFFICE CLOSED*
Wednesday, May 31	**CLE:** Ethics Update – Pt 2
JUNE 2023	
Monday, June 19	*Juneteenth – OFFICE CLOSED*

New Members

Sharmela Bachu
Irene M. Baker
Beverly Benjamin-George
Annette M. Bevans
Luke J. Bigelow
Scott L. Bookstein
Tae Ethan Choi
Walter Drobenko
Michael Hilt
Thomas M. John
Beatrice Leong
Adrian Macias
Ahmed Nouh
Susan R. Pepitone
Traptthi Perumal
Kim Petersen
Christopher F. Treiber
Lisa B. Weinberger

Necrology

Hon. Maxine L. Archer

2022-2023 Officers and Board of Managers of the Queens County Bar Association

President – Adam Moses Orlow
President-Elect – Michael D. Abneri
Vice President – Zenith T. Taylor
Secretary – Kristen J. Dubowski Barba
Treasurer – Deborah Marie Garibaldi

Class of 2023	Class of 2024	Class of 2025
Joseph Carola, III	Sandra M. Munoz	Frank Bruno, Jr.
Joshua R. Katz	Hamid M. Siddiqui	Etan Hakimi
Michael Kohan	Sydney A. Spinner	Sharifa Milena Nasser
Estelle J. Roond	Jasmine A. Valle	Tammi D. Pere
Joel Serrano	Clifford M. Welden	A. Camila Popin

Queens Bar Bulletin

Executive Director
Jonathan Riegel

Queens Bar Bulletin Editor
Paul E. Kerson

Associate Editors: Stephen D. Fink and Richard N. Golden

Publisher:
Queens Public Media, LLC, under the auspices of Queens County Bar Association. The Queens Bar Bulletin is published monthly from October to May.
Advertising Office:
Queens Daily Eagle
8900 Sutphin Boulevard, LL11,
Jamaica, Queens, NY 11435
(718) 422-7412

Send letters and editorial copy to:
Queens Bar Bulletin 90-35 148th Street, Jamaica, NY 11435
Editor's Note: Articles appearing in the Queens Bar Bulletin represent the views of the respective authors and do not necessarily carry the endorsement of the Association, the Board of Managers, or the Editorial Board of the Queens Bar Bulletin.

"Queens Bar Bulletin"
(**USPS Number: 452-520**) is published monthly except June, July, August, and September by Queens Public Media, LLC, 8900 Sutphin Boulevard, LL11, Jamaica, NY 11435, under the auspices of the Queens County Bar Association. Entered as periodical postage paid at the Post Office at Jamaica, New York and additional mailing offices under the Act of Congress. Postmaster send address changes to the Queens County Bar Association, 90-35 148th Street, Jamaica, NY 11435.

QUEENS COUNTY BAR ASSOCIATION
90-35 148th Street, Jamaica, NY 11435 • Tel 718-291-4500 • Fax 718-657-1789 • www.QCBA.org • CLE@QCBA.ORG

The Criminal Court Committee presents a
ZOOM CLE

SEARCH AND SEIZURE UPDATE 2023

Tuesday, May 9, 2023 1:00 pm - 2:00 pm

Sponsored by:
ADDABBO & GREENBERG

PRESENTER:
HON. BARRY KAMINS (RET.)
Law Offices of Aidala, Bertuna & Kamins, P.C
Recent Developments in Search and Seizure

MODERATOR:
BARBARA WILKANOWSKI, ESQ.
Chair, Criminal Law Committee

QCBA Member - $0.00
Non-Member - $35.00

CLE Credit: 1.0 in Professional Practice
Transitional Course – Valid for All Attorneys.
ACCREDITATION: QCBA has been certified by the NYS CLE Board as an Accredited CLE Provider in NYS, 10/2022 - 10/2025.

Registration Form

Pay by: ___Check ___Credit Card **Auth. Signature**_____ **Tel.**_____

Card #: _____ **Exp. Date** _____/_____ **Amt: $**_____

Name:_____ **Email:**_____

Must Register & Pay by May 8th to receive access. WWW.QCBA.ORG or EMAIL: CLE@QCBA.ORG
No Refunds/credits if registration is not canceled by May 8, 2023.

Editor's Note

Book Review: *No One Can Stand a Toss* by Justice Barry A. Schwartz

By Paul E. Kerson

Our distinguished former Queens County Supreme Court Justice Barry A. Schwartz has written a memoir, No One Can Stand a Toss. This book should be required reading in every law school. It is an excellent book which explains our criminal justice system in a way that has not been explained before. Barry was Chief Assistant District Attorney, a Defense Attorney and a Queens County Supreme Court Justice.

He explains the system from all three perspectives. He was also a Law Secretary and he explains that job as well.

For a short time, Barry was a Law Professor at the City University Law School. He details the difference between law as an academic subject and law in the real world.

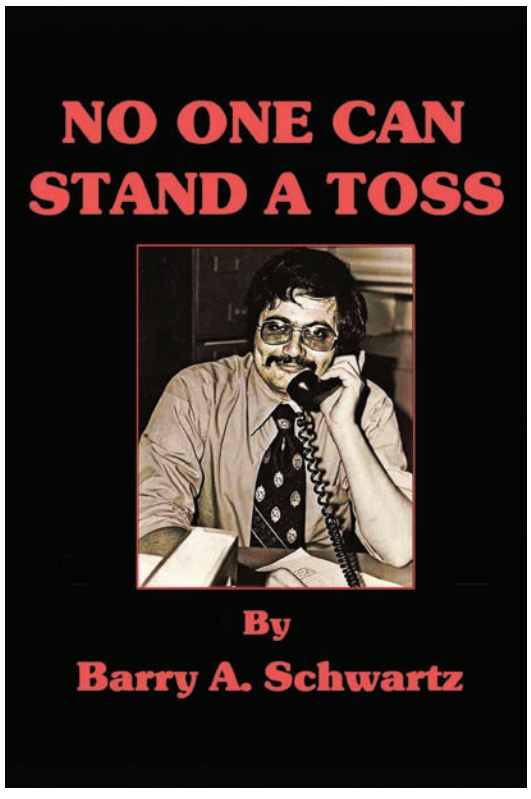
But most of all, he gives us his frank views of so many people in our world: District Attorney Richard Brown; April Agostino, the former Chief Clerk of the Appellate Division, Justice Kenny Browne, Justice Tom Demakos, Tom Duffy, Shelly Galfunt, Al Gaudelli, Justice Aaron Goldstein, Justice Nat Hentel, Sheriff Kerry Katsorhis, District Attorney Melinda Katz, Justice Barry Kron, famed Defense Attorney Bill Kunstler, our past QCBA President Wallace Leinheardt, Justice Arthur Lonschein, Justice Bob McGann, Appellate Division Justice Neil O'Brien, Appellate Division Justice Frank O'Connor, Queens County Democratic Party Executive Secretary Mike Reich, Chief Assistant District Attorney Jim Robertson, District Attorney John Santucci, Justice Fred Santucci, Appellate Division Justice J. Irwin Shapiro, Sid Sparrow, Justice Francis X. Smith, Evan Stavisky, Senator Toby Stavisky, Assistant District Attorney Barbara Underwood and Justice Moe Weinstein.

For each of these distinguished members of the Queens County legal community, Justice Schwartz gives us his frank opinion and his views of the contributions to our justice system that each of these people have made.

Rarely is a book written where you personally know all of the characters. I never quite had an experience like this.

In law schools, students read case after case after case. But in Justice Schwartz's book, one can gain an understanding of how the legal and political systems actually work or don't work. But perhaps the best part of Justice Schwartz's book is his humility. The book is called No One Can Stand a Toss.

However, that title is taken from Chapter 71. Because Justice Schwartz took chapter 71's title for the book title, I read it carefully. After he had spent some time as a Criminal Defense Attorney, Justice Schwartz went back to the District Attorney's office. He had this to say about that experience:



"But when I returned, I found that all of these factors contributed to – in some cases – a sense of self-righteousness, phony toughness, and a belief that ADAs were without sin because after all, they were doing God's work in putting bad guys away…

I had a much less sanctimonious view of myself. Not that I didn't believe myself to be an honorable man. I did. I do. But it was tempered with a recognition that honor, like everything else, is a relative term, within the bell curve of life. And a certain recognition that no one can stand a toss. Not me. Not them. Not anyone.

Or as Justice Greg Lasak would put it when he, Doc (Shelly Galfunt) and I were nursing a cocktail or two at the end of the day: 'at least we know we're crooks.' It was less a comment on our own absence of honor than a recognition that some of our colleagues were a little lacking in the humble department.

Out of that grew the nicknames that we gave to each other: Don Gregory and Don Barry. Like the Godfather, we were men of honor – but with feet of clay." See page 374.

I so appreciated Justice Schwartz's humbleness in writing this chapter. But I must add a certain regret. Nowhere in the contents, the index, or the text of the book is the City or State Corrections Department. The conditions in our City jails and State prisons are horrific. The notion that Assistant District Attorneys do not consider this fact is frankly, very disturbing.

Over the course of the years, I spent 14 years on our Assigned Counsel Plan administered by our QCBA Bar Panels Committee of which I was chair or Co-Chair for decades. I was so disgusted with the prison injuries I saw, that I then took up numerous prison injury cases. We tried to start a case of 37 badly injured prisoners to show that the State Prison Administration was completely defective. See *Webb v. Goord*, 197 F.R.D. 98 (S.D.N.Y. 2000), 340 F. 3d 105 (2d Cir. 2003). The United States Court of Appeals, Second Circuit would not let us do this.

However, one of our cases succeeded spectacularly. In *Britt v. Garcia*, 457 F. 3d 264 (2d Cir. 2006) we did achieve a $7.65 million dollar jury verdict against the State Corrections Commissioner and Deputy Superintendent of the Sing Sing prison personally. This led to a reorganization of the New York State Department of Correctional Services (DOCS) and a renaming of same to the New York State Department of Correctional Services and Community Supervision (DOCCS).

After its formation, the DOCCS started releasing as many prisoners as possible as soon as possible in order to reduce the number of horrific prison injuries: beatings, rape, homicide, and numerous hospitalizations caused by both prisoners and guards. I like to think that this was the ultimate Assigned Counsel Plan victory.

For all of the over-indicting and overcharging and horrific maximum sentencing that I witnessed on

CONTINUED ON PAGE 7

REGISTRATION OPEN

QUEENS COUNTY BAR ASSOCIATION

ONE HUNDRED FORTY-SIXTH
ANNUAL DINNER AND INSTALLATION OF OFFICERS & MANAGERS

at **Terrace on the Park • Flushing, New York**

Thursday, May 4, 2023

Installation of Officers and Managers

MICHAEL D. ABNERI	**PRESIDENT**
ZENITH T. TAYLOR	**PRESIDENT-ELECT**
KRISTEN J. DUBOWSKI BARBA	**VICE PRESIDENT**
JOSHUA R. KATZ	**TREASURER**
JOEL SERRANO	**SECRETARY**

Class of 2024
Sandra M. Munoz
Hamid M. Siddiqui
Sydney A. Spinner
Clifford M. Welden
Jasmine I. Valle

Class of 2025
Frank Bruno, Jr.
Etan Hakimi
Sharifa Milena Nasser
Tammi D. Pere
A. Camila Popin

Class of 2026
Desiree Claudio
Ruben Davidoff
Mark L. Hankin
Adam Moses Orlow
Estelle J. Roond

Cocktails: 5:30 pm
Dinner & Program: 7:00 pm
Business Attire

Reservations: $185 per person thru May 3 / $220 same day
Early Reservations: $160 per person through April 26
$125 per person for QCBA members admitted 4 years or less thru April 26

Dear QCBA Members and Friends:

On Thursday, May 4, the Queens County Bar Association will hold our Annual Dinner and Installation of the 2023-24 QCBA President Michael D. Abneri and all of the association's officers and managers. This dinner is the highlight of our programming year and a not-to-be-missed event!

As we have in past years, we will be producing a Dinner Journal for the event and will be offering sponsorship packages to fit every budget. This journal affords us the opportunity to commemorate the accomplishments of our Association, congratulate Michael and the Board of Managers and celebrate over 146 years of service to our members and the community in Queens County. All sponsorship packages include at least one ticket to the dinner and proceeds from the sponsorships and advertising benefit the Queens County Bar Association and the Queens Volunteer Lawyers Project.

The sponsorship and advertising opportunities are being offered by the Queens Volunteer Lawyers Project, a 501(c)(3) nonprofit organization and the cost, less the value of the dinner tickets, is tax deductible to the full extent allowed by law.

To secure your sponsorship or advertisement, please complete the form on page 3 and submit the form and your artwork as follows:

- email to: mweliky@qcba.org *(PDF or JPG files only)*
- mail to: Queens Volunteer Lawyers Project
  90-35 148th Street
  Jamaica, NY 11435
  Attn: Annual Dinner Committee

If mailing your artwork, please mail it flat (do not fold or crease the art)

For questions regarding journal advertisements, please contact Mark Weliky. For questions regarding sponsorship packages, please contact Jonathan Riegel. Contact information for both are below.

We thank you in advance for your participation and support!

Mark Weliky
Executive Director
Queens Volunteer Lawyers Project
mweliky@qcba.org
718-291-4500, x225

Jonathan Riegel, CAE
Executive Director
Queens County Bar Association
jriegel@qcba.org
718-291-4500, x224

Adam Moses Orlow
President
Queens County Bar Association
aorlow@orlowlaw.com
718-544-4100

Sponsorships

DIAMOND
Limit of 1
$8,500
- back cover full page ad in full color
- table of 12 in premium location near dais
- acknowledgement in all marketing and press releases
- 4 email messages to QCBA members between May 2023 and April 2024
- Up to $1,500 in sponsorship credit for any 2023-24 CLE program(s)
- one marketing table at the dinner
- company logo on signage and table flyers at the dinner
- recognition from the podium

RUBY
Limit of 2
$6,000
- inside front or back cover full page ad in full color
- 8 tickets at table in premium location near dais
- acknowledgement in all marketing and press releases
- 3 email messages to QCBA members between May 2023 and April 2024
- Up to $900 in sponsorship credit for any 2023-24 CLE program(s)
- one marketing table at the dinner
- company logo on signage and table flyers at the dinner
- recognition from the podium

EMERALD
Limit of 4
$5,000
- includes Gold page full page ad
- 6 tickets at a table near the dais
- acknowledgement in all marketing and press releases
- 2 email messages to QCBA members between May 2023 and April 2024
- one marketing table at the dinner
- company logo on signage and flyers at the dinner
- recognition from the podium

SAPPHIRE
$4,000
- includes Silver page full page ad
- 4 tickets at a table near the dais
- acknowledgement in all marketing and press releases
- 1 email messages to QCBA members between May 2023 and April 2024
- company logo on signage and flyers at the dinner
- recognition from the podium

GOLD
$3,000
- includes full page ad
- 3 tickets to the dinner
- acknowledgement in all marketing and press releases
- company logo on signage and flyers at the dinner
- recognition from the podium

SILVER
$2,500
- includes full page ad
- 2 tickets to the dinner
- acknowledgement in all marketing and press releases
- listed on signage and table flyers
- recognition from the podium

BRONZE
$1,500
- includes half page ad
- 2 tickets to the dinner
- acknowledgement in all marketing and press releases
- listed on signage and table flyers
- recognition from the podium

SPONSOR
$1,000
- includes quarter page ad
- 1 tickets to the dinner
- acknowledgement in all marketing and press releases
- listed on signage and table flyers
- recognition from the podium

Journal Ads

• Back Cover	7-3/8"x9-7/8"	$2,500	• Inside Front or Back Cover	7-3/8"x9-7/8"	$1,750
• Gold Page	7-3/8"x9-7/8"	$1,250	• Silver Page	7-3/8"x9-7/8"	$1,000
• Full Page	7-3/8"x9-7/8"	$750	• Half Page	7-3/8"x4-3/4"	$500
• Quarter Page	3-1/2"x4-3/4"	$350	• Business Card	3.5"x2"	$200

All journal ad measurments are listed as width x height and represent the printable area for your ad.
Inside front or back and outside back cover ads are full color. All interior page ads are black and white only.

QUEENS COUNTY BAR ASSOCIATION
90-35 148th Street, Jamaica, NY 11435 • Tel 718-291-4500 • Fax 718-657-1789 • www.QCBA.org • CLE@QCBA.ORG
PRESIDENT: ADAM MOSES ORLOW
ACADEMY OF LAW DEAN: Michael D. Abneri, Esq.
ACADEMY OF LAW ASSOCIATE DEANS: Kristen J. Dubowski Barba, Esq. • Hon. Darrell L. Gavrin • Leslie S. Nizin, Esq. • Violet E. Samuels, Esq. • Hamid M. Siddiqui, Esq.

Cooperative & Condominium Law Committee presents a ZOOM CLE

COOPERATIVE & CONDOMINIUM LEGAL UPDATE 2023

Wednesday, May 10, 2023 • 6:00 pm - 7:30 pm

Sponsored by:

BIG APPLE ABSTRACT CORP. LYNX MORTGAGE BANK

PANELISTS:

Geoffrey Mazel, Esq. – *Founding Member of Hankin & Mazel, PLLC; Co-Chair of the Cooperative & Condominium Committee*
Mark Hankin, Esq. – *Founding Member of Hankin & Mazel, PLLC; Co-Chair of the Cooperative & Condominium Committee*
Zahra Jafri – *President, Lynx Mortgage Bank LLC*
Matthew Goldberg, Esq. – *Member of Hankin & Mazel, PLLC*

TOPICS:

- Legislative Update- Review of several key pieces of legislation which are being considered or have passed in the NY City Council and NY State Legislature of interest to practicing real estate attorneys in dealing with Co-ops and Condos.
- Access License Agreements- Review of key items and pitfalls to look for when negotiating an Access License Agreement.
- Co-op & Condo Loan Updates- a review of best practices when representing a client taking a Co-op or Condo loan. In addition, a review of recent underwriting and Fannie Mae guidelines that real estate attorneys should be aware of.
- Due Diligence in representing the purchaser of a Cooperative Apartment- best practices reviewed and discussed.

CLE Credit: 1.5 in Professional Practice

Transitional Course – Valid for All Attorneys. **ACCREDITATION:** QCBA has been certified by the NYS CLE Board as an Accredited CLE Provider in NYS. Application for Renewal has been filed and is currently pending.

Fee: QCBA Member - $0.00 Non-Member - $35.00

REGISTER NOW **WWW.QCBA.ORG or EMAIL: CLE@QCBA.ORG**

Must Register & Pay by May 8th to receive ZOOM access.
No Refunds/credits if registration is not canceled by May 8, 2023.

President's Message

Serving Our Members

By Adam Moses Orlow

The Queens County Bar Association exists to serve its members. There are many ways we do this such as: free CLE programs, insurance programs including professional liability, disability and life, lawyer referral service panels, networking and socializing through stated meetings and other events, including our annual installation dinner and golf outing, attended by colleagues of both the bench and bar and more. Additionally, when construction is (hopefully soon) completed and we move into our new space directly across from the Supreme Courthouse, we will once again provide our members with a "tech center" with free access to WiFi and a computer, use of a copy machine, printer, fax machine and free use of our conference room space.

By far though, the primary means through which this Association serves it members is through our committees. The QCBA has over 50 committees covering almost every area of legal practice. It is through our committees that lawyers have a say in how law is practiced in Queens. Have a concern about the way Compliance Conferences are scheduled? Speak up in the Supreme Court Committee. Have an issue with the conduct of a Judge? Bring it to our Judicial Relations Committee. Want to have input into the quality of judicial candidates in Queens? Join our Judiciary Committee. Want to make sure Lawyers in Queens are properly educated in various areas of the law? Our Academy of Law is for you. Interested in issues affecting the LGBTQ+ community? We have an LGBTQ+ Committee for that. Have a desire to help a young lawyer acclimate to the profession? Join our Mentor Committee. These of course, are just a few examples.

I urge those members who are not yet on a committee to join and become active. Your participation will not only benefit you, but will help all of us in advancing this noble profession.

Finally, for this Association to continue to do all the good work it does in helping the legal community of Queens County, in addition to your active participation, we need money. Without adequate funding, we cannot pay our staff, or keep our lights on. Nothing we do can get done if we cannot pay our bills. Over the last number of years, we have been running consistent deficits. The Board of Managers recognized that such a situation could not continue. To address this, we have introduced a Corporate and Platinum Sponsorship Program allowing companies and law firms to have valuable access to our members in exchange for their sponsorships. This program has been a tremendous success thanks in large part to the efforts of our Executive Director, Jonathan Riegel. Many companies and firms have taken advantage of the opportunities our sponsorships offer and I am proud to report that every Firm and Company that sponsored us last year has returned to sponsor us again this year. Our sponsors, along with the anticipated sale of our building, will hopefully secure us financially for many years to come.

If you are interested in becoming more active in the QCBA, or can help us by sponsoring one of our events or even becoming a Platinum Sponsor, or just want to ask about how this Association can better serve you, please contact me at **aorlow@orlowlaw.com** or contact our executive director, Jonathan Riegel at **jriegel@qcba.org**.

Editor's Note

Book Review: *No One Can Stand a Toss* by Justice Barry A. Schwartz

CONTINUED FROM PAGE 4

the Assigned Counsel Plan from 1982 to 1996, I got dozens and dozens of those sentences ultimately reduced by that $7.65 million verdict. On appeal by the State, liability was sustained and we won the right to a second trial on the issue of damages. On the verge of the second trial, the case was settled for an amount I cannot disclose.

I did not do this alone. My then law partner, our fellow QCBA member, John Duane, Esq., helped me prepare the case and Ira Greenberg, Esq., our fellow QCBA member, of our office helped me try the case. Ira is today a sitting Queens County Civil Court judge.

Before I left the Assigned Counsel Plan in disgust over Corrections' misconduct, I got five people acquitted of murder or attempted murder in hard fought jury trials. I believe this to be a State record.

While reading this book, I have come up a much better plan to operate the system: Before taking the job as an Assistant District Attorney, Criminal Court Judge or Supreme Court Criminal Term Justice every applicant must spend two weeks at Attica, Dannemora, or Greenhaven. They must be locked in. They must observe the horrific prison injuries and observe the horrific treatment that each prisoner receives. Then and only then should they permitted to take up work as an Assistant District Attorney, Judge or Justice.

I regret that I did not come up with this idea years earlier. Justice Schwartz can take special pride that his book caused me to come up with this way of improving the entire system and bringing it up to Federal and State Constitutional standards for the first time.

Reflections on Judge Leonard L. Finz

BY WALLACE "WALLY" LEINHEARDT, ESQ.

Reflecting on the impact that Judge Leonard L. Finz had on me, and fellow members of the Queens County Bar Association (the Association), takes me back to the time when I was Chair of the Young Lawyers Committee of the Association, and he was a recently elected Civil Court Judge.

During a discussion with Judge Finz, (whom I had known prior to his ascendancy to the bench as an outstanding trial attorney) I wondered out loud if he thought he could help the younger, less experienced trial lawyers in the Association learn the skills that would make them better trial attorneys?

Out of that conversation grew one of the most successful programs ever presented at the Association. (Coincidently a similar program is xqbeing presented by Surrogate Peter Kelly as I write this.)

Over a series of weeks, Judge Finz dissected a trial into its various parts: jury selection; opening; direct examination; cross examination; and summation. Everyone participated and was involved. In addition, he had attendees play, and comment, as: plaintiff's counsel; defense counsel; witnesses and jurors.

Putting into practice what Judge Finz taught us was immediately beneficial for me and another attendee, Morty Povman. We both had the gratifying experience of "Ringing the Bell" in Queens Civil Court, getting Plaintiff jury verdicts for the maximum amount (at that time) of $10,000!

I'm sure there are a great number of other attorneys who benefited from Judge Finz sharing his knowledge and experience.

In 1978, while I was President of the Association, I accompanied Judge Finz to a press conference in Manhattan, where he not only publicly announced his retirement from the Bench but used the opportunity to appeal for an increase in the salaries of Judges.

Speaking as an avid reader of his books, and his Association columns, and a lifelong mentor and friend, I know he will be deeply missed by all who knew him.

Wallace "Wally" Leinheardt is a Sustaining Associate member of the Queens County Bar Association and had been an engaged member for nearly 60 years. He has been a long-time participant, volunteer, committee chair and member of the Board of Managers, served as QCBA President in 1977-78 and has remained an active member since then.

(Part 2 – Continued from March Queens Bar Bulletin)

Emergency Rental Assistance Program (ERAP) and its Impact on Landlord-Tenant Litigation

BY HON. GEORGE M. HEYMANN

Fortunately for the landlords, most of the Housing Court judges did not follow this reasoning and began conducting hearings as to whether, on a case-by-case basis, the stay should be vacated. In *2986 Briggs LLC v. Evans*, (2022 NY Slip Op 50215[U]), a licensee holdover against the occupant(s) of a Rent Stabilized apartment who remained in possession of the premises after the tenant of record died, the court addressed the issue of its authority to conduct a hearing while applications for a stay were pending before the OTDA. The court determined that it did have the "authority to lift an ERAP stay in an appropriate case … As to certain matters, the ERAP Law assigns exclusive authority to OTDA: To establish eligibility standards, set priorities and process ERAP applications. However, the 'Restrictions on eviction' section – including the stay provision – adheres to matters outside OTDA's realm; that is, to eviction proceedings pending in the court system with which the administrative agency is not involved. And while the stay language appears absolute, to find it to be so would raise doubts as to the statute's constitutionality, an outcome to be avoided where possible." The court found nothing in the law to prevent landlords from challenging a stay and raising "cogent" arguments that occupants do not meet the criteria for a stay, or that even if they do it would be irrelevant. Here, the licensee provided no proof that he was a tenant or occupant "obligated to pay rent". Petitioner successfully argued that the ERAP stay was futile because regardless of whether the respondent could pay use and occupancy, his license to live in the apartment expired on the death of the tenant of record and he would be required to vacate the premises. The ERAP stay was lifted.

In an analogous holdover case, *Actie v. Gregory*, (2022 NY Slip Op 50117[U]), the tenant of record filed an ERAP application but vacated the premises while the application was pending. The undertenant remained in possession and opposed the petitioner's motion challenging the stay, seeking vacatur, on the grounds that his building was unregulated, and he needed the apartment for the use of his immediate family. The court emphasized that "[t]he statute provides no mechanism for a challenge to the stay and there appears to be either indefinite inchoate timeframes within which an application must or may be processed. If a petitioner is precluded from challenging the stay, the outcome is the same as existed with CEEFPA prior to *Chrysafis, supra*. An occupant may file an ERAP application, whether eligible or not, an intended beneficiary of the program or not, in good faith or bad, and significantly where the outcome will not result in the preservation of a tenancy. In this scenario the occupant will have unilaterally invoked a stay while precluding the petitioner in the action from engagement or participation in the process to which they are a party". *** "While the COVID-19 pandemic prompted the Legislature to enact the statute and provide this sweeping relief *en masse* (Emphasis in original), to deny a party-in-interest an opportunity to challenge a stay if it can demonstrate the *futility* (Emphasis added) of the stay in a particular context or that it should not otherwise apply, would contravene most of our legal framework and fundamental ideas of fairness." In vacating the stay, the court found that "it would be counterintuitive and prejudicial to preclude Petitioner from challenging an ERAP stay where approval of the application will not result in the preservation or creation of a tenancy".

Papandrea-Zavaglia v. Arroyave, (2022 NY Slip Op 22109), was a holdover proceeding wherein the landlord terminated the tenant's tenancy in an unregulated premises. Landlord commenced this proceeding prior to the enactment of ERAP. Initially, Petitioner sought use and occupancy (U&O) which was allowed. After ERAP went into effect, the respondent was notified that U&O would no longer be sought. As the landlord was only interested in regaining possession of the subject premises in order to sell the building, requiring the landlord to wait for an approval from OTDA was unnecessary given that the landlord would only reject the payment and refuse to reinstate the tenancy. In granting the Petitioner's motion to vacate the stay, the court stated that "[a] stay under the ERAP statute is appropriate only when the benefit provided could potentially resolve litigation". The most significant observation of ERAP's impact appears in the second to last paragraph of the decision: "The court must avoid an unreasonable or absurd application of a law when interpreting a statute (citation omitted). The ERAP legislation was not intended to act as [a] prophylactic statute and nor was it designed to create a barrier preventing small property owners from advancing litigation involving residential properties, where the tenancy is not subject to statutory control, landlord expresses its intent not to seek use and occupancy, and desires to pursue litigation where the tenancy has been property [sic] terminated".

One of the most cited cases for the vacatur of a COVID-19 stay is *Abuelafiya v. Orena*, (2021 NY Slip Op 21247). Here, the landlord commenced a nonpayment proceeding in March 2020 after the tenants defaulted on their rent. At that time, tenants were renting a home in Lloyd Harbor, New York for $6,800 per month. They had a one year written lease that was to end on August 31, 2020. They stopped paying in March 2020. The petition was adjourned to May 2021 due to the closing of the courts. Thereafter, the Petitioner was awarded a default judgment and warrant of eviction as the tenants failed to appear. Although the tenants initially filed a Hardship Declaration, they subsequently withdrew it and there was no stay in effect. The tenants then moved for a stay or a vacatur of the warrant. By the time this matter was adjudicated, the tenants had accumulated arrears in the amount of $113,000. As one of the factors to be considered for an ERAP stay is whether an individual in the household can demonstrate a risk of experiencing homelessness or housing instabilities, the tenants in this case conceded that they owned another house in Atlantic Beach, New York. The court found as a matter of fact that "the tenants are ineligible for ERAP funding as they are not experiencing housing instability by virtue of the fact that they own a second house they may relocate to. Eligibility having been determined; the ERAP stay is vitiated".

Ami v. Ronen, (2022 NY Slip Op 22098), is an example of ERAP's broad stroke having unintended results against the landlord. Here, the subject building is an owner-occupied two-family house and the landlord notified the tenant that at the expiration of the lease it would not be renewed so that Petitioner's disabled wife, then living in a facility, could move back home. Tenant originally delayed the proceeding by filing a Hardship Declaration that ran until January 15, 2022, when the moratorium ended. When that stay expired, tenant *then* submitted an ERAP application as the proceeding was in the process of moving forward. The court noted "that while automatic court Covid Stays and respondent's Hardship Declaration prevented petitioner from pursuing its rights in seeking possession of the subject premises, respondent was allowed to go forward with a series of HP proceedings against petitioner". (Emphasis in original) Clearly, this is just another example of how this statute was only concerned with protecting the tenants from eviction without a careful balancing of the equities to both sides of the landlord-tenant relationship. In vacating the stay, the court stated the statute "was never intended as a sword to be used by a nonregulated tenant to remain in occupancy ad infinitum …".

Contrary to *Abuelafiya v. Orena*, supra, *Sea Park East LLP v. Foster*, (2021 NY Slip Op 213470), involved a case where the tenants filed an ERAP application which was approved but erroneously failed to include an additional three months. Tenants appealed and filed a second ERAP application further extending a stay of this nonpayment proceeding. Petitioner's motions to vacate the stays were denied.

Likewise, in *LaPorte v. Garcia*, (2022 NY Slip OP 22126), where the prime tenant sought to evict his roommate in a holdover proceeding, the court determined that said roommate, having filed an ERAP application, is an "occupant" and petitioner's refusal to participate in the ERAP program did not require vitiation of the any stays of the proceeding. "The fact that the Petitioner does not want to participate in the program is not fatal to an ERAP stay. Petitioner 'does not possess the right to dissolve the stay b[y] refusing to provide required input for the application to be complete' (citations omitted). To hold here that

CONTINUED ON PAGE 10

QCBA Celebrates *Women's History Month*

For the first time, all five justices of the Appellate Term for the 2nd, 11th and 13th Judicial Districts are women…and all five women joined us for a virtual discussion. The theme of this year's Women's History Month was "Celebrating Women Who Tell Our Stories" and each judge told her story, from childhood through the early stages of her career to ascending to the bench and finally to the Appellate Term. A special thank you to Presiding Justice Wavny Toussaint, Associate Justices Cheree Buggs, Marina Cora Mundy, Lisa S. Ottley and Lourdes Ventura. Thank you also to Supreme Court Justice Bernice Siegal, the first woman from Queens to serve on the Appellate Term, for moderating the discussion and to Jasmine I. Valle, vice chair of the QCBA Diversity and Inclusion Committee, for planning and hosting the event.

The program is available on demand at no charge to QCBA members and eligible for 2 CLE credits in Diversity (CLE credits are at an additional charge). Contact the QCBA for details.

Emergency Rental Assistance Program (ERAP) and its Impact on Landlord-Tenant Litigation

BY HON. GEORGE M. HEYMANN

CONTINUED FROM PAGE 9

the ERAP stay would be vitiated based solely upon Petitioner's representation that he is only interested in possession would potentially make an ERAP stay inapplicable to almost all holdover proceedings where possession is the desired outcome for petitioners. That result is unsupported by the plain reading of the statute…". (See, *Hudson Avenue Housing Associates, LLC v. Howard*, (2022 NY Slip Op 22078), a holdover proceeding, where Petitioner avers than any stays should be vacated. The court disagreed stating that any ERAP application stays both nonpayment and holdover proceedings. Moreover, here, the Petitioner failed to request any due process hearing thus, his motion to vacate any stay was denied.)

Additional cases where ERAP applications will be vacated: Superintendent holdovers where there is no legal obligation to pay rent (*Karan Realty Associates LLC v. Perez*, [2022 NY Slip OP 22093]); Squatters in a foreclosed building, holdover proceeding may move forward as maintaining a stay "would be futile" (*Kelly v. Doe*, [2022 NY Slip Op 22077]) and Illegal activity [i.e.: drugs] in the subject premises (*River Park Residences, LP v. Williams*, [2022 NY Slip Op 50872(U)]).

CONCLUSION

Since its inception, ERAP has put a tremendous strain on landlords seeking to have their cases heard on the merits due to the tremendous backlog of cases that are either awaiting determinations from OTDA, or having a motion heard by the court to vacate a stay in effect. Clearly, if the sole intent of ERAP was for tenants to obtain sufficient funds to maintain their tenancy, then any stay provision should not have applied to holdover proceedings, where there is no intention of the landlord to maintain any relationship with the tenant. The only inference that could be drawn is that the Legislature was attempting to prevent evictions at all costs, without distinction.

As can be seen from the sampling of cases above, courts varied in their interpretations of the statute in rendering their decisions.

The ERAP program expired on January 23, 2023, with applications having been accepted until January 20, 2023. Each application will be reviewed in the order in which it was received, and all stays in those cases remain unless otherwise determined by a court after a hearing on a motion to vacate. As of January 29, 2023, OTDA was only processing applications through November 30, 2022, unless additional funds became available.

The end of the ERAP program enables landlords to commence new proceedings no longer subject to the automatic stays in the prior statutes. However, the many cases that were commenced pre-COVID and up to January 23, 2023, remain subject to the rules put in place since March 2020.

George Heymann is a retired judge of the NYC Housing Court; former adjunct professor of law, Maurice A. Deane School of Law at Hofstra University; certified Supreme Court mediator; of counsel, Finz & Finz, PC and a member of the Committee on Character and Fitness, Appellate Division, Second Department, 2nd, 10th, 11th & 13th Judicial Districts.

LGBTQ+ Bench Cards

BY. HON. JAMES L. HYER, JUSTICE OF THE SUPREME COURT

CONTINUED FROM PAGE 1

Pronouns". This Report and Resolution was presented to the NYSBA Executive Committee on January 19, 2023, which voted to approve the Report. The NYSBA House of Delegates then approved the Report on January 20, 2023.

With the passage of this Report and Resolution, the NYSBA President presented a Separate Report and Resolution to the House of Delegates of the American Bar Association, ("ABA") on February 6, 2023. The ABA Report and Resolution was adopted, and like the NYSBA Resolution, resulted in the ABA adopting the best practices and spirit of the Bench Card, while promoting that each of the member organizations within the ABA work to promote the adoption of a similar Bench Cards in each of their respective jurisdictions (states, territories, districts, etc.).

Thereafter, I met with the Board of Directors of the International Association of LGBTQ+ Judges to encourage that each of the Association's members advocate for the adoption of the Bench Card in their own court systems. It is further my understanding that the Bench Card will be a topic of a presentation to be offered at the Lavender Law Conference of the National LGBTQ Bar Association this year.

The LGBTQ Bench Card is available for download on the QCBA website at www.qcba.org/news or member attorneys may receive printed copies by calling the QCBA office.

Judiciary, Past Presidents and Golden Jubilarian Night
March 21, 2023

Judiciary, Past Presidents and Golden Jubilarian Night
March 21, 2023

PRESS RELEASE

New York State
Unified Court System

Hon. Tamiko Amaker
Acting Chief Administrative Judge

Contact:
Lucian Chalfen
Public Information Director
Arlene Hackel, Deputy Director
(212) 428-2500

www.nycourts.gov/press

Date: March 27, 2023

Blue-Ribbon Panel Named to Implement Pandemic-Related Innovations Aimed at Enhancing the Delivery of Justice

NEW YORK–Acting Chief Judge Anthony Cannataro and Acting Chief Administrative Judge Tamiko Amaker today announced the establishment of a blue-ribbon team of experts tasked with implementing recommendations that will build on pandemic-related innovations to improve the administration of justice. The Court Modernization Action Committee (CMAC) comprises leaders of the court system and the bar, members of the community, court users and justice partners. Supreme Court Justice Craig Doran of the Seventh Judicial District will chair the new committee.

CMAC stemmed from a report and recommendations issued last month by the Commission to Reimagine the Future of New York's Courts' Pandemic Practices Working Group, also led by Justice Doran. In addition to expanding and encouraging the use of virtual court proceedings, the recommendations include:

- Bringing greater transparency and consistency to the use of virtual proceedings
- Improving the functioning of remote proceedings
- Expanding alternatives for court users to access virtual proceedings and other court resources
- Improving accessibility for people who require special accommodations
- Enhancing systems for communicating with and supporting court users, including revamping the court system's website
- Ensuring that there is appropriate public access to virtual proceedings
- Expanding the use of electronic filing of cases
- Investing in locally appropriate modernization projects that will permit courthouses to better support virtual, hybrid and in-person proceedings
- Improving training and technical support for judges, court staff and court users
- Developing a detailed plan for responding to a future pandemic or other court disruption, and a system for testing, refining and deploying that plan
- Appropriating and earmarking supplemental funds for court modernization and emergency preparedness.

"Last month, the Pandemic Practices Working Group provided us with a solid plan to modernize practices and protocols to ensure the court system is positioned to deal with unforeseeable events in the future while improving access to justice right now," Judge Cannataro said. "Now, the task is to follow that blueprint and implement reforms and enhancements, and I have every confidence that the CMAC will help lead us to the future. I am very grateful Judge Doran and the members of the committee for so generously donating their time and expertise to what they and I believe is a vital cause: the modernization of our court system."

Judge Amaker, who served on the Working Group in her capacity as Deputy Chief Administrative Judge for Management Support and will also serve on CMAC, said, "It is a privilege to collaborate with such a committed and dedicated group. I know we are all ready to roll up our sleeves and get to work on refining our court system. We all appreciate that reimagining our courts is not a one-and-done proposition. Rather, it is a continuing commitment."

"We all want to get the same place—an efficient, effective, user-friendly court system that embraces change and is prepared for future contingencies—so it made sense to combine our expertise and efforts," said Justice Doran. "It was no accident that the Working Group had "working" as part of its title, and it is no accident that the CMAC has the word "action" in its name. We're here to get things done."

Hank Greenberg, who chairs the Commission to Reimagine the Future of New York's Courts and served on the Working Group, said, "Since the Commission to Reimagine the Future of New York's Courts was established in 2020, its working groups have produced 15 reports that have resulted in significant and beneficial changes in court operations. But none holds greater potential to enhance access to justice, improve the experience of litigants, and save time and money, than the report and recommendations produced by the Pandemic Practices Working Group. It is a blueprint for action, which CMAC will take to enhance the delivery and quality of justice for all New Yorkers."

Serving on the CMAC are:

Chair:

Hon. Craig Doran, Supreme Court Justice, 7th Judicial District

Co-Chairs:

Scott B. Reents, Cravath, Swaine & Moore LLP

William Silverman, Proskauer Rose LLP

Project Manager:

Christine Sisario, Director of Technology, Office of Court Administration

Members:

Hon. Tamiko Amaker, Acting Chief Administrative Judge and Deputy Chief Administrative Judge for Management Support, Office of Court Administration

Nancy J. Barry, Chief of Operations, Office of Court Administration

Mark A. Berman, Partner, Ganfer Shore Leeds & Zauderer LLP

Wilderness Castillo-Dobson, Associate, Proskauer Rose LLP

Jessica Cherry, Assistant Deputy Counsel, Office of Court Administration

Michael DeVito, Manager, Office of Record Production, Office of Court Administration

CONTINUED ON PAGE 17

(The full report is available at https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR23_03.pdf.)

Press Release: March 14, 2023

Blue-Ribbon Panel Named to Implement Pandemic-Related Innovations Aimed at Enhancing the Delivery of Justice

CONTINUED FROM PAGE 15

Stephen Fiala, Commissioner of Jurors and County Clerk, Richmond County

Hon. Patria Frias-Colón, Supreme Court Justice, Kings County

Hank Greenberg, Shareholder, Greenberg Traurig; Chair of the Commission to Re-Imagine the Future of NY's Courts

Sheng Guo, Program Manager, Courtroom Modernization, Office of Court Administration

Hon. Craig Hannah, Supervising Judge, Buffalo City Court

Rezwanul Islam, Deputy Executive Director, Nassau Suffolk Legal Services

Leanne Lapp, Public Defender, Ontario County, Past President of the State Defender's Association

Richard Lewis, President-Elect, New York State Bar Association

Roger Juan Maldonado, Partner, Smith Gambrell & Russell, Past President of the New York City Bar Association

Hon. Edwina G. Richardson-Mendelson, Deputy Chief Administrative Judge for Justice Initiatives, Office of Court Administration

Kelsey Miller, Associate, Cravath, Swaine & Moore LLP

Michael Miller, Past President, New York County Lawyers Association and New York State Bar Association

Lillian M. Moy, Executive Director (Retired), Legal Aid Society of Northeastern New York

Barbara Mule, Staff Counsel, Permanent Commission on Access to Justice

Hon. James P. Murphy, Administrative Judge, Fifth Judicial District

Hon. Shannon Pero, Justice, Town of Greece

Anthony R. Perri, Deputy Counsel, Office of Court Administration

Portia Proctor, Associate, Proskauer Rose LLP

Hon. Raymond L. Rodriguez, Acting Justice of the Supreme Court, Kings County

Nicole Swanson, Associate, Proskauer Rose LLP

Raymond A. Tierney, District Attorney, Suffolk County

Kyle Van Zutphen, Senior Budget Analyst, OCA Division of Financial Management

The Practice Page

Let's Play *Jeopardy!* – Ordinary Negligence Or Medical Malpractice?

BY HON. MARK C. DILLON
Serves on the Appellate Division, Second Department

Typically, an ordinary negligence action will have nothing to do with medical malpractice, while other actions involving hospital and physician treatments clearly implicate medical malpractice. Sometimes, the line between negligence and medical malpractice is a close call. Correctly classifying cases as either ordinary negligence or medical malpractice can affect case outcomes. The differences involve the applicable statute of limitations, the requirements of CPLR 3012-a, and the standard and proof for liability.

The crucial difference between ordinary negligence and medical practice is the duty that the defendant has allegedly breached to the plaintiff — and whether that duty involves common every day experiences versus matters of medical science requiring special skills (*Jeter v New York Presbyt. Hosp.*, 172 AD3d 1338). Actions for medical malpractice can be asserted against *non-physicians*, so long as acts or omissions involve specialized medical, dental, or podiatric direction, knowledge, or skills (*Rabinovich v Maimonides Medical Center*, 179 AD3d 198). The limitations period for negligence is three years but only 2.5 years for medical, dental, and podiatric malpractice (*compare* CPLR 214[5] *with* 214-a), so that assessing the true nature of the cause of action is necessary for its commencement in a timely fashion.

So let's play *Jeopardy*! There will be answers followed by the questions. The game category is "Ordinary Negligence Or Medical Malpractice."

Answer: Medical Malpractice.

Question: Psychiatrists? Psychiatrists are M.D.s with the right to prescribe medications (*Karasek v La Joie*, 92 NY2d 171).

Answer: Ordinary Negligence.

Question: Psychologists? Psychologists are not M.D.s and not "medical" (*Karasek v La Joie*, supra).

Answer: Medical Malpractice.

Question: Chiropractors? If they treat medical conditions of the body akin to a doctor or if the service bears a substantial relationship to the rendition of medical treatment by a licensed physician (*Foote v Picinich*, 118 AD2d 156).

Answer: Ordinary Negligence.

Question: Veterinarians? Medical malpractice requires treatment of the *human* body, whereas animals are legally deemed to be personal property (*Ratusch v Attas*, 3 Misc.3d 763).

Answer: Medical/Dental Malpractice.

Question: Orthodontists? Sufficiently akin to dentistry (*Cresson v NYU College of Dentistry*, 45 AD3d 352).

Answer: Medical Malpractice.

Question: EMTs? For acts or omissions while performing trained medic services (*Lynch v Town of Greenburgh*, 61 Misc.3d 459), though not for non-medical acts such as the careless driving of an ambulance.

DOUBLE JEOPARDY

Answer: Medical Malpractice.

Question: X-Ray Technicians? (*Lang-Salgado v Mount Sinai Med. Ctr., Inc.*, 157 AD3d 532) (fall from a stretcher caused by a violation of hospital protocol found to be medical-related).

Answer: Ordinary Negligence

Question: Laboratories? For acts or omissions that are outside of medical services or which are merely scientific (*Playford v Phelps Memorial Hosp. Center*, 254 AD2d 471).

Answer: Medical Malpractice.

Question: Other Laboratories? If the lab relies on the services of a physician such as a radiologist misreading a diagnostic film (*Culhane v Schorr*, 259 AD2d 511).

Answer: Medical Malpractice.

Question: Nurses? For acts or omissions while rendering medical-related services (*Beliler v Bodnar*, 65 NY2d 65)(failure to take proper medical history).

Answer: Ordinary Negligence.

Question: Other Nurses? Acts or omissions outside of medical services, such as the negligent placement of a wheelchair footplate not involving medical judgment (Cochran v Cayuga Medical Center, 90 AD3d 1227).

FINAL JEOPARDY

Answer: Medical Malpractice.

Question: Obstetrician Who Tosses the Newborn to a Nurse Moments After Delivery Where the Baby is Then Dropped On the Floor? At the time of the "toss," the conduct was still within the scope of the doctor-patient relationship as to be deemed medical malpractice, even though the baby had fully exited the birth canal by the time of the incident (*Rojas v Tandon*, 208 AD3d 702).

Additionally, if an action sounds in medical malpractice, counsel is required under CPLR 3012-a to execute a certificate of merit. The attorney must certify a review the facts of the case and consult with at least one licensed physician, dentist, or podiatrist knowledgeable about the relevant issues, and as a result conclude that the action has a reasonable basis. The purpose behind CPLR 3012-a is ethical, to deter frivolous actions and thereby reduce the cost of medical malpractice insurance premiums (*Trewari v Tsoutsouras*, 75 NY2d 1). No CPLR 3012-a certification is required for an action that does not sound in medical malpractice. Plaintiff's counsel must therefore accurately assess, by the time of the action's commencement, whether the action is that of ordinary negligence or medical malpractice.

Finally, liability for medical malpractice is measured against whether the provider deviated or departed from the accepted standard of care, proximately causing the alleged injuries (*Mazella v Beals*, 27 NY3d 694). Expert testimony is usually required to establish or refute that standard because of the specialized knowledge that the cases involve (*Joyner v Middletown Medical, P.C.*, 183 AD3d 593), but it is not needed if an action can be determined from the jurors' common knowledge such as under *res ipsa loquitor* (*Kombat v St. Francis Hosp.*, 89 NY2d 489)(foreign object left in a patient during surgery). Contrastingly, for ordinary negligence, expert testimony may be needed or helpful depending on the nature and complexities of the case, but claims and defenses may also sometimes be established without experts if the issue to be resolved is within the common knowledge and experiences of jurors (*Bermeo v Rajai*, 282 AD2d 700).

Mark C. Dillon is a Justice of the Appellate Division, 2nd Department, an Adjunct Professor of New York Practice at Fordham Law School, and a contributing author of CPLR Practice Commentaries in McKinney's.

Right To Counsel Considerations in 2023

BY FRANK BRUNO, JR.

Gideon v. Wainwright is a landmark case in the United States Supreme Court, decided in 1963. In this case, Clarence Earl Gideon, a Florida man who had been convicted of breaking into a pool hall and stealing money and soda, appealed his conviction on the grounds that he had not received a fair trial. Gideon had requested that the court appoint an attorney to represent him, but his request was denied because Florida law only required the appointment of counsel for capital cases.

The Supreme Court ruled unanimously in Gideon's favor, holding that the Sixth Amendment's guarantee of the right to counsel applied to state criminal trials through the Fourteenth Amendment's due process clause. The Court held that an individual charged with a crime has a fundamental right to an attorney, even if he or she cannot afford to pay for one, and that the state must provide counsel in such cases.

The Federal decision in *Gideon v. Wainwright* has had a significant impact on the criminal justice system in the United States, ensuring that indigent defendants are provided with legal representation and are able to receive a fair trial. New York has long attempted to ensure the rights of litigants by providing Counsel. Here are some of the ways that Gideon has been implemented nationwide:

Following the decision, all defendants who face the possibility of imprisonment are entitled to an attorney, regardless of their ability to pay. If a defendant cannot afford an attorney, the court must appoint one. NY further extended representation in the Family Court system and for children and recently the right was extended to persons facing eviction. States have established public defender systems to ensure defendants who cannot afford an attorney are provided Counsel. Gideon has ensured that defendants are able to receive a fair trial, as their attorneys can provide them with a defense and cross-examine witnesses, resulting in the innocent not being convicted and guilty defendants (after fair adjudication) receiving fair punishment. The right to counsel reduced wrongful convictions, as defendants are able to receive a fair trial and have access to competent representation provided that Counsel is appropriately paid, properly funded and not overburdened.

There are some challenges and issues with its implementation. Some problems include: Many public defenders are overworked and underpaid, resulting in a high caseload and limited time to prepare for each case. This can lead to inadequate representation for some defendants, particularly those charged with complex cases. While Gideon requires states to provide legal representation for indigent defendants, some states have not adequately funded their public defender systems, resulting in a lack of resources for some defendants. Many defendants who cannot afford bail are held in pretrial detention for extended periods, often without access to legal representation. This can result in defendants being coerced into plea bargains or being convicted without a fair trial. Even with a public defender, some defendants may not receive adequate representation, as some public defenders may lack the resources or experience to effectively defend their clients.

Overall, while Gideon was a significant step towards ensuring access to legal representation, more needs to be done to ensure that all defendants receive adequate representation, regardless of their financial means. Right-to-counsel for litigants requires higher payment to lawyers. There is a pending lawsuit to increase the hourly rate for Criminal Court and Family Court attorneys representing the indigent and children in the Courts. Proudly, when I was President of the QCBA, I was the first Bar Association President to sign onto the lawsuit and continue to support the litigation. You may not know that 18B attorneys have received one rate increase since 1986. In 2004, the rate was increased to $75 per hour for Felony Criminal cases and Family Court practitioners and $60 per hour for misdemeanor cases and has remained the same for the past 18 years.

There is presently an interim injunction for 18B attorneys to be paid $158.00 per hour. Double sounds good for sure however it is not enough. I am involved in a matrimonial action where opposing counsel is billing out at $700 per hour and I routinely see $600 and $500 per hour in Queens Supreme Court. Manhattan and Nassau seem to be higher hourly rates. By the way, the City and State were not persuaded by the low rate, long period without a raise and the volume and significance of the types of litigation. They did not simply agree to raise the rate, it required a lawsuit and an interim order. Similarly, the legislature did not pass a law to increase the rate.

The proposition is that the inadequate pay causes a small group of dedicated attorneys to handle an excessively large volume. Every panel attorney I know can handle pressure, try cases with the best of them and care more than the system about their clients. It is the unrelenting volume of cases without the required number of attorneys that takes a toll. Higher pay rate would result in more attorneys committing to this practice reducing the volume for all; better serving the needs of litigants. It would result in more justice for more people. As a society we should be judged on how we treat our elderly, our indigent and our children. We are wanting.

Spring cleaning for the Law Office. Purge old files: Review and organize, dispose of any outdated or unnecessary documents. This can free up space and improve organization. Take a look at files in your basement and storage. Shred copies, return original documents and scan. Going paperless can reduce costs with improved efficiency. Use cloud-based solutions for document storage, sharing, and encourage digital communication with clients and colleagues. (We need more emails!)

Clean and declutter workspaces: Encourage staff to clean and declutter their workspaces, including desks, filing cabinets, and bookshelves. This can improve productivity with a more pleasant working environment. Review and update hardware and software, including computers, printers, and software programs. This will ensure the office is operating efficiently with the latest technology. Review the firm's finances, including expenses, revenues, budget. This can identify areas for cost savings and opportunities for growth.

Review and update office policies and procedures, including those related to client communication, document management, and data security. Ensuring the office is operating in compliance with legal and ethical standards.

Streamline processes and improve efficiency in your law office. Implement document management systems, e-signature software, case management software to manage cases and documents efficiently. Automate routine tasks such as scheduling appointments or sending reminders. Consider software solutions chatbots or virtual assistants to automate these tasks. Improve the client experience to improve client satisfaction and retention. Implement client portals for secure communication and document sharing, solicit feedback from clients to improve services. Investing in staff development to improve performance and productivity

Organize and restock office supplies, including pens, paper, printer cartridges, coffee and tea. This can staff has the resources to work productively. Clean and declutter common areas, including reception areas, break rooms, and conference rooms. Creating a welcoming, professional environment for clients and staff alike. Utilize technology, email marketing, social media posts, and Bar Association networking with colleagues. Learn and continue learning. Biennial registration and CLE requirements ensure that we keep up with current law and recent developments. Spending just a few hours per week will place you in the top percentage of all attorneys.

Spring cleaning for a law firm involves reviewing and organizing all aspects of the office, from files and finances to technology and policies. By taking the time to clean and organize, a law firm can operate effectively, and create a more pleasant working environment for staff and clients.

Frank Bruno, Jr. is Past President of the QCBA, a Member of the Board of Managers, a regular contributor to the Bar Bulletin and a practicing attorney for more than 26 years.

Allen E. Kaye

Immigration Questions

We Need Humane Solutions, Not Harmful Legislation

Joseph DeFelice

AILA proudly welcomes this blog post from Diversity ,Equity, and Inclusion Committee Law Student Scholarship recipient Woorod Atiyat, part of a series intended to highlight the important ways in which diversity, equity, and inclusion inform immigration law and policy. More information about AILA's DEI Committee and its important work is available on AILA's website.

The U.S. legal system broadly can be characterized as flawed, and advancements are long overdue. Immigration law in the United States, for instance, criminalizes immigrants, refugees, and asylum seekers through a series of unjust laws and increasingly harsh penalties imposed on both those entering the country in search of a better life, and those who have faced mistreatment and racial profiling in the criminal legal system. With the high volume of ethical violations targeted at these marginalized communities, there is an urgent need to protect the civil, human, and labor rights of all immigrants and ensure their dignity is affirmed in places of work. With the recent series of policies that were implemented under the Trump Administration, Congress now carries the burden of using its delegated powers to salvage the remaining rights immigrant communities have while also bearing the responsibility to oppose bills that hinder the rights of immigrants.

Sadly, some recent legislative efforts clearly do not have the rights of immigrants in mind. For instance, in November 2022, Rep. Charles Eugene "Chip" Roy, joined by 16 Republican colleagues, introduced the "Border Safety and Security Act of 2022". In response, a group of over 250 local, state and national refugee, human rights and immigration organizations wrote a letter to House members opposing the bill, stating it requires the Department of Homeland Security (DHS) to defer the entry of any non-U.S. nationals who do not have valid entry documents during any period in which DHS cannot detain or return such an individual to a foreign country contiguous to the United States. If passed, a state would hold authority to sue DHS for further enforcement of the bill. The legislation would seal off all borders and ports of entry, severing access to protection for vulnerable people seeking a better life, such as asylum seekers, unaccompanied minors, torture victims, and human trafficking victims fleeing life-threatening situations. The bill is contrary to our nation's moral principles, violates U.S. refugee law, and would trigger the U.S. to violate its international obligations. Moreover, the bill would give DHS broad discretion to ban all asylum access even if this inhumane and impossible condition were somehow achieved.

This bill represents an attempt to circumvent our country's international asylum obligations. If passed, such a bill would negatively impact the global perception of the Unitec States as a nation that protects those seeking refuge. Deporting arriving migrants without conducting individual screening for asylum or trafficking violates long-standing treaty obligations to protect people fleeing political, religious, ethnic, racial, and other forms of egregious persecution. These pledges are embodied in decades of bipartisan legislation that codifies the right to nondiscriminatory asylum access at U.S. borders. The Border Safety and Security Act would clearly put the United States in violation of its international legal obligations.

Article 14 of the 1948 Universal Declaration of Human Rights (UDHR) states "everyone has the right to seek and to enjoy asylum from persecution in other countries." Although the UDHR is expressly nonbinding, the right to seek asylum that it articulated has become the cornerstone of international refugee law; other aspects of refugee law, such as non-refoulement and guarantees of proper treatment, stem from this fundamental right. Further, the Border Safety and Security Act would violate the Refugee Convention. The Refugee Convention builds on Article 14 of the 1948 Universal Declaration of Human Rights, which recognizes the right of persons to seek asylum from persecution in other countries. Under this convention through Article 5, a refugee may enjoy rights and benefits in a state as well as to those provided for in the Convention. This bill would not only effectively repeal the Refugee Act's asylum provisions, but also the Trafficking and Victims Protection Reauthorization Act's unaccompanied child provisions and DHS's statutory parole authority.

As the 118th Congress is now taking shape after the election, I urge Congressional members to turn away from this malpractice and refuse to move forward on a bill like H.R. 7772. Instead of harming immigrants and the most vulnerable, Congress must rise to its responsibility and serve as protectors of the immigrant community and our country's values of fairness and justice.

BY ALLEN E. KAYE AND JOSEPH DEFELICE

Allen E. Kaye and Joseph DeFelice are the Co-Chairs of the Immigration and Naturalization Committee of the Queens County Bar Association.

Committed to Building Rewarding Relationships

Flushing Bank's **Business Power Money Market** account is perfect for business customers who want to keep their funds liquid while earning a guaranteed interest rate of 2.35% on balances of $75,000 or more.[1]

To qualify for the **Business Power Money Market** account you must also have or open a Flushing Bank Complete Business Checking account.[1,2] With Complete Business Checking, you have access to over 55,000 ATMs, business mobile banking, mobile check deposit, and more. Plus, new **Complete Business Checking** customers can qualify for additional bonuses.[3]

To open a new **Business Power Money Market** account, visit your local Flushing Bank branch. For a list of nearby branches and hours, go to **FlushingBank.com**.

Small enough to know you.
Large enough to help you.®

FLUSHING Bank

1) New Business Power Money Market account with new money only. To qualify for this offer you must maintain a Complete Business Checking account with a minimum monthly balance of $5,000. Existing Business money market account customers are not eligible. New money is defined as money not currently on deposit with Flushing Bank. The Annual Percentage Yield (APY) is effective January 27, 2023. The interest rate is guaranteed for a 365-day period from the date of account opening. For daily balances of $74,999 or less, the 365-day guaranteed interest rate is 0.10% with an APY of 0.10%; for daily balances of $75,000 to $999,999 the 365-day guaranteed interest rate is 2.32% with an APY of 2.35%; and for daily balances of $1,000,000 or more the 365-day guaranteed interest rate is 2.32% with an APY of 2.35%. After the Guaranteed Rate Period has lapsed, the interest rate will revert to the non-guaranteed tiered rates in effect for the Business Power Money Market. Fees may reduce earnings. Other than as described above, at our discretion, rates may change at any time without notice. You must maintain the required daily balance for the statement cycle to receive the respective disclosed yield. You must deposit a minimum of $100 to open this account. A low balance service charge of $15.00 will be imposed every month if the balance in the Business Power Money Market account falls below $5,000 any day of the month. The rate and offer are subject to change and early termination without prior notice at any time. 2) A Flushing Bank Complete Business Checking account with a minimum monthly balance of $5,000 is required to receive the advertised rate. Certain fees, minimum balance requirements, and restrictions may apply. Fees may reduce earnings on these accounts. 3) The Business Value Program (BVP) is limited to one (1) new Complete Business Checking account per customer. New money only. Existing business checking account customers are not eligible. A new checking account is defined as any new checking account that does not have any authorized signatures in common with any other existing Flushing Bank business checking account(s). An existing business checking customer is defined as anyone who currently has or has had a Flushing Bank business checking account within the last 24 months. New money is defined as money not currently on deposit with Flushing Bank. The Flushing Bank BVP consists of two bonus programs: the BVP Gift Card bonus and the BVP Activation bonus. Please speak with a Flushing Bank representative for additional information and program specific details including balance and transaction requirements.

Follow us on

Flushing Bank is a registered trademark

MEMBER FDIC