

# Queens

## BAR BULLETIN

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

May 2023 | Volume 90, No. 8



## ChatGPT Helped Me Draft an Answer to a Notice of Opposition

BY TANEEM KABIR, KABIR LAW PLLC

ChatGPT helped me draft an answer to a Notice of Opposition. All I had to do was simply see through all its lies and second-guess everything it told me.

ChatGPT, the artificial intelligence chatbot released by OpenAI last year, has certainly garnered a lot of recent attention. A law school professor used it to publish a 14-page treatise in an hour.<sup>1</sup> One practitioner demonstrated how it could replace a lawyer for certain simple tasks.<sup>2</sup> The program even took all sections of the July 2022 bar exam and scored in the 90th percentile.<sup>3</sup>

But there is a long way to go from writing a treatise or passing a bar exam to giving sound legal advice tailored to a client's specific circumstances.

How long was that path, exactly?

I ran an experiment with a simple set of premises:

- (1) I put myself in the shoes of a typical business owner (Applicant) who had filed a trademark application with the United States Patent and Trademark Office (USPTO) and was waiting for the USPTO to approve it, and

- (2) during this waiting period, one of my competitors (Opposer) filed a Notice of Opposition against my application asking the USPTO to not approve my application for various reasons,<sup>4</sup> and

- (3) because I am interested in saving money on legal fees, I wanted to ask ChatGPT to help me figure out how to respond to this Notice of Opposition.<sup>5</sup>

The results were alarming.

Here are my conclusions from my analysis of the prompts and corresponding responses from ChatGPT in chronological order:

### I. ChatGPT generalizes certain details and has a poor ability to decide what to emphasize.

Prompt #1: What is a Notice of Opposition?

ChatGPT: A Notice of Opposition is a legal document that is filed by a party who wants to oppose the registration of a trademark, patent, or

other intellectual property. It is typically filed with the relevant intellectual property office or agency and must be filed within a specific timeframe after the publication of the application for registration.

The purpose of a Notice of Opposition is to inform the intellectual property office and the applicant that the opposing party believes that the registration of the trademark, patent, or other intellectual property would infringe upon their existing intellectual property rights or would otherwise be harmful to their business interests.

The opposing party must provide grounds for their opposition and may be required to provide evidence to support their claims. The applicant will have the opportunity to respond to the Notice of Opposition, and the intellectual property office will ultimately make a decision on whether to grant or deny the registration based on the arguments and evidence presented by both parties.

ChatGPT's response here is mostly correct. But the program dives right into answering the client

CONTINUED ON PAGE 10



## Table of Contents

ChatGPT Helped Me Draft an Answer to a Notice of Opposition.....	1,10,11
Editor's Note .....	4,5
Directory Corrections.....	6
President's Message.....	7
Should the First Department Have Dismissed for Misdescription of Body Type Many of the Parking Summonses It Upheld?.....	9
When It's Good To Have "Unclean Hands" .....	9
QCBA Annual Dinner and Installation .....	12
Annual Mike Dikman Family Law Dinner .....	13
Putting up a Fence in New York State .....	15
The Practice Page .....	18
A Very Brady Article .....	21
When the Law and Mental Health Collide .....	22

# 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

### MAY 2023

Wednesday, May 24  
LGBTQ+ Committee Meeting - 1:10 pm  
<https://us04web.zoom.us/join>  
Meeting ID: 756 6432 9509 Passcode: ZuV6jd  
**CLE:** Ethics Update – Pt 1  
Monday, May 29  
*Memorial Day – OFFICE CLOSED*  
Wednesday, May 31  
**CLE:** Ethics Update – Pt 2

### JUNE 2023

Tuesday, June 6  
Special Membership Meeting – 1:00 pm  
<https://us02web.zoom.us/join>  
Meeting ID: 88392767413 Passcode: 376144  
Wednesday, June 7  
**CLE:** ABCs of Bankruptcy – Part 1 - 1:00 pm  
Friday, June 9  
**CLE:** Implicit Bias: Deal With It - 1:00 pm  
Tuesday, June 13  
**CLE:** Cyber Security - 1:00 pm  
Wednesday, June 14  
**CLE:** ABCs of Bankruptcy – Part 2 - 1:00 pm  
Thursday, June 15  
**Event:** Young Lawyers Committee Happy Hour,  
Co-Hosted by QCWBA and NYSBA,  
Austin's Ale House - 5:30 pm  
Thursday, June 15  
**CLE:** New Notary Laws: Know Before You Sign! - 1:00 pm  
Monday, June 19  
*Juneteenth – OFFICE CLOSED*  
Wednesday, June 21  
**CLE:** ABCs of Bankruptcy – Part 3 - 1:00 pm  
Wednesday, June 28  
**CLE:** The Trial Series – Part 4 – Tentative

### JULY 2023

Tuesday, July 4  
*Independence Day – OFFICE CLOSED*

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# New Members

- |                       |                     |
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## Editor's Note

# The Solution to our Slow-Motion National Crisis

By Paul E. Kerson

What is the right level of federal taxation? Immigration control? Support for the poor? Military preparedness? Intervention in foreign conflicts?

These are “normal” political questions that animated our national democracy until January 6, 2021.

On that date everything changed. The United States Capitol building was invaded by an armed mob of more than 2,000 people seeking to violently overturn the results of 2020 national election.

Five people were killed in this attack.

This mob violence was part of a written seven-part plan approved by then-President Trump to wrongfully overturn the 2020 election. See Google, *Wikipedia*, “January 6 United States Capitol Attack”.

Prior to January 6, 2021 the Trump Campaign and its allies brought 63 different lawsuits in State and Federal Courts around the country seeking to challenge the 2020 election results. All 63 cases were lost. See Google, *Wikipedia*, “Post-Election Lawsuits relating to 2020 U.S. Presidential Election”.

Under the above listed facts, it can be said that President Trump committed the crime of treason in violation of 18 U.S.C. Section 2381, which carries a penalty of a minimum of five years imprisonment and a minimum \$10,000 fine and a maximum of death.

But most important for the nation, 18 U.S.C. Section 2381 forbids a convicted Defendant “from holding any office under the United States”.

“Treason” is defined in the United States Constitution as “levying war” against the United States. Was the armed mob attacking the United States Capitol on January 6, 2021 “levying war”?

That is the legal, political, moral and deeply disturbing question facing the nation in the next 19 months. At the end of that time, November 2024, the next national election will be held.

Mr. Trump seeks to be the Republican Party candidate. He has been indicted for misconduct in New York for filing false business records in connection with the 2016 election. Criminal investigations are continuing by the State of Georgia and in Washington, D.C. by the Federal Justice Department concerning his alleged misconduct in the 2020 election.

There is also a separate Federal Justice Department Washington, D.C. criminal investigation concerning Mr. Trump's retention of classified government documents after he left office in January 2021.

What happens now? Can we have a “normal” election with an indicted candidate?

This happened once before. Former Indiana State Senator Eugene V. Debs was a Socialist Party candidate for President in 1900, 1904, 1908, 1912 and 1920.

He was indicted and convicted for urging potential United States soldiers not to fight in World War I in 1918. His conviction was affirmed by the United States Supreme Court in 1919. See *U.S. v. Debs*, 249 U.S. 211, 39 S. Ct. 252 (1919).

He ran for President in 1920 from his prison cell and lost again. His prison sentence was commuted to time served by President Harding in 1921.

In deciding what to do now, we must look to *U.S. v. Debs*, cited above. Imprisoning political candidates for treason is an action worthy of lesser nations. That is the teaching of President Harding's sentence commutation but not pardon of Mr. Debs. See Google, *Wikipedia*, “Eugene V. Debs”.

By commuting the sentence, and not pardoning Mr. Debs, President Harding continued the prohibition against Mr. Debs' holding public office.

Did Mr. Trump commit treason? Five people are dead in an armed attack on the United States Capitol that he helped to plan.

Should the nation be put through the destabilizing spectacle of four felony trials of a former United States President while he is a candidate during an election year?

The answer is found in 18 U.S.C. Section 3161 (h) (2) and *U.S. v. Djokic*, 2023 WL 167494 (S.D.N.Y. 2023).

In 18 U.S.C. Section 3161 (h) (2) permits Deferred Prosecution Agreements. The Prosecutor drafts and signs a Court-approved written Agreement with the Defendant wherein the Government agrees to indefinitely postpone the prosecution so long as the Defendant changes his behavior as written in the agreement.

In *U.S. v. Djokic*, cited above, sets forth a well written Deferred Prosecution Agreement.

In the case of Mr. Trump, a Deferred Prosecution Agreement should include the following provisions:

- (a) lifetime abstention from running for public office.
- (b) lifetime abstention from campaigning for anyone else running for public office.
- (c) lifetime abstention from raising funds for election campaigns at any level of government.

The goals of this Deferred Prosecution Agreement are as follows:

1. Four criminal trials of a former President during an election season where he is a candidate will destabilize our judicial and political systems.
2. Running a candidate under indictment, let alone four separate indictments in three separate cities does serious harm to the party that nominates him, thus creating damage to the two-party system.

The two-party system is essential to solving the “normal” important political questions set forth in the beginning of this article.

In order to accomplish this, I am hopeful that the Federal Justice Department will host meetings at the highest level as follows:

1. A meeting with the District Attorney of New York County, New York and the District Attorney of Fulton County, Georgia in an effort to persuade them to sign on to this Deferred Prosecution Agreement.
2. Meet with the adult children and business associates of the Trump Organization and convince them that it is in the best interest of their golf course, apartment house and hotel business for Mr. Trump to sign this Deferred Prosecution Agreement.
3. Meet with the top officials of the Republican Party and convince them that the Federal Justice Department is specifically interested in the continued health of the Republican Party because we cannot have a two-party system without it in order to solve the “normal” important political questions set forth at the outset of this article.
4. Meet with Mr. Trump himself and his attorneys and express to him that the United States Government and its Justice Department does not wish to treat its former Presidents in any kind of punitive way. Convince him that his legacy, at age 76, is to rebuild his golf course, apartment house and hotel business such that he leaves it to his adult children in much better financial shape than it is today. Assure him that four or more prosecutions will undoubtedly be extremely detrimental to these businesses in a way that no one can control. Tell him that he owes it to the memory of his late father, Fred Trump, to pass on the family business better off than when he inherited it.

If the private persuasion above does not work then Public Opinion should be mobilized, starting with public speeches by top Republican Party officials, members of the Trump family and his business associates. It would be important to convince the

CONTINUED ON PAGE 5



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## Editor's Note

### **The Solution to our Slow-Motion National Crisis**

#### **CONTINUED FROM PAGE 5**

business associates and family of Allen Weisselberg and Michael Cohen to issue public statements urging Mr. Trump to sign the proposed Deferred Prosecution Agreement. These former business associates of Mr. Trump have been convicted and imprisoned by Courts at the urging of prosecutors seeking their testimony.

It is up to all of us, Democrats, Republicans and Independents, to save the Republican Party from its coming self-destruction in nominating a candidate who committed treason. Efforts to convict him in an election year are unseemly, distasteful, destabilizing, unworthy of a great nation and likely to backfire.

Preserving the two-party system to conduct the debate about "normal" important political questions listed above is an effort we all must make.

Without this effort, where are we? With a former Head of State who has committed treason and will likely do so again? What does this do to our foreign relations and our military? What does this do to ourselves?

The successful conclusion of a Deferred Prosecution Agreement for Mr. Trump pursuant to 18 U.S.C. Section 3161 (h) (2) should be the national goal of every American. Our Federal Government is worth preserving.



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Jillian A. Tivin, Court Attorney to Judge Schiff

The Clerk of the County is Doreen Hanley - 718-262-7300  
The Deputy Chief Clerk is Barbara Oliveri

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## President's Message

# A Final Note

By Adam Moses Orlov

Time sure does fly. A year has come and gone in what feels like a blink. Nevertheless, much was accomplished.

A year ago this association had just begun its journey toward financial health. A plan put in place two years ago, to build a sponsorship program, sell our building and lease new office space, had just begun to be executed. Our hope and expectation was that over this past year we would grow our sponsor base, sign a contract for the sale of the building and move into our new space. We did not quite achieve all of this but we certainly made progress on all fronts.

**Sponsors:** Our platinum sponsorship program has been a fantastic success. It has given us new life and allowed us to continue and even expand our wonderful events and programs. Jonathan Riegel, our Executive Director, has done a fabulous job of reaching out to the Queens corporate community as well as our Queens based law firms and creating partnerships with them to gain access to our members. Those who sponsored last year have seen the value of that investment and, as a result, every one of our corporate and platinum sponsors who sponsored us last year has returned to sponsor us again this year. Additionally, we have added a number of new sponsors this year and we look forward to our sponsorship program expanding even further next year. Many thanks to our sponsors for supporting us. Please go to our website at [www.qcba.org](http://www.qcba.org) to see who they are.

**The sale:** At the beginning of the year we had a buyer that expressed interest. We had moved through the process with them but it never came to the point of a signed contract, and ultimately, that buyer would not commit. Nevertheless, I am pleased to report that we have had a number of parties express interest over the past few weeks and the QCBA Fund, Inc. is very close to signing a contract with one of them.

**The move:** We have a signed lease for space directly across the street from the Supreme Courthouse. The lease was signed in November. We anticipated then that we would move in January or February. Yet, to our great frustration, it is now late May and we have not yet moved. Why? Construction! As part of our lease agreement our landlord agreed to build out the space to our specifications. Well, that has taken a lot longer than we expected. Of course, construction work always takes longer than expected so I guess we should have adjusted our expectations but had we done that then it would have taken longer still because, as previously stated, construction time always exceeds expectations. If you got through that last sentence scratching your head wondering if it made sense, then maybe you have a small taste of the frustration we have felt watching things move at what felt like a snail's pace these last few months. In

any event, the work is now, finally, largely complete and the space is beautiful. We should be moving our office over in a matter of days and once we do we look forward to inviting you for a tour of your Bar Association's new home.

With my term as President ending on May 31 this will be my last President's message to you. While I cannot honestly say I will miss writing these messages I can say that, overall, I will miss this position. I enjoyed this past year and I confess to being surprised by that. I thought it would be a lot of time, a tremendous responsibility and a not too healthy dose of aggravation. Indeed, it was a lot of time and a big responsibility, but very little aggravation. On the contrary, much like in my professional life,

I found the attorneys I worked with on our board specifically, and in this association generally, to be cordial, respectful, and dare I say...pleasant. I count many among you as friends largely as a result of the time I spent being active in this association. I also went to countless events of both this association and our Affinity Bar Associations this year, many of which I otherwise would not have gone to if I were not president, and I thoroughly enjoyed them.

So, this being my final President's message, here is my final message to you as President. Become active. In this Association, sure. But also in other areas of your community. You will do some good and find a sense of fulfillment in that. And, you will likely meet some wonderful people along the way.



### Queens County Bar Association

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## SPECIAL MEMBERSHIP MEETING NOTICE

TO THE MEMBERS OF THE QUEENS COUNTY BAR ASSOCIATION:

The undersigned members of the Queens County Bar Association have submitted the attached proposed bylaws amendments for consideration by the membership of the Queens County Bar Association. Consistent with the provisions of Article XV, Section 1, of the By-Laws of the Queens County Bar Association. The signatories to this petition are:

Michael Abneri	Kristen Dubowski	Sharifa Milena Nasser	Hamid Siddiqui
Frank Bruno, Jr.	Etan Hakimi	Adam Orlov	Sydney Spinner
Joseph Carolla III	Joshua Katz	A. Camilla Popin	Zenith Taylor
Desiree Claudio	Michael Kohan	Estelle Roond	Jasmine Valle
Ruben Davidoff	Sandra Munoz	Joel Serrano	Clifford Welden

**Therefore, a SPECIAL MEETING of the Queens County Bar Association will be held virtually via Zoom on TUESDAY, JUNE 6, 2023, at 1:00 P.M. The sole matter to be considered and voted upon at this meeting shall be the proposed amendments to the bylaws of the Queens County Bar Association.**

The meeting may be accessed at:

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Dated: May 12, 2023  
Jamaica, N.Y.





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– Wanda M.

I cannot recommend Etan highly enough. From the very beginning, we charted a sale plan and it worked flawlessly. Etan is extremely knowledgeable in navigating the complexities of selling a home and guided me every step of the way, I had a special situation where timing of the sale was critical. Etan worked exceptionally hard to ensure that we hit our targets. Aside from being an awesome professional. He's just a really nice guy and a pleasure to work with. A truly fantastic experience.

– Richard A.

I became the Executor of my Aunt's estate which included a condo she owned in Queens. Etan was recommended by our estate attorney to be our realtor. He was great from the very beginning! He was always very professional and extremely knowledgeable about the real estate market. I live in New Jersey and he made the difficult task of selling my Aunt's condo in Ridgewood NY an absolute pleasure. He helped me with every aspect of the entire process. With Covid entering the picture, it became a long process and he was wonderful every step of the way. He spent a lot of time answering numerous questions, always returning calls promptly and keeping me updated on different strategies to sell the condo. I would recommend him and his team very highly!

– Joan T.



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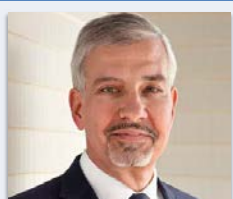
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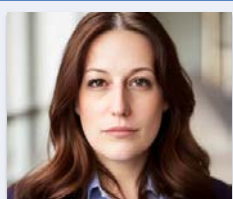
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Jasmine I. Valle, Esq., Moderator  
Principal Law Clerk to the  
Hon. Lourdes M. Ventura



David Paul Horowitz, Esq.  
Law Offices of  
David Paul Horowitz, PLLC



Katryna Kristoferson, Esq.  
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**PROGRAM:** Implicit bias is real, has real world consequences, and can be deadly. Join us to discuss whether an individual can gain insight into their own biases, whether having implicit bias necessarily means an individual will act in a biased way, and what does and doesn't work to curb implicit bias. Finally, does implicit bias tell us more about the individual or the larger society in which we live?

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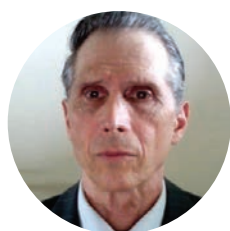
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## Should the First Department Have Dismissed for Misdescription of Body Type Many of the Parking Summonses It Upheld?

BY DENNIS BOSHACK

In *Matter of Sysco Metro NY, LLC v City of New York*, 168 AD3d 459 (2019), the Appellate Division, First Department, affirmed the IAS court in upholding 367 parking summonses although the IAS court noted that many of them misdescribed the body type of the summonsed vehicles. It would seem that the First Department overlooked misdescription of body type and that the IAS court disregarded this misdescription insofar as any of the 367 summonses contains this misdescription.

VTL 238(2) provides for service of a parking summons on the operator or owner of a motor vehicle and requires the summons to contain five vehicle identification elements. Those mandatory elements are 1) plate designation, 2) plate type, 3) expiration date of registration, 4) make or model of vehicle, and 5) body type of vehicle. However, a parking summons may omit the plate type or expiration date if that information is not shown on the license plates or registration sticker of the vehicle and the summons so states (VTL 238(2-a)(a)).

*Sysco* affirmed the IAS court's decision (*i.e.*, 59 Misc 3d 727 (Sup Ct, NY County 2017)), which dismissed 1019 parking summonses upon a finding they misdescribed the body type of tractors by describing it "as anything other than 'TRAC' or 'tractor'" (*Sysco*, 59 Misc 3d at 735). "Each of these [1019] summonses listed the body type not as a 'tractor,' but as a 'truck,' a 'DELV,' or another notation" (*id.*, at 729).

In *Sysco* (168 AD3d 459), the City argued that requiring a parking summons to list the five mandatory vehicle identification elements "is infeasible and that imprecise designations of body types may be upheld." (The City

made those arguments for summonses issued to tractors without registration stickers stating the tractors' body type (*see* appellants-cross-respondents brief [City's brief] in *Sysco*, 168 AD3d 459, at, e.g., 1-2)). The Appellate Division rejected those arguments as unavailing (*Sysco*, 168 AD3d 459).

Besides dismissing 1019 summonses for misdescription of body type, the IAS court also upheld "367 'lift gate' summonses [that allege] tractors violated 34 R.C.N.Y. 4-08(k)(7), which prohibits a commercial vehicle from parking on a street with the vehicle's lift gate down while the vehicle is unattended. Each summons, however, lists the license plate and state of the tractor, which has no lift gate but pulls a trailer housing the lift gate. Many of these summonses also do not list the offending tractor's body type as 'tractor'" (*Sysco*, 59 Misc 3d at 730).

However, insofar as that misdescription of the tractor's body type exists, it would seem the First Department overlooked it when upholding the 367 summonses. It upheld those summonses without mentioning that misdescription and stated the "[IAS] court correctly found that the [lift gate summonses] properly specified tractors as the body types" (*Sysco*, 168 AD3d at 461). The IAS court ignored that misdescription except to state, "Many of these summonses also do not list the offending tractor's body type as 'tractor'" (*Sysco*, 59 Misc 3d at 730).

Like the IAS court, the Appellate Division upheld the lift gate summonses on the ground that, because VTL 238(2) applies to service of a summons on the operator or owner of a motor vehicle and a trailer is not a motor vehicle, "[r]espondents rationally interpreted the statute to allow for a summons to be issued to the owner or

operator of the tractor to which an offending trailer is attached" (*Sysco*, 168 AD3d at 461).

While a tractor attached to a trailer may be summonsed for a lift gate violation, VTL 238(2), which must be strictly complied with (*Matter of Nestle Waters N. Am., Inc. v City of New York*, 121 AD3d 124, 129 (1st Dept 2014)), requires a parking summons to identify the summonsed vehicle (and thus its owner, whom the summons charges with a parking violation) by stating the vehicle's 1) plate designation 2) plate type 3) expiration date of registration; 4) make or model, and 5) body type--except a parking summons may omit the plate type or expiration date if that information is not shown on the license plates or registration sticker of the vehicle and the summons so states (VTL 238(2-a)(a)). VTL 238(2-a)(b) provides that "[i]f any information which is required to be inserted on a notice of violation [a/k/a 'parking summons' and 'parking ticket'] is omitted from the notice of violation, misdescribed, or illegible, the violation shall be dismissed upon application of the person charged with the violation" regardless of whether the violation took place. Like omission, "a misdescription of any of the five mandatory identification elements also constitutes a jurisdictional defect mandating dismissal" (*Nestle*, 121 AD3d at 128-129 (citing *Matter of Wheels, Inc. v Parking Violations Bur. of Dept. of Transp. of City of N.Y.*, 80 NY2d 1014, 1016 (1992))).

*Dennis Boshnack is a former Administrative Law Judge of the New York City Parking Violations Bureau. He now practices before the bureau.*

## When It's Good To Have "Unclean Hands."

BY DIANA THE HAPPY LAWYER

As lawyers we know "unclean hands" is not a good thing. It refers to the questionable actions of a party that results in them being partially at fault for a resulting litigation and may prevent recovery. But is there a time when it's good to have "unclean hands?"

With the easy accessibility of a local grocery or fruit stand, we can pop in and get fresh veggies or pick a up a bundle of colorful flowers for our table. While we are not required to maintain a small farm in our back yard to survive, the health benefit of digging in the dirt and cultivating growth are well documented.

According to Web MD, gardening can make you feel more peaceful and content by focusing your attention on

the moment and away from negative thoughts. Your self-esteem improves when you see the results of your efforts in planting and tending to your garden and your sense of pride increases when you see healthy plants growing. The physical movements of digging, raking, and weeding are great exercises that reduce anxiety and depression and ward off dementia. Joining a community garden increases social connection, a support system and teamwork.

*Science World* magazine reports that scientists have discovered that soil contains a mycobacterium that increase the brain's production of serotonin – the "happy chemical." The National Library of Medicine published the results of a study of people of an average age of 76

years showing increased levels of brain nerve growth factors and improved memory after performing 20 minutes of gardening.

Your cognitive brain functions will benefit from an investigation of the type of plants you want, the proper soil, watering and sunlight needed to increase the chance of success. Remember to wear the proper shoes, gloves, and clothing to prevent the risk of injury or sunburn and even if you don't have a back 40 (inches) you can grow flowering plants or herbs right inside your home on the windowsill or a balcony.

Planting season is upon us, so go out and get your hands dirty!



# ChatGPT Helped Me Draft an Answer to a Notice of Opposition

BY TANEEM KABIR, KABIR LAW PLLC

## CONTINUED FROM PAGE 1

because it lacks the intuition of a human practitioner who would know to first confirm the jurisdiction of the client's situation. The program does not know what kind of intellectual property application the client has and does not know how to ask such a question to the client. Instead, ChatGPT makes an excessively general reference in its response to an "intellectual property office" and tries to produce an answer that covers "trademark, patent, or other intellectual property."

ChatGPT also does not know how to emphasize critical details in its response that a human practitioner would likely have known to do here, such as the fact that a Notice of Opposition filed against the client signals the beginning of an *inter partes* proceeding before the Trademark Trial and Appeal Board (TTAB). A client receiving a Notice of Opposition is akin to them getting served with a Summons and Complaint.<sup>6</sup> They are about to face long and contested litigation ahead at the TTAB, complete with discovery, experts, witnesses, and a trial—all with strict deadlines. A human practitioner would have emphasized these critical details to convey a sense of urgency to the client. ChatGPT does not go that far.

## II. ChatGPT will give information that is correct but incomplete.

Prompt #2: Prompt #2: How much time do I have to respond to a Notice of Opposition?

ChatGPT: The amount of time you have to respond to a Notice of Opposition depends on the specific intellectual property laws and regulations governing the relevant jurisdiction where the opposition was filed. Generally, you will have a set period of time to respond, which is typically a few months from the date you receive the Notice of Opposition.

For example, in the United States, if you receive a Notice of Opposition against your trademark application, you will have 30 days from the date of service of the opposition to file an answer with the Trademark Trial and Appeal Board (TTAB) or to request an extension of time to file an answer. In the European Union, the period for responding to a Notice of Opposition against a trademark application is three months from the date of publication of the application.

It is important to note that failing to respond to a Notice of Opposition within the prescribed time period can result in the abandonment of your application or the granting of the opposition, which could prevent you from obtaining the intellectual property registration you sought. It is therefore crucial to act promptly and seek legal advice if you receive a Notice of Opposition.

Here, ChatGPT has told the client they have 30 days from the date they were served the Notice of Opposition to file their Answer with the TTAB. This is true, but not completely true.

37 CFR § 2.105 states: "When an opposition...with proof of service...has been filed and the correct fee has been submitted, the [TTAB] shall prepare a notification...[identifying] the title and number of the proceeding and the application involved and shall designate a time, not less than thirty days from the mailing date of the notification, within which an answer must be filed." [Emphasis added] However, Section 310.03(a) of the Trademark Trial and Appeal Board Manual of Procedure (TBMP) also states "it is the general practice of the Board to allow the defendant in an opposition...proceeding 40 days from the mailing date of the notification in which to file its answer." [Emphasis added]

A human practitioner knowledgeable in TTAB procedure would not have told the client they have only 30 days to respond to the Notice of Opposition. Instead, depending on the date of the TTAB's notification, the client may have had up to 40 days to answer.

## III. There is a certain art to asking the right prompts to ChatGPT.

Prompt #3: I have a US trademark application, so only give me responses related to US procedure.

CHAT GPT: Sure, if you have a US trademark application and receive a Notice of Opposition, you will have 30 days from the date of service of the opposition to file an answer with the Trademark Trial and Appeal Board (TTAB) or to request an extension of time to file an answer.

If you need more time to respond to the opposition, you may file a request for an extension of time to answer, which will give you an additional 30 days to respond. You may request up to five extensions of 30 days each, for a total of 180 days.

If you fail to respond to the Notice of Opposition within the prescribed time period or fail to file a request for an extension of time, your trademark application may be deemed abandoned, and you may lose the opportunity to register your trademark.

It is important to note that responding to a Notice of Opposition can be complex and may require legal expertise. It is recommended that you seek the assistance of a qualified trademark attorney to help you prepare your response and protect your rights.

I wanted ChatGPT to stop generalizing about which "intellectual property office" rules I had to follow in my roleplay as a client. I told the program I had a US trademark application. Its response to this prompt revealed two things:

First, a client using ChatGPT would need to know beforehand there is a difference between the TTAB and foreign intellectual property offices when it comes to the Opposition process.<sup>7</sup> Moreover, a client would need to have the appreciation these differences were substantial enough to warrant prompting ChatGPT to limit its responses to the client's jurisdiction. If a client did not have this prior knowledge or appreciation before using ChatGPT, they may have continued to receive responses

from the program that were generalized to cover multiple jurisdictions.

Second, ChatGPT offered some new and vital information about extending the client's time to answer the Notice of Opposition. Note that I did not ask ChatGPT how I could get extra time to answer. My prompt was strictly about limiting the conversation to the US opposition process. The program provided information about an extension as if it was an afterthought. It is uncertain whether the program would have conveyed this important detail later on in the conversation. If a real client had not requested ChatGPT to limit its future responses to TTAB rules, it is possible the client may have never been told anything about extending their time to answer the Notice of Opposition.

## IV. ChatGPT does not know how to strategize.

Prompt #4: How do I file a request for an extension of time to answer?

ChatGPT: To request an extension of time to answer a Notice of Opposition in a US trademark application, you must file a written request with the Trademark Trial and Appeal Board (TTAB) before the expiration of the 30-day response period. The request must include:

1. The name and address of the party making the request for extension;
2. The serial number or registration number of the trademark application or registration involved in the opposition;
3. The name and address of the opposing party;
4. A statement of the grounds for the extension request;
5. The length of the extension requested (e.g., 30 days); and
6. The signature of the party making the request or its authorized representative.

The request for extension can be filed online through the Electronic System for Trademark Trials and Appeals (ESTTA) or by mail, fax, or hand delivery to the TTAB. You should ensure that your request is received by the TTAB before the expiration of the 30-day response period to avoid the risk of your trademark application being deemed abandoned.

It is important to note that the TTAB may grant or deny a request for extension of time in its discretion, and that multiple requests for extension may not always be granted. Therefore, it is advisable to provide a sufficient explanation for your need for an extension and to ensure that your request is filed in a timely manner.

The six-point list above is mostly accurate as to what an Applicant's request for an extension to answer must contain. But the program failed to inform the client of the *best* strategy for getting an extension and, ultimately, setting up the framework for resolving the matter entirely.

CONTINUED ON PAGE 11



# ChatGPT Helped Me Draft an Answer to a Notice of Opposition

BY TANEEM KABIR, KABIR LAW PLLC

## CONTINUED FROM PAGE 10

ChatGPT says the client “must file a written request with the [TTAB].” However, TBMP Section 310.03(c) states: “The time for filing an answer may be extended or reopened by stipulation of the parties, approved by the Board, or on motion granted by the Board, or by order of the Board.”

There are four different ways to extend the client’s time to answer the Notice of Opposition, one of which is a stipulation between the parties. ChatGPT does not offer this strategy at all in its response. A human practitioner would know that picking up the phone and talking to your adversary about extending professional courtesies or building rapport is one of the best ways to start an adversarial proceeding. A human practitioner would recommend getting the other side’s consent for an extension *before* directly requesting the TTAB’s permission for same. By following ChatGPT’s explicit instructions, the layperson client may have ended up losing a valuable opportunity to connect with their adversary.

## V. ChatGPT will give patently false information.

**Prompt #6:** Can you give me a sample of an answer to a Notice of Opposition?

**Chat GPT:** Sure, here is a sample answer to a Notice of Opposition in a US trademark application. This sample is for illustrative purposes only and should not be relied upon as legal advice.

[Your Name and Address]  
[Date]

Trademark Trial and Appeal Board  
US Patent and Trademark Office  
P.O. Box 1451  
Alexandria, VA 22313-1451

Re: Opposition No. [insert opposition number]  
Trademark Application Serial No. [insert serial number]

To Whom It May Concern:

Respondent, [your name], by and through its undersigned counsel, hereby answers the Notice of Opposition filed by Opposer, [opposer’s name], on [date of opposition], in the above-referenced matter.

Preliminary Statement

Respondent denies all allegations of the Notice of Opposition that are not expressly admitted herein.

Response to Allegations

[Here you would include your response to each allegation of the Notice of Opposition. Your response should be numbered and should directly address each allegation in the Notice of Opposition. You should include any relevant legal arguments and supporting evidence.]

Affirmative Defenses

[Here you would include any affirmative defenses that you wish to assert, such as fair use, lack of likelihood of confusion, or abandonment. Your affirmative defenses should be numbered and clearly stated, and you should provide a legal basis for each defense.]

Prayer for Relief

Respondent respectfully requests that the opposition be dismissed, and that the USPTO approve the trademark application. Respondent also requests any further relief that may be just and proper.

Respectfully submitted,  
[Your signature]  
[Your Name]  
[Your Address]  
[Your Phone Number]  
[Your Email]  
[Your Bar Admission Information]

Note: This is just a general template, and your specific answer to a Notice of Opposition may vary based on the specific allegations and facts involved in your case. It is highly recommended that you consult with a qualified trademark attorney for guidance on how to draft an effective response.

Continuing my roleplay as a typical client looking to save money on legal fees, I asked ChatGPT to provide me with what many clients may have asked from you by now: a sample document they could fill out on their own.

What the program offered in response to this prompt was blatantly erroneous.

First, ChatGPT offered a sample Answer written in business letter format. The typical client, unfamiliar with TTAB procedure, is likely to interpret this to mean the TTAB will accept a paper submission of their Answer. However, the TTAB generally does not accept paper submissions. 37 C.F.R. § 2.126(a) states: “Submissions must be made to the Trademark Trial and Appeal Board via ESTTA.” ESTTA is the Electronic System for Trademark Trial and Appeals, the TTAB’s electronic filing system. Paper submissions are accepted by the TTAB only if the ESTTA is unavailable due to technical problems, or when extraordinary circumstances are present.<sup>8</sup> The client who relies on ChatGPT’s sample here would have ended up with a rejection from the TTAB and perhaps also missed their deadline to submit an Answer in the proper format.

Second, the program tells the client to include in their Answer a “response to allegations” using “any relevant legal arguments and supporting evidence.” A human practitioner is highly unlikely to ever advise a client to do this. An Opposition proceeding at the TTAB follows the Federal Rules of Civil Procedure Rule (FRCP), and FRCP Rule 8 requires that “[i]n responding to a pleading, a party must: (A) state in short and plain terms its defenses to each claim asserted against it; and (B) admit or deny the allegations asserted against it by an opposing party.” Furthermore, TBMP Section 311.02(a) states: “The defendant should not argue the merits of the allegations in a complaint

but rather should state, as to each of the allegations contained in the complaint, that the allegation is either admitted or denied.”

A client’s Answer to a Notice of Opposition at the TTAB should not provide legal arguments and supporting evidence at this stage of the proceeding, because doing so risks the client’s Answer being deemed by the TTAB to be argumentative, nonresponsive, or otherwise not in compliance with Fed. R. Civ. P. 8.<sup>9</sup> The Opposer, as the plaintiff in any Opposition proceeding, bears the burden of proof by a preponderance of the evidence. A human practitioner would know what *not to say* in the client’s Answer.

In summary, although ChatGPT has shown some intriguing ability to recall information and synthesize human-like responses to questions, it is still a long way off from giving even basic legal advice tailored to simple but specific circumstances. A client who tries to use ChatGPT to get quick and free answers puts themselves at risk of being dangerously misled.

<sup>1</sup> Jenna Greene, Will ChatGPT Make Lawyers Obsolete? (Hint: Be Afraid), *www.reuters.com*, Dec. 9, 2022, <https://reut.rs/3n1xHWC> (last accessed Apr. 19, 2023).

<sup>2</sup> Colin Salao, How ChatGPT Can Replace Lawyers, According to a Lawyer, *www.thestreet.com*, Apr. 18, 2023, <https://bit.ly/3oE6oC4> (last accessed Apr. 19, 2023).

<sup>3</sup> Debra Weiss, Latest Version of ChatGPT Aces Bar Exam with Score Nearing 90th Percentile, *www.abajournal.com*, Mar. 16, 2023, <https://bit.ly/40B0miQ> (last accessed Apr. 18, 2023).

<sup>4</sup> 15 U.S.C. § 1063(a). See also USPTO Trademark Trial and Appeal Board Manual of Procedure Section 303.

<sup>5</sup> This experiment was done using the freely accessible version of ChatGPT known as GPT-3.5—and not the more advanced premium version known as GPT-4—because the cost-conscious client is likely to opt for a free tool over a paid one. This experiment was also repeated using Google’s Bard program (a competitor to ChatGPT) and produced similar results.

<sup>6</sup> 37 CFR § 2.116(c) states: “The notice of opposition...and the answer correspond to the complaint and answer in a court proceeding.” The other parts of this subchapter detail other procedural parallels between federal court proceedings and TTAB proceedings.

<sup>7</sup> See, e.g.: European Union Intellectual Property Office, Opposition, *euipo.europa.eu*, <https://bit.ly/3Ni3QnF> (last accessed Apr. 19, 2023). In the European Union, after an Opposer files their Opposition against an Applicant, the European Union Intellectual Property Office (EUIPO) mandates both parties take a “cooling off” period of 2 months during which time they are expected to discuss settlement. In the US, there is no such “cooling off” mandate by the TTAB during the Opposition process.

<sup>8</sup> 37 C.F.R. § 2.126(b).

<sup>9</sup> See *Turner Entertainment Co. v. Ken Nelson*, 38 USPQ2d 1942 (TTAB 1996), where the TTAB, in a precedential decision, was forced to interpret the applicant’s Answer to the Notice of Opposition on its own. The Answer was filed by a pro se applicant and was deemed by the TTAB to be argumentative, nonresponsive, and otherwise non-compliant with Fed. R. Civ. P. 8.



# QCBA Annual Dinner and Installation May 5, 2023





# Annual Mike Dikman Family Law Dinner Honoring Judges Anna Culley and Margaret McGowan May 17, 2023







## QUEENS COUNTY BAR ASSOCIATION

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# Putting up a Fence in New York State

BY SHIRA J. BIEGACZ, ESQ., SACCO & FILLAS LLP

An owner of real property in New York State has the right to improve that property within the limits of the law.<sup>1</sup> Often, such improvement includes the installation of a fence close to the property line. Many homeowners rely on a property surveyor to determine placement of a fence, or they simply instruct the fence installer to continue an existing fence, without considering their neighbor's property rights.

If you plan on installing a fence in New York State, make sure to do your homework and take your neighbors into account to avoid future boundary line disputes:

1. **Review local ordinances:** Check the zoning laws and ordinances specific to your area. Check with the local building department, planning office, or municipality to understand the requirements and restrictions regarding fences. It may be helpful to consult with the company installing the fence to determine whether and how you can adhere to such requirements and restrictions.
2. **Obtain necessary permits:** Depending on the jurisdiction, you may need to obtain permits before constructing a fence. Contact the local building department or planning office to determine if permits are required.
3. **Communicate with neighbors:** While not legally required, it is often beneficial to discuss your fencing plans with neighbors, especially if the fence may affect shared boundaries or views. Open communication can help address any concerns or potential disputes early on and can save both neighbors from headaches and excessive legal costs down the line. If your neighbor does not agree with your planned fence it may be time to get an attorney involved.
4. **Adhere to property boundaries:** Check local ordinances to determine whether your fence is required to be positioned a certain distance from a shared property line (referred to as a setback). Ensure that the fence is installed within your property's boundaries to avoid encroaching on neighboring parcels. If you do not have an updated property survey, you may have to order a new survey from a professional surveyor to determine where your property lines lie.

## Fences and Adverse Possession

Adverse possession is a legal concept that allows an individual occupying another's property openly, notoriously and without the owner's permission for a specific period of time, to acquire ownership of that property by adverse possession.

To establish adverse possession in New York, the person seeking ownership must demonstrate the following:

1. **Actual possession:** The individual must physically occupy and control the property, excluding others from using it.
2. **Open and notorious use:** The possession must be visible and apparent to the property owner, such as by cultivating the land, or making improvements.

3. **Hostile and exclusive possession:** The occupation must be without the owner's permission and in a manner inconsistent with the owner's rights.
4. **Continuous possession:** The use of the property must be uninterrupted and continuous for ten years.

For 175 years, individuals in New York State were able to claim title to a neighbor's property if they put up a fence, impermissibly, and cultivated the adversely possessed property within that fence or encroachment. This Law caused many un-neighborly disputes and excessive litigation surrounding the erection of fences, as homeowners lived in fear of giving up their property rights by adverse possession.

In 2008, the New York State Legislature recognized that the way we live and make improvements to real property has changed since the Real Property Actions and Proceedings Law's inception. The Legislature therefore drastically changed the Real Property Actions and Proceedings Law to reflect the way we live now. The amendments specifically address fences and other de minimis improvements.

Pursuant to the amended statute, to lay claim to title by adverse possession, the person claiming title by right must have "a reasonable basis for the belief that the property belongs to the adverse possessor."<sup>2</sup> Further R.P.A.P.L. §543 addresses routine maintenance of property and establishes that "the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse." Finally, and most important to this conversation, the amended R.P.A.P.L. §543(1) clearly states that "the existence of de minimis non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse." The 2008 Amendment to the R.P.A.P.L. is significant in that it allows property owners to amicably negotiate placement of fences and other de minimis encroachments on their property with their neighbors without fear of giving up title to their property.

## Boundary Line Agreements

Despite the clear Law regarding fences, if your neighbor wants to install a fence or a portion of their fence on your property, or if you want to enter into an agreement with your neighbor to install a shared fence on the boundary line,<sup>3</sup> it is in your best interest to contact an attorney to determine whether you need a boundary line agreement to avoid any future issues related to the area of property which sits on your neighbor's side of the fence, making it clear that your neighbor's possession of the property on their side of the fence is permissive and not adverse.

A boundary line agreement is a legal document that can be used to resolve a boundary line dispute between neighboring property owners. This agreement allows the parties involved to establish a clear and mutually agreed-upon boundary line, helping to prevent future conflicts.

To create a boundary line agreement in New York, consider the following steps:

1. **Communication:** Open and honest communication with the neighboring property owner is key. Discuss the issue and express a willingness to reach a resolution through a boundary line agreement.
2. **Hire professionals:** It is advisable to hire a professional surveyor to accurately determine the location of the property boundaries and provide detailed information that can be used to establish the boundary line in the agreement.
3. **Drafting the agreement:** Consult with a real estate attorney to draft a boundary line agreement. The attorney will ensure that the agreement accurately reflects the intentions of the parties involved and adheres to the relevant laws and regulations of New York.
4. **Agreement terms:** The boundary line agreement should include specific details, such as the legal description of the properties involved, the established boundary line, and any additional provisions or conditions agreed upon by the parties. Surveys for all affected properties should be attached. The boundary line agreement may also address matters like maintenance responsibilities, shared expenses and filing fees, and dispute resolution mechanisms.
5. **Recording the agreement:** Once the boundary line agreement has been reviewed and signed by both parties, consider recording the agreement with the County Clerk's Office in the county in which the properties are located. Recording the agreement helps establish a public record of the agreed-upon boundary line and provides additional legal protection in the event of future boundary line disputes.

As most homeowners discover, the erection of a fence is no simple matter. It's advisable to seek professional help from an attorney to avoid jeopardizing your neighborly relationship and to protect your property rights.

*Shira J. Biegacz, Esq. is an associate attorney in Sacco & Fillas LLP's commercial litigation department. Shira has 15 years' experience representing clients in State Court, Bankruptcy Court and Arbitration in a multitude of real estate-related matters, including mechanics lien foreclosures, alleged negligent construction and commercial real estate disputes. She regularly counsels construction managers, general contractors, subcontractors, owners and developers through all phases of construction and litigation. You can reach Shira at sbiegacz@saccofillas.com.*

<sup>1</sup> Real Property Actions and Proceedings Law (RPAPL), Article 15.

<sup>2</sup> R.P.A.P.L. §501(3)

<sup>3</sup> See New York Consolidated Laws TWN § 300 for more information regarding the installation and maintenance of boundary line fences.



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## The Practice Page

# New York's New Electronic Notary Law

BY HON. MARK C. DILLON

*Serves on the Appellate Division, Second Department*

New York now allows for the remote notarization of documents through the enactment of Executive Law 135-C, which became effective on February 1, 2023. It keeps notarization procedures current with developing technologies, as usable for commercial and other transactions and, as particularly relevant to us, litigation documents.

The statute provides that New York notaries may use audio-visual communication technology to interact with a principal at a remote location, subject to certain conditions. First, the notary must file a prescribed registration form with the Secretary of State confirming the ability to perform electronic notarizations. The form elicits the notary's name, address, e-mail address, the expiration date of the notary's commission, an exemplar of the notary's signature, and the type of electronic technology the notary intends to use. The exemplar signature on file shall only be used for notarial acts (Executive Law 135-C[5][a], [b], [c]). Any change that may occur in the notary's e-mail address must be reported to the Secretary of State within five days of the change (Executive Law 135-C[7]).

Second, at the electronic meeting, the notary shall confirm in the normal course the identity of the person who is to sign the written instrument, in the electronic view of the notary. The notary must also confirm that the instrument to be executed is the same as that which the signatory attests to signing (Executive Law 135-C[4][a]).

Third, the notary must attach his or her electronic signature to the instrument in such manner that its alteration or removal would be technologically detectable and render evidence that would invalidate the notarial act. The notary's electronic certificate must disclose that the oath or acknowledgment was obtained through electronic communication technology (Executive Law 135-C[5][a], [d]).

Fourth, the notary must retain for at least ten years an electronic copy of any video or audio recording of the notary's confirmation of the document signer's identity (Executive Law 135-C[2][b]).

Fifth, the notary may perform notarial acts where the signer of the instrument is elsewhere in New York State or in another state. The requirement that the signer of the instrument "personally appear" before the notary is statutorily satisfied. If the signer of the instrument is outside of the United States, the electronic notarization is permitted only if the subject matter of the instrument is to be recorded in a U.S. jurisdiction or involves U.S. property (Executive Law 135-C[4][a], [b]).

Observationally, the enactment of Executive Law 135-C makes life easier for attorneys obtaining affidavits from out-of-state witnesses, as it bypasses the need to obtain a "certificate of conformity" attesting that an oath taken in a foreign state conforms with the laws of that jurisdiction or of New York, as otherwise required by CPLR 2309(c) (e.g., *Midfirst Bank v Agho*, 121 AD3d 343, 348-49). The wide use of remote technology for the New York notarization of instruments executed by out-of-state signers means that the bench and bar may be seeing less of CPLR 2309(c) in the future. Since the practicing bar has sometimes found the acquisition of certificates of conformity to be a cumbersome and sometimes-complicated nuisance, any parting from CPLR 2309(c) will not be with sweet sorrow.

Sixth, if an original document must exist for recording, a printed copy of the electronically-notarized document suffices so long as all of the foregoing requirements of the statute are satisfied (Executive Law 135-C[6][a]). A physical or electronic image of a stamp, impression, or seal need not accompany the electronic signature if the notary has attached an electronic notarial certificate meeting

the requirements of the statute (Executive Law 135-C[6][c]). The notary must certify that the paper version of the document and its signatures accurately reflect the electronic version, and if so, the municipal recording officers must accept the paper version for filing. The statute provides notaries with a template of the certification language that is to be used on the paper copy for filing (Executive Law 135-C[6][d][i], [ii], [iii]).

Seventh, the statute reserves to the notary the right to decline in any instance the performance of notarial acts through electronic means, including but not limited to circumstances where the notary is not satisfied that the signatory is competent or has the capacity to execute the instrument, or where the signatory's signature may not be knowingly or voluntarily made (Executive Law 135-C[9]). This provision assures that notwithstanding the geographic distance between the signatory and the notary, the *de jure* propriety of the notarial procedure is still guarded. Conversely, no notary is permitted to provide notarial services exclusively through electronic means (Executive Law 135-C[8]).

And finally, notaries may charge up to \$25 for their remote electronic notarial services (19 NYCRR 182.11[g]).

The Secretary of State is specifically authorized to promulgate rules that establish standards, practices, procedures and forms (Executive Law 135-C[5][e]). Therefore, notary publics, including attorney notaries, should stay abreast of relevant communications from the Secretary of State.

---

*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.*



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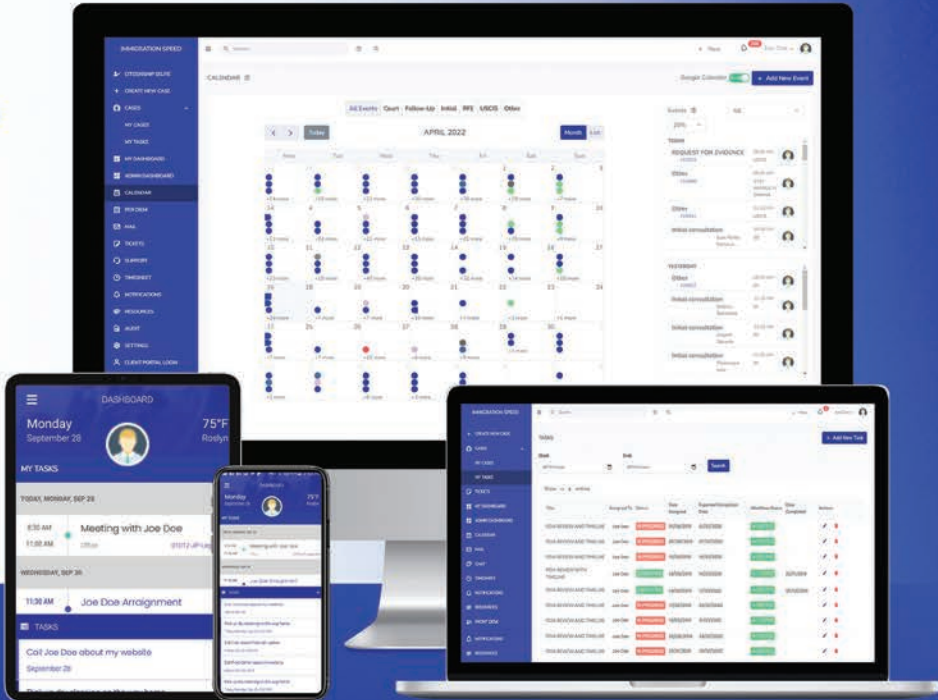


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Donna received her law degree from St. John's University of Law. She is currently the Chairperson of the Board of Directors of the Catholic Lawyers Guild of Queens and was past President of the Queens County Women's Bar Association, the Astoria Kiwanis Club, East River Kiwanis Club, and the Catholic Lawyers Guild of Queens. Co-Chair of the Elder Law Section of Queens County Bar Assn. 2012-2019



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## A Very Brady Article

BY FRANK BRUNO, JR.

*“Here’s the story of a lovely lady who was bringing up three very lovely girls. All of them had hair of gold, like their mother, the youngest one in curls. Here’s the story of a man named Brady, who was busy with three boys of his own. They were four men, living all together, but they were all alone. Till the one day when the lady met this fellow and they knew it was much more than a hunch, that this group must somehow form a family. That’s the way they all became the Brady Bunch.”*

Here’s the story, of a blended family. Basically, one where the parents have children from previous relationships and all the members come together as one unit. Blended families increasingly are more common. You have the stepfamily, reconstituted family, or complex family. Yours, mine, and ours. Sometimes one of both parents has children from a prior relationship combining to form a new bunch. The parents can be heteronormative or something more progressive in all of our new-fangled options. The “non-traditional” is more common statistically now with 54% of married or unmarried living together couples having a step-someone relationship and 40% of new marriages being remarriage.

An extra layer of relationship complexity to be sure with a touch of added complexity to legal life planning and navigating life circumstances as well. Who gets the old family car? Which parent pays for the young adult child’s car insurance? Who gets the two tickets to attend high school graduation? Where do we spend holidays and who goes where? Is it divide and conquer or divided we fall? Knowing the players of a blended family can ensure your family will embrace its strengths and work through its differences.

Intact family dynamics are fraught with worries. We have the oldest kid favoritism or the same gender preference or the “baby” of the family who gets spoiled; the blended family adds several layers of intrigue to the mix. We have the close proximity child and the out-of-town kid. We are faced with who is more sensitive about their role, or self-conscious? Who feels like an outsider, or what parent feels put out by the addition of a new step-sibling, step-parent, or half-sibling when the new baby arrives? It takes effort and a sincere desire to navigate these complexities to keep the family unified and happy. The laws for what happen if a person becomes incapacitated or passes are still very much based on the traditional family model, which means that

the blended family likely will end up in court and conflict without planning for them in advance.

The concept of the step family has been around for centuries, many blended families were not recognized until the two parents married and agreed to care for the children together, even if one parent was not biologically related. Currently, much more acceptable for the adults in the relationship to live together and raise the children jointly without the formality of marriage or adoption. Blended families may experience difficulty in terms of child support, medical decisions, and other complex issues, such as: Conflicting family roles of children, such as when an older child of one parent becomes the youngest of all the kids or a new elder child assumes that role. Conflicting responsibilities as to daily chores, appropriate behavior, and other expectations. Difficulties with names for step-parent and social etiquette between the non-involved biological and active step-parent, and the role assumed. Stress on both parents when balancing the needs of their children and the new partner. Many of these issues can be ameliorated through open dialogue and effective communication.

Mathematically two into one is difficult. Difficult circumstances abound but there many benefits to a blended family as well: Children have the benefit of two, or more, caregivers. There is an appreciation of diversity and differences. There are other persons to provide additional financial and emotional support. A greater support system will exist with additional siblings and the new family structure may be healthier than their previous one.

Estate Law and the Blended Family. What happens when you become incapacitated or die, may not match your wishes. Although you may see your step-family members the same way as your blood relatives, the law does not.

In New York, if a person is survived by a spouse, he/she would only receive a part of the estate if you have living children or parents with your living children or parents receiving the balance.

Death with no estate plan may not result in the outcome you want for your loved ones, especially in a blended family situation. It is important to create an estate plan for the blended family well in advance, and I encourage you to discuss your plan with the members of your family to avoid hurt feelings,

confusion, or pain in the future. Avoid conflict in your blended family through open communication.

Estate planning is often seen as a highly private affair, sometimes it should not be. In the case of a blended family, having open conversations with your loved ones about your estate plan and your goals for the family can save them from hurt feelings, Court and conflict in the future. The plan for your blended family will depend entirely on family dynamics, family members’ situations, personal values for how an inheritance could be given and the legacy you want to leave.

Some parents may want step-kids and biological kids to inherit an equal share from you and your spouse however that can only be arranged through active advance planning. Maybe you want to make sure that the youngest has the financial support they will need if something happens to you whereas the older children are able to support themselves. Maybe you have a step-parent or step-sibling that you would want to gift a special item of yours like a watch or necklace. For better or worse, a person you have a step-relationship with has no right to inherit from you under the law, unless you put your plan in writing.

Every detail of the Will or Trust does not have to be shared but start with an open conversation about the general goal of the estate plan, such as wanting everyone to have an equal share, or that you want to provide more for your biological children because the step-children will already receive a full inheritance from their other parent. By taking the mystery out of your estate plan goals, your stepchildren will feel included in the discussion and feel like they are knowledgeable about your plan rather than feeling hoodwinked or hurt if they find out later that your plan doesn’t align with the expectations, they created for it in their minds. Dashed expectations cause hurt and pain. Even better, let the people in your life know you value and love them, and that no matter the relation, you care about them. Instead of leaving your family a messy Court battle, leave your family an example of financial wellness, peace and harmony. Saving the world; one bunch at a time.

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## When the Law and Mental Health Collide

BY PATRICIA R. LYNCH, ESQ.

Divorce is one of the most stressful events a person can experience. It touches on nearly every aspect of life—from the financial to the emotional. Even the most amicable of divorces can have a significant impact on the mental health of the parties involved. When there are minor children involved, the stakes become even higher, and the ripple-effect of the divorce can be long-lasting on the parties and child(ren).

As a divorce and family law practitioner, I, of course, counsel my clients through the legal aspects of their divorce or family law proceeding and zealously advocate for them in Court, but I have found that many clients tend to blur the line between legal counsel and emotional confidant. As their attorney, I know the intimate details of their home life, finances, and children, so it is natural for them to think of me as a person they want to confide in when it comes to the more emotionally traumatic aspects of their litigation. The problem is, I am not a mental health professional, I am a legal professional, so one of the first pieces of advice I give to clients who are experiencing a contested divorce or who seem particularly emotionally impacted by an uncontested divorce is, “get into therapy!”. I recommend therapy not only for the good of my clients and their mental health, but my recommendation is also meant to help them learn to navigate their litigation with a clear head. When a litigant comes into a divorce proceeding with their emotions front and center, they are only serving to harm themselves and their own credibility in the eyes of the Court, and that can cause damage to the ultimate outcome of their divorce.

Despite the significant progress we have seen in breaking the stigma of seeking treatment for mental health, I still hear clients ask me if seeing a therapist will be looked upon unfavorably by the Court. If my position on this is not already clear, I feel that therapy should be a pre-requisite to filing for divorce. Having the support of a mental health professional who can help give litigants the tools to work through the trauma of a divorce or separation and, in turn, allow parents to help their child(ren) through the process is invaluable. Fortunately, I am seeing therapy become a more common recommendation from the Bench, but there is still plenty of progress to be made.

Absent Court-mandated therapy, a litigant will only pursue therapy if they themselves believe in therapeutic treatments. Even when a Judge issues

an Order that a party begin therapy, that treatment is only as good as the person allows. This becomes particularly significant when dealing with decisions regarding custody of the minor child(ren).

Custody in New York State is broken up into two parts—physical and legal custody. The Courts have jurisdiction over a child until they reach the age of 18. Physical custody is generally granted to one parent who will be the parent with whom the child(ren) resides and the parent who will make the day-to-day decisions about the care of the child(ren). The non-custodial parent is then generally granted parenting time with the child(ren) outside of the residential home. In New York State, absent allegations of abuse, the Courts generally favor fostering equal (or as close to equal as is reasonably possible) contact with both parents. While it is rare, a Court may even award joint physical custody when the parents live close enough to each other and the child(ren) would not be significantly impacted by living with each parent 50% of the time.

Legal custody, on the other hand, involves the “major decisions” associated with the child(ren)’s care—meaning the medical, educational, or religious decisions surrounding the child(ren). More often than not, joint legal custody is the goal for Courts, but that is not always reasonable or best.

When two people decide to divorce, it is implied that there has been a breakdown in their ability to communicate with one another. Joint legal custody requires two people, who otherwise want to separate, to set aside their differences and be able to come together to make decisions for the benefit of their child(ren). There is no doubt that many parents are able to do this, but there is a significant number who are unwilling or unable to co-parent in a way that fosters a healthy lifestyle for their child(ren).

In New York, the standard in determining custody is what is in the “best interest” of the child(ren). In determining “best interest”, Courts must look at a variety of factors and render a decision based on the totality of the circumstances. Factors that a Court might consider include the home environment of each parent, the parents’ ability to provide the child(ren) with appropriate guidance, the ability of the each parent to provide for the child(ren)’s emotional, physical, and intellectual needs, the financial status of each parent and their ability to provide monetarily

for the child(ren), the physical and mental fitness of each parent, and the likelihood of each parent to foster a healthy relationship with the other parent. See generally *Elliott v. Felder*, 69 A.D.3d 623 (2d Dep’t 2010). While these factors are helpful and important in making a decision regarding custody, there are limitations within the Court that might lead to an inadvertently harmful decision.

Judges, lawyers, and other Court officials are not trained to spot hidden forms of abuse. I often see this occur in cases where there may be no instances of reported physical abuse, but abuse is nonetheless present. It is very easy for a party to be warm, charming, and seemingly trustworthy to the outside world, and then be manipulative and psychologically abusive behind closed doors. This type of “hidden abuse” can sometimes end up hurting the victim far more than the abuser in divorce or custody proceedings. Without the proper tools to spot someone who is putting on a show for the Court, the victim can easily be seen as the party who is trying to alienate the child(ren) from the abuser, and the Court might ultimately determine that the abuser is more credible. This could lead to decisions that either place the child(ren) with the party who is less capable of meeting their emotional needs, or that force two parties to spend their lives making decisions about their child(ren) together. It gives power to a person who will use that power to their advantage, and the child(ren) ends up with irreparable psychological damage.

As I said at the beginning of this article—I am a legal professional, not a mental health professional—but we cannot pretend that the law and mental health are not intertwined. This is especially true when we are dealing with life-altering litigation that could have effects for generations. It is perhaps time for the legal profession and the mental health profession to join forces to ensure that we are really looking out for the best interest of all children, and that we all have the tools needed to protect their physical, mental, and emotional well-being.

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