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Rachael Candoni

Editor

ROCKLAND COUNTY BAR ASSOCIATION

NEWSBRIEF

www.rocklandbar.org

August 2022

President's Post

Next year marks a century and 30 years since Alonzo Wheeler, Esq. and Abram Demarest, Esq. met at the St. George Hotel on Burd Street in Nyack and founded the Rockland County Bar Association. The building still stands and we are looking forward to meeting there next year in celebration of our 130th anniversary.

It is a privilege and honor to serve as Bar President after having practiced for decades in the County loved by so many of my fellow practitioners. We have a competent judiciary committed to equal justice under the law. Our members have a wide array of experience in a variety of practice areas. Collectively, we are here to serve the needs of my fellow attorneys and those of the citizens of Rockland County. Our Lawyer Referral Service directs Rocklanders to a competent practitioner in an area that matches one's needs. Our website can direct you to an array of agencies and not-for-profits which provide guidance, valuable information and, if necessary, needed assistance.

I envision reaching out to "centers of influence" in the County and building bridges between the legal community and other public service organizations. I will soon be reaching out to not-for-profit organizations to learn how our Association can have greater relevance, whether by convening public interest forums in areas affecting our residents, or by simply establishing an ongoing dialogue to address areas of mutual concern that might be amenable to legal insight and direction.

I look forward to collaborating with my colleagues in providing quality continuing legal education to our members. I welcome greater diversity, equality and inclusion for the bench and bar alike. The richness of the various communities in our County can only be a source of strength and must unite rather than divide us. I especially want to reach out to younger attorneys and make sure they know that our more seasoned members are here to mentor and assist them. We want to continue to inspire high school students through our mock trial competition anticipating that some may consider a future in the law, whether it be as an attorney in private practice, government service or law enforcement. We want to continue expanding a dialogue among our members with periodic Practitioner's Chats providing an opportunity to express our ideas, opinions and concerns. I want our members to know that in these trying times that there is always assistance available at our Association if one is struggling with mental health, alcohol or any other substance abuse issue. Recognizing the need for help is a source of strength and our Association will always be here for you every step of the way.

Our staff is here to assist the public. So if you encounter a legal issue, or have a question or inquiry that you, whether a member of our Association or not, believe is important, feel free to pick up the phone and call the Association at 845-634-2149 or send us an email at office@rocklandbar.org

I welcome the opportunity of leading the Rockland County Bar Association forward to our 130th anniversary celebration. We want to be relevant, involved and proactive with a mantra of service above self because the greatest gift in being a member of the Bar is the opportunity to give back to our community. This is a reward far greater than any fee.

I look forward to an exciting and dynamic year of service in collaboration with my brother and sister attorneys, our extraordinary judiciary, our esteemed Executive Director, the RCBA staff and the public at large.

All the best for a successful and exciting year.

Sincerely,
Robert (Rob) L. Fellows

RCBA Cares

The following resources are provided to you courtesy of the Lawyer to Lawyer Committee.*

Lawyer Assistance Programs

New York State Bar Association: 1-800-255-0569; lap@nysba.org

New York City Bar Association: 212-302-5787; <https://nysba.org/attorney-well-being/>

Suicide Prevention

National Suicide and Crisis Lifeline: Dial 988

Crisis Text Line: Need help? Text START to 741-74 1

Chemical Dependency and Self-Help Sites

Alcoholics Anonymous (AA): 212-870-3400; www.aa.org

International Lawyers in A.A. (ILAA): www.ilaa.org

Narcotics Anonymous (NA): 818-773-9999; www.na.org

Nicotine Anonymous (NA): 1-877-TRY-NICA; nicotine-anonymous.org

Mental Health

Depressed Anonymous: depressedanon.com

National Mental Health Association (NMHA) - 1-800-273-TALK (8255) to reach a 24-hour crisis center; Text MHA to 741741 at the Crisis Text Line

Source: Andrew Denney, Bureau Chief of NYLJ and the New York State Association of Criminal Defense Lawyers.

****For more information about the Lawyer to Lawyer Committee, please email Manuela Gomez at manuela@rocklandbar.org***



SAVE
THE
DATE!

Annual Dinner
2022

OCTOBER 20, 2022

6PM - 10PM

THE VIEW ON THE HUDSON
PIERMONT, NEW YORK





PLEASE JOIN US AT A RECEPTION
IN HONOR OF
Judge Robert Berliner
ON HIS
RETIREMENT

FRIDAY, SEPTEMBER 30, 2022
6:00 PM TO 10:00 PM

OPEN BAR, SIT DOWN DINNER, DJ

THE NYACK SEAPORT
21 BURD STREET
NYACK, NY 10960

COST \$120.00
GIFT ONLY \$20.00
CASH OR CHECKS MADE OUT TO CASH

KINDLY RSVP TO
CINDY DILLON, 845-483-8303
ROCKLAND SUPREME
BY SEPTEMBER 10TH



To: Attorneys, professional staff & interested parties

ATTEND FREE SURROGATE'S COURT

E-FILING TRAINING*

10:00am - 12:00pm

March 17, 2022

April 14, 2022

May 19, 2022

June 16, 2022

July 14, 2022

August 18, 2022

Where: Virtual - on-line via Microsoft Teams

Attend the free e-filing training in which the NYSCEF Resource Center staff will guide you through your first Surrogate' Court filing, review court rules, and provide helpful tips to avoid pitfalls and achieve success. Attorneys can receive 2 (free) CLE credits.

PRE-REGISTRATION IS REQUIRED

*NYSCEF training classes provide 2.0 FREE Continuing Legal Education (CLE) credit hours. (1.0 credit in Professional Practice and 1.0 credit in Law Practice Management).

To register go to www.nycourts.gov/efile and click on the register for training link.



To: Attorneys, professional staff & interested parties

ATTEND FREE SUPREME COURT

E-FILING TRAINING*

10:30am - 12:30pm

March 16, 2022

April 13, 2022

May 18, 2022

June 15, 2022

July 13, 2022

August 17, 2022

Where: Virtual - on-line via Microsoft Teams

Attend the free e-filing training in which the NYSCEF Resource Center staff will guide you through your first Supreme Court filing, review court rules, and provide helpful tips to avoid pitfalls and achieve success. Attorneys can receive 2 (free) CLE credits.

PRE-REGISTRATION IS REQUIRED

*NYSCEF training classes provide 2.0 FREE Continuing Legal Education (CLE) credit hours. (1.0 credit in Professional Practice and 1.0 credit in Law Practice Management).

To register go to www.nycourts.gov/efile and click on the register for training link.



DONNA G. SILBERMAN
Rockland County Clerk

COUNTY OF ROCKLAND
OFFICE OF THE COUNTY CLERK

One South Main Street, Suite 100
New City, New York 10956-3549

Phone # (845) 638-5070
Fax # (845) 638-5647

rocklandcountyclerk@co.rockland.ny.us
www.rocklandcountyclerk.com

Deputy Clerks
Jamie Graham
Joseph Alongi
William Phillips

**New Option for Local Title Companies and Attorneys for Receiving
Recorded or Rejected Documents**

WHY WE'RE DOING THIS ➡ This new & elective "on-hold pickup" option was created as a customer convenience to eliminate the wait often experienced when mailing rejected or newly recorded documents to recorders. Unfortunately, we have no control over the post office or other mailing companies and are unable to predict mail transport times or lost items once documents leave our office.

HOW IT WORKS ➡ Each participant will be assigned a personal folder that will be placed in a locked and secure file cabinet which will be located in the "employee-only" area of our office. All paper documents which require corrections or original recorded documents will be placed in participant folders. To access documents, participants may appear personally at our back customer service counter Monday through Friday from 7:00 a.m. to 6:00p.m. Participants may call our office at any time to inquire if there are rejections/documents waiting to be picked up.

HOW TO OPT-IN ➡ To set up a folder and begin having your documents be converted to "on-hold" pickup, contact our office at (845) 638-5069.

REMINDER...Document pickup may be completely avoided by eRecording!

POSITION AVAILABLE—Intellectual Property Docketing Clerk for Law Office in Orangeburg, NY.

Job Responsibilities:

General clerical including opening, retrieving and filing files and documents according to office filing system, logs and dockets all forms of correspondence. Light typing and email communications, answering of telephones, open and distribute mail, photocopying and scanning. Enters, updates and maintains patent and trademark database and litigation case list pursuant to instructions which requires repetitive data entry with accuracy and high attention to detail. Preparation of periodic reports and tables. Perform other routine office duties and other tasks as needed.

Job Requirements:

This position has the following requirements:

Must possess a high level of professionalism and interpersonal skills so as to be able to work well with employees at all levels within the organization and maintain all information in the strictest of confidence.

Must possess attention to detail, ability to balance multiple projects and have strong time management skills.

Knowledge of DocketTrak or similar docketing system

Proficiency in MS Word, Outlook, Excel, and PowerPoint

Must have ability to compose documents in the appropriate business style using correct grammar and spelling. Must have ability to work overtime as needed.

Familiarity with billing programs and systems is a plus

Benefits:

Competitive salary dependent upon experience and skills

9am-5pm (overtime may be required)

Employer-paid medical insurance for employee

Employer-paid profit sharing plan

References and prior employment history will be verified before commencing employment.

Send resume and salary requirements to nmpcnyc@gmail.com.

**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ANNOUNCEMENT FOR
BANKRUPTCY JUDGESHIP**

The United States Court of Appeals for the Second Circuit invites applications from qualified candidates for a 14-year appointment as United States Bankruptcy Judge for the Northern District of New York in Albany, New York. The selection process will be confidential and competitive. Applicants will be considered without regard to race, color, religion, sex, national origin, age, sexual orientation, or disability.

The current annual salary of a United States Bankruptcy Judge is \$205,528.

The Second Circuit uses an open and competitive selection process. All applications are screened by a Merit Selection Committee. The Committee will review applicants using the following criteria: legal competence evidenced by experience with complex legal issues; an aptitude for legal scholarship and writing; familiarity with the courts and court processes; commitment to equal justice under the law; characteristics indicative of a sound judicial temperament; a reputation for integrity, good character and ethical behavior; and physical and mental health sufficient to meet the demands and tenure of the position. The Merit Selection Committee will select a limited number of applicants for interview and will conduct appropriate due diligence inquiries into the candidates' backgrounds and qualifications. Upon a majority vote of the Second Circuit Judicial Council, the Council will forward the Merit Selection Committee's Report with any recommendations or comments to the active judges of the Court of Appeals. The selected nominee will be required to satisfy FBI and IRS background investigations prior to appointment.

Basic qualifications for consideration include:

1. Membership in good standing of at least one state bar, the District of Columbia bar, or the Commonwealth of Puerto Rico bar, and never other than membership in good standing of every bar of which the applicant has been a member; and
2. A minimum of five years of legal practice experience.

Application forms are posted on the Court's website at <http://www.ca2.uscourts.gov>.

Completed application packages must be in the format required by the Second Circuit and received no later than September 16, 2022.



NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

New York State Bar Association Committee on Professional Ethics

Opinion 1242 (07/07/2022)

Topic: Conflicts; Town Attorney

Digest: A town attorney is prohibited from representing a private client before boards of a neighboring town with respect to zoning and land use matters if the town attorney has conflicting personal interests, unless the conflict is consentable and the town attorney obtains informed consent from both the town board that appointed him and the private client. In any case, Rule 1.11(f)(2) prohibits the town attorney from using his official position to improperly influence a tribunal to act in a private client's favor.

Rules: 1.0(f) & (w); 1.7(a)(1)-(2) & (b); and 1.11(f)(2)

FACTS:

1. The inquirer is a town attorney who, with the consent of the town board that appointed him, has continued to maintain a private practice. In his private practice, the inquirer represents a client who has commercial real estate interests both within the town he serves and in neighboring towns. The inquirer would like to represent the private client on a zoning and land use matter in one of those neighboring towns.

QUESTION:

2. May a town attorney represent a private client on a zoning and land use matter in another town if the private client also has commercial real estate interests within the town the town attorney serves?

OPINION:

3. Absent informed consent from each affected client, Rule 1.7(a) of the New York Rules of Professional Conduct ("Rules") prohibits concurrent representations when a reasonable lawyer would conclude that either:

- (1) the representation will involve the lawyer in representing differing interests; or
- (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property, or other personal interests. [Emphasis added.]

Rule 1.7(a)(1): Differing interests among clients

4. "Differing interests" are defined in Rule 1.0(f) to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest."

5. Zoning and land use issues come before the town board, planning board, zoning board and perhaps other boards in the town which the inquirer serves.

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These boards normally fall within the definition of a “tribunal” in Rule 1.0(w), which provides that the term “Tribunal” denotes “a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity...”

6. The zoning and land use issues that come before these boards may be of regional or county- wide importance. The same or similar zoning and land use issues, implicating the same or similar development and land use policies and concerns, may come before boards of coordinate jurisdiction in neighboring towns – for example, the protection of environmentally sensitive areas, the preservation of open space and agricultural lands, waterfront development, the creation of multi-family or two-family zoning districts, or the expansion of commercial uses in business districts.

7. It would appear, at first blush, that the town attorney would be representing “differing interests” in a situation where the same or similar land use issues were at play in both the inquirer’s own town and a neighboring town, and the inquirer took a position on a land use issue on behalf of the private client in the neighboring town that contradicts the position favored by the town board that appointed him. The Comments to Rule 1.7, however, indicate that Rule 1.7 does not ordinarily require client consent to such a conflict, which is often called a “positional” or “issue” conflict. Specifically, Comment [24] to Rule 1.7 provides in pertinent part:

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. ...

8. Accordingly, even if the inquirer here, in representing his private client before a neighboring town’s board, were to take a position inconsistent with a position that the town board employing him would take, there would be no conflict of interest within the meaning of Rule 1.7(a)(1).

Rule 1.7(a)(2): Personal interest conflicts

9. Nevertheless, the inquirer may have a conflict under Rule 1.7(a)(2) if there is a significant risk that his personal and financial interests would adversely affect the inquirer’s professional judgment in representing the town board that employs him or the private client in the neighboring town. As the rest of Comment [24] to Rule 1.7 states:

[24] ... A conflict of interest exists, however, if there is a significant risk that a lawyer’s action on behalf of one client will materially limit the lawyer’s representation of another client in a different case; for example, when a decision favoring one client will create a precedent likely to weaken seriously the position taken on behalf of the other client. ... Similar concerns may be present when lawyers advocate on behalf of clients before other entities, such as regulatory authorities whose regulations or rulings may significantly implicate clients’ interests. If there is significant risk of an adverse effect on the lawyer’s professional judgment, then absent informed consent of the affected clients, the lawyer must decline the representation. [Emphasis added.]

10. A significant risk might exist here. For example, the inquirer might not zealously advocate for a position that would benefit the private client in the neighboring town if that position would be contrary to the preferred land use policies of the town board that employs him. The inquirer in that case might “pull his punches” out of concern that the town board that appointed him would be so displeased that the town board would fire him or refuse to renew his appointment, or that the town board would revoke its consent for him to continue to maintain a private practice. Alternatively, in order to avoid displeasing his private client, the inquirer might soften his positions on behalf of his town board employer or recommend that the town board adopt land use policy positions less hostile to, and more consistent with, the best interests of his private client.

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11. In N.Y. State 1216 (2021), we addressed a similar dynamic in a different context. The inquirer there, an assistant county attorney, was responsible for the implementation of a particular vendor's insurance management software in the county that employed him. The same vendor then offered to retain the assistant county attorney as a consultant to facilitate the vendor's sale of the software to other counties. In addressing the "financial, business, property or other personal interests" arising under Rule 1.7(a)(2), we expressed concern that the vendor might pressure the assistant county attorney not to fully assert the county's contractual rights or not to assert the county's best bargaining position when the software service agreement with his county employer came due for renewal, because the inquirer might fear that the outside vendor would terminate him and thereby cut off a significant source of income. Id. ¶ 14.

12. We lack sufficient facts to determine here whether there is a "significant risk" under Rule 1.7(a)(2) that the inquirer's personal and financial interests would adversely affect his professional judgment in representing either the town board which employs him or his private client. The inquirer will have to assess the level of risk himself in light of all of the facts and circumstances, including the factors listed in Comment [24] to Rule 1.7 (quoted above).

Rule 1.7(b): Consentability and consent

13. Even if the inquirer determines that a conflict of interest exists under Rule 1.7(a)(2), the concurrent representation may nonetheless be permitted under Rule 1.7(b) which provides:

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

14. We have previously opined that a unit of government may waive a conflict pursuant to Rule 1.7(b), provided the conflict is waivable under the Rules and "(i) the lawyer was reasonably certain both that the entity was legally authorized to waive the conflict of interest and that all legal prerequisites to the consent had been satisfied and (ii) the lawyer reasonably believed that the process by which the consent was granted was sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust." N.Y. State 1130 ¶15 (2017). The inquirer should determine whether any conflict waiver by the town board satisfies these criteria. See also, N.Y. State 1238 ¶ 14 (2022) (quoting same passage from N.Y. State 1130).

Additional caveats

15. Even if there is no conflict under Rule 1.7(a), or if there is a waivable conflict and informed consent to the representation is properly sought, secured, and confirmed in writing under Rule 1.7(b) from both the town in which the inquirer serves and the private client, two additional caveats are in order.

16. First, this committee interprets the Rules and we do not opine on questions of law. Therefore, the inquirer should be mindful that, independent of any ethical concerns, the inquirer's proposed conduct may violate applicable law governing town attorneys, including but not limited to the Public Officers Law, the General Municipal Law, the Town Law, and the town's own ethics code. See N.Y. State 1130 ¶ 7 (2017).

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17. Second, the inquirer must also be mindful of Rule 1.11(f)(2) which cautions that a lawyer who holds public office shall not “use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client” (other than the town that employs him). See also Rule 1.11, Cmt. [3] (Rule 1.11(f) is designed to “prevent the lawyer from exploiting public office for the advantage of another client”); and N.Y. State 1065 ¶ 11 (2015) (“even assuming there is no conflict under Rule 1.7(a), the inquirer is prohibited from using any influence he may have as a public official to influence or attempt to influence, any tribunal to act in favor of the [inquirer’s] proposed client.”).

CONCLUSION

18. A town attorney is prohibited from representing a private client before boards of a neighboring town with respect to zoning and land use matters if the town attorney has conflicting personal interests, unless the conflict is consentable and the town attorney obtains informed consent from both the town board that appointed him and the private client. In any case, Rule 1.11(f)(2) prohibits the town attorney from using his official position to improperly influence a tribunal to act in a private client’s favor.

(04-22)

RCBA ONLINE CLE PROGRAMS PRESENT

**ANOTHER CRITICAL UPDATE ON NEW YORK'S
NEW DISCOVERY LAW**

Wednesday, September 21, 2022

12:30 P.M. - 1:30 P.M.

WEBINAR VIA ZOOM

REMOTE NOTARIZATION IN NEW YORK

Respectfully submitted,

Alden B. Smith, Esq.

Co-Chair of the RCBA Continuing Legal Education Committee

Effective February 25, 2022, New York State did away with its in-person only notarization of paper documents with ink signatures. The one exception was when New York State Governor's Executive Order 202.7 was in effect. Executive Order 202.7 allowed the use of remote notarization of client ink-signatures on paper documents. When the Governor's Executive Order 202.7 expired, the New York Legislature responded to the void left by reinstating remote notarization and expanding on the concept.

Effective upon the Governor's signing of the legislation, New York Notaries are able to notarize both paper and electronic documents remotely, using secure online digital technologies. However, the new law contains two (2) different versions of new Executive Law Section 135-c. The first version contained in Subdivision 1 of the legislation became effective immediately, but it will be repealed and replaced on January 31, 2023 with a different Section 135-c contained in Subdivision 2 of the law. The replacement law under Section 135-c Subdivision 2, effective January 31, 2023, will allow Notaries to provide remote notary services so long as they register with the Department of State. On that date, new regulations will go into effect with additional requirements for electronic Notaries.

Remote ink notarization in effect until January 31, 2023.

Section 1 of the Legislation, which contains new Executive Law 135-c, advises any Notary qualified under the Executive Law to perform a remote notarization using communication technology if all conditions set forth in Subdivision 2 of the Executive Law 135-c are met. No qualifications other than licensure as a Notary are specified.

The language required by the statute for notarial certificates for remote notification is new. Notaries can certify the authenticity of electronic records and "paper out" the certified electronic documents on a specified form that County Clerks and recorders are required to accept for recordation.

New York Notaries who are situated in New York can now notarize signatures of persons not physically in the state. They can even notarize signatures of persons outside the United States provided there is a U.S. nexus.

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For the New York Notary who wishes to perform a “remote notarization” and who is physically located within the State of New York at the time of the notarization, the Notary must identify the remote signor (also known as the “principal”) of the document through any one of the following three methods:

1. The Notary’s personal knowledge of the signor;
2. By means of communication technology that facilitates remote presentation by the signor of an official, acceptable form of ID, credential analysis, and identity proofing; or
3. Through oath or affirmation of a credible witness who personally knows the signor, and who is either personally known by the Notary or identified by the previously means of communication technology.

Regardless of the method used to confirm the identity of the signor, the Notary must be able to see and interact, in real-time, with the remote signor of the document through audio-visual communication technology. This technology must have security protocols in place to prevent unauthorized access. The Notary must make and keep an audio-visual recording of the remote notarization and ensure that there is backup of the recording.

After the remote signor has executed the document, it must be transmitted to the Notary Public for officiating. The Notary must confirm that the document is the same as the one signed remotely in the Notary Public’s presence before applying the notary stamp and signature to the document. The following statement must be added to the jurat: “This remote notarial act involved the use of communication technology”.

The anti-fraud protections of remote notarizations are built into Section 1 of the statute. There are three (3) basic anti-fraud requirements of the new notary law. First, Notaries must use a reliable method to confirm the signor’s identity and keep a journal recording how the signor’s identity was confirmed. Second, Notaries must use reasonable means to ensure the integrity and identity of signed and notarized documents. Third, Notaries can refuse to perform a notarial act if not satisfied that a signor is competent to sign a record or is not signing knowingly and voluntarily. Most important, Notaries must make a backup of the video recording notarizations and retain them for ten (10) years. The Notary’s journal of remote notarizations, which records the date, time, signor, technology used, notarial services provided, and the identification credentials used, must be retained for five (5) years after the Notary leaves office.

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The signor can prove identity in two (2) different ways. The first is a three (3) step process, which begins when the signor presents an approved ID containing a photograph, signature and credential security features, such as physical characteristics (e.g., height and eye color) or a holographic image. The second and third steps address the risks that the proffered credential is fake or altered. The Notary must subject the credential to analysis by an online process that uses public or proprietary databases to confirm that the credential is not fraudulent or modified.

As part of this “credential analysis” the Notary must compare the signor’s photograph to the signor’s appearance on the database. Finally, the Notary uses “identity proofing” to assure the Notary that the signor is the person reflected in the credential. To do this, the Notary uses personal information about the signor available from public and proprietary data sources. The most common form of identity proofing uses personal questions based on credit bureau databases that only the signor can answer quickly.

The other ways for signors to prove their identity is for a “credible witness” who knows the signor to provide an oath or affirmation as to their identity. If the credible witness is not personally known to the Notary, the witness must be subjected to an electronic credential analysis and identity proofing. This “credible witness” method will likely be most useful for transactional and estate planning matters where the lawyer knows both the Notary and the signor and can easily provide the required oath or affirmation. This method can be useful as well when a signor is not able to provide their identity online (e.g., they have no credit history) but knows a credible witness such as a Minister, Rabbi, community leader or public official.

REMOTE ELECTRONIC NOTARIZATION AFTER JANUARY 31, 2023

Section 135-c of the Executive Law entitled “Remote Ink Notarization”, will be repealed effective January 31, 2023, and replaced by a new Section 135-c entitled “Electronic Notarization”. After January 31, 2023, only e-notarization of electronic documents and remote-e-notarization will be permitted. Remote ink notarization, or (RIN), will be replaced by e-notarization of electronic documents and remote-e-notarization, or (RON). Section 2 of the new statute applies to “electronic notarial acts” which involve only electronic records. It deals with identification of the remote signor and contemplates that the Secretary of State will issue regulations for the communication technology used in an electronic notarization. A single transmission must be secure from interception, permit live real-time communication, and permit communication with and identification of the signor.

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Under Section 2 of the statute, the Secretary of State must recognize at least two (2) processes of fraud detection technology for authenticating the identity of a “remotely located individual” not personally known to the Notary, but until the Secretary issues regulations recognizing new technologies, the only two (2) means of identification, credential analysis and identity proofing, will be acceptable and available.

Importantly, Notaries will not be able to perform an electronic notarial act until they register with the Secretary of State under a yet to be developed system. The registration process for electronic Notaries will have the limited purpose of identifying them and the technology they use and their signature. The Secretary of State will have authority to adopt rules setting standards relating to the Notaries electronic signature.

A Notary does not have to provide remote notary services. If a notary does not have the appropriate technology or capability to provide such services or does not wish to engage at all in remote notarization, a Notary may decline to provide remote services.

The new legislation states in part that a County Clerk, City Registrar, or other recording officer, where applicable, shall accept for recording a tangible copy of an electronic record and that is otherwise eligible to be recorded under the laws of New York State if the record has been certified by a Notary Public. To be accepted, the Notary would first have to certify the remotely notarized document. Questions about filing such documents should be directed to the filing office where the document will be submitted.

In conclusion, New York’s new Remote Notary Law reforms New York Notary Law by authorizing remote on-line notarization of both paper and electronic documents until January 31, 2023. After January 31, 2023, it provides for a different Section 135-c limited to remote on-line e-notarization.

Remember: New York’s Law governing in-person notarization of paper documents is not affected by the new Remote Notary Law.

NEW YORK STATE BAR ASSOCIATION HOUSE OF DELEGATES UPDATE

The New York State House of Delegates met on Saturday, June 18, 2022 at the Otesaga Hotel in Cooperstown, NY. As vice president for the Ninth Judicial District, I attended that meeting and the two (2) preparatory executive committee meetings held on June 16th and 17th.

The meetings were attended by a majority of members in person rather than remotely for the first time in years. As we discussed the issues before us there was an overwhelming sense of camaraderie and outright joy at finally being able to get together like we did prior to the Pandemic.

Sherry Levin Wallach of Westchester County was sworn in as the 125th President of the New York State Bar Association by Hon. Cheryl E. Chambers of the Appellate Division Second Department. A keynote address was presented remotely by Hon. Jenny Rivera, Associate Judge of the New York State Court of Appeals. The President's report, treasurer's report and report of the New York State Bar Foundation were presented to the House.

The key issues facing the New York State Bar Association are the same that all bar associations are dealing with today. Dwindling membership, primarily in the young attorney categories, and challenging financial issues. These matters were discussed by the Executive Committee and House of Delegates and various committees and task forces will be studying them and reporting back on ways to address them.

A report and recommendations was presented by the Task Force on Voting Rights and Democracy. This task force was created as a result of the claims of widespread election fraud presented after the last Presidential election. The report, which was amended by the executive committee before submission to the House, made the following suggestions:

- A) That ethics rules be devised for election workers preventing workers from sharing vote tallies or recount information on a privileged basis and forbidding election workers to partake in partisan activity.
- B) That hiring of election workers be more professionalized, requiring merit selection and wider advertising of availability.
- C) That a position of inspector general be created to identify and suggest solutions to various voting problems as they arise. (A motion in the house to eliminate this position from the report was defeated).

The report and recommendations as amended were passed by the House.

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The most debated matter concerned the report and recommendations of the Committee on Diversity, Equity and Inclusion. In 2004, the New York State Bar Association realized that it had a severe leadership diversity problem. As a result, the Bar Association created two (2) executive committee seats and twelve (12) House of Delegate seats that were designated to recruit racial and ethnic minority participation in the leadership of the association. The by-laws calling for these special seats had a ten year sunset provision. In 2014, the bylaws were extended for an additional ten years because it was felt more work needed to be done on the issue. The current report recommended making those seats permanent. The argument against (presented by motion in both the Executive Committee and the House) was to set another ten year sunset provision.

It should be noted that both sides wanted continued designation of these seats for racial and ethnic minorities. Both sides of the issue agreed that more needed to be done to recruit and involve minorities into the leadership positions. The question was how we proceed to do that.

The arguments on both sides were compelling. Those in favor sought an unblemished commitment to diversification and believed that making the seats permanent would do so. Those that sought another ten year sunset provision argued that making the seats permanent would admit failure in the association's diversification efforts, would create improper permanent quotas and would prevent regular and needed review of our diversity efforts.

Motions to amend the resolution from making the subject seats permanent to setting another ten year sunset provision were defeated in both the executive committee and house. The report and recommendations were passed by the house.

Other reports were presented by the Trusts and Estates Law Section regarding the Equity for Surviving Spouse Act; a request was made for NYSBA to join the Illinois Bar in presenting a resolution to the ABA House of Delegates to prevent ownership of law forms by non-lawyers and to prevent lawyers from sharing fees with non-lawyers; a report and recommendations from the Task Force on the US Territories was presented regarding the notorious Supreme Court insular cases; and the Committee on Mandated Representations submitted a report A) regarding language requirements for Desk Appearance Tickets, and B) regarding the need for evidentiary hearings when temporary orders of protection are requested.

All reports are available at the NYSBA website.

It was an honor to represent the Ninth Judicial District at the meetings. Please send me an email if you wish to contribute your opinions on any of these issues.

Cordially,

Adam Seiden

Vice President, Ninth Judicial District

[August 2022]

COMMERCIAL LITIGATION ISSUES OF INTEREST

Submitted by Joseph Churgin, Esq. and Susan Cooper, Esq.*

Your client was under contract to supply cranes to be used by a construction contractor at the contractor's various construction sites. Your client was not paid for the cranes supplied for one construction site where the contractor provided the actual construction work pursuant to a subcontract with the general contractor. You filed a mechanic's lien and commenced an action against the general contractor and subcontractor to foreclose the lien, breach of contract, and unjust enrichment. You identify your client as both a sub-subcontractor and a material-man entitled to assert a lien against the trust funds required to be held by the general contractor under New York's Lien Law.

The general contractor moved to dismiss the action as against it and to discharge the mechanic's lien. It cited cases that interpret the Lien Law to exclude claims made by suppliers to subcontractors or any sub-subcontractor not in privity with the general contractor. You cite cases, including one in the Appellate Division, Second Department, interpreting the Lien Law to include a sub-subcontractor as a beneficiary of the trust fund, even where there is no contractual privity with the general contractor.

Will you defeat the motion to dismiss the claims against the general contractor?

The answer is "no."

In *Gotham Equip. & Rigging LLC v. Mhany Cortelyou LLC*, NYLJ June 21, 2022, Case Number 527028/2021 (Sup. Ct. Kings Co. May 23, 2022), Gotham, which had contracted to supply cranes for a construction contractor's project sites, claimed it was not paid for cranes used at one project site where the contractor was working as a subcontractor. Gotham filed a mechanic's lien and sued the general contractor and subcontractor to foreclose the lien and for breach of contract and unjust enrichment. The general contractor moved to dismiss all claims against it, arguing that there was no authority for lien claims against the general contractor where there was no contractual obligation of the general contractor to pay for the subcontractor's materialmen.

The Court examined case law interpreting Lien Law § 71, which provides that a contractor, as a trustee, is responsible for "payments for which the trustee is authorized to use trust funds" including "payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen."

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The Court discussed the case of *Merrill Iron and Steel Inc., v. Yonkers Contracting Company Inc.*, 2006 WL 2679940 (S.D.N.Y. 2006), which noted that Article 3-A of the Lien Law (which includes Lien Law § 71), is “ambiguous as to whether a general contractor’s fiduciary duties under Article 3-A extend to second-tier contractors . . . who lack contractual assurances of direct payment from the general contractor,” and that “interpretation of the statute remains unsettled.”

Merrill surveyed numerous cases that disagree about whether a subcontractor or sub-subcontractor are in privity with the owner or general contractor. The *Merrill* Court concluded that, although the Court of Appeals has not yet weighed in on this, the weight of case law “favors the view that only subcontractors with a contractual right to payment from the general contractor have standing to sue the general contractor under Article 3-A.” The *Merrill* Court reviewed numerous cases, including two Appellate Division, Second Department, cases with conflicting results – *Vanguard Equip Rentals, Inc. V. CAB Assocs.*, 288 A.D.2d 306 (2d Dep’t 2001) (allowing a sub-subcontractor’s claim, despite the absence of contractual privity with the property owner or general contractor), and *Avon Elec Supplies, Inc. v. W.K.T. Assocs., Inc.* 297 A.D.2d 768, 769 (2d Dep’t 2002) (requiring contractual privity for a subcontractor to recover under § 71).

Based on the weight of authority, The Court here dismissed Gotham’s claims against the general contractor and dismissed the unjust enrichment claim against the subcontractor, noting that Gotham had a valid breach of contract claim against the subcontractor.

The lesson? If you represent a sub-subcontractor, or a supplier to a subcontractor, on a construction project, advise your client that unless the general contractor is contractually bound to pay you as a supplier or sub-subcontractor to the subcontractor, your client may not be able to enforce a mechanic’s lien or be entitled to payment by the general contractor if the subcontractor fails to pay your client. As long as the law remains “unsettled,” enforcement of mechanics’ liens filed by sub-subcontractors and suppliers to subcontractors have uncertain outcomes, unless the general contractor is contractually bound to pay. Case law favors dismissal of such claims.

* By Joseph Churgin, Esq. and Susan Cooper, Esq. of
SAVAD CHURGIN, Attorneys at Law

Technology Tips for Attorneys

submitted by

Michael Loewenberg*

It's hard to be self-sufficient when it comes to new technology. As solo practitioners or part of small firms, it's often difficult to get support to learn and become effective with new technology software and tools. And yes, we're busy and don't have time to waste to learn new things.

Here are some suggestions to help you become a more tech-savvy lawyer.

When you're exploring and evaluating technology solutions for your practice, get a feel for the software you're looking at by visiting the software company's website. You don't need to learn all the details when you're checking it out so spend a little bit of time to get a sense for how the program works and how its features could benefit you. Initial impressions matter and take notes to help you compare and decide how to proceed. Sign up for demos; you'll learn a lot.

When you have software tools implemented in your practice, you want to be sure you're maximizing your return on investment and taking advantage of the application's features. Sometimes it's simple and sometimes it's more difficult to learn how things work but it's easy to ask for help. Here are a couple of suggestions:

- Search YouTube for explainer videos about the software program in general as well as specific functions you need to learn about. Be sure to pay attention to the dates of the videos you watch so you're watching demos on the most recent version (which, I'm sure, you have!). And if you find a YouTube channel you like about your software, be sure to subscribe so you get notified when new content is posted.
- Hire someone to help you. You don't need to hire a big company that charges as much as you do on an hourly basis. What you need is a computer-savvy person who's good at explaining technical topics and someone you can engage on a contract basis when needed.

To help you stay abreast of the latest in legal technology, attend tech-related CLEs that focus on your practice areas. Many CLEs are still offered virtually so it's easy to find seminars to bolster your technical knowledge and get CLE credit too.

And finally, to stay on top of trends and read about other's experiences, read legal tech blogs. Here are some examples: <http://www.futurelawyer.com/>

<https://www.attorneyatwork.com/legal-technology/>

Embrace new technology and use the tools and resources described here to save time and improve efficiency in your practice.

*Michael Loewenberg is the President of MESH Business Solutions, Inc., New City, NY, 10956 and he is also an Affiliate Member of the RCBA.

THE PRACTICE PAGE**Hon. Mark C. Dillon *****FORMAL AND INFORMAL JUDICIAL ADMISSIONS**

There are times that a statement or position of a party in a judicial proceeding, or by the same party in prior proceeding, may be binding upon that party as an admission. There are two types of judicial admissions --- “formal” and “informal.” The distinction is important because one is binding and conclusive, while the other is merely “some” evidence of the matter stated. Factors delineate which is which.

A *formal* judicial admission is binding on the party that made it and is conclusive on the fact that it speaks to. A classic example is when an allegation in a complaint is admitted by the defendant in the answer. The admission in the answer is binding upon the defendant on the matter stated, and removes the underlying factual allegation as a contested issue (*Somir v. Weiss*, 271 AD2d 433; *Scolite Intern. Corp. v Vincent J. Smith, Inc.*, 68 AD2d 421). Formal judicial admissions also include sworn responses to interrogatories (*Custom Orthotics of NY, Inc. v State Farm Mutual Auto Ins. Co.*, 18 Misc.3d 979 [Dist. Ct. Suffolk Co.]), sworn responses to a Notice to Admit (*Advanced Tempromandibular Disorder & Dental Surgery v Progressive Northeastern Ins. Co.*, 27 Misc.3d 463 [Dist. Ct. Suffolk Co.]), and trial testimony of a party that is adverse to his or her interests and is otherwise uncontradicted by other evidence (*Knutson v Sand*, 282 AD2d 42). Not qualifying are admissions of counsel made upon mere information and belief (*March Associates Constr., Inc. v CMC Masonry Const.*, 151 AD3d 1050).

By contrast, an *informal* judicial admission exists when an allegation in a verified pleading or affidavit in an *earlier* action between the parties relates to an allegation before the court in the current action. “A party’s pleading in one case may generally be used as an evidentiary admission in other litigation” (2 McCormick On Evid. § 257 [8th ed.]). Statements contained in a bill of particulars verified by the party or uttered at a deposition may qualify as informal judicial admissions (*Ocampo v Pagan*, 68 AD3d 1077; *Gomez v. City of New York*, 215 AD2d 353). However, the doctrine does not apply if the prior admission is made only upon information and belief (*Scolite Intern. Corp. v Vincent J. Smith, Inc.*, 68 AD2d 417), as such nomenclature falls short of certitude. The doctrine also does not apply if the prior pleading is verified by counsel rather than by the party (*Sound Communications, Inc. v Rack and Roll, Inc.*, 88 AD3d 523). Amended, withdrawn, or superseded pleadings lose their status as formal judicial admissions, but may be used as informal admissions.

While informal judicial admissions in pleadings and discovery are, by nature and definition, not conclusive of the facts asserted, they are nevertheless *some* evidence of the facts as represented (*35 West Realty Co., LLC v Booston, LLC*, 171 AD3d 545). An informal judicial admission, while not conclusive, is more in the nature of a prior inconsistent statement of the party being impeached by it later. But an informal judicial admission, unlike a run-of-the-mill prior inconsistent statement, must be sworn to and created by the party to be charged, based on direct knowledge, and made in connection with the current or an earlier judicial proceeding (*Id.*, at 545; *Sound Communications, Inc. v Rack and Roll, Inc.*, 88 AD3d at 524). Stated more colloquially, an informal judicial admission is a prior inculpatory statement that is on steroids by virtue of having been created by a party on personal knowledge during a judicial proceeding, and under oath. The content of an informal judicial admission is not binding or conclusive on the party that made it, but it is some evidence of the matter stated that may be considered by a trier of fact in determining the ultimate issues of an action (*35 West Realty Co., LLC v Booston, LLC, supra*).

Whether admissions are of the formal or informal variety, parties must always be careful in what they say in pleadings and discovery responses. For parties seeking to use them, they can be of evidentiary value.

*Mark C. Dillon is a Justice of the Appellate Division, 2nd Dep’t., and Adjunct Professor of New York Practice at Fordham Law School, and a contributing author of CPLR Practice Commentaries in McKinney’s.

Odyssey, our Members' Literary Corner

In this space, Members can share their personal literary works, including poems and short stories.

We hope to publish one Member's submission each month in Newsbrief. *Odyssey* is a space for our Members to showcase their literary talents - because there is more to an attorney's life than work, and so much more to share with each other.

The Hourglass

By Seth Schlanger, Esq.

*The early years so quickly pass with all their toil and dreams,
and games and toys and other joys that aren't all they seem;
night gives way to bedtime and about then dad comes home,
in time for a hug or to tuck me in or to be with mom alone;
some weekends he has things to do, bills to pay and such,
but we have our time together and I always feel his touch;
he cannot always play with me but that couldn't be so bad,
for wherever life will take us he will always be my dad.*

*The sands of time pass slowly over countless smiles and tears,
into a mass of contrite truths of fertile teenage fears;
agonies and doubt might rise in spectra dark and weary
and at times I have no inner strength to answer every query;
dad can't always be at home to help clear every path,
but he's always there to guide me even in the aftermath;
he cannot always hear me call but that couldn't be so bad,
for wherever life will take us he will always be my dad.*

*His hair has turned to grayish white, wrinkles mark his hands and face,
sometimes seeming ever frailer as the hourglass counts in place;
so I gather all my gratitude to pay tribute to a man
who has been best friends to mom and has done the best he can;
when nights were cold and days were dark and life was not quite fair,
he always wandered with us and his heart was always there;
he wasn't always perfect but that couldn't be so bad,
for wherever life will take us he will always be my dad.*

*My children have grown up now and have left their childhood home,
to lead their lives their own way and raise families of their own;
but I hope they think about me as they venture on their way
and feel these words sincerely that I know I'll always say;
he wasn't always perfect but that couldn't be so bad,
for wherever life has taken us he has always been
and will always be my dad.*

IT'S DUES TIME!

This is a friendly reminder that it is time to pay your 2022-23 RCBA Membership Dues. Annual Dues for 2022-23 for regular Members are \$185.00.

[Renew and pay online](#) or send in the Renewal Form with your check. After October 15, 2022 the dues amount increases to \$200.00!

If you have any questions about your Membership, please contact Rachael Candoni, Program Coordinator, at

rachael@rocklandbar.org, or call Rachael at 845-634-2149.

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A logo for the RCBA Lawyer Referral Service. It features a green starburst with the text "still not a member? JOIN NOW!". Below the starburst is a green circle containing a white scale of justice. To the right of the scale, the text "2022 RCBA" is in red, "Lawyer" is in large blue font, and "REFERRAL SERVICE" is in smaller blue font below it.

A graphic of a storefront for the "RCBA STORE". The sign above the entrance says "RCBA STORE". Above that, it says "VISIT US ONLINE". Below the storefront, it says "OPEN FOR BUSINESS". There is a "Click here" link pointing to the storefront.

MEMO

TO ALL RCBA COMMITTEE CHAIRS & VICE – CHAIRS

The Association is seeking articles from your committee for publication in the Bar's monthly Newsletter. The membership would greatly benefit from your input and would appreciate it. The article does not have to be complicated or long- a succinct piece of general interest and importance would be best.

If you are able to submit an article for the Newsletter it should be sent via email to rachael@rocklandbar.org by the 15th of the month so that the Executive Board may review it.

Thank you!



CLE CORNER

PLAN YOUR YEAR OF CLEs NOW!

2022 CLE TITLE	DATE & TIME
<p>Another Critical Update on New York's New Discovery Law</p>	<p>September 21, 2022 12:30 p.m.—1:30 p.m.</p>
<p>Using Trusts to Avoid the Pitfalls of Probate</p>	<p>October 25, 2022 12:00 p.m.—1:00 p.m.</p>

NEW CLE REQUIREMENT

In addition to ethics and professionalism, skills, law practice management, and areas of professional practice, a new category was added for diversity, inclusion and elimination of bias courses. This category of credit is effective January 1, 2018.

Experienced attorneys due to re-register on or after July 1, 2018 must complete at least one credit hour in the Diversity, Inclusion and Elimination of Bias CLE category of credit as part of their biennial CLE requirement. The transitional CLE requirement for newly admitted attorneys remains unchanged. For more information about the CLE Rules, visitnycourts.gov/Attorneys/CLE.

CLE REQUIREMENTS

Newly admitted attorneys must complete 32 credit hours of accredited “transitional” education within the first two years of admission to the Bar. Sixteen (16) credit hours must be completed in each of the first two years of admission to the Bar as follows: 3 hours of Ethics and Professionalism; 6 hours of Skills; 7 hours of Practice Management and/or areas of Professional Practice.

Experienced Attorneys must complete 24 credit hours of CLE during each biennial reporting cycle: 4 credit hours must be in Ethics and Professionalism. The other credit hours may be a combination of the following categories: Ethics and Professionalism, Skills, Practice Management or Professional Practice.

FINANCIAL HARDSHIP POLICY:

RCBA members and non-members may apply for tuition assistance to attend Association continuing legal education programs based on financial hardship. Any member or non-member of our Association who has a genuine financial hardship may apply in writing, no later than five working days prior to the program, explaining the basis of his/her hardship, and, if approved, may receive tuition assistance, depending on the circumstances.

COMMITTEE CORNER

Your Committee Chair will contact you regarding any upcoming remote meetings.

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NEWSBRIEF IS NOT PUBLISHED IN JULY

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Advertising & articles appearing in the RCBA Newsletter does not presume endorsement of products, services & views of the Rockland County Bar Association.

All advertisements and articles must be reviewed by the Executive Committee for content.



ANNOUNCEMENT FROM THE RCBA REAL ESTATE COMMITTEE

Please be advised, that after many months of work and coordination between the RCBA, the Real Estate Committee, its Co-Chairs and Members; we are pleased to announce that the RCBA Real Estate Committee has created, voted-on and Approved an updated Real Estate Contract for the first time in Decades!

Co-Chairs Jeff Yanowitz and David Ascher took notes and comments from the Real Estate Committee members over many months to provide this updated Contract to the entire RCBA! We look forward to utilizing this Contract throughout Rockland County and providing a more modern and stream-lined approach to Real Estate Transactions for us all.

Please find two updated contracts (single family home and condominium) on our RCBA website at www.rocklandbar.org. Scroll down to the bottom of the homepage and find links under "Helpful Links."





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**ATTORNEY'S FILES SOUGHT
ANTHONY OCCHIPINTI**

If anyone knows the whereabouts of Anthony (Tony) Occhipinti's files, please contact Manuela at the Bar Association. Anthony passed away in 2017.
manuela@rocklandbar.org

PART-TIME PARALEGAL

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