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Rachael Candoni—Editor

ROCKLAND COUNTY BAR ASSOCIATION

NEWSBRIEF

www.rocklandbar.org

February 2023

President's Post

Younger practitioners take notice. There is fertile ground in Rockland County to grow your practice provided you are not intimidated by death! I say this after meeting with Judge Keith Cornell, Rockland's Surrogate and his principal law attorney, Aimee Pollak, Esq. and the Co-chairs of the Surrogate's Court & Estate Planning Committee, Lynne Hilowitz, Esq. and Lawrence (Larry) Codispoti, Esq.

Among other topics discussed at that meeting were the known and very competent Estates & Trusts attorneys who have retired. I think of Orville Mann, Jr., Esq., Frank Brown, Esq., Robert Lewis, Esq., David Klein Esq., Lee Hoffman, Esq. and Jim Reilly, Esq. Others may inadvertently have not been recalled. There is, I believe, a vacuum in our County in the area of Wills, Estates and Trusts. Perhaps, colleagues establishing their own practices or recently admitted can benefit by filling this void. Larry, Lynne and estates practitioners, Bill Smith, Esq., Sarah Keating, Esq. (now with Bleakley Platt in White Plains), would, I believe, be happy to provide mentorship and guidance as an expertise in this unique practice realm is developed.

Judge Cornell and Heather Barney, Rockland Surrogate Deputy Clerk, together with Lynne and Larry have graciously agreed to serve as moderators in future CLE's that will address basic Surrogate Court filings. In the words of Judge Cornell, "it is good advice not to dabble in the Surrogate's Court arena as there have been too many instances of incorrect filings by attorneys without sufficient expertise". Why not sharpen your skills and consider jumping into this practice area if you have an interest? Indeed, Judge Cornell believes that an excellent entry point into Surrogate's Court practice involves guardian ad litem appointments. Our Surrogate will gladly "train" young lawyers in the responsibilities of serving as a guardian ad litem. So, if you are interested, please consider adding your name to the guardian ad litem list by reaching out to the Surrogate's Court. Also, feel free to take advantage of free e-file trainings being offered.

The bottom line is if you want to avoid going to Surrogate's Court, don't die but instead do some planning to arrange affairs in advance without the need for court involvement. Also, be vigilant when preparing a basic pro forma will. Sometimes, what may seem simple and straightforward is not adequate as there are many nuances in the preparation of wills, as well as trusts and devising estate plans.

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Experienced practitioners are always available to help in a multiplicity of specialty areas. I can speak for Committee chairs, whether it be in the realm of criminal law, personal injury or real estate. There is always someone to provide guidance or feedback.

To those members who require the Rockland County Commissioner of Finance to serve in the capacity of Public Administrator on an estate matter, please know that our own Jim Birnbaum, Esq. is taking over much of the legal work to have this accomplished should the need arise.

I am reminiscing about Hon. Hector LaSalle, our guest of honor at RCBA's Annual Dinner last fall. Who would have predicted what awaited Justice LaSalle! I, and many others, were delighted to learn of his nomination for Chief Judge of the Court of Appeals, but at the same time was saddened by the refusal of the Senate Judiciary Committee to allow the entire Senate to vote on the nomination. Certainly, our Senate should not be a rubber stamp for any governor's nominee regardless of the position. However, to me there is something undemocratic that bothers one on a gut level by having the Senate Judiciary Committee reconstituted before the hearing even began when some members have expressed pronounced views against the nomination in advance of the nominee's appearance.

Wherever you may be on the political spectrum, from the progressive left to the conservative right, we all can agree that there is an interesting constitutional issue that may await us should the Governor not abandon Justice LaSalle. Indeed, to my knowledge, the issue has never been decided and it speaks to the language of the NY Constitution wherein the Governor's nominee for Chief Judge shall be with the advice and consent of the Senate. Does that mean that the entire body, or can the Senate, pursuant to its own internal rules and procedures, vote a nominee down in Committee? Would this satisfy the constitutional requirement? There are arguments on both sides, and whether the Governor pursues the issue or withdraws her nomination for Chief Judge, we shall soon know. On a personal note, hearing Justice LaSalle speak at our dinner, talking with him, I say he is a decent man who has been thrust into a political quagmire which in no way dilutes his preeminent stature and fitness to serve as our Chief Judge. This is my view alone but certainly I respect but do not necessarily embrace a contrary opinion.

I hope there is consensus that a reasonable mechanism should be established to remove politics from the selection of our judiciary, striving to appoint the most talented and competent among us to the bench. Let's see how this judicial legislative drama plays out.

With gratitude to our Sheriff Louis Falco III for opening up his Training Center to a warm welcome to one of our new sitting Supreme Court Justices, Hon. Christie D'Alessio. Many of our members gathered for lunch with her and her staff at our recent "Lunch With a Judge" Program, and Justice D'Alessio graciously answered many questions about her philosophy and insight. We want to make her stay here as welcoming as possible. I am sure that this jurist's service will be an exemplary one. Importantly, she is delighted not to have to commute from Irvington to Poughkeepsie and her court clerk, Dave, certainly will show her the best places outside the courthouse to have lunch in our welcoming Hamlet.

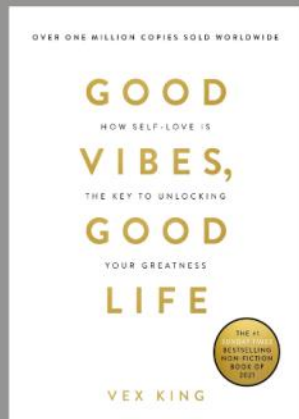
As I am writing, I am thinking the next post will be in March and we will have almost survived the winter of 2023, one perhaps that we will look back upon and say "where was the snow?" Beware because March roars in like a lion and leaves as a lamb. May there be less roar in the weeks ahead with spring soon on the horizon.

Sincerely,

Robert (Rob) L. Fellows, Esq.— President

RCBA CARES

LTLC Wellness Corner



BOOK RECOMMENDATION:

Good Vibes, Good Life by Vex King

Good Vibes, Good Life is a wonderful quick read for anyone looking to identify and transform negative patterns in their life into positive interactions and thoughts. King offers useful suggestions for practicing self-care, overcoming fears and cultivating positive habits to achieve personal greatness and find a higher purpose.

Good Vibes, Good Life is available now on [Amazon.com](https://www.amazon.com)

WELLNESS CLASSES

Let's Meditate New York: Free virtual
Guided Meditation workshop

Every Sunday 9:45 a.m. - 11:00 a.m.

Sign up at [Eventbrite](https://www.eventbrite.com) to register

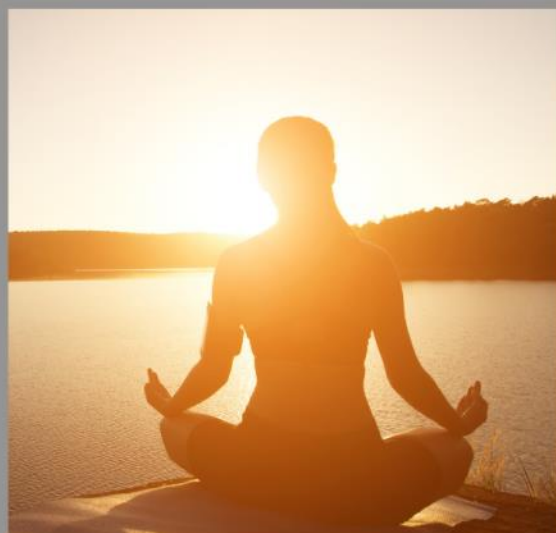
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85 South Piermont Avenue

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Visit [NyackYogaCenter.com](https://www.NyackYogaCenter.com) for more information



PODCAST RECOMMENDATIONS

- Be the CEO of your Life and Business with Laura Catina and Amy Mara
- Be a Better Lawyer with Dina Cataldo
- New Earth Lawyer
- The Resilient Lawyer with Jeena Cho
- Legally Speaking Podcast

**GROW YOUR PRACTICE WITH
THIS AFFORDABLE RESOURCE!**

**LAWYER REFERRAL SERVICE (LRS)
TIME TO RENEW OR JOIN FOR 2023**

**The Lawyer Referral Service (LRS) program year runs from
January 1 – December 31.
It is time to renew or join!**

TO RENEW:

Go to homepage on our website, www.rocklandbar.org, and go to “Member Resources.”

1. Click on “Join the Lawyer Referral Service”
2. Log-in to your account
3. Click on “2023 Renewal Form”

TO JOIN:

Go to homepage on our website, www.rocklandbar.org, and go to “Member Resources.”

4. Click on “Join the Lawyer Referral Service”
5. Log-in to your account
6. To Sign-up for the first time: click on “Plan Description and Full Application”

**JOIN OR
RENEW
TODAY**

PLAN OF THE LAWYER REFERRAL SERVICE

The Rockland County Bar Association under the guidance of the American Bar Association, has established a Lawyer Referral Service (“The Referral Service”) on a County-wide basis. The office is located at the Rockland County Bar Association, 337 North Main Street, Suite 1, New City, New York 10956.

The willing participation and continued support of lawyers practicing in Rockland County is crucial to the smooth operation of the Referral Service.

The purposes of the Referral Service are:

- To be a public service, available to assist the general public by providing an alternative source for any person who can afford to pay a reasonable fee for legal services and who does not have a lawyer by providing a referral to a lawyer who practices in Rockland County.
- To provide a vehicle for persons who need a legal representative but whose earnings or assets are too high for the standards set by Rockland County Legal Aid Society or Pro Bono New York; and
- To establish a better rapport between the public and the legal profession.

The Referral Service Plan is not designed to take clients away from attorneys. In fact, a cardinal principle will be to establish whether a prospective client has a present attorney. The Referral Service will not refer the client to a panel attorney of the Referral Service if we learn that a prospective client has seen other attorneys in an effort to bargain on fees. Additionally, a prospective client shall not be referred to a panel attorney if the prospective client has previously engaged the services of a lawyer on the same matter unless the original lawyer-client relationship has been properly terminated in writing.

1. Membership on the Referral Service Panel is by individual attorney and not by law firm.
2. A panel attorney must abide by all of the rules of the Referral Service and will in no way hold, or claim to hold, the Rockland County Bar Association, the Referral Service or any of the members, officers or employees liable in connection with any referral made.

Won't you consider joining this important service? Find out more. Go to: www.rocklandbar.org. Go to “Member Resources.”



THE FOUNDATION OF THE
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E-mail office@rocklandbar.org

January 27, 2023

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Executive Director

RACHAEL CANDONI
Program Coordinator

MANUELA GOMEZ
Assigned Counsel Administrator

Dear Friend:

We are pleased to let you know that a Portrait Committee has been formed to raise funds to commission a judicial portrait of our recently retired Supreme Court Justice, the Hon. Robert M. Berliner. Upon its completion, the portrait will be presented to the County of Rockland for acceptance to join the likeness of other judicial luminaries in the Rockland County Courthouse.

It would be most appreciated if you would consider a donation to the portrait fund. Please send your check in whatever amount you believe is appropriate payable to the Rockland County Bar Foundation to:

Rockland County Bar Foundation
337 N Main Street, Suite 1
New City, NY 10956

Should you also wish to become part of the Committee, please let us know.

As has been the case with other retired members of the judiciary, this is a most fitting tribute to an individual who has well served and earned the respect of bench and bar alike.

With appreciation for your involvement in this worthy endeavor, we remain

Very truly yours,

The Portrait Committee:

Jeffrey M. Adams, Esq.
Steven H. Beldock, Esq.
Leonard J. Birbrower, Esq.
Valerie J. Crown, Esq.
Amy Eisenberg, Esq.
Robert L. Fellows, Esq.
Barry S. Kantrowitz, Esq.
Marshall A. Neimark, Esq.
Siobhan O'Grady, Esq.
Alden H. Wolfe, Esq.

By: Nancy Low-Hogan, Ph.D. – Executive Director

**COMMITTEE TO PROMOTE GENDER FAIRNESS IN THE COURTS
NINTH JUDICIAL DISTRICT**

RICHARD J. DARONCO WESTCHESTER COUNTY COURTHOUSE

111 DR. MARTIN LUTHER KING, JR., BOULEVARD

WHITE PLAINS, NEW YORK 10601

(914) 824-5451

FAX: (914) 824-5874

The Ninth Judicial District Committee to Promote Gender Fairness invites you to participate in our essay contest.

The contest is to celebrate Women's History Month 2023. Two first place cash prizes will be awarded: 1) one to the best entry submitted by a freshman/sophomore; 2) one to the best entry submitted by a junior/senior. Two second place cash prizes will be awarded: 1) one to the best entry submitted by a freshman/sophomore; (2) one to the best entry submitted by a junior/senior. The contest is open to all students in accredited high schools in Westchester, Rockland, Putnam, Dutchess and Orange Counties.

Essays should be 500 words or less. Essays in excess of 500 words will not be considered. The essay topic is as follows:

Would the elimination of gender pronouns promote gender equality?

FORMAL REQUIREMENTS

- 1) Send two legible copies of your paper to the following address:

Hon. Charles D. Wood, J.S.C.
Westchester County Courthouse
111 Dr. Martin Luther King Jr. Blvd., White Plains, NY 10601
Attn: Rosemarie Gannon

- 2) Include one cover page with your name, address, telephone number, email, school and grade.
3) Do not staple any pages together.
4) Do not put any identifying information, including the name of your school, on the essay itself.

All entries must be postmarked no later than Friday, February 24, 2023. The winners will be announced in March 2023. By submitting an entry, you agree that we may publish your essay.

We hope you will share your thoughts and perceptions about this topic with us. Remember, there is no right answer. We just want you to think and we want you to make us think.

9th Judicial District 2023 Summer Judicial Internship Program

When: June 5, 2023 - July 14, 2023

Who should apply: College and law school students

What: Unpaid ~6 week internship encompassing the entire Ninth Judicial District (Westchester, Putnam, Rockland, Orange, and Dutchess Counties). Interns are placed in a location convenient for them. All interns will attend a detailed orientation on June 5th and weekly professional development lectures with guest speakers held in the Westchester County Courthouse in White Plains. Interns are expected to work Monday through Friday from 9 to 5 and are responsible for paying parking fees.

Note: the internship program is limited to 50 students.

How: Interested law students and college students should complete the employment [application](#) and email it, along with a cover letter (explaining why you are interested in the program, what areas of law interest you, and what County you prefer to be placed), resume, and official transcript to Stefanie DeNise, Internship Coordinator, at sdenise@nycourts.gov. Interviews will be conducted on a rolling basis, beginning in January. All applications must be received no later than March 31, 2023.

****Advertisement****

Notary Service Seeking Attorney Witness Closers

Professional Notary Services, Inc. is looking for 1099 Attorney Witness Closers throughout New York State to handle various mortgage loan signings. The position requires printing, scanning, and traveling to closing locations. Closings occur during the day, nights, and weekends for optimal flexibility.

You must be a licensed New York State Attorney with a valid notary commission, have a minimum of \$25,000 in Errors & Omissions insurance, and obtain a yearly background check from the National Notary Association. Pay varies depending on the circumstances of signing.

If interested, please submit your resume in confidence to Marcy@professionalnotaryservices.biz. We look forward to speaking to you!

YOUR PROFESSIONAL ETHICS

Richard A. Glickel, Esq.

Disputed Fees and Confidentiality; Rule 1.6

New York lawyers are permitted to accept credit card payments for legal services. But, what ethical constraints, viz., *the duty of confidentiality, apply when a client disputes the fee and seeks a “chargeback” from the credit card provider? And, does participation in the chargeback dispute initiated by the client relieve the lawyer of his or her obligations under New York’s Fee Dispute Resolution Program?*

*These questions were recently examined by the New York State Bar Association’s Committee on Professional Ethics in **N.Y. State 1248** (11/23/2022).*

Rule 1.6(a)(1) of our Rules of Professional Conduct, provides that “[a] lawyer shall not knowingly reveal confidential information”

“Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.”

“A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to establish or collect a fee.” See Rule 1.6(b)(5)(ii). The Opinion notes that “[t]he fee collection exception will apply sometimes, but not always,” and the limiting parameters of confidentiality still apply; e.g., “information about the fact and nature of the lawyer’s representation, and the fact that services were rendered, may or may not be confidential” and “even the existence of a lawyer-client relationship is sometimes confidential under Rule 1.6(a).” Even if the exception applies, the lawyer may only use or reveal – after first redacting “unnecessary information” – such information as the lawyer “reasonably believes necessary” to dispute the chargeback and obtain payment.

And, while a lawyer may dispute a client’s credit card chargeback request, participation in the dispute process does not relieve lawyers of their obligations under the Fee Dispute Resolution Program.

Committee Opinion 1248 concluded as follows:

If a client disputes a credit card payment of legal fees by requesting a chargeback, the lawyer may dispute the chargeback by providing information to the credit card provider about the services rendered. The disclosure may include the retainer agreement and invoices to the client if (a) the information is not confidential; or (b) if the information is confidential but (i) the client gives informed consent to disclose the confidential information, or (ii) the

*client does not give informed consent, but the lawyer reasonably believes that the disclosure of confidential information is necessary to establish or collect the lawyer’s fee. Such disclosure should be limited or redacted to reveal only what is objectively reasonable to rebut the chargeback request and prove the lawyer’s entitlement to his or her fee. Participation in the resolution of the chargeback dispute initiated by the client does not relieve the lawyer of a lawyer’s professional obligations pursuant to the New York State Fee Dispute Resolution Program. **N.Y. State 1248** (11/23/2022).*

So New York lawyers can carefully utilize certain redacted documents such as the retainer agreement, itemized bills or time records to establish charged fees that are properly owed in an effort to collect disputed fees without breaching attorney-client confidentiality. But, absent some voluntarily arrived at resolution, lawyers must still adhere to the Fee Dispute Resolution Program.

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Minimum Fees, Nonrefundable Fees; Rules 1.5; 1.5(a), et seq.

Some members may recall last October's RCBA CLE discussion concerning letters of engagement, retainer agreements and legal fees. Not surprisingly, perhaps, legal fees are a recurring topic for NYSBA's Committee on Professional Ethics. The issue of minimum versus nonrefundable fees was revisited in November's **N.Y.State Opinion 1245**.

Simply stated, "a lawyer may charge a non-excessive minimum fee, but may not charge a non-refundable fee." N.Y. State 1202 ¶ 12.

An agreement to pay a minimum fee is subject to Rule 1.5(a) which directs that "[a] lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. The factors to be considered in determining whether a fee is excessive may include the following:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent.

N.Y. State 1945 notes that consistent with the principle that a minimum fee must be reasonable and not excessive, Rule 1.16(e) requires a refund, upon termination or withdrawal from representation, of *any portion of the fee that has not been earned*.

So a lawyer may charge a minimum fee to provide a defined legal task provided (a) the service is performed as agreed; (b) the engagement letter provides in plain language how the minimum fee will be calculated and the circumstances under which it will be "incurred"; and (c) the minimum fee is reasonable and not excessive and was therefore fully earned. N.Y. State 1945.

As for "nonrefundable" fees, they are – in a word – prohibited under the New York Rules of Professional Conduct which specifies that "[a] lawyer shall not enter into an arrangement for, charge or collect . . . (4) a nonrefundable retainer fee." Rule 1.5(d)(4). See Matter of Cooperman, 83 NY2d 465, 476 (1994); N.Y. State 1202 (2020) and 22 NYCRR § 1400.4.

Respectfully submitted,

Richard A. Glickel, Chair

RCBA Committee on Professional Ethics

RCBA members may request an informal opinion on issues of ethical concern from the Association's Committee on Professional Ethics by addressing their written question(s) to:
rglickel@glickelaw.com .



Supreme Resolutions

HON. ROBERT M.
BERLINER



Mediations & Arbitrations

ABOUT US

Justice Robert M. Berliner recently retired as the Senior Resident Supreme Court Justice in Rockland County.

Throughout his legal career as a Law Clerk and Judge, Justice Berliner has settled thousands of cases in Supreme Court, Surrogate's Court and Family Court. As a Judge he has presided over hundreds of jury and non-jury trials and drafted thousands of well-reasoned opinions with an emphasis on personal injury, matrimonial and commercial litigation.

Justice Berliner is now available to serve the members of the Bar as a mediator or as an arbitrator.

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- Mediation is generally more cost-effective than litigation

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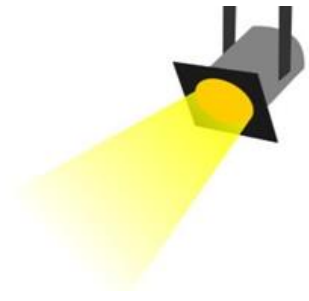
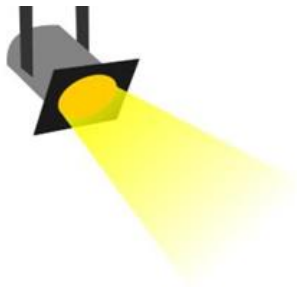


**The Committee on Diversity,
Equity & Inclusion presents...**

SPOTLIGHT

On

Jeffrey Florestal, Esq.



In recognition of Black History Month held each February, the Committee on Diversity, Equity and Inclusion shines the spotlight on Jeffrey Florestal, Esq.

Who is your hero?

As a first generation Haitian American, my hero is Toussaint L 'Overture, the self-educated, formerly enslaved Haitian leader who rose to prominence for his role in defeating the French paving the way for Haiti to become the first independent nation governed by formerly enslaved people.

Where did you grow up and what has been your educational path?

I grew up in Spring Valley but relocated to Florida in the 9th grade, where I attended and successfully completed high school. Upon graduation I worked at a call center which was my first full time job. At age 20, I returned to New York and attended Rockland Community College, where I earned my Associates of Arts degree in Humanities. I then attended John Jay College, where I was a member of the Pre-Law Society. I went on to earn my Bachelor of Arts degree in Political Science, minoring in English and History. After earning my degree and before attending law school, I worked for a few years at the Bowery Residents' Committee in the Homeless Outreach Program. I then went on to continue my studies at Pace University School of Law as a part time (4L) student. During law school I served as the Black Law Student Association (BLSA) President, and participated in the BLSA Mock Trial team, which won a regional championship and ranked top eight at a national competition. I had a very good law school experience and am grateful for the role BLSA helped me to achieve my career goal of becoming an attorney.



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What are your current legal positions/roles? What are your future professional goals?

I am a recent addition to the County's Office of the Public Defender (PD) serving as an Assistant Public Defender. I transitioned to the PD's office having previously served as an Assistant District Attorney in both Rockland and Bronx County DA's offices.

I believe my public service background working in not-for-profit organizations which serve indigent clients who might not be able to afford legal service carries over to my current role with the PD's office. Serving low-income clients is a duty I take very seriously. In addition to my public service work, I also have a private practice – the Florestal Firm where I provide criminal defense, vehicle and traffic, and family law services. I am planning to apply to become a member of the Assigned Counsel Panel.

What is your favorite thing about Rockland?

My favorite things about Rockland are the accessibility to the city and familiarity due to spending my childhood here. Simply put, Rockland is my home. I had a positive upbringing here, have planted roots once again and plan to raise my children here. My wife and I are raising three children: my 16-year-old niece, 4 year old son, and 19 month old daughter.

What is some good advice you have received during your life?

Some good advice I received came from my BLSA Mock Trial Coach, Betty Lawrence-Lewis who shared a philosophy with me – “the most prepared attorney will win”. I aspire to always be the most prepared attorney. Additionally, my personal philosophy about work is “try not to worry too much about it because it could be worse; be happy doing the work you are doing”.

What is your favorite television show, movie, and guilty pleasure?

On a lighter note, my favorite television show is “The Wire”, and my favorite movie is “Coming to America”. My guilty pleasure is Sour Patch Kids.

[FEBRUARY 2023]

COMMERCIAL LITIGATION ISSUES OF INTEREST

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

Your clients reside in a neighborhood zoned for single-family homes. In 2019, a brewery with an outdoor bar and entertainment opened next door to your clients' homes on property where a nursery and farmstand previously operated. Your clients suffer from excessive traffic, noise, odors, and numerous other disturbing conditions. The brewery operated for more than a year before the Town issued a stop-work order and violated the brewery for not having a building permit and the required certificates of occupancy. The brewery continued to operate for five more months before you demanded, by letter, pursuant to Town Law § 268(2), that the Town take immediate action to stop the brewery's recurring violations. The Town did not respond. A month later, the brewery applied for a building permit for the alterations made, and settled the violations charged by pleading guilty to not obtaining the required certificates of occupancy. A few months later, the Town denied the brewery's application for a building permit in the absence of a use variance, and issued new violations and two stop-work orders. A year after you filed your client's first demand for the Town to put an end to the violations, you again demanded that the Town take all appropriate action to end the violations. The Town responded that it did not intend to seek injunctive relief against the brewery. You then commenced an action seeking an injunction against the brewery's operation, pleading that the Town was not enforcing its code. On your motion for a preliminary injunction enjoining the brewery's operation, the Town argued that it made appropriate efforts to enforce the code by denying the brewery a building permit, commencing a criminal proceeding, and issuing stop-work orders.

Will you succeed in obtaining a preliminary injunction enjoining operation of the brewery?

The answer is *yes*.

In *McWhinney v. Rockland Cider Works LLC*, NYLJ 1673901595NY326652022

(Sup. Ct. Rockland Co. January 19, 2023) (Case No. 32665/2022) (Zugibe, J.), the defendant cidery made alterations to property formerly used as a nursery and farmstand next door to the plaintiffs' properties in a residential zone in the Town of Orangetown. The cidery manufactures hard cider and operates an outdoor bar and entertainment business, subjecting the plaintiffs' properties to excess traffic, noise, pollution, safety concerns, and other problems. The cidery did not apply for any permits nor obtain the required certificates of occupancy before beginning its operations.

In January of 2022, the plaintiffs commenced an action, authorized by Town Law § 268(2), to enjoin the continued operation of the cidery in violation of the Town Code. In the Court's decision on plaintiffs' motion for a preliminary injunction enjoining the cidery from operating, the Court detailed the significant historical dates of events impacting the relief sought.

October 2020 – The Town issued violations for failing to obtain permits and operating without a certificate of occupancy.

March 2021 – The plaintiffs demanded [by letter, pursuant to Town Law § 268\(2\), that the Town take immediate action to stop the cidery's recurring violations. The Town did not respond.](#)

April 2021 – The cidery applied for an after-the-fact building permit.

May 2021 – The cidery pleaded guilty to failing to obtain certificates of occupancy, in full satisfaction of the October 2020 charges.

June 2021 – The application for a building permit was denied because operation of a cidery required a use variance. The cidery did not appeal the denial or seek a use variance.

August 2021 – The Town issued new violations for failure to obtain permits and certificates of occupancy, and later issued a stop-work order for failure to obtain electrical permits for the cidery's new electrical work. The cidery did not thereafter seek an electrical permit.

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September 2021 – The Town issued another stop-work order for new construction work. The cidery did not thereafter apply for construction permits. Instead, it filed a petition for a zoning amendment.

November 2021 – The State Liquor Authority issued a notice of proceedings to revoke the cidery's farm winery license for failure to conform with building codes [and fire, health, and safety regulations](#).

January 2022 – The State Liquor Authority issued a second notice of proceedings to revoke the cidery's farm winery license for failure to conform with building codes and fire, health, and safety regulations in December 2021.

January 2022 – The cidery commenced a hybrid action for both declaratory and Article 78 relief to declare the cidery a use by right and void the stop-work order. The Court (Berliner, J.) granted a TRO enjoining the Town from taking any further action against the cidery or the cidery's rights based on the stop-work order.

March 31, 2022 – The plaintiffs again demanded, by letter, that the Town take all appropriate action to stop the violations.

April 4, 2022 – The Town Attorney allegedly responded that the Town did not intend to seek injunctive relief against the cidery.

May 2022 – The Town moved to dismiss the cidery's hybrid action.

June 2022 – The plaintiffs commenced this action.

January 5, 2023 – The Court (Zugibe, J.) dismissed the hybrid action brought by the cidery.

The plaintiffs alleged on their motion for a preliminary injunction that the operation of the cidery business interfered with their use and enjoyment of their properties, and diminished their properties' values. The plaintiffs' affidavits provided details of the cidery's operation causing excessive traffic, noise, pollution, noxious fumes, safety issues, vehicles blocking access to some of the plaintiffs' properties, intoxicated patrons trespassing and urinating on certain of the neighbors' properties. A certified real estate appraiser submitted an affidavit opining that the cidery's operation negatively impacted the fair market value of the plaintiffs' properties.

The Town opposed the motion and cross-moved to dismiss the action, arguing that the plaintiffs lacked standing for failing to demonstrate special damages, failing to establish the Town's lassitude or nonfeasance in enforcement of the zoning laws, failing to demonstrate that the plaintiffs were within the zone of harm, and failing to satisfy the requirements for a preliminary injunction.

The Court began by discussing Town Law § 268(2), which permits three taxpayers, who reside in a district where violations exist and who are aggrieved by the violations, to institute an action or proceeding within ten days after failure or refusal of the proper officer or board to institute an action or proceeding to "restrain, correct or abate" a violation of the Town's zoning ordinance. Quoting *Little Joseph Realty v. Town of Babylon*, 41 N.Y.2d 738, 741 (1997), the Court explained that the statute was "intended to create an avenue for direct action by which resident taxpayers, acting in concert, may overcome official lassitude or nonfeasance in enforcement of zoning laws."

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Citing *McPhair v. Sand Land Corp.*, 56 A.D.3d 449, 450 (2d Dep’t 2008), the Court held that the Town’s enforcement actions (denying the building permit application, commencing the August 2021 criminal proceeding, and issuing stop-work orders) do not constitute “appropriate action or preceding[]” within the meaning of Town Law § 268(2), since they were not taken within 10 days after the plaintiffs’ demand that the Town enforce its Code, as required by the statute.

Moreover, the Court noted that common law permits private property owners who suffer special damages to “maintain an action seeking to enjoin the continuance of the violation and obtain damages to vindicate [their] discrete, separate and identifiable interest[s],” quoting *Town of N. Elba v. Grinditch*, 131 A.D.3d 150, 155 (3d Dep’t 2015). The fact that plaintiff’s properties border the cidery gives rise to an inference of damage and injury, as found in *Town of N. Elba*, *supra*.

Finally, the Court noted that preliminary injunctive relief based on a violation of a zoning ordinance does not require irreparable harm, only a likelihood of success on the merits and a balancing of the equities in favor of movant, citing *Thilberg v. Mohr*, 74 A.D.3d 1055 (2d Dep’t 2010). The court found that the plaintiffs made a “strong showing” of likelihood of success based on the Town’s own denial of the permit application, issuance of stop-work orders, and the cidery’s guilty plea to the charge of failing to obtain appropriate certificates of occupancy. Further, the cidery offered no proof that it would be harmed by a preliminary injunction, demonstrating that the equities balance in favor of the plaintiffs. A hearing was ordered to fix the amount of the undertaking to be posted by plaintiffs.

The lesson? If your client believes he or she is aggrieved by a Town not enforcing its code, have your client assemble at least three taxpayers residing in the district where the violations are occurring. Then, on their behalf, demand in writing that the Town take appropriate action. If the Town does not take appropriate action within ten days, commence an action to enjoin the violations.

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

THE PRACTICE PAGE**STANDING --- WHEN IS THE DEFENSE WAIVED?**

By Hon. Mark C. Dillon

CPLR 3211(a) lists a number of defenses that are waived unless the defending party raises them in either a responsive pleading or in a motion to dismiss (CPLR 3211[e]). Those defenses are arbitration and award, lack of capacity, a prior action pending between the same parties for the same cause of action, collateral estoppel, res judicata, bankruptcy, infancy or other disability, payment, release, the statute of limitations, the statute of frauds, an improper counterclaim, and lack of personal jurisdiction. A close reading of the statute reveals that the “lack of standing” is not specifically mentioned in CPLR 3211, nor for that matter is standing included in the illustrative list of affirmative defenses listed in CPLR 3218(b).

Must standing be raised early? Is the defense waived if not raised? The answer, as is often seen in the law, is that “it depends.”

As a general rule, a plaintiff’s lack of standing must be raised as an affirmative defense in an answer or in a pre-answer motion to dismiss, and if not, is waived (*Fossella v Dinkins*, 66 NY2d 162, 167 [1985]; *Castaldi v Syosett Central School Dist.*, 203 AD3d 690 [2nd Dep’t. 2022]). The same is true when a plaintiff replies to a counterclaim (*CUCS HDFC v Aymes*, 191 AD3d 522 [1st Dep’t. 2021]). This is true even though CPLR 3211 and 3018 make no actual reference to standing. Standing, which is not mentioned as being statutorily waived, and “capacity,” which is mentioned, are treated by the case law as “twins” (*Nicke v Schwartzapfel Partners, P.C.*, 148 AD3d 1168, 1174 [2nd Dep’t. 2017] [citing *Siegel*, N.Y. Prac. sec. 136 [5th ed.]]). Capacity, of course, refers to the ability of a party to bring an action, whereas standing regards the party’s right to do so. Nevertheless, the two similar but distinct concepts are treated the same by case law for purposes of waiver. Practitioners should therefore include the defense in pre-answer motions to dismiss, or assert it as an affirmative defense in responsive pleadings, to preserve the issue.

While the foregoing is a general rule, there are a couple of exceptions which break it. One applies to actions involving residential mortgage foreclosures. RPAPL 1302-a provides that notwithstanding any contrary provisions of CPLR 3211 (e), an objection or defense based upon the lack of standing is not waived and may be raised at any time until the foreclosure sale, and after if the judgment and sale is rendered on default. The statute applies by its terms only to foreclosure actions involving “home loans” as defined in RPAPL 1304(6)(a), but not to other foreclosure actions. Home loans are defined as those involving natural persons in residential dwellings and condominiums within New York, occupied or intended to be occupied as a personal residence, including reverse mortgages. By statutory construction, the defense survives even if the defendant makes an unsuccessful pre-answer dismissal motion on other grounds, because it is “notwithstanding” the provisions of CPLR 3211(e). The statute became effective on December 23, 2019 (L.2019, ch. 739, sec. 1), meaning that from then forward, the waiver of standing depends on whether the action is a residential mortgage foreclosure within the scope of RPAPL 1302-a (not waived) or is any other action subject to CPLR 3211(e) (waived).

The second exception, for attorneys caught in the bind of having not raised a waivable defense, is to seek to correct the error by moving under CPLR 3025(b) to amend the responsive pleading to add the defense. While such motions are to be freely given, they may be denied in the court’s discretion if the “late” assertion of the proposed affirmative defense is palpably insufficient or patently without merit, or would cause undue prejudice or surprise to the adversary party (*Petry v Gillon*, 199 AD3d 1277 [3rd Dep’t. 2021]; *Greater Bright Light Home Care Services, Inc. v Jeffries-El*, 199 AD3d 777 [2nd Dep’t. 2021]). As a general matter, the earlier any such motion is made to amend the pleading, the better, as an early proposed amendment may be less likely to cause prejudice to another party.

The bottom line for standing waivers is to treat the issue like Moses parting the Red Sea --- with residential mortgage foreclosure litigation on one side governed by the unique provisions of RPAPL 1302-a, and all other litigation on the other side of the sea governed by the traditional rules of CPLR 3211(e) and its interpretative case law.

*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 to the New York Practice Commentaries in McKinney’s.

Technology Tips for Attorneys **submitted by Michael Loewenberg***

Artificial Intelligence has been in the news lately, especially the company OpenAI that got a huge infusion of cash from Microsoft: Microsoft has already invested \$1 billion in the company and estimates that they will put in another \$10 billion. OpenAI introduced a long-form question-answering tool called ChatGPT that answers complex questions conversationally.

ChatGPT is software that has been trained with massive amounts of data so that it can write pages of content in response to questions. OpenAI trained ChatGPT to interact in a conversational way. The dialogue format makes it possible for ChatGPT to answer follow-up questions, admit its mistakes, challenge incorrect premises, and reject inappropriate requests.

There are limitations, of course, and the tool is not perfect. It's known to make errors in its answers and the data is from early 2021 so current events are not in its information database.

I asked ChatCPT about "tech tips for attorneys" and here is its response:

1. Utilize legal research databases such as LexisNexis or Westlaw to quickly and efficiently find relevant case law and statutes.
2. Use a document management system to organize and store client files and case materials.
3. Utilize practice management software to streamline scheduling, billing, and case management.
4. Use e-filing to file documents with the court and stay on top of deadlines.
5. Utilize digital signature software to quickly and easily execute and file legal documents.
6. Use timekeeping software to accurately track billable hours and increase billing efficiency.
7. Utilize virtual meeting software such as Zoom to communicate with clients and colleagues remotely.
8. Use encryption and secure file sharing to protect client data and maintain confidentiality.
9. Take advantage of mobile apps and mobile-optimized websites to access legal resources and information on the go.
10. Stay current on legal technology developments to find new ways to improve workflow and efficiency.

So ChatGPT sort of wrote this month's article for me!

You can try ChatGPT yourself for free. Because of its popularity right now, You might get an "at capacity" message but keep trying and you'll be able to sign up for an account. Go here to check it out: <https://chat.openai.com/>

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

Odyssey, our Member's 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.

Presidential Limericks by Arnold Etelson, Village of Montebello Justice, Retired

Founding Fathers Era

George Washington #1 Father of his Country 1789-1797 Federalist

Accepted role not as a king, but as President

Unanimously elected based upon incredible credentials so evident

Brilliant general defeated the British

Their domination came to a finish

Gentleman farmer, surveyor, planter his bent

John Adams #2 Father of American Independence 1797-1801 Federalist

Puritan from Quincy, Mass., as was his son

Died on July 4, 1826, same as Jefferson

On our Independence 50th anniversary to the day

It really ought to be the subject of a play

Friend of Jefferson after retirement after losing to him on his second run

Thomas Jefferson #3 Father of Declaration of Independence 1801-1809 Republican

"We hold these truths to be self-evident"

Spent much time in France escaping the colonies' political vents

Ardent states' rights supporter, superb writer with common sense

His Louisiana Purchase made our borders immense

His Memorial in D.C. expresses what he meant

James Madison #4 Father of the Constitution 1809-1817 Republican

Staunch advocate of separation of powers

Wife Dolly's famous White House ice cream delighted guests for hours

Years later made with all sorts of berries

Most famous of which is Ben and Jerry's

His Bill of Rights stands as states rights' towers

James Monroe #5 Era of Good Feelings President 1817-1825 Democratic-Republican

His doctrine opposed European interference with North and South America

For one million dollars he bought the State of Florida

Third Founding Father to die on July fourth

Established 49th parallel with Canada on the north

During his tenure 5 new states came forth

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Odyssey

Our Members' Literary Corner

We hope to publish a literary piece, written by one of our Members, each month in Newsbrief.

Please email your submission in a Word document to Barbara@rocklandbar.org

WE WANT TO HEAR FROM YOU!



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 Barbara@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!

2023 CLE TITLE	DATE & TIME
Consumer Debt & Personal Bankruptcy 101	February 28, 2023 12:00pm—2:00pm

NEW CLE REQUIREMENT:

In addition to ethics and professionalism, skills, law practice management, areas of professional practice, and diversity, inclusion and elimination of bias courses, there is a new category for cybersecurity, privacy and data protection. This category of credit is effective January 1, 2023.

Experienced attorneys due to re-register on or after July 1, 2023 must complete at least one credit hour in the Cybersecurity, Privacy and Data Protection CLE category of credit as part of their biennial CLE requirement. Newly admitted attorneys need not comply if admitted prior to July 1, 2023 in their newly admitted cycle, but must comply in future reporting cycles. Attorneys admitted on or after July 1, 2023, must complete the 1 CLE credit hour in Cybersecurity, Privacy and Data Protection as part of their new admitted attorney cycle. For more information about the CLE Rules, visit nycourts.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:

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We are now regularly meeting via Zoom and would like you to attend. If you are on the Committee and have not been receiving notices, please check/update your contact details with the Bar. If you are not a member, we would like you to join. The Bar Association will facilitate this process. Our next meeting is Tuesday, March 7, 2023, at 5:00 p.m. Jeff Adams, Chair and Valerie Crown, Co-Chair.



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