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Barbara Silverstone—Editor

ROCKLAND COUNTY BAR ASSOCIATION

NEWSBRIEF

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June 2023

President's Post

Please take a moment to reflect about a topic which has for too long remained in the shadows. The issue of mental health as it relates to society in general, and attorneys in particular, has emerged as a cogent and meaningful topic. Thankfully, we are now addressing an important issue which has for too long impacted upon our profession. Big Law has taken the lead in addressing our well-being and mental health. This mindset is long overdue and must imbue and filter down to smaller firms and sole practitioners. How refreshing it is to acknowledge that stress and its deleterious consequences affects us all to some extent. This is why it is most important to strike a healthy work-life balance with good nutrition, adequate sleep and a supportive environment, whether of family or friends.

An article in the NY Law Journal dated May 19, 2023, starts off like this: "AT NO POINT in the history of law firms has mental health and wellness been talked about as much as it was in the past three years." "The most cut throat law firms in the country are offering mindful sessions, hiring guest speakers to talk about exercise and nutrition, removing alcohol from firm events and turning to staff to support each other's mental well-being."

Stress continues with high billable hour requirements in many of the larger firms. According to ALM's (formerly American Lawyer Media), in its latest Mental Health and Substance Abuse survey, concluded that 71.1% of lawyers surveyed said they had anxiety and 38.2% were depressed. Fifteen percent of those answering the survey had contemplated suicide in their professional legal career.

The majority of lawyers surveyed displayed a negative outlook on their careers and personal lives. More than 50% said they felt the sense of failure or self-doubt, lost emotion, were increasingly cynical and negative and had decreased satisfaction and a diminished sense of accomplishment. Sixty percent were physically or mentally overwhelmed or fatigued, felt moody or irritable, exhausted or struggled concentrating. A third felt helpless, trapped, detached and alone in the world.

Only 41% said their legal workplace was a safe environment to even raise concerns about mental health and substance abuse. A fifth of the respondents identified stigma attached to asking for mental health when asked what about their workplace impacted their well-being.

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The study derives from a 2023 survey of mental health in the legal profession which requested feedback from 3000 lawyers about mental wellness. It suggests that owners and managing partners of law firms must take ownership of mental health initiatives and training.

The survey shows that in-house lawyers are also feeling anxious and overwhelmed. Sixty percent of these practitioners reported having anxiety and decreased job satisfaction while 70% percent said they were exhausted and 65% feel overwhelmed.

Perhaps one ameliorative remedy is to reduce billable hours and do a better job of communicating high expectations. There must be the ability and option to disconnect fully at times. Indeed, some believe that the billable hour model needs to go away.

The goal is to eliminate barriers, both real and imagined, that stop people from getting assistance. We just have to acknowledge the reality of stress from our job and at times from family. Big Law is to be commended for taking mental health issues from the backburner sidelines and creating a meaningful dialogue. We owe it to ourselves to continue these efforts.

Here are some practical and easily implemented solutions - forge positive relationships, pursue a healthy lifestyle, sleep, diet, reduce sugars, exercise, meditate, take breaks, don't constantly be a prisoner of your emails and take a break from social media. Don't hesitate to reach out to a competent therapist if you need assistance. It is a sign of strength and a commitment to self-betterment.

RCBA has a Lawyer to Lawyer Committee which is there to address issues that may overwhelm one at times. If one would like to join the committee, please reach out to its co-chairs, Bridget Gauntlett (bglafont@nycourts.gov) or Amy Mara (amy@catinamara.com).

Mental health is an important component of overall health. We certainly can acknowledge that bruises of the heart are often more difficult to overcome than bruises of the flesh.

On May 24th, RCBA sponsored an interesting CLE on the topic of restorative mediation, attended by almost 100 people from throughout the district and beyond. Restorative mediation, as I commented upon in last month's Post, is an evolving field, taking root in the civil litigation arena. This unique form of mediation allows those who have been harmed to feel empowered, to express their concerns, and communicate to the defendant or their insurance company representative not just the extent of the physical harm inflicted, but how one has been impacted in a variety of ways by the wrongdoer. Special thanks to the Hon. James Hyer who spearheads the Access to Justice Initiative in the 9th Judicial District. Gratitude to the Hon. Debra Martin who sits as Acting Supreme Court Judge in the Court of Claims in Rochester and who is a pioneer and advocate of restorative justice mediation. If one wants to learn more about this expanding field of conflict resolution, feel free to reach out to Duke Fisher, Esq. who is an international recognized mediator who can provide greater context and information about the restorative mediation process. Duke can be reached at mediator.trainer@gmail.com, or <https://dukefisher.com/>, or 607-967-5917.

Congratulations to the winners of the RCBA's Mock Trial competition, the team of Clarkstown North High School. Special thanks to Derek Tarson, Esq. and Kim Holstine, Esq., the team's Attorney Advisors. Congratulations to our runner up, Nyack High School and its Attorney Advisors Duncan Rogers Lee, II, Esq. and Giulia Palermo, Esq. The High School Mock Trial competition continues to attract students and interest throughout the county. Should anyone wish to be a trial coach, feel free to contact rocklandmocktrial@gmail.com, or call the RCBA Office at 634-2149. I for one recall coaching the Clarkstown North team in the early 80's and it was a very rewarding experience.

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Our Diversity, Equity & Inclusion Committee has established an essay contest open to all Rocklanders attending high school in or out of the county. The winner of the contest will receive a \$500.00 stipend. Members of the DEI Committee reviewing the essays look forward to student responses to the following topic:

“Why should people of all races take part in Juneteenth celebrations?”

We hope to expand the contest in the future, increasing stipends and making more than one award.

Our Lunch with a Judge program continues to be of interest, drawing many of our members. How interesting it was to learn of Justice Amy Puerto’s judicial philosophy and her expectations of litigants and her unique view of what it means to be a judge, striving to dispense justice evenly and fairly. We were impressed with Judge Puerto and are grateful that she is sitting in our courthouse.

Our Annual Dinner celebrating our 130th anniversary will invariably be a well-attended, sold out evening. Why do I say this? Through the efforts of the Hon. Linda Christopher we were able to secure as our Guest of Honor and speaker our new Chief Justice of the Court of Appeals, Hon. Rowan Wilson. This is a major accomplishment. So mark your calendar for October 26th at The View on the Hudson. Make a reservation early as we expect this to be a sold out event of great interest to the bench and bar alike.

I met with most of the Pro Bono Subcommittee members of the Access for Justice Initiative recently. We dialogued the needs of pro bono representation throughout the 9th Judicial District and particularly how RCBA might assist. We are in the planning stages.

After meeting with Surrogate Cornell, we are implementing a Surrogate’s Court CLE series to help practitioners navigate the Surrogate’s Court process in a more efficient and seamless way. The series has been tentatively scheduled for this fall, sometime in September, October and November. We will keep you informed.

Why not, as the summer approaches, begin the process of stress reduction, self-care and decompression with a commitment to take some time to just relax, unwind, read a good book or dive into something that you ordinarily would not pursue. It is wonderful to find a passion we love separate and distinct from our profession. The well-rounded practitioner is often an effective and well-grounded advocate.

**“Roll out those
lazy, hazy, crazy days
of summer” – Sam Cook**

Sincerely,

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



**ROCKLAND COUNTY BAR
ASSOCIATION
2023 INSTALLATION DINNER**

with

Swearing-In of New Officers

– Your old-fashioned barbeque, but better!

JOIN US AS WE RECOGNIZE OUR HONOREES:

**LEONARD J. BIRBROWER, ESQ. – THE JOSEPH G.
BALSAMO AWARD**

LAURA M. CATINA, ESQ. – THE STERNS AWARD

**ANDREA F. COMPOSTO, ESQ. & LAURIE A.
DORSAINVIL, ESQ. – THE COMMITTEE CHAIR(S) OF
THE YEAR AWARD**

Thursday, June 15, 2023

5:00 p.m. – 8:00 p.m.

**OUTDOORS! – WOODMONT DAY CAMP,
420 Phillips Hill Road, New City, NY 10956**

Includes appetizers, dinner, dessert, beer, wine, soda

\$75.00/pp – in advance ~ \$85.00/pp – at the door.

Please RSVP by: June 5th

**Make checks payable to RCBA. Mail to:
RCBA, 337 N. Main St, Suite 1, New City, NY 10956
OR click below to register and pay online.**

[TO RSVP, CLICK HERE](#)



Technology Tips for Attorneys submitted by Michael Loewenberg*



As an attorney, your mobile phone is one of the most important tools in your arsenal. It helps you stay connected with clients, colleagues, and the world around you. However, like any other technology, mobile phones are vulnerable to hacking. This month, we'll explore some mobile phone hacks for attorneys that can help you stay safe and secure.

First and foremost, it's important to use a strong and unique password to protect your phone. A weak password can be easily guessed by hackers, leaving your phone and all the sensitive information on it vulnerable. Use a combination of letters, numbers, and symbols to create a password that's difficult to crack.

Another important step to take is to keep your phone's operating system and apps up to date. Developers are constantly releasing updates that address security vulnerabilities and add new features. By keeping your phone up to date, you'll ensure that you have the latest security patches and features to keep your phone secure.

It's also a good idea to be cautious when downloading apps. Only download apps from trusted sources, such as the Apple App Store or Google Play. Be wary of apps that request access to sensitive information, such as your contacts or location, without a valid reason.

One of the most effective ways to protect your phone is to use two-factor authentication (2FA). 2FA adds an extra layer of security by requiring a second form of identification, such as a code sent to your phone, in addition to your password. Many apps and services offer 2FA as an option, and it's highly recommended that you enable it wherever possible.

If you're using a public Wi-Fi network, be sure to use a virtual private network (VPN) to encrypt your data and protect your privacy. Public Wi-Fi networks are often unsecured, making them prime targets for hackers looking to intercept sensitive information.

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Finally, it's important to be cautious when using social media on your phone. Social media platforms are often targeted by hackers looking to steal personal information or spread malware. Be sure to use strong passwords and enable two-factor authentication on your social media accounts

In conclusion, mobile phone security is a crucial concern for attorneys. By using strong passwords, keeping your phone up to date, being cautious when downloading apps, using 2FA, using a VPN on public Wi-Fi networks, and being careful when using social media, you can help protect your phone and the sensitive information on it. Stay safe out there!

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

JOIN US FOR THE NEXT CLE SESSION:

THE 15 MINUTE VOIR DIRE - WHEN TIME REALLY MATTERS

Wednesday June 14 12:00—1:30

Register Here

COMMERCIAL LITIGATION ISSUES OF INTEREST

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

Your client is a mold removal company that agreed to pay \$36,500 of the company's future receivables in exchange for \$25,000 in cash. The agreement required your client to deposit all receipts into an approved account from which the funder would receive daily ACH debits of \$300, representing 10% of the company's anticipated receivables, until fully paid. The daily amount was adjustable upon proof of actual receipts. When your client stopped paying, the funder sued for breach of contract seeking over \$31,000, representing the balance owed plus fees and costs. The funder immediately moved for summary judgment based on an affidavit of the funding company's "Collections Coordinator." The affidavit attached the funding company's "Remittance History" in spreadsheet form. The affiant stated that the recordings were made in the regular course of business at the time of the transactions, and were maintained under her supervision. The records were based on information given to the recorder by someone with personal knowledge and with a business duty to transmit the information accurately. You oppose the motion denying the amount owed and arguing that the funder did not demonstrate a prima facie case of the amount paid, the amount due, or the default.

Will you defeat summary judgment?

The answer is *yes*.

In *Capybara Capital LLC v. Zilco NW LLC*, NYLJ 1684251840NY526946202, (Sup. Ct. Kings Co. May 15, 2023) (Case No. 526946/2022), the plaintiff paid \$25,000 in cash to the defendant on April 20, 2022, pursuant to a "Revenue Based Factoring Agreement" by which the plaintiff purchased 10.4% of the defendant's total future accounts receivable up to the sum of \$36,500. The agreement provided for the defendant to deposit all of its receipts into a specified account and to pay plaintiff via daily ACH payments of \$304.17, which was an estimate of 10.4% of the defendant's anticipated daily receipts. The amount was to be adjusted based on reconciliation with defendant's actual receipts. Plaintiff claimed that on May 9, 2022, the defendant stopped payment on plaintiff's debits to the account.

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Plaintiff moved for summary judgment by affidavit of its “Collection Coordinator,” attaching the plaintiff’s “Remittance History,” which was a spreadsheet with 11 columns and 76 lines. The coordinator stated 1) she reviewed plaintiff’s books and records; 2) the business records annexed to the affidavit were made in the regular course of business at or around the time of the transactions, and were maintained under her supervision and control; 3) the information in the records was given to the recorder by someone with personal knowledge and a business duty to transmit the information accurately. The affidavit alleged default on May 9, 2022, and that the outstanding balance with fees and cost was \$31,303.16.

The Court found that the affidavit did not lay a proper foundation for the business record exception to the hearsay rule. Simply stating that the records were *maintained* under her supervision and control does not authenticate the *accuracy* of the records, since she did not allege she was familiar with plaintiff’s record keeping practices and procedures, that she had personal knowledge of the defendant’s payment history, or identify the source of her knowledge of a default. Indeed, noted the Court, the affidavit stated that the records were given to the recorder by someone with personal knowledge. Who did have such knowledge and who was the recorder?

The Court noted that a proper foundation for admission of business records must be by someone with personal knowledge of the maker’s business practices and procedures; it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted, citing *U.S. Bank N.A. v. Zakarin*, 203 A.D.3d 1275 (2d Dep’t 2022). The Court declined to speculate about the meaning of the spreadsheet without the plaintiff providing an explanation of what the spreadsheet reflects, as required to meet the burden of proof on summary judgment.

Although the defendant claimed the agreement was a usurious loan, and not a purchase of future receivables, the Court found the issue was premature, as the plaintiff had not met its evidentiary threshold. Nonetheless, the Court noted its familiarity with factoring companies purchasing future receivables that would constitute a high interest rate if the transaction were a loan, noting that such financial transactions are controversial, and referring to case law about how to resolve the issue, citing *Principis Capital, LLC v. I Do, Inc.*, 201 A.D.3d 752 (2d Dep’t 2022).

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The Court denied the motion for summary judgment since it was based on inadmissible evidence and did not establish plaintiff's entitlement to judgment as a matter of law. There remain triable issues of fact as to a default, and if so, how much is owed.

The lesson? When authenticating a business record by affidavit, be sure the affiant has personal knowledge of the record keeping practices and procedures of the business and explains what the records reflect. Merely using the lingo of business record authentication in an affidavit will not suffice if the affiant did not make the record and does not have actual personal knowledge of the source of the information contained in the records and how the record was made. At times, more than one affidavit may be necessary.

Editor's note: There are pages of cases listed in NYSCEF for Cappybara Capital LLC with 2022 index numbers in Kings County alone. Factoring agreements for the purchase of future receivables in return for cash up front, as the Court noted, often result in defaults and litigation.

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

MEMO

TO ALL RCBA COMMITTEE CHAIRS & VICE – CHAIRS

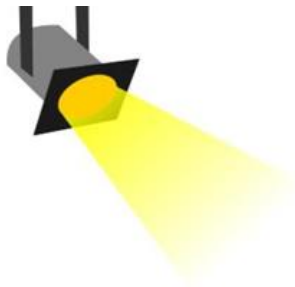
The Association is seeking articles from your committee for publication in the Bar's monthly Newsletter. The membership would greatly benefit from your input and would appreciate it. The article does not have to be complicated or long- a succinct piece of general interest and importance would be best.

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!



Monthly
Newsletter



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

SPOTLIGHT

Hon. David Fried



In celebration of Pride Month, the DEI Committee shines its spotlight on the Hon. David Fried, attorney and Justice of both the Spring Valley Justice Court and Town of Ramapo Justice Court.

Where did you grow up and what is your current hometown?

My current hometown is Montebello. I was born in California and have lived in the Town of Ramapo since I was a baby. After I was born, my parents moved back to New York to be closer to my grandparents. My paternal grandparents were Holocaust survivors and had moved to Israel after the war, and then to the Bronx. My maternal grandparents lived in Westchester. My mother grew up in Yonkers and my dad grew up in the Bronx.



Where did you go to college and law school?

I attended Manhattanville College in Purchase and graduated with a BA in political science and psychology. During and after college, I was an Advance Aide to President and Mrs. Clinton. For example, if they were traveling to Greece, I would travel to Greece 10 days in advance, arrange their travel, coordinate their logistics, implement their schedule, and assist them when they arrived. I've remained close with President Clinton and Secretary Clinton ever since. Right after graduating college, I attended and graduated from the Benjamin N. Cardozo School of Law of Yeshiva University.

Did you always want to be a lawyer/Judge?

No. As a kid, I always wanted to be an airline pilot. I took flying lessons when I was thirteen. Then I wanted to be a television producer. In high school I became much more interested in government and politics and that interest stayed with me. When I was 23 years old, I was elected to the Rockland County Legislature. After I graduated law school, I did not necessarily plan on working as a lawyer. While a County Legislator, I chaired the Public Safety Committee, and I became very interested in criminal justice. This led me to run for Spring Valley Justice. The very first time I set foot in a courtroom, I was wearing a robe! In 2014, I opened my own practice which I have maintained to date.

What has been your career path/current occupation?

When my term was ending in the Rockland County Legislature, I began working for the Rockland County Sheriff's Office as a civilian. In 2009, while working for the Sheriff, I decided to run for Spring Valley Justice

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and won that election. In 2018, I was elected Town Justice for the Town of Ramapo. I am currently a Justice for both Spring Valley and the Town of Ramapo. I love judicial service. I enjoy the ability to have a direct impact in meaningful ways and to help find solutions to problems.

Concurrently, I also have a general private practice in which I represent clients in criminal defense, estate work, matrimonial and family law, and a wide variety of plaintiff's and defendant's civil litigation.

What is your favorite thing about Rockland County?

The people. It's a wonderful place to live. I grew up in a very diverse community, surrounded by different cultures. It opened my eyes to a much broader perspective on life. My legislative and judicial service has been a wonderful exposure to different perspectives. As a judge, I try to understand the people who appear before me. For example, there is a large Haitian community in the municipalities that I serve. As a legislator and then as a judge, I have formed a close relationship with the Haitian community. I have traveled to Haiti several times with local delegations.

Rockland County also has a fantastic bar and judiciary. I have built strong friendships within our profession that are very important and special to me. This is a great county in which to practice law.

Would you like to share anything about your personal life?

My husband, Duarte, is originally from the Dominican Republic. I have a 15 year-old stepson, Ezahir, who is a sophomore at Suffern High School. I love being a step-dad very much. We also have an incredibly sweet (but enormous) rescue pup, Harrison. Harrison is 2 ½ years old, a mixed breed, and still thinks he's a lap dog even though he is 120 pounds! Harrison is my greeter when I get home every day.

Duarte and I married in 2020 during the pandemic so our wedding was a virtual ceremony. We had 500 virtual wedding guests from all over the globe! Hillary Clinton spoke at our wedding and NY State Supreme Court Justice Sherri Eisenpress officiated our vows.

My parents live in Suffern and my brother, Aaron, who is a Corrections Officer, lives in Stony Point. I presently have two nieces and a nephew. Tragically, a niece of mine, beautiful Harper, passed away a few years ago in a furniture tip-over accident. My family and I formed Harper Smiles, Inc., a non-profit organization, to give Harper a strong and meaningful legacy. We work hard to educate families about the dangers associated with furniture tip-overs. In fact, working closely with Assemblyman Zebrowski, Harper's Law became law in New York. That law has significantly enhanced our work to prevent similar tragedies from happening to other families. We also work extensively with the Maria Fareri Children's Hospital in Harper's memory.

Who is your inspiration/hero?

My parents are my inspiration and heroes. All my personal values and ethics come from my parents. My dad was a mechanic and my mom worked in business (they are both retired now). They worked hard to make sure my brother and I had a good life and always put family first. They inspire me to work hard and be a good person and to care about people. I would not be who I am today if it wasn't for them. I really mean that.

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What good advice have you received?

First, balance work and family. It is so possible in our profession to get consumed by work. Have a strong work ethic but don't let it infringe on family time.

Second, follow your gut. You are going to have to make difficult decisions in our field. Maintain a strong set of values and ethics. Do a gut check and make sure you are following what you believe in.

Third, it is okay to step out of your comfort zone. Try to live life to the fullest. Sometimes that is difficult to do. You have to push yourself as best you can.

What is your favorite TV or streaming show or book?

My favorite book right now is BOTH/AND by my good friend Huma Abedin. I really enjoyed her memoir. We hosted a book signing with Huma at our home last year.

I just finished binge watching *The Night Agent*, a suspense drama about an agent working in the White House who uncovers a conspiracy. I also like *American Horror Story* and I am dipping my toe into anime.

What do you like to do in your spare time?

I love to travel. I've been to Israel, London, Australia, Mexico, El Salvador, India, and several US states. I am an avid concert goer. I like being right up front at the stage. The last concert I went to was to see Dermot Kennedy, an Irish singer whose been topping the charts here at home.

I also love to paint, and I have a painting studio in my home. I find painting to be very therapeutic. It is a wonderful outlet to express myself and relax. I have created abstract art and painted portraits of my niece, dogs, and landscapes.

Is there anything we didn't cover that you would like the bar association to know about you?

I sit on the board of the Onyx and Breezy Foundation, an animal welfare non-profit and on the board of the Rockland County Pride Center. I am the co-chair of the LGBTQ+ Subcommittee of the 9th Judicial District Access to Justice Committee. I am also on the Executive Committee of the Justice Brandeis Law Society for the 9th Judicial District.

I am grateful to my colleagues. Being a lawyer comes with a lot of responsibility and pressure. I have found that relationships and friendships in our profession have enhanced my experience as a lawyer. In terms of judicial colleagues, I am blessed to work with judges that have been great resources and friends. I would like the Bar Association's leadership to know how much I value their good and critically important work. The Bar Association provides opportunities for professional enhancement and brings us closer together as colleagues.



ROCKLAND COUNTY BAR ASSOCIATION
337 NORTH MAIN STREET
SUITE 1
NEW CITY, NEW YORK 10956
845-634-2149

FAX (845) 634-1055
E-mail office@rocklandbar.org

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Program Coordinator

MANUELA GOMEZ
Assigned Counsel Administrator

May 15, 2023

Dear Members of the Rockland County Bar Association:

The Diversity, Equity and Inclusion Committee in conjunction with The Foundation of the Rockland County Bar Association, Inc., is pleased to announce that it has created a Juneteenth Essay Scholarship contest open to all junior and senior high school students who either reside in Rockland County or attend high school in Rockland County. One \$500 scholarship will be awarded to the recipient of the winning essay. The student-recipient of this scholarship must be present at the RCBA Awards and Installation Dinner on June 15, 2023 to accept the scholarship award.

We turn to you, our dedicated, invested members of the Bar Association to contribute to this worthy cause. We are hopeful that this will be our inaugural year and that we will be able to offer even more scholarship opportunities next year and in the years to come.

If you are able to offer a donation toward the Juneteenth Essay Scholarship, please make your checks payable to The Foundation of the Rockland County Bar Association, Inc., and mention Essay Contest. Mail to: 337 N. Main Street, Suite 1, New City, NY 10956.

All donations are tax deductible.

Thank you for making a difference.

Very truly yours,

Andrea Composto, Esq. and
Laurie A. Dorsainvil, Esq.
DEI Co-Chairs

**To donate online via credit card payment, go
to: <https://www.rocklandbar.org/store>
Scroll down to “Sponsorships.” Click on the
amount you wish to donate.**

RSVP NOW!

2023 AWARDS

AND INSTALLATION DINNER

JUNE 15, 2023

5:00P.M. – 8:00P.M.

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**Join us as we swear-in our new 2023-24
Officers, and welcome our new Board
Members!**

Woodmont Day Camp
Phillips Hill Road, New City

~

BARBEQUE AND MORE!

THE PRACTICE PAGE

COVID-19 AND CONTRACTUAL *FORCE MAJEURE*

Hon. Mark C. Dillon*

Sometimes contracts cannot be performed by a party because of circumstances beyond the party's control. Contractual performance may occasionally be excused for reasons involving an Act of God or *force majeure*. There is a definitional difference between the two terms. An Act of God regards a natural event that renders performance impossible such as a flood, hurricane, or earthquake. *Force majeure* is a broader concept that may include Acts of God, but also extends to labor strikes, equipment or transmission failure, war, riots, or other compelling circumstances beyond the party's control (*Team Marketing USA Corp. v Power Pact, LLC*, 41 AD3d 939, 942). The terms do not include the impossibility of performance by virtue of a party's mere financial difficulty or economic hardship, insolvency, or bankruptcy (*407 East 61st Garage, Inc. v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 281).

How do the financial disruptions that were caused by the covid-19 pandemic fit in? Is covid-19 a defense to a party's failure to perform contractual obligations? The short answer, as is often seen in the law, is that it depends. We do not currently or definitively know whether covid-19 is a natural virus that qualifies as an Act of God, or a virus engineered in a laboratory that went awry as to better fit *force majeure*. To date, the relevant case law has viewed covid-19 defenses under the umbrella of *force majeure*.

Force majeure may excuse contractual performance for businesses shut down by the terms of Governor Cuomo's covid-related Executive Orders, but according to most of the case law, the contract between the parties must contain a *force majeure* provision for those Executive Orders to trigger the defense (*JN Contemporary Art, LLC v Phillips Auctioneers LLC*, 29 F.4th 118, 123-24 [2nd Cir. 2022]; *850 Third Avenue Owner, LLC v Discovery Communications, LLC*, 205 AD3d 498; *195 B Owner LLC v Anthropologie, Inc.*, 77 Misc.3d 850). By contrast, if a contract *foresees* business disruption from governmental orders or regulations, the *force majeure* clause will not apply to excuse a party's contractual performance from those orders (*A/R Rental LLC v Hugo Boss Retail, Inc.*, 72 Misc.3d 627), especially for contracts executed post-covid (*Greenberg v Gallagher*, 77 Misc.3d 1233[A]). If a contract contains no *force majeure clause*, the defense is not available (*Arista Development, LLC v Clearmind Holdings, LLC*, 207 AD3d 1127, 1129; *Fives 160th, LLC v Qing Zhao*, 204 AD3d 439, 440).

In a commercial lease action entitled *175 Medical Vision Properties, LLC v Adubor*, 73 Misc.3d 1221 (A), the plaintiff sought unpaid rent, additional rent, costs, and fees for the tenant's default. The defendant, in opposing summary judgment, did not contest the terms of the lease or its breach, but argued that his medical

...Continued

practice closed because too many patients in 2020 were scared to go to his office because of covid-19. The Supreme Court rejected the defense, finding that the defendant's financial difficulty did not excuse his performance of the contract. There have been many similar decisions rendered against commercial tenants, that while properties might not be profitable or were rendered temporarily unusable because of covid-19, they were not destroyed as to excuse the payment of rent (*E.g. Amherst II UE LLC v Fitness International, LLC*, 74 Misc.3d 1203(A); *A/R Retail LLC v Hugo Boss Retail, LLC*, *supra*; *Bay Plaza Community Ctr., LLC v Bronx Vistasite Eyecare, Inc.*, 2021 WL 1794562; *1140 Broadway LLC v Bold Food, LLC*, 2020 WL 7137817).

A *force majeure* defense may be cognizable when covid-19 disrupts a one-time event, such as a couple's cancellation of a wedding venue as a result of state Executive Orders restricting public gatherings (*Nelkin v Wedding Barn at Lakota's Farm, LLC*, 72 Misc.3d 1086). But beware! In one case, a wedding venue was not required to return a down payment as the rental contract failed to contain any *force majeure* clause to excuse the happy couple's performance of it (*Bennett v Blue Barn Cider Corp.*, 77 Misc.3d 1229[A]), perhaps rendering them less happy.

As for residential and commercial leases and those of small businesses, the legislature enacted three parallel statutes known as the Tenant Safe Harbor Act (TSHA) (L.2020 ch. 127, secs. 1,2), the Covid-19 Emergency Eviction and Foreclosure Prevention Act (CEEFPFA) (L.2020, ch. 381, as amended L.2021, ch. 417), and the Emergency Protect Our Small Businesses Act (EPOSBA) (L.2021, ch. 73, as amended L.2021, ch. 417). These Acts protected residential and commercial tenants and small businesses which declared covid-related financial hardship from being evicted during defined qualifying time periods. Nevertheless, money judgments could still be rendered for unpaid rent without any stay of its enforcement (*Casey v Whitehouse Estates Inc.*, 73 Misc.3d 562, 574). CEEFPFA even protected small businesses from eviction for at least 60 days during the post-lease holdover period. Whether particular tenants actually experienced financial hardship due the pandemic became questions of fact for the courts to resolve on a case by case basis (*e.g. Malacznski v Wittmann*, 73 Misc.3d 849, 853-54), with the burden upon the landlord to establish the invalidity of the tenants' covid-19 hardship declarations (*e.g. Lahijani v Madison Global LLC*, 73 Misc.3d 1025, 1028; *Sanchez-Tiben v Washington*, 73 Misc.3d 721, 724). The foregoing statutes bestowed protections upon qualifying tenants and small businesses which, in effect, provided them with presumptive *force majeure* defenses, and accomplished it at some expense to the landlords of the state. The TSHA, CEEFPFA, and EPOSBA had sunset provisions that ultimately triggered for each on January 15, 2022.

Very little case law has arisen from construction-related contracts that could not be performed because of covid-19, perhaps as those contracts routinely contain Act of God and/or *force majeure* provisions.

The bottom line is that covid-19 defenses tend to be fact intensive and results may vary between commercial and residential tenancies, from case to case within those categories, and during different timeframes.

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

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UCS-23

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Trial Division

Homicide Bureau

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CLE CORNER

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June 14, 12:00 pm—1:30 pm

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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.

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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.

CLE UPDATE

CYBERSECURITY REQUIREMENT

Effective January 1, 2023 - New Category of CLE Credit - Cybersecurity, Privacy and Data

Protection: A new category of CLE credit - Cybersecurity, Privacy and Data Protection - has been added to the CLE Program Rules. This category is defined in the [CLE Program Rules 22 NYCRR 1500.2\(h\)](#) and clarified in the [Cybersecurity, Privacy and Data Protection FAQs](#) and [Guidance document](#). Providers may issue credit in Cybersecurity, Privacy and Data Protection to attorneys who complete courses in this new category on or after January 1, 2023.

Effective July 1, 2023 - Change to Experienced Attorney Biennial CLE Requirement to Include One

Credit Hour in Cybersecurity, Privacy and Data Protection: Experienced attorneys due to re-register on or after July 1, 2023 (birthday is on or after July 1st) must complete at least 1 CLE credit hour in Cybersecurity, Privacy and Data Protection as part of their biennial CLE requirement. See [CLE Program Rules 22 NYCRR 1500.22\(a\)](#).

Effective July 1, 2023 - Change to Newly Admitted Attorney CLE Requirement to Include One

Credit Hour in Cybersecurity, Privacy and Data Protection: Newly admitted attorneys whose admission to the NY Bar is on or after July 1, 2023 must complete at least 1 CLE credit hour in Cybersecurity, Privacy and Data Protection as part of their CLE requirement. See [CLE Program Rules 22 NYCRR 1500.12\(a\)](#).

Attorneys may apply a maximum of three (3) credit hours of cybersecurity, privacy and data protection-ethics to the four-credit hour ethics and professionalism requirement.



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Your Rockland County Bar Association Negligence Committee regularly meets via zoom. If you are not yet a member and wish to join our committee, please contact the association. If you have a topic that you think may be of interest to the committee, please let us know.

Our next meeting is June 12, 2023, at 5:00 p.m. on June 12, 2023 at 5:00, there will be a guest speaker, Stanley Silverstone, Esq., employment attorney.

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