

Volume 30 | Number 4

March | April 2020

**CT**

**LAWYER**

**HOW COURTROOM  
ATTORNEYS CAN  
FLOURISH IN  
ARBITRATION**

**What to Do about  
Negative Online  
Reviews**

**Is Remote  
Deposition Tech  
Right for You?**



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# Join Us as We Celebrate These Stars of Our Legal Community



- ★ Dinner and Dancing
- ★ Networking with Your Peers
- ★ Outstanding Stories of Service to the Community and Legal Profession



## This year's stars will include:




**Henry J. Naruk**  
*Judiciary Award*  
Hon. Alvin W. Thompson  
United States District Court  
for the District of Connecticut



**Edward F. Hennessey**  
*Professionalism Award*  
Hon. Kenneth L. Shluger  
New London District  
Superior Court




**Tapping Reeve Legal Educator Award**  
**Jennifer G. Brown**  
Interim Executive Vice  
President and Provost  
Quinnipiac University  
School of Law




**John Eldred Shields**  
*Distinguished Professional Service Award*  
John Rose, Jr.



**Charles J. Parker Legal Services Award**  
**Erin E. Kemple**  
Connecticut Fair  
Housing Center




**Citizen of the Law Award**  
**Audrey B. Blondin**  
Blondin Law Office LLC



**Citizen for the Law Award**  
**Judith Altmann**  
Holocaust Survivor  
and Educator

### Young Lawyers Section Vanguard Award




**Austin Berescik-Johns**  
Law Office of Austin B.  
Johns LLC


### The Honorable Anthony V. DeMayo Pro Bono Award




**Gayle C. Carr**  
Cohen & Thomas




**Mark A. Healey**  
Mark A. Healey Attorney at Law



**Joanna M. Kornafel**  
Green & Sklarz LLC



**Kristi D. Kelly**  
Suisman Shapiro  
Attorneys-at-Law



**Susan M. Williams**  
Susan M. Williams LLC

**Note:** This event is postponed due to the COVID-19 pandemic. Visit [ctbar.org/awards](http://ctbar.org/awards) or call (844)469-2221 for updates.



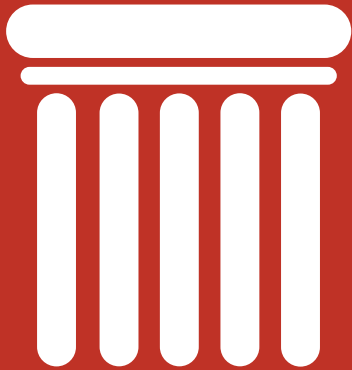
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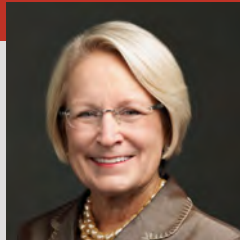
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### Keynote Speaker

**Judy Perry Martinez**  
President, American Bar Association



Judy Perry Martinez is currently serving as the American Bar Association's (ABA) 143rd president. Before her presidency, Attorney Martinez held numerous ABA leadership positions, including serving as chair of the ABA Presidential Commission on the Future of Legal Services and the ABA Young Lawyers Division, and was a member of the ABA Commission on Women in the Profession.

Attorney Martinez has also served in numerous roles within the New Orleans and Louisiana State Bar Associations. She is committed to public service and assisted in the establishment of the New Orleans Pro Bono Project. She is Of Counsel at Simon Peragine Smith & Redfeare LLP in New Orleans, LA.

### Featured Speakers

**Colin McRoberts and Celia Chase**  
SAB Negotiation Group



An attorney and commercial litigator by training, international consultant and trainer Colin McRoberts has a wealth of experience that he brings to his highly interactive training programs. He has worked with clients in a diverse range of sectors, including finance, technology, real estate, insurance, and manufacturing.



Celia Chase is a seasoned leader, who has held senior-level positions in the technology industry and has an in-depth background in strategy and marketing. She has created her career building and managing global, high-performing teams that focus on bottom-line growth.

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[ctlegalconference.com](http://ctlegalconference.com),  
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Hon. Jonathan Silbert  
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Charles Stohler  
New Haven



Eric Wiechmann  
Hartford

FEBRUARY 2020

Su	Mo	Tu	We	Th	Fr	Sa
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10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28		

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\* The National Academy of Distinguished Neutrals is an invitation-only professional association of over 1000 litigator-rated mediators & arbitrators throughout the US and a proud sponsor of the AAJ and DRI. For more info, please visit [www.NADN.org/about](http://www.NADN.org/about)

# CT LAWYER

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## SEND US YOUR IDEAS

Contact editor@ctbar.org.

Article submissions or  
Topic ideas are welcome.

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123rf

# Spending the Balance of Our Lives as Unofficial Ambassadors

BY NDIDI N. MOSES

**“You may never have proof of your importance but you are more important than you think. There are always those who couldn’t do without you. The rub is that you don’t always know who.”**

—Robert Fulghum,  
*All I Really Need to Know  
I Learned in Kindergarten*

**S**pring is in the air, and many of us have begun emerging from the solitude of our homes, offices, and maybe even the ski slopes, to enjoy the steadily increasing hours of sunlight, blooming foliage, and social gatherings. In this season of new beginnings and rejuvenation, our social calendars, which were starving for attention in the dead of winter, will burst with a multitude of opportunities to explore new places and make new acquaintances at networking events, open houses, and cultural celebrations. Coincidentally, my calendar reminded me that my next President’s Message for the *CT Lawyer* was due while I was at my son’s kindergarten open house. When we arrived, my son froze and clung to my leg once his eyes caught the gazes of a room full of unfamiliar parents and children. Within seconds of our arrival into the auditorium, the school’s official ambassadors

*Ndidi N. Moses is the 96th president of the CBA. Her focus for this bar year is balance for a better legal profession. As an active member of the association, she serves on the Board of Governors, House of Delegates, and Pro Bono Committee.*



approached us with enthusiastic chatter and gleeful faces. As they ushered us into the auditorium, my son’s frozen face thawed, and was replaced with dancing eyes. The sincere and welcoming introduction set the tone for the rest of our visit, and transformed my son’s anxiety about starting a new school into anxious anticipation about his new beginnings.

The entire experience transported me back to a series of my own firsts, i.e.: my first day of law school and my first time walking into a networking event. I began to reflect on the crucial roles official and unofficial ambassadors play when we start a new chapter in our lives. For instance, I recall walking nervously and awkwardly onto the University of Connecticut School of Law’s campus, feeling invisible in the sea of new law students, and overwhelmed by the majestic buildings. Then, a welcoming smile greeted me, followed by a genuine and reassuring, “Hello, are you new here?” In that moment, I was reminded that I wasn’t invisible, and the campus began to feel quaint. As I am writing this, I can hear the

chattering voices of attorneys at my first networking event, discussing important cases, legal concepts, and sophisticated ideas. I remember peering out from the furthest corner of what seemed like an enormous room, trying to devise an escape plan. My plan, however, was foiled by the approach of another attorney, who commenced a conversation with me, and gently began to usher me into the crowd to make additional introductions. Instead of initiating my exit plan, I decided to stay a bit longer.

Though my moments with these ambassadors were fleeting, each encounter was life altering. By serving as ambassadors, whether officially or unofficially, these individuals played a crucial role in each chapter of my life. A few of them matriculated to become friends and mentors. The vast majority of them, however, I recognize today only by face, and I doubt many of them remember my name.

While mentors are lauded and celebrated for their efforts, official ambassadors are not often remembered, much less re-



**“I recall walking nervously and awkwardly onto the University of Connecticut School of Law’s campus, feeling invisible in the sea of new law students, and overwhelmed by the majestic buildings.”**

ceive awards for their gracious deeds. The prospect of notoriety is bleaker if one is an *unofficial* ambassador. In fact, these individuals often fail to realize they are performing a service, and would probably decline the title of *ambassador* if it was offered. The vast majority of people reading this article now fall into this category. You may have unknowingly served as an unofficial ambassador at some point in your life if you greeted a law student or young lawyer you did not know, introduced someone you just met to your friends and colleagues, sparked a conversation with an unfamiliar face, or made someone who may feel invisible aware that they are vis-

ible and valuable. In the absence of unofficial ambassadors, our legal community in Connecticut would experience a mass exodus of talent, very prematurely. Accordingly, a long, overdue “thank you” is owed to these thoughtful and unsung heroes and heroines, who quietly and modestly support the vitality of Connecticut’s legal community, requiring neither honor nor acclaim.

This spring, as you are reentering society and reacquainting yourself with the world, please take the time to be aware of those who are making their debut. Imagine the difference we can all make if we

intentionally assumed the role of an unofficial ambassador when we noticed someone was in need of a genuine smile and a friendly face. The next time you are at an event, socializing with your friends and catching up with lost acquaintances, make sure to glance at the outer corners of the room. You may notice some unfamiliar faces lurking there, preparing to make a quick and discreet exit. Before they can craft an escape plan, consider walking over to introduce yourself. You never know—one of them, one day, may assume a leadership role in a bar association and owe a debt of gratitude to you for convincing her to *stick around*. ■



## Don't Go it Alone... Renew Your Membership Beginning April 1

The CBA is the largest voluntary, nonprofit member service organization supporting legal professionals in Connecticut. With nearly 10,000 members, the CBA is dedicated to promoting public service and advancing the principles of law and justice.

### CBA members:

- Network with colleagues, generate referrals, and improve their skills
- Have a voice at the State Capitol
- Give back to the community through volunteer opportunities

Renew online at [ctbar.org/renew](http://ctbar.org/renew) or call our Member Service Center at (844)469-2221.



# Upcoming Education Calendar

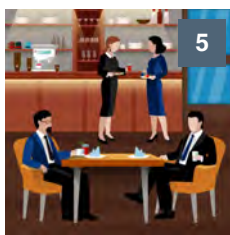
Register at [ctbar.org/CLE](http://ctbar.org/CLE)

## The CBA is taking the following steps in response to COVID-19 (coronavirus):

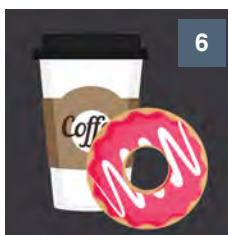
The CBA will not host in-person programs, CLE seminars, or meetings beginning Friday, March 13 through June 30. The Connecticut Legal Conference has been postponed to Monday, September 14. A virtual annual meeting will be held on Monday, June 8. Visit [ctbar.org/coronavirus](http://ctbar.org/coronavirus) for the most up-to-date information.

FREE webinars and conference calls regarding the legal profession's response to COVID-19 are being organized. Visit [ctbar.org/CLE](http://ctbar.org/CLE) for all available seminars.

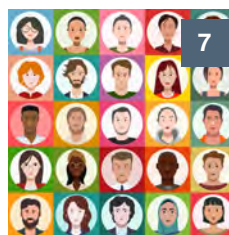
Due to the COVID-19 pandemic, Member Appreciation Month is canceled at this time.



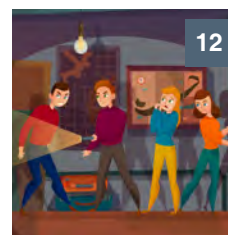
Member Reception



Finals Study Snacks



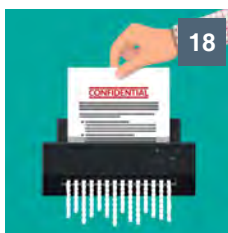
Headshots



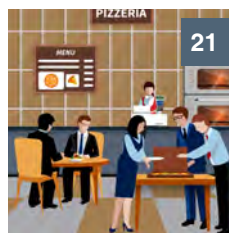
Escape Room



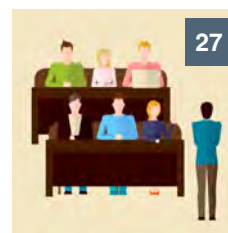
Headshots



Shred Truck



Member Reception



Judges Reception



# News & Events



*Members of the CBA delegation at the ABA Midyear Meeting, including (L to R) President-elect Amy Lin Meyerson, Past President Monte E. Frank, ABA Delegate Stephen J. Curley, Past President Barry C. Hawkins, President Ndiri N. Moses, and ABA YLD Delegate Lauren M. McNair.*

## CBA Members Attend ABA Midyear Meeting

More than a dozen CBA members attended the American Bar Association's Midyear Meeting in Austin, TX from February 12 to 17. Members who attend serve on various committees and divisions, including the Presidential Appointments Committee, Nominating Committee, Youth at Risk Commission, and Committee on Scope and Correlation of Work. President Ndiri

N. Moses lobbied in favor of Resolution 115, regarding the improvement of the accessibility, affordability, and quality of civil legal services; Past President Fred Ury spoke at the National Council of Bar Presidents; and Past President Monte E. Frank spoke before the ABA House of Delegates in support of gun safety regulations.

## IN MEMORIAM

**Eugene E. Cederbaum** passed away on January 17, 2020 at the age of 77. He received his JD from the Columbia University School of Law, went on to attend the US Army Judge Advocate General's Legal Center at the University of Virginia, and then served for four years as a military lawyer, rising to the rank of captain. He practiced law privately and with the firms Nevas Nevas and Rubin, Goldstein and Peck, and Wake See Dimes Bryniczka Day and Bloom. He was actively involved within his community and served as a president of the former Westport Bar Association and as a member of the CBA House of Delegates.

**Lawrence D. Church** passed away on December 4, 2019 at the age of 67. He attended the University of Connecticut School of Law, and went on to partner with Charles Pirro III to open Pirro & Church LLC, where he worked for over 35 years. As a lifelong Norwalk resident, Attorney Church was deeply involved in the Norwalk community, serving on the Common Council, along with stints on Planning & Zoning and Redevelopment. Attorney Church was a member of the CBA Estates and Probate, Litigation, Planning and Zoning, and Solo and Small Firm Sections.

**Robert L. Iamonaco** passed away at the age of 59 on November 8, 2019. He attended Providence College for his undergraduate degree, the University of Connecticut for his MBA, and Western New England University School of Law for his JD. He was a member of the CBA Business Law, Commercial Law and Bankruptcy, and Real Property Sections.

**Hugh C. Macgill** passed away at the age of 79 on Feb 13, 2020. He served as the dean of the University of Connecticut School of Law from 1990 to 2000. While construction of the Thomas J. Meskill Law Library was his signature achievement as dean, he also moved the law school ahead in practical learning, establishing the Tax Clinic, partnerships for transactional and child advocacy clinics, and a clinical fellowship. Dean Macgill's tenure produced the Insurance Law Center, the *Connecticut Insurance Law Journal*, and the university's first two LLM degree programs. He stepped down from the dean's office in 2000, but continued to teach until 2014. Dean Macgill served in myriad professional and civic organizations, including as chairman of the Connecticut Humanities Council, the State Ethics Commission, the Connecticut Urban Legal Initiative, and as president of the Connecticut Bar Foundation, the Connecticut Historical Society, Neighborhood Legal Services in Hartford, and the Watkinson Library at Trinity College.

**Sheldon Aaron Mossberg** passed away on December 22, 2019 at the age of 72. He received a law degree from the University of Connecticut in 1984 and worked as both a paralegal and an attorney at Connecticut Legal Services in Willimantic. In a 30-year career as a Social Security and Disability attorney in private practice in Willimantic, he advocated tirelessly and tremendously for the most vulnerable populations, including the injured, mentally ill, physically disabled, and America's veterans. Additionally, he served on several Boards of Directors, including the United Way and United Services for over a decade. He was also a member of the CBA Disability Law Section.

## YLS Donates \$2,000 to Prudence Crandall Center



(L to R) Prudence Crandall Center Executive Director Barbara Damon thanks YLS Law School Outreach Director Logan C. Carducci and the YLS for their donation.

The Young Lawyers Section holiday party was held on December 11, 2019 at Five Churches Brewing in New Britain, and raised \$2,000 for the Prudence Crandall Center (PCC). Proceeds from the registration fee benefited the Prudence Crandall Center, one of few domestic violence programs in the country offering a unique continuum of shelter, housing, and support services.

"Prudence Crandall Center is a local domestic violence shelter offering short- and long-term emergency housing for victims of domestic violence. This year, members of the CBA Young Lawyers Section became involved with PCC and learned about the amazing services it offers for women, men, and children who are victims of domestic violence. The YLS was honored to work with staff at PCC and to donate all proceeds from the annual Holiday Party to support PCC and help move victims toward safe lives for themselves and their families," said YLS Law School Outreach Director Logan C. Carducci.

GET THE NEWS and JOIN THE CONVERSATION  
[www.ctbar.org](http://www.ctbar.org)

## Charity e-Cookbook Now Available for Sale

A second edition of the *From the Court to Cuisine* cookbook is now available to purchase for \$9.99. Produced by the CBA, this e-cookbook contains over 100 recipes submitted by members of the Connecticut Bar Association, Connecticut Asian Pacific American Bar Association, Crawford Black Bar Association, Connecticut Hispanic Bar Association, Connecticut Italian Bar Association, and the Connecticut South Asian Bar Association as well as CBA staff.

In 2009, the CBA produced a charity cookbook, *From Court to Cuisine*, under



the leadership of past president Livia D. Barn-dollar (2008-2009). As current President Ndidi N. Moses explained in her introduction, the second edition is a compilation of these original recipes, with new additions, and the primary goal “to bring us all together in one kitchen, celebrating our differences, while embracing our similarities.”

All proceeds of this e-cookbook will be

donated to Greater Hartford Legal Aid, New Haven Legal Assistance Association, Inc., and Statewide Legal Services of Connecticut. Visit [ctbar.org/Cookbook](http://ctbar.org/Cookbook) to learn more.

## International Law Section Re-Established

**This fall, the Board of Governors approved** the re-establishment of the International Law Section. The mission of the section is to promote the educational and professional objectives of the CBA within the practice area of International Law, which includes public and private international law. The section anticipates holding regular meetings with CLE credit on the following general categories of topics: international business law, including the sale of goods; international dispute resolution, including arbitration; international family law, including child kidnapping; international human rights; and public international law.

Visit [ctbar.org/sections](http://ctbar.org/sections) for more information on how to join.

## CZEPIGA DALY POPE & PERRI WELCOMES Paul J. Knierim



We are pleased to announce that the recently retired probate court administrator and long-time judge Paul J. Knierim has joined our firm as Counsel to lead our expansion into the dispute resolution practice area.

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## PEERS AND CHEERS

### Attorney Announcements

Bauer Law Group welcomed **Joseph A. DiSilvestro** as an associate attorney. Attorney DiSilvestro represents children as a guardian ad litem and is an attorney for the minor child in custody disputes throughout the state.

**Jennifer E. Gaiette** of Eversource Energy received the Connecticut Power and Energy Society's (CPES) 2019 New Energy Professionals Rising Star Award at The Future of Energy Conference and Exposition. CPES is Connecticut's leading association of energy professionals, is dedicated to generating information, sharing ideas and educating Connecticut about energy.

**Peter R. Knight** of Robinson+Cole was recognized by Lawyers for Children America (LFCA) for providing pro bono legal services to Connecticut children who are victims of abuse and neglect. Attorney Knight has been a volunteer for LFCA for more than 20 years.

**Thomas O. Farrish**, most recently a partner in the Hartford office of Day Pitney LLP, has been selected as a magistrate judge for the District of Connecticut and will preside at the Hartford fed-

eral courthouse. Judge Farrish fills the magistrate judge vacancy created by the retirement of Magistrate Judge Donna F. Martinez.

Holland & Knight's Global Private Wealth Services Group has added **David W. Thal** as a partner in the firm's Stamford office. Attorney Thal focuses on estate planning and the administration of trusts and estates, particularly for clients with family offices and operating businesses.

### Firm/Organization Announcements

**Conway Stoughton LLC** is pleased to announce that it has added three new principals to its team: Julie A. Harris, Yelena Akim and Jay Huntington. In addition, it has welcomed three new attorneys to its team of associates: Peter Sabellico, Amanda Buckingham, and Raymond Gauvreau.

**Murtha Cullina LLP** has promoted Attorneys Elizabeth A. Galletta, James W. McLaughlin and Lisa P. Staron to partner. The firm has also promoted Robert A. Heinimann, Jr. to counsel.

**PEERS and CHEERS SUBMISSIONS**  
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# Professional Discipline Digest

VOLUME 28 NUMBER 4 | BY JOHN MORRIS

**Presentment** ordered for violation of Rule 3.3(a)(1) of the rules for misrepresentation because of a failure to supplement her grievance response to acknowledge a court order for her removal as conservator. Further found the Respondent violated Rule 8.4(4) by failing to diligently pay the conserved person's bills exposing the conserved person to shut off notices and potential eviction. #18-0150, #18-0162, *Cathy & Christine Schwartz vs. Stephanie E. Czap* (8 pages, 8 pages).

**Agreed disposition** to a violation of Rule 4.4(a). Respondent shall take six credit hours of continuing legal education—three in ethics and three in real estate law—within nine months of disposition. Respondent shall provide the committee with a complete CLE Log (Form JD-CE-1) by January 31. #18-0042, *Joann Price vs. Elizabeth Kopec* (11 pages).

**Agreed disposition** of the disciplinary sanction of reprimand for violations of Rules 1.2(c), 1.5(b), 1.4(a)(2), 1.4(a)(3), and 1.4 (a)(4). #17-0554, *Robert Salatto vs. Corey A. Heiks* (10 pages).

**Agreed disposition** for the Respondent to submit to and fully cooperate with an audit of his clients' funds account from May 2016 through December 2018, and further ordered that the Respondent shall make restitution to the Complainant of \$15,000 payable in \$1,000 increments every 30 days until paid in full for violation of Rule 1.15(k)(3). #16-0781, *Grace Ping Liu vs. Benjamin B. Hume* (11 pages).

**Agreed disposition** that Respondent violated Rules 1.3 and 8.1 (2) and P.B. §

2-32(a)(1). Respondent shall make restitution to the Complainant of \$200 within 30 days. #08-0401, *Nicole Sawka vs. Kevin W. Lynch* (10 pages).

**Presentment** ordered for Respondent's violation of Rules 1.5(b), 8.1(2), 8.4(3), 8.4(4) and P.B. § 2-32(a)(1). The Respondent accepted a retainer to pursue to file a complaint with the Dept. of Consumer Protection to address a crumbling foundation matter, failed to file the complaint, and misrepresented to the Complainant that the claim had been filed. Respondent further failed to respond to the grievance complaint and violated Practice Book rules regarding attorney registration. Additional violation of Rule 1.3 to be included at presentment. #18-0282, *Lisa Kirschner vs. David V. Chomick* (9 pages).

**Presentment** ordered for Respondents violation of Rule 8.4(4). Respondent engaged in unethical conduct as a court appointed conservator and conduct prejudicial to the administration of justice by failing to appropriately manage Complainant's finances and diligently pay bills. #18-0149, *Charles Stone vs. Stephanie E. Czap* (8 pages).

**Agreed disposition** of reprimand for violation of Rules 1.1, 1.3, 1.4, and 1.15. #18-0290, *Robert Koteles vs. John Harrington* (10 pages)

**Agreed disposition** of reprimand for violation of Rule 1.2. #18-0386, *RCN Capital LLC vs. Aimee L. Wickless* (10 pages).

**Agreed disposition** of restitution for violation of Rule 1.3. Respondent will make restitution to Complainant of

**Prepared by CBA Professional Discipline Committee members** from public information records, this digest summarizes decisions by the Statewide Grievance Committee resulting in disciplinary action taken against an attorney as a result of violations of the Rules of Professional Conduct. The reported cases cite the specific rule violations to heighten the awareness of lawyers' acts or omissions that lead to disciplinary action.

Presentments to the superior court are de novo proceedings, which may result in dismissal of the presentment by the court or the imposition of discipline, including reprimand, suspension for a period of time, disbarment, or such other discipline the court deems appropriate.

A complete reprint of each decision may be obtained by visiting [jud.ct.gov/sgc-decisions](http://jud.ct.gov/sgc-decisions). Questions may be directed to editor-in-chief, Attorney John Q. Gale, at [jgale@jqglaw.com](mailto:jgale@jqglaw.com).

\$2,000 within 10 days. #18-0484, *Lauren Leblanc vs. Richard P. Lawlor* (10 pages).

**Presentment** ordered for violations of Rules 1.1 and 1.3 for failing to provide competent representation by failing to respond to a motion for summary judgment and failing to appear for the hearing thereon; violation of 1.2 by failing to realize the objectives of the representation; violation of Rules 1.4(a)(1), (2), and (3) and 1.4(b) by failing to communicate with the client; violation of Rule 1.5(a) by charging an unreasonable fee considering the lack of actual representation; and violation of Rule 8.1(2) and P.B. § 2-32(a)(1) for failing to respond to the grievance complaint. #18-0342, *Sean Jacobus vs. Dale D. Morgado* (7 pages).

**Agreed disposition** of presentment to consolidate the matter with another pending disciplinary matter, *Disciplinary Counsel vs. Gatison*, NNH CV 18-6078817, pending in New Haven. #18-0291, *Paul Izzo vs. Keisha S. Gatison* (8 pages).

**Reprimand** and restitution ordered for violation of Rules 8.1(2) and 8.4(4). Respondent violated Rule 8.4(4) by entering into an agreement to resolve a prior grievance complaint by engaging in fee arbitration agreed to be binding, and then failed to pay the award to Complainant. Further, the Respondent violated Rule 8.1(2) and P.B. § 2-32(a)(1) by failing to timely respond to the grievance complaint. Respondent is ordered to make restitution of \$1,470.76 within 60 days. #18-0486, *Paula St. Thomas vs. Thomas Lengyel* (8 pages).

**Audit** ordered for violation of Rule 1.15(b). Respondent set up a bill pay of a personal debt from his IOLTA account, failed to keep complete records of his IOLTA account, and failed to produce records to disciplinary authorities upon request. Respondent maintained a negative balance in his IOLTA account for a substantial period of time. Respondent

engaged in unethical conduct and is ordered to take, in person, and at his own expense, six credit hours of continuing legal education in IOLTA Trust Account management within nine months. Respondent shall also provide the Committee a completed Continuing Education Log (Form JD CE 1) by Jan. 31, 2020. Respondent shall further submit to an audit of his IOLTA accounts from Jan. 2017 through Dec. 31 2019. #18-0560, *Michael Bowler vs. Joseph Barbarie*.

**Presentment** ordered for Respondents violation of Rule 1.3 for failing to diligently represent Complainant, filing an appearance only after judgment entered, and failing to take any action to reopen the judgment. Further Respondent violated Rule 1.4(a)(3) by failing to keep Complainant advised of the status of his case and never notified Complainant that a lien had been filed. Further, the Respondent violated Rule 1.5(a) by charging an unreasonable fee considering the amount of time spent on the case and the result achieved. Lastly, Respondent violated Rule 8.1(2), and P.B. § 2-32(a)(1) by failing to respond to the Grievance Complaint. #18-0127, *Yvonne Francis vs. Jeffrey Cedarfield* (8 pages).

**Presentment** ordered for violations of Rules 1.1, 3.4(3), 8.1(2), and 8.4(4). Respondent violated Rule 1.1 by failing to check land records and corporate records prior to filing a complaint against the wrong party, causing Complainant to lose her claim against the proper parties. Respondent violated Rule 3.4(3) and 8.4(4) by failing to comply with court ordered payments entered as a default judgment against him and failing to appear for examination of judgment debtor. Respondent violated Rule 8.1(2) by failing to respond to the grievance complaint. Additional violation as to P.B. § 2-32(a)(1) to be included at presentment. #18-0322, *Juquina Smith-Shaw vs. Paul Cramer* (8 pages).

**Agreed disposition** of presentment to consolidate with another pending disciplinary matter, *Disciplinary Counsel vs. Giacomi*, UWY CV 17-6033986, pending in Waterbury. #18-0561, *Roger Bolduc vs. Alan Giacomi* (8 pages).

**Agreed disposition** of reprimand to violations of Rules 1.3 and 8.1(2) as well as Section 2-32(a)(1) of the Practice Book. #18-0578, *Mary Ann Pezzente v. Jeffrey D. Cedarfield* (10 pages). ■

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## CBA Career Center

BY CORRINE KING

The Connecticut Bar Association's online job board, CBA Career Center, is your one-stop resource for legal jobs in Connecticut and across the country. Job seekers can apply for legal jobs and post their resume for free to be visible for hundreds of legal employers to view. Employers can post their jobs for a nominal fee. To access the CBA Career Center, visit [jobs.ctbar.org](http://jobs.ctbar.org).

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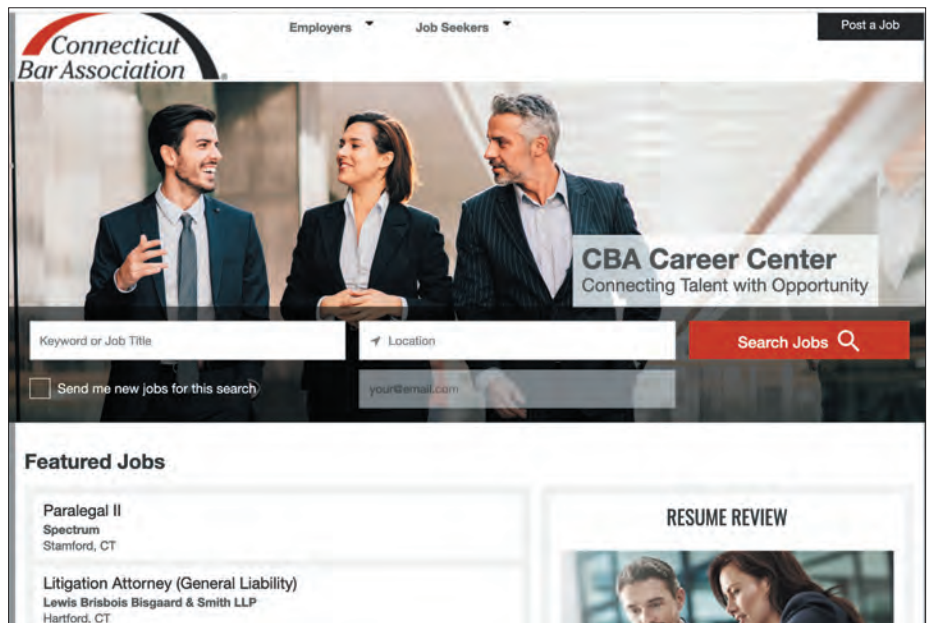
### Job Seekers

#### Job Search and Alerts

Members looking for new career opportunities can search and apply to top jobs in the legal industry on the CBA Career Center. Available positions can be filtered by job function and location. After you set your search criteria, you can sign up for daily or weekly Job Alert e-mails to keep you informed of the latest job postings.

#### Post Your Resume

As a CBA member, you can post your resume in the CBA Career Center's Resume Bank, for free, so employers can contact you. Your contact information will remain anonymous until you choose to share it with an interested employer.



### Resources

The CBA Career Center has a Job Search Resource Center that features everything you need to make your resume stand out, ace the interview, advance your career, and navigate the digital world through social media and digital communication. Career coaches are also available to give you the edge you need to land the perfect job.

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The CBA Career Center is powered by YM Careers. If you need assistance using YM Careers, please call their customer support team at (860)437-5700. ■

*Corrine King is the marketing lead at the Connecticut Bar Association.*

# “A BRAVE N

## HOW COURTROOM ATTORNEYS CAN FLOURISH IN ARBITRATION

BY ROY L. DE BARBIERI  
AND ERIC WIECHMANN

**T**he age of commercial arbitration has come. “We have become an arbitration nation,” said the U.S. Court of Appeals for the ninth Circuit just last year; “an increasing number of private disputes are resolved not by courts, but by arbitrators.”

Like it or not, those confirmed and diehard litigators in the state and federal court systems have to reconcile doubts about the arbitration process and embrace it. The American Arbitration Association (AAA) administers over 150,000 commercial arbitrations nationwide. There are other providers, including JAMS, CPR International Institute for Conflict Prevention & Resolution, and various state organized administration providers who add to this number annually.

From law school on, we as litigators have spent our careers learning how to excel in preparing our cases, utilizing the matrix of procedural rules to our advantage, and how to persuade a jury or overburdened judge of our client’s position. Having handled many different matters in various courts, lawyers believe their skills are easily transferrable to any situation, including commercial arbitration. This is not so easily done. One must appreciate the different approaches that most commercial arbitrators expect to effectively “sell” a case.

Arbitration should not be treated as a “private” version of civil litigation. The same rules and procedures do not apply and the opportunities to adjust the process to your benefit are much greater.



Also, the use of arbitration has grown as it has been continually designed to be better, quicker, and cheaper than litigation in the courts. Lawyers trying to handle their case the same way as they would in state or federal court are adding unnecessary time and expense to the arbitration process.

Following are ten suggestions that should be considered in preparing for and trying a commercial arbitration based on observations collected from well-seasoned and experienced commercial arbitrators.

### **1** KNOW YOUR DOCUMENTS

Arbitration is a contractual process between the parties. The scope of issues to be resolved, the law to be applied, the lo-

# EW WORLD”



cation of the arbitration, the procedural rules to follow, the parties subject to the arbitration, the limitations on damages or other relief are controlled by the parties' agreement. Obviously, one must look to the arbitration clause first—but don't stop there. Review the whole contract to check on controlling substantive law; requirements for pre-arbitration settlement talks; limitations on the award of compensatory; or punitive damages, interest, or attorney fees. Review all exhibits and affiliated contracts to see if there are related issues or parties that should be consolidated into the underlying arbitration. Are there issues that must be tried separately in court or in another arbitration process? Remember these agreed upon rules and principles are not written in stone. As commercial arbitration is a party driven process, the contractual directions can usually be modified if both parties agree to the changes.

Photo credit: Aleksandr Davydov/123RF

## 2 KNOW THE RULES

While the substantive law is probably set in the contract, the procedural rules are usually set by the arbitrable institution mentioned in the contract (AAA, ICDR, JAMS, CPR).<sup>1</sup> While they all slightly differ to an extent, each of these institutions have created rules to encourage a fair, efficient, and economical resolution of the dispute. To accomplish this, the rules discourage the pleadings and motion battles so common to court litigation. Arbitration does not require extensive, detailed, fact-based pleadings. AAA commercial Rule R-4(e) iv requires nothing more than a Claimant setting out "a statement setting for the nature of the claim including the relief sought and the amount involved."<sup>2</sup> There is no need to engage in pleading in court style pleading practice.

## A BRAVE NEW WORLD

A statement of claim (or counterclaim) can be a narrative of a few pages setting forth, clearly and concisely, what was the agreement, what happened, what went wrong, and what the redress should be. This gives you the opportunity to tell your story clearly to the arbitrator and not have the arbitrator get bogged down in hundreds of paragraphs of allegations and numerous legal theories. An experienced arbitrator will be able to work with the parties to identify and refine, by the time of the hearing, the legal theories underlying the claims, answers, and counterclaims. This simplified standard dissuades the pleading practice (e.g., motions to dismiss, motions to strike, request to revise) common to courts.

AAA Commercial Rule R-33 mandates that “the arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the motion is likely to succeed and disposes of or narrows the issues in the case.” In practice, arbitrators are disinclined to grant the filing of these motions. One of the few bases for their award being set aside (“vacated”) is for them to be found preventing a party from fully putting on their case (*see* 9 U.S.C. § 10, C.G.S. § 52-407 *ww*). So unless it is clear that no factual issues are involved and the issue can be resolved solely on a matter of law, arbitrators will wait until the evidentiary hearing to address the issues. Arbitrators also want the parties to expeditiously focus on discovery and not delay the hearing through motion practice.

## 3 KNOW YOUR ARBITRATOR

In many instances, the arbitration clause or rules of the arbitral institution allows the parties significant input in choosing their arbitrators. The parties often have the opportunity to decide the fact finder. This is especially important as there is usually no substantive appeal of their award. There are four basic areas parties should consider in choosing the arbitrator: (1) experience as an arbitrator and as a judge or lawyer; (2) expertise with a specific area of law, industry, or technical area; (3) temperament and ability to organize and supervise the process; and (4) time to commit to properly work on the case. Remember, this is the person or people who will not just render an award, but can work with you to both design and implement the arbitral process.

While records of prior awards are very limited and arbitrators cannot discuss their awards, there are other avenues to get a good idea of your candidates. You can always ask colleagues for experiences with suggested candidates. Most arbitrators have a website that will discuss their experiences, set out their approaches to arbitration, and list their ADR organizations and publications. In some instances, you are entitled to request a non-substantive interview with candidates.

## 4 THE PRELIMINARY CONFERENCE

The initial prehearing conference is one of the most important events in the arbitration. Unlike court cases that are controlled by a myriad of rules and court ordered schedules

set down by overburdened judges, the arbitration process can be customized to the parties’ needs. Prepare for it! Before this initial conference, the arbitrators will provide the parties with a checklist of matters to be discussed. These will cover discovery, scheduling, issues about arbitrability of the dispute, parties involved, interim relief, issues with the authority and acceptance of the panel and numerous other issues. It is important to review these with your client and decide how you want to proceed. It is also expected that you will confer with opposing counsel to see what you both can agree upon. Arbitrators will usually adopt the attorney’s suggestions if they do not unnecessarily delay the process or increase the expense. Arbitrators will often suggest parties attend the hearing or at least have them sign off on the process. Many arbitrators will also be very flexible in setting up the process if they believe it will aid in the presentation of the evidence and the fairness of the hearing.

Once the conference is over, arbitrators will issue an order setting out the schedule for the hearing, document exchange, and other prehearing activities. While they will often allow amendments to this order for good cause, they will be very reluctant to allow changes that will delay the hearing as it might take months to establish new dates for a hearing that will accommodate all of the parties and arbitrators’ schedules. Unlike many courts, postponements are sparingly granted and almost never because of the arbitrator.

## 5 KNOW YOUR OPTIONS FOR INTERIM RELIEF

Remember that arbitrators are available for emergency or interim relief, but do not have marshals or sheriffs to carry out their orders. As the parties have contracted to settle their dispute by arbitration, the arbitration process should be used for such interim needs. The rules generally provided for application to the arbitrator in such instances. Federal and state courts have procedures set to enter orders in aid of arbitration. Save applications to a court for true “time sensitive” emergencies (e.g. before the arbitrators are chosen) or matters involving third parties outside the scope of the arbitrators jurisdiction. Too many times arbitrators are bypassed and practitioners go to court unnecessarily delaying their time for hearing.

## 6 PRIVACY/CONFIDENTIALITY ARE NOT THE SAME

Lawyers always say that one of the advantages of arbitration is that it is private and not subject to the public scrutiny found in most civil litigation. To an extent this is true. Most arbitrable institutions mandate that the hearing should be private.<sup>3</sup> Also, awards, with a few exceptions, are not filed in a public forum and arbitrable institutions will keep them private. It must be remembered, though, that if either party moves in court to enforce or vacate the award, that party can file the award and other relevant papers with the court and thus they become available to

the public. While the process may be private, it does not mean all documents produced or exchanged in the proceeding will be kept confidential, nor are the parties bound to secrecy without an agreement. The arbitrator is also empowered to order at the prehearing exchange of information, or admission of evidence at the hearing, that such information will be treated as confidential (AAA Commercial Rule R-23).

Each attorney must focus on how to protect their clients' document and any sensitive personal or business information. This should start at the initial prehearing conference where the issue of confidentiality should be addressed. This review should go beyond the identification of and designation of confidential information, the redaction of personal information, and the entry by the arbitrator of a confidentiality order. The Connecticut Rules of Professional Conduct require all of us to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of client information (RPC Rule 1.6) and to maintain our competence in using relevant technology (RPC Rule 1.1 official commentary). Transmission or storage of documents, pursuant to discovery or evidence at the hearing, should be protected from cyber-attack. Attorneys and their clients must work with the arbitrator to create a procedure to provide reasonable cyber security to protect the confidentiality of information used in the arbitration.

## 7 DISCOVERY WILL BE LIMITED

For many years, Connecticut arbitrators would say that the Connecticut Rule on arbitral discovery was: "Each lawyer should exchange whatever they have in their file with the other lawyer and proceed to hearing."

While that was rather simplistic, it certainly expressed the desire of commercial arbitrators to reduce and eliminate the excessive costs of time and treasure experienced in litigation style preparation for hearing. Many providers have now instituted basic guidelines for clear, concise, and effective demands for disclosure of documents and exchange of the same. The New York State Bar Association has instituted a very fair and equitable set of protocols to limit the expense and time consuming process created by request to produce "any and all" and "each and every," etc.

Time consuming and expensive exploration depositions have no place in commercial arbitration. Commercial arbitrators have been trained to administer the arbitration process and eliminate unnecessary time consuming and expensive processes that are not necessarily useful to the decision maker. That being said, arbitrators will support and direct, by order, the necessary exchange of significant documents not available to parties who need them. No one expects counsel to arbitrate in the blind, but the limitations imposed are meaningful and significant since arbitration is a dispositive process that is supposed to be expedited. If you really need to take a deposition, be prepared to explain and justify it to the panel.

## 8 KNOW YOUR AUDIENCE

Advocates should be careful not to use courtroom like examinations techniques for cross and direct. Direct testimony can easily be presented by written statements of fact and evidence signed and presented to the arbitrator before the hearing. It saves time and money for the parties and allows the arbitrator to probe and set up for a hearing. Cross examination of direct witness testimony can be the first order of business and begins your hearing by being halfway there. Sure we know that witness statements on direct testimony are always prepared and vetted by lawyers, but so is oral direct testimony. There is no need to take hours and days with direct testimony when an arbitrator can hear it all prior in writing. Also, remember evidentiary rules are relaxed in arbitration. Almost all documents will be admitted by the arbitrator "for whatever they are worth." Limit your evidentiary objections to those of relevance or privilege.

Also, the arbitration room is a small room. There is no place for innuendo, abrasive conduct, or aggressive language towards the opposite parties or their counsel. This is not a jury trial. This is not even a bench trial. Court-like demeanor should be observed, witnesses and parties should be addressed by their surnames. The arbitrator should never be called your honor, but Ms. or Mr. Arbitrator. Snide remarks and attacks on parties or witnesses are no



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## A BRAVE NEW WORLD

way to impress the arbitrator. In fact, it could add to a disrespect for your client's position. During the hearing, listen to the arbitrators' comments or questions to you or the witness. Arbitrators usually are more open in their statements during a hearing than a judge in open court. Their comments or questions are usually made to help them understand testimony or a party's position. Understanding their limited interjections will help you more effectively present your case.

## 9 FOCUS ON DAMAGES

It is surprising how often attorneys will focus 90 percent or more of their presentation at the hearing on liability and then quickly mention damages with little explanation as to how they have arrived at or computed their figures. They often fail to identify all of the evidence needed to support their damages claim, or they forget to discuss how interest should be awarded. This leaves the arbitrator ploughing through the record trying to arrive at a correct amount. While the law and rules allow an arbitrator significant flexibility in determining damages, they are extremely motivated to get it correct. Make sure you help them as there will be no appeal if they mistakenly award an incorrect amount. It is often helpful at the hearing or before post hearing briefs to start a dialogue with the arbitrator about how they would prefer damage presentations be made.

## 10 PREPARE FOR NO APPEAL

When the client is drafting or agreeing to an arbitration clause they almost never focus on the fact that there will be no appeal. The Federal Arbitration Act 9 U.S.C. § 10(a)<sup>4</sup> provides for only four limited reasons to set aside an award, none of which deal with the arbitrator factual findings or incorrect application of the law. When on the eve of the hearing the potential exposure of a negative award becomes clearer, or when the award is rendered, the client becomes very frustrated that they have very limited ability to challenge the award. At this juncture, the time and expense saved in the arbitration becomes less important. As a result, prepare for this eventuality early. It is important to remind the client early of the lack of an appeal so they can take it into account in helping you prepare for the case and possibly consider mediation. Keep in mind that mediation is always available during the arbitration process. AAA Commercial Rule R-9 strongly urges the parties to mediate during the arbitration and arbitrators have a duty to suggest this option. Lastly, remember that some arbitration agreements provide for an appeal of a decision to a special panel of appeal arbitrators. The standard of review in these appeals is not quite as broad as from a court's judgment. It is usually limited to errors of law that are material and prejudicial or a determination of facts that are clearly erroneous. Many arbitral institutions have promulgated rules for such a process (See AAA Optional Appellate Arbitration Rules). In "bet the company" situations, these rules can be agreed upon by the parties in the original agreement.

## CONCLUSION

We have tried here to point out some of the practitioner pitfalls and issues that we often see in the process of administering commercial arbitration cases. Statistics tell us that 90 percent of today's litigators have not been trained in arbitration or dispute resolution. One would be well advised to take a more focused look at the nuances of commercial arbitration and commence a new approach to a very valuable resolution process that has become mainstream and no longer alternative. The American Arbitration Association, JAMS, CPR, and bar associations all provide very interesting and significantly valuable courses for litigation practitioners to adjust to the arbitration style of case hearings. We encourage you to take advantage of these, and to begin to more fully appreciate commercial arbitration and consider its benefits, and dispose of the myths and Shibboleths that have grown over the years. Interesting statistics from the American Arbitration Association indicate that 80 percent of all commercial arbitrations are awarded as requested and 20 percent or less have mixed results, which illustrates the value of embracing commercial arbitration as a key aspect of your practice. ■

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*Roy L. De Barbieri is Of Counsel to the Firm of Zangari Cohn Cuthbertson Duhl & Grello PC, with offices in New Haven, Hartford, and Providence. Attorney De Barbieri has 25 years of experience as an arbitrator and mediator of domestic and international commercial disputes; he is a distinguished dispute resolution neutral, and continues to perform his independent services as an arbitrator and mediator throughout Connecticut and across the country. Additionally, he is a member of the CBA's Dispute Resolution Section Executive Committee, and is a past chair of the section.*

*Eric Wiechmann was a partner at McCarter & English LLP until he retired in 2019; he currently serves as an ADR neutral under the banner WiechmannADR. Over the past 25 years, Attorney Wiechmann has been involved in numerous arbitrations both as an advocate and as a neutral. As an arbitrator, he has handled a wide range of large complex cases involving energy, environmental, product liability, professional liability, corporate disputes, securities, and breach of contract. Additionally, he serves as a neutral for several ADR organizations (AAA, CPR, NADN, NAM, FINRA), the court systems in Connecticut and New York, and for private referrals.*

## NOTES

1. "Any controversy or dispute arising out of or relating to this contract, or the breach thereof, shall be settled by arbitrations administered by the American Arbitration Association under its Commercial Arbitration Rules ..." Commercial Arbitration Association Commercial Arbitration Rules, Introduction.
2. The same standard applies to counterclaims, AAA Commercial Rules R-5.
3. AAA Commercial Rule R-25. "The Arbitrator and AAA shall maintain the privacy of the hearing unless the law requires to the contrary."
4. § 10(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:
  - (1) where the award was procured by corruption, fraud, or undue means;
  - (2) where there was evident partiality or corruption in the arbitrators, or either of them;
  - (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by the rights of any party have been prejudiced; or
  - (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

# Is Remote Deposition Technology Right for You?

BY DONNA M. HOFFMAN

Advances in technology have assisted society in becoming more time and cost efficient while improving our overall well-being. An increasingly popular advancement in court reporting services, the remote deposition can maximize litigators' productivity, reduce clients' costs, and lead to a better work-life balance.

Although one can attend a deposition remotely via speakerphone or Skype, sophisticated technology provides secure web conferencing and features that allow the user to present exhibits and get a real-time feed. Such technology allows an attorney, client, or expert to attend a deposition from anywhere in the world if they have a laptop with a webcam and an Internet connection—as long as the witness does too. It's an alternative to traditional videoconferencing where finding locations equipped to host the deposition is often challenging and is limited to video-to-video communication.

Photo credit: gstockstudio/123rf



## Is Remote Deposition Technology Right for You?

Consider the following benefits of using sophisticated remote deposition technology:

**Maximize Time.** As Benjamin Franklin said, “Lost time is never found again.” Travelling to a deposition wastes valuable time. An eight-hour deposition may cost an attorney 48 hours out of the office while driving to an airport, flying, and potentially staying overnight. With remote attendance, the attorney doesn’t have to leave the office and can resume work as soon as the deposition is over.

**Reduce Costs.** Airfare, car rental and hotel fees, and meal expenses are all eliminated with remote attendance. These cost savings are passed on to appreciative and cost-conscious clients.

**Eco-Friendly.** With remote attendance, exhibits need not be copied and shipped but can be uploaded and presented electronically, which saves costs and trees.

**Additional Attendees.** In-House counsel and expert witnesses can join the deposition remotely to view key witnesses and can privately communicate via chat with outside counsel during the deposition.

**Prep Witnesses/Experts Remotely.** In addition to remote deposition attendance, witnesses and experts can be prepped remotely.

**Improve Work-Life Balance.** Because remote deposition technology saves time, it gives attendees the flexibility and convenience to get back to life, whether that means going to a child’s event or pursuing a hobby or pastime.

**Real-Time Feed.** This is a live feed transcription of the spoken word at the deposition. This feature allows one to search keywords and highlight text.

**Chat Capability.** This feature allows attorneys to communicate privately, publicly, or with agency support staff via a chat screen during the deposition. Make sure to look at which tab you’re on to ensure that you are chatting privately while using this feature.

If you choose to give remote deposition technology a try, make sure the court reporting agency you choose offers security of data, which should be managed and stored in a secure data center that is HIPAA compliant; supervision of the remote deposition from start to finish to ensure that all goes smoothly, includ-

*Continued on page 40 —*



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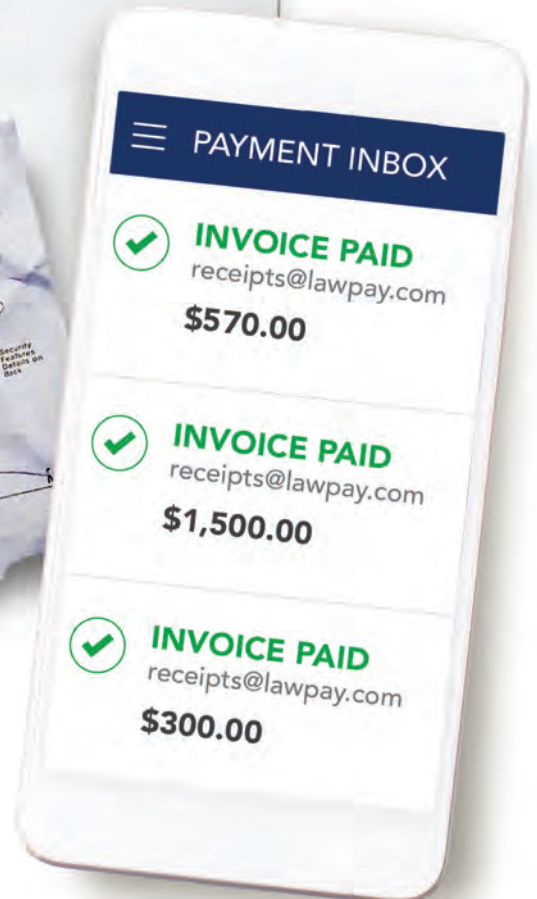
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# Negative Online Reviews: Pause and Think Before You Respond

By David P. Atkins and Marcy Tench Stovall

**It is an inescapable fact of modern life: the internet encourages everyone to have, and share, opinions about everything. And lawyers and law firms, just like restaurants and hotels, increasingly are the subject of online reviews by consumers. Indeed, according to a 2014 survey, more consumers used Yelp to search for a law firm than traditional websites such as Martindale-Hubbell.**

This phenomenon confronts lawyers and law firms with a thorny set of questions: should the firm respond to a former client's negative online reviews, and, if so, what exactly should the firm say—and not say—in its response? And, even if the lawyer's response would not run afoul of the Rules of Professional Conduct, is the posting of an online response prudent as a matter of law firm risk management?

"A lawyer *shall not* reveal information relating to the representation of a client..." (emphasis added) And, as the authors of the *Annotated Rules of Professional Conduct* warn, in contrast to the mechanics of the attorney-client privilege, "Rule 1.6 contains no exception permitting disclosure of information" protected under the Rule even if it has been "previously disclosed or [is] otherwise publically available."<sup>1</sup>

Nor is a lawyer's obligation to stay mum limited to information the client considers to be secret, sensitive, or potentially embarrassing. Instead, a lawyer is duty bound to preserve as confidential *any* information—no matter how innocuous—the lawyer has gleaned that relates to the representation of a client. And this includes matters learned from sources other than the client. As the commen-



## The Ethical Constraints on Publicly Responding to a Client's Negative Online Review

Subject to certain narrow exceptions, Rule 1.6 of the Rules of Professional Conduct imposes a broad prohibition:

Illustration credit: vladwe//iStock

## Negative Online Reviews

tary to Rule 1.6 provides, the obligation of confidentiality “applies not only to matters communicated in confidence by the client but also to *all* information relating to the representations, whatever its source.” (emphasis added).<sup>2</sup>



### The “Self-Defense” Exception

One of the exceptions to client confidentiality within Rule 1.6 is the so-called “self-defense” exception. Under Rule 1.6(d) of the Connecticut Rules of Professional Conduct, a lawyer is permitted to reveal information otherwise subject to the Rule’s strict non-disclosure obligation if the disclosure is made “to establish a claim or defense...in a *controversy*” with a client or “to respond to allegations in any *proceeding* concerning the lawyer’s representation of the client.” (emphasis added) Of course, even under those circumstances, the Rules’ authors impose a restriction on *how much* the lawyer may properly reveal: the lawyer may disclose client information only “to the extent the lawyer reasonably believes necessary.”

The first question for a lawyer seeking to invoke the self-defense exception is whether a client’s use of an online review site such as Yelp to publicly criticize his or her former (or current) counsel creates a “controversy,” thereby freeing the lawyer, under the self-defense exception, to defend his or her reputation by publicly revealing protected client information. Another question is whether such an online posting amounts to a knowing waiver by the client of the confidentiality protections of Rule 1.6. The consensus of state and local disciplinary bodies is a “no” to both questions.

This is true even in New York, notwithstanding that New York’s version of Rule 1.6 appears to expand the circumstances in which a lawyer may reveal otherwise protected client information: a lawyer

may do so in order “to defend the lawyer or the lawyers’ employees and associates against an *accusation* of wrongful conduct.” (emphasis added).<sup>3</sup> The New York Rule does, however, limit the *scope* of permitted disclosure: as in Connecticut, any permitted disclosure about the client may not go beyond what the lawyer “reasonably believes is necessary” to respond to a public “accusation” of misconduct.

In New York State Bar Association Ethics Opinion 1032 (2014), the Bar Association’s Committee on Professional Ethics concluded that the word “accusation” is “defined as ‘[a] formal charge against a person, to the effect that he is guilty of a punishable offense’...or ‘charge of wrongdoing, delinquency or fault.’” In view of that definition, the committee concluded that a New York lawyer may not disclose otherwise protected client confidential information solely to respond to the criticism by a former client posted on a lawyer-rating website.



### Disciplinary Risks of Going Too Far in Refuting a Client’s Negative Review

A Colorado case from 2016 illustrates the disciplinary risks when a lawyer posts a response that exceeds the bounds of what is “reasonably necessary” to address a negative review. The lawyer in question, a solo criminal defense practitioner, was the subject of an online review posted by a former client on Google+. In his review, the former client asserted that his former counsel is the “worst” attorney in Denver, and that he had paid the attorney \$3,500.00 and in return the attorney “did nothing.” He also reported that the attorney had lost his temper and called the client’s wife names. The former client opined that the attorney should be compelled to terminate his law practice.<sup>4</sup>

The attorney posted a response to Google+. Among other things, he described his former client as “nothing but abusive, demanding, insulting and offensive....” He also publicly disclosed the following about his former client: “He was not even able to substantiate the alleged facts that he presented to me....”

The same lawyer also faced a separate online review, posted by a different former client, also on Google+. In that review, the former client called the attorney one of the “worst attorneys” and asserted he was “late and unprepared for hearings, and that he walked out of court before a hearing was over and that he never used evidence given to him.” In his response to that review, the lawyer revealed, among other things, that the former client had paid him with a bounced check and had fabricated affidavits using forged signatures. The lawyer wrote that the former client’s “dishonest, fraudulent, and criminal conduct speak for themselves.”

The disciplinary tribunal found that the respondent lawyer had revealed substantial information relating to his representation of the two former clients, and had done so without the permission of either. Thus, the court concluded the lawyer had violated Rule 1.6. The court rejected the attorney’s defense based on the self-defense exception. The court suggested that even if the lawyer’s responses could be deemed a “defense” “in a controversy between” the lawyer and his former clients within the meaning of the self-defense exception, the content of his responses went too far. He “could not have reasonably believed it necessary to disclose the full range of information he posted.... [It] was unnecessary for [the lawyer] to describe the criminal charges his client was facing, and it was even more gratuitous to allege that [the former client] gave him an insufficient funds check and that she fabricated affidavits.” For his violations of Rule 1.6, the Colorado attorney was suspended for six months.

In 2014, an Illinois disciplinary tribunal considered a similar situation and imposed a reprimand on a lawyer for having violated Rule 1.6 in posting a response on Avvo to a former client's review on the site. Among other things, the lawyer described advice she had given the client about settling his unemployment benefits claim: "Despite knowing he would likely lose, he chose to go forward with a hearing to...obtain benefits." She also editorialized that the client's "own actions...are what caused the consequences he is now so upset about."<sup>5</sup>



### Law Firm Risk Management Lesson: Consider the Benefits of Restraint in Responding to a Negative Online Review

Most online review websites, including Yelp and Avvo, are set up to allow the target of a review to post a response that will appear immediately below the posted comments of the dissatisfied client. Significantly, the operators of those websites themselves alert the responder to precisely the risks that led to the unhappy disciplinary outcomes for the Colorado and Illinois lawyers described above.

Avvo actually suggests wording for a law firm's response to a negative review: "We are sorry you had a bad experience with our firm. This matter does not sound familiar and we strive for the utmost client satisfaction in every case. Please contact me directly to discuss your specific concerns." And Yelp provides this astute caution: "Yelp allows businesses to respond publicly and privately to user reviewers. However,...internet messaging is a blunt tool and sometimes good intentions come across badly." Indeed, posting a response readily can backfire, and it likely will increase the number of consumers who actually read the negative review.

In assessing whether to publicly post a response to a client's negative online review, the law firm or lawyer should first determine if one review by a single, disgruntled former client actually will hurt the reputation of the firm or the lawyer. And if the risk-benefit calculation leads the firm to okay a posted response, the lawyer still must ensure its contents do not include any client information beyond what is "reasonably necessary" to respond to the criticism. The firm also should take care not to disclose sensitive information. Even if such details arguably are "necessary"—and even if accurate—the former client is likely to view the disclosure as an effort at embarrassment or character assassination, thereby subjecting the lawyer to possible disciplinary sanction.

other factors and shared by few, if any, others. They will examine your reputation in light of more than one review. Some opinions are self-discrediting and will only influence people you would not want as clients in any event."<sup>6</sup> ■

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Yelp provides this astute caution:

"Yelp allows businesses to respond publicly and privately to user reviewers. However,... internet messaging is a blunt tool and sometimes good intentions come across badly."

One way of threading this needle is to indicate in the public response that while you disagree with a former client's descriptions, your professional obligations prevent you from responding publicly without the client's consent. Another option: without a point-by-point refutation of the assertions in the negative reviews, direct readers to *positive* reviews posted by different clients.

The following, from an assistant general counsel for the Oregon State Bar, provides a useful summary of sensible guidance to lawyers contending with a negative online review: "Not every opinion must be contested. Reasonable consumers recognize that a negative review may be unfounded, motivated by

#### NOTES

1. Ellen J. Bennett and Helen W. Gunnarsson, *Annotated Rules of Professional Conduct* (9th Ed. 2019).
2. See CBA Standing Committee on Professional Ethics, Informal Opinion 98-17 (Rule 1.6 obligation extends to information obtained from client's bookkeeper concerning client's mental health and suspicion of alcoholism, as well as to lawyer's own observations about client).
3. N.Y.R.P.C. 1.6(b)(5).
4. *People v. Isaac*, 2016 WL 6124510 (Colo. Office of Presiding Disciplinary Judge, Sept. 22, 2016).
5. *In re Tsamis*, No. 2013 PR 00095 (Ill. Atty. Registration and Disciplinary Commission, Jan. 15, 2014).
6. Linn D. Davis, *Reputation Management: Responding to Negative Online Reviews*, 77 Oregon State Bar Bulletin 9 (July, 2017).

# Exploring Connecticut Law in

# TREATMENT WITHOUT CONSENT

## Cases

**T**HE CONCEPT OF INFORMED CONSENT to medical treatment is embedded at the intersection of law and medicine. A clinician can recommend a particular course of treatment, but is not allowed to proceed with it without the informed consent of the patient, after outlining the risks and benefits of proceeding with treatment, and the risks and benefits of not proceeding, as well as other available treatments. The patient then makes a choice whether or not to follow the clinician's recommendation. There are exceptions to this general rule for people who lack capacity to give informed consent. This article will examine Connecticut law regarding treatment without consent, specifically with regard to shock therapy and will provide suggestions to remedy two due process failures in current Connecticut law that undermine the integrity of forced treatment.

Illustration credit: Trifonov\_Evgeniy/Stock

BY GINA TEIXEIRA



## Treatment Without Consent

### ECT and Procedure

Shock, or Electroconvulsive Therapy (ECT), is a controversial treatment option offered to people with serious mental health conditions living in the community and on psychiatric inpatient units. Sometimes people agree to shock after other treatments have failed. In Connecticut, the general rule is that no shock can be administered without the patient's written informed consent.<sup>1</sup> If a physician concludes the person is capable of informed consent, the hospital has authority to administer shock for up to 30 days,<sup>2</sup> and the patient may revoke consent at any time. When the patient is capable of informed consent, the patient is assumed to have balanced the risks, benefits, and alternatives of the proposed treatment after consultation with their doctor, and then made a decision about whether to accept the shock procedure.

The immediate goal of the shock procedure is to have the patient experience a seizure.<sup>3</sup> This is accomplished by the passage of electric current to the brain through two electrode pads placed on the patient's head. Anesthesia like Succinylcholine and Methohexital are often used in shock procedures and warrant an additional informed consent discussion due to the serious nature of these medications. Side effects, and after effects of shock are short- and long-term memory loss and confusion. Somatics, LLC, the manufacturer of Thymatron, a machine that administers shock, has published the following disclosure on their website: "ECT may result in anterograde or retrograde amnesia. Such post-treatment amnesia typically dissipates over time; however, incomplete recovery is possible. In rare cases, patients may experience permanent memory loss or permanent brain damage."<sup>4</sup>

In *Riera v. Somatics, LLC*, the United States District Court for the Central District of California ruled that there was sufficient evidence for a reasonable jury to find that the prominent manufacturer of shock devices, Somatics, LLC, caused brain injury in the plaintiffs by failing to warn their treating physicians of the risk of brain injury associated with shock, and also through failure to investigate and report to the FDA complaints of brain damage and death resulting from shock.<sup>5</sup>

### Informed Consent

In cases where shock is voluntary, there is no need for a Probate hearing.<sup>6</sup> However, what happens when a person refuses consent, or lacks the capacity to consent? If a person resides in the community, shock does not take place. In Connecticut, shock can only be forced on people who are currently admitted to inpatient psychiatric facilities. Probate courts in Connecticut hear shock cases and determine whether a person will be forced to undergo this procedure.

In forced treatment cases involving shock, there is no informed consent requirement under Connecticut law when the head of the hospital and two physicians deem the patient to be incapable of informed consent. In such a case, a petition is filed in probate court, and a hearing is held.

If the probate judge finds that it is more likely than not that 1) the patient is not capable of informed consent and that it is more likely than not that 2) no other, less intrusive, beneficial treatment exists, the court may issue an order permitting shock treatment.<sup>7</sup> The court's order cannot exceed 45 days; however, a hospital may petition for repeated authority to shock over a patient's objection without limit and without a legal requirement to hold informed consent discussions with the patient or with anyone else.

Connecticut also permits treatment with psychiatric medication over objection of a patient in an inpatient psychiatric facility, but the legal standard is different. The forced medication statute provides that if doctors make a determination that the person (respondent in probate court) is not capable of informed consent, the probate court appoints a conservator to go through with the informed consent process and then inform the doctor of their decision about the proposed medication.<sup>8</sup> The informed consent process requires that "[t]he conservator shall meet with the patient and the physician, review the patient's written record and consider the risks and benefits from the medication, the likelihood and seriousness of adverse side effects, the preferences of the patient, the patient's religious views, and the prognosis with and without medication. After consideration of such information, the conservator shall either consent to the patient receiving medication for the treatment of the patient's psychiatric disabilities or refuse to consent to the patient receiving such medication."<sup>9</sup>

There is no informed consent requirement in forced shock cases.<sup>10</sup> Therefore, the hospital can proceed with the shock procedure without being legally required to have a discussion with anyone about the benefits, risks, and alternatives to shock.

In both forced medication and forced shock cases, the determination of whether a person is capable of informed consent is subjective, at best. Often, doctors will conclude a patient is capable of informed consent when the patient agrees with the physician's recommendations and not capable of informed consent when the patient disagrees. The subjective nature of capacity to provide informed consent is just one problem in shock cases. Another problem is that there is no legal requirement for an independent doctor or medical expert to testify. Although the statute requires the head of the hospital and two physicians to bring the petition to probate court, these three professionals work together and cannot be considered "independent." Also, there is no requirement for any of these doctors to be present at the hearing for cross-examination.

### Illusory Rights to Appeal

If the probate court orders shock over the patient's objection, no real legal recourse exists for that person to challenge the probate court order before being forced to have the forced treatment they are seeking to avoid. Neither the probate appeal statute nor the forced treatment statutes currently include any provision for an



automatic stay of the probate court’s decision. Appellants have the right to request a stay of the probate order, but it may not be granted.<sup>11</sup> The hospital can schedule shock on the day the petition is granted, and may have administered dozens of treatments before an appeal is heard. This situation often leaves the patient fearful and experiencing what some have described as the anxiety and stress associated with an imminent assault. The effect of the lack of the automatic stay is to make the right to appeal a nullity.

Therefore, the reality in Connecticut today is that a person can be forced to undergo the shock procedure pursuant to a probate court order, after an informal hearing with no real right to appeal. If the appeal is pursued anyway and the probate court order is found to be legally deficient, the injustice to the person who has already experienced the assault is magnified. The right to appeal seems to exist as part of the statutory right to appeal a probate order.<sup>12</sup> However, that right is completely illusory without an automatic stay of the probate order.

Attorneys appointed by probate courts to represent indigent clients at shock hearings are not compensated for representation on an appeal even if the appeal has merit and serious liberty issues are at stake.<sup>13</sup> This leaves the patient, on a locked psychiatric unit, without legal representation. The already stressful situ-

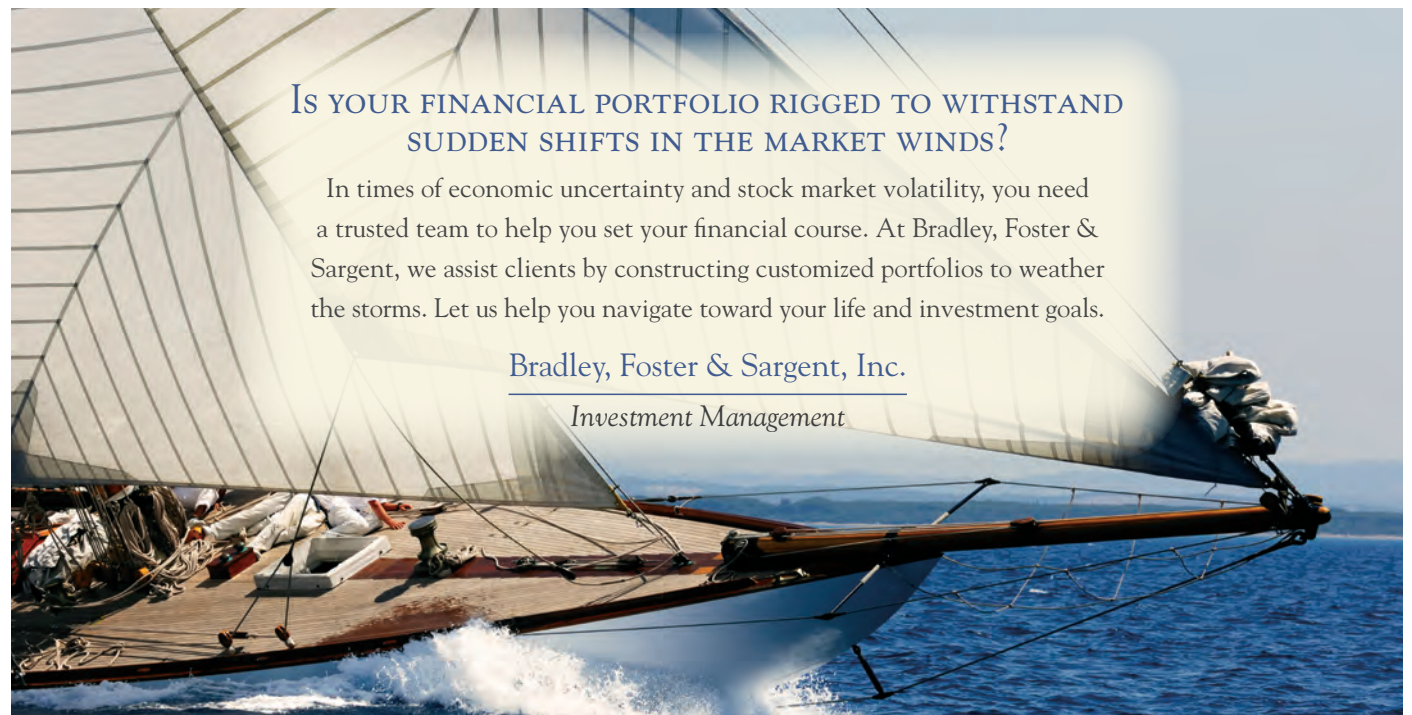
ation for the patient is exacerbated by the desperate need to find an attorney willing to file a motion for stay and a complaint in one day. At a minimum, Connecticut’s shock statute should be amended to provide for an automatic stay of the probate court order in cases of forced treatment to provide a meaningful opportunity for appeal.

### Lower Standard of Proof

In comparing forced shock to forced medication cases, the legal standard is more relaxed in shock cases. The standard of proof for finding someone incapable and allowing a substituted decision maker for forced medication is “clear and convincing evidence.”<sup>14</sup> This is a high standard, exceeded only by “beyond a reasonable doubt” which is only used in the criminal context. There is no standard articulated in the statute for finding someone incapable and ordering shock, so the presumption is that the standard is a preponderance of the evidence (more likely than not).

### Proposed Remedies

Ideally, forced treatment cases would be heard in Superior Court rather than probate court and judges would have no involvement with the appointment of counsel for indigent parties. New York already has a system where forced treatment cases are heard in the trial courts instead of the probate system. In Connecticut,



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## Treatment Without Consent

probate court judges directly appoint attorneys who appear before them to represent respondents. This inherent conflict is not present in juvenile or criminal cases where judges in Superior Court have no role in the appointment of attorneys.

The right to appeal is also more robust in criminal and juvenile matters than it is for people facing forced treatment in probate court. In juvenile cases, for example, if the court-appointed attorney believes there is no legal basis for appeal, that attorney must not only take steps to preserve the appeal, but must also request the appointment of an appellate review attorney to consider whether there is any merit to the appeal.<sup>15</sup> If there is merit, the appellate review attorney will file the appeal.<sup>16</sup> If the appellate review attorney concludes there is no merit to an appeal, that attorney must notify the party in writing of the time left to appeal pro se or with other counsel and a copy of that letter must be sent to the clerk for juvenile matters.<sup>17</sup> These provisions are entirely absent in probate court and help to explain why so few forced treatment cases are appealed even though probate courts hear these cases on a regular basis.<sup>18</sup>

Due process exists, in part, to provide protections for people against government error and overreach. Although forced shock is controversial, there should be broad agreement that the due process issues and the serious constitutional implications that come with having no real right to appeal in Connecticut is some-

thing that needs to be addressed either through litigation or the legislative process, or both. Due process requires more than access to an elected judge, a probate court-appointed lawyer who wishes to continue getting appointments, and a hearing with minimal standards of proof.

Many people think of probate court as the court that handles trusts and estates. *However, probate courts also have the power to take away a person's liberty with an order of commitment, to take away property through conservatorship and to subject people to forced treatment.* At a minimum, forced treatment statutes should include a provision for an automatic stay of the probate court order in the event the decision is appealed so that people facing forced shock have a real opportunity to appeal, just as most aggrieved litigants in Superior Court do when they file an appeal in appellate court. In Connecticut today, a person has no real legal recourse even when a probate court order is made on unlawful procedure, and even when basic due process protections that already exist were ignored. By the time any appeal could get in front of a superior court judge, the forced shock is over. An automatic stay of the probate court order and an informed consent requirement are fundamental aspects of a safe and fair process. It is unconscionable for people to receive forced shock pursuant to probate court orders that are found to be legally invalid on appeal.<sup>19</sup> The need for an automatic stay cannot be overstated. ■

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*Gina Teixeira is a staff attorney at the Connecticut Legal Rights Project, Inc. in Middletown. She represents indigent clients with mental health conditions in probate appeals involving forced treatment decisions and conservatorship issues. She also litigates discrimination cases, defends tenants in summary process matters, and handles Social Security appeals. Attorney Teixeira is a member of the Elder Law and Disability Law Sections of the CBA.*

### NOTES

1. Conn. Gen. Stat. § 17a-543(c)
2. Shock is a series of repeated treatments, usually two or three times a week.
3. "Consensus Conference. Electroconvulsive Therapy," *The Journal of the American Medical Association (JAMA)*, 254, no. 15 (October 1985): 1
4. [www.thymatron.com/catalog\\_cautions.asp](http://www.thymatron.com/catalog_cautions.asp)
5. 2018 WL 6242154 at pp. 4, 11
6. Conn. Gen. Stat. § 17a-543(c)
7. Conn. Gen. Stat. § 17a-543(c)
8. Conn. Gen. Stat. § 17a-543(e)(1)(A)
9. Conn. Gen. Stat. § 17a-543(e)(1)(B)
10. Conn. Gen. Stat. § 17a-543(c)
11. Conn. Gen. Stat. § 45a-186(g): "The filing of an appeal under this section shall not, of itself, stay enforcement of the order, denial or decree from which the appeal is taken. A motion for a stay may be made to the Probate Court or the Superior Court. The filing of a motion with the Probate Court shall not preclude action by the Superior Court."
12. Conn. Gen. Stat. § 45a-186
13. Conn. Gen. Stat. § 45a-649a(c)
14. Conn. Gen. Stat. § 17a-543(e)(1)(A)
15. Conn. Practice Book § 79a-3(b)
16. Conn. Practice Book § 79a-3(c)(1)
17. Conn. Practice Book § 79a-3(c)(2)
18. [www.ctprobate.gov/Documents/2016%20-%202017%20Biennial%20Report.pdf](http://www.ctprobate.gov/Documents/2016%20-%202017%20Biennial%20Report.pdf), pp. 7-9
19. <http://civilinquiry.jud.ct.gov/DocumentInquiry/DocumentInquiry.aspx?DocumentNo=17075911>, <http://civilinquiry.jud.ct.gov/DocumentInquiry/DocumentInquiry.aspx?DocumentNo=17068768>

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# Changing Lives through Pro Bono Pardon Advocacy

By SUE GARTEN

**G**reater Hartford Legal Aid (GHLA) hosted a one-day pardon clinic at its Asylum Avenue office on Saturday, October 19, 2019. The clinic gave 56 Hartford-area residents who had changed their lives a chance to erase their criminal records and get a fresh start. Attorney Ling Ly, part of The Travelers volunteer team, said, “We were inspired by the applicants’ stories of overcoming hardships and dedicating themselves to living better lives.”

At the GHLA clinic, 80 lawyers, law students, and staff from The Hartford, The Travelers Companies, Shipman & Goodwin, Robinson+Cole, and the University of Connecticut School of Law joined GHLA to work with the pardon applicants. GHLA’s community partners—the Urban League of Greater Hartford, the Center for Latino Progress, Community Partners in Action, and Capitol Workforce Partners—had recruited and pre-screened applicants to determine whether they might be successful pardon candidates.

GHLA organized the clinic to address a major problem: about one million adults in Connecticut have a criminal record. Having a criminal record creates a significant barrier to finding a good job and a decent home because employers and landlords routinely do background checks.

“It’s been very hard that the bad choices I made when I was young are used to deny me opportunities even though I have become a much better person. I was so happy that lawyers at the clinic listened to me, treated me with respect, and helped



me tell my story on the pardon application,” explained clinic participant Tasha J.

Connecticut is fortunate to have a system for expunging state criminal records that is professionally managed and politically independent. The state Board of Pardons and Paroles has the authority to erase an individual’s criminal record for convictions in Connecticut state courts, enabling the person to move forward in life without being forever judged by a criminal history. The Board has granted full pardons to about 70 percent of eligible applicants in recent years.

The only legal requirements for getting a full pardon are that three years must have passed since the applicant’s last misdemeanor conviction and five years must have passed since the last felony conviction. The Board considers a number of factors when evaluating a pardon petition, including:

- How many offenses the applicant committed and how much time has passed since the last offense

- How serious the offenses were
- How long the applicant has been clean and sober if drugs or alcohol played a role in the criminal conduct; Whether the applicant accepts responsibility for his or her actions
- What contributions the applicant has made to family and the community since committing the crimes

Representing a pardons applicant is an excellent opportunity for a pro bono attorney to do life-changing work with a limited investment of time. No prior experience doing criminal defense work is necessary. The pro bono attorney can learn the essentials of the pardon process within two hours, can interview the client and prepare the application in one meeting (though the client and attorney

*Continued on page 40* —



*Sue Garten is the managing attorney at Greater Hartford Legal Aid, Inc.*

Photo credit: Andrey Popov/Stock

## Osborn v. City of Waterbury, 333 Conn. 816 (2019): Is the Supervision of Children on a Playground beyond the Common Knowledge of a Layperson?

By CHARLES D. RAY and MATTHEW A WEINER

**A** number of interesting negligence cases came our way in 2019. There was the case in which the Supreme Court held that a doctor owed a duty of care to his patient's girlfriend, who contracted an STD after the doctor incorrectly informed his patient that he was STD-free. *Doe v. Cochran*, 332 Conn. 325 (2019). There was the court's adoption of the alternative liability doctrine in a case where three defendants had negligently disposed of cigarettes, but it was unclear which cigarette had burned down a mill. *Connecticut Interlocal Risk Management Agency v. Jackson*, 333 Conn. 206 (2019). There was the case of a pedestrian, struck by a stolen taxicab, who sued the cabdriver because he had left his taxicab unlocked in a high crime area. *Snell v. Yellow Cab Company, Inc.*, 332 Conn. 720 (2019). To close the year, December brought us *Osborn v. City of Waterbury*, 333 Conn. 816 (2019), and the question of whether expert testimony was needed to resolve the standard of care for the supervision of schoolchildren.

In *Osborn*, the child-plaintiff was a fifth grader at a public elementary school in Waterbury. One day, during a lunchtime recess, a group of students assaulted the child by, among other things, punching her and throwing stones at her face. The attack left the child with facial scarring, posttraumatic headaches, and a "lingering effect on [her] emerging personality and self-image."

At the time of the incident, the school's classroom teachers were on their lunch break. Because the student body ate and went outside for recess together, as many as 400 students were on the playground

when the plaintiff was attacked. Evidence presented during the subsequent civil trial suggested that between one and five adults were monitoring the 400 students on the playground when the attack occurred. Evidence further "demonstrated that the paraprofessionals who broke up the incident and attended to the child after the child was hurt had to run from *inside* the building to address the situation." (Emphasis in original.)

The plaintiff and her mother sued the city and the board of education, among others, claiming that the defendants were negligent in that they failed to provide adequate supervision over the students at recess. After a court trial, the trial court ruled in favor of the plaintiffs and concluded that "1 student intern and 3 or 4 staff members were not sufficient to exercise control over as many as 400 students" on the playground. The court awarded the plaintiffs money damages in the amount of \$67,090.47.

On appeal to the Appellate Court, the defendants claimed that the plaintiffs had failed to produce evidence "that the pertinent standard of care required more than four or five adults to monitor students on the playground...." In particular, the defendants claimed that, without expert testimony, the trial court could not properly have concluded that the standard of care required the defendants to provide more than five adults to monitor 400 elementary school students. A unanimous Appellate Court agreed with the defendants and concluded "as a matter of law, that without expert testimony, the [trial] court could not properly have found that the defendants breached their duty of care to

the child [on the basis that] there was an inadequate number of adults on the playground to supervise the students at the time the child was injured." The Appellate Court therefore reversed the trial court's judgment and remanded with direction to enter judgment in favor of the defendants.

On certification to the Supreme Court, the plaintiffs argued that the trial court did not need expert testimony to determine that the defendants had breached their duty of care to the child. Justice Mullins, writing for himself and Justices Palmer, D'Auria, and Ecker, agreed.

The majority opinion began its legal analysis with a clarification. The majority read the complaint—and the trial court's ruling thereon—to involve a claim of inadequate supervision. Thus, the majority understood the operative claim as being broader than that there was "an inadequate number of staff on the playground." Thus, "the supervisor to student ratio was not the *sole basis* of the trial court's conclusion that the defendants were negligent...." (Emphasis in original.) Instead, the plaintiffs had alleged, and the trial court had concluded, that "the defendants did not exercise proper control over the students" regardless of the supervisor to student ratio.

Turning next to the legal question before it, the majority explained that expert testimony can assist the fact finder in understanding the standard of care applicable in a negligence case and in "evaluat[ing] the defendant's actions in light of that standard...." However, expert testimony is *required* only if the question "goes beyond the field of the ordinary knowledge and experience of judges or jurors."

Usually, expert testimony is required when a plaintiff asserts a claim of professional negligence or malpractice. But there are exceptions. For example, even in a case arising from a professional relationship, expert testimony is not required when “the negligence is so gross as to be clear to a layperson.” Similarly, expert testimony is not required if “the alleged claim of error involves a task that is within the common knowledge of a layperson.”

In this case, the alleged error involved the supervision of children. For the majority, then, the dispositive question was whether this task involved “professional judgment or skill”—and, therefore, required expert testimony regarding the standard of care—or whether it was one more akin “to those that laypeople routinely perform.”

The majority concluded that supervising children is not a task beyond the ken of the average person. It, after all, requires no scientific or specialized knowledge. And the fact that the incident at the heart of this case “occurred on a playground during school hours, rather than on the same playground after school hours, does not change the fact finder’s ability to determine what constitutes adequate supervision.”

Moreover, the majority disagreed with the Appellate Court that expert testimony was needed to determine whether the supervisor to child ratio was adequate. In doing so, the majority reiterated that the plaintiffs’ claim was broader than merely that the defendants had failed to maintain an adequate ratio. “Indeed, even if there had been expert testimony regarding the desired ratio of staff to children and the facts demonstrated that the school met that ratio, the fact finder still may have determined that the supervision was not adequate because adequacy is not based just on numbers, and nothing in the complaint limited the plaintiffs’ claim to a mere numerical calculation between the number of students and the number of adults.”

Justice Kahn, writing in dissent for herself, Chief Justice Robinson, and Justice McDonald, disagreed. For the dissent, a crucial piece of the record, not adequately



considered by the majority, was testimony from the elementary school’s principal. Specifically, the principal testified that the Waterbury Board of Education had a supervision policy requiring a minimum of one supervisor for every 125 students on the playground. Thus, if there had been 400 students on the playground at the time of the incident, supervised by four or five adults, the student to supervisor ratio would have been within the parameters of the board’s policy. For the dissent, then, the legal issue was whether the trial court could have properly concluded, in absence of expert testimony regarding the standard of care, that the defendants had acted negligently “notwithstanding the fact that the supervisor to student ratio complied with or exceeded the goals set forth in the board’s policy.”

In concluding that expert testimony was needed, the dissent likened the case to *Santopietro v. New Haven*, 239 Conn. 207 (1996). In *Santopietro*, a spectator at a softball game, injured by a bat thrown by a frustrated player, sued the umpires of the game. The plaintiffs alleged that various players in the game had engaged in unruly behavior prior to the bat throw, and that the umpires had acted negligently by not taking control of the game. The Supreme Court concluded that because

umpires receive formal training, possess specialized knowledge, and make highly discretionary decisions, to prevail the plaintiff had to present expert testimony establishing that the umpires’ failure to act constituted an abuse of their broad discretion.

As the dissent observed, the defendant education professionals, like the umpires in *Santopietro*, obtain specialized training and knowledge. Therefore, “[a]lthough many fact finders may be familiar with the supervision of children, and even the supervision of large numbers of children, that familiarity does not preclude the need for expert testimony when the fact finder would not be familiar with the procedures and considerations of education professionals when determining appropriate supervisor to student ratios.” In fact, the need for a policy setting forth an appropriate ratio, itself, “supports the view that

*Continued on page 40 →*



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■ Any views expressed herein are the personal views of DASA Weiner and do not necessarily reflect the views of the Office of the Chief State’s Attorney and/or the Division of Criminal Justice.

# Highlights

## Recent Superior Court Decisions

The Connecticut Law Reporter is a weekly publication containing the full text of Superior Court opinions. For copies of the opinions described here, or information about the reporting service, call (203) 458-8000 or write The Connecticut Law Book Company, P.O. Box 575, Guilford, CT 06437.

### ■ Arbitration

*330 Railroad Avenue, LLC v. JCS Construction Group, Inc.*, 68 CLR 807 (Mottolese, A. William, J.T.R.), holds that an arbitration clause of a construction contract that provides for the application of the rules established by a particular arbitration organization, here the American Arbitration Association, while expressly providing that the arbitration shall *not be heard* by the designated organization in violation of the organization's rule prohibiting the use of its rules in arbitrations it does not administer, does not defeat the clause even though compliance is seemingly impossible and may be illegal.

### ■ Bankruptcy and Foreclosure

*LBI, Inc. v. Sparks*, 68 CLR 620 (Calmár, Harry E., J.), holds that the exception to the permanent bankruptcy injunction against suits against a discharged debtor, for claims brought solely in aid of the prosecution of a claim against a third party, applies only to actions to enforce subrogation rights against insurers and contractual rights against guarantors and not to actions to enforce contractual indemnification rights. The opinion reasons that in subrogation actions and actions against guarantors relief is being sought on an obligation directly owed by the third party to the creditor so that relief is available without entry of a judgment against the discharged debtor, whereas a contractual right to indemnification arises only after a debtor has incurred an out-of-pocket expense and therefore cannot be enforced without the entry of a judgment against the debtor.

In a mortgage foreclosure action a dispute over the proper description of the property securing the obligation bars entry of summary judgment as to liability, both because there is an unresolved issue of fact (the identification of the property subject to the mortgage), and because judicial efficiency would be served by resolving the dispute before entry of summary judgment. A title search has revealed that a portion of the property described in the mortgage deed infringed on an adjoining neighbor's land to an as yet undetermined extent. *Wells Fargo Bank, N.A. v. El-Sharnouby*, 68 CLR 891 (Taylor, Mark H., J.).

### ■ Civil Procedure

A public school district is an entity existing independent of the district's board of education. Therefore the only statutory authorization for service of process against a school district is Conn. Get. Stat. § 52-57(b)(4) which authorizes service "upon its clerk or one of its committee." Service upon any other town department or official, including the town clerk, would be insufficient. *Mulvihill v. Danbury Public Schools*, 68 CLR 849 (D'Andrea, Robert A., J.).

### ■ Contracts

A general contractor's imposition of a mandatory job site safety program and monitoring of subcontractors for compliance do not establish sufficient control to impose liability for injuries at areas under subcontractor control. *Bustamante v. FIP Construction, Inc.*, 68 CLR 765 (Budzik, Matthew J., J.).

The statute prohibiting the commencement of an action to recover a real estate

commission by a person not holding a valid real estate license, Conn. Get. Stat. § 20-325a(a), does not impose a subject-matter jurisdictional requirement. Therefore a person relying on the statute to defend an action to enforce a commission must assert the statute as a special defense. This opinion denies a motion to dismiss a complaint for a commission brought by an unlicensed person, sought on the grounds that the statute deprived the plaintiff of standing because no special defense had been filed. *Connecticut Building Solutions, LLC v. Boliakis*, 68 CLR 609.

Allegations that the defendant, a managing member of a limited liability company, negligently misrepresented the LLC's capabilities as a construction contractor and negligently supervised the performance of a construction contract between the plaintiff and the LLC, are sufficient to state claims against the defendant individually for negligent misrepresentation and a violation of CUTPA. However, the allegations are insufficient to state a claim against the defendant individually for negligent supervision of the LLC's performance of the contract. *Bibb v. Modern Construction, LLC*, 68 CLR 903 (Shaban, Dan, J.).

### ■ Environmental Law

*Blue Bird Prestige, Inc. v. Stratford IWC*, 68 CLR 727 (Radcliffe, Dale W., J.), holds that the statutory extension of the jurisdiction of inland wetlands commissions to include activities in upland review areas, Conn. Get. Stat. § 22a-42a(f) (authorizing jurisdiction over any activity in an upland area "likely to impact or affect wetlands or watercourses"), does not authorize IWC

regulation of any activity in such an area but rather only activities that are “likely to impact or affect wetlands or watercourses.” This matter involves a commission decision to deny a wetland application on grounds that there is an available alternate use for the upland review area which would pose a reduced risk of impacting an adjacent wetland area. The opinion holds that the absence of any evidence that the proposed activity is likely to have an effect on the wetland area deprives the commission of any authority to deny the application, or even to exercise its authority to impose a “feasible and prudent alternative” to the proposed application, Conn. Get. Stat. § 22a-41.

### ■ Immigration Law

In a civil action for injuries incurred in a motor vehicle accident brought by a foreign alien, the alien may not be questioned concerning immigration status because such questioning may interfere with the state and federal constitutional right of all foreign aliens to access to the civil courts of this state regardless of immigration status, unless the alien is seeking damages for a loss of future wages (because the likelihood that such a claimant will leave the country is relative to an evaluation of future income). *De Lantigua v. Shaw*, 68 CLR 871 (Krumeich, Edward T., J.). The opinion also makes the broader holding that the status of an alien defendant’s operator’s license is inadmissible in an action for personal injuries from a motor vehicle accident, other than, perhaps, in an action for negligent entrustment.

### ■ State and Local Government Law

*Tierinni v. Noonan*, 68 CLR 906 (Sferrazza, Samuel J., J.T.R.), holds that State marshals are “state officers or employees” within the definition of that phrase contained in the Claims Against the State Act, Conn. Get. Stat. § 4-141(5). Therefore any claim against a state marshal arising out of the performance of service of process duties must be first presented to the Claims Commissioner pursuant to the Claims Act.

Only the Superior Court, and not a Pro-

bate Court, has authority to appoint directors for an inactive and dysfunctional nonstock corporation that owns a cemetery which has fallen into a state of disrepair. The court’s authority is established by the Nonstock Corporation Act, Conn. Get. Stat. § 33-1091a, and not by a statute specifically applicable to cemeteries. The opinion notes the lack of judicial precedent governing the management of deteriorating cemeteries. *Bridgeport Probate Court v. Park Cemetery Association, Inc.*, 68 CLR 791 (Arnold, Richard E., J.T.R.).

### ■ Unemployment Compensation

*JCC of Greater New Haven, Inc. v. Administrator, Unemployment Compensation Act*, 68 CLR 872 (Richards, Sybil V., J.), holds that in an appeal from a decision of the Employment Security Appeals Division Board of Review, the granting by the Board of the appellant’s motion to correct a finding does not authorize the court to question the board’s credibility determinations in light of the corrections, because a court on appeal from the Board may only consider “evidence certified to it by the board and then for the limited purpose of determining whether the finding should be corrected,” P.B. § 9-2(a). The opinion also holds that an unsworn statement of an applicant’s co-worker is admissible as evidence in an unemployment compensation proceeding.

### ■ Zoning

*B. Metcalf Asphalt Paving, Inc. v. North Canaan PZC*, 69 CLR 24 (Shaban, Dan, J.), holds that an automatic approval caused by a zoning agency’s failure to take timely action on a site plan application may not be enforced through a zoning appeal but rather only through a plenary action such as a mandamus action. A right to automatic approval may not be enforced through a zoning appeal because the Zoning Appeal Statute authorizes appeals only from agency “decisions,” Conn. Get. Stat. § 8-8(b).

Renovations to a single-family, ranch style home to accommodate five unrelated elderly adults does not convert the home into a “boarding house” under a zoning

ordinance that defines a permitted “single-family dwelling” as a structure housing either individuals who are all related by blood or marriage or up to five unrelated individuals, and defines a “boarding or rooming house” as a structure housing not more than 20 persons “where meals may be provided.” The structure is to be used as a group home for five unrelated elderly persons who will be serviced daily by a licensed home-care business that will provide assistants working in shifts to help cook meals and assist residents with other daily chores. The opinion distinguishes a “board home” from a “single-family residence” primarily on the grounds that the residents of a boarding house generally do not engage in communal living, do not consider the premises to be their permanent residence, and do not share a common characteristic (as, for example, all being “elderly”). *7 Forest Hill Road, LLC v. Norwalk ZBA*, 69 CLR 41 (Mottolese, A. William, J.T.R.). ■

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# Plate #3: Keep a Healthy “Rotation”

By AMANDA G. SCHREIBER

**T**here is a symbiotic relationship between work and the rest of your life. If you eat well, exercise, get adequate sleep, and develop overall healthy habits there will be a natural benefit to your career. It is an all too easy to understand concept that few young lawyers, or lawyers of any age, have mastered.

My column this year has explored the juggling act of the present-day young lawyer. I started the year opining that a young lawyer’s life often feels like a plate spinning act at the circus—one individual desperately juggling, trying to keep those delicate plates twirling in the air. To date, I have explored the work and family plates, and the obstacles to keeping those metaphorical plates spinning.

However, the most neglected plate for most young lawyers is the health and wellbeing plate. Of all the plates in a young lawyer’s life it is the one most likely to fall, crashing down and shattering to pieces.

It’s no surprise. After all, lawyers work in a career prone to unhealthy habits and toxic levels of stress. With the advent of new technology, our jobs have become sedentary. We sit gazing at a laptop screen for extended periods of time, repeating the same movements over and over (hopefully not reaching for that tin of leftover holiday candy). Worse yet, for all the satisfaction that comes from working in a career defending fairness and justice, our day-to-day is fraught with a high consequence of error, unpleasant and angry people, focus on pre-

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cision, deadline-driven burdens on time, and generally long work days (noted as I write this article at midnight).

### So why don’t we do better for ourselves?

I don’t think this plate is neglected because lawyers do not comprehend the importance of self-care. It’s because stress stems from a lack of resources to accomplish goals, and in the prioritizing process we tend to put ourselves last. As a class we are a stressed out, overextended bunch. If it is not an immediate concern, it does not get addressed as a priority.

This simply cannot be for lawyers of any age. But to my young lawyer colleagues, I offer this advice: you must understand that there is a puberty to your career, including an awkward and prolonged period of growth. A successful legal career requires years of learning the craft, networking, and building a practice—it doesn’t happen overnight. A part of that journey must include a focus on your own health and wellbeing. To have a long and prosperous legal career, you’ll

need to keep your mind sharp. Further, you’ll want to maintain sound health so you can best enjoy the fruits of your hard labor and are better equipped to withstand the obstacles life in the law will throw your way.

Although I have surely not mastered this balancing act myself, colleagues offer advice on how best to keep the metaphorical health and wellbeing plate in rotation. Working in a daily break or routine is a simple way to maintain health and wellbeing no matter how busy the day. After all, there is a reason major fitness companies remind you to stand up and take 200 steps an hour.

“I fill the fridge with healthy foods and try to eat throughout the day,” says Johanna Katz, Appellate Practice co-chair of the Young Lawyers Section and associate at Pullman & Comley LLC. “Finding time to exercise is much harder though. I find if I can go to the gym I get a boost of energy, but that’s not an option some days. On those days I’ll do squats or push-ups against the counter while microwaving lunch or waiting





“ To have a long and prosperous legal career, you’ll need to keep your mind sharp. Further, you’ll want to maintain sound health so you can best enjoy the fruits of your hard labor and are better equipped to withstand the obstacles life in the law will throw your way. ”

for my coffee to brew. Finding just one minute of exercise here and there makes a difference.”

On those days you can take more significant time to yourself, colleagues recommend finding an activity that provides an emotional reset. Too often lawyers push themselves to the breaking point. To better serve yourself and your long-term career, become adept at identify-

ing that point and provide yourself the much needed, head-clearing break. “Get out,” says Jonathan Friedler, non-CLE director of the Young Lawyers Section and associate at Geraghty & Bonnano LLC. “I like hiking, it’s therapy for me. The physical health aspect speaks for itself, but it also clears my mind. Nothing feels better than accomplishing your task and there’s nothing like being at the top of the mountain.”

It is my hope that this column ignites conversation among lawyers of all ages as to the importance of the health and wellbeing plate and the need to maintain a focused eye on it. Use your career and its challenges not as a detriment, but as inspiration and motivation to live the life you want to live—happier and healthier. ■

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## Supreme Deliberations

Continued from page 35

the appropriate supervision ratio for an elementary school playground based on the unique circumstances of that setting is not a simple issue with which every adult would be automatically familiar.”

Certainly, reasonable minds can differ regarding whether the supervision of large numbers of children is a task within the “common knowledge of a layperson.” But perhaps the most intriguing thing about *Osborn* to us appellate nerds was the starkly different ways that the majority and the dissent viewed the record; in particular, the testimony regarding the existence of a policy concerning the appropriate supervisor to student ratio. The principal testified that the board had a policy of “1 staff to 125 students” and that the policy was included “in the handbook for policies and procedures.” It was this testimony upon which the dissent based its argument that the plaintiffs needed an expert to establish that the defendants had violated the applicable standard of care *notwithstanding their compliance with the written policy*.

But as the majority pointed out, the dissent’s use of the principal’s testimony seems contrary to how reviewing courts

typically view the evidentiary record. The trial court, after all, did not make a finding regarding the existence of a policy or what the policy entailed, and the written policy itself was not admitted into evidence at trial. Thus, how do we know that the trial court found the principal’s testimony credible? And doesn’t the principle that an appellate court should read the record in the light most favorable to sustaining the judgment require the reviewing court to assume that the trial court did *not* find the testimony regarding the policy credible?

Perhaps the takeaway is that trial court judges in civil cases would be well advised to include a footnote in their written opinions that states something like the following: “any...evidence on the record not specifically mentioned in this decision that would support a contrary conclusion, whether said evidence was contested or uncontested by the parties, was considered and rejected by the court.” *State v. Diaz*, No. CR-17-0176287, 2018 WL 4955690, at \*1 n.1 (Sep. 24, 2018) (*Vitale, J.*). Some judges in criminal cases have been dropping such a footnote over the past few years and, to our knowledge, none of the decisions containing the footnote has been subject to the scrutiny employed by the dissenters in *Osborn*. ■

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## Pro Bono

Continued from page 33

will need to gather supplemental documentation, such as police incident reports and probation letters), and may appear at just one brief hearing before the Board of Pardons and Paroles. The legal services programs can mentor pro bono attorneys who are interested in this work, which can be done with an individual referral outside of a clinic context.

The assistance and support of a compassionate attorney goes a long way to helping men and women with criminal records complete the pardon application process. The pardon process requires all applicants to revisit their criminal past. They must write a personal essay about why they want a pardon and how they

have changed since their criminal activity. For many, writing the essay is an intensely painful and emotional experience, as they relive the years of addiction, victimization, mental illness, and troubled relationships. And in order to get the required references they must disclose their full criminal history to people who now know them as trustworthy co-workers, fellow congregants, or neighbors. Many people simply do not complete the application process because of the emotional pain involved.

Everyone who is granted a pardon will tell you that it is liberating to be unburdened by their criminal record, able to work and live without fear of being judged and obstructed for mistakes in their past. General Counsel David Robinson of The Hartford stated: “The Hartford was thrilled to

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## Remote Deposition

Continued from page 22

ing available support staff for potential troubleshooting; and exhibit chain of custody, which should be the same as at a traditional deposition.

A growing number of attorneys have started to use remote deposition technology to enhance their practice and save time and money. If you have been considering it and the above benefits align with your practice’s needs, then remote deposition technology may be right for you. ■

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