Volume 31 | Number 4

March | April 2021

CT LAWYER

2020 YEAR IN REVIEW

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Supreme Court of Connecticut

Edward F. Hennessey Professionalism Award
Patricia R. Kaplan (posthumously)

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John Eldred Shields Distinguished Professional Service Award
Amy Calvo MacNamara
The Law Offices of Amy Calvo MacNamara

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Kathy Flaherty
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Greg Davis
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Loree Foundation

James M. Loree
Loree Foundation

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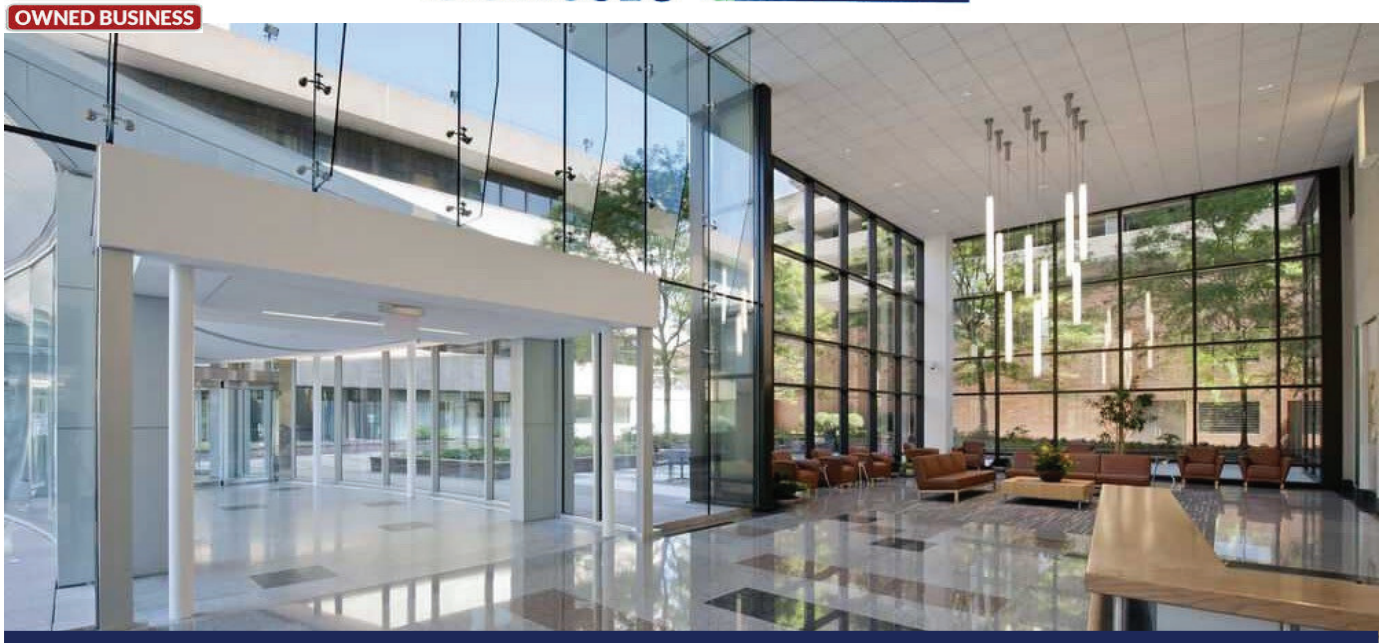

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FEATURES

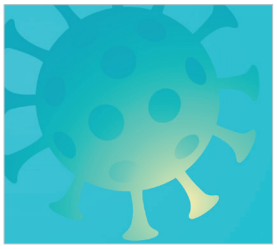
11 The Resource Report: Find a Lawyer CT

12 2020 and Lawyer Ethics
By Jonathan Friedler and Mark Dubois

18 Assignees of Past Due Loans: What You Need to Know *By Elizabeth C. Yen*

22 2020 Developments in Labor and Employment Law in Connecticut
By Lewis Chimes and Mary-Kate Smith

29 Endurance of the Legal Profession During a Crisis *By Kyle LaBuff*



COLUMNS

4 PRESIDENT'S MESSAGE

2020 Year in Review: Staying Connected While Apart *By Amy Lin Myerson*

30 DIVERSITY, EQUITY, & INCLUSION

What Gets in Our Way? The Challenges of Achieving Diversity, Equity, and Inclusion in the Legal Profession *By Cecil J. Thomas and Karen DeMeola*

32 TIME TO GO PRO BONO

Investing in Justice: The Impact of Establishing Right to Counsel for Tenants Facing Eviction *By Cecil J. Thomas*

34 SUPREME DELIBERATIONS

Revisiting the Doctrine of Governmental Immunity? *By Charles D. Ray and Matthew A. Weiner*

40 YOUNG LAWYERS

An Anchor in the Storm: YLS Lawyers in the Classroom Project
By Cindy M. Cieslak

DEPARTMENTS

6 Education Calendar

7 News & Events

36 Court Decisions

SEND US YOUR IDEAS

Contact editor@ctbar.org.

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2020 Year In Review: Staying Connected While Apart

By AMY LIN MEYERSON

Amy Lin Meyerson *is the 2020–2021 President of the Connecticut Bar Association. She is a sole practitioner in Weston, Connecticut, practicing business and general corporate law.*

A year has passed since Governor Lamont used the CTAlert system to urge all Connecticut residents to "Stay Safe, Stay Home."[1] In response to the global pandemic, the Connecticut Bar Association deployed its COVID-19 Pandemic Task Force working in concert with the governor's office and the Connecticut Judicial Branch to resolve legal issues and provide timely and accurate information and resources to CBA members, our legal community, and the public at large as quickly as possible.

We express our gratitude to the task force co-chairs,[2] task force subcommittee co-chairs,[3] their respective members, and other good and special CBA members for their dedication and countless hours volunteering tirelessly to promote the health and vitality of the legal profession and ensure access to justice for our clients, including our most vulnerable neighbors in need of basic human necessities.

While the work of the COVID-19 Pandemic Task Force has come to a close, we are aware that many of our members and other lawyers still are experiencing difficulties and have concerns that are not being addressed. The CBA is working on your behalf to understand, navigate, and advocate for you to provide the most up-to-date solutions and resources available. We will continue to collaborate with the governor's office, the legislature, and the Judicial Branch to find answers to your questions and further guidance on how to safely engage in the practice of law.

Facilitating meetings with the Judicial Branch and promoting CBA positions[4] with the state legislature are just some of the continuing efforts we have been diligently moving forward.

Through open lines of communication with the Allocation Subcommittee of the Governor's COVID-19 Vaccine Advisory Group,[5] we have expressed the concerns facing front line attorneys who are at risk because of the nature of their practice and the operation of the courts, including the issues facing the criminal defense bar. The importance of the vaccine to restoring the operations of our court and increasing access to the judicial system cannot be overstated. We urge the Allocation Subcommittee to make a recommendation to the governor to prioritize at-risk attorneys on the vaccine distribution schedule.

> "And so we lift our gazes not to what stands between us but what stands before us
>
> We close the divide because we know, to put our future first, we must first put our differences aside
>
> We lay down our arms
> so we can reach out our arms
> to one another
>
> We seek harm to none and harmony for all
>
> ~National Youth Poet Laureate, **Amanda Gorman**

The economic impact of COVID-19 will cause an unprecedented eviction crisis, temporarily stayed by state and federal eviction moratoriums. Lawyers, judges, and court administrators continue to take the lead in finding new avenues to gain access to justice. If you are able, please volunteer for any one of the programs the CBA has developed to help marshal pro bono attorneys to assist those in need, including CBA Pro Bono Connect, CT Free Legal Answers, CBA Virtual Small Business, CBA Free Legal Clinics, and CBA Lawyers in Libraries.

Whether it is giving your time or monetary support, we encourage you to engage with us. You may find these volunteer and charitable giving opportunities that align with our mission of advancing the legal profession and the principles of law and justice or meet the needs of some of Connecticut's most vulnerable residents through CBA Gives[6] at ctbar.org/CBAGives and at ctbar.org/ProBono.

Insights, inquiries, and recommendations from the legal community on what more the Connecticut Bar Association may do are greatly appreciated. The CBA welcomes your input on issues and concerns that we may assist to resolve. You may post inquiries anonymously by clicking on the "Share Your Inquiry or Concern" button on the CBA website. However, if you submit your contact information, we will respond to you directly when we have a course of action and/or an answer.

As we continue to await word on when the CBA can begin to reopen our offices and safely bring back in-person events, we invite you to Connect to Succeed and join us as we Champion our communities; Broaden networks; and Advance justice. Despite the challenges arising from the pandemic and in the face of great social unrest, we were able to continue to guide our clients to good and right results.

The theme for this issue of the *CT Lawyer* is "Year in Review." You will read articles that feature the achievement of just some of our colleagues over the past year in different practice areas, including ethics, employment law, and debt collection laws.

We are excited that we will soon have new attorneys join our ranks to assist with our ongoing efforts. On January 14, 2021, the CBA and the Connecticut Bar Examining Committee joined Chief Justice Robinson for a virtual event hosted by the Connecticut Judicial Branch to congratulate recent law school graduates and other successful candidates who passed the Connecticut bar exam administered in February 2020 and October 2020.

Once these successful bar exam takers are admitted to the Connecticut Bar, they will receive a letter from the Connecticut Bar Association confirming their automatic free membership to the CBA with an offer to join up to three of our sections for free for the remainder of the bar year.

Through our 70+ sections, committees, and task forces, the CBA provides professional development and networking opportunities that are crucial to the exchange of ideas and information to equip us with the knowledge and resources to serve our clients while staying connected, resilient, and motivated. The CBA delivers the outstanding services and award-winning CLE programs we need to be the exceptional legal professionals our citizens and communities rely upon. One of our largest and most active sections is our Young Lawyers Section, or YLS, which is the home in the CBA for new attorneys who are 37 years old or younger or those who have been admitted to the bar for less than six years. Read the YLS column on page 38 to learn more about the YLS activities.

We look forward to welcoming Connecticut's newest attorneys into our CBA membership and are excited to encourage and support the civil and robust open exchange of diverse ideas and perspectives among them. Civility allows us to listen to one another, share ideas, and advocate effectively. We continue to champion the rule of law to ensure that laws are not capriciously applied or misapplied against individuals and by lawmakers themselves. Examples from our not-too-distant past show that we still have much work to do and must be ever vigilant.

Stay safe and be well. ■

NOTES

1. https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2020/03-2020/Governor-Lamont-Uses-CTAlert-System-to-Urge-Connecticut-Residents-to-Stay-Safe-Stay-Home
2. https://www.ctbar.org/members/sections-and-committees/task-forces/2020-covid-19-pandemic
3. https://www.ctbar.org/members/sections-and-committees/task-forces/2020-covid-19-pandemic/subcommittees
4. https://www.ctbar.org/legislative-affairs/legislative-agenda
5. https://portal.ct.gov/DPH/Communications/Disease-Preparedness/COVID-19-Vaccine-Advisory-Group
6. https://www.ctbar.org/about/cba-gives

Upcoming Education Calendar

Register at ctbar.org/CLE

MARCH

17 Residential Real Estate Closings Series | Important Considerations from Commitment to Policy

17 Trial Skills Series—Summation

18 Motley Speaker Series: Structural Racism and Financial Services*

22 Legal Entrepreneur Series: Hanging Your Shingle/Opening Your Own Solo or Small Firm Practice

23 How and Why to Use a Vocational Expert in Litigation

24 Be a Trusted Advisor—How to Make Decisions Under Uncertainty

24 Trial Skills Series—Direct Examination

25 Immigration Family Law

25 Connecticut's Paid Family Medical Leave Act: What Attorneys Need to Know

31 Mode of Operation: Narrowed to Nothing? Relevant Authority, Pleading, and Practical Application

APRIL

1 Wellness for Wealth: Simple Strategies to Up Your Game*

7 Residential Real Estate Closings Series | Trends, Ethics, E-things, Cybersecurity: Everything "E"*

7 Trial Skills Series—Cross Examination

12 Legal Entrepreneur Series: Building Revenue and Ethical Considerations as a Solo/Small Firm Attorney*

14 Trial Skills Series—Opening Statement

19 Negotiations

21 The Importance of Networking and Building Connections

27 Media Training for Lawyers*

MAY

3 Sheff v. O'Neill—25th Anniversary

5 Stay Connected: Return to the Office, Not to Old Tech

10 Legal Entrepreneur Series: Marketing Your Solo or Small Firm

**Ethics credit available*

CBA Provides Pro Bono Legal Services in Libraries

CBA Vice President Horgan, Public Library of New London's Director of Informational Services Thomas Kramer, and Attorneys Zrenda and Scully volunteer for Lawyers in the Libraries at the Public Library of New London.

The CBA has established the Lawyers in the Libraries program to provide free pro bono legal services to members of the public in a community setting. The program, which began on December 3, allows members of the public to register for a 20-minute appointment and receive free legal advice in the areas of landlord/tenant, immigration law, family law, employment, consumer rights, and personal injury at the Public Library of New London and Ferguson Library in Stamford.

"With the COVID-19 restrictions in place, the CBA is thrilled that we are able to provide in-person and virtual legal services through our Lawyers in the Libraries program," said CBA President Amy Lin Meyerson. "Many thanks to Kyle LaBuff and CBA Executive Director Keith J. Soressi for conceptualizing and establishing this CBA pro bono legal services program, and Vice President Dan Horgan for taking the lead in running the program in the New London area. We welcome the participation of more attorney volunteers in the CBA Lawyers in the Libraries program."

The Lawyers in the Libraries program was established by CBA member and Presidential Fellow, Kyle J. LaBuff. Attorney LaBuff actively recruits attorneys to staff the program and coordinated the use of space and sign up of clients with the library representatives. CBA Vice President Daniel J. Horgan is assisting Attorney LaBuff with recruiting attorneys and staffing the New London location. This pro bono program is an initiative of the CBA's Pro Bono Committee and was originated as Attorney LaBuff's presidential fellowship project.

"These clinics are a great way to help those who are struggling in these tough times. Between the Great Recession and the COVID-19 pandemic, pro bono opportunities have helped those with evictions, family matters, and immigration cases. In addition, it gives young attorneys a chance to gain experience where needed. The moment I was sworn in, I started volunteering all over Connecticut," shard Attorney LaBuff. "In the upcoming months, we plan to expand the Lawyers in Libraries program to more libraries throughout Connecticut. By the end of 2021, we hope to have participating libraries and attorneys in all of the counties of Connecticut."

The program is currently meeting in-person and following all recommended social distancing guidelines. The program will continue to meet unless it is unsafe to do so and/or the libraries are closed.

Attorneys who wish to provide pro bono services through the Lawyers in the Libraries program should e-mail probonoclinc@ctbar.org.

GET THE NEWS and JOIN THE CONVERSATION
www.ctbar.org

Nine Attorneys Certified as Residential Real Estate Specialists

Nine attorneys became part of the inaugural class of Connecticut Board Certified Residential Real Estate Specialists in January. This achievement signifies they are extremely competent, experienced, and skilled in residential real estate law.

The attorneys who earned this certification are:

Edward M. Cassella, Cloutier & Cassella LLC, Old Saybrook

Descera Daigle, Goldman Gruder & Woods LLC, Norwalk

Gregory F. DeManche, DeManche Law Group, LLC, Avon

Michael W. Epright, Epright Law LLC, Haddam

Monika A. Gradzki, The Gradzki Law Firm LLC, New Britain

Jay N. Hershman, Baillie & Hershman PC, Cheshire

Daniel K. Readyoff, Allingham Readyoff & Henry LLC, New Milford

Michael D. Rybak, Guion Stevens & Rybak LLP, Litchfield

Anthony D. Santoro, The Law Offices of Anthony D. Santoro, Middlebury

To achieve this five-year certification, each of these nine attorneys accumulated more than 36 hours of continuing legal education activities in residential real estate law, received five or more references from other attorneys or judges knowledgeable regarding their practice and competence, and passed a written exam. All specialists are in good standing with each bar they have been admitted, have practiced law in Connecticut for at least five years, and dedicate 25 percent or more of their total practice to the area of residential real estate law.

The Real Property Section of the Connecticut Bar Association (CBA) launched the Residential Real Estate Specialist Certification program in July of 2019 to help the public identify attorneys who have demonstrated expertise in the area of residential real estate law based on their competence, experience, and skills. The Legal Specialization Screening Committee and the Rules Committee of the Connecticut Superior Court approved the CBA's certification program in December of 2018 to raise the level of practice in this area of law.

For more information regarding the Board Certified Residential Real Estate Specialist and the certification program, visit ctbar.org/RRESpecialist or contact the program's staff advisor, Phanny Cahill, at pcahill@ctbar.org.

SEEKING LEADERS TO SERVE ON THE HOUSE OF DELEGATES FROM 2021-2024

The CBA is seeking leaders to represent their colleagues in the House of Delegates for a three (3) year term. Please consider volunteering your time to strengthen the CBA, bring new ideas, and encourage growth to the association as we move forward in the coming years. The districts that have at least one (1) expiring seat beginning July 1 are 3, 5, 7, 8, 9, 10, and 12.

Please keep in mind that if you currently are seated on the House of Delegates and your term is about to expire, you still need to follow the procedure for nomination once again.

To learn about the online nomination process, including instructions for nominating colleagues in your District and/or yourself, visit ctbar.org/HOD2021. Completed petitions are due Monday, April 12.

Image credit: Natee Meepian/iStock/Getty Images Plus

IN MEMORIAM

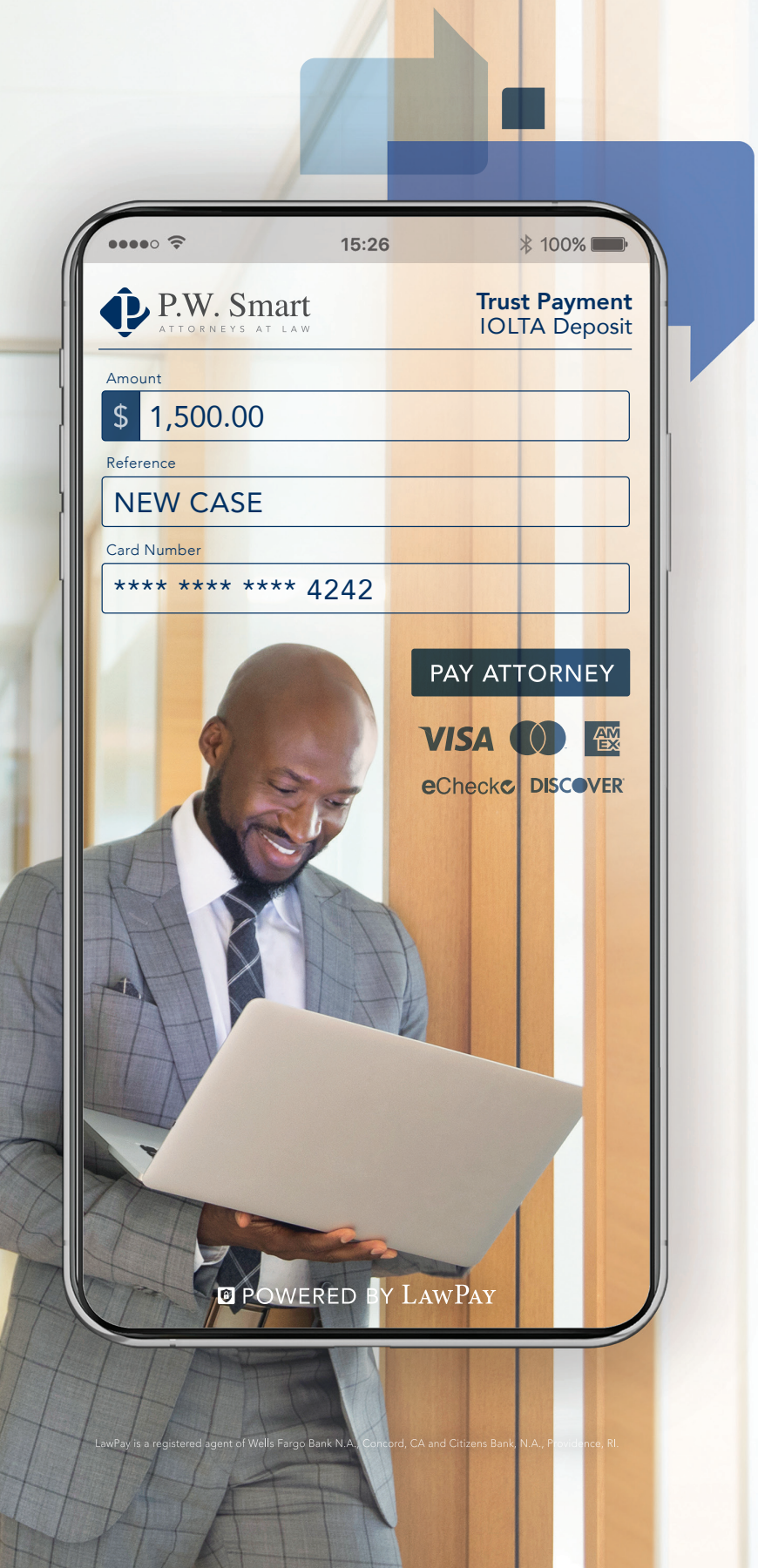
Hon. Dominic J. Squatrito passed away at the age of 82 on January 20, 2021. He was a member of the United States District Court for the District of Connecticut. He received his undergraduate degree from Wesleyan University, attended the University of Florence, Italy on a Fulbright scholarship, and received his law degree from Yale University. Judge Squatrito began his legal career at the law firm of Bayer & Phelon in Manchester. He remained at this firm, which later became Phelon Squatrito FitzGerald Dyer & Wood PC, for nearly 30 years. Judge Squatrito was nominated to the federal bench by President Bill Clinton on July 28, 1994, and received his commission on October 7, 1994. He assumed senior status on November 1, 2004 and served the court with honor and distinction for more than 25 years.

Richard A. Bieder passed away on January 16, 2021. He graduated from the University of Pennsylvania's Wharton School of Finance and New York University Law School. Attorney Bieder served as a lieutenant in the US Navy's Judge Advocate General Corps., ultimately stationed at the Naval Air Station in Subic Bay, the Philippines. After the Navy, he begin his 40-year career as a trial lawyer. He joined the firm headed by Ted Koskoff in Bridgeport in 1969. In 1972, the firm became Koskoff Koskoff and Bieder. As senior partner at the firm, Attorney Bieder fought for victims in class action suits resulting from state and national mass disasters, battled insurance companies and other powerful institutions, and fought for the un-empowered.

John Edward Lee passed away on December 12, 2020 at the age of 76. A graduate of Georgetown University and the UConn School of Law, he was admitted to the Connecticut Bar in 1969, but his practice was delayed when he was drafted into the United States Army, where he served until 1971. He then joined the firm of Garvey Colleran Weiner & Levy, eventually becoming a partner. He later became a solo practitioner and worked independently until the end of his career, which included arguing a case before the United States Supreme Court. Attorney Lee was a member of the American Bar Association, the Connecticut Bar Association (of which he served as chair of the Young Lawyers Section), and the New Haven County Bar Association.

Lee Sawyer passed away on October 31, 2020 at the age of 38. He earned his bachelor's degree as well as a graduate certificate in public relations at Central Connecticut State University, and he earned his JD from UConn School of Law. After finishing law school, he completed a public policy fellowship with the ZOOM Foundation before going on to envision and launch RecycleCT, a foundation devoted to increasing recycling in Connecticut. His most recent role was chief of staff at the Connecticut Department of Energy and Environmental Protection (DEEP).

Richard P. Zipoli, Sr. passed away on November 2, 2020 at the age of 87. He was a graduate of Providence College and Fordham University Law School. After graduating from Providence College, he served in the US Army and attained the rank of first lieutenant. Attorney Zipoli began his law career as an associate of the late James E. Russell. He founded the law firm of Zipoli, Keefe & Dodd and practiced general law for 25 years, then later concentrated in residential and commercial real estate law, probate law, and elder law. He was a member of the Waterbury and Connecticut Bar Associations and an officer and director of the Connecticut Italian-American Bar Association. Attorney Zipoli also served as judge advocate for the Florio Post Veterans Association. ■



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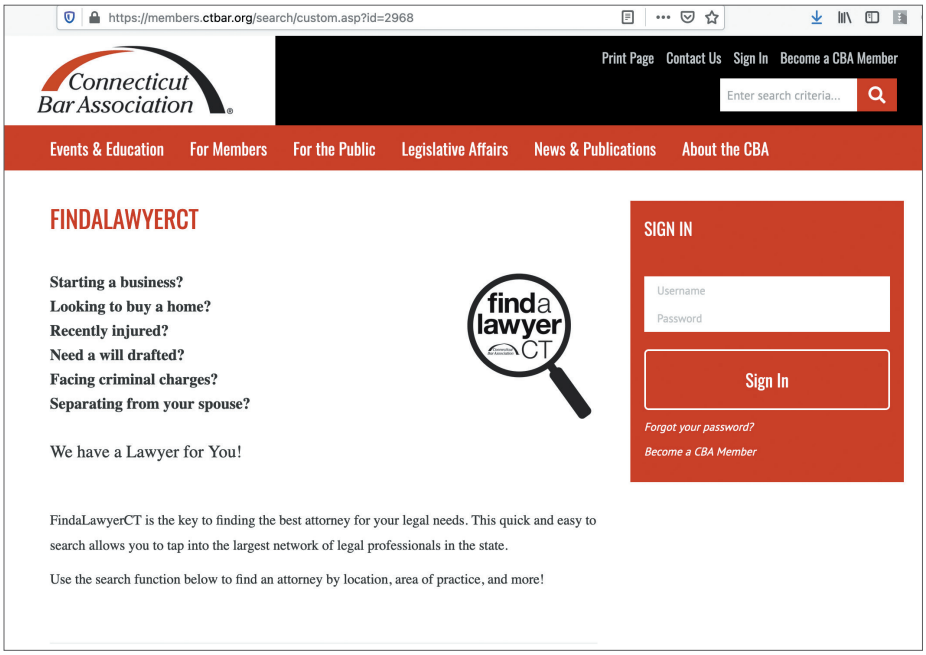

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"In 2020, Find a Lawyer CT was used to find attorneys more than 20,000 times and was the second most popular page on the CBA website, after the homepage."

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INTEGRITY
TRUTH
COMMITMENT

2020 and LAWYER ETHICS

BY JONATHAN FRIEDLER AND MARK DUBOIS

The past year brought significant changes to society—some short-term, some permanent. Unsurprisingly, there were important developments in the field of legal ethics, some driven by the pandemic and politics, some by shifts in tone and approach, which may be best understood as generational. While our analysis of the effects of 2020 on the field of ethics norms and rules is not exhaustive, and some of the changes we have identified may only be the first inkling of a process that will continue for years to come, we believe it safe to say that this year will be remembered long after we're allowed to take our masks off in public.

Image credit: DrAfter123/DigitalVision Vectors

Pandemic to Politics: COVID-19 Changes Everything

Any discussion of 2020 has to start with the pandemic, which resulted in sweeping changes across industries globally, including the practice of law. COVID-19 turned out to be nastier, more transmissible, and much more disruptive than many of us ever dared to guess. The concept of an open and accessible court system, readily available for the enforcement of laws and the resolution of civil disputes was challenged at its core by the fact that public

meeting places and gatherings were now dangerous and often prohibited. Buildings, elevators, courtrooms, jury boxes, holding cells, and chambers were suddenly functionally obsolete to the point of being public dangers. The way that justice has been delivered for centuries had to change or be suspended for the duration of the threat, if not forever. Goodbye short calendar. Goodbye meeting with clients and litigants in hallways and conference rooms and hammering out agreements in civil and family cases. Goodbye small claims. Goodbye to the assembly line of Part B criminal dockets.

New ways of effectuating the administration of justice had to be invented, sometimes overnight. Fast forward a few short months, and remote teleconferences are the rule, not the exception. Platforms such as Zoom, Skype, FaceTime, Webex, and Google Meet became a normal tool of the trade. The technology, which was there but little used, has been embraced and integrated into our processes in an incredibly short period of time.

This rapid change in the way proceedings are conducted implicates Rule 1.1, the attorney's duty of competence, which includes the obligation to understand and master the technology used to facilitate the methods, means, and processes of justice delivery. Thus, although the inability to secure an out-of-state witness's testimony by virtual teleconference due to unfamiliarity with the technology may have been excusable in February 2020, the expectation would likely be quite different in the current atmosphere.

When law offices are closed or severely curtailed because of social distancing protocols, there are a myriad of ways in which our ethical obligations are impacted. Under Rule 1.3, lawyers are obligated to represent their clients "with reasonable diligence and promptness." Although an attorney's ability to prosecute a client's matter in timely fashion is doubtlessly impacted by the delays occasioned by the pandemic, a client's subjective understanding may not grasp this concept. We have already seen ethics complaints by clients who have cast the blame for such delays upon their counsel.

In the absence of in-person contact, how do we fulfill our ethical duty to communicate with our clients in a meaningful manner? Can we have the type of deep discussions and engage in the nuanced counselling necessary to properly advance a client's interests over Skype or Zoom? How do we ensure confidentiality when attorney-client communications are being conducted mostly in the ether?

In addition to these questions, the pandemic has broadened the ethical quagmire of unauthorized practice of law (UPL), a felony in some jurisdictions. If a lawyer lives in one state and "remotes" into her office in another, is she practicing law where she sits, where the "office" is, or in both? When my office is mostly virtual, and I am working where I live instead of where I am licensed, am I violating unauthorized practice of law statutes and rules? Do jurisdictional limits only apply to content? For instance, can I practice Connecticut law for Connecticut clients from another state, or do I need to have an office or a server in Connecticut or have a relationship with someone who does? Given the exposure to criminal liability, these concerns are more than hypothetical musings.

In December, the ABA issued Opinion 495,[1] which tried to address some of these concerns. Unfortunately, the opinion is very general and it leaves the determination of whether such conduct constitutes UPL up to the jurisdiction in which the conduct is occurring. The only constant among the many jurisdictions regulating the practice of law seems to be that there is no one rule that fits all and lawyers are advised to consult bar opinions and court and ethics rules in their own jurisdictions. Practitioners working remotely from jurisdictions in which they are not licensed should note that Opinion 495 advises that "having local contact information on websites, letterhead, business cards, advertising, or the like would improperly establish a local office or local presence under the ABA Model Rules." Again, an attorney is cautioned to check the rules of their particular jurisdictions. Because reciprocal discipline is an ever-present threat, it behooves a lawyer to ensure their conduct is in conformity with both the jurisdiction in which they are physically located, and in which they are servicing clients.

It is often said that a 19th century lawyer dropped into a 21st century courtroom could figure things out pretty quickly because a lot of what we do now is done the same way as it was centuries ago. But it wasn't possible to establish a legal presence in a jurisdiction sufficient to trigger the applicability of authorized practice of law rules with a few mouse clicks until a few years ago. Now, it's done every day, as lawyers required to stay home in one state must continue to service their clients in another. Very few states have rules that reflect this new way of doing business. It is difficult to discern the boundaries of appropriate conduct when the consequences of straying across a state line on your computer may be grounds for bar discipline or criminal prosecution.

The Presidential Election and Legal Ethics

The other half of the "pandemic and politics" discussion is the way the presidential election and its aftermath focused attention on lawyers' duties under Rules 3.1 and 3.3 as well as Federal Rule 11 to avoid filing or pursuing frivolous or unsupported claims. Because election-related litigation seeks injunctive relief and other immediate remedies to avoid mootness issues, many dozen lawsuits were filed in battleground states where the outcome might be determinative of the result of the election, kind of like an amplified *Bush v. Gore*. Many were filed by Biglaw firms that withdrew actions just as quickly as they filed them, possibly fearing serious sanctions if not criticism, bad publicity, shunning, and ridicule.

What, then, is a lawyer's duty of pre-suit investigation as to the merits and bona fides of a client's claim, especially when tight time limits and a lack of a clear smoking gun make the "upon

knowledge and belief" allegation an attractive alternative? Can a lawyer publish anything in a lawsuit based solely on a client's subjective belief that there must be something wrong somewhere?

While the sanctions issues in these cases haven't been sorted out as of the writing of this article, and because bar discipline cases often proceed in secret, at least until probable cause is found, it's hard to say whether the 2020 elections cases are going to redefine our understanding of the law in this regard. Nonetheless, as the lack of substance behind many of these claims is made apparent, even under existing rules some lawyers are going to have problems.

Restatement, Third, of the Law Governing Lawyers defines a claim or contention as being frivolous when it is one "that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal will accept it." While Connecticut law provides that "even a weak case may be strong enough to withstand the zephyr of an evidentiary nonsuit,[2] *O'Brien v. Superior Court*[3] and *Brunswick v. Statewide Grievance Committee*[4] teach us that the test for frivolity is an objective one and "though a claim need not be based on fully substantiated facts when filed, once it becomes apparent that the claim lacks merit, an attorney violates rule 3.1 by persisting with the claim, rather than withdrawing it."[5] Thus, Connecticut lawyers pursuing claims that the late Hugo Chavez and a cabal of deep state actors hacked voting computer systems and changed the results of the election are going to get into trouble every time they file.

Advertising, Professionalism, and Non-Lawyer Service Providers Advertising

Though less dramatic and entertaining than the "pandemic and politics" tranche of ethics issues, there were important developments related to advertising, professionalism rules, and firm ownership and non-lawyer legal service providers last year.

Much of the advertising rule regime has been simplified and rewritten, with changes effective both in 2020 and 2021. Many of these changes resulted from amendments to the ABA model rules, which began a few years ago with a comprehensive re-write of the rules by the Association of Professional Responsibility Lawyers and other interested parties. Rule 7.4 was repealed and its regulation of field of practice claims rolled into Rule 7.4A. Rule 7.5 was repealed and its restrictions on law firm names and letter heads are now in the commentary to Rule 7.1. The rules are now somewhat inconsistent with the statutes governing lawyer advertising, but under the rule of *Persels v. Banking Commissioner*,[6] in any instance of variance, the rules will control.

These changes embraced the reality that 40-plus years after lawyer advertising became legal, much marketing is done on the Internet and through social media. The rules always struggle to stay abreast of technological changes. Though Connecticut retains a robust body of regulation concerning specialization, as found in Rules 7.4A-C, the basic and single rule of legal marketing remains in Rule 7.1's prohibition of false and misleading claims. Because one person's permissible commercial hyperbole may be another's misleading trade practice, we urge lawyers who advertise to stay familiar with the rules, comply with Practice Book 2-28A's requirement of filing all advertising and consider the availability of advisory opinions from the Grievance Committee found in Practice Book 2-28B.[7]

Discriminatory and Harassing Speech or Conduct

On February 8, 2021, the Rules Committee voted to approve an amendment to Rule 8.4 based upon ABA Model Rule 8.4(g) governing conduct that a lawyer "knows or reasonably should know is harassment or discrimination on the basis of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender expression or marital status in conduct related to the practice of law."[8] The version of the rule that was approved by the Rules Committee contains a number of changes from the ABA Model Rule. These changes were made to ensure the rule's consistency with the substantive law of antidiscrimination and antiharassment, and to address concerns of constitutionality, overbreadth, and overreach. Though more than half of the states have prohibitions on such conduct within their rules, the proposal is not without controversy.

Very recently a federal court in Pennsylvania enjoined enforcement of a version of the rule there based upon concerns under the First Amendment, particularly that the Pennsylvania rule could be read to reach speech alone.[9] Answering these concerns, the Connecticut version is directed at conduct, has commentary requiring the conduct to be "directed at an individual or individuals" and that the conduct be "harmful" or "severe or pervasive" before it can be actionable. Additionally, the Connecticut proposed rule includes commentary that clarifies that the rule does not reach constitutionally-protected conduct.

The proposed rule has broad support in the CBA with eleven sections and committees sponsoring or approving the proposed rule before its approval by a substantial majority of the CBA House of Delegates in September of 2020. A survey conducted by the CBA in September of 2020, which included over 500 attorney participants, revealed that approximately 50 percent of respondents "reported that they had experienced discrimination, harassment, or sexual harassment based on membership in a protected class in conduct related to the practice of law."[10] Over 40 percent of respondents identified that they had witnessed such conduct in professional contexts. Yet some of the comments submitted to the Superior Court's Rules Committee by lawyers reflect that the tensions between claims of free speech and so-called "cancel culture," which are hotly discussed in other public fora, exist in this debate. We'll have to wait to see how the judges vote in June.

Non-Lawyers and Access to Justice

Finally, and perhaps most significantly, this year saw the CBA study a proposal to expand access to justice by changing rules related to who can deliver legal services. In 2020, the supreme courts of Arizona[11] and Utah[12] adopted rules that eliminated Rule 5.4's prohibition on non-lawyers having a financial interest in a law firm, allowed the licensing of legal paraprofessionals who can give legal advice and appear and speak in court and at administrative hearings on behalf of clients on a limited basis and adopted rules and a regulatory framework permitting "Alternative Business Structures," enabling legal fee-sharing with non-lawyers and non-lawyer ownership of legal services providers.

In late March, just as the pandemic closed courts and cancelled public meetings, the CBA, which had been examining these issues in its State of the Legal Profession Task Force, aired a symposium where Justice Constandinos Himonas of the Utah Supreme Court, American Bar Foundation Faculty Fellow Rebecca Sandefur, and Zachariah DeMeola, University of Denver's Institute for the Advancement of the American Legal System manager, discussed how adopting such rules could expand the availability of legal help to many who can afford neither the time nor the money needed to advance their legal rights in courts and other dispute resolution forums.

Professor Sandefur, a sociologist, not a lawyer, who is deeply involved in the ABA Foundation's "Roles Beyond Lawyers Study" has championed separating the legal advice and the legal representation components of attorney-client services, allowing non-lawyers to give advice beyond general information on legal rights, remedies, and processes. Her thesis is that many non-lawyers need but cannot obtain information in important areas such as consumer debt, landlord-tenant issues, family law, including the care and custody of minor children and dependent adults, neighborhood safety, and environmental conditions, and that this could be provided by non-lawyers using technology and new means and models of service delivery.[13] The Arizona and Utah regimes allow experimental and new service delivery regimes that enable this vision. California and New York are reportedly taking serious looks at some of these changes too. To the extent that the bar embraces, or at least doesn't resist, these ideas, the practice of law may well be quite different in coming years, especially when judicial administrators make permanent what are now emergency measures that move much of what happened in courthouses to virtual forums.

The Years Ahead

The effects of the COVID-19 pandemic on the practice of law and the operation of courts and systems of civil and criminal justice are going to be far-reaching and permanent. The two big-

gest cost centers in court administration are people and facilities. There is no escaping the fact that virtual, computer-based, calendar calls, status conferences, pretrial meetings, legal arguments, mediations and court-side events, including trials, can be efficiently and cheaply provided outside of the courthouse environment using easily accessible and available technology.

This may well mean that many more lay persons can effectively participate in legal processes. It will also mean that lawyers will have to develop new ways of offering and providing their services to consumers. Rule regimes, including ethics, often lag behind operational realities. It's quite probable that in years to come we'll see legal ethics shift from a set of strict performance standards to general propositions and considerations divorced from specific requirements or details. Lawyers may cede some of their turf to others who can do some of what was traditionally thought of as lawyer work cheaply and more efficiently and will focus on areas where they can add value to the transaction worthy of their fees.

Legal ethics regimes, much like the common law, evolve over time and in reaction to social and political developments. But this doesn't happen in a smooth, linear manner. Rather, they grow in fits and starts, often playing catch-up to commercial trends. When we look back at 2020 a decade from now, it may well be that it marks a milestone in this progress. ■

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NOTES

1. www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-495.pdf.
2. *Hinchliffe v. American Motors Corporation*, 184 Conn. 607, 622 (1981)
3. 105 Conn. App. 774 (2008).
4. 103 Conn. App. 601, *cert. denied*, 284 Conn. 929 (2007).
5. *O'Brien v. Superior Court*, 105 Conn. App. 774, 786–87 (2008).
6. *Persels & Assocs., LLC v. Banking Com'r*, 318 Conn. 652, 122 A.3d 592 (2015).
7. Prior opinions are available on the judicial website at https://www.jud.ct.gov/SGC_old/Adv_opinions/default.htm.
8. www.ctbar.org/docs/default-source/lprc/september-2-2020/lprc-request-proposed-amended-ct-rpc-8-4(7)-8-21-20.pdf?sfvrsn=723148bf_2
9. *Greenberg v. Haggerty, et al.*, Civil Action No. 20-3822 (Dec. 2020).
10. Proposed Amended Rules of Professional Conduct 8.4(7) Report for the Connecticut Bar Association House of Delegates Meeting, Amended as of December 4, 2020.
11. www.azcourts.gov/Portals/201/Press%20Releases/2020Releases/082720RulesAgenda.pdf
12. www.utcourts.gov/utc/news/2020/08/13/to-tackle-the-unmet-legal-needs-crisis-utah-supreme-court-unanimously-endorses-a-pilot-program-to-assess-changes-to-the-governance-of-the-practice-of-law/
13. www.americanbarfoundation.org/research/project/106

Assignees of Past Due Loans: *What You Need to Know*

By ELIZABETH C. YEN

PAST-DUE AND CHARGED-OFF loans are often sold to third-parties at a discount, with the third-parties thereafter attempting to recover their investment through debt collection efforts. Recent court cases discuss the potentially important distinction between a simple sale and assignment of a debt or receivable, and a sale and assignment that includes all contract rights originally associated with the debt or receivable. For example, *Madden v. Midland Funding*, 786 F.3d 246 (2nd Cir. 2015), cert. denied, 136 S.Ct. 2505 (2016), held that the assignment by a national bank of a charged-off credit card account to an unaffiliated nonbank debt purchaser did not give the assignee the continuing right to charge interest at the rate that would have been permitted to the national bank pursuant to 12 USC Section 85 (part of the National Bank Act). Instead, the Second Circuit held that applicable state usury law would apply to the debt purchaser. The national bank assignor in Madden did not retain any interest in the assigned charged-off account, so that prospectively applying applicable state usury law to the assignee would not interfere with the national bank assignor's federally granted powers to lend at interest rates permitted by the National Bank Act.[1]

After *Madden*, some courts have distinguished between the assignment of a charged-off credit card account, on the one hand, and the assignment of credit card receivables without an assignment of the underlying credit card accounts that generate the receivables, on the other hand. The latter scenario falls outside the scope of Madden, so that the applicable interest rates for the assigned receivables should continue to be governed by the usury law applicable to the underlying credit card accounts themselves.[2]

In addition, to protect the ability of federally chartered banks to sell, assign, and transfer their loans, the Comptroller of the Currency adopted amendments to 12 CFR Sections 7.4001 and 160.110, clarifying that the interest rate charged on a loan originated by a national bank or federally chartered savings association is not affected by the sale, assignment, or other transfer of such loan.[3] The Federal Deposit Insurance Corporation issued a similar regulation to clarify that interest on a loan originated by a state-chartered FDIC-insured bank, if permitted by 12 USC Section 1831d(a), is not affected by "the sale, assignment, or other transfer of the loan, in whole or in part."[4] The validity of these regulations is the subject of pending litigation.

The bare assignment of a receivable also may affect the assignee's ability to enforce the assignor's arbitration or other dispute resolution rights pursuant to the loan agreement relating to the receivable. For example, in *Pounds v. Portfolio Recovery Associates*, ____ S.E.2d ___, 2020 WL 6437285 (N.C. App. 2020),[5] plaintiffs argued that a bill of sale assigning certain past due credit card account "receivables" (debt) and closed-out "accounts" did not include assignment of the arbitration clause in the underlying credit card account agreements (even though some of those arbitration clauses specifically extended the right to enforce the arbitration clauses to assignees), because "as a matter of law ... the mere sale and transfer of the ... receivable (the debt) did not transfer the right to arbitrate." In the opinion of the Court of Appeals, if the parties to the assignment agreement "had intended to transfer all of the rights and obligations of the original [credit card] agreement, those parties could have taken care to so indicate in the agreement." This Court of Appeals decision purports to apply Utah and South Dakota law, which "both require express intent to assign identified rights or subject matter."[6] Because the bill of sale did not clearly indicate an intent to assign all of the original creditor's rights, the Court of Appeals held that the right to compel arbitration "was not implicitly assigned along with Plaintiffs' Accounts or Receivables."

In contrast, in *Peterson v. Midland Funding*, 2020 WL 6719116 (N.D. Ill. 2020), decided under Nevada law, bills of sale for certain past due credit card accounts expressly transferred all of the assignor's "right, title and interest in and to (i) the accounts

Image credit: erhui1979/Digital/Vision Vectors

... and (iii) all claims or rights arising out of or relating to each referenced account." The court therefore held that the bill of sale transferred to the assignee the right to enforce both the arbitration and class action waiver provisions in the credit card account agreements. The court reached the same conclusion for a bill of sale that transferred all "right, title and interest in and to the accounts," reasoning that this constituted an assignment of "the entirety" of the accounts, "including the ability to enforce both the arbitration provision and class action waiver provision."[7]

■ The views expressed herein are personal and not necessarily those of any employer, client, constituent, or affiliate of the author.

These and other cases indicate that stock phrases such as "all right, title and interest" may continue to have important substantive meaning and significance when rights to receive payment are assigned.[8]

Assignees of certain regulated consumer credit accounts should also consider whether applicable state statutes give them the right to continue to impose interest or finance charge at the original contract rate, as well as the right to continue to enforce other terms and conditions of such accounts. For example, nonbank assignees of certain consumer loans of $15,000 or less made to Connecticut residents by FDIC-insured banks may enforce the original terms and conditions of such loans, provided the Annual Percentage Rates imposed by the bank lenders in connection

with such loans is 36 percent or less and the assignees are either licensed in Connecticut as small loan companies or qualify for an exemption from the license requirement.[9] As another example, assignees of certain Connecticut retail installment contracts and purchase-money loans that finance the purchase of (and are secured by) business equipment with a cash price of $16,000 or less or consumer goods or motor vehicles with a cash price of $50,000 or less may generally enforce the terms and conditions of such contracts and loans to the extent permitted by the Connecticut Retail Installment Sales Financing Act.[10]

Assignees of past due consumer loans should also be aware of new federal consumer debt collection practices regulations issued by the Consumer Financial Protection Bureau (CFPB) with a November 30, 2021 mandatory effective date,[11] including new regulations governing collection of time-barred consumer debt and new model forms consumer debt collectors may use. Applicable state consumer debt collection requirements that provide consumer debtors with greater protections than those available under federal law remain effective.[12] ■

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NOTES

1. *See also Madden v. Midland Funding*, 237 F.Supp.3d 130, 151 (S.D.N.Y. 2017) (holding that New York's 25 percent per year criminal usury ceiling applies to New York State residents' charged-off credit card balances originated by FIA Card Services, N.A. (a national bank headquartered in Delaware) and sold to Midland Funding, LLC, even though the applicable credit card agreements stated that they were subject to applicable federal laws and "the laws of the State of Delaware (without regard to its conflict of laws principles)," because enforcement of Delaware-permitted interest rates higher than 25 percent per year "would violate a fundamental public policy of the state of New York").
2. *See, e.g., Cohen v. Capital One Funding*, ___ F.Supp.3d ___, 2020 WL 5763766 (E.D.N.Y. 2020).
3. *See* 85 Fed. Reg. 33530 (June 2, 2020) (effective August 3, 2020). The states of California, Illinois, and New York have filed suit against the Comptroller of the Currency in the U.S. District Court for the Northern District of California, challenging the OCC's rulemaking authority. See complaint filed July 29, 2020 (Case No. 4:20-cv-05200), copy available at https://oag.ca.gov/system/files/attachments/press-docs/OCC%20Non-bank%20Interest%20Rule%20Complaint%20%28as%20filed%29.pdf

   A hearing on the parties' cross-motions for summary judgment has been scheduled for March 19, 2021.
4. *See* new 12 CFR Section 331.4(e) and 85 Fed. Reg. 44146 (July 22, 2020) (effective August 21, 2020). Seven states and the District of Columbia have filed suit against the FDIC in the U.S.

District Court for the Northern District of California, challenging the FDIC's rulemaking authority. See complaint filed August 20, 2020 (Case No. 4:20-cv-05860), copy available at https://oag.ca.gov/system/files/attachments/press-docs/FDIC%20Complaint%20%28as%20filed%29.pdf

The parties have agreed to extend the time for filing defendant's answer to the complaint and cross-motions for summary judgment to dates after the March 19, 2021 scheduled hearing on cross-motions for summary judgment in related litigation against the Comptroller of the Currency. (*See* n. 3 *supra*.)

5. *See also* 849 S.E.2d 877 (N.C. 2020) (mem.) (granting defendant's motion for temporary stay on November 24, 2020).
6. Courts in other jurisdictions have reached opposite conclusions. *See, e.g., Good v. Cavalry Portfolio Services*, 2019 WL 6003493 (E.D. Pa. 2019) (holding that, under South Dakota law, including UCC Section 9-404(a), the assignment of a credit card "account" includes an assignment of the amounts owed on the account and "also the rights contained in the governing contract" between the debtor and the assignor) and cases cited therein. The *Pounds* North Carolina Court of Appeals decision discounted the UCC Section 9-404(a) argument, noting that an assignor and assignee have the right to voluntarily enter into an assignment that varies the terms of Section 9-404(a).
7. In *Stratton v. Portfolio Recovery Assoc.*, 171 F. Supp.3d 585 (E.D. Ky. 2016), the court did not have to decide whether a mere assignment of charged-off credit card "receivables" included assignment of the contract rights in the related credit card agreement, because the plaintiff had alleged that the defendant assignee had attempted to "collect from Ms. Stratton interest that was neither authorized by agreement nor permitted by law." Because the plaintiff was relying on the terms of the credit card agreement for some of her claims, she was estopped from arguing that the assignee could not invoke the terms of the same credit card agreement.
8. *See also Wolcott v. Coleman*, 2 Conn. 324, 337 (1817) (indicating that "a note becomes the equitable property of the assignee by assignment") and *Dexter v. Hitchcock*, 10 Conn. 209 (1834) ("the assignee of a chose in action ... gains all the interest of the assignor and all his rights, except the right of sueing in his own name"). These cases may help explain why an assignee of a note or other right to receive payment may want the assignor to specify that the assignment is of more than just the assignor's equitable rights and interests, but also of the assignor's legal rights and title to the note. (*See also, e.g.*, Conn. Gen. Stat. Sections 42-135a(8) and 36a-556(c), which appear to distinguish between the "sale," "transfer," and "assignment" of a loan, note, or other evidence of indebtedness.)
9. *See* Conn. Gen. Stat. Section 36a-557(c).
10. *See* Conn. Gen. Stat. Sections 36a-770 and 36a-779 and Conn. Gen. Stat. Section 36a-535 *et seq. See also Sikorsky Financial Credit Union v. Butts*, 315 Conn. 433 (2015) and *Sikorsky Financial Credit Union v. Pineda*, 182 Conn. App. 802 (2018).
11. *See* 12 CFR Part 1006 (Debt Collection Practices, CFPB Regulation F), clarifying certain consumer debt collector obligations under the federal Fair Debt Collection Practices Act, 15 USC Section 1692 *et seq.*, published at 85 Fed. Reg. 76734 (November 30, 2020) and supplemental rulemaking dated December 18, 2020, published at 86 Fed. Reg. 5766 (January 19, 2021) (each presently with a November 30, 2021 mandatory effective date - see 85 Fed. Reg. at 76863 (November 30, 2020) and 86 Fed. Reg. 5766 (January 19, 2021)).
12. *See, e.g.*, 15 USC Section 1692n, Conn. Gen. Stat. Section 36a-805, and Conn. Regs. Section 36a-809-6 *et seq.*

2020 Developments in Labor and Employment Law in Connecticut

BY LEWIS CHIMES AND MARY-KATE SMITH

COVID-19 led to a dramatic change in the meaning of work. Employers adjusted to a remote work force, and millions lost their jobs. COVID-19's impact on the courts cannot be understated. After March 2020, there were no jury trials in Connecticut and only a few bench trials. Deadlines and statutes of limitation were suspended. Attorneys adjusted to remote depositions, mediations, judicial conferences, and court arguments. The long-term impact of this new world remains to be seen. But in the intermediate term, the courts and counsel will be dealing with a backlog of trials and new and unsettled legal issues arising from COVID-19.

FEDERAL LAW DEVELOPMENTS

Federal Legislation

Federal employment legislation in 2020 was a response to the economic crisis created by COVID-19 and the subsequent lockdown. Congress passed two laws—the Families First Coronavirus Relief Act (FFCRA) and the Coronavirus Aid, Relief and Economic Security Act (CARES)—that provided benefits to workers and employers affected by COVID-19.

FFCRA (1) provided two weeks paid sick leave for employees affected by COVID under certain circumstances; and (2) up to ten additional weeks paid emergency family leave for employees who had to stay home for childcare due to COVID for employers with 1 – 500 employees.

The CARES Act (1) provided a one-time stimulus check for eligible individuals and families; (2) broadened the eligibility standard for unemployment benefits to include independent contractors, gig workers, and others who were otherwise ineligible for unemployment; (3) provided an additional $600 weekly compensation benefit for 13 weeks for anyone receiving unemployment during the prescribed time period; (4) provided an additional 13 weeks of unemployment once state unemployment eligibility expired; and (5) provided loans to employers who maintained their workers on their payroll that were forgiven if the employer met certain criteria.

Federal Court Decisions

1. United States Supreme Court Decisions

a. Under Title VII, Discrimination "because of sex" Applies to Gay, Lesbian, and Transgender Employees

The most significant decision in 2020 was *Bostock v. Clayton County Georgia*, ___ U.S. ___, 140 S.Ct. 1731(2020). The court ruled in a 6-3 decision that the "because of sex" language in Title VII of the Civil Rights Act of 1964, (42 U.S.C. 2000e *et seq*.) ("Title VII") covered discrimination based on an individual's sexual orientation and sexual identity. The decision was written by Justice Gorsuch, and the three dissenting justices[1] argued the lack of legislative intent to cover discrimination based upon sexual orientation and sexual identity when Title VII was enacted. Justice Gorsuch had little trouble rejecting these arguments based upon his judicial philosophy:

> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

140 S.Ct. at 1737.

At the time *Bostock* was decided, only 21 states prohibited discrimination in employment based upon sexual orientation. *Bostock* represented a significant expansion of civil rights for LGBTQ persons in the workplace.

b. "But-For" Causation Can Encompass Multiple Causes.

In *Bostock*, the court also distinguished the "but-for" causation standard in discrimination cases from a stricter "sole" causation standard. An adverse employment action may have multiple "but-for" causes:

> In the language of law, this means that Title VII's "because of" test incorporates the "simple and traditional" standard of but-for causation. *Nassar*, 570 U.S. at 346, 360, 133 S.Ct. 2517. That form of causation is established whenever a particular outcome would not have happened "but-for" the purported cause. See *Gross*, 557 U.S. at 176, 129 S.Ct. 2343. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

> This can be a sweeping standard. Often, events have multiple but-for causes… When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision.

140 S.Ct. at 1739. Justice Gorsuch noted the "motivating factor" standard, applicable under Title VII discrimination claims, is a more forgiving standard because liability may follow "even if [the protected trait] was not a but-for cause of the employee's employment decision. 140 U.S. at 1740.

c. But-For Causation Standard Applies in 42 U.S.C. § 1981 Cases/But-For Causation is the Default Standard of Causation in Federal Statutory Claims

The Civil Rights Act of 1866 (42 U.S.C. §1981) was passed after the Civil War and stated that all male persons born in the United states are citizens "without distinction of race or color, or previous condition of slavery or involuntary servitude." It has been broadly interpreted to cover persons of color with respect to their employment contracts.

In *Comcast Corporation v. National Association of African American-Owned Media, et al*, ___U.S. ___, 140 S. Ct. 1009 (2020), the Supreme Court held that the plaintiff in a §1981 case had the burden of proving "but-for" causation of injury, as opposed to the substantial factor causation standard used under Title VII.

In *Comcast*, the court noted that the but-for tort standard is the general standard applied under common law tort cases. The court indicated that this "ancient and simple" causation test is the default background rule against which Congress is normally presumed to have legislated when creating causes of action, including federal antidiscrimination laws. 140 S. Ct. at 139-140.

d. But-For Causation Does Not Apply Under the Age Discrimination in Employment Act Provision Covering Federal Employees.

In *Babb v. Wilkie*, ___U.S. ___, 140s. Ct. 1168 (2020), the Supreme Court held that the section of the Age Discrimination in Employment Act that covers federal employees provides a broader causation standard than the discrimination provisions covering private employers.

The language of the ADEA covering federal employees states in pertinent part that personnel actions affecting individuals aged 40 and older shall be "*made free from* any discrimination based on age…" 29 U.S.C. §633a(a). In contrast, the provision covering private sector uses the "because of age" language that has been held to apply the but-for causation standard. 29 USCA § 623(a). The court stated that the difference between the term "made free from any discrimination" indicates a broader standard than the "but-for" "because of . . .age" language in the section of the ADEA.

e. Religious School Teachers Not Protected by State and Federal Labor and Employment Laws Under First Amendment Free Exercise of Religion Clause.

In *Our Lady of Guadeloupe School v. Morriey-Berru*, 140 S.Ct. 2049 (2020), the Supreme Court expanded the "ministerial exception" articulated in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012) to teachers at private religious schools. Religious institutions are protected by the Free Exercise Clause of the First Amendment from lawsuits brought under federal and state discrimination laws brought by teachers in their schools. The exception applies even if the teacher may not be a practicing member of the institution's religion.

2. Second Circuit Decisions

a. 42 U.S.C. §1983 First Amendment Retaliation

In *Agosto v. New York City Department of Education*, 982 F. 3rd 86 (2d Cir. 2020), the Second Circuit addressed the distinction between constitutionally protected employee speech, which addresses issues of political and social concern, and unprotected speech focused on personnel issues. The court ruled that a complaint about a failure of the Board of Education to properly apply its internal grievance procedures is a personnel issue and does not rise to the level of protected speech. The court also indicated that in evaluating whether speech is constitutionally protected, it is necessary to examine the underlying motivation. A request for budgetary information may be constitutionally protected speech under certain circumstances, but not if it is motivated by a personal grievance. The courts also questioned whether minor payroll discrepancies amongst department staff rose to the level of a protected public concern, even if they are not motivated by personal grievances.

b. Title VII Hostile Work Environment

In *Rasmy v. Marriott International, Inc.*, 952 F. 3rd 379 (2d Cir. 2020), the Second Circuit determined that the trial court improperly excluded consideration of incidents of harassment that were not directly discriminatory, such as accusing the employee of being a "rat" or filing false workplace complaints against the employee, if other circumstances indicate that it was part of a racially hostile environment. In addition, certain comments and behavior that were not specifically directed against the plaintiff may also be a part of the hostile environment if the plaintiff was aware of them. Lastly, the court held that there was no requirement of physical threat in order to prove the existence of a hostile work environment.

c. ADA – Disability

In *Woolf v. Strada*, 949 F. 3rd 89 (2d Cir. 2020), the Second Circuit held that an individual who claims disability working for a particular supervisor due to migraines aggravated by workplace stress but is able to work under a different supervisor is not "disabled" under the Americans With Disabilities Act because it not a substantial limitation on the ability to work in a class or a broad

range of jobs. This decision may make it difficult for employees who claim disability due primarily to workplace stress to bring a claim under the ADA.

3. Connecticut District Court Decisions

a. Discrimination

i. *McDonnell-Douglas* Standard

In *Cellmark v. Pollard*, 2020 WL 5732455 (D. Conn. 2020), Judge Hall held that a senior executive's statement to the employee that they "expected him to retire soon," coupled with the prima facie case, plus evidence that the employer's proffered reason for termination was pretextual was sufficient to overcome the employer's motion for summary judgment.

In *Velez v. Town of Stratford*, 2020 WL 1083625 (D. Conn. 2020), the employer argued that the employee's poor performance in the position as training lieutenant meant that he was not "qualified" under that prong of the prima facie case. The court held that the employee met the threshold for the prima facie case, because he had been performing in the job for a reasonable period of time before the performance issues arose.

In *Bracey v. Waterbury Board of Education*, 2020 WL 1062939 (D. Conn. 2020) the district court denied summary judgment on one of the employee's race discrimination claims. The court stated that a reasonable juror could find that a supervisor's comment that the employee "was not a good fit" reflects racial animosity.

ii. Adverse Employment Action

In *Velez*, *supra*, Judge Bolden ruled that the transfer of a training lieutenant to a position as the midnight commander of the patrol division was not an adverse employment action under Title VII or FEPA. A job transfer that does not cause economic loss is insufficient unless "the change in responsibilities is a setback to one's career."

iii. Fair Employment Practices Act – Causation Standard

In *Zeko v. Encompass Digital Market*, 2020 WL 3542323 (D. Conn. 2020), Judge Shea indicated that FEPA age discrimination cases and federal ADEA cases both apply the same "but for" causation standard. This appears to be a change in Judge Shea's position. In *Weisenback v. LQ Management*, 2015 WL 5680322 (D. Conn. 2015), he indicated that although no Connecticut Appellate Court had ruled on the FEPA causation standard, he applied the broader "motivating factor" standard.

iv. Failure to Promote

In *Zeko, supra*, Judge Shea held that an employee's failure to apply for a promotion was not a requirement to a discriminatory failure to promote claim. The employee had made inquiries about promotional opportunities, but his supervisor made comments to him that made clear that he would not be promoted if he applied. The court held that his failure to formally apply for the position was not necessary to pursue the claim; his application for the position would have been futile.

v. Employer Liability for Co-Worker Harassment

In *Benitez v. Jarvez*, 2020 WL 1532306 (D. Conn. 2020), Judge Bryant delved into a thorough and detailed analysis of employer liability for a racially hostile environment created by multiple non-supervisory employees. Any attorney litigating a hostile environment case based upon the actions of non-supervisory employees would do well to review the decision.

vi. Retaliation – Causation

In *Byrne v. Yale University, Inc.*, 450 F. Supp. 3rd 105 (D. Conn. 2020) a faculty member claimed retaliation for complaints of sex discrimination and breach of contract in the decision to deny tenure. The employee had not made specific complaints about discrimination or sexual harassment, but she participated in a "Climate Review" investigation of the Department. During that investigation, she provided details of sexual harassment. The defendant argued that the senior faculty members who had voted against her tenure had no specific knowledge of what the employee had said during the investigation, and that there was insufficient causal connection. The court held that even though they did not have specific knowledge of her communications in the Climate Review investigation, there was sufficient evidence to conclude that the senior faculty members believed that she had provided such evidence. This was sufficient to raise an issue of fact as to discriminatory intent.

b. 42 U.S.C. §1983: First Amendment Retaliation

In *Brown v. Office of State Comptroller*, 456 F. Supp. 3rd 379 (D. Conn. 2020), the court gave a detailed analysis of when employee speech as a private citizen is protected under the First Amendment or unprotected speech where the speech was part of the employee's official duties, pursuant to *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The employee, an attorney in the Office of the Comptroller, argued that certain communications to state auditors were protected speech. The court distinguished between communications with auditors made before and after she had filed a state whistleblower complaint. The court held that the speech to the auditor prior to her whistleblower complaint was made pursuant to her official duties and thus not protected speech under *Garcetti*. In contrast, her communications with the state auditors after she had filed her whistleblower complaint were protected speech, since it was related to the investigation of her whistleblower complaint and not part of her job duties.

The court also ruled that the employee's refusal to submit false statements to the State Employee Retirement Commission, to the IRS compliance attorney and to the IRS were protected speech because it potentially exposed the employee to criminal charges. The district court held that submission of false statements expos-

ing the employee to criminal charges is never a part of a public employee's official duties.

c. Non-Compete/Non-Solicitation

In *Cellmark v. Pollard*, 2020 WL 5732455 (D. Conn. 2020), Judge Hall denied the employer's motion for summary judgment as to whether the employee violated his non-solicitation agreement. The employee argued that the employer violated the employment agreement prior to any alleged violations of the non-solicitation provision. The court held that if there had been a material breach by the employer, the employee would be excused from further performance under the employment contract, including the non-solicitation provision.

d. Negligent Misrepresentation

In *Corcoran v. G & E Real Estate* 2020 WL 5300255 (D. Conn. 2020), the employee claimed that he was discharged for an old criminal conviction that the employer knew about and had previously assured him would not be a basis for termination. Although the court granted the employer's Motion to Dismiss on other grounds, it recognized that an employer's representation that the employee will not be terminated for a particular reason or for a particular period of time modified the at will relationship and could be a basis for a negligent misrepresentation/promissory estoppel claim. In this instance, based upon the employer's alleged representation, they could not terminate the employee for his prior criminal conviction.

e. Wrongful Discharge

In *Corcoran, supra*, the court granted the employer's Motion to Dismiss the employee's wrongful discharge claim. The employee argued that his discharge for a prior felony conviction, of which the employer had been aware for several years, violated the public policy embodied in Conn. Gen. Stat. §31-51i (limitations upon criminal records inquiries in employment applications and employment decisions). Conn. Gen. Stat. §31-51i only addresses criminal charges that had been dismissed and sealed under the erasure statutes. Since the employee's prior conviction was never dismissed, the public policy underling Conn. Gen. Stat. §31-51i was inapplicable.

STATE EMPLOYMENT LAW DEVELOPMENTS

State Legislation and Executive Orders

The legislature was not in session for most of 2020 due to COVID-19. When it met its focus was on COVID-19 and police accountability issues following the death of George Floyd and Black Lives Matter protests.

Governor Lamont passed a series of executive orders regulating essential workers who would continue to work during the lockdown as well as working conditions to address the safety issues presented by COVID-19 in the workplace as more employees returned to work. The Connecticut Department of Economic Development was tasked with issuing a series of workplace guidelines for COVID-19 for various industries as they reopened.

The Paid Family and Medical Leave Act, passed in June 2019, began to be implemented in 2020. The Act provides paid leave benefits to employees who cannot work due to their own serious health condition or that of a family member.[2] The program will be administered by a quasi-public agency, the Paid Leave Authority. Beginning in November 2020, covered employers were required to register with the Paid Leave Authority and the collection of wage deductions began on January 1, 2021. Employees will be eligible to receive benefits starting January 1, 2022. After January 1, 2022, Connecticut's FMLA law will reduce the minimum threshold coverage from employers with at least 75 employees to one.

Connecticut Court Decisions

1. Connecticut Supreme Court Decisions

a. Constructive Discharge

In *Karagozian v. USV Optical, Inc.*, 335 Conn. 426 (2020), the Connecticut Supreme Court held that a plaintiff claiming constructive discharge is not required to allege or prove that the employer intended to force the employee to quit, only that the employer intended to create the *conditions* the employee claims compelled her to quit. A constructive discharge occurs when the defendant created a work atmosphere so difficult or unpleasant that a reasonable person in the plaintiff's shoes would have felt compelled to resign.

b. Wage and Hour: Class Certification

The Supreme Court, in *Rodriguez v. Kaiaffa, LLC*, __ Conn. __ , No. 20274, 2020 WL 5919680 (2020), upheld a class certification of restaurant servers in a break from a majority of trial court decisions denying class certification in tip cases for restaurant workers.

The defendants argued that that a determination of the validity of plaintiff's legal theory was necessary prior to class certification. The Supreme Court rejected this argument. The plaintiff was seeking damages for a company-wide practice of assigning nonservice duties and improperly taking a tip credit. Determination of the validity of this policy would determine liability for all class members, satisfying the commonality and typicality factors of the class certification determination.

The defendant also argued that since it was unclear that all of the purported members of the class had been assigned non-service tasks, the factual differences in the individual cases made class certification inappropriate. The court also rejected this argument. Whether an individual server performed nonservice tasks relevant to individualized damages, rather than the common liability issue.

2. Connecticut Appellate Court Decisions

a. Evidence

In an employment disability discrimination case, *Kovachich v. Dep't of Mental Health & Addiction Servs*., 199 Conn. App. 332 (2020), the Connecticut Appellate Court ruled on several evidentiary issues.

(1) Discussions about potential accommodations made during a CHRO Mandatory Mediation are inadmissible settlement discussions. Conn. Evid. Code §4-8(b)(1).

(2) An adverse party may use the *original* deposition transcript to impeach a party or as evidence of a party admission, even if the adverse party had submitted a corrected or amended response on its deposition errata sheet. Assuming that the original deposition transcript is admitted, the impeached party would be entitled to introduce the relevant portion of the errata sheet on re-direct or rebuttal.

(3) Statements or emails made by union employees acting in their capacity as advocates for the plaintiff are inadmissible as party admissions against their employer. Conn. Code of Evidence §8-3(1)(D). Hearsay statements by a party's agent, servant, or employee must concern a matter within the scope of their agency. In this instance, the statements were not made as part of their regular job duties, since they were acting as advocates for the union.

d. Defamation: Truth as a Special Defense.

In *Gerrish v. Hammick*, 198 Conn. App. 816 (2020), plaintiff sued an officer from his former police department for defamation for telling a subsequent employer that plaintiff would not receive a letter of good standing from the department. At the time no formal decision had been made about the issue, but the defendant officer's police chief subsequently confirmed at a deposition that plaintiff would not have received a letter of good standing. The court granted summary judgment to the defendants. Since the statement was substantially true, it is irrelevant whether or not the declarant was certain that it was true at the time he made the statement.

3. Connecticut Superior Court Decisions

a. Conn. Gen. Stat. 31-51q (Free Speech Protection)

i. Job-Related Safety Complaints When Related to Public Health are Protected Speech.

In *Roach v. Transwaste, Inc.*, No. HHDCV176074305S, 2020 WL 588934 (Conn. Super. Ct. 2020) (Noble J.), the court held that the plaintiff's job-related safety complaints, which included his objection to driving a tractor trailer transporting hazardous waste on a single-tire rather than the double-tire configuration, addressed threats to the public's health and safety. Therefore, they were a matter of public concern sufficient for the jury to find a violation of General Statutes § 31-51q. The court also held that the "substantially motivating factor" standard for causation applies to § 31-51q.

ii. Misuse of Public Resources Is Protected Speech.

An employee's report that a municipal bus driver was operating the bus in areas where no pick-ups or drop-offs were scheduled, and that the bus was parked at a private location for a lengthy period of time related to the misuse of public resources and was a matter of public concern. *Belinsky v. Town of Monroe*, 2020 WL 6204055 (Conn. Super. 2020)(Cordani, J.). The court also concluded that where the plaintiff's report of misuse of public funds was true or made with an honest belief that it was true, it would be unlikely to interfere with the plaintiff's bona fide job performance or her relationship with her employer. A reasonable employer would expect an employee to report misuse of public resources.

iii. Internal Complaint of Assault Were Not a Matter of Public Concern.

In *Sheehan v. Town of N. Branford*, 2020 WL 3058147 (Conn. Super. 2020) (Wilson, J.), an internal complaint that a co-worker assaulted the plaintiff was not constitutionally protected speech under General Statutes § 31-51q, because it did not raise an issue of public concern.

iv. Interference with Job Duties and Working Relationship Is Affirmative Defense to § 31-51q Claim

Under Conn. Gen. §31-51q, even if an employee's speech is constitutionally protected, an employer is not liable if the protected activity substantially interferes with the employee's bona fide job performance or the working relationship. In *D'Amato v. New Haven Bd. of Educ*., 2020 WL 1656202, at *12 (Conn. Super. Ct. Mar. 3, 2020) (Wilson, J.), the court ruled that an employee need not affirmatively plead non-interference with her job performance or her working relationship in her complaint; rather it is an affirmative defense which must be pled by the defendant.[3]

v. Defendant Accusation of Plaintiff's Mismanagement of Department Insufficient to Prevail at Summary Judgment

In *Azrelyant v. Town of Greenwich*, 2020 WL 6121352, at *1 (Conn. Super.2020) (Povodator, JTR), the plaintiff, the head of the Greenwich Parking Authority, claimed to have been discharged in retaliation for her complaints about corruption and financial mismanagement in the department. The defendant conceded that she had made the complaints, and that the complaints were protected speech involving a matter of public concern but argued that she was to blame for the corruption and mismanagement due to her poor oversight. The court denied defendant's motion for summary judgment and held that whether the defendant's accusations were a legitimate justification for her discharge was an issue of fact.

b. Obligation of Good Faith and Fair Dealing: Contractual Severance

In *Azrelyant, supra*, the plaintiff had an employment contract with the Town of Greenwich that provided for severance in the event of the termination of her employment. After her discharge, the defendant refused to pay her the contractual severance unless she executed a release. The court held that this conduct was sufficient to raise an issue of fact as to the breach of the obligation of good faith and fair dealing.

c. Discrimination: Hostile Work Environment

The plaintiff's hostile work environment count, in *Young v. Town of Cromwell*, 2020 WL 3485724, at *1 (Conn. Super. 2020), was legally insufficient where she alleged that she suffered sexual harassment following the cessation of the plaintiff's consensual intimate relationship with the chief of police. The plaintiff did not allege any unwelcome sexual advances, requests for sexual favors or coercion.

d. Wage and Hour: Class Certification

The court granted class certification, in *Belgada v. Hy's Livery Serv., Inc.*, 2020 WL 3058148, at *1 (Conn. Super. Ct. Apr. 20, 2020) (Ozalis, J.), where plaintiffs alleged that the defendants violated the Connecticut Minimum Wage Act by taking deductions from chauffeurs' wages for meal breaks. The fact that there would be differences between the number of hours each chauffeur worked during their meal breaks was insufficient to raise an issue under the commonality or typicality factor. Proof of the hours each chauffeur worked during their meal breaks was an issue of damages, which did not bar class certification.

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NOTES

1. Justices Alito, Thomas, and Cavanaugh dissented.
2. General Statutes § 31-49e *et sec.*
3. *See Matthews v. Dept. of Pub. Safety*, 2013 WL 3306435, at *8 (Conn. Super. 2013) [56 Conn. L. Rptr. 262](Peck,J.), *Algarin v. LB&O, LLC*, 2017 WL 3879306, at *3 (Conn.Super. 2017)(Kamp,J.) and *Schulz v. Auto World, Inc.*, 2016 WL 7135040, at *9 (Conn.Super. 2016)(Elgo, J.). But *see Armstrong-Grice v. Cmty. Health Servs., Inc.*, No. CV106012800S, 2011 WL 1565877, at *3 (Conn. Super. Ct. Mar. 30, 2011)(striking § 31-51q claim for failure to plead non-interference); *King v. Connection, Inc.*, No. CV106015682S, 2011 WL 3211250, at *5 (Conn. Super. Ct. June 20, 2011)(same).

Endurance of the Legal Profession During a Crisis

By KYLE LABUFF

I WAS WATCHING THE KEN BURNS DOCUMENTARY of the Roosevelts a few weeks ago. When the documentary would shift the focus to Franklin Delano Roosevelt, I was reminded of the level of challenging times that we as a nation have endured. Thinking of my grandparents, who were part of the Greatest Generation, it certainly puts a lot in prospective. My Italian grandmother would tell me stories of what it was like growing up during the Great Depression. They would have to put cardboard in parts of the soles of their shoes when they were worn, as they could not afford new shoes. An orange would be the only item in their stocking for Christmas. The level of uncertainty and fear weighed heavily on every family, but they pushed through the uphill battle. This was a result of tightening the belt, working together, trying new paths, and rolling up the sleeves.

There is a point made cited on various websites noting if someone was born in 1900, their first 50 years were a story of endurance unlike most generations moving forward. Starting with World War I, the Spanish Flu, The Great Depression, World War II, the Cold War, and the loss of multiple presidents. (Emerginggrowth.com) The times are tough now, but I have no doubt we-citizens and lawyers can push through this as we have done in the past.

It has been such an inspiration to see how the Connecticut Bar Association has reacted to the pandemic. A COVID-19 Pandemic Task Force, spearheaded under Ndidi Moses's presidency and continued under Amy Lin Meyerson's presidency, has provided relief to attorneys throughout Connecticut. This has been in the form of helping with the PPP loans, understanding how the profession will adapt to the technological needs, and even an opportunity to report hate crimes. There were eight subcommittees, including: Liaison to the Executive and Legislative Branch, Judicial and Federal Branch Liaison, Legal Aid, Public at Large, Legal Profession, Financial Impact on the Legal Profession, Technology, and Law Students and Law Schools. We know that there continues to be a tremendous demand for legal aid with each month that passes. Evictions, wills, and bankruptcies will flood the state and it should be our obligation to answer the call. If you have any spare time, please donate your efforts to help those in need. I myself have gone through challenging economic times in adulthood and I still make volunteering an obligation. There is always someone in a worse position.

Immediate Past President Ndidi N. Moses organized the State of the Legal Profession Task Force during her presidency. This task force consists of five subcommittees: Leveraging Technology to Advance the Legal Profession, Advancing the Legal Industry through Alternative Business Models, Law Schools and Future Lawyers, Modernizing Lawyer Referral and Law Firm Models, and Revising Ethics Rules. Although this task force was established before the pandemic, this has developed into a stress test of our profession. This past September, the task force hosted a virtual seminar to discuss the "Advances in Technology, Artificial Intelligence and Alternative Fee Arrangements." The task force's findings provided an accurate need and direction of our field.

FDR was once quoted as saying, "If something doesn't work, admit it frankly and try something else. But above all, try something!" The CBA is doing more than trying "something!" The one-two punch of these task forces brought information and hopefully more peace of mind and opportunity to the legal field. I am thankful for the leadership of Attorneys Amy Lin Meyerson and Ndidi Moses. Many others participated in these Task Forces and I thank them, too. I particularly want to thank my fellow Millennials who embraced the challenge and helped out by taking on those pro bono cases. I used to worry how we were an untested generation. Between the Great Recession and the COVID-19 pandemic, I no longer believe that. We have most certainly been tested.

Our profession was unquestionably around in 1900 and we endured. Now is no different. Through great leadership, working together, and a little bit of sacrifice, we will get through this era of uncertainly and worry—and we will be stronger for it! ■

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What Gets in Our Way?

The Challenges of Achieving Diversity, Equity, and Inclusion in the Legal Profession

By CECIL J. THOMAS AND KAREN DEMEOLA

"Not everything that is faced can be changed, but nothing can be changed until it is faced."
–James Baldwin, *The Cross of Redemption: Uncollected Writings* (2010).

Our profession has wrestled with its diversity, equity, and inclusion challenges for a long time now. Bar associations have often contributed to these issues, and have served as somewhat of a proxy for our profession's slow journey towards greater diversity, equity, and inclusion (DE&I). For example, the American Bar Association (ABA), founded in 1878, was originally only for white, male lawyers. In 1912, the ABA admitted three Black lawyers by mistake, and then promptly sought to rescind their membership.[1] The ABA determined that they had admitted Black lawyers "in ignorance of material facts" and acknowledged that "the settled practice of the Association has been to elect only white men as members."[2] The ABA ban on the admission of Black lawyers was formally ended with a resolution in 1943, but it was not until 1950 that the ABA admitted a Black lawyer to its membership.[3] It was not until 55 years later, in 2005, that Dennis Archer, the former mayor of Detroit, served as the first Black president of the ABA.[4]

What can we learn from this brief examination of the history of the ABA? First, that our profession's history of explicit and direct exclusion and discrimination is still very recent. Second, the road from discrimination and exclusion, to more equitable rules, to diversity in numbers and initial inclusion, and then to meaningful inclusion through growth and advancement, is a long and difficult one. Third, while we can celebrate individual and organizational progress and achievement, we need to do much more to achieve a true culture of belonging for all attorneys, in acceptance of all of our different identities. Finally, creating that culture of belonging requires fundamental transformation, which may be immensely challenging in a profession that values the stability of precedent and tradition. How might we apply some of these lessons to our own legal organizations here in Connecticut? What really gets in our way?

In our last article, we talked about measuring diversity and inclusion within our legal organizations. We encouraged organizations to assess not only the number of diverse attorneys, but also the organizational culture and climate, by creating safe environments and mechanisms for the provision of candid feedback on how attorneys and other members experience your organization. Receiving such candid feedback can be difficult, particularly for those who are responsible for setting that culture and climate, but is necessary to understand positive aspects of office culture as well as the opportunities for improvement. It is critical to hold up the mirror and examine internal culture, processes, and practices that may frustrate your diversity, equity, and inclusion efforts. The individual experiences of diverse attorneys within your organization are the ultimate measure of your commitment to DE&I. Without a culture of inclusion and belonging, organizational statements, policies, and participation in external diversity initiatives are, at best, incomplete measures.

On both the individual and organizational levels, critical DE&I feedback is difficult to hear and process, because this feedback may cause dissonance in our self-perceptions. We maintain certain deeply-held narratives about ourselves, about our organizations, our work, and our values. These narratives make us proud, define us, drive the expenditures of our energies, and give us joy in our associations. As organizations, we extol our commitments to diversity, equity, and inclusion as core organizational values. As individuals, and particularly as lawyers, we pride ourselves on our egalitarianism. As a result, we often struggle with the premise that we are contributing to systems and cultures that exclude or marginalize individuals of diverse identities.

Too often, when we are confronted with diversity, equity, and inclusion challenges, we choose to revert to our idealized organizational and personal narratives, rejecting in the process any experience, uncomfortable interaction, or troubling fact that seem contrary to those narratives. We succumb to a temptation to view our individual and organizational diversity, equity and inclusion commitments as absolutes, leading to a perception of narrative conflict when we are challenged or confronted with "contrary" information. In our first article in this column, we emphasized that your DE&I commitment is to the journey, to an evolutionary process. This necessarily means that you have and will make mistakes along the way. Embracing that vulnerability will allow you to see candid feedback as a necessary aid to your development, that will make you and your organization stronger as you become more equitable and inclusive.

Our defensiveness about our organizational and individual DE&I narratives manifest in common, but often subtle or even unconscious defensive maneuvers. For example, we often talk about "fit" when hiring or making personnel decisions. When an organization lacks meaningful diversity, "fit" may actually be code for a desire for conformity with the majority. An organization that is meaningfully inclusive should not be concerned with whether the individual fits the organization. Rather, an organization committed to DE&I should be focused on whether it has created an environment where that individual can grow, thrive, and contribute to the collective mission from the fullness of their individual experiences and identities. Common subjective assessments, such as the "ability to connect with clients" or the determination of who is best to be the "public face" of an organization may also be fraught with subtle biases for or against certain identities.

Diversity retention and attrition issues are often reframed as organizational "success stories," thereby co-opting the narratives of those individuals in an effort to avoid addressing the organization's lack of DE&I progress. Alternatively, legal organizations resort to broad and generalized statements about retention issues, claiming that they cannot find qualified diverse applicants, that qualified diverse attorneys do not have connections to Connecticut or do not want to live in Connecticut. Often they rely on stereotypical "norms," or claims that diverse attorneys are not interested in certain work or career aspirations, or are unlikely to remain with the organization for long-term growth and advancement. In our years of teaching and presenting on DE&I issues, we have sadly heard all of these statements. These subjective assessments, which are frequently repeated, given excessive credence, and then take on the appearance of generally accepted facts, are immensely harmful.

Our professional focus on liability or potential litigation may also pose challenges; preventing us from addressing DE&I challenges with a more empathetic and vulnerable approach. When confronted with DE&I issues, an organization may begin a process of creating a negative narrative around the individual to avoid wrestling with the organization's lack of commitment and progress. This "it's not me, it's you" mentality is immensely destructive to DE&I efforts, and reinforces the common perception that silence or false affirmation are the only options for diverse attorneys who may be struggling with negative experiences.

How we tell our stories can subtly but perceptibly reinforce our profession's exclusionary tendencies. Consider, for example, the effects of portraits hanging in the halls of our courts, our firms, our law schools, and bar associations. Each of these images, particularly those that harken to a time when our profession was expressly discriminatory, confirm certain stereotypes, express certain biases, and convey a message. Each image serves as a subtle message about who belongs, and who does not. If our present-day images of our organizational leaders, of our high-achievers, and of our most celebrated individuals are similarly homogenous, those simply reaffirm a long and present reality of exclusion, regardless of how many DE&I investments, statements, and commitments we might make. Here again, we see a battle of narratives, between one narrative that celebrates DE&I, and another one that appears to only portray competence, accomplishment, and potential in certain majority identities.

We opened this piece with an examination of the ABA's history of racial discrimination and exclusion. There are additional lessons that we might draw from that narrative. The ABA now openly acknowledges those past acts of exclusion and discrimination in its "ABA Timeline," as part of its public-facing story of itself. This acknowledgement appears alongside organizational milestones and accomplishments. That fuller, more vulnerable, more truthful acknowledgement is part of the key to successful DE&I efforts, except that we must have the self-awareness to bring that vulnerability to the present. We cannot just be honest about troubling facts that appear in our history, drawing comfort that those were the acts of another generation, or another time. Those individuals likely lacked the self-awareness to fully see the harm and long-term impact of their acts of discrimination and exclusion. They likely justified their actions with resort to the defensive myths and commonly-held assumptions of the day. We may not be much different today.

While our own present DE&I challenges are less overt and explicit, our diversity metrics tell us that we still have much work to do. Do we have the present honesty and vulnerability to acknowledge the shortcomings of our efforts? Can we acknowledge our own acceptance of norms, traditions, and stereotypes that have perpetuated our profession's DE&I crisis? Or will we continue to rely on the comfort of our own narratives, until some future generation tells our story in a more honest, and less flattering light, as part of their own narrative?

The Rev. Dr. Martin Luther King, Jr. taught us that "the time is always right to do what is right." As a profession, we are capable of solving our DE&I challenges. In the process, we must be ready to be vulnerable, to tell the fuller story of ourselves and our institutions, to put away our defensiveness, and to seek forgiveness and reconciliation. Future generations will tell

Continued on page 40 →

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Attorney Thomas is the co-chair of the CBA's Diversity and Inclusion Committee, having previously served as co-chair of the Committee from 2015 through 2018, including with Attorney DeMeola in 2017. Attorneys Thomas and DeMeola have been instrumental in the development of many of the CBA's diversity and inclusion initiatives, and regularly speak and teach on diversity, equity, and inclusion in the legal profession.

Investing in Justice: The Impact of Establishing Right to Counsel for Tenants Facing Eviction[1]

By CECIL J. THOMAS

"True peace is not merely the absence of tension; it is the presence of justice."

–Rev. Dr. Martin Luther King, Jr.

State and federal eviction moratoria have created a significant, albeit temporary, change in the typical landscape of Connecticut's eviction crisis. Although Connecticut continues to see a steady stream of evictions in the midst of this economic and public health crisis, the number of evictions brought since April of 2020 has been much lower than at any other time in the past several decades. This temporary reprieve provides us with an unprecedented opportunity to face Connecticut's once and future eviction crisis head-on, rather than allowing an unmitigated eviction tsunami to flood our state. If we do not address this crisis proactively, the resumption of Connecticut's eviction crisis, exponentially amplified by COVID-19, will cause devastating harms to Connecticut renter households, and tremendous economic costs that will be borne by all of us for years to come.

Traditionally, Connecticut landlords bring approximately 20,000 evictions a year.[2] These evictions are concentrated in Connecticut's urban centers, making Waterbury, Hartford, Bridgeport, and New Haven among the top 100 cities with the highest eviction rates in the country.[3] Connecticut's eviction moratorium, and various federal moratoriums, which are expected to expire sometime this year, have temporarily reduced these numbers, creating much-needed housing stability for hundreds of thousands of low-income renter households who have been devastated by the effects of the COVID-19 pandemic. By all accounts, when these state and federal moratoria are lifted, the United States will see an "avalanche" of evictions.[4]

Lawyers are a significant part of the solution to this anticipated crisis. Ensuring access to legal counsel for tenants is an investment in justice, an investment in the principle that the rule of law and equal access to justice are not just empty promises. The City of Baltimore, MD recently enacted a right to counsel for tenants facing eviction, becoming the seventh jurisdiction in the country to adopt such a measure.[5] Other cities that have enacted a right to counsel in eviction cases include New York City, Philadelphia, San Francisco, and Cleveland. A number of other jurisdictions across the country have made significant investments to ensure greater access to justice for tenants facing evictions, or are currently exploring such proposals.[6] Here in Connecticut, a number of right to counsel bills have been introduced in this legislative session by members of the Connecticut General Assembly.[7] These are welcome signs of progress here in Connecticut. The stakes involved in these cases—the loss of home, and all of the attendant harms—are simply too high to allow the status quo to continue. Enacting a right to counsel in eviction cases will yield improved outcomes for Connecticut's renter households, and result in significant governmental and societal cost savings.

Why is it so important to provide lawyers to tenants facing eviction? Connecticut's eviction (summary process) laws represent a balance between an extraordinarily speedy process for landlords, and strict adherence to due process protections for tenants. This intended balance is evidenced in well-settled principles of Connecticut summary process law. "Summary process is a special statutory procedure designed to provide an expeditious remedy." *Young v. Young*, 249 Conn. 482, 487–88 (1999) "Because of the summary nature of this remedy, the statute granting it has been narrowly construed and strictly followed." *Jefferson Garden Assocs. v. Greene*, 202 Conn. 128, 143 (1987). Preserving this balance requires the assistance of counsel. Unrepresented tenants, forced to litigate against represented landlords within this expedited framework, cannot be said to receive true justice. Under Connecticut's summary process statutes, the pleadings advance every three days,[8] resulting in a median disposition time for all summary process cases of just 26 days.[9] A tenant who loses a summary process matter may receive a stay of execution of as little as five days.[10] With such high stakes, it is hard for an unrepresented tenant to assess the costs and benefits of settlement versus further litigation. Landlords are represented by counsel in over 80 percent of Connecticut summary process cases. Tenants are represented by counsel in only 7 percent of those cases.[11] The default rate for tenants failing to appear, currently 37 percent of summary process cases, is one reflection of this disparity in representation.[12] While these figures reflect a certain "absence of tension" in our

Connecticut eviction processes, they do not reflect the presence of justice.

Evictions cause devastating personal consequences, described in greater detail in my prior column in this series. Evictions cause affected households and families to experience homelessness, housing instability, and adverse health and education outcomes, often lasting many years after the eviction. The record of an eviction causes the loss of future housing opportunity, as that record causes prospective landlords to deny future rental applications. Evictions disproportionately impact low-income renters, who are often operating on razor-thin margins, meaning that even small economic setbacks, such as a reduction in hours of work, a towed vehicle, a family emergency, or short period of illness, can cause a chain reaction that rapidly leads to eviction. Evictions disproportionately affect racially and ethnically diverse communities, with women and children of color evicted at significantly higher rates throughout the country. Evictions, and the resulting housing instability, are a tragic reality for low-income children, with studies estimating that one in four low-income U.S. children experience an eviction by the age of 15 years old.[13] Given the scale and scope of our country's unaddressed eviction crisis, these personal harms result in societal and governmental costs reaching hundreds of millions of dollars in increased shelter, social service, healthcare, and child welfare costs.[14]

By examining jurisdictions that have enacted right to counsel measures, we can better understand the potential for positive impact in Connecticut from such an investment in justice. As a result of enacting an eviction right to counsel, tenant representation rates in evictions in New York City rose from 1 percent to 38 percent from 2013 to 2020. During that time, evictions dropped 41 percent overall, including a 15 percent drop in 2019 alone. Overall, 84 percent of tenants who were represented by counsel remained in their homes.[15] Evictions fell five times faster in zip codes where NYC's right-to-counsel law took effect in 2018 than in zip codes without right-to-counsel.[16] Analysis of civil legal aid representation of tenants in Baltimore found that "when tenants are represented, they can avoid the high likelihood of disruptive displacement in 92 percent of cases."[17] A similar study in Philadelphia found that represented tenants avoided disruptive displacement in 95 percent of cases.[18]

Investment in access to justice for low-income tenants facing eviction also results in significant governmental and societal costs savings. Global advisory firm Stout Risius Ross has found that every dollar invested in providing legal representation to low-income tenants would yield estimated savings of $12.74 to Philadelphia,[19] and $6.24 to Baltimore and Maryland.[20] In Philadelphia, Stout found that $3.5 million could provide legal assistance to all tenants unable to afford representation, avoiding $45.2 million in costs to Philadelphia annually. In Baltimore, Stout found that the $5.7 million cost to fully implement right to counsel for low-income tenants facing eviction would produce a total combined savings of $35.6 million to Baltimore and Maryland. This is just a snapshot of the beneficial impact of right to counsel initiatives, revealing the profound potential of such an investment in justice here in Connecticut.

I urge you to get involved, and to take up this important cause in the advancement of access to justice. The Connecticut Bar Association is supporting eviction right to counsel proposals before the Connecticut General Assembly in the upcoming legislative session. The CBA has joined the American Bar Association COVID-19 Pro Bono Bar Network that is developing a nationwide pro bono eviction defense response to the impending eviction surge. Many of our Connecticut legal aid programs are working to marshal and train additional pro bono volunteers to help respond to Connecticut's eviction crisis, and would certainly welcome your assistance. The CBA is providing training support and case referral connections for pro bono attorneys interested in eviction defense through CBA Pro Bono Connect.[21] Please take some time to support the eviction right to counsel movement and to volunteer to provide pro bono representation to tenants facing eviction at this crucial time.

On every level, whether through the beneficial impact on a vulnerable family, or through the systems change that you help to create, your efforts will reflect the true measure of our profession's deep commitment to access to justice. ■

NOTES

1. This is the third column in a series on Connecticut's eviction crisis. For the first in the series, please see "Connecticut's Eviction Crisis and the Right to Counsel Movement," *CT Lawyer* magazine, Vol. 30, No.6 (July/August 2020). For the second column in the series, highlighting the impact of evictions on Connecticut's low-income families and children, please see "The Devastating Impact of Evictions on Connecticut Families," *CT Lawyer* magazine, Vol. 31, No. 3 (January/February 2021).
2. Connecticut Advisory Council on Housing Matters, Report to the General Assembly (January 6, 2021), Appendix C-2
3. Eviction Lab, Top Evicting Large Cities in the United States, evictionlab.org/rankings/#/evictions
4. "Struggling Renters Face Avalanche of Evictions Without Federal Aid," *Washington Post*, December 25, 2020; "An Eviction Tsunami is on the Horizon, and with it Comes More COVID Cases." *CT Mirror*, December 16, 2020.
5. Bennett Leckrone, *Baltimore Tenants Now Have Legal Right to Lawyer in Eviction Cases*, Maryland Matters (Dec. 4, 2020), www.marylandmatters.org/blog/baltimore-tenants-now-have-legal-right-to-lawyer-in-eviction-cases. .
6. *See* Nat'l Coal. for a Civil Right to Counsel, *Major Developments* (last accessed Dec. 17, 2020), www.civilrighttocounsel.org/major_developments. *See also* Kriston Capps, *The Right to Eviction Counsel is Gaining Momentum*, Bloomberg CityLab (Dec. 13, 2019), www.bloomberg.com/news/articles/2019-12-13/the-fight-to-boost-tenant-right-to-counsel-laws.
7. *See e.g.*, "Access to Counsel in Certain Summary Process Proceedings," Proposed House Bill 5359 (2021); "An Act Concerning Right

Continued on page 40 →

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Revisiting the Doctrine of Governmental Immunity?

By CHARLES D. RAY and MATTHEW A. WEINER

A police officer sees a car with illegal undercarriage lights and decides to follow it. After the car attempts to avoid being followed by the officer, the officer gives chase. A minute or two later, the chased car crashes, killing one of the passengers inside. Can the decedent's estate sue the police officer and municipality, claiming that the officer acted unreasonably in his pursuit? Maybe, maybe not. That, at least, is the lesson we learned from *Borelli v. Renaldi*, 336 Conn. 1 (2021).

Eric Ramirez operated the Mustang convertible that came to the attention of Officer Anthony Renaldi. Dion Major rode in the front passenger seat of the Mustang and 15-year-old Brandon Giordano rode in the back. As the Mustang drove along Route 67 in Seymour, Renaldi observed that it had illuminated underglow lights, in violation of state law. Renaldi maneuvered his vehicle behind the Mustang, which then sped up. The Mustang continued at a high rate of speed and illegally passed vehicles operating on Route 67. At some point, Renaldi activated his emergency lights and siren, and notified dispatch that he was engaged in a pursuit. After the chase crossed into Oxford, the Mustang turned off Route 67 onto Old State Road. Renaldi lost sight of the Mustang, which struck an embankment and turned over onto its roof. Ramirez and Major survived the crash, but Giordano did not.

The administratrix of Giordano's estate sued, among others, Renaldi and the Town of Seymour. The complaint alleged that Renaldi was negligent in pursuing the Mustang. The defendants moved for summary judgment based on their claim that the doctrine of governmental immunity barred the suit. The trial court granted the summary judgment motion.

On appeal, a majority of the Supreme Court affirmed, with Chief Justice Robinson and Justice D'Auria authoring separate concurring opinions, and Justice Ecker authoring a dissenting opinion. Justice Kahn, writing for the majority, began by clarifying what the appeal was *not* about. Specifically, although the complaint reasonably could have been understood to challenge both Renaldi's decision to begin the pursuit and his manner of driving during it, on appeal, the plaintiff had narrowed her argument, addressing only whether governmental immunity applies to an officer's decision to begin a pursuit after observing illegal conduct. Whether a police officer can be sued for negligently operating his or her vehicle *during* a pursuit, or in a *nonemergency* situation, was not before the Court.

The majority started with the observation that "the operation of a police department is a governmental function" and, as such, "acts or omissions in connection therewith ordinarily do not give rise to liability on the part of the municipality." There are, however, exceptions to governmental immunity, and the majority opinion focused on whether those exceptions applied under the facts presented in *Borelli*.

For example, a police officer has immunity for discretionary decisions made in the exercise of professional duty, but does not have immunity for ministerial acts. See Conn. Gen. Stat. § 52-557n(a)(2)(B) (providing that municipalities are not liable for negligent acts that "require the exercise of judgment or discretion as an official function"). "A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise

Image credit:seasame/DigitalVision Vectors

of his own judgment [or discretion] upon the propriety of the act being done." To demonstrate the existence of a ministerial duty, a plaintiff usually "must point to some statute, city charter provision, ordinance, regulation, rule, policy, or other directive that, by its clear language, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion…."

In arguing that Renaldi's decision to start pursuing Ramirez was ministerial, rather than discretionary, the plaintiff pointed to General Statutes § 14-283, which govern the rights and duties of, among others, officers operating police vehicles "in the pursuit of fleeing law violators…." The plaintiff cited § 14-283(d), which provides that "[t]he provisions of this section *shall not* relieve the operator of an emergency vehicle from the duty to drive *with due regard for the safety of all persons and property*." (Emphasis added.) The plaintiff argued that the emphasized language imposed on officers a ministerial "duty to weigh the safety of all persons and property and the seriousness of the offense prior to initiating a pursuit…."

The majority disagreed. It first found support for its decision in the text of the relevant statutes. It reasoned that the phrase "due regard" does not mandate a particular response to specific conditions. Instead, it "imposes a general duty on officers to exercise their judgment and discretion in a reasonable manner." In addition, General Statutes § 14-283a, which authorize the adoption of "a uniform statewide policy for handling pursuits by police officers," sets forth guidelines for officers to consider when initiating a pursuit. But these factors—which include road and environmental considerations, population density, whether the identity of the occupants of the fleeing vehicle is known, and whether immediate apprehension is necessary for public safety—"highlight the discretionary nature of the duty."

The majority also found support for its determination in prior decisions. For instance, in *Coley v. Hartford*, 312 Conn. 150 (2014), the Court concluded that General Statutes (Rev. to 2013) § 46b-38b(d)(5)(B), which requires officers reporting to a domestic violence scene to stay there "for a reasonable time until, in the reasonable judgment of the officer, the likelihood of further imminent violence has been eliminated," allows for the exercise of judgment and discretion, notwithstanding language that "*required* that officers remain at the scene for a reasonable time and exercise reasonable judgment...." (Emphasis in original.) Moreover, although the Court, in *Tetro v. Stratford*, 189 Conn. 601 (1983), affirmed a negligence verdict against officers for their role in a police chase during which the fleeing vehicle injured an innocent bystander, the defendants in *Tetro* did not assert governmental immunity. Instead, the legal issues in *Tetro* involved proximate cause and the applicability of § 14-283 to accidents that did not directly involve an emergency vehicle. *Tetro*, therefore, was inapplicable.

The majority further concluded that the identifiable person-imminent harm exception to discretionary act governmental immunity did not apply. Pursuant to that exception, there is no immunity where the plaintiff proves: (1) an imminent harm; (2) an identifiable victim or a "narrowly defined identified class[ ] of foreseeable victims"; and (3) "a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm…." Giordano, however, was not like a schoolchild, *legally compelled* to attend a public school during school hours—the only class the Court previously had identified as falling within this exception. Furthermore, under the plaintiff's theory, the identifiable person-imminent harm exception would swallow the rule because, in any police pursuit, there will always be at least one person whose presence the police should have been aware of. For the majority, such an outcome would violate good public policy, pursuant to which police officers must be "free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits…."

Justice Ecker disagreed and wrote a tome challenging the generally accepted narrative that "near-total [municipal] immunity [i]s an unadulterated continuation of an old and deeply rooted common-law tradition…." At the outset, Justice Ecker disagreed with the majority that the legal issue on appeal was confined to whether the plaintiff could pursue a claim challenging Renaldi's decision to initiate the pursuit. For Justice Ecker, the plaintiff had challenged "the entire pursuit from start to finish." Having reframed the legal question before the Court, the door was opened to Justice Ecker's wide-ranging critique. Because it's impossible to do justice to Justice Ecker's dissent within the confines of this column, we urge those of you interested in the historical development of municipal immunity law to read it. Here are just a few highlights.

Over the past three decades, the Court's jurisprudence has, in effect, conferred near-absolute immunity from negligence liability for municipal employees. To Justice Ecker, these decisions not only undermine good public policy, but conflict with the text and purpose of General Statutes § 52-557n, which the legislature enacted in 1986. Furthermore, the jurisprudence conflicts with the common law as it existed before § 52-557n which, according to Justice Ecker, did not provide blanket immunity for municipal employees carrying out

Continued on page 40 →

■ 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.

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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, PO Box 575, Guilford, CT 06437.

Administrative Law

Commissioner of the Department of Correction v. FOIC, 70 CLR 196 (Cordani, John L., J.), holds that public agencies are neither authorized nor required by the FOIA to provide information stored on employee personal cell phones, unless the agency is entitled by law or contract to access such information, because the Act's definition of "public records or files" is limited to "data or information relating to the conduct of the public's business *prepared, owned, used, received, or retained* by a public agency, or to which a public agency is entitled to receive a copy by law or contract.

The Freedom of Information Act exemption for police records "compiled in connection with the detection or investigation of crime" does not apply to investigations of infractions, because "infractions" are not included in the statutory definition of "crimes." *Avon v. FOIC*, 70 CLR 111 (Cordani, John L., J.). The opinion also holds that a public agency may not require that an FOIA requester sign a receipt acknowledging receipt of *copies* of public documents in response to an FOIA request because the FOIA must be strictly construed in favor of disclosure and there is no express requirement for a written acknowledgement for the receipt of copies.

Commissioner of Department of Emergency Services v. FOIC, 70 CLR 203 (Cordani, John L., J.), holds that prompt compliance with FOIA requests is a primary agency duty comparable in importance to other agency primary duties; therefore, the press of other agency work alone ordinarily is not a valid excuse for delayed compliance.

Arbitration Law

Hartford v. Hartford Police Union, 70 CLR 174 (Budzik, Matthew J., J.), holds that a Hartford police officer's violation of a federal consent decree requiring all officers to refrain from the use of racial epithets provides a sufficiently explicit public policy to support the vacating of an arbitration award that reinstated an officer terminated for making such comments, in spite of the officer's otherwise clear disciplinary record. The opinion notes that since 2015 there has been only one other instance in which a Connecticut court has overturned an arbitration award reinstating an employee.

Contracts

Strazza Building & Construction, Inc. v. Harris, 70 CLR 92 (Genuario, Robert L., J.) (*Strazza I*), holds that the Supreme Court's recent recognition of a rebuttable presumption that a construction project subcontractor is in privity with its general contractor for res judicata and collateral estoppel purposes does not apply to the reverse situation: a general contractor is not presumed to be in privity with its subcontractors for res judicata and collateral estoppel purposes. The opinion reasons that the Supreme Court's ruling was based on the fact that a general contractor is likely to have broad knowledge concerning the performance of all subcontractors so that it is reasonable to presume that rulings adverse to the general contractor could reasonably be given res judicata or collateral estoppel effect in later litigation between the general contractor and other subcontractors. On the other hand, each subcontractor is less likely to have knowledge of the services provided by other subcontractors and therefore there is less justification for applying a comparable presumption in favor of the general contractor against subcontractors. This opinion holds that a ruling in an action unsuccessfully prosecuted by a project sponsor against a single subcontractor for the release of a mechanic's lien, that any lienable funds had been exhausted and therefore unavailable to satisfy the subcontractor's claim, is not entitled to res judicata or collateral estoppel in a subsequent action brought by the *general* contractor against the project sponsor.

Criminal Law

A trial court has jurisdiction to hear a habeas corpus petition based on the petitioner's perceived risk of acquiring the covid 19 virus due to claimed adverse prison conditions, even though no challenge to the petitioner's conviction has been raised. *Little v. Commissioner*, 70 CLR 77 (Oliver, Vernon D., J.). The opinion also holds that the court has authority to preliminarily release a habeas petitioner pending resolution of the petition, subject to the posting of bail.

Driving Under the Influence

Marshall v. Commissioner of Motor Vehicles, 70 CLR 194 (Cordani, John L., J.), holds that a DUI arresting officer's failure to comply with the statutory requirement that an A-44 arresting report be delivered to DMV within three days does not render an otherwise compliant report inadmissible as evidence in a license suspension hearing, provided the report eventually reaches DMV within a reasonable period.

Education Law

Dunlop v. Regional School District No. 10, 70 CLR 189 (Taylor, Mark H., J.), holds that the Teacher Assault Indemnification Statute, Conn. Gen. Stat. § 10-236a (requiring that a board of education provide indemnification for financial loss incurred by a teacher as a result of "an assault upon such teacher or other employee while such person was acting in the discharge of his or her duties"), applies to negligent as well as intentional assaults.

Employment Law

Stavridis v. National Spine & Pain Centers, LLC, 70 CLR 23 (D'Andrea, Robert A., J.), holds that a dispute between an employer and employee over a noncompete agreement does not arise in "trade or commerce" and therefore does not give rise to a CUTPA claim, even if the dispute is based on an alleged interference by the employer with the plaintiff's ability to work for another employer.

A Superior Court opinion holds that allegations that an employer violated the Connecticut Fair Employment Practices Act by terminating an employee for the manner in which a chronic medical condition was being treated (the use of a marijuana-based oil to treat a skin disease) state a claim even though the act requires proof that the alleged discriminatory conduct was based on the *existence* rather than the *manner* of treating a disability. *Peck v. Waterbury Board of Education*, 70 CLR 8 (Gordon, Matthew D., J.). The opinion construes the allegation as raising a claim of discrimination based on a perception that the plaintiff was handicapped.

The opinion in *Martin v. United Capital Corp.*, 70 CLR 19 (Moukawsher, Thomas G., J.), presents a useful explanation of the court's decision to award mandatory attorneys fees well in excess of a claimant's recovery on a claim under the Conn. Minimum Wage Statute, Conn. Gen. Stat. § 31-68 (providing that an employer who violates the Minimum Wage Statute "*shall be required to pay* the costs and such reasonable attorney's fees as may be allowed by the court"). The opinion cautions that the traditional rules governing discretionary fee awards are not directly applicable to claims under statutes that impose *mandatory* fee awards.

Insurance Law

A Superior Court opinion holds that a defendant in a motor vehicle accident case may bring an apportionment complaint against a plaintiff's UIM insurer for an apportionment of liability attributable to an unidentified co-tortfeasor, regardless of whether the plaintiff has already brought the insurer into the action. *Ocasio v. Fulton*, 70 CLR 97 (Gordon, Matthew D., J.). The opinion rejects the rule of the majority of the trial court opinions that have ruled on this issue that such an apportionment claim may be asserted only if the plaintiff has already brought the insurer into the action, as was the situation in the Supreme Court's 2001 *Collins* opinion that held that a third-party apportionment complaint may be asserted against a plaintiff's UIM insurer.

An apportionment of liability claim against a UIM insurer based on the negligence of an unidentifiable operator requires proof that both the operator and the owner are unidentifiable, because an owner may be liable under the statute imposing vicarious liability for an operator's negligence. This case involves a rear-end collision brought by a plaintiff whose vehicle was struck from behind by the named defendant while stopping for traffic. The defendant has brought an apportionment complaint against the plaintiff's UIM carrier alleging the negligence of an unidentified third party operating a truck in front of the plaintiff that was identified by the plaintiff as a "Terminix" truck and that left the scene without stopping. The opinion reasons that the allegation of knowledge that the truck was associated with the Terminix company precludes an implied allegation that the *owner* of the truck was unidentifiable. *Sebastian v. Gaddis*, 70 CLR 101 (Gordon, Matthew D., J.). ■

An Anchor in the Storm

YLS Lawyers in the Classroom Project

By CINDY M. CIESLAK

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One question I continue to ask myself this year is: what does it mean to be an organization? A recent leadership training I attended suggested that organizations are merely groups of people striving to serve the needs of its members. Members join organizations to help themselves as an individual, but they also join to be part of a community and a vision larger than themselves.

But when we are stressed or anxious, we tend to focus on the former, forgetting the latter. The pandemic brought stress and anxiety into most of our lives. Many of us have lost loved ones and struggled with that grief while forced to navigate a new virtual world: from court proceedings for our clients, to holidays with our families, to school for our kids. In such times, forging deeper human connections within our community and aspiring to a vision larger than ourselves can feel like luxuries for which we have neither the time nor emotional bandwidth.

In spite of this, I have found that the moment I am most tempted to cut myself loose from that deeper connection is when I most need it. Amidst all this disruption, finding ways to give back to our communities and to remain a part of that larger vision is an anchor in the storm. Both as individuals, and as organizations, we thrive when we lean into our values.

Paradoxically, despite and because of the stress, suffering, and hardship, the past several months of serving as chair of the Young Lawyers Section have been one of the most rewarding periods of my life. Presented with a global pandemic and the temptation to hunker down and wait for it to pass, the Young Lawyers Section instead chose to partner with the community to make progress on issues that matter. This past fall, we engaged in a voter registration drive and get-out-the-vote campaign via our social media channels. After the November election, we partnered with Foodshare for the YLS's annual Horn of Plenty Food Drive to help make the difference between hungry and healthy during the holiday season, raising a substantial amount of monetary donations (since in-kind was not an option this year) to help feed those in need. In December, we held a holiday networking event with two charitable components with donations to both the Connecticut Food Bank and Connecticut Children's Medical Center.

Our work to serve our communities is not over. I also decided to revive the "Lawyers in the Classroom" program—in which young attorneys partner with Connecticut elementary schools to lead students through an interactive civics workshop—with two major updates. First, attorneys now attend classrooms virtually, not in-person. COVID-19 made that a necessity. The second update was inspired by the Judicial Branch calling on attorneys to raise the bar when it comes to racial and social justice in our communities.

By way of background, this past summer we witnessed the unjust killings of George Floyd and other persons of color and a wave of civil rights protests rising up against a society that has disenfranchised and oppressed non-white individuals. In that moment, the judicial branches of many states stayed silent. Ours spoke out. Chief Justice Richard A. Robinson of the Connecticut Supreme Court issued a statement in June and, together with Associate Justice Maria A. Kahn, hosted "A Virtual Conversation on Racial Justice" in July, calling on the bar to have the kind of honest talks about race that, in this country, are uncomfortable. The chief justice noted that many in his position had chosen silence. But he asked himself what message that would send. In the end, he concluded that the Judicial Branch was about some-

thing bigger than his personal comfort—equal justice for all.

The Chief Justice's choice was not inevitable. Equal justice for all is a big goal. And faced with goals larger than themselves, people often despair that any small action they take will not matter. I am reminded of the story of an old man who walked along a beach littered with starfish at low tide and came upon a small girl hurling one after another into the sea. Puzzled, he asked what she was doing. The youth replied, "When the sun gets high, they will die, unless I throw them back into the water." The old man chuckled, "But there must be tens of thousands of starfish on this beach. I'm afraid you can't make much of a difference." The girl bent down, picked up a starfish, and threw it as far as she could into the ocean. Then she turned, smiled, and said, "It made a difference to that one!"

The summer's events and the Justices' comments inspired the Young Lawyers Section to take a second look at one small action we were taking—the Lawyers in the Classroom program—and ask how it could make a difference. This program could initiate and invite conversations about civics and racial justice from a young age. After much discussion, YLS Civics Education Co-Directors Leland Moore and Scott Garosshen updated it with three goals in mind: (1) inspire students to learn about, engage with, and lead their community at the local, state, and national levels; (2) teach through an antiracist lens; and (3) partner with students to understand and appreciate justice, the rule of law, and democratic institutions.

To achieve these goals, they worked with three teacher consultants and many more partners within the bar to develop the program's first lesson: "Rules, Fairness, Democracy, & You." The lesson is divided into three segments. Section One begins by comparing and contrasting rules and fairness, then has students explore those concepts, working together to come up with rules to live together on a deserted island. Section Two asks how individuals can change unfair rules and walks students through the ways our government listens to people, from voting to courts to protest. Section Three concludes with examples of young people who have changed the rules and the world, from Ruby Bridges, to Greta Thunberg, to the students in two court cases, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) and *Tinker v. Des Moines*, 393 U.S. 503 (1969). Time is provided at the end for students to engage in a question-and-answer segment with our volunteer attorneys.

Image credit: mgfoto/iStock/Getty Images Plus

At its best, the program is a candid conversation with the students. When Attorney Paige Vaillancourt and I presented at a fourth grade classroom in November, the students asked us if we liked being attorneys and whether being an attorney was hard. We explained that although the job of an attorney is often challenging, it is also rewarding, as the heart of our job is helping people resolve their differences and work together. I found that, by the end of the program, talking about rules and fairness with the students had reset the cynical attitude I occasionally have about the law and legal profession. And I think it lit the spark of civic engagement in a few young hearts—they were eager to learn and ultimately inspired to convince their teacher to change a classroom rule.

The Lawyers in the Classroom Program benefits not only our members, but also our organization and communities at large. For many organizations and communities, including the Connecticut Bar Association, the best investment is in our people. Creating future leaders is just as important as strengthening our current leaders, and having early conversations about rules, fairness, and leadership in a representative democracy is critical.

If you are reading this column and want to join us in our small step toward a vision of a more inclusive and engaged community, please consider volunteering with the Lawyers in the Classroom program. If you know any teachers, administrators, or school staff, help us spread the word to them. You (and they) can find out more at: ctbar.org/lawyers-in-the-classroom. These are tumultuous times. But sometimes tumult reminds us of who we are. ■

Time To Go Pro Bono

Continued from page 33

to Counsel in Summary Process Proceedings," Proposed Senate Bill No. 531; "An Act Establishing a Pilot Program That Will Provide Legal Counsel to Tenants in Eviction Proceedings," Proposed Senate Bill 523 (2021)

8. Conn. Gen. Stat. 47a-26c ("All pleadings, including motions, shall advance at least one step within each successive period of three days from the preceding pleading or motion.")
9. Connecticut Advisory Council on Housing Matters, Report to the General Assembly (January 6, 2021), Appendix C-3
10. Conn. Gen. Stat. 47a-35 ("Execution shall be stayed for five days from the date judgment has been rendered….")
11. Connecticut Advisory Council on Housing Matters, *Report to the General Assembly* (January 6, 2021), Appendix C-8.
12. *Id*. at Appendix C-6.
13. "The Devastating Impact of Evictions on Connecticut Families," *CT Lawyer* magazine, Vol. 31, No. 3 (January/February 2021).
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19. *See* n. 18.
20. *See* n. 17.
21. www.ctbar.org/members/volunteer-today/CBA-pro-bono-connect/for-attorneys. To learn more about how to navigate Pro Bono Connect, please see Time to Go Pro Bono Column. *CT Lawyer*, September/October 2020. www.ctbar.org/docs/default-source/publications/connecticut-lawyer/ctl-vol-31/1-septoct-2020/ctl-sept-oct-20---column---time-to-go-pro-bono.pdf?sfvrsn=e06b274a_6

Supreme Deliberations

Continued from page 35

discretionary tasks, but rather permitted juries to impose negligence liability where municipal employees had abused their discretion when carrying out a discretionary task. Indeed, in *Tetro*, a unanimous Court upheld a damages award based on negligent police conduct during a pursuit.

But what about the majority's point that *Tetro* is irrelevant because the defendants had not raised the immunity issue in that case? Justice Ecker had "great difficulty believing" that the *Tetro* defendants "would have overlooked the most basic and common defense in the municipal playbook had it been viable." Instead, the fact that the *Tetro* defendants had not raised the defense supported Justice Ecker's conclusion that, prior to the judicial intervention of the past few decades, immunity was not available in such situations. Stated another way, "the fact that municipal immunity was a nonissue in Tetro almost certainly was a function of a failure to litigate the obvious [rather] than a failure to raise and decide the issue."

Justice Ecker also criticized the majority's determination that the identifiable person-imminent harm exception did not apply under the facts of *Borelli*. After conducting another historical review, Justice Ecker concluded that, among other things, the current understanding of the exception is far too narrow. For example, the "legally compelled presence" requirement, properly understood, is a sufficient condition for the exception to apply, not a necessary one.

On the issue of whether the contemporary understanding of this exception has strayed from its doctrinal underpinnings, Justice Ecker may not be alone. Justice D'Auria, in his concurring opinion, expressed his willingness to reevaluate the contours of the exception in a future case. And Chief Justice Robinson, in his concurring opinion, observed that "[i]n a precedential vacuum … no one would be more of an identifiable person subject to imminent harm than the occupant of a car being pursued by police…." Nevertheless, Chief Justice Robinson concluded that, as a policy matter, the exception should not apply to passenger "presumed to be in cahoots" with a fleeing lawbreaker.

So where does this leave us? After *Borelli*, a claim attacking an officer's decision to start a chase is likely to fail. But given the separate opinions of Chief Justice Robinson and Justice D'Auria, as well as Justice Ecker's dissent and the care that the majority took to limit the scope of its holding, we can't say for sure that a suit challenging the manner in which an officer conducted a pursuit, or an officer's conduct during a nonemergency situation, would meet the same fate. *See also Cole v. City of New Haven*, ___ Conn. ___ (Oct. 15, 2020) (reversing summary judgment order where, among other things, evidence indicated that city and police department policies may have imposed ministerial duty governing officer's conduct during a pursuit). Perhaps the Court is primed for a dramatic reversal of its recent municipal immunity jurisprudence. We may not have to wait long to find out. *See Daley v. Kashmanian*, 335 Conn. 939 (2020) (granting certification to address whether § 52-557n confers governmental immunity from liability for damages arising from personal injuries caused by an officer's negligent operation of a vehicle during on-duty surveillance). ■

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Continued from page 31

our story from a fuller, and perhaps less flattering perspective. It is up to us as to whether they will tell a story of fundamental transformation towards a more diverse, equitable, and inclusive legal profession for the future. ■

NOTES

1. Lawrence M. Friedman, *A History of American Law (4th Edition)* Oxford University Press (2019), p. 707-708.
2. American Bar Association, "ABA Timeline," https://www.americanbar.org/about_the_aba/timeline/ (last retrieved on February 9, 2021)
3. *Id*.
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