

# WESTCHESTER LAWYER



THE WESTCHESTER COUNTY BAR ASSOCIATION'S MONTHLY MAGAZINE

JANUARY 2020 | VOL. 7 | NO. 1

WESTCHESTER  
COUNTY BAR  
ASSOCIATION

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SCHOOL OF LAW

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THE WESTCHESTER COUNTY BAR  
ASSOCIATION'S MONTHLY MAGAZINE

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## Networking Event

# Chase Away the Midwinter Blues

February 10, 2020  
5:00 pm to 8:00 pm

**Tickets:**  
(includes dinner and cash bar)  
\$20 | \$25 at the door

**Copper House Restaurant**  
11 Taylor Square  
West Harrison, NY

### **SHAKE OFF THOSE MID WINTER BLUES!**

Join us for a fun filled evening at the Copper House, an Italian-inspired American Eatery & Marketplace, that serves up locally sourced farm-to-table comfort foods and artfully crafted cocktails in a rustic and homey, yet sophisticated setting.

*Join us in support of  
**FEEDING WESTCHESTER***

*Bring an item to donate.*

*Most needed:*

*Beans (canned/dried)*

*Cereals*

*Canned meals*

*Canned Vegetables/Fruit*

*Peanut Butter*

*Pasta/Rice*

*Full list is available online  
on the Calendar event page*

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Bronze: \$250

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### **HOW TO SUBMIT THIS REGISTRATION AND PAYMENT FORM**

**ONLINE:** Go to our website Calendar at [www.wcbany.org/events](http://www.wcbany.org/events) and follow prompts. **EMAIL** scanned form to [events@wcbany.org](mailto:events@wcbany.org).

**MAIL** form and payment (if by check make out to "WCBA") to: WCBA, 4 Westchester Park Drive, Suite 155, White Plains, NY 10604.

**NOTE:** Contributions or gifts to the WCBA are not tax deductible as charitable contributions; however, they may be tax deductible as ordinary and necessary business expenses.

Please join us for the Westchester County Bar Association's

# 2020 ANNUAL MEETING and Past Presidents' Dinner

**Wednesday,  
March 18, 2020**

**Cocktail Reception: 6:00 pm  
Dinner Meeting: 7:00 pm**

Coveleigh Club  
459 Stuyvesant Avenue  
Rye, New York

**Tickets**

Member (M) | Non-member (NM)  
(M) \$80 | (NM) \$90 through March 11  
(M) \$95 | (NM) \$105 after March 11

Table of Ten  
\$700 through March 11

\$800 after March 11

*The evening will feature a cocktail reception and dinner to honor our Past Presidents and conduct our Annual Meeting and Election of Officers and Directors for 2020-2021.*

**Sponsorship opportunities are available.**

Sponsorships include pre/post-event publicity in the *Westchester Lawyer* magazine, in e-news and on the website.

**Platinum: \$5,000: 10 tickets plus full page ad in the Magazine**

**Diamond: \$3,500: 10 tickets + half page ad in the Magazine**

**Gold: \$2,000: 5 tickets + half page ad in the Magazine**

**Silver: \$1,000: 2 tickets + quarter page ad in the Magazine**

**Bronze: \$ 500: 1 ticket + business card ad in the Magazine**

**Attention . . .  
Section & Committee Co-chairs**

**Annual Reports are due  
January 30, 2020.**

**Please submit reports to  
CLE@wcbany.org.**

**RESERVATION AND PAYMENT INFORMATION**

- I would like to make \_\_\_\_\_ reservations.
- I would like to reserve a Table of Ten.
- I would like to be a sponsor. (For information: sponsor@wcbany.org)

Name \_\_\_\_\_  
 Email \_\_\_\_\_  
 Firm \_\_\_\_\_  
 Bus. Phone \_\_\_\_\_

\_\_\_ Tickets: \$80 ea. (before March 11) \$ \_\_\_\_\_  
 \_\_\_ Tickets: \$95 ea. (before March 11) \$ \_\_\_\_\_  
 \_\_\_ Table of Ten: \$700 (before March 11) \$ \_\_\_\_\_  
 \_\_\_ Table of Ten: \$800 (before March 11) \$ \_\_\_\_\_

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**NAME(S):** (Please submit additional names on a separate sheet)

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**MAIL** form and check made out to: "WCBA" TO: WCBA, 4 Westchester Park Drive, Suite 155, White Plains, NY 10604

Contributions or gifts to WCBA are not tax deductible as charitable contributions; however, they may be tax deductible as ordinary and necessary business expenses.

# **Call for Nominations: Deadline: February 3, 2020**

*The WCBA is seeking nominations for two new awards to be presented at the ANNUAL MEETING on March 18, 2020:*

## **OUTSTANDING NEW LAWYER AND OUTSTANDING MENTOR**

### **■ Outstanding New Lawyer Award**

The Outstanding New Lawyer Award will be presented to an attorney admitted ten years or less who has demonstrated any combination of a commitment to professionalism, volunteerism in the community, pro bono activities, dedication to their career, enhancement of the profession and who demonstrate sensitivity to professional ethics.

### **■ Outstanding Mentor Award**

The Outstanding Mentor Award will be presented to an attorney who has dedicated time to help the next generation of lawyers grow their careers, manage responsibilities, experience professional networking, who provide substantive learning experiences and opens doors for new opportunities.

***Nominations for each award are limited to three letters in support.***

**Nominations must be delivered by February 3, 2020 to:**

**WCBA Awards Committee**

**Dawn Kirby and Richard Gardella**

**c/o Kirby Aisner & Curley LLP**

**700 Post Road, Suite 237**

**Scarsdale, NY 10583**

**or email [dkirby@kacllp.com](mailto:dkirby@kacllp.com)**



# HAUB LAW: *The Next 40 Years*

By Horace Anderson, Esq.

Dean, Elisabeth Haub School of Law at Pace University

For over 40 years, the Elisabeth Haub School of Law at Pace University has made its home in the heart of Westchester County. And nearly 40% of students enrolled at Haub come from north of Manhattan. Students are attracted by our picturesque campus and practice-based approach to legal education. They get integrated into practice environments as early as their 2L year, and they go on to serve communities from White Plains to Washington State and beyond. As legal education continues to evolve, Haub Law has evolved with it, ensuring that we are offering the best possible training for law practice and leadership, now and in the future.

At Haub Law, we combine rigorous academics with practice-based learning opportunities that prepare our students to practice law on the day they graduate, by exposing them to practice as early as they are ready. What makes our approach so unique – and so successful – is that we meet students where they are, academically and otherwise, and bring legal education to them.

Seeking to meet students where they are was behind our announcement last spring of our Flex J.D. The Flex J.D. is an expanded part-time scheduling option available to all students pursuing their J.D. at Haub. The Flex J.D. makes legal education more accessible to working professionals, allowing part-time law students to take all of their required classes in the evenings on Tuesday and Thursday, as well as on Saturday mornings and online. The Flex J.D. is ideal for prospective students who hold full-time jobs or have family commitments that might

prevent them from enrolling in a typical J.D. program. In less than one year, applications for the Flex J.D. have increased more than 100%. As we move into the next academic year, we are pleased to welcome even more students to our campus to pursue their degree through this option.

To best prepare future lawyers to compete in a changing legal landscape, we are also ensuring that we are responsive to new legal and business developments in the county. Health and technology is an \$18 billion business in Westchester, and supports more than 50,000 high quality, high demand jobs. Corporations, hospitals, health care providers and others need well-trained lawyers to ensure compliance with new regulations and to develop responsible health care policies and practices. To meet this new and growing need, Haub Law plans to re-launch our certificate in Health Law and Policy. The certificate provides students with an additional credential and training that will give them the knowledge they need to excel in the healthcare field in which legal skills are required or are a significant advantage.

While we respond to new areas, we also are doubling down on our strong grounding in the fields that have made us so successful over the past four decades. Haub Law is incredibly proud to be the #1 ranked environmental law program in the nation, according to U.S. News and World Report. The environmental law program has a long history of preparing students to act both locally and globally. Haub Law is one of only two law schools in the country that is a

full voting member of the International Union for the Conservation of Nature (IUCN) World Conservation Congress. Our students and faculty drafted nine motions to be considered at the Congress, which takes place in Marseille, France in June. Decisions made there have wide-reaching implications for environmental law and policy around the globe. And our students have a seat at the table as they work to combat the challenges of climate change and develop policies to create a more sustainable planet.

Through these areas and others, we are proud that we are serving the needs of our students. But we are equally as proud to serve the needs of Westchester. Through our clinics and externships, our students are working and advocating for Westchester residents and often providing them with critical legal help. The Pace Women's Justice Center is the leading provider of legal services to victims of domestic violence and elder abuse in the County. Similarly, our Immigration Justice Clinic provides counsel and representation to immigrants seeking asylum in the County and beyond. The work that these clinics are doing, as well as the work of our Land Use Law Center, Energy and Climate Center, and others around Haub Law, is more critical now than ever.

As we move into the next 40 years on our White Plains campus, we look forward to continuing our deep partnerships with the Westchester Bench and Bar, as well as our not-for-profit, corporate and governmental partners that continue to do so much to support our students, alumni, and faculty.

# From the President

## Honorable Linda S. Jamieson



Not the result of an ophthalmologist's exam or the long running topical news program on ABC, which had its debut broadcast on June 6, 1978, but this is the year that is to be rapidly upon us.

2020, the first year of the third decade of the 21st Century, is, however, a good chance for each of us to check our visions, personal and professional, as to how we wish to set that vision for the year and decade ahead.

A vision for the future always begins with a dream and no article in January of any year about visions or dreams is meaningful unless respect and admiration is paid to the dreams and visions of the Reverend Dr. Martin

Luther King, Jr., as we anticipate celebrating what would have been his 91st birthday on January 20, 2020.

On August 28, 1963, on the one hundred year anniversary of the issuance of the Emancipation Proclamation, Dr. King orated his masterful "I Have a Dream" speech in Washington D.C. before 250,000 people.

In that speech, Dr. King reminded the huge assemblage of the struggles African Americans had endured in the five score years after the Emancipation Proclamation was issued by President Abraham Lincoln ... struggles that continue to this day.

In that speech, Dr. King also put

forth the premise that the authors of the Constitution and Declaration of Independence had executed a promissory note to our citizens, a promissory note that every American in the generations that have followed is heir and obligee to.

As we stand on the precipice of this first month of the first year of a new decade of the 21st Century, it is important for all attorneys to appreciate the significance of that promissory note to our citizens, a note that the founders of this Country, a great number of whom were attorneys, obligated themselves to for the benefit of us all.

(continued on page 6)

### Save the Date | ANNUAL BANQUET 2020 | Wednesday, May 13, 2020 | 6:00 pm

#### WCBA'S 122nd ANNUAL BANQUET & Induction of Officers and Directors

Cocktail Reception 6:00 pm  
Dinner Meeting 7:00 pm

Join us for our annual induction of officers and directors with cocktail reception, dinner, and souvenir dinner journal.

**Featured Speaker:** Hank Greenberg, Esq.  
President, New York State Bar Association

#### Brae Burn Country Club

39 Brae Burn Drive, Purchase, NY

**SPONSORSHIPS ARE AVAILABLE:** All include pre/post-event publicity in the *Westchester Lawyer* magazine and on the website.

**Platinum Sponsor – \$5,000**  
Table of ten, full page color ad in the Banquet Journal

**Diamond Sponsor – \$4,000**  
Table of ten, a diamond border full page ad in the Banquet Journal.

**Gold Sponsor – \$2,500**  
5 tickets, a gold border full page ad in the Banquet Journal.

**Silver Sponsor – \$1,500**  
2 tickets, ½ page ad in the Banquet Journal.

**Bronze Sponsor – \$750**  
1 ticket, ¼ page ad in the Banquet Journal.

**Souvenir Journal ads** are available. **For more information contact:**  
sponsor@wcbany.org; or 914-761-3707 ext. 50

## FROM THE PRESIDENT

(continued from page 5)

2020 will be a tumultuous year both politically and in the halls of justice as there will be any number of legal issues of significance that will test the bounds of our republican form of government and the rule of law.

Dr. King had a dream that the rough places in our society would be made plain and the crooked places would be made straight with faith in our system of government, but the challenges before us in the year ahead are as daunting as ever, and perhaps even more so.

I think it is appropriate to quote from Dr. King's speech so as to remind us of his dream ... a dream that I know I have ... and hope you all have ... for this, our ever evolving democratic republic:

I say to you today, my friends, though even though we face the difficulties of today and tomorrow, I still have a dream. It is a dream deeply rooted in the American dream. I have a dream that one day this nation will rise up, live out the true meaning of its creed: "We hold these truths to be self-evident, that all men are created equal" ...

with this faith we will be able to transform the jangling discords of our nation into a beautiful symphony of brotherhood. With this faith we will be able to work together, to pray together, to struggle together, to go to jail together, to stand up for freedom together, knowing

that we will be free one day...

When we allow freedom to ring, when we let it ring from every city and every hamlet, from every state and every city, we will be able to speed up that day when all of god's children, black men and white men, Jews and Gentiles, Protestants and Catholics, will be able to join hands and sing in the words of the old Negro spiritual, "Free at last, Free at last, Great God a-mighty, We are free at last.

As members of our noble profession, you have the ability to make a difference in the lives of your clients every day. Every one of us has the ability to re-set our dreams and reinforce our visions so that we can help others to maintain a strong belief that our system of government and justice really works.

I know that I have my own vision for what I want to accomplish during the remaining months of my term as your President, and that vision includes the following initiatives. All of which are designed to make our association stronger, to strengthen our individual practices and accordingly, strengthen the belief your clients can have in our legal system, a legal system that is being tested in a very pronounced way.

It is my dream that through strong networking, abundant continued legal education, and significant community outreach to public associations and schools,

- a. that this profession will cultivate and reinforce civility and honor among our members
- b. that young attorneys and soon to be attorneys will realize the importance and need for membership in the Bar Association and networking to further their goals and desires; and further
- c. that through continued progress in the court system via the "Excellence Initiative," people will respect the law and our system of justice and that all will have equal access to justice, whether rich or poor.

In closing, I wish you all a happy and healthy New Year with the hope that all your dreams and visions become your reality.

Remember that January 27-31, 2020 is the 143rd Annual Meeting of the New York State Bar Association. There will be a wonderful Gala Dinner held on January 30th at the American Museum of Natural History, to which all New York State Bar Association members are invited. Supreme Court Justice Elena Kagan will be the Special Guest of Honor and the New York State Court of Appeals and State Appellate Judges will also be honored at the event.

If you have any suggestions, comments or concerns, remember I can always be reached at [president@wcbany.org](mailto:president@wcbany.org) or in person, by appointment.





A monthly column with a focus on matters of practice and procedure.

# THE PRACTICE PAGE

## CAN LIABILITY BE ESTABLISHED FOR “BLACK ICE”?

By Hon. Mark C. Dillon

Justice of the Appellate Division  
Second Department

Adjunct Professor of New York Practice  
at Fordham School of Law

It's winter. Plaintiff attorneys handling personal injury cases face peculiar challenges when their clients have slipped and fallen on “black ice,” as distinguished from regular ice or snow. There is no definition of black ice in *Black's Law Dictionary*, and the National Weather Service refers to it as a slang term (National Weather Service, “Black Ice,” <http://w1.weather.gov/glossary/index.php?letter=6>). Black ice forms from water when winds and temperatures are colder than the surface beneath it. The freezing process under those conditions expels air bubbles from the water, causing the ice that forms to be unusually smooth, thin, and virtually invisible. Black ice is a transient condition that melts quickly once it is exposed to sufficient sunlight or higher temperatures.

Whenever a plaintiff sues a premises owner for permitting a hazardous ice condition, the plaintiff must prove either actual or constructive notice of the condition for liability to attach. How may a plaintiff prove actual notice to the property owner if black ice is, by nature and definition, virtually invisible? How may a plaintiff prove constructive notice if black ice conditions are fleeting and transient? These questions pose unique legal quandaries for plaintiffs.

The invisibility and transience of black ice makes these slip-fall cases more difficult for plaintiffs to win and easier for property owners to defend. Attorneys, courts, and jurors must take the facts as we find them.

A negligence action involving a two-hour black ice condition is more challenging for plaintiffs to prove than a negligence action involving “regular ice” present for two days. In most cases, there may simply be no way for plaintiffs to avoid that reality.

One strategy that may be available to plaintiffs for overcoming problems of proof inherent in black ice cases is if the condition is shown to be a recurring one, as in *Vincent v. Landi*, 101 A.D.3d 1565 (3d Dep't 2012) and *Phillips v. Henry B's, Inc.* 85 A.D.3d 1665 (4th Dep't 2011). Once a defendant property owner is on actual notice of a recurring condition, the defendant may be charged with constructive notice as to each specific recurrence that follows (*Rachin v. Michaels Arts & Crafts*, 118 A.D.3d 1391 [4th Dep't 2014]).

A second approach involves the *sui generis* evidence of the cases which, despite the transience of black ice, nevertheless support a finding of actual or constructive notice, or at least a question of fact on those issues. In *Walters v. Costco Wholesale Corp.*, 51 A.D.3d 785 (2d Dep't 2008), a plaintiff defeated a motion for summary judgment by establishing that a slip-fall had occurred at the same location 45 minutes before the plaintiff's fall, and the defendant's on-site manager observed the ongoing black ice condition immediately after the plaintiff's fall. In *Pomeroy v. Gelber*, 117 A.D.3d 1161 (3d Dep't 2014), the plaintiff defeated summary judgment with an affidavit of an expert meteorologist that the black ice condition

had been present for several hours before the occurrence. In *Torosian v. Bigsbee Village Homeowners Ass'n*, 46 A.D.3d 1314 (3d Dep't 2007), a witness testified that the black ice condition had been in existence the evening before, and there were photographs depicting the ice at the same location after the plaintiff's accident. In *Bullard v. Pfohl's Tavern, Inc.*, 11 A.D.3d 1026 (4th Dep't 2004), an affidavit of a witness describing slippery conditions was supported by an expert meteorologist regarding precipitation and temperatures. The common denominator of these cases is that the plaintiffs brought forth specific witnesses and evidence, whether lay and/or expert, who supported potential liability despite the difficulties associated with proving the visibility and duration of the alleged black ice conditions.

Third, a condition initially reported as “black ice” might not actually be so. In *Wright v. Emigrant Savings Bank*, (112 A.D.3d 401 (1st Dep't 2013), the plaintiff's “black ice” terminology during her deposition was belied by her description of the ice itself, which she recalled as “black grayish” and “dirty snow,” and capable of observation by prior actual or constructive notice.

Conversely, property owners' defenses may exploit the plaintiffs' difficulties with proof on issues of prior actual or constructive notice. On balance, plaintiffs' attorneys typically face challenges in prosecuting black ice cases, and must draw upon their best skills to navigate them.



## NYSBA House of Delegates Meeting

By **Nelida Lara, Esq., Andrew Schriever, Esq. and Dawn Kirby, Esq.**

The New York State Bar Association's House of Delegates met on November 2, 2019, at the New York State Bar Association, Bar Center, in Albany, NY.

The House of Delegates was presided over by NYSBA President-Elect Scott M. Karson and minutes were taken by NYSBA Secretary and WCBA Board Member, Sherry Levin Wallach. Those in attendance included WCBA Delegates: WCBA Past President Dawn Kirby, WCBA Treasurer Andrew Schriever, Hon. Robert A. Spolzino, WCBA Board of Director Nelida Lara, and Christopher C. Palermo. WCBA Vice President James L. Hyer participated in the NYSBA Nominating Committee Meeting, which took place the day before on November 1, 2019.

The NYSBA Nominating Committee Meeting was presided by NYSBA Past-President and Chair of the Nominating Committee Claire P. Gutekunst during which the following were nominated and approved on behalf of the Ninth Judicial District: Hon. Adam Seiden as Vice President, and Karen Beltran, Claire Degnan, John Pappalardo as NYSBA House Delegates. Also nominated and approved was the NYSBA next President-Elect-Designee, T. Andrew Brown, who currently serves as the

Chair of NYSBA's Finance Committee. Congratulations!

The House agenda commenced with the report of the NYSBA Treasurer, Domenick Napoletano followed by the report and recommendation of Mr. Brown on behalf of the Finance Committee. Mr. Brown reported what seems to be a nationwide trend of declining membership and declining CLE revenue. The numbers are the lowest they have been in the last 10 years and even lower than during the economic crisis of 2008. NYSBA has several strategies to deal with the downturn, among the ones proposed by the Finance Committee are increase of digital outreach, global initiatives, and improved technology.

An additional initiative to increase membership participation and revenue was presented by Robert T. Schofield, IV on behalf of the Committee on Bylaws, which proposed an amendment to Article III of the Bylaws to include paralegals within the category of Non-Attorney Affiliates who may become members of NYSBA. This proposal was subscribed to by the members of the House of Delegates and will be considered for approval at the Annual Meeting of the Association on January 31, 2020. President Henry M. Greenberg also recommended during his report to the House to

expand global outreach by promoting membership to international attorneys, to revamp NYSBA's communications strategy, and to reinvent the work of the various task force groups.

The Working Group on Attorney Mental Health asked the House to approve its recommendation calling for the elimination of inquiries about mental health history, diagnosis, or treatment from the application for admission to the Bar of New York State. The recommendation was approved.

On behalf of the Committee on Diversity and Inclusion, Mirna M. Santiago requested approval of its report and recommendations calling for the promotion of civil discourse and promotion of diversity in the profession. The report noted that current public discourse contains strong elements of hostility and divisiveness which threatens democracy. The report was unanimously approved.

The Rules of Professional Responsibility were the topic of an extensive report by Prof. Roy Simon on behalf of the Committee on Standards of Attorney Contact (COSAC) and a lively debate by members of the House of Delegates. COSAC proposed several amendments in a blackline form to Rules 1.0, 1.10, 2.4, 4.1, 5.2, 5.4,



Andrew Schriever (WCBA Treasurer), James Hyer (WCBA Vice President), Sherry Levin Wallach (WCBA Director and NYSBA Secretary), Hon. Cheryl E. Chambers (Associate Justice of the Appellate Division, Second Department), Dawn Kirby (WCBA Past President), Nelida Lara (WCBA Director) and Hon. Robert A. Spolzino, Appellate Division, Second Department (retired).

5.5, and 7.1-7.5. Highlights included a specific process for dealing with potential conflicts when attorneys transfer between law firms; requirements for neutrals/mediators to explain to *pro se* litigants that their role is not as an attorney for the party, but rather as a neutral such that their communications are not protected by attorney-client privileges; clarification of the prohibition against New York lawyers assisting out of state and foreign lawyers in the unauthorized practice of law; detailed comments concerning prohibitions in attorney advertising, including through business cards, websites and letterhead to ensure that advertising information does not contain misleading information or statements; and finally, the ability for lawyers to participate in for profit lead generation services. All recommendations were approved.

Finally, NYSBA Past-President Seymour W. James and William T. Russell Jr. presented the report and recommendations of the Task Force on

Parole Reform. The first recommendation presented was to eliminate mandatory pre-adjudication revocation of parole status based on technical parole violations, such as failing to make required office reports, paying required fees, and complying with a parole officer's instructions. These instances of parole revocation result in reincarceration at significant financial costs, as well as adverse impacts to the parolee, who, under current rules, could be re-imprisoned prior to a hearing. The second recommendation addressed the issue of good time credits through which parolees can reduce the amount of time they spend on parole, suggesting that, as part of a new program of implementing graduated sanctions (in lieu of immediate reincarceration) for technical parole violations, a parolee could lose "earned time credits" for a fixed period of time following an adjudicated violation of parole. The third recommendation is to increase the number of parole commissioners, in that currently the New York State

Board of Parole is required to have only nineteen members, but that same Board is responsible for adjudicating parole release decisions for 10,000-12,000 cases annually, resulting in sitting commissioners having inadequate time for preparation, review and conducting face to face interviews. The report was approved.

NYSBA will return to its long-standing tradition of hosting an annual gala dinner which will take place on Thursday, January 31, 2020 at the American Museum of Natural History in New York City. Since the first gala in 1877, guest speakers have included Benjamin Cardozo, Oliver Wendell Holmes Jr., Louis Brandeis, William Brennan, Thurgood Marshall, Dwight Eisenhower, Grover Cleveland, and William Howard Taft. For more information, sponsorship and advertising opportunities, and to purchase individual tickets go to [www.nysba.org/galadinner](http://www.nysba.org/galadinner).



## Family Members Beware: Not All Creditors Are Created Equal

### *The “Family Services Rule” and Creditor Claims Asserted by Close Family Members*

By Andrew Frisenda Esq. and Gary E. Bashian, Esq.

To put it mildly, a surviving spouse and/or child is usually frustrated when they are disinherited from their husband, wife, or parent’s estate plan, or learn that the inheritance they are to receive is significantly smaller than they had hoped.

In situations such as these, it is common for the slighted party to bring a creditor claim for past “services rendered” to the decedent against the estate in an effort to secure, or supplement, an inheritance that they believe should be greater.

Unsurprisingly, these types of creditor claims are subject to vigorous opposition as, if collectible, they will reduce the assets ultimately payable to the estate’s other named beneficiaries.

However, not all creditors are created equal, and in many situations an Estate can invoke the “Family Services Rule” to defeat claims made by a close family member seeking compensation for services allegedly rendered to the decedent during life.

Generally speaking, the “Family Services Rule” presumes that, absent

clear and convincing proof showing that the creditor had a reasonable expectation of compensation, services performed on behalf, or for the benefit, of close family members are: 1) made out of love and affection; are therefore 2) gratuitous; and 3) cannot form the basis of a post-death creditor claim (*see In re Estate of Curtis*, 83 A.D.3d 1182 [3d Dep’t 2011]).

As such, based in large part on the presumption that all such services rendered to close family are gratuitous, the “Family Services Rule” bars many

familial creditor claims absent very specific facts that afford the family member standing to sue as a legitimate creditor.

To that end, the alleged familial creditor must establish that there was either an agreement between the parties that payment would be made for the services rendered, or in the absence of any such agreement, that the character of the services rendered was so “exceptional” that payment could be reasonably expected by the claimant (see *In re Lutz’ Estate*, 55 Misc. 2d 226 [Oneida Cty. Surr. Ct. 1965]; *In re Post’s Estate*, 132 N.Y.S.2d 422 [Ulster Cty. Surr. Ct. 1954]; *Matter of Cooke*, 45 Misc. 2d 365 [Onondaga Cty. Surr. Ct. 1965]; *Matter of Gorden*, 8 N.Y.2d 71 [1960]).

Indeed, in light of the presumption that services rendered between close family are gratuitous, the “Family Services Rule” places the burden squarely on the shoulders of the alleged familial creditor to establish that they in fact have standing to sue as a legitimate creditor of the estate, and that the services were not rendered out of love and affection.

However, a familial creditor can rebut the presumption that services were rendered out of love and affection if they can offer evidence establishing that they had a reasonable expectation of payment.

A written agreement acknowledging the decedent’s intent to pay for the services as rendered payment would of course constitute such evidence, and effectively rebut the presumption that no payment was expected or intended.

Similarly, a clear course of conduct wherein compensation was paid in the past can also establish that the claimant had a reasonable expectation of compensation for providing personal services thereafter.

Even a demand for payment that was ignored by the Decedent can effectively rebut the presumption of gratuitous service (see *contra Cooke supra*).

Nevertheless, where the record is devoid of any such proof, or other evidence establishing claimant’s reasonable expectation that they would be compensated for the services rendered, the court will not presume a formal compensation agreement existed; a promise to pay was made; and/or that the “Family Services Rule” does not bar the claim in its entirety (see *Cooke, Gorden, supra*).

The closer the family relationship, the stronger the presumption that the services rendered were gratuitous, i.e.: where it is difficult to rebut the presumption that services rendered between spouses; parents and children; and/or between siblings were gratuitous, the presumption does not automatically extend to more distant relations such as nieces, nephews, and/or in-laws (see *In re Harvey’s Estate*, 102 N.Y.S.2d 725 [Broome Cty. Surr. Ct. 1951]; *Matter of Furniss*, 86 A.D. 96 [4th Dep’t 1903]; *Matter of Sutton*, 159 A.D. 21 [3d Dep’t 1913]).

Notably, the fact that the services rendered were commercial in nature, does not, in and of itself, preclude invocation of the “Family Services Rule,” nor its presumption that the services were rendered gratuitously (see *Gorden, supra*).

Given the presumptions afforded by the “Family Services Rule,” a creditor claim asserted by a close family member cannot survive a CPLR § 3211(a)(7) Motion to Dismiss for failure to state a cause of action – be it in Supreme or Surrogate’s Court – unless claimant’s Pleading alleges, *inter alia*, that there was either a written compensation agreement; a promise by the debtor to pay for the services rendered;

and/or facts establishing the claimant’s reasonable expectation for payment based on the circumstances and past experience. Failure to meet these basic pleading requirements will all but guarantee swift dismissal as, without reference to at least one these basic fact allegations, the “Family Services Rule” will likely bar a litigant’s claim as a matter of law.

While the “Family Services Rule” is by no means immutable or absolute, it is a rule of law that must always be considered in detail when either prosecuting or defending a matter wherein a creditor claim is made by a close family member.

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**Andrew Frisenda, Esq.**, is a Senior Attorney at the law firm of Bashian P.C., focusing his practice on trusts & estates litigation; legal malpractice; corporate litigation; appellate practice; estate planning & administration; guardianship matters; and business creation. Andrew practices in the NYS Appellate Divisions; frequently appears in both the NYS Surrogate’s and Supreme Courts; and lectures as a NYS Continuing Legal Education speaker. Andrew is a Co-Chair of the WCBA Appellate Practice Committee, and a member on the White Plains Bar Association’s Board of Directors.

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**Gary E. Bashian, Esq.**, is the managing member of the law firm Bashian P.C., is a past President of the Westchester County Bar Association. He is presently on the Executive Committee of the New York State Bar Association’s Trust and Estates Law Section as Vice Chair of the Estate Litigation Committee, and is a past Chair of the Westchester County Bar Association’s Trusts & Estates Section. Mr. Bashian has practiced law for over thirty-five years and is a frequent lecturer and author. He practices in estates and trusts, estate litigation, elder law, elder law and guardianship litigation, business planning, corporate and commercial litigation and not-for-profit corporation law and asset and wealth preservation.



# ANGER, SOCIETY, AND THE LAW

By Rich Esposito, M.S. CAMS

Rage, fury, exasperation, whatever you want to call it, anger is a powerful emotion that can overwhelm and hamper one's better judgment. Lawyers can assist their clients by providing and offering a solid resource for their client's anger management.

Anger is part of the human anatomy, and many times there are valid reasons why we get angry or feel frustration, irritation, and obstruction. Anger is our body's physiological response to something we perceive as a warning or threat. It triggers us, makes us hyper-alert, and allows us to focus with great intensity on disturbances in any given situation. When adrenaline and other stress hormones are activated in our bodies, it creates a cascading series of changes including increased breathing and heart rate, muscle tension, even headaches. One's behavior can become irrational and aggressive. When angered, you're accessing the reptilian cortex of the brain, which regulates fear and aggression.

Seemingly trivial events such as being stuck in traffic or your favorite sports team losing a pivotal game can trigger an intense and sometimes dangerous negative response. Some sports fans have been banned from entering a stadium or ballpark until they take anger management classes. Domestic violence

and spousal confrontations can lead to separation and divorce. Children can be endangered and remanded to Child Protective Services. Anger Management programs have proven helpful for many attorneys seeking to help their clients through these difficult times. For example, anger management classes can help a client regain visitation rights with their children or facilitate getting an order of protection rescinded.

If the court mandates anger management classes, attorneys may need to refer their clients to anger management specialists. When anger is triggered, previous ongoing stress is often the forerunner to the aggressive reaction. Stress is related to every aspect of life, and major sources of stress can include large-scale stressors like your job, or financial problems leading to domestic violence, child abuse, and other violent acts of irrational behavior. Everyone is familiar with outbursts of aggressive behavior such as when someone experiences road rage, but many people don't understand why they undergo these experiences. Oftentimes we continue to push our negative feelings down until the effort becomes too great and we experience endorphin overload—we feel ready to explode. Our modern day fast-paced schedules, combined with a multitude

of technological distractions, do not help.

Often someone who struggles with anger will downplay how it affects their life, or not even realize how they are unintentionally being aggressive or abusive. Learning to pay more attention to one's behavior and judge it critically is a step in the right direction with anger management.

There is compelling data to suggest that a simple rewiring of our associations and behavior can create tremendous results for a person who wants to acknowledge their anger problem and deal with their feelings appropriately, and the court system will demand this! Anger Management has become one hot topic in keeping society sane instead of insane. Scientific evidence based techniques taught in anger management show how reducing pressure can change human life for the better.

Knowing clients are getting in trouble legally or hurting those around them, seeking professional counsel and Anger Management helps clients move forward with their lives. It's a sign of strength when someone shows a willingness to get honest feedback from a therapist, so try to encourage that behavior within your practice.

## Key Strategies for Dealing with Anger That Can Benefit Anyone

### Think Before You Act

It is extremely easy to say or do what you want while you are in the heat of the moment. It's times like these when we say something that we, deep down, do not mean. Take some time and think about what you want to say. Practice taking some deep breaths or counting to ten. Be sure to give the person you are arguing with time to also do the same.

### Express Yourself Mindfully

When people lose control of their anger, they'll often report feeling like they were on autopilot during an angry outburst, yelling out whatever words came into their head. Once you can slow yourself down a bit and get to the place where you are thinking more clearly, be sure to share your feelings of frustration using assertive communication, not aggressive communication. Share what you are concerned about and be direct. Be mindful of the tone of your voice.

### Get Some Physical Exercise

If you find yourself getting angry on a regular basis, take a look at how much physical activity you're getting.

Channeling your anger and getting it out through vigorous exercise can significantly reduce your stress. Find a physically challenging activity you enjoy, or go for a walk, or hit the gym. Not only does physical activity release pleasure-inducing chemicals to your body, but it also provides a contemplative period of reflection that can provide a more rational vantage point on a recent argument, or frustrating situation you may be about to enter.

### Take a Break

Your body is probably not getting enough rest: your cell phone is sending you alerts multiple times every hour, you have a busy work schedule, etc. Demands pile up throughout the day on all of us. Ignoring those stimuli and making time to do something just for yourself, even for a short period, can help you stay calm. Do this not just once, but several times throughout the day. It's amazing how taking breaks during the rough parts of the day can help you feel better prepared for the challenges ahead. Walking to get some water, chatting with some colleagues, or watching a funny video on your phone could all be great tiny breaks.

**Rich Esposito, M.S. CAMS**, is the author of *The Evolution of Student Behavior* available on Amazon and at Barnes and Noble. He is an anger specialist, counselor, life coach, a rational emotive behavior therapist in education, and is certified in modern psychotherapy. Mr. Esposito holds a Master in Science in counseling education and is a graduate of Purchase College and Long Island University. He is certified as a National Anger Management Specialist Level 11.

He has been featured on NBC, in *Bronx Times*, *The New York Post*, *Parent Magazine*, *Westchester Magazine*, *The Viking*, and numerous other journals and magazines.

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## Do I Have to Return Money Paid to Me by Mistake?

By Michael E. Kremen, Esq.  
and James C. Keidel, Esq.

The following question came in through the hotline from an insurance agent: “The insurance carrier that is my principal by agency agreement paid me a nearly six-figure bonus. I was not sure what the payment was for, and so I held onto it for almost a year, rather than spending it. Eventually, however, I did spend the money. Later, the insurance carrier asked for the funds to be returned. Do I have to return the money?”

As we researched the answer to this question, we found that the answer was not as clear cut as we thought it would be. In New York, when funds are paid through mutual mistake, the receiving party does not necessarily have to return the funds in all scenarios. There are several ways parties go about recovering funds paid by mutual mistake, including claims of unjust enrichment, quasi-contract and restitution.

Under the ‘mistake of fact’ doctrine, “[m]oney paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund.”<sup>1</sup> Thus, a Court would have to find that recovery of the funds would be inequitable to the receiving party to order the receiver eligible to keep the funds. There must be detrimental reliance to go with the unjust enrichment in order for the receiver to keep the funds.<sup>2</sup> In the absence of detrimental reliance, “a

party who pays money, under a mistake of fact, to one who is not entitled to it, should, in equity and good conscience, be permitted to recover it back.”<sup>3</sup>

Further, the ‘discharge of value’ rule provides that “a creditor of another or one having a lien on another’s property who has received from a third person any benefit in discharge of the debt or lien, is under no duty to make restitution therefor, although the discharge was given by mistake of the transferor as to his interests or duties, if the transferee made no misrepresentation and did not have notice of the transferor’s mistake.”<sup>4</sup> Under ‘discharge of value’, a creditor can retain erroneously received funds if it accepted the funds in good faith in the ordinary course of business and for valuable consideration.<sup>5</sup> Also, the Uniform Commercial Code (“UCC”) provides a reasonable time limit for discovery of the error by the payee: 90 days.<sup>6</sup>

Contracts between the parties may, however, control the transaction<sup>7</sup>. There can be no valid claim for unjust enrichment when the matter is controlled by a contract, as unjust enrichment is a quasi-contract claim, an obligation created in the absence of any agreement.<sup>8</sup> “The existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter.”<sup>9</sup>

Despite the potential arguments available above, in similar situations, most agents negotiate a partial return

of the funds. This is done in consideration of the continued business relationship between the agent and the carrier and also practicality, including that litigation would cause the loss of a substantial portion of the funds the agent would have attempted to keep.

### Endnotes

- 1 See *Banque Worms v. Bank America Int’l*, 77 N.Y.2d 362 (1991).
- 2 See *Green Tree Servicing, LLC v. Christodoulakis*, 136 F.Supp.3d 415 (E.D.N.Y. 2015).
- 3 *Id.*
- 4 See Restatement of Restitution [Second] § 14 [1].
- 5 See *In re Awal Bank, BSC*, 455 B.R. 73 (U.S. Bank. Ct. S.D.N.Y. Aug. 2011).
- 6 See UCC § 4A-205(b).
- 7 See *Green Tree Servicing, supra*.
- 8 *Id.*
- 9 *Id.*

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**Michael E. Kremen, Esq.**, former Director of Operations of the Westchester County Bar Association from 2014-2015, now handles insurance defense lawsuits at Brooks, Berne & Herndon PLLC. Michael can be reached at michael.kremen@lawbbh.com.

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# Holiday PARTY 2019

On Thursday December 5, 2019, the WCBA's Annual Holiday Party was held at the cozy and festively decorated Via Garibaldi Restaurant in White Plains, NY. Members and friends enjoyed a

lovely evening of tasty food, a full open bar and lively conversation.

Thank you to our guests who made contributions to *United for the Troops* again this year.

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# member Spotlight



**Ruth Raisfeld, Esq.**

**Tejash:** How long have you been a member of the WCBA and what are some of your contributions?

**Ruth:** 17 years. I served as Chair and Co-Chair of the WCBA Alternative Dispute Resolution Committee between 2002 and 2015 . . . this was at a time that mediation and arbitration were growing and becoming more of a standard process to avoid and resolve litigation.

**Tejash:** What is your current job and practice area?

**Ruth:** I have a private practice as a mediator and arbitrator. While I am a member of the American Arbitration Association mediation and employment arbitration panels, the vast majority of my work comes from private retention by law firms and their clients. Nearly 100% of my practice is employment and labor disputes, either threatened litigation or pending cases in the federal and state courts.

**Tejash:** How did you become involved in ADR?

**Ruth:** I studied Labor Relations in college at Cornell so I always knew about

In this feature, Tejash V. Sanchala, interviews WCBA members about their experiences and insights. Tejash is a former WCBA Board Member and Employment Law Committee Co-Chair.

Tejash can be reached at: [tejash@sanchalalaw.com](mailto:tejash@sanchalalaw.com)



alternative forms of dispute resolution and one of my first internships was with a labor arbitrator in the White Plains area. After practicing employment and labor law for 22 years, I decided to strike out on my own as a neutral.

**Tejash:** How has the ADR field changed in the past few years?

**Ruth:** When I started my dispute resolution practice about 17 years ago, mediation was often confused with arbitration, even among the judiciary. While mediation and arbitration are significant processes in the labor and employment law area, it had been less prominent in commercial and civil matters. Through the work of various academics, practicing professionals and bar association committees, the judiciary is now “sold” on mediation as a way to help reduce dockets, introduce settlement efforts earlier in the litigation process, and lead to more efficiency and less expense for litigants. New York State Chief Judge Janet DeFiore has helped to lead the way on this and ADR is now a “presumptive” option in the commercial and civil litigation arena. Lawyers are introduced

to and trained in dispute resolution in the law schools and in continuing legal education. Settlement strategies often call upon different skills than commonly thought by litigators.

**Tejash:** What is one of your favorite legal success stories?

**Ruth:** For many years, I represented St. John’s University which was the subject of a great deal of litigation by faculty who did not get reappointed or tenured and sued to challenge these decisions. I worked closely with the St. John’s general counsel who retired 20 years ago and is still one of my best friends and the smartest lawyer I know still at age 86!

**Tejash:** Who were some of your legal mentors?

**Ruth:** I had the great fortune to clerk for Judge William Hughes Mulligan, former Dean of Fordham and Second Circuit judge. Through that clerkship, I was introduced to other Fordham alum including former Attorney General Louis Lefkowitz and the great labor mediator and former Dean of Fordham, John Feerick. These legal giants were generous and took me under their wings!

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**Tejash:** If you were not practicing law, what would you be doing?

**Ruth:** I would travel extensively and live in other parts of the world on an extended basis.

**Tejash:** What might people be surprised to learn about you?

**Ruth:** I am a pretty direct and straight talking person so people may be surprised to know that I like to spend time alone enjoying nature.

**Tejash:** What do you splurge on?

**Ruth:** Watches . . . I find as a mediator, spending long amounts of time in a room with people who I meet for the first time in the heat of the battle, they often comment on my watches or jewelry, which must give them confidence that I know what I am talking about.

**Tejash:** What is the best hour of your day?

**Ruth:** All the work gets done between 2-7: that's when the cases settle!

**Tejash:** What are some of your favorite movies?

**Ruth:** That's easy: *Gone with the Wind*; *Saving Private Ryan*; *Forrest Gump* . . . movies entwined with history are my favorites.

**Tejash:** What is your favorite meal?

**Ruth:** Carbs: bagels, pizza, chicken.

**Tejash:** What are some of your favorite vacation trips ?

**Ruth:** My two favorite vacation destinations are Italy and Israel.

**Tejash:** What is one of your favorite things to do in Westchester?

**Ruth:** I take long walks in Scarsdale and along the Bronx River and listen to podcasts. One of my favorite podcasts is The Daily, to keep up with the inside track on the news and also Recode Decode, hosted by Kara Swisher which covers how technology impacts our everyday lives.

**Tejash:** What is the best advice you have ever received?

**Ruth:** "Keep your eye on the ball," which for me meant, don't let your career overbalance your marriage and family.

**Tejash:** When is the last time you were outside of your comfort zone?

**Ruth:** Probably the first time I was asked to mediate a class action case. I had not been familiar with class actions and so had to get smart quickly to help resolve those kind of cases which have a lot of moving parts. Also, the hot topic these days is wage-and-hour disputes which are often mediated because the settlements require court approval; if a mediator is involved, some of the less savory aspects of settling cases are avoided.

**Tejash:** What is one of your future ambitions?

**Ruth:** Retirement!

**Tejash:** What is your favorite part of being involved with the WCBA?

**Ruth:** I have found WCBA to have low barriers to entry: the professional staff and the members are friendly, competent and welcoming of any lawyer or law student who wants to contribute their time, expertise or resources.

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## Lauren C. Enea, Esq. Honored



Westchester County elder law attorney Lauren C. Enea, Esq., an associate at Enea, Scanlan & Sirignano, LLP, was recently honored at Westfair Communications' 2019 Millennial

Awards. The awards celebrate a new era in the workforce, recognizing individuals who are leaving their footprints in the local business community.

Ms. Enea concentrates her practice on wills, trusts and estates; Medicaid planning, special needs planning and probate/estate administration. "I ... am honored to be recognized in an area that I'm truly passionate about."

On November 18, Ms. Enea was also elected as the Secretary of CAREERS Support Solutions' Board of Directors. A non-profit organization, CAREERS helps individuals with disabilities obtain gainful employment in Westchester, Putnam and Dutchess Counties.

## Four Partners of Danziger & Markhoff LLP Are Recognized Among the Top Practitioners in Westchester County by "Best Lawyers" and "SuperLawyers"



Harris Markhoff was selected for inclusion in the The Best Lawyers® 2020 in the areas of Corporate Law and Trusts & Estates. Michael Markhoff was selected in the area of Trusts & Estates. Joshua S. Levine was selected in the area of Health Care Law. Selection for Best Lawyers is based on an exhaustive peer-review survey in which over 50,000 leading attorneys vote on the legal abilities of other lawyers in their practice areas.

In addition Jay Fenster and Michael Markhoff have been similarly selected for inclusion in the 2019 New York Metro Super Lawyers list. Jay was selected in the area of Employee Benefits/ERISA and Michael was selected in the area of Estate Planning and Probate. Only 5 percent of the attorneys practicing in New York receive this honor.

Photos from left: Harris Markhoff, Michael Markhoff, Joshua Levine and Jay Fenster.



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# FROM THE BACK BENCH

BY RICHARD M. GARDELLA, ESQ.  
Editor-in-Chief  
WCBA Past President



Richard M. Gardella, Esq., is counsel to Bertine, Hufnagel, Headley, Zeltner, Drummond & Dohn LLP. He is a past president of the Westchester County Bar Association and the Westchester County Bar Foundation, the editor-in-chief of this *Magazine*, and a former WCBA delegate to the American Bar Association and the New York State Bar Association.

President Trump is not the first U.S. president accused of an abuse of power and threatened with impeachment.

In the first nearly two centuries of this nation, there was only one presidential impeachment, an effort that missed U.S. Senate conviction by one vote.<sup>1</sup> In the near half century since, there have been four impeachment efforts. The first of those four avoided a House vote and a Senate trial by presidential resignation while the next presidential removal effort failed by a substantial margin to get the two thirds Senate majority needed for conviction and removal from office.

The last two impeachment efforts involve our current president. The first effort, centered around the Mueller probe, did not reach a House vote while the current effort surrounding foreign aid to the Ukraine is still evolving.

In facing an actual impeachment effort, Trump joins Andrew Johnson, Richard Nixon and Bill Clinton with Nixon's resignation providing the only presidential impeachment removal success so far. Over the years, other presidents were accused of abusing power and threatened with impeachment, but they never actually faced a serious organized impeachment effort.

The disputed 2000 presidential election led to calls for a Bush impeachment and Harry Truman, whose sometimes colorful, yet effective White House career was touched on in this space last month,<sup>2</sup> was the target of impeachment cries in 1952 after he seized steel mills in face of a scheduled strike by steel union workers.

Reflecting the view of most of this country's press back then, *The New York*

*Daily News* featured this headline in response to the steel seizure: "Truman Does a Hitler."

In attacking the president's action, the president of one of the steel companies charged: "Hitler and Mussolini did the same thing in Germany and Italy as Truman has done in The United States."

That type of widespread visceral reaction to the seizure led to the talk of impeachment by the president's conservative foes. Truman, for his part, had chosen the drastic seizure measure instead of The Taft-Hartley Act or other measures authorized by Congress when negotiations between the unions and the steel companies broke down. It was a bow to labor and its support of the president. Truman relied on that support. The Taft-Hartley Act, which provided a "cooling-off" period, robbed strikers of some of their negotiation power and was hated by unions.

Sixty seven years ago this month the steel worker union voted to delay a strike for 45 days, announcing the workers strike would take place February 21, 1952 in the absence of an acceptable wage agreement.

The vote came after the failure of negotiations and the efforts of federal government wartime wage and price stabilization agencies to settle this dispute. The Korean War at the time had settled into a brutal stalemate and was months from an armistice. Steel production was vital to the continuing war effort, leading to Truman's drastic action in response to the steel workers' strike threat.

His seizure announcement came on April 9, 1952 at 10:30 p.m. Washington time after talks collapsed and the Union



## A Changing World of Political Complication

The U.S. Supreme Court's handling of the wartime crisis posed by a steel strike is instructive to today's court followers.

All of the justices were appointed by Democratic presidents, five by Franklin Delano Roosevelt and four by Harry S. Truman. Seven were registered Democrats while only one admitted to being Republican. One justice was listed as an Independent.

While there were seven separate written opinions—six for the majority and one for the three member dissent—those opinions were brief by current standards.

The total in pages of the steel decision only amounts to a quarter of the recent 120 page decision by a federal judge on whether or not a former White House aide can refuse to respond to a congressional subpoena.

Certainly the crisis faced by the Supreme Court in 1952 dwarfs in importance the recent subpoena

case and yet the top court was able to make an important constitutional determination with relative brevity and promptness.

All of which suggests that brevity is no longer viewed as the “soul of wit” and that political warfare and posturing today in Washington trumps the national service need for effective, efficient national governance.\*

\*See *The Notable Trials Library 1995*, edition of *The Anatomy of a Connotational Law Case* by Alan F. Westin.

notified the steel makers that steel workers would strike at 12:01 a.m. on that date.

Less than a half hour after the notification, Republic Steel and Youngstown Sheet & Tube Company went to court seeking a temporary restraining order. Failing at this first court move the companies joined by two other manufacturers, went back to Federal Court the next day seeking a permanent injunction. Oral argument was held on April 24<sup>th</sup> before Federal Judge David Pine.

The government argued that Article II of the Constitution cannot be read to limit the president's power to meet all emergencies. The finding of an emergency was not reviewable by the court, it was asserted.

Judge Pine did not agree. Pointing out there was no congressional authorization for the seizure, he wrote of the government position: “To my mind this spells a form of government alien to our Constitutional government of limited powers. I therefore find that the acts of the defendant are illegal and without authority of law.”

In a 5-4 ruling, the Court of Appeals for the District of Columbia Circuit, sitting *en banc*, stayed the Pine injunction until May 2, 1953. The stay

would remain in effect after that date if the Supreme Court took up the case. At the president's urging the union agreed to call off the strike pending a Supreme Court ruling.

On June 2, 1952, the U.S. Supreme Court by a vote of 6 to 3, in *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579 (1952), held that the president lacked the authority to seize the steel mills. Writing for the divided Court, Justice Hugo Black said the president had no authority to seize private property on national security grounds without authorization from Congress.

After the government returned the mills to the owners a few hours following the top court ruling, the steel workers went on strike. The strike had a major and prompt impact on the economy and the war effort with a half million workers laid off and tank as well as other military production impacted.

Truman compelled a meeting of the two sides at the White House on July 24<sup>th</sup>, and forced an agreement ending the strike. The settlement terms were about the same terms as offered by workers to the employers at the start of the strike.

The bargaining position of the manufacturers was eroded with defections of small steel producers,

pressure from a federal price stabilization agency's agreement to a steel price increase and Truman's intention to act under Section 18 of the Selective Service Act. This last action would involve taking over the steel mills and drafting workers into the service. It would be taken under direct congressional authorization.

The strike resulted in significant economic loss. That loss is estimated by some to have amounted to over 37 billion dollars in current dollars. In addition 1.5 million people were driven into unemployment.<sup>3</sup>

As with other threats to the country, Truman met the steel crisis head on, but not without political calculation and concern—a concern that helped exacerbate the problem the nation faced back then.

## Endnotes

1. See the February 2011 *Back Bench* column in this *Magazine's* predecessor *Newsletter*.
2. See the December 2019 *Back Bench* column in this *Magazine*.
3. These figures were taken from Wikipedia as were the quotes in this piece.

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