Haub Law’s Response to COVID-19

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Happy New Year 2021!

Goodbye, and for many of us good riddance, to 2020.

After a year that brought us a global pandemic that forced us all to restructure our lives around it, COVID-19 vaccines are being distributed as I write this. After an extremely difficult and divisive election, our federal government is about to pass another bipartisan aid package for those whose lives have been upended by COVID. In addition, after many demonstrations, some far from peaceful, an open discussion of race relations in our country has been rekindled, perhaps for the first time since the civil rights movement.

The new year typically brings with it a time for reflection and reprioritization. The year 2020 has exposed deep divisions in our society that will not be remedied quickly. But I was recently exposed to an unexpected source of hope—from all people, Al Pacino. During his monologue in the football drama, Any Given Sunday, Mr. Pacino’s character, Coach D’Amato, has the following to say at the end of a halftime speech during a game his team is losing badly:

That’s a team, gentlemen, and either, we heal, now, as a team, or we will die as individuals.

Change is, of course, difficult. Tackling the divisions within what is in many ways an adolescent nation, will take time, perhaps even generations. Dr. Martin Luther King, Jr. likely knew this as he and his cohorts began what seemed at the time to be an impassable hurdle in this country:

… 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.

In this spirit, as we start this new year, let’s have our New Year’s resolutions include being of service to one another—to Listen to those who are in need, to Learn from our differences and to Grow from our challenges.

We are very proud to report that in 2020, the WCBA hosted over 150 CLEs and webinars and registered over 3000 attendees. That is three times the number of events and registrants compared to 2019.

New Year, New Beginnings, New Resolutions

Speaking of change… how many of you make a New Year’s resolution that you ultimately fail to achieve? Ha! Me, too! This year will be different! I challenge you all to stick to your resolutions! How?, you ask—by considering a few techniques:1

1. Start with one, and only one, important goal. You may have others but it is important to keep one as a priority.

2. Write down your resolution, preferably as a single word. For example, if you want to stop procrastinating, write in big letters PROACTIVE in a place where all can see. Announce to all your friends and family to help keep you on track.

3. Turn each resolution into a habit. Everyday, do something to work toward that goal. For instance, if you want to lose weight, wake up every morning and work out first thing.

4. Work on one change at a time. For instance, if you want to get healthy, first month, cut out sugar; second month, drink more water; third month, eat more vegetables, etc.

5. Use a calendar. Every day you do your new habit, mark an “X” on the day. When you look at the whole month, you will notice the blank days.

I wish you good luck in any and all of your endeavors to change for the better in 2021!

(continued on page 2)
The WCBA in 2021

The WCBA has some fun and interesting events scheduled to take place in January.

On January 5, 2021, the WCBA is again partnering with the WWBA to have another Employment Law Roundup. Led by Tejash Sanchala, Kyle McGovern and Kim Berg, this group evolved based on the synergy of the Labor & Employment Task Force within the WCBA’s Community Recovery Task Force’s Economic Recovery Program, which was created in response to the COVID-19 pandemic and its devastating effect on Westchester County.

On January 19, 2021, the WCBA Bankruptcy & Creditor’s Rights Committee presents its Annual Roundtable with Judge Robert D. Drain, U.S.B.J. of the United States Bankruptcy Court, Southern District of New York White Plains Division. I am excited to sponsor this event on behalf of my new firm, Clair Gjertsen & Weathers, PLLC!

On January 20, 2021, the WCBA will host a CLE on the “Do’s and Don’ts of Housing Discrimination in Rentals.” A diversity and inclusion CLE credit will be provided to the attendees. By popular demand and due to the overwhelming success of the three bar association’s December Trivia Challenge, the WCBA is hosting a second Trivia Challenge night on January 26.

Considering the courts’ in-person shut down, the Law Practice Management Committee and Trial Lawyers & Tort Law Committee timely scheduled a CLE titled “Best Practices for Virtual Trials,” to take place on January 28. (For the most recent Calendar updates please visit www.wcbany.org.)

The WCBA is also proud of its Section and Committee Chairs. I invite you to attend any Section or Committee meeting. The Sections and Committees meet regularly to discuss current laws and trends, to brainstorm on current events/issues and to prepare CLEs. I have had the pleasure of attending several meetings in the past months. Be sure to check out the Events calendar on the WCBA website for upcoming Committee and Section Meetings. Please join! We are very proud to report that in 2020, the WCBA hosted over 150 CLEs and webinars and registered over 3,000 attendees. That is three times the number of events held and registrants recorded in 2019.

This year, the WCBA endeavors to continue to be a resource to the bench, bar and legal community. We are already planning a virtual mock trial tournament, the annual golf outing and the Annual Banquet! We invite you to check out our website www.wcbany.org, to get involved, and to make a difference! Make it your 2021 New Year’s resolution!

As always, should any of you like to reach me with comments, suggestions or concerns, I am always available at president@wcbany.org, or by calling 914.573.6213.

Be well and be safe!

Endnote

1. https://www.phrasemix.com/blog/5-steps-to-achieving-your-new-years-resolutions
Join or Renew Your WCBA Membership Today!

Renew or become a member of the WCBA today!

As a member of the WCBA, you will enjoy a full range of benefits designed to provide professional support, camaraderie and educational opportunities all year long:

- Join our network of over 1600 members with access to CLEs, networking events, and 6 signature events each year.*
- Become a part of Westchester’s legal and business community where you can grow your network, advance your firm, and better serve the needs of clients.
- Professional development opportunities include participation in committees, pro bono work, and being published in the monthly *Westchester Lawyer* magazine or yearly *Westchester Bar Journal*.
- Enjoy members-only discounts on essential products and services as well as discount pricing on CLEs and Association events.*

*Thank you for your support and membership!*

*Events may be virtual.*

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**Renew Today! EXPRESS MEMBERSHIP RENEWAL FORM 2021**

<table>
<thead>
<tr>
<th>SCHEDULE OF YEARLY WCBA DUES</th>
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<tbody>
<tr>
<td><strong>Standard Bar/Affiliate/Paralegal</strong></td>
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<tr>
<td>Sustaining Member</td>
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<tr>
<td>Admitted to the Bar 10 years or more</td>
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<tr>
<td>Admitted to the Bar 5-9 years</td>
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<tr>
<td>Admitted to the Bar less than 5 years</td>
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<td>Affiliate Non-Lawyer</td>
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<tr>
<td>Paralegal</td>
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<tr>
<td>Admitted to the Bar less than 1 year</td>
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<tr>
<td>Student</td>
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<tr>
<td><strong>Government/Municipal/Non-Profit Employee</strong> <em>(Full-Time Judge, Attorney, Paralegal)</em></td>
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<tr>
<td>Admitted to the Bar 10 years or more</td>
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<tr>
<td>Admitted to the Bar 5-9 years</td>
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<td>Admitted to the Bar less than 1 year</td>
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<td>Student</td>
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*SECTION FEES:* Please note that there is a small fee for membership in WCBA Sections:

- $10: New Lawyers
- $20: Family Law
- $20: Municipal Law
- $20: Real Property
- $20: Tax Law
- $20: Trusts & Estates

Please check the section(s) you wish to join and add that fee to your payment below.

**HOW TO RENEW**

**To pay by credit card:** Visit our website at www.wcbany.org/join and follow prompts.

**To pay by check:** Submit form with check made out to “WCBA” and mail to:

WCBA, 4 Westchester Park Drive, Suite 155, White Plains, NY 10604

For more information, please contact isabel at 914-761-3707, Ext. 50, or isabel@wcbany.org

Contributions or gifts to WCBA are not tax deductible as charitable contributions; however, they may be tax deductible as ordinary and necessary business expenses.
I Can’t Marry My Foreign Fiancé Until Next Year?

By Kodai S. Okano, Esq.

NOTE: This article in no way supports or encourages any form of illegal immigration and abuse of the visa systems.

Background

Have you ever thought how do I bring my foreign fiancé to the United States (U.S.) in order to get married? The answer to the question is you need to get a K-1 Visa (or Fiancé Visa) from the U.S. Department of State (DOS) to just get married in the U.S.

The DOS has historically issued approximately 45,000 to 50,000 K-1 visas each year. A K-1 Visa allows a U.S. citizen and a foreign fiancé to get married in the U.S., and to start their new life in the U.S.

To obtain a K-1 Visa, a U.S. Citizen and a foreign fiancé must first file a I-129F petition and have to go through a long and cumbersome application process. Historically, it takes six to nine months to complete the process. However, due to the COVID-19 pandemic, the U.S. Citizenship and Immigration Services (USCIS) is likely to take a year or more to process said petition.

While waiting to obtain a K-1 Visa, if a foreign fiancé tries to visit a U.S. citizen fiancé as a tourist and tries to enter the U.S., the foreign fiancé always faces a risk of the rejection of his or her entry into the U.S., because the U.S. Customs and Border Protection (CBP) has the broad discretion to reject the foreign fiancé’s entry. If the CBP rejects the foreign fiancé’s entry into the U.S., the CBP will send back the foreign fiancé to his or her home country immediately, and the foreign fiancé and the U.S. citizen fiancé will not be able to see each other again in the U.S. until the DOS issues a K-1 Visa to the foreign fiancé. Furthermore, due to the COVID-19 pandemic, the U.S. prohibits a foreign fiancé, who has been in China, Iran, European Schengen area, United Kingdom, Republic of Ireland, and/or Brazil, from entering the U.S.

Hence, the current K-1 Visa application system creates an inequality in the marriage process among U.S. citizens. On the one hand, a U.S. citizen is allowed to marry his or her U.S. citizen fiancé soon. On the other hand, the current U.S. visa application process makes it difficult to choose when to get married and penalizes a U.S. citizen who chooses a foreign national as his or her fiancé through the long and cumbersome application process. The right to marry is a fundamental human right protected by the U.S. Constitution. I propose an alternative visa option in order to protect said right for a U.S. citizen with a foreign fiancé.

Is the Right to Marry Protected as a Fundamental Human Right?

The U.S. Supreme Court (Court) has long protected the right to marry against government intrusions since 1923. In Meyer v. Nebraska, the Court held that “to marry, establish a home and bring up children … and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” After the Meyer case, the Court has "continued to solidify the broad protections available to married couples and families."

This trend has continued in the 21st Century. For example, in Lawrence v. Texas, the Court held that the right to marry is a realm of personal liberty and private life of the individual, and it is a promise of the Constitution. In addition, in U.S. v. Windsor, the Court held that "the states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce ... and the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." Furthermore, in Obergefell v. Hodges, the Court held that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, those protections also extend to same-sex couples. These cases reaffirm that the right to marry is a fundamental human right and demonstrate the Court’s undeviating protection of the rights of marriage, family relationships, and procreation for a U.S. citizen.

Does a U.S. Citizen Have the Right to Live Together with His or Her Fiancé?

In general, the federal courts have held that a U.S. citizen has a fundamental right to live with his or her immediate or extended family. For example, in Escobar v. I.N.S., the U.S. Court of Appeals held that “the right to live
with and not be separated from one's immediate family is 'a right that ranks high among the interests of the individual' and that cannot be taken away without procedural due process.”\(^{14}\)

Additionally, in a dissenting opinion in *Kerry v. Din*, Justice Breyer argued that the Court "has long recognized the institution of marriage, which encompasses the right of spouses to live together … is central to human life."\(^{15}\) However, the plurality opinion held that a non-U.S. citizen spouse did not have a constitutional right to live in the United States with his or her U.S. Citizen spouse.\(^{16}\) Further, in *Kleindienst v. Mandel*, the Court held that a non-U.S. citizen spouse had no constitutional right of entry to this country as a nonimmigrant or otherwise.\(^{17}\) Furthermore, the Court held that policies pertaining to the entry of aliens and their right to remain in the U.S. are particularly concerned with the political conduct of government.\(^{18}\)

Thus, in the context of immigration laws, the Court does not even recognize a non-U.S. citizen spouse's right to live together in the U.S., and it naturally gives us an answer that a foreign fiancé also does not have the right to live together with his or her U.S. Citizen fiancé in the U.S.\(^{19}\)

Since the right to marry and the right to live together are the two sides of the same coin, such rights should also be extended to a U.S. citizen who chose a foreign national as his or her partner. Without the right to live together, recognizing the right to marry and declaring the right to marry as a fundamental human right makes “the right to marry” a one-sided right, because the goal of marriage is not just to get married but also to live together, to establish a home, and to bring up children.\(^{20}\) The declaration of such a one-sided fundamental human right by the Court degrades the value of the other fundamental human rights that the Court has long recognized.

**Alternative Visa Option and Its Implementation**

There are important governmental interests related to immigration matters such as prevention of unlawful immigrants, visa scams, and visa fraud. Therefore, this section proposes an alternative visa option based on the Australian visa system that seeks to balance a transnational couple's right to live together in the U.S. and the important governmental interests.

In Australia, there is a visa option called a “Bridging visa.” The Bridging visa allows a person who *lawfully* entered Australia to stay lawfully while he or she is waiting for an immigration decision, or his or her new visa application is being processed.\(^{21}\) Through the Bridging visa, a foreign fiancé and an Australian citizen are able to live and stay together in Australia while they are waiting for an actual marriage visa to be issued.

Turn to an implementation of the Bridging visa in the U.S., visa fraud and national security would be the main hurdles to be surmounted to implement such a visa option. However, it is not unreasonably difficult to overcome such hurdles and introduce a Bridging visa option, because the U.S. has already implemented an Electronic System for Travel Authorization (ESTA), which is an automated system that determines the eligibility of visitors to travel to the U.S. A foreign national, who wishes

(continued on page 6)
to travel to the U.S., has to obtain the ESTA before entering the U.S.\textsuperscript{22} To obtain the ESTA, the foreign national has to show that he or she does not pose a threat to the welfare, health, safety, or security of the U.S. Thus, the ESTA enables the U.S. administrative agencies to pre-screen all travelers before they try to enter the U.S. and provides a certain level of security.

Since the ESTA has already functioned as a pre-screen process, it is not unreasonably difficult to include a Bridging visa application in the ESTA process and screen the application simultaneously provided that a foreign fiancé has already submitted his or her K-1 Visa application and is waiting for the application to be processed. By introducing more generous visa options like a Bridging visa, not only will a transnational couple’s right to live together be protected, but also the USCIS can take more time to perform detailed and rigorous examinations of K-1 Visa applications, which would prevent problems such as illegal immigrations, visa scams, and visa fraud.

Conclusion

The issues here are only applicable to approximately fifty-thousand people a year in the U.S. Once the K-1 Visa is issued, no one complains anymore about the interference with his or her rights. However, even if the interference is a minor problem to most U.S. citizens, as discussed above, it is important to resolve such problems and protect the value of the fundamental human rights by constantly raising our voices and improving an administrative process. Therefore, the U.S. should introduce a more flexible visa system to address the diversified needs of U.S. citizens and take less restrictive measures that do not interfere with the fundamental human rights of U.S. citizens.

Endnotes


2 The U.S. Dept’ of State, Bureau of Consular Affairs, Nonimmigrant Visa for a Fiancé (K-1), https://travel.state.gov/content/travel/en/us-visas/immigrate/family-immigration/nonimmigrant-visa-for-a-fiance-k-1.html. A K-1 Visa only permits a foreign-citizen fiancé(e) to travel to the United States and marry his or her U.S. citizen sponsor within 90 days of arrival. A K-1 Visa itself does not automatically give a permanent residency or work permit to the foreign-citizen fiancé.

3 See the U.S. Citizenship and Immigration Services, Check Case Processing Time, https://egov.uscis.gov/processing-times/.

4 Although the DOS issues a K-1 Visa, a I-129F petition which is required to obtain the K-1 Visa is processed and examined by the USCIS. See the U.S. Citizenship and Immigration Services, I-129F; Petition for Alien Fiancé, https://www.uscis.gov/i-129f.


8 Id. at 399.


13 Baca, supra note 9, at 621.


16 Id. at 101.


18 Id. at 766-67.

19 See also Baca, supra note 9, at 624-28.

20 Obergefell, 576 U.S. at 668; Zablocki v. Redhail, 434 U.S. 374 (1978). Noting that the goal of a marriage can be different, and it depends on who he or she is.


22 The U.S. Customs and Border Protection, ESTA, https://esta.cbp.dhs.gov/utm_source=google&utm_medium=google&utm_term=(not%20provided)&utm_content=undefined&utm_campaign=(not%20set)&gclid=undefined&delid=undefined&GALID=624963815.1603758365. The ESTA allows a citizen of the Visa Waiver Program countries such as Australia, Germany, and United Kingdom to visit the U.S. for less than 90 days without obtaining a tourist visa.

Kodai S. Okano, Esq., is an assistant law clerk to the Honorable Llinét M. Rosado, Supreme Court of the State of New York, 12th Judicial District. He received his juris doctor from SUNY School of Law and LLM from Osaka University, Japan.
It suffices to say that 2020 has truly been a memorable year. Aside from the obvious unprecedented circumstances and challenges caused by the COVID-19 pandemic, there have been many rewarding experiences as well for me during my first year at LSHV. As I reflect on my experience thus far with LSHV and as the WCBF Fellow, I am reminded of the perpetual need to zealously advocate for the underrepresented and marginalized groups that we serve. The devastating impact that the COVID-19 pandemic has had on the communities we serve cannot be overstated.

At LSHV, I have been afforded the opportunity to advocate for those in danger of losing their housing—a basic, fundamental need—at a critical moment in time. Specifically, I have been able to provide legal representation in Landlord-Tenant court and in proceedings with various administrative agencies for individuals and families that would otherwise not be able to afford an attorney.

The COVID-19 pandemic has drastically changed how we are able to represent our clients, but I am thankful that LSHV has quickly adapted to the circumstances and provided the support necessary to ensure that we can best serve our clients. Throughout my first year at LSHV, I have been able to provide a wide array of representation for clients, including in-court representation, advocacy with Section 8 agencies and community outreach. For example, I recently represented at trial an elderly, disabled person facing eviction in the midst of the COVID-19 pandemic.

There have been several challenges along the way during my first year at LSHV and as the WCBF Fellow, but I have had many rewarding experiences and am incredibly appreciative for the opportunity to serve our community’s most vulnerable and marginalized groups. Once more, I want to thank all those who support the WCBF and the Fellowship, and I look forward to continuing to build on my experiences from my first year at LSHV.
Kasama: What kind of law do you practice?

Wendy: I do foreclosure defense and bankruptcy law.

Kasama: How did you become involved in this type of law?

Wendy: You kind of fall into these types of things. Growing up, I had always wanted to be a doctor. I have always volunteered in the medical field. I was a candy striper for six years and served as an EMT during college and beyond. After Organic Chemistry, I realized maybe a medical career was not what I wanted to do. While at law school, I thought I would do health law. I thought, how can I combine both law and medicine.

Kasama: I can tell this is going to be a good story, tell me about your internships while at law school.

Wendy: The first summer after law school, I interned at the Attorney General’s office. I drove from Poughkeepsie to Albany each day because I couldn’t afford to get an apartment. It was a two-hour commute each way. I was paid $125 per week. I enjoyed that internship; it was in the Consumer Fraud Bureau. I learned a lot and enjoyed the camaraderie of our class of 20.

Kasama: What about your other internships?

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Kasama: What about your other internships?

Wendy: I interned for the office of the Chief Medical Examiner. That was an amazing experience as well. The General Counsel went on a vacation for two weeks. I sat at her desk my second year of law school. I also interned for the NYC Health and Hospital Corporation. That was mainly a desk job, doing things like contract review. I realized that I didn’t want to do that.

In my third year of law school, in the last semester, as I was looking at my resume, I realized that I had experience in government and the private sector. What I wanted now was experience with a judge. I saw an ad in the career center for a criminal court judge in Kew Gardens, Queens. I drove over there and had an interview with the Honorable Charles Posner. He hired me on the spot. It was amazing. I would do night court with him. I would sit on the bench with him and go through the rap sheet. He would ask, “What would you do in this case?” He really mentored me. He let me write a decision. He reached out to the New York Law Journal to get it published. It did and I still have a copy of the article framed on my wall in my office.

He was such a mentor to me. I fell in love with being in court. He said to me that I should consider the DA’s office. So, I had an interview with the Brooklyn’s DA’s office, and they hired me. Sometimes you think you have this whole thing planned out…but happenstance…Originally, I wanted “judge” experience. I wasn’t thinking that I was going to get a job from working for a judge.

Kasama: What happened in the Brooklyn DA’s Office?

Wendy: I moved up fairly quickly in the Brooklyn DA’s office. I was promoted to the Domestic Violence Bureau. I got my own office, the only one in our class of 100. I was the point person for victims of domestic violence. They wore pendants around their necks, when they pushed the button, my beeper would go off. I would get calls at 2am; I would have to call the precinct/jurisdiction that they were in to get the police to go over there to make sure that they were safe. I had a lot of other great experience, like trial experience. I also had a lot of experience empathizing with youth who did not have the same opportunities as I did. It was heartbreaking, that gave me the drive to always reach out and help.

Kasama: You’ve touched on this already, but tell me more about your volunteer work.

Wendy: I have always pursued public service and volunteer work. Currently, I serve as the President of the Westchester County Bar Association (WCBA). I started a program, the Community Recovery Task Force, which has two components. One component (The Advance Directives for First Responders Program) helps train first responders on things like power of attorney, health care proxy, etc. The other part of the program is the Economic Recovery Program. We help people on topics like what happens if you’re furloughed, information about PPE, PPP, small business loans, etc. There is more information on our website about this program. See Community Recovery Task Force at wcban.org.

Kasama: Wendy, I’m so impressed with your success, resourcefulness, and...
volunteerism. So how did you get into foreclosure and bankruptcy law?

Wendy: It was hard to make ends meet on a government salary, so I accepted an offer with a foreclosure and bankruptcy firm two years after working for the Brooklyn DA’s office. I’ve been practicing foreclosure and bankruptcy law for more than twenty years.

Kasama: What advice do you have for law students?

Wendy: I have three pieces of advice, the first is that it is important to have mentors. Find one or two people who really care about you getting the right experience and being there and available for questions. I wouldn’t be where I am today without having those certain people in my life and guiding me. The old adage is believing in you before believing in yourself—we are our own worst critic.

The second piece of advice is to show up and work really hard. I am a hard worker; I might not be the smartest, but I am always the hardest worker.

The third piece of advice is to take advantage of all the experiences and opportunities available. While I was in school, I worked, and I aimed to have different experiences to learn from. I was always juggling and balancing. I would attend CLE’s as a student and network with attorneys. Take advantage of what the Bar Association can do for you and what you can do for the Bar. Put your name out there and network. Don’t be afraid; get involved!

Kasama: I can attest to benefiting from a Westchester County Bar Association event. I attended “Meet the Judges” in the fall. I made meaningful connections, met with attorneys and judges.

What has changed for you during the pandemic?

Wendy: It’s really bizarre, there is a silver lining that came out of this. On one hand, there is so much sadness, with people getting sick, losing lives, jobs, etc. But now that we are remote, I am able to do more. I used to spend about four hours a day on the road. I had to drive from Peekskill to Islip, to NYC, to Brooklyn, to Bridgeport, etc. With the extra time that I gained, I am more efficient. I devoted much of this time to the Westchester County Bar Association. It helped me balance my full-time job as a foreclosure defense and consumer bankruptcy lawyer, my full-time commitment to the WCBA, and being the proud single mom of two teenage girls.

Kasama: Wendy, you are always busy and engaged. What is your next move?

Wendy: I have been given a tremendous opportunity to partner at an established firm in White Plains. One of the owners is retiring and he has asked me to join his practice, and to build it up and honor his legacy. It is a firm that focuses in foreclosure defense, consumer bankruptcy, landlord/tenant and real estate transactions. We launch January 1, 2021!

Kasama: Wow, congratulations, Wendy. I wish you every success; you will achieve success and you deserve it.
AFFIDAVITS VERSUS AFFIRMATIONS

By Hon. Mark C. Dillon

There are circumstances in New York Practice when affidavits must be used, and others when affirmations may be used instead. The improper use of an affirmation can be fatal to an application or its defense. An affidavit signed by a fact witness should state facts, not legal arguments. Affirmations may properly be filed under penalties of perjury by attorneys to recount a case's procedural history and provide pleadings and other exhibits. Rule 202.8 of the Uniform Civil Rules for the Supreme Court and the County Court instructs that legal arguments should not be included in affidavits but in a separate legal brief, though in practice, our state courts routinely accept legal argument included in affidavits but in a separate legal brief, though in practice, our state courts routinely accept legal argument contained within attorney affirmations.

Affirmations are more convenient to prepare than affidavits, if for no other reason than a notary public or other acknowledging officer need not be enlisted to confirm the identity of the affirmant, administer an oath, and oversee the document's execution. When an attorney is also a party, the attorney should utilize the affidavit format to support or oppose factual matters (N.Y. CPLR 2106[a]; Nazario v. Ciafone, 65 A.D.3d 1240, 1241 [2d Dep’t 2009]), notwithstanding that person's status as an officer of the court. If an attorney serves process under Section 308 of the New York Civil Practice Law and Rules (“CPLR”) or other statute, or serves litigation paperwork in the normal course, the attorney is best advised to execute an affidavit of service, rather than an affirmation, as such conduct casts the attorney in the role of a fact witness to the task undertaken.

Rule 2106(a) of the CPLR provides that affirmations may be used by non-party physicians, osteopaths, and dentists authorized to practice in the state. The provision caters to the convenience and time pressures of medical and dental professionals. By extension, persons authorized in those fields wholly outside of New York may not properly submit information by affirmation (Kelly v. Fenton, 116 A.D.3d 923, 924 [2d Dep’t 2014]). The language of Rule 2106 of the CPLR does not extend to chiropractors (Casas v. Montero, 48 A.D.3d 728, 729 [2d Dep’t 2008]), engineers (Woodard v. City of New York, 262 A.D.2d 405 [2d Dep’t 1999]), architects (Laventure v. McKay, 266 A.D.2d 516, 517 [2d Dep’t 1999]), or other non-designated experts and professionals. If an affirmation is improperly used instead of an affidavit, the defect is waived unless the adversary party objects to it (Sam v. Town of Rotterdam, 248 A.D.2d 850, 851 [3d Dep’t], lv. to appeal denied, 92 N.Y.2d 804 [1998]), though an objection may be cured by an oath taken by a notary public before the return date of the application (Brightly v. Liu, 77 A.D.3d 874, 875 [2d Dep’t 2010]).

Occasionally, a witness may have a sincere religious objection to swearing an oath to the Almighty. Any person who, for religious reasons, wishes to use an affirmation as an alternative to a sworn statement may do so. However, to be effective, such an affirmation must still be taken before a notary public or other authorized official (N.Y. CPLR § 2309[a]; Slavenburg Corp. v. Opus Apparel, Inc., 53 N.Y.2d 799, 801 [1981]). This procedure is different than that used for physicians, osteopaths, and dentists as those professionals are within the expressed scope of Rule 2106 of the CPLR, whereas persons with religious reservations are not.

Affidavits and affirmations are to be executed “in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs” (N.Y. CPLR § 2309[b]). For this reason, the documents invoke the language of an oath. Affirmations are to be executed to reflect that their content is “affirmed...to be true under the penalties of perjury” (CPLR 2106[a]). A mistake in the form of a submission, or in the right to submit it, will not necessarily be lethal provided it is caught in time, and courts are lenient in allowing the correction of mistakes under the grace provisions of Section 2001 of the CPLR (e.g. Gallucio v. Grossman, 161 A.D.3d 1049, 1053 [2d Dep’t 2018]). However, attorneys should not rely on the discretionary forgiveness of such defects, because, absent the favorable exercise of that discretion, a non-compliant affirmation is rendered incompetent as proof of the facts asserted within it (Law Offices of Neal D. Frishberg v. Toman, 105 A.D.3d 712, 713 [2d Dep’t 2013]).

None of this is rocket science, which is all the more reason that documents should be submitted to courts in the proper form.

Hon. Mark C. Dillon is a Justice at the Appellate Division, Second Department, an adjunct professor of New York Practice at Fordham Law School, and an author of CPLR Practice Commentaries in McKinney’s.
Faith Based Court Access (FCA)
By Valerie Bezzell

A new and innovative access-to-justice program is available in Westchester. The Faith-Based Court Access (FCA) program, a part of New York State Chief Judge Janet DiFiore’s “Access to Justice Initiative”, is designed to ensure that all communities, including the disadvantaged, can access the court system in a safe and respectful way even if they lack the technology to do so.

Ninth Judicial District Administrative Judge Kathie E. Davidson, in collaboration with area faith leaders, the Honorable George Latimer and the Westchester County government launched the new FCA pilot program along with five local houses of worship.

The mission of the FCA is to provide disadvantaged persons remote access to the New York State Court system, promoting equal use of our legal system. The designated Houses of Worship offer private “safe-haven” space, trained personnel and electronic resources to log into court proceedings and to connect with legal service providers. Each participating House of Worship has designated a room equipped with a laptop/computer, telephone, Internet access, web camera, printer and scanner providing for a fully equipped access-to-justice resource center. The locations are available to help anyone who does not have a lawyer and cannot afford to hire one; anyone seeking a safe, private location to access Court Help Resources; anyone who needs access to Do-It-Yourself (DIY) documents and who does not have access to computer equipment.

The FCA hopes to expand to additional Houses of Worship as well as to other parts of the Ninth Judicial District (Westchester, Putnam, Dutchess, Rockland and Orange Counties).

Recommended COVID-19 safety measures are observed at sites including: appointment scheduling to limit density, social distancing and sanitizing between uses; face masks, hand sanitizer and other PPE provided.

Some areas of the law in which an unrepresented person may seek assistance from this program include, but are not limited to: Landlord/Tenant Matters; Family Law (Domestic Violence, Adoption, Custody/Visitation, Child Support, Divorce); Surrogate matters (Guardianship, Wills, Trusts & Estates); and Foreclosure Matters. A list of the initial FCA sites follows:

Grace Baptist Church
52 South 6th Ave., Mount Vernon, NY
Mon., Wed., Fri., 9:30 AM-1:30 PM
914-664-2676
Reverend Bill Mizell, under the leadership of Reverend Dr. W. Franklyn Richardson
Wmm@gracebapt.org

San Andres Episcopal Church
22 Post Street, Yonkers, NY
Mon., Wed., Fri., 9:30 AM-1:30 PM
914-963-9563
Pastor Richard Suero
Church Secretary Beatrix Castrillon
sanandresyonkers@gmail.com

Bethesda Baptist Church
71 Lincoln Ave., New Rochelle, NY
Thur., 10 AM-2 PM
914-632-6713
Reverend Dr. Paul Weaver
WeaverDirector@gmail.com

Church of the Assumption
131 Union Ave., Peekskill, NY
Mon., Tues., Thurs., 9:30 AM-1:30 PM
914-737-2071
Father Esteban Sanchez
Estebota@hotmail.com

To find out more about access to justice initiatives in the Ninth Judicial District, contact Maria-Alana Recine
914-824-5476 or mrecine@nycourts.gov.

For more information on the FCA please visit: http://ww2.nycourts.gov/faith-based-court-access.

Equal justice under law is not merely a caption on the facade of the Supreme Court building; it is perhaps the most inspiring ideal of our society.
—Justice Lewis F. Powell, Jr., U.S. Supreme Court
Westchester County was home to the original hot spot of the COVID-19 pandemic in the United States; so, it is entirely fitting that the county’s only law school, Elisabeth Haub School of Law at Pace University (Haub Law), has responded by ramping up our programs in the fight against the virus.

Careers related to the health care and bio-tech industries, particularly near the Law School’s campus in Westchester, are on the rise. The U.S. Bureau of Labor Statistics projects that employment in healthcare occupations is expected to grow 15% from 2019 to 2029, which is much faster than the average for all occupations, adding about 2.4 million jobs.

Health care jobs sit at the intersection of science, technology and the law. Skilled lawyers will be needed in so many areas of this field, including understanding the implications of new regulations, advising health-related corporations and organizations on transactional and compliance matters, and influencing policy.

Haub Law, with its Paths to Practice curricular approach and existing certificate program in Health Law and Policy, is uniquely suited to provide lawyers and graduates with the skills they will need to compete in this new marketplace. Haub Law will soon be seeking American Bar Association and New York state approval to offer an online Advanced Certificate for Health Law and Policy to practicing lawyers looking to expand their capabilities in health law, and to non-lawyer professionals working in the healthcare space who need to understand the legal and policy landscape to do their jobs.

The current Advanced Certificate in Health Law and Policy is awarded to JD students upon their graduation from Haub Law. To earn the Certificate, students must earn 15 credits, with the following required courses: Health Law in America, Bioethics and Medical Malpractice, Public Health Law, and Healthcare Lawyering Skills.

The remaining credits may be satisfied with a list of electives. Courses we offer include: Accounting for Lawyers, Cannabis Law, Constitutional Law Seminar: End of Life Issues, Corporate Finance, Elder Law, Environmental Litigation and Toxic Torts, Food Systems Law, Guided Research or Directed Research (Health Law topic), Externship: Legal Services/Public Interest/Health Law, Health Law & Policy Seminar (Healthcare Compliance), Health Law and Ethics, Health Law and Policy Seminar (Healthcare Compliance), and the course Health Law Policy Seminar (Healthcare Compliance).

The Haub Law faculty offering courses in the health law certificate curriculum are uniquely suited given their areas of expertise. For instance, Prof. Barbara Atwell offers a new Health Law & Policy Seminar on Health Equity. This class will explore the unique challenges that people of color, immigrants, members of the LGBTQ community, the disabled, domestic violence survivors, those suffering from mental health challenges, the poor, and others are confronted with when they interface with our health care system. The class will address legal institutional structures that need to be reformed or dismantled in order to achieve health equity for all.

Likewise, Professors Steven Chananie, Gretchen Flint, Karen Gallinari and Linda Martin offer rich expertise and research in issues related to health law and policy.

Land Use, Human Health, and Equity

Haub Law has already been very active in health law and policy research and is involved in a number of innovative projects. For instance, the Land Use, Human Health, and Equity Project, launched by the Land Use Law Center, makes accessible effective land use tools for strengthening public health and environmental protections in urban communities in response to the pandemic. These strategies can contribute to communities’ healthy and resilient post-pandemic futures while also reinvigorating cities’ climate change management capabilities.

Through a team of two dozen student researchers led by Professor John R. Nolon, this project addresses climate change and COVID-19 by discovering local solutions. The COVID-19 pandemic and climate change grave threat public health. Both call for a sharper focus on “sustainability,” a term given new meaning by these undeniable threats. A fear-based trend of people leaving cities has emerged as an initial response to the pandemic. If this trend continues, it could pose serious risks to low-carbon land use strategies recently adopted by densely populated urban communities and worsen already disproportionate public health harms in marginalized communities. Land use law can play an essential role in effectively addressing these issues and shaping a healthier, more prosperous future.

The Center’s reports will describe local land use solutions, garnered from case studies and reports, to show how localities are responding to the pandemic through land use planning and regulation. We will demonstrate how comprehensive plans, land use regulations, the review of development proposals, novel uses of public infrastructure, and other feasible strategies can protect public health, promote equity, and provide financial stability.

Moreover, Haub Law students have already been addressing COVID-19 issues in their research. Haub Law students, Morgan Dowd, Marissa Cohen, and Matthew Pappalardo provided substantial assistance to the NYS Bar Association’s Health Law Section, in particular to the Task Force which was created to address legal and ethical issues raised by COVID-19.

Environmental Law and Health Law and Policy

Haub Law offers a number of courses in its nationally ranked Environmental Law program that relate to health law and policy, including Advanced Seminar in Environmental Law:

- Environmental Litigation
- Clinic–Clinical Advocacy;
- Environmental Law Survey;
- Climate Change Law;
- Food Systems Law;
- Access to Justice Seminar; and
- Agriculture & Environmental Law.

The Environmental Law Survey course intersects directly with issues relating to environmental health. Core statutes studied in the class (Toxic Substances Control Act, Clean Air Act, and Clean Water Act) index the requirements of regulation to human and ecological health impacts. Notably, the National Environmental Policy Act compels the consideration of environmental impacts, including health, in the context of decision making.

Prof. Katrina Kuh’s Climate Change Law course provides the opportunity for students to research and write on one of the many areas where climate change intersects with environmental health. Prof. Margot Pollans’ course in Food Systems Law identifies the human health costs of food production, including those related to food consumption, food production, and labor in the food system. These programs and courses stand at the forefront of a strong interdisciplinary approach to health law and policies that will help us fight the COVID-19 pandemic and fend off the next one.

Jessica Bacher, Esq., is the Director of the Health Law and Policy Certificate and Executive Director of the Pace Land Use Law Center. Established in 1993, the Land Use Law Center is dedicated to fostering the development of sustainable communities and regions through the promotion of innovative land use strategies and dispute resolution techniques. As the Executive Director, Ms. Bacher’s responsibilities include development and implementation of projects relating to local land use practice, distressed property remediation, transit-oriented development, sustainable communities, land use responses to sea level rise, and code enforcement, as well as providing strategic assistance to numerous municipalities. Most recently, she led the City of Newburgh, New York, in the development of a distressed property remediation implementation plan that focuses on the development of a land bank.
New York's “Red Flag” Law was enacted on August 24, 2019 and it has been codified in Article 63-A of the Civil Procedure Law and Rules (C.P.L.R.) as the Extreme Risk Protection Order. The intent behind this statute is commendable; it is meant to protect our communities against gun violence. Unfortunately, the standards set forth in the statute seemingly circumvent constitutional protections, the Criminal Procedure Law (C.P.L.) and it changes the burdens established under the C.P.L. for criminal prosecutions.

The Temporary Extreme Risk Protection Order (TERPO) and Extreme Risk Protection Order (ERPO) statutes are found in C.P.L.R. Sections 6340-6347. Not only are the statutes vague and constitutionally unsound, but they arguably violate both U.S. Constitution (Amendments I, II, IV, V, VI and XIV) and the New York State Constitution (Article I). The TERPO or Final Extreme Risk Protection permits and encourages arbitrary and discriminatory enforcement by failing to provide minimal guidelines to given law enforcement. These “civil” laws have criminal law implications. There is nothing in these statutes that alerts the unrepresented respondent of the possibility of criminal prosecution for complying with its terms or any order issued pursuant to C.P.L.R. Article 63-A. In fact, if anything C.P.L.R. Section 6347 states that:

no findings or determination made pursuant to this article shall be interpreted as binding, or having collateral estoppel or similar effect, in any other action or proceeding, or with respect to any other determination or finding, in any court, forum or administrative proceeding.

In practice, people are being criminally charged for the possession of weapons or other items that are recovered or surrendered pursuant to a TERPO or ERPO. The respondent then becomes a defendant in a criminal case. Consequently, these statutes have massive implications both constitutionally and procedurally for those people charged with crimes. At least 17 states and the District of Columbia have “red flag” laws, and others have had legislation for these laws drafted and/or introduced. The New York ERPO statutes provide for a civil court order based upon an ex parte application which is issued by a supreme court judge sitting in a civil part. The ERPO and TERPO prohibit a respondent from purchasing, possessing, or attempting to purchase or possess a firearm. The application may be made by law enforcement and/or lay people such as school employees or family members, and it can be based upon uncorroborated hearsay allegations. The basis of the application can be merely the belief of the applicant (or other reporter) that the respondent has firearms and that there is “probable cause” to believe that the respondent is “likely to engage in conduct that would result in serious physical harm to himself, herself or others as defined in paragraph one or two of subdivision (a) of section 9.39 of the mental hygiene law.” In defining “likelihood to engage in serious harm,” the statute refers to Section 9.39 (a) of the Mental Hygiene Law. However, unlike that which is required under the Mental Hygiene Law, the determination pursuant to Article 63-A for a TERPO does not have to be made by licensed mental health professionals. Instead it can be made by any lay person or any member of law enforcement, who believes a person has the “likelihood to engage in serious harm,” may make application, regardless of prior experience or training. In essence, a judge issuing a Temporary or Final Extreme Risk Protection Order is making a finding under the Mental Hygiene Law that classifies the respondent’s mental state without professional analysis or support and/or legal counsel. Indeed, C.P.L.R. Article 63-A is not clear about how such a finding can or will be used in a subsequent criminal prosecution. The law also begs the question: Can a person determined under C.P.L.R. Section 6343 to have mental incapacity be acting with the requisite intent to be later charged criminally for possession of said weapons? Additionally, this decreased standard opens the door for retaliatory and unsubstantiated allegations to serve as the basis for a TERPO and a search of the respondent’s property and person.

The “red flag law” is a Civil Order effectively circumventing the Right to Counsel under the Sixth Amendment of the United States Constitution. It alters the burdens required for a lawful search and seizure that exist in a criminal proceeding under the C.P.L. The respondent...
(and potential future criminal defendant) is not represented by counsel during the ex-parte proceeding even though the result of the issuance of the TERPO may be search warrants. Further, the law requires respondents to sign a receipt for guns surrendered and/or anything recovered during a search admitting possession thereof, whether or not the items are lawfully possessed. For example, if an illegal gun is recovered pursuant to a search authorized pursuant to a TERPO, the unrepresented person is required to sign a receipt for the firearm not being advised as to the implications of doing so or of his or her constitutional right to remain silent. The respondent will then be prosecuted in criminal court for the unlawful possession of a firearm, which may be a misdemeanor or felony charge, both of which carry with them the potential for terms of incarceration.

Since this ex parte application can be made by law enforcement or lay people and the supporting deposition can be based on uncorroborated double or even triple hearsay, it bypasses the Criminal Procedure Law’s standard of proof required for a search warrant under C.P.L. Section 690 thereby eviscerating the established standard of proof required for the admissibility of evidence in a criminal case. Further, upon the issuance of a final ERPO, C.P.L.R. Section 6343(3)(d) provides that:

[a]s part of the order, the court may also direct a police officer to search for firearms, rifles and shotguns in a respondent’s possession consistent with the procedures of article six hundred ninety of the criminal procedure law.

The language of C.P.L.R. Section 6343 permits a search to be ordered by the judge without a warrant issued pursuant to Article 690 of C.P.L. The use of the word “may” in this section of Article 63-A, merely permits the authorization of a search warrant that comports with the procedures of Article 690 of C.P.L.

The search as it is authorized under C.P.L.R. Section 6342 provides no parameters as to the time frame in which the search may be executed. It does not limit the number of times searches may be conducted. Although the statute provides for an order that must be issued by the court, there are no additional directives in the black letter law that require the TERPO to set forth parameters for the execution of a search in the statute. It3 flouts the standard set out in the Criminal Procedure Law for a search warrant and the myriad of case law that has been developed protecting an individual’s Fourth Amendment Rights.

Upon this Temporary Order, the unrepresented respondent is required to voluntarily surrender all of his firearms. Even upon this surrender, law enforcement is authorized to conduct a search of the respondent’s person and home upon (any) reason to believe an enumerated listed weapon is still in the respondent’s possession. C.P.L.R. Section 6342 states that the temporary order itself must include a form to be completed and executed by the unrepresented respondent which must list all the “firearms, rifles and shotguns possessed by him or her and their particular locations.”9 Requiring a respondent to sign a receipt for items either surrendered or recovered violates a person’s right to self-incrimination in that if the weapons surrendered or recovered are illegally possessed, the respondent will be prosecuted criminally. See, U.S. Const. Amend. V.

Article 63-A of the C.P.L.R., which legislates the ERPO, fails to include the protections afforded to people under the Criminal Procedure Law, Penal Law, and the New York State and United States Constitutions. Thus, in addition to being constitutionally unsound, any evidence recovered pursuant to a TERPO or ERPO cannot be permitted to be used in any criminal proceeding.

The remedies to correct the constitutional wrongs and legal inconsistencies created by the statute are: (1) repeal the statute; or (2) amend the statute to clearly provide for the same constitutional protections afforded people under the United States and New York Constitutions. See U.S. Const. Amend. I, II, IV, V, & IV; N.Y.S Const. Art. I. Additionally, if this statute remains, new legislation must be enacted under the Criminal Procedure Law to preclude the admissibility of anything recovered under a TERPO or ERPO or statements made by the respondent in response to the application or the issuance of said Order.

Endnotes

4 New York Civil Procedure Law (C.P.L.R.) Article 63-A.
5 Id. New York is the only state to have legislation that allows teachers and school administrators to be the applicants for a petition.
6 C.P.L.R. § 6342(1).
7 See, C.P.L.R. § 6342.
8 United States Constitution Amendment IV.
9 C.P.L.R. § 6342(4)(e).

Sherry Levin Wallach, Esq., is the Deputy Executive Director of the Westchester Legal Aid Society and the Secretary of the New York State Bar Association (NYSBA). She is a member of the Board of Directors of the WCBA. Ms. Wallach is the Executive Committee Liaison to the NYSBA Committee on Professional Discipline and serves on the YLSA Task Force on Parole Reform. She is a Past Chair of the NYSBA Criminal Justice and Young Lawyers Sections and Co-Chaired NYSBA’s Task Force on Incarceration Release Planning and Programs as well as a past Co-Chair and Chair of the NYSBA’s Membership Committee. Ms. Levin Wallach is a member of the Criminal Justice, Women in the Law, Trial Lawyers and Torts Insurance Compensation Law Sections. She is Co-Founder, lecturer and Team Leader for the NYSBA’s Young Lawyer’s Section Trial Academy and a frequent CLE speaker for the NYSBA and Westchester County Bar Association.
Collaborative Divorce and Passive Resistance
By Arnold D. Cribari, Esq.

This article is inspired by President Barrack Obama’s eulogy at the funeral service of Congressman John Lewis, and a collaborative divorce.

What do you do when you are in the midst of representing a client in a collaborative divorce and his/her spouse is persistently unreasonable? [In order to make the language in this article less cumbersome, your client will be the wife, and her unreasonable spouse will be her husband.]

One option is to recommend to your client (the wife) that she terminate the collaborative process and litigate the divorce with new attorneys.

Let’s say she is reluctant to litigate because of the risks, including the potential monumental legal fees and stress that can result from a big battle in divorce court.

Then, what do you do?
First, tell her not to despair, that she is not alone and that she has selected a divorce settlement process where she can obtain the help she needs.

Chances are that there are significant power imbalances in her relationship with her unreasonable husband. The collaborative divorce process is designed to correct such power imbalances.

How so?
Tell her that you, as her collaborative lawyer, can prepare her, empower her, advocate for her, give her legal advice, help her identify her needs and interests, and support her throughout the collaborative case. The collaborative family specialist and financial specialist, who are neutral, can also provide her with invaluable support, and their neutrality can engender trust that can enable them to have a positive influence on her difficult spouse.

It is likely that the whole interdisciplinary team of collaborative professionals (both lawyers, the family specialist and the financial specialist) agree with your client, and will do their best to get her husband on track to reach a fair settlement.

Tell your client to keep her eye on the dual goals of a good divorce settlement and a good aftermath. A good divorce settlement is one that meets your client’s needs and interests, and those of her children and spouse. A good divorce aftermath is one in which your client and her future former husband (now her current husband) are cordial towards each other at the future important events in their children’s lives.

In the wake of the moving funeral service of Congressman John Lewis and President Barrack Obama’s inspiring eulogy, it occurred to me that the concept of “Passive Resistance” can apply in a collaborative divorce. Then, it occurred to me that an ideal mindset for a spouse and the collaborative divorce professionals to have, when confronted with a persistently unreasonable spouse, is “Respectful Nonviolent Assertiveness and Resistance.”

Respectfulness, which is a cornerstone of collaborative divorce, is a commitment made at the outset of the collaborative case. It is required by the Collaborative Code of Conduct and the Participation Agreement, which both parties and their lawyers sign at the beginning of the case.

Nonviolence is also a necessity in a collaborative divorce. The need to be nonviolent in one’s actions is obvious; however, the need to be nonviolent in one’s words is not so obvious. Both spouses need to feel safe, both physically and emotionally, in order for the collaborative divorce process to work. When there is a hint of the threat of any form of violence, collaborative professionals use their active listening skills to restore peace and order.

Such active listening skills can even diffuse a potentially explosive, life-threatening situation. An example of this appears in “Nonviolent Communication: A Language of Life,” at pages 13 through 14, between the author, Dr. Marshall Rosenberg (referred to as “I”) and an initially hostile Palestinian (referred to as “He”) in the riveting dialogue below that took place in a mosque at Deheisha Refugee Camp in Bethlehem:

“Murderer, Assassin, Child Killer”

“I addressed the man who had called me a murderer:

I: Are you angry because you would like my government to use its resources differently? (I didn’t know whether my guess was correct, but what is critical is my sincere effort to connect with his feeling and need.)
He: Damn right I’m angry! You think we need tear gas? We need sewers, not your tear gas! We need housing! We need to have our own country!

I: So you’re furious and would appreciate some support in improving your living conditions and gaining political independence?

He: Do you know what it’s like to live here for twenty-seven years the way I have with my family – children and all? Have you got the faintest idea what that’s been like for us?

I: Sounds like you’re feeling very desperate and you’re wondering whether I or anybody else can really understand what it’s like to be living under these conditions. Am I hearing you right?

He: You want to understand? Tell me, do you have children? Do they go to school? Do they have playgrounds? My son is sick! He plays in open sewage! His classroom has no books! Have you seen a school that has no books!

I: I hear how painful it is for you to raise your children here; you’d like me to know that what you want is what all parents want for their children – a good education, opportunity to play and grow in a healthy environment…

He: That’s right, the basics! Human rights - isn’t that what you Americans call it? Why don’t more of you come here and see what kind of human rights you’re bringing here!

I: You’d like more Americans to be aware of the enormity of the suffering here and to look more deeply at the consequences of our political actions?”

The natural reaction when violent words are spoken is to be reactive, by using angry and offensive language in response that creates a conflict, and getting into an argument that exacerbates the conflict. Instead of being reactive, Dr. Rosenberg used active listening techniques, including listening very carefully to what the Palestinian said; paraphrasing his statements as to content and reflecting back the emotion expressed, thereby demonstrating understanding; and listening and paraphrasing empathetically. By using these techniques, Dr. Rosenberg built connection, trust and rapport with the Palestinian.

The upshot of the above dialogue is that the Palestinian subsequently invited Dr. Rosenberg to his home for a Ramadan dinner and they became friends.

Collaborative divorce lawyers use the same techniques that Dr. Rosenberg applied in the above example.

Returning to the ideal mindset for a difficult collaborative divorce, what about assertiveness?

Assertiveness is important because the collaborative divorce process works best when each party’s needs and interests are fully asserted in a respectful manner.

What about resistance?

In my approximately 20 years of experience as a New York collaborative divorce lawyer, numerous difficult cases got settled when my client and I did not give up, did not give in, and respectfully resisted when the other spouse persistently made unreasonable demands. When the other spouse said or did something offensive or upsetting at a collaborative settlement conference, I would remind myself not to be reactive, but rather do the following: initially acknowledge, silently and secretly, whatever judgment I may make that is triggered by the other spouse’s unreasonableness; formulate a strategy to move the negotiation forward in a positive way; and take action accordingly, which might include using active listening techniques to diffuse the conflict.

This respectful nonviolent assertiveness and resistance reminds me of peaceful protest in the civil rights context. Both involve having courage, respectfully speaking out, and not shying away from conflict or “good trouble,” as Representative John Lewis would say.

It is also important to have patience and faith in the collaborative process. When this happened in my difficult collaborative divorce cases, there was almost always a breakthrough, and the recalcitrant spouse finally saw the light. Once that occurred, the divorcing couple was on the road to the promised land of a good divorce settlement and aftermath to their divorce.

In closing, it occurs to me that some may say that a divorcing couple is disqualified from the collaborative process if one or both spouses are difficult. It is true that a difficult spouse is more likely to abuse the collaborative process and increase the chances that negotiations will irreversibly break down. In my opinion, the ethical way for collaborative professionals to proceed in a difficult case is to provide informed consent. The client is advised of the risks, including the potential costs (money and time) of proceeding collaboratively, and then the client decides whether or not to assume those risks.

The potential benefits are considerable for a client who assumes such risks. On many occasions, I have seen how the modeling of respectful conflict resolution by the collaborative professionals can help transform the difficult spouse into a respectful negotiating partner.

Arnold D. Cribari, Esq., has practiced law for over 40 years, and for the past 30 years he has concentrated exclusively in matrimonial and family law. For the past 20 years his practice has included collaborative law and divorce mediation. Arnold is the author of numerous articles including Restraining the Custodial Parent from Relocating the Child to a Distant Domicile., Collaborative Law: Divorce Lawyer as Peacemaker and The Struggle to Preserve Collaborative Law Benefits when Litigating a Divorce.
Tejash: How long have you been a member of the WCBA?

Daniel: I joined the WCBA earlier this year, when I moved my practice from a firm in New York City to Yankwitt LLP in Westchester County.

Tejash: What is your current job and practice area?

Daniel: I am a partner at Yankwitt LLP, where I handle a broad range of commercial, regulatory, and appellate litigation. I also have a financial services regulatory advisory practice, in which I service banking, cryptocurrency and digital asset clients.

Tejash: How was your experience clerking for two appellate judges for the Second Circuit – the Honorable John M. Walker Jr. and the Honorable Guido Calabresi?

Daniel: I was fortunate to work for two wise and thoughtful jurists. Each one had a distinct view of the law and approach to judging, which I closely observed and from which I learned. Being able to clerk for the two federal judges was an invaluable learning experience and informed how I practice law today.

Tejash: Can you talk about your work in public service before you joined the private sector?

Daniel: Ever since I was in high school, community service has been an important part of my life. That sense of responsibility and satisfaction extended to my legal career. I joined the U.S. Attorney's Office, because I believed (and still do) that responsible lawyers in government can do the right thing in hard situations and help make people's lives better. I continued on that mission by working for the New York State Attorney General's Office helping to fight mortgage fraud on behalf of both homeowners and investors, and, as General Counsel for the New York State Department of Financial Services, I helped to enforce international anti-terrorism sanctions against global banks that repeatedly violated them for profit. Now in the private sector, my clients benefit from the hands-on experience I had working on important, complex issues that build skills that are hard to develop elsewhere.

Tejash: What is one of your favorite success stories?

Daniel: Over the past few years, my work developing legal regulations for blockchain technology—especially in the cryptocurrency and financial services space—has been gratifying. While I was General Counsel at the Department of Financial Services, we worked hard to make New York the leading regulatory innovator in this sector to keep pace with technological innovation. It has been tremendously rewarding to watch a multi-billion-dollar market rise on the legal foundations we built. New York continues to be an international trailblazer in this field, and there is enormous potential for businesses across the state to benefit from those advances. Now that I am in the private sector, I continue to participate in developments in this area of the law and continue to feel rewarded by the work.

Tejash: Who were some of your legal mentors?

Daniel: I have had the honor of learning from tremendously accomplished attorneys. Also, Judges Walker and Calabresi were wonderful
teachers and working in the U.S. Attorney’s Office under Mary Jo White was like practicing law in Camelot. My parents were equally important to my growth as a lawyer. They practiced together for many years in a small litigation firm, specializing in commercial and matrimonial work. I watched how they tirelessly advocated for clients and always remained decent people while doing it. They were successful but not arrogant, and they demonstrated to me the important lesson that caselaw is made of real-life stories.

Tejash: If you were not practicing law, what would you be doing?
Daniel: I would likely be a writer of some kind – a journalist, historian, or novelist, perhaps. I have always considered being able to use language artistically as a gift and achievement.

Tejash: What might people be surprised to learn about you?
Daniel: People are always surprised to learn that I was the National Civil Rights Director for the Anti-Defamation League. People do not generally associate government lawyers with civil rights advocates. Both jobs, however, strive to protect the fundamentals on which our society was built – personal liberties and equal treatment under the law. They are more alike than most people realize.

Tejash: What is the best hour of your day?
Daniel: I’m definitely a morning person; I would have to say my most productive hour is between 9 and 10 a.m.

Tejash: What are some of your favorite movies?

Tejash: What are some of your favorite vacation trips?
Daniel: Every summer, my family and I go to the beach for a week. It is easy, and good for the soul. We enjoy jumping the waves, beautiful sunsets, delicious meals, and sleeping in the salt air. For me that is perfection.

Tejash: What is the best advice you have ever received?
Daniel: A wise person once told me that you cannot control what people say about you; you can only control what you do.

Tejash: What advice would you give to new lawyers?
Daniel: My advice would be two-fold: 1) protect your integrity, as it is your most valuable asset, and 2) form strong relationships in your personal and professional lives. It is hard to succeed without them.

Tejash: What is one of your future ambitions?
Daniel: I would like to write a book that makes people both think and laugh.

Tejash: What is your favorite part of being involved with the WCBA?
Daniel: I believe the WCBA and its rich, diverse programming provides opportunities for collegial and engaging work. I look forward to getting involved and building meaningful relationships.
I mean, don’t get me wrong, lawyers can code, if they want to; but, they don’t have to.

There’s a prevailing argument in legal tech circles over whether lawyers should be coders. This argument is often misconstrued to mean that lawyers should be developing their own software. And, that’s an entirely different thing. It’s sort of like making the assumption that the guy who tinkers with an old Corvette on the weekend should launch an automotive corporation. And, the same argument applies for lawyers that applies to that weekend warrior: he shouldn’t do that because he can make more money in his day job, which also carries with it far less risk.

The point is: if you want to be a lawyer, be a lawyer; if you want to start a software company, start a software company. But don’t do both.

The math works, too.

Solo, small and large law firms waste money and resources when they develop their own software, rather than using off-the-shelf software that can be customized for far less than it costs to build software from scratch. The situation is even worse when lawyers become involved in a software build, because lawyers charge far more money than the average software developer or consultant, which means that lawyers are leaving money on the table when they do anything but lawyering. Those attorneys who stick to substantive practice and farm out lower leverage activities make money; those lawyer who abandon those activities lose money. That’s why it’s so important to practice at the top of your law license if you’re an attorney, and to effectively delegate work.

If you need some help picking someone else’s software, we can assist.

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Jared D. Correia, Esq., is the Founder and CEO of Red Cave Law Firm Consulting, which offers subscription-based law firm business management consulting and technology services for solo and small law firms. Red Cave also works with legal institutions and legal-facing corporations to develop programming and content. A former practicing attorney, Jared has been advising lawyers and law firms for over a decade. He is a regular presenter at local, regional and national events, including ABA TECHSHOW. He regularly contributes to legal publications, including his column, ‘Managing,’ for Attorney at Work, and his ‘Law Practice Confidential’ advice column for Lawyerist. Jared is the author of the American Bar Association publication ‘Twitter in One Hour for Lawyers’. He is the host of the Legal Toolkit podcast on Legal Talk Network. Jared also teaches for Concord Law School, Suffolk University Law School and Solo Practice University.
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From left: Paul M. Millman, Ryan Ondrovic with his father Supreme Court Judge Robert Ondrovic and WCBA President Elect James Hyer deliver presents to Montrose VA Hospital in Honor of Veterans Day.

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WWBA and WCBA Employment Law Roundup
Join us for a collaborative discussion: Navigating Employment Law Matters in the COVID-19 Era

Jan. 11 Mon. 12:30 PM - 1:30 PM
Happy New Year! You’ve Been Hacked! Now What?!
Join us to discuss how to recognize, prevent and react to cyber attacks

Jan. 22 Tues. 12:30 PM - 1:30 PM
WWBA and WCBA Employment Law Roundup

Jan. 26 Tues. 5:30 PM - 7:00 PM
Bar Association Trivia Night Challenge
Join us at 5:30 p.m. and enjoy the comedy stylings of Debra Reiser, Esq., “Funniest Lawyer in NY Finalist,” while everyone logs in.
   At 5:45 PM we’ll send you to breakout rooms and start Round 1. Play 3 rounds of Trivia and meet a new group of colleagues in breakout rooms for each round.

Jan. 27 Wed. 12:15 PM - 1:15 PM
Does Video Conferencing Work for You?
This webinar will show you how attention paid to your body language can make video meetings more positive and successful.

FEB. 2 Tues. 12:30 PM - 1:30 PM
Law Practice Management Committee Meeting

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Jan. 19 Tues. 12:30 PM - 2:00 PM
Roundtable with Judge Robert D. Drain: What’s New and Relevant
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Do’s and Don’ts of Housing Discrimination in Rentals
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Jan. 28 Thur 1:00 PM - 2:00 PM
Best Practices for Virtual Trials
Moderator: Hon. Walter Rivera, NYS Court of Claims
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Immigration Committee Virtual Meeting

On December 10, 2020, the Immigration Committee met to discuss current issues and shared tips in the practice of immigration during these challenging times.
Please join us next time!

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The reading of the obituary of a prominent California lawyer in the Wall Street Journal last November sent me back to New Rochelle’s High School’s basketball court seven decades earlier.

White Plains High School’s men’s basketball team was playing a powerful New Rochelle squad led by an athletic center. As a member of my high school’s junior varsity, I had played that center in preparation practices with the varsity. Looking at him now from the stands, I realized how unsuited for the practice role I was. A physical specimen, he stood almost four inches taller than me at 6-foot-7 and possessed athletic ability I could only dream about.

But his superior physical attributes and his playing ability are not what is remembered here nor are they what trig-gered this ancient memory. It was a ges-ture—a small gesture—during the game that revealed his character and perked my respect for and my interest in him.

A young, inexperienced member of the White Plains varsity squad was given the daunting task of guarding the rival center. Putting all of his effort and ability in the task, he sadly did not come close to mastering that challenge. In the second half, his effort ended when he fouled out. Dejected, the young White Plains player took a seat on the bench with his head down.

Suddenly something happened that I never saw in past encounters between the two rival teams. When the dejected White Plains center slumped down on the bench, the New Rochelle center ran over to the White Plains bench and shook the hand of his downcast White Plains opponent, saying a few words. I could not hear what was said, but I assumed it was something to this effect: “nice game kid.”

All of these years later while I do not remember the score of the game or which team won, that simple, mature, and sympa-thetic gesture by the big center remains crystal clear in my memory. I had seen a budding man of character show concern for an opponent in the midst of hot competition.

Reading the obituary of Jesse Arnelle, a top California lawyer, who died October 21, 2020 in his San Francisco home at the age of 86, confirmed my long-ago reaction to that basketball gesture. In later life, Arnelle, the thoughtful New Rochelle center from my memory, kept faith with his character and remained the person revealed to me at that game back then.

Over the years since the game, I had watched his career as he played college football for Penn State, moved on to play professional basketball for the Fort Wayne Pistons and later became a successful West Coast lawyer. While working in New Rochelle in the 1970’s as a newspaper editor, I also learned of the strong and respected family to which Arnelle belonged.

The Wall Street Journal article fleshed out the exceptional, important life he lived. At Penn State, he also played center for the basketball team that made it to the Final Four in 1954. While at Penn State, he was elected as the first Black to head the school’s student body as president.

Before joining the professional basketball circuit after graduation, Arnelle turned down a professional football career. The Los Angeles Rams drafted him in 1955.

Following service in the U.S. Air Force, he earned a law degree from Dickinson Law School in Carlisle, Pennsylvania. Recruited by Robert Kennedy, he joined the Peace Corps working in Turkey where he learned the language. He also served in India. In 1968, he moved to San Francisco to eventually become a lawyer in private practice.

In May of that year, Penn State in-vited Arnelle back to receive an alumni award. Just a month before the invitation, Dr. Martin Luther King, Jr. had been as-sassinated. According to the Journal piece:

… In a stinging speech, Mr. Arnelle refused to accept the award because of what he de-scribed as a failure to recruit more Black students, professors and administrators….

He pointed out in his speech that there were no Black professors with tenure nor a Black member of the school’s board of trustees. That board lack was corrected in the following year when Arnelle was elected to the Penn State Board—a post he would hold for forty-five years.

According to the Journal piece, in 1984 Arnelle with his friend, William Hastie, founded one of the first Black law firms serving top U.S. corporations. He was quoted later saying:
Good, careful parenting is a foundation stone—maybe even the keystone—of a successful free society.

In a way, Arnelle’s life story with its success at most or even, perhaps, all phases, is proof of the thoughtful, every day parenting by parents who care and take the daily trouble and responsibility that comes with that basic life role.

It is clear that the former New Rochelle sports star was the recipient of that kind of close family supervision by loving parents.

The Journal obituary provided evidence of that important parental guidance as well as that offered by school teachers who care. The second and third paragraphs of that piece state:

... With two other brothers and his parents, he lived in a public housing project in New Rochelle, N.Y. ‘Whatever you did, it had to be done perfectly.’ He told the New Yorker in 1993 ‘whether it was making your bed, cleaning your room, washing the dishes, or cleaning out the furnace.’ His father, an immigrant from Jamaica who ran a small moving company, ‘would come behind us and show us how we could do it better.’

Arnelle retired from the firm in 1998. An outdoors man, he climbed Mt. Kilimanjaro and hiked trails in Spain. He is survived by his wife and two children.

The Journal article quoted one of his long-time friends as saying:

He never acted like he was anything special. He had time for everybody.

If that is what Arnelle felt, he was wrong. The one-time New Rochelle High School center, who lived a remarkable and full life after high school, was a special person. I take pride in my recognition of that fact from the stands seventy years ago.¹

His parents taught him to stand and salute when the national anthem played on the radio. When he showed up unprepared for a high school Spanish class, a teacher challenged him to try harder ‘otherwise,’ he recalled being told, ‘get out of my classroom and be just another athletic bum.’

The above parenting and coaching guidance brings to mind the following words of Frederick Douglas, the 19th century abolitionist: “It is easier to raise strong children than to repair broken men.”

Endnote
1 The Wall Street obituary of Jesse Arnelle in the November 14, 2020 issue of that newspaper was relied on in writing this column, which also used quotes from that article. However, as to Arnelle’s height while in high school, the memory here is that he was listed as 6-foot-7 and that is the height stated in this column. The Journal obituary says he was 6-foot-5.

Photos courtesy of collegian.psu.edu

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.
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