

WESTCHESTER LAWYER



THE WESTCHESTER COUNTY BAR ASSOCIATION'S MONTHLY MAGAZINE

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Staying Focused in Turbulent Times

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WESTCHESTER LAWYER

THE WESTCHESTER COUNTY BAR
ASSOCIATION'S MONTHLY MAGAZINE

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From the President

Wendy Marie Weathers, Esq.



Welcome summer 2020! I hope you are all safe and healthy and that your businesses are continuing to progress through the recovery phases of this pandemic. This year will likely be remembered for generations. For some, it has involved the loss of a friend or loved one—and to you we express our deepest sympathy. For others, it has been a celebration of achievement and success—Congratulations to all the graduates of 2020! While the ceremonies associated with those happy events may have been held like a drive-in movie or through live video streaming, one thing is for certain - we will overcome the current challenges and come out stronger.

We are Americans and we should be proud of our resilience and tenacity. This is how our country was created — change brought new ideas and vice-versa. Happy Birthday America! The celebration of the birth of America — the Fourth of July—is not just about fireworks and barbecues—it is about patriotism and solidarity.

To appreciate this event, please indulge me with providing a little history:

“The Fourth of July—also known as Independence Day—has been a federal holiday in the United States since 1941, but the tradition of Independence Day celebrations goes back to the 18th century and the American Revolution. On July 2nd, 1776, the Continental Congress voted in favor

of independence, and two days later delegates from the 13 colonies adopted the Declaration of Independence, a historic document drafted by Thomas Jefferson.”¹

While the body of the document outlines a list of grievances against the British crown, the preamble includes its most famous passage:

“We hold these truths to be self-evident; that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.”²

Philadelphia held the first annual commemoration of independence on July 4, 1777, while Congress was still occupied with the ongoing war. After the Revolutionary War, Americans continued to commemorate Independence Day every year, in celebrations that allowed the new nation’s emerging political leaders to address citizens and create a feeling of unity. Over the years, the political importance of the holiday would decline, but Independence Day remained an important national holiday and a symbol of patriotism.³

During these challenging times, it’s important that we respect and support one another and be a unifying force for each other. I have such fond mem-

ories of celebrating the Fourth of July with my family when my grandparents would tell us about the challenges and hurdles they overcame to come to this great country for a better life.

Both of my paternal grandparents emigrated from Grossheubach, a small town in Germany. They were fortunate to leave before World War II started. My grandfather left Germany when he was 19 years old in December, 1929. My grandmother left Germany when she was 20 years old in October 1937. They married a few years later and my father was born in 1943 as a first-generation American. Unfortunately, he became the “man” of the house at the age of 7 as a result of my grandfather suffering a fatal heart attack. My dad, along with his younger brother, grew up in the South Bronx tenements with many other immigrants who had started their new lives in America. The pursuit of a better life was a common theme for many believed that only in this country could their dreams come true.

My dad taught my brother and me to work hard and to strive to be the best we could be. With very few resources, my parents provided a loving home for my brother and me. As a result, I was the first woman in our family to graduate college and the first lawyer of the family, while my brother is the first doctor of the family. I am very grateful to be an American and I will always remember the sacrifices

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CLE/Webinar News

By Isabel Dichiara, WCBA Executive Director



The WCBA staff would like to say a special thank you to all of our members. Over the course of the last 3+months, your WCBA has been working to keep you informed and provide resources to help you through these challenging times.

While the staff has been working remotely, we have been able to connect with more than 850 members of our legal community—both WCBA members and non-members—to offer more than 20 CLE programs and another 20 non-CLE webinars plus our weekly Coffee Talk and the new Adventures in “At-Home Working & Parenting”. We are so grateful for your support—

both online and via email. We wanted to take a moment as we all begin to consider phasing back in to offices to say an extra “thank you” to our Annual Sponsors, Corporate Partners, and all of the wonderful speakers who have helped us support our WCBA members during these challenging times.

A special “Thank you” to all of the WCBA members and guests who have taught CLEs and webinars this spring. We are so proud of the partnerships forged in these last few months with our local Westchester Black Bar Association and Westchester Women’s Bar Association, as well as our regional partners from the Dutchess County Bar Association and Rockland County Bar Association as we co-hosted or shared resources to make CLEs available to all of our members. We have also been privileged to partner with the New York State Bar Association to offer several CLEs and webinars free for our WCBA members.

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Navigating Employment Issues in Light of COVID-19	Jaclyn G. Goldberg, Esq. Lance H. Klein, Esq.	Speakers	
Court Access during the COVID-19 Pandemic Executive Orders, Administrative Orders, and Court Policies for the 9 th Judicial District and Appellate Division, Second Department	Maira Laidlaw Esq. David Simon, Esq. Bridget Eichinger, Esq.	Moderator Speaker Speaker	Trusts & Estates Section
Pandemics & Planning: What lawyers Should Consider for Both Their Practice & Personal Affairs	Anthony Enea, Esq.	Speaker	
Attorney Trust Accounts: The Basics, Ethical Considerations & Beyond	Paul M. Millman, Esq. Lawrence McElroen Deborah Scalise, Esq.	Moderator Speaker Speaker	Grievance Committee and Real Property Section
Artificial Intelligence and Arbitration: The Computer as an Arbitrator – Are we There Yet?	Jeff Zaino Paul Bennett Marrow, Esq. Mansi Karol Steven Kuyan	Moderator Panelist Panelist Panelist	ADR Committee and Business & Commercial Law Committee

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Ethical Referrals In Person and Online: Plan Your Referral Strategy Now for The New Normal	Abby Rosmarin, Esq. Carol Schiro Greenwald, Ph.D.	Panelists	
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Successful Appellate Strategies: Justice Spolzino Reveals the Secrets	Hon. Robert A. Spolzino	Speaker	
A discussion of SPCA 17A and MHLS Art. 81 Guardianships and the process for court approval of a Supplemental Needs Trust	Lauren C. Enea, Esq. Sara Meyers, Esq.	Speakers	Adult Guardianship Committee
The NYS Court Presumptive ADR Programs: A Virtual Update	Marc Sheridan, Esq. Hon. Walter Rivera Suzy Hickson, Esq. Lisa M. Courtney, Esq. Lisa Denig, Esq. Referee Joel R. Kullas, Esq. Sharon Matthie, Esq. Bridget O’Connell, Esq.	Moderator Panelists	ADR Committee and Law Practice Management Committee

WEBINARS

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Making Remote Work Work: Success Strategies for Introverts & Extroverts	Laura Powers	Speaker	WCBA & NYSBA’s Business Law Section
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It Can Be Done! Best Practices in the Virtual Practice of Law in T&E and Real Estate	Maira Laidlaw, Esq. Kimberly Bliss, Esq. Anne Aicher, Esq.	Moderator Speaker Speaker	Trusts and Estates Section
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Ahead of the Curve: Best Practices from Established Virtual Law Firms	V. Jonas Urba, Esq. Tracey I. Levy, Esq.	Speakers	Law Practice Management Committee

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Ahead of the Curve: Best Practices from Established Virtual Law Firms	V. Jonas Urba, Esq. Tracey I. Levy, Esq.	Speakers	Law Practice Management Committee
Virtual Depositions: Best Practices	Debra A. Levinson Michael E. Levinson	Speakers	DALCO Reporting
Growing During Times of Crisis: Practical Ideas to Update Your Marketing and Technology for the New Normal	Carol Schiro Greenwald, Ph.D. Andrea Prigot	Speakers	Law Practice Management Committee
Remote Court Conferences Roundtable	Hon. Walter Rivera	Host	Law Practice Management Committee
Why HER and Not ME? How YOU Can Be the Attorney Reporters Call	Janet Falk	Speaker	
There's a Reporter on the Line to Talk with You	Janet Falk	Speaker	
Returning to the Workplace: What you need to know now	Chuck Newman Marc Roberts Brian Auerbach	Speakers	The Charles Newman Company
Litigating in the Westchester Commercial Division During COVID-19: A Virtual town Hall Discussion	Hon. Linda S. Jamieson Hon. Gretchen Walsh Brian S. Cohen, Esq. Matthew D. Donovan, Esq.	Speaker Speaker Moderator Moderator	Business & Commercial Law Committee
4 Ways to Succeed at LinkedIn During and After Pandemic	Bruce K. Seagall	Speaker	

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Please join us at the Westchester County Bar Association's Annual

GOLF OUTING 2020

GlenArbor Golf Club, Bedford Hills, NY

Tuesday, September 22, 2020

Our friends at GlenArbor Golf Club are open and ready to welcome the WCBA for our Annual Golf Outing in September. The club is following all requirements for cleanliness and social distancing including offering outdoor dining.

We hope you'll team up with bar members, judicial members, clients, friends, and colleagues for an enjoyable day of golf, BBQ Lunch and awards.

Sponsorships and Co-Sponsorships are available!

Sponsor a tee, green or part of the event. **Donate** a raffle prize!

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Please see page 6 for Sponsor

Reservation and Payment Form WCBA Golf Outing 2020

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Bedford Hills, New York

Team up with bar members, judicial members, clients, friends and colleagues for an enjoyable day of golf, BBQ Lunch and awards.

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THE PRACTICE PAGE

WESTCHESTER'S EIGHT HISTORIC COURTHOUSES

By Hon. Mark C. Dillon

Westchester County has occupied a number of courthouses during its history. The summer doldrums provide an opportunity to step away from the CPLR topics that define this column and acknowledge a piece of Westchester's rich legal history.

The first county courthouse was located in Bedford from approximately 1720 to 1758. Since New York was then a province of the British possessions, the judges were appointees of the King. The courthouse was destroyed by fire and replaced by a second courthouse in White Plains. The "second" courthouse, which opened in 1759, was located at the site of the Armory at the intersection of South Broadway and Mitchell Place. It, too, burned to the ground in 1775. There were suspicions that arson was the cause of that fire, as the courthouse symbolized British authority at a time when passions between Colonialists and Loyalists were high (NYS UCS, <http://ww2.nycourts.gov/courts/9jd/westchester/countyhistory.shtml> [for certain historical information used about White Plains courthouses discussed here]).

The third and fourth courthouses operated simultaneously in Bedford and White Place for several decades. The Bedford facility was located at the village green and used from 1788 to 1868. One notable jurist at that courthouse was John Jay's son, William Jay, who was a judge of the Westchester County Court from 1820 to 1842 (Monaghan, Frank, *John Jay*, 431 [New York: Bobbs-Merrill,

1935]). The Bedford Courthouse ceased being used when a law was enacted requiring that all superior court terms be held at the county seat, White Plains. The building still exists as a restored museum operated by the Bedford Historical Society, complete with a jail cell on its second floor (BHS, http://www.bedfordhistoricalsociety.org/museum_exhibits/index.php).

A fifth courthouse was erected in 1855 on the block where the White Plains Galleria now stands, which was replaced on the same block by a larger sixth "Supreme Court Building" in 1909. The sixth structure quickly proved to be inadequate as Westchester grew in population, and it was replaced on the same block by an even larger courthouse in 1919, the county's seventh. The 1919 courthouse was six storeys tall but designed so that its roof could be raised to add more floors. By 1954, the 1919 courthouse housed five Supreme, one County, and one Surrogate Court judges and justices. Those numbers rose to a total of 14 jurists by 1966, in part due to a 1962 law that permitted justices of the Supreme Court to be certificated for service after age 70, to age 76 (L.1962, c. 704, § 2, now Judiciary Law § 115).

The current 19-storey courthouse opened in 1973. Those of us who have practiced law for some decades remember that the building was plagued with a variety of maintenance problems for more than 30 years. As in the past, the new facility failed to keep pace with the population and commercial



growth of Westchester, necessitating construction of a state-of-the-art annex completed in 2005. The annex added 22 courtroom and ancillary facilities to those of the courthouse tower, raising the total size of the combined complex to 500,000 square feet. Today, there are almost three dozen superior court jurists with chambers in White Plains.

Courthouses provide a focal point for a county's legal community. With various courthouses located at the site of today's Galleria Mall, or within a block's walk of it now, it is not surprising that law firms congregated in the same vicinity along Main, Grand, and Court Streets, and Martine and Mamaroneck Avenues. One such building, at 199 Main Street, is known as the "Bar Building." It was constructed in Chicago-style in 1926 and has twelve floors. Another is the eight-storey Northcourt Building at 175 Main Street, built in 1931. Both buildings were quite tall for White Plains when initially built and likely defined the city's skyline. Many downtown law firms migrated from there to the modern high rises nearer the train station today, and fanned out to the various corporate parks along the I-287 corridor.

What might our state courthouse facilities be in 2075? Happy summer.

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 a contributing author of CPLR Practice Commentaries in McKinney's.



Averting The “Next” Pandemic in New York

By Prof. Nicholas A. Robinson
University Professor for the Environment

In his televised morning briefings, Governor Andrew Cuomo has warned often that New Yorkers need to be ready for the next novel coronavirus infection. It is already on its way. Why is this new “Virus X” at our door step, and what can we do to get ready?

COVID-19 still threatens us. New York’s first task is preparing hospitals and all public health systems for a second wave, or managing persistent infections as they continue to appear. The Governor’s safeguards have these tasks in hand. But what about diseases

from yet new viruses or bacteria?

Simultaneously, as we cope with COVID-19, New York also needs to organize to avert a new infection, which is already at our door step.

COVID-19 is but one of many diseases that we humans catch from animals. Many viruses and bacteria live peacefully with animals until their host’s habitat is disturbed. A novel coronavirus will seek a new host, infecting a new animal. Eventually humans become the host. Often an insect will convey the microbe from one

animal to a human being, such as ticks that convey Lyme Disease, or mosquitoes that convey yellow fever, malaria, and now Zika virus. The virus behind COVID-19, SARS-CoV-2 reached humans after peacefully living with bats. All these “spillovers” are examples of *zoonosis*.

We have long known that humans share many diseases in common with different animals, like tuberculosis. What is new *now* is the increased frequency with which humans interface with microbes from animals, and be-

come ill. The destruction of forests in Africa, in South America, and Asia destroys habitat for many wild animals, which then shed their viruses, like Ebola (1976) or HIV/AIDS (1983). Here, building roads and suburban real estate development fragments fields and severs wildlife corridors, making Lube disease more common.

Once a virus finds a human, we share the disease with each other. Locally infected people travel, and airplanes bring the diseases to distant lands. It took weeks for rats to bring Bubonic Plague, the medieval “Black Death,” to Europe on sailing ships. A virus jumps continents in a few hours now.

There are perhaps 700,000 viruses yet to be discovered. Of the 335 human diseases identified between 1960 and 2004, 61% are of zoonotic origin, and 72% of all recent diseases are zoonotic. This trend is increasing. No public health system alone can prevent this. We are ill equipped right now to detect and contain the spread of microbes. Once the microbes infect us, it is too late.

Louis Pasteur pioneered microbiology and discovered the principles of vaccination. When he died on December 27, 1822, his last recorded words were “*Le microbe n’est rien, le terrain est tout.*” His life’s work taught him that the microbe is “nothing,” but “*la terrain,*” the habitat where the microbe lives, is everything. It would take decades before a new discipline, the science of ecology, first explained the linkages between people and microbes, flora and fauna in ecosystems. The science of virology would emerge about the same time, at the end of the 19th century. It was not until 1933 that scientists discovered that a virus had caused the 1918 Influenza Pandemic.

We now know that Pasteur was prescient. If humans take good care

of the natural environment, they minimize the chance of encountering a microbe searching for a new host. The microbe alone is insignificant, but caring for health of the Earth’s terrain indeed can be everything!

Zoonotic diseases are on the rise for several reasons. The escalating loss of biodiversity is the root cause. Biodiversity loss is a *health risk multiplier*. Since human, animal, plant and ecosystem health are interdependent, managing zoonotic spillovers requires the government to mainstream biodiversity conservation and enhance ecosystem resilience. This requires integrated cooperation between environmental conservation, public health, agriculture, and natural resources sectors.

Climate change increases the likelihood of a new microbe infecting New Yorkers. Increased rainfall and humidity provide favorable conditions for mosquitoes to breed and for adult mosquitoes to survive. In 1999, the West Nile virus, transmitted to humans by mosquitoes, made its first appearance in the Western Hemisphere in New York, after a drought followed by heavy rains. Since then, over 1,600 people have died of the disease. Extreme weather events cause a cascade of other effects that influence disease. Heat and droughts create dry conditions, providing fuel for forest fires that end up fragmenting forests and driving wildlife closer to humans.

An inter-agency, or “whole of government” collaboration is required. Such collaboration runs against the grain. Conservation of wild nature, and veterinary health of domestic animals, is often deemed an amenity, an option to support after other priorities are met. Government budgets assign twice as many resources to Departments of Health, and exponentially more than

health to support military or police security. COVID-19 reveals the folly of this approach. Zoonotic diseases are a non-traditional security threat, causing incalculable human and economic loss.

Protection of biodiversity requires maintaining intact and functional ecosystems, which are also the fundamental infrastructure for all of life, health and socio-economic well-being. In 2019, too late to make a difference for COVID-19 Pandemic, the Wildlife Conservation Society, German Government, UN agencies and others called for adoption of a “ONE HEALTH” approach to controlling zoonosis. A suite of policies and best practices exists to avert the “next” pandemic.

Fortunately for New Yorkers, most of the laws and systems called for to avert the “next” pandemic are in place. The problem is that they have never been aligned together to address disease avoidance. Given what COVID-19 has taught us, it would be irresponsible not to build ONE HEALTH into New York’s governance. Will we? There is the risk of “business as usual” and choosing not to learn, as happened after the experience of SARS in 2003-2004.

Since we know that the “next” zoonotic spillover is happening now, we must actively manage the interface between humans and animals. Governor Andrew Cuomo uses his Executive Chamber to coordinate myriad agencies to combat COVID-19. The same is required in the future. This can be done at once by activating the Governor’s Council of Environmental Advisors, as is authorized under Article 7 of the Environmental Conservation Law. A statutory body is needed to prevent a future governor neglecting this strategic cockpit for One Health, as Pres-

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PACE PAGE

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ident Trump did when he disbanded the White House NSC Directorate for Global Health and Security, which President Obama had established after the Ebola crisis.

A top priority for this Executive Chamber Council will be to supervise how New York implements its new climate change legislation. New York's Climate Leadership & Community Protection Act of June 2019 provides tools toward a One Health protection of New Yorkers. In Section 75-0109 of the Environmental Conservation Law, this Act provides for off-setting carbon emissions through extending forests and other ecosystems to enhance the photosynthesis that removes carbon dioxide from the atmosphere. The same healthy habitats serve to avert zoonosis spillover.

The same Act amended New York's *COMMUNITY RISK & RESILIENCE ACT* in ways that also could be deployed to directly protect against zoonotic diseases.

Section 17-A mandates the Department of Environmental Conservation to address impacts on public health and species and to identify the most "significant climate-related risks," along with measures to mitigate those risks. Section 17-B requires applicants for all permits to identify physical climate risks and how to handle them and authorizes DEC to mandate mitigation measures. Increased disease spillovers are climate risks.

Governor Cuomo can also deploy New York's *STATE ENVIRONMENTAL QUALITY REVIEW ACT* which requires all state and local governmental agencies to make a holistic evaluation of potential environmental impacts and risks. SEQRA effectively enables a ONE HEALTH approach. SEQRA could collect data on ecological zoonotic risks, whenever an EIS is undertaken, identify options for sustaining health of ecosystems to contain spillovers of bacteria and viruses, identify the cumulative

impacts exacerbating biodiversity loss, and identify how to avoid fragmentation of intact ecosystems and restore migration corridors for species.

Finally, One Health is all about sustaining biodiversity, the terrain. New York is already the world's leader in stewardship of natural areas. When ecological habitats remain undisturbed, the bacteria and viruses in wild nature tend to remain relatively stable in their natural hosts, which dilutes the chances of spillovers to humans.

New Yorkers deserve credit for 150 years of ever more successful conservation of nature, which has kept microbes at bay. In 1894, voters added to the Constitution guarantees that the Forest Preserve should be "kept as forever wild forest land." Together with the Adirondack Park Agency, New York sustains healthy wild habitats larger than all of Massachusetts. New York's 30.2 million acres are home to 19 million New Yorkers, who maintain forests

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on 18.95 million acres, 63% of our land area or about one acre per resident. Government forest habitats are at least 3.7 million acres. Privately-owned forest hold 14.4 million acres, owned by 687,000 landowners.

New Yorkers can enhance this protective buffer against their interface with zoonosis in next November's state elections when they can vote on Governor Andrew Cuomo's "Restore Mother Nature" Bond Act initiative. This Act would restore up to 10,000 acres of freshwater wetlands, and reconnect or replant 10,000 miles of stream habitat.

New York can establish enhanced phyto-sanitary safeguards for its agricultural sector, and control of goods imported into or through New York. Precautions to prevent microbes entering in our airports and at State borders

can be established. The Department of Agriculture & Markets joins Health, Environmental Conservation, Transportation, and other State agencies are key parts of the One Health approach. New York also has unmatched expertise in its universities, organizations like the Wildlife Conservation Society, and across its public health sector.

New York should "write the book" about how to prevent the "next" pandemic. Through a gubernatorial strategic inter-agency Council, New York can prioritize zoonotic diseases that threaten New York, and guide the integration of zoonosis management into actions combatting the climate crisis. The Council can oversee establishing continuous biodiversity-related health surveillance to detect and manage emerging zoonotic disease spillovers

and avert health emergencies. The Council can guide all state agencies and local governments about stewardship of biodiversity and care for the expanse of natural areas to end habitat fragmentation and to provide migration corridors and buffer zones that manage disease-risk from human interfaces with animals in shared ecosystems.

Even in the middle of this COVID-19 Pandemic, New York can build back better, to anticipate and weather the "next" pandemic. The State cannot wait for Washington, D.C. and must build its own resilience. New York's leadership can pilot others to the security of One Health.



Prof. Nicholas Robinson has written about averting the next pandemic since before COVID-19 hit New York. On February 18, 2020, he published "Coronavirus We Thought We Knew Ye! The Wuhan Potential Pandemic" for the American College of Environmental Lawyers, available at <http://www.acoel.org/post/2020/02/18/CORONAVIRUS-We-Thought-We-Knew-Ye!-The-Wuhan-Potential-Pandemic.aspx> (concluding then that "The 'next' pandemic is upon us."). The

Westchester Lawyer published his essay "One World, One Health": Legal Preparations To Avert The Pandemic" (March 1, 2020), before the NY COVID-19 cluster appeared in New Rochelle. He co-authored an essay on "How Do We Prevent The Next Outbreak?" for *Scientific American* (March 25, 2020) at <https://blogs.scientificamerican.com/observations/how-do-we-prevent-the-next-outbreak/>. He recently has been lecturing in webinars often on how to avert the "next" pandemic. The New York State themes in the essay above were the primary focus of a Webinar presented to the New York State Bar Association Section on Environmental & Energy Law (EELS) on May 21, 2020; on April 15, 2020, he lectured for the UN Food & Agricultural Organization (FAO) on a webinar from Rome for 130 FAO experts, on "Lessons from COVID-19 for One Water, One Health," at <https://www.eli.org/vibrant-environment-blog/clean-water-pathway-stopping-covid-19-and-advancing-biodiversity>; on April 24, 2020, he lectured for the IUCN World Commission on Environmental Law IUCN on a webinar for 130 environmental law experts internationally regarding these themes also,

see <https://www.iucn.org/commissions/world-commission-environmental-law/resources/webinar-series>; on May 5, 2020, together with The Mission of France to the UN, and IUCN, Pace University's Elisabeth Haub Law School presented his lecture at a "Knowledge Dialogue" webinar for 180 delegates at the UN General Assembly, applying these themes to international law situations, see <https://law.pace.edu/global-center-environmental-legal-studies/knowledge-dialogue-international-cooperation-prevent-next-pandemic>; and on May 11, 2020, this international law lecture was repeated for 150 environmental law experts in Brazil through the Institute of Law for a Green Planet. Prof. Robinson founded Pace University's environmental law program in 1978, and served as the chair of Governor Mario M. Cuomo's Environmental Advisory Board (1985 – 1994), and later chaired the Commission on Environmental Law of the International Union for the Conservation of Nature (1996- 2004). He is currently Executive Governor of the International Council of Environmental Law (ICEL).



Staying Focused in Turbulent Times

By Joshua D. Weisbrot
Senior Vice President
Morgan Stanley

When the market is volatile, almost everyone thinks about their financial future and the potential impact such fluctuations may have on their retirement accounts. However, it is during these turbulent times that it's important to remember certain basic, time-tested principles of investing.

Continue Contributions

It may not seem intuitive, but continuing to contribute to your retirement plan—even during market downturns—can potentially enhance your returns over the long-run. A down market can be an opportunity for you to acquire more shares of your investments at a lower price. Consistent investing through market ups and downs is called “dollar-cost averaging.” If an investment’s price is

high, you buy fewer shares, or units. When prices are low, you buy more. Investing regularly, using dollar-cost averaging, can help reduce the risk associated with buying during big swings in market prices.

Diversify

If you’ve ever heard the saying, “Don’t put all your eggs in one basket,” then you already have a basic understanding of diversification. Diversifying your portfolio can reduce risk and volatility. Review your account and make sure your portfolio is not too heavily weighted in company stock, or in any single asset class.

Stay Invested

You may be anxious about the decrease in the value of your investments. But don’t be tempted to

move out of the market, sit on the sidelines and wait for prices to rebound. Trying to time the market could potentially jeopardize your financial strategy—and your future goals.

Maintain a Long-Term Focus

Any investment decisions you make should be based on your financial goals and objectives, time horizon and risk tolerance, rather than concerns about market volatility. Even if the market seems volatile, remember that ups and downs are normal. It is important to stay focused on your financial future and refrain from making short-term decisions on long-term investments.

History demonstrates that there will always be some degree of uncertain-

ty and volatility in the markets. While market events are out of our control, we do have control over our financial objectives and how our investments are allocated to help us achieve them. If you would like assistance in determining the mix of asset classes that can help you meet your financial objectives, contact your financial advisor.



Joshua Weisbrot is a Senior Vice President / Financial Advisor in The Soundview Complex/ Purchase at Morgan Stanley Smith Barney LLC ("Morgan Stanley"). He can be reached by email at joshua.d.weisbrot@morganstanley.com or by telephone at 914-225-5499. His website is: <https://advisor.morganstanley.com/joshua.d.weisbrot>

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Joshua Weisbrot's career as a Financial Advisor began over thirty years ago at EF Hutton in Great Neck, New York. He has been with Morgan Stanley and its predecessor firms since 1987, and is recognized as a Century Council Member since 2000.

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The Long Arm of Surrogate's Court Jurisdiction

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

In our increasingly interconnected world, more and more people maintain assets outside of their home state.

For a Surrogate's Court practitioner and their fiduciary clients, this means that a decedent's real and personal property alike might be found far from the Surrogate's Court that admitted the decedent's will to probate, issued letters testamentary, or appointed an administrator.

When a decedent's property is found outside of New York State, jurisdictional issues inevitably arise, especially in the context of a contested proceeding brought pursuant to Section 2102 or 2103 of the Surrogate's Court Procedure Act (SCPA).

However, just because a fiduciary may be forced to seek the discovery and turnover of assets outside of New York—typically because these assets have been improperly withheld from the estate during the course of the estate's administration—that does not necessarily mean that a New York Surrogate is without jurisdiction, and cannot directly exercise their authority, outside of New York.

Indeed, as Surrogate Pettit concluded in the 2018 case of *Matter of*

"The long arm of the law slides up the outskirts of town."

— Elvis Costello

Mahoney,¹ a New York Surrogate's power to reach across state lines is well founded where, in the course of a SCPA 2103 (and by extension an SCPA 2102) proceeding, real and/or personal property allegedly belongs to an estate, yet is in the possession of another outside of New York.

The constitutional and statutory framework for this power is derived as follows:

1. Pursuant to SCPA 201 and the NY Constitution, Article VI, Section 12, the Surrogate's Court has "full and complete general jurisdiction in law and in equity to adminis-

ter justice in all matters relating to estates and the affairs of decedents, and . . . to try and determine all questions, legal or equitable, arising between any or all of the parties . . . as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires."

2. Pursuant to SCPA 209(4), this jurisdiction includes the power "[t]o determine a decedent's interest in any property claimed to constitute part of [the] gross estate subject to estate tax, or ... to be property available for distribution under [a decedent's] will ..., and to determine the rights of any persons claiming interests therein...."
3. Pursuant to SCPA 2103, a discovery proceeding may be brought by fiduciaries concerning any property, as defined in SCPA 103 (44) that is "real or personal property...."
4. Pursuant to Section 3-5.1(a)(2) of Estate Powers & Trusts Law, personal property includes "any

property other than real property, including tangible and intangible things.”

Accordingly, a New York Surrogate’s Court that has “...primary jurisdiction over decedent’s estate, unlike a court of ancillary jurisdiction, [and] is the proper forum to bring a discovery proceeding as to property over which it has subject matter jurisdiction [outside of New York State].”²

Therefore, in an SCPA 2102 or 2103 turnover proceeding, the New

York Surrogate’s Court may not only extend its reach to investigate and repatriate tangible personal property across state lines, but also may use its powers to investigate issues related to real property—such as inspection, financial status, and valuation—that do not encroach on the transfer of title, which remains in the province of the ancillary court’s authority.

Somewhat counterintuitively, but clearly supported by a close reading of the law, under the right factual cir-

cumstance, a New York Surrogate’s Court with primary jurisdiction over an estate can exercise its jurisdiction and authority over a decedent’s real and personal property “wherever located,” a fact that will come as great relief to many a fiduciary tasked with marshalling assets located outside of New York.

Endnotes

- 1 62 Misc.3d 522 (Albany Surr Ct 2018).
- 2 *Matter of Mahoney*, 62 Misc.3d at 525.



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 board member of the White Plains Bar Association.



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, 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 the areas of Trusts and Estates Planning and Litigation, Elder Law, Guardianships, Business Planning, Corporate and Commercial Litigation, Not-For-Profit Corporation Law and Asset and Wealth Preservation.



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Henry G. Miller – A Memory

By Gary E. Bashian, Esq.

yer to be mentored by Henry for six years. Henry was the most sensitive, caring, brilliant, and thoughtful person as well as a natural born courtroom litigating attorney. Henry's style was not belligerent, not demanding, not critical, not pompous and not demeaning. Henry told the story to the Judge and jury and his honesty was clear and convincing.

Henry was an accomplished lawyer telling a story with an absolute complete command of the facts and the law. You as a juror had to believe him, and most jurors had to believe him, and most jurors and Judges did believe Henry. Myself and many other young lawyers who worked at Clark Gagliardi and Miller had Henry as a mentor. Many of the attorneys who practiced and still practice in Westchester and nearby and who were his partners learned so much from Henry who was such a good teacher. Henry had no enemies but only attorneys and staff who had great affection for him, as he did for them.

The late Judge Joseph F. Gagliardi, the former District Attorney of Westchester and then Supreme Court Judge, and Chief Administrative Judge for the 9th Judicial District saw Henry as a trial lawyer in his Court in one of Judge Gagliardi's cases in the late 1960's.

When Henry traveled from his Brooklyn office as defense counsel for an insurance company, he appeared before Judge Gagliardi who was very impressed with Henry. Judge Gagliardi said to his father the patriarch Frank M. Gagliardi, as the story goes: "Dad – you better hire Henry Miller to keep this firm going for a long time," and that is exactly what Frank M. Gagliardi and his other son, Lee Gagliardi, did. Shortly after Henry joined the firm, he was

made a young Managing Partner and Lee Gagliardi shortly thereafter was appointed as a Federal District Court Judge.

One story about Henry I must repeat, because he told me about this one case and then he laughed. I was fortunate enough to prep many of Henry's cases. All the other associates and partners were so happy to see Henry's victories because of his attention to detail and ability to tell a believable story. Henry was able to carefully craft questions based on the facts so that witnesses at a deposition or at trial made statements and gave testimony that were pivotal to winning a case at trial or to force a settlement. Henry was never satisfied with some of the facts, he needed all the facts, and kept thinking about how to win on the truth.

This case that Henry told me about was tried after I left the firm, but I would always return to see Henry while at my other law firms. I asked Henry how he felt after I learned that acting as defense counsel, he had just lost a very important case with damages awarded in the millions of dollars. Henry smiled at me and chuckled and said "you know, I feel pretty good, actually, because I was selected to be the defense attorney on one of the biggest litigated cases in the history of Westchester County, which is a great honor, and, the damages could have been many millions more, and the client is very happy, so I feel pretty good and honored to have acted as their trial attorney."

Henry was not frustrated and did not hide this loss, but he was proud of his work on a case that took many months to prepare and try.

Shortly after learning of Henry's passing, for some reason I remembered the meeting my daughter and I had with Henry, because my daughter Jennifer is an aspiring actress and screen writer in Los Angeles who is studying for her Master's Degree at USC there. I was thinking how happy I was for them to meet since Henry was my mentor and first boss after law school and army active duty in a JAG office. This meeting was so special for me because Henry always said he really wanted to be a playwright and actor, not a lawyer. Henry, acknowledged as one of the greatest Westchester trial lawyers, who loved the law and being a great trial lawyer, had another passion—which he never hid from anyone. His real passion was to write and act.

Henry was a Brooklyn boy who grew up with parents who lived a modest life. He was most proud of his days as a newspaper delivery boy who was never late on his route and he helped his family with his earnings. He served in the Army during the Korean War and went to St. John's Law School at night with another classmate, Mario Cuomo.

I was a very fortunate young law-

Remembering John F. Strouse Jr.

By Ralph Nobile, Esq.

Past President

Westchester County Bar Association

Jack's first work was as an Investigation Adjuster at the All State Insurance Company. He learned his trade well and was asked to join the firm to become a trial lawyer in Boston.

There he was, Jack Strouse, the guy who couldn't get into West Point because he wasn't selected, but the guy who was now a trial lawyer for a major insurance company. Jack Strouse and his wife Claire enjoyed a great life together and it is apparent that he also found joy in practicing law and walking into the court room and saying, "Your Honor, I'm representing the defendant and I'll be the trial lawyer in this case".

All those beautiful words. But like all things, other parts of his life were important too. Jack Strouse had originally enjoyed the Epsilon Sigma Pi Fraternity joys as well as being invited to become a Phi Beta Kappa at Manhattan College. Because of this continued excellence in his academics, when he was asked to become a trial lawyer, it was not a difficult task. The dream of doing it was a bit faded but it had nev-

er really left him. So there he was, Jack Strouse, trial lawyer, enjoying so much of the work in the courtroom.

He was accepted as an honest, deliberately good trial lawyer and enjoyed what he had to do to prepare.

Preparing for a trial requires tremendous dedication. A lot of hours, a lot of thinking, a lot of notes, just become part of your life because you've got to have notes when you're standing up—you can't read papers, you've got to look at notes. So there he was, Jack Strouse, a guy with a family enjoying the tribute he accepted as one of the members of the Bar in Boston.

How do we best salute Jack Strouse? We best salute him by saying he was not only a good friend of the group, which included many of the successful lawyers in the area, but also was remembered as a straight shooter. No better praise can ever become part of your life than being known as a lawyer who is a straight shooter.

He was a good friend to William S. Hickey, who also enjoyed a BA degree

from Manhattan College, and a good friend of John W. Keegan Sr., who also enjoyed a wonderful career as a trial lawyer.

Jack Strouse also talked about Genarro Crispino, whom everybody remembered because he became a Supreme Court Judge in Bronx County, and many times all of us who were in the trial world had to appear before him. What a fun day—your classmate's the Supreme Court Judge and you're going to appear before him with a case that's going to trial.

Well, I could continue on, and on, and on, but the gist is that Jack Strouse was honorable, dedicated and enjoyed the family life, although it was cut short by the untimely passing of his beautiful wife, Claire.

The Graduates of Manhattan College and Fordham University Law School all remember Jack because he was quite a guy.



Ralph R. Nobile, Esq., is a Past President of the Westchester County Bar Association and a founding member of Nobile, Magarian and DiSalvo, LLP. His practice areas include automobile accidents; wrongful death; premises liability; real estate contracts; construction litigation and workers compensation.

Mr. Nobile is the recipient of the James D. Hopkins Achievement Award, Westchester County Bar Association and the Fordham Law School Distinguished Alumnus Award. Mr. Nobile is the author of "To Criticize or Not," in Westchester County Bar Topics. He is a Past Chairman of the Fair Rent Hearing Committee, Yonkers and was the host of the Westchester Bar Radio Program, "The Westchester Lawyer Speaks."



John J. Hughes, Esq.

member Spotlight

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

Tejash can be reached at: Tejash@sanchalalaw.com



Tejash: How long have you been involved with the WCBA?

Jack: I've been a WCBA member for over nineteen years. Until starting my current position, I served on the WCBA's Judicial Screening Committee. Several years ago, I taught a CLE class for the WCBA Real Property Section on time of the essence closings.

Tejash: What is your current job?

Jack: Since January 2020, I've been the ADR ("Alternative Dispute Resolution") Coordinator for the Bronx Surrogate's Court.

Tejash: The ADR program sounds interesting and timely. What should WCBA members know?

Jack: As a "recovering litigator" I know firsthand that litigation is costly, time consuming and emotionally draining. Even if you are "successful" after years of fighting in a trial court, you face the prospects of defending appeals and trying to collect on any judgment rendered. After considering the costs and delays of protracted litigation, parties are often left feeling unsatisfied with what they receive in a settlement.

Realizing this, the Bronx County Surrogate, Hon. Nelida Malavé-Gonzalez, has committed to developing and implementing a state-of-the-art presumptive ADR program for her court.

As the court's ADR Coordinator, most of my time is spent on helping build its mediation program. During the public health crisis, many mediators learned to effectively conduct mediations using videoconferencing and other technologies. In May 2020, the court began actively referring cases to virtual mediations.

Experienced Surrogate's Court practitioners and mediators might find the program an excellent opportunity to expand their practices and assist the public. Interested WCBA members can contact me by e-mail at jjhughes@nycourts.gov for more information.

Tejash: How did you transition from a 19 year career in private practice as a litigator to the public sector?

Jack: I give lots of credit to Hon. Brandon Sall, the Westchester County Surrogate, who has pioneered Surrogate's Court mediation. He allowed

me to attend a free Part 146 training class needed for certification as a Surrogate's Court mediator. After taking that class, I became a believer in the value of resolving disputes through mediation. By chance, after finishing the class and gaining firsthand experience in mediations, I learned that Surrogate Malavé-Gonzalez had created a position in her court for an ADR Coordinator. It was serendipity.

Tejash: Who has been influential in your career?

Jack: My former partners and co-workers at Bertine Hufnagel taught me about the law and professionalism. In addition to imparting many life lessons, WCBA Past President Richard Gardella made me a better writer. I am inspired every day by Bronx Surrogate Malavé-Gonzalez, who is a visionary committed to public service. I admire Hon. Myrna Socorro, a supervising judge, for her commitment, kindness and character. WCBA member Lisa Denig, Special Counsel for OCA Initiatives; Rebecca Price, the ADR Program Director for the SDNY District Court; Michelle Kern Rappy, Senior Settlement Coordinator for

the NY Supreme Court; Magdalena Porrata, my court's supervising attorney; and Elix Madera-Fliegelman, the court's Chief Clerk, have all become role models for my career in the court system.

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

Jack: Since the quarantine began, I am up to running five miles a day and doing 150 pushups and thirty chin-ups every morning. I also started taking on-line salsa dancing lessons, promising my wife I would take her out dancing when everything re-opens. The way those lessons are progressing, she should probably buy a pair of steel toed shoes—I step on her feet a lot.

Tejash: What do you splurge on?

Jack: I have a passion for handmade suits. I like working with tailors to create suits that fit my own sense of style.

Tejash: What is the best time of your

day?

Jack: The moment that I wake up in the morning. The first thing I do when I wake up is count all of my blessings and give thanks for being given another day to spend with my wife (Cindy), two children (Benjamin and Angelina) and my other family and friends.

Tejash: What are some of your favorite movies?

Jack: Rocky, Creed, Skyfall, 1960's movie musicals starring Elvis Presley, Snatch and Roadhouse (nobody pulled off a mullet like Patrick Swayze).

Tejash: What is your favorite meal?

Jack: Your mom's homemade channa masala. A close second is the avocado salad pizza from Il Baccio Trattoria in Bronxville.

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

Jack: Going with my wife and kids

to church on a Sunday, having a nice lunch together and then spending the rest of the day with them at Harbor Island Park in Mamaroneck.

Tejash: What is one of your future ambitions?

Jack: To become fluent in Spanish. After taking a trip to Puerto Rico to see my mother's birthplace, I fell in love with the island, its culture and language.

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

Jack: Over the years the WCBA has allowed me to make new friends and connections. I have met many talented ADR practitioners who are WCBA members, such as Marc Sheridan, Adam Halper and Nancy Rudolph. The WCBA has provided me with the opportunity to meet great lawyers in all areas of practice whose presence, dignity and professionalism I admire.

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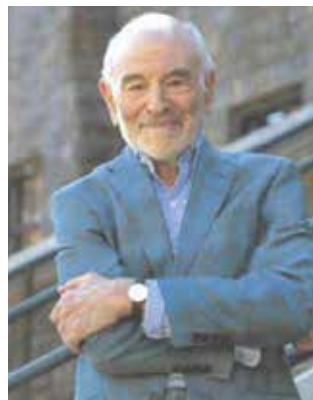
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Pace University Recognizes Bennett Gershman as Distinguished Professor of Law



Long-time Elisabeth Haub School of Law Prof. Bennett Gershman is a noted teacher and nationally recognized expert on prosecutorial misconduct.

Pace University has recognized Prof. Gershman, a member of the Elisabeth Haub School of Law faculty, as a Distinguished Professor, which is the

highest honor the University bestows upon faculty. This honor comes in recognition of a sustained record of extensive, extraordinary research and scholarship, outstanding teaching, and exemplary service to the University, and to the faculty member's professional field. Prof. Gershman's body of work was strongly recommended by his Department Chair, School Dean, and many Pace colleagues. He was strongly supported by the University Distinguished Professor Advisory Committee, endorsed by the Provost and President, and approved by the Pace Board of Trustees.

Elisabeth Haub School of Law Professor Appointed To SEC Investor Advisory Committee



An authority on securities law, Prof. Elissa Germaine will help advise the U.S. Securities and Exchange Commission on regulatory priorities and protecting investors.

Prof. Germaine is one of six new members

appointed to the committee, established under the Dodd-Frank Wall Street Reform and Consumer Protection Act to advise the SEC on regulatory priorities, regulation of securities products, trading strategies, fee structures, disclosure effectiveness, and initiatives to protect investors and promote investor confidence and the integrity of the U.S. securities markets.

FROM THE PRESIDENT

(continued from page 1)

my grandparents made to come to this country so their family could have a better life.

And with strong feelings of harmony within the Westchester County Bar Association, I will endeavor, as your President, to continue to provide support and resources to the next generation. As members of the legal community, we are in an excellent position to help, guide and mentor. The Westchester County Bar Association is committed to remaining relevant and to being a strong resource for bench, bar, students and community. We continue To Listen, To Learn and To Grow each and every day because from crisis comes opportunity.

Like the Founding Fathers' secession from the British, and my paternal grandparents' flight from a country facing poverty and war, we shall overcome our challenges and hurdles despite today's current climate. Let us be a force of good, mentoring the next generation of lawyers, and helping first responders make sure they have the proper paperwork in place should they be personally affected by COVID-19 or any other life-changing events. This Independence Day, let us celebrate

our personal journeys as well as those of our ancestors, and let us encourage those who follow in our footsteps to be proud and to respect each other and the rule of law.

Collaboration and networking continue during this pandemic. WCBA has made tremendous efforts to continue staying in touch. Our weekly "Coffee Talk" provides a casual forum for our colleagues to share how they are adapting to our current environment. We discuss technology, courts, family, economic programs and mental wellness.

We are working diligently to get to the next phase of the WCBA's Community Recovery Task Force mission. We are extremely grateful for the outpouring of volunteers. Our unification in offering guidance and solutions to the current legal challenges facing first responders, the business & legal community, and the citizens of Westchester County as a result of the COVID-19 pandemic continues to amaze me. In keeping with the mission of the WCBA, we continue to employ our resources to aid Westchester County in navigating, recovering, and ultimately emerging stronger than before. To join this great cause, please contact us at

CRTaskForce@wcbany.org.

Since the start of the pandemic we have welcomed over 60 new members; we have partnered with several bar associations, businesses, legal services and the Elisabeth S. Haub School of Law at Pace; and we have held over 40 CLE's and free webinars.

The Westchester County Bar Association is committed to remaining a strong resource to bench, bar and students as we continue to aid both our community and each other. Thank you for the privilege and the opportunity of serving each and every one of you. Be well and be safe.

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

Endnotes

- 1 Fourth of July – Independence Day, April 17, 2020 <https://www.history.com/topics/holidays/july-4th>
- 2 Declaration of Independence, July 2, 2019 <https://www.history.com/topics/american-revolution/declaration-of-independence>
- 3 Fourth of July – Independence Day, April 17, 2020 <https://www.history.com/topics/holidays/july-4th>

Pace University's Elisabeth Haub School of Law Now Offers a Part-Time Flex Program



Pace University's Elisabeth Haub School of Law offers a part-time flex program, making the Law School more accessible to working professionals and others.

The new scheduling option allows part-time law students to take all of their required classes on Tuesday and Thursday evenings, as well as on Saturday

mornings, as they pursue their J.D. degrees at the Law School campus in White Plains, NY. "By now offering required courses

on evenings and weekends, we are expanding access to legal education and providing rigorous academics and training to those who are working professionals or have other daytime responsibilities," said Dean Horace Anderson.

Students can learn more about the part-time program and scheduling options, including a list of frequently asked questions at: <https://www.law.pace.edu/admissions-aid/flex-jd-scheduling-option>.





FROM THE BACK BENCH

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



Eighty-seven years ago this month, an out of work Dutch immigrant was indicted for setting the fire that destroyed the Reichstag, the home of the German parliament in Berlin.

A committed Communist living on an invalid's pension, Marinus van der Lubbe admitted setting the fire, saying he did so to bring attention to the plight of workers in the world. He was not a Stalinist, but identified with Leon Trotsky, a Stalin rival who was exiled from Russia and later assassinated in Mexico.

The Reichstag fire reportedly was van der Lubbe's fifth attempt to destroy Berlin's public buildings following earlier failures. He even used some of his clothing to make torches to spread the fire, according to his admission. He was captured, disheveled, and half dressed at the fire site. His vision damaged by an on the job accident, van der Lubbe had earlier spent fifteen days walking from Holland to Berlin to settle in the German capital.

The blaze provided Hitler, who had become German Chancellor just four weeks before, with all the excuse he needed to suspend civil liberties, eliminate Communist opposition, and seize dictatorial powers.

Following the February 27, 1933 fire, Germany's President Paul von Hindenburg issued an emergency decree at Hitler's urging. An enabling act gave the Nazi leader plenary powers to abolish civil liberties, transfer state powers to

the Reich government and provided the "legal" basis for Hitler's dictatorship. Under the emergency powers, the one hundred Communist representatives were expelled from the German parliament and their leaders imprisoned.

When Hitler was named Chancellor, about one third of the parliament were members of the Nazi party. After the fire and by the time Hindenburg died in August 1934, the Nazi party controlled parliament and Hitler became an absolute ruler—the Führer.

Charged along with van der Lubbe were four Communist leaders, including three Bulgarians. Van der Lubbe denied the four had anything to do with his arson. However, the picture of a lone, possibly mad pyro mechanic as the cause of the Reichstag's destruction did not fit the Nazi narrative of a Communist violent attempt to seize power and disrupt the German government. Clearly, the four other Communists were charged to flesh out the failed Red takeover story.

When the four leaders were acquitted by a judge after the show trial, Hitler was purportedly furious. However, van der Lubbe was convicted on his own testimony. The Dutch defendant explained at his trial in his testimony that he was "defending my political honor". He said he sought to ignite the working class against injustice. Just a few days shy of his twenty fifth birthday, van der Lubbe was beheaded by guillotine on January 10, 1934 in Leipzig.

Because the fire so suitably served

the Nazi purpose by providing a rationale to seize power and destroy Communist influence, ending all political opposition, many have argued and believed that the fire was actually set by Nazi party operatives. Van der Lubbe was merely a convenient fall guy under this story line. As a matter of fact, some dictionary descriptions of the fire flat out state that the fire was the work of the Nazi party. Over the years, that belief has been fed by insider testimony. One commentator reported that Herman Goring had told him that he was responsible for the fire. In addition, a former SA officer reported that he brought van der Lubbe to the Reichstag after the fire was already engulfing the building. Others claimed that there was a purposeful delay in fighting the fire.

However, despite that testimony and the common suspicion that the Nazi party had an intimate hand in the Reichstag destruction, most historians today believe that van der Lubbe and he alone set the fire to somehow aid the working class to get justice. He was not part of a Communist party plan to seize power.

Over the years, since World War II, German courts have twice overturned the Dutch immigrant's guilty verdict only to have those decisions reversed by higher courts. The last case reversed held that van der Lubbe was innocent by reason of insanity.

Finally van der Lubbe was granted a posthumous pardon in 2008, ending

the half blind out-of-work laborer's case forever.

The Reichstag was not fully restored until the last decade of the 20th

century. Its destruction and the political manipulation of that destruction for sinister political gain should not be forgotten today.¹

Endnote

- 1 Internet sources were relied on writing this column.

A Much Earlier Fake Flag Case

The Reichstag fire was not the first or last “fake flag” case to produce a false narrative in order to fuel a political power and social transformation in a country.

Such events get the title because they raise a false red flag signaling major societal and political attacks on established order from an unplanned incident or under developed conspiracy aimed at a society's foundation. Whether the Reichstag fire was the work of a half-crazy political maverick; the poorly planned and executed attack by opposition groups or a falsely created incident by the ruling class to protect their power, it was how those in power or seeking power utilize the event to eliminate opposition and gain more absolute power that earns the name.

More than three centuries before the Berlin blaze, London was home to an early “flag event” that profoundly settled the question of religious and political authority in England.

By the start of the 17th century the Catholic church headquartered in Rome still had wide influence in the English island nation despite Henry VIII's break with Rome and the establishment of the Church of England in the previous century. King James I at the beginning of his reign seemed inclined toward more tolerance of Roman worship in England.

That all changed by June 1603



when the King at the urging of his secretary of state issued a proclamation expelling all Roman Catholic priests and seminaries on pain of death. Fines against Catholics that had been previously remitted under prior conciliation were now collected. The enforcement changes helped lead to a pivotal “fake flag” event in English history—The Gunpowder Plot.

The plot involved the placement of a huge amount of gunpowder under the English Parliament building to destroy the King and the English government. One of the plotters, Guy Fawkes, a Catholic convert and a soldier of fortune, gave his name to England's annual November 5th holiday marking the aborted plot's discovery and failure. He was one of nine executed after trial. That number included England's top Jesuit priest. Three other alleged plotters were killed during their capture and one other died in the Tower.

There are three ways to look at the plot and its complete frustration, according to one commentator.*

First a highly organized plan was luckily discovered at the last moment and thwarted. Second, as some Catholic commentators claimed, the real plot was a frame up hoax engineered by the government to end any Catholic influence in England. Finally, the third view, which seems to make the most sense, holds there was a bomb plot, but it was discovered by authorities who let the plotters proceed until the time was ripe for dramatic exposure.

Providing support for the third view is how the plot was discovered. A Papist, but also a supporter of the King, received a letter in October warning him to stay away from Parliament on November 5, 1605, the date set for the bomb explosion. That Lord, who was later rewarded, brought the letter to the King's attention.

The bomb site was checked by authorities several times before the scheduled bomb date, but Fawkes was not arrested until November 4. The other alleged conspirators fled, but were captured or killed four days later. There was no evidence that the top Jesuit, who was executed, was involved in the plot.

* See the *Notable Trials Library* 1991 edition of *Trial of Guy Fawkes and Others (the Gunpowder Plot)*, edited by Donald Carswell, published by William Hodge and Company in Britain in 1934.

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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