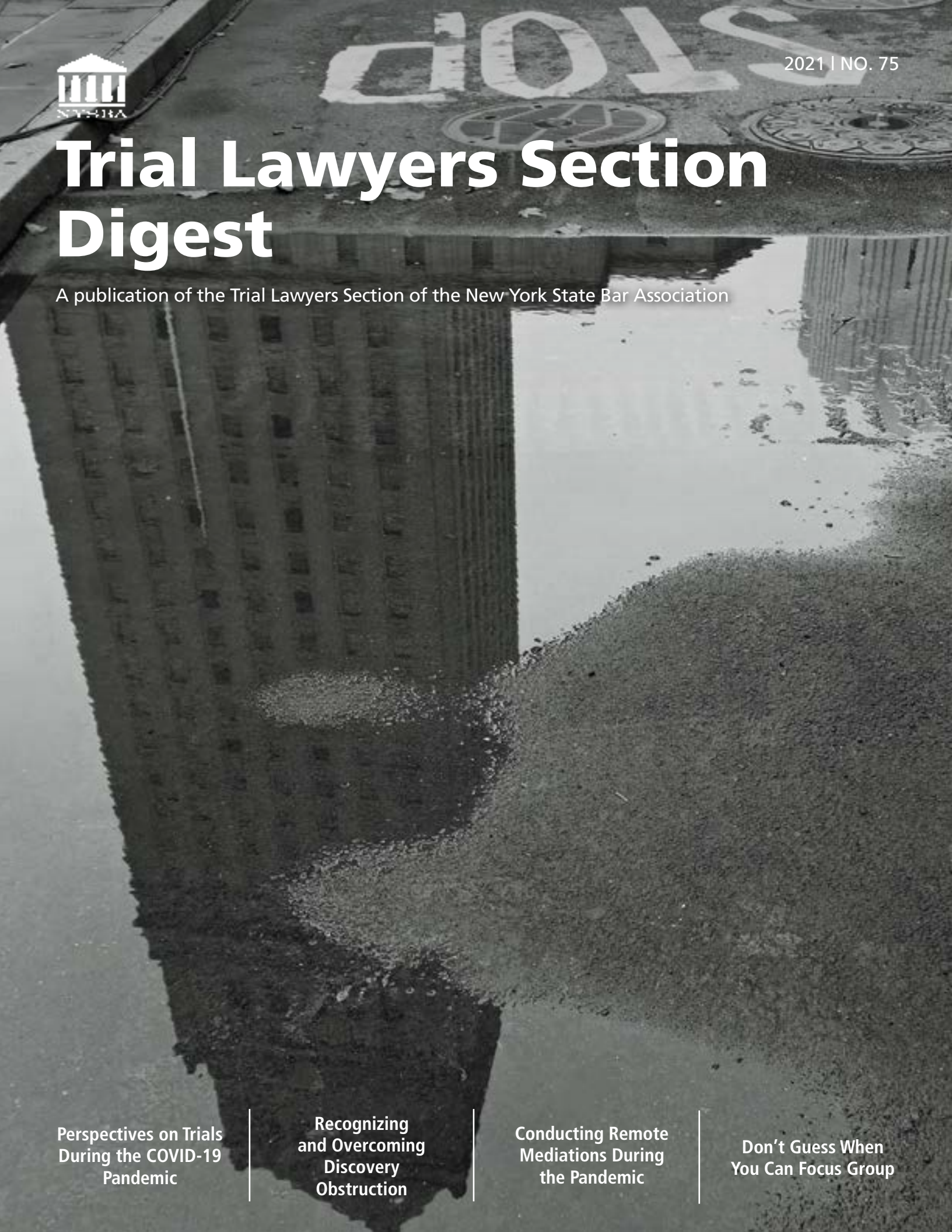
2021 | NO. 75

Trial Lawyers Section Digest

A publication of the Trial Lawyers Section of the New York State Bar Association



Perspectives on Trials During the COVID-19 Pandemic

Recognizing and Overcoming Discovery Obstruction

Conducting Remote Mediations During the Pandemic

Don't Guess When You Can Focus Group

NYSBA

YOUR *Membership Matters*

Renew your NYSBA and Section membership to keep these benefits:

- Complimentary CLE credits with select packages
- 25%+ discount on all additional CLE programs offered
- 25%+ discount on all NYSBA published books & forms
- Access to Section membership perks: Section-specific publications, leadership opportunities, networking and more!
- Complimentary copies of the *Bar Journal*, *State Bar News*, *CasePrepPlus* and *NY Law Digest*

Renew online at

NYSBA.ORG/RENEW2022

or through our Member Resource Center at 800.582.2452

Contents

Features

Cover Art: Eugene A. Ward photographed the Thurgood Marshall United States Courthouse in Manhattan's Foley Square well prior to the outbreak of COVID-19.

Editor's Note: Now in the lingering shadow of the pandemic, Mr. Ward's gritty, grainy, black-and-white photograph was selected as the Trial Lawyers Section Digest's cover art in December 2021 because it was deemed to be reflective of how COVID-19 turned trial law upside down and backwards. Even for zealous trial lawyers who have since returned to court, the pandemic for a time slowed some litigation to a "STOP."

NYSBA

Trial Lawyers Section Digest

2021 | No. 75

Regulars

TRIAL LAWYERS SECTION DIGEST

Publication of Articles

The *Digest* welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted electronically (preferably in Microsoft Word) along with two printed originals. Please submit articles to:

Editor:

CaraMia Hart
Finz & Finz, P.C.
410 East Jericho Turnpike
Mineola, NY 11501-2112
(516) 433-3000
chart@finzfirm.com

Unless stated to the contrary, all published articles and materials represent the views of the author(s) only and should not be regarded as representing the views of the Section officers, Executive Committee or Section members or substantive approval of the contents therein.

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at 518-463-3200.

The *Trial Lawyers Section Digest* is published for members of the Trial Lawyers Section of the New York State Bar Association. Members of the Section receive a subscription free of charge.

Publication Date: December 2021

ISSN 1530-3985 (print) ISSN 1933-8457 (online)

TRIAL LAWYERS SECTION OFFICERS

NYSBA.ORG/TRIAL

Message From the Section Chair

By William S. Friedlander

The Trial Lawyer Section has been very busy since our last *Digest* issue and I wanted to give you all an update.

Well-attended and informative **CLE Programs** that were sponsored by and/or co-sponsored by our Trial Lawyers Section included and were not limited to: "Commercial Division Rules in Supreme and County Courts: What You Must Know," to "The Trial Academy," and through to the most recent Vanguard Ruth Bader Ginsburg Awards Program, which was held in connection with National Diversity Day, October 6, 2021.

The **Trial Lawyer Section Awards Luncheon** was held June 21, 2021, at which time awards were distributed as follows:

- The Justice Irma Vidal Sanaella Award for Excellence in the Courtroom was awarded to Chief Judge Janet DiFiore;
- The Peter C. Kopff Trial Advocacy Award was awarded to Kevin Hunt of Syracuse; and
- The Betty D. Friedlander Award for Trial Excellence was awarded to Cynthia LaFave of Albany (and my mom would have been so honored to know of this award that was named after her).

The **Vanguard Ruth Bader Ginsburg Award Program** was so motivating, inspiring, and energizing. Diversity and inclusion have been and are a major focus of the Trial Lawyer Section and the Association. The panelists—Judge Rowan Wilson from the Court of Appeals; Judge Hector LaSalle, presiding Justice of the 2nd Department; Judge Doris Gonzales, Administrative Judge of Bronx County; Judge Genine Edwards, and U.S. Attorney for the Western District of New York, Trini Ross—all shared the challenges they faced to get to where they are today. This year's award recipient, Katrine Aliha Beck, also recounted her journey from once being an Irani immigrant to becoming a founder of an all-woman law firm that has grown from five to 25 lawyers, in three states, in just three years.

If you haven't attended a Vanguard Award program you are missing out.

Moreover, the Trial Lawyers Section's bi-weekly "brown bag lunch" series has been great fun and is an opportunity for networking. These discussions have given participants a chance to share lunch and questions, as peers and special guests give feedback.

I want to personally thank all of the contributors to our *Trial Lawyers Section Digest* for sharing with us their different insights. While some of us may still be more housebound than usual during this ongoing COVID-19 pandemic, by reading we can still enjoy the perspectives of trial lawyers and mediators and focus group facilitators and even the occasional "off the beaten path" travel adventurer. I appreciate learning more about discovery obstruction, on the one hand, while also assessing a biographical evolution and a book review. Reading, in my experience, can help to teach us to be better at what we do. If you are interested in writing for our *Digest*, too, please let us know.

On a personal note, after 47 years of practicing law, I've gained from my experiences and incredible mentors and colleagues this important insight: that the business of law is ever-changing, and adaptability for both lawyers and firms is critical. We must become agents of change in order to ensure long-term success and to effectively carry out our duty to zealously represent our clients and competently practice law according to our profession's ethics.

Starting as a law clerk in my parents' office, I learned from them this enduring lesson: Embrace change, don't resist it. At that time, our office used pre-IMB Selectric typewriters, then IBM Mag Card machines, an ancient relic for word processing. We then moved to CPM WordStar, then WordPerfect and finally Word. Over time, we obtained increasingly sophisticated phone and computer systems and explored a host of digital research, file-sharing, and storage mechanisms. We took to audio recording, and then video depositions. And in the past two years, we have taken on the new technologies of Zoom, remote work, remote depositions, and, eventually, Team court appearances and even video trials.

After each shift, there was a near mutiny. Staff complained repeatedly and said that if we could go back to whichever, more work could get done. But as we embraced each change, we found new shortcuts, efficiencies, and, in turn, productivity. Everyone eventually came to accept and be proficient in the new technology. The same can be said for changes in Court Rules, NYCRR, and FRCP.

Today, with the COVID-19 pandemic, changes in the political climate, and challenges to the civil and criminal justice systems, we as trial lawyers can easily be devastated by the sheer number of new challenges we face. But I urge us, instead, to embrace these opportunities for

change. That willingness to embrace change, rather than resist it, will lead to a thriving practice.

The business of law will always provide opportunities for diversification and cutting-edge technology to enhance productivity—if there is the leadership, creativity, and organization to embrace the change that comes with it. Old habits can die hard, but my view has always been to embrace change. That has never been truer than in the past year as we have all grappled with the effects of the pandemic on our practices. Nonetheless, we have survived, and will come out not only better technologists but better advocates, better colleagues.

And of course, NYSBA's many resources can help you and your firm adapt to change and evolve with the times.

A Trial Attorney's Perspective on Trials During the COVID-19 Pandemic

By Alecia Walters-Hinds

[Editor's Note: This article was written and submitted for publication prior to the reported evolution of the most recent coronavirus variant, Omicron.]

The waiting game for trial attorneys to resume trials throughout this COVID-19 pandemic has been an exhausting roller-coaster. With constantly changing rules and mandates, it has been hard to determine what will happen with trials going forward. Between March 2020 and September 2021, for example, there were multiple starts, re-starts, and halts of jury trials in New York. Throughout this pandemic, Chief Judge of the Court of Appeals of the State of New York, Janet DiFiore, has made efforts to resume and normalize trials, but inherent challenges remain. While some trial attorneys may remain hesitant to conduct trials because of ongoing uncertainties, many others have felt fortunate to be able to take verdicts despite this pandemic.

One thing that most trial attorneys can agree upon—they miss the action. As the immediate past-president of the New York City Chapter of the American Board of Trial Advocate (ABOTA), my opinion is that one of our nation's fundamental bedrock principals is the right to trial by jury. But what happens when that Seventh Amendment right collides with a public pandemic riddled with certain health concerns? The result is a constantly changing landscape, to which trial attorneys must adapt.

As of this writing in late 2021, I recently picked a jury in Suffolk County Supreme Court. Before that, the last time I had picked a jury was in March of 2020. We disbanded that jury back in 2020 with the expectation that we would restart the trial in the next month or two. However, a week after my jury was disbanded, the lockdowns began, and we still have not fully returned to normal. When I was recently picking that jury in Suffolk County, I was struck by just how much nuance became lost in translation, with everyone's faces covered by masks.

While some trial attorneys may have enjoyed the first few months of rest in 2020, most quickly became restless and eager to resume trial work. ABOTA is an organization composed of both plaintiff and defense trial attorneys, and I have been fortunate to have friends on both sides. In the time that has elapsed since the pandemic began, the New York courts have tried to establish some level of "normalcy." One thing is certain—while trial lawyers may still be adjusting to the new normal, they are also ready to get back to regularly trying cases.

New York COVID-19 Protocols and Advances

Commission to Reimagine the Future of New York's Courts

In June 2020, at what may have been the height of the pandemic in New York City, Chief Judge DiFiore organized the Commission to Reimagine the Future of New York's Courts, to which I was appointed. In this role, the commission examined technological, regulatory, and other long-term innovations for New York's court system, while providing short-term recommendations for the resumption of in-person operations amid the COVID-19 pandemic.

One of the first tasks of the commission was to prepare a nine-page report entitled "Goals and Checklist for Restarting In-Person Grand Juries, Jury Trials and Related Proceedings." It included step-by-step guidance on how to create customized court plans based on local conditions, and was published in the New York Law Journal. The guidance also included suggestions as to how the different counties might handle jury selection and trials. Specifically, the report contained a comprehensive checklist on restarting trials, courthouse and courtroom access,

---

Alecia Walters-Hinds is a partner in the New York and Hartford offices of Lewis Brisbois and a vice-chair of the General Liability Practice. She is also a trial attorney and the president of New York City American Board Of Trial Advocates (ABOTA). Her practice focuses on defense of claims in a variety of areas, including the handling of high exposure and catastrophic injuries that range from general liability to medical malpractice claims. She has published best practices articles in the *New York Law Journal* and New York State Bar Association's *One on One*. She has also been a presenter at Continuing Legal Education courses on trial advocacy.

The author wishes to thank Kristen Carroll, an associate with the New York office of Lewis Brisbois, for her substantial and significant contributions to this article.

jury pools, jury reporting, and selection, among other key topics.

Some New York counties, including Nassau County, have adopted variations of the commission's "Goals and Checklist" guidance, tailored to the needs of their local jurisdictions. We look forward to additional counties throughout New York continuing the process of resuming in-person trials.

Updates Since the Commission's Guidance

In September 2020, civil jury trials resumed in several counties throughout New York State. On September 9, 2020, for example, Chief Judge DiFiore began a week-long jury trial pilot program. During that program, a limited number of jury trials began in certain areas of New York, with civil and criminal trials commencing in Suffolk, Schuyler and Erie Counties. The plan was to begin with limited trials, and then expand to a fuller court docket, as safety conditions improved.

There were multiple trials that occurred between September and October of 2020 in different counties. However, trials were shut down again in late October into November of 2020, because of a rise in COVID cases. Nonetheless, some law offices (such as mine) were able to obtain trial verdicts during this time. Most trials in New York were put on hold in late 2020, until 2021, which, as this article goes to print, is now nearing its own close.

On April 19, 2021, Chief Judge DiFiore released a message to the legal community announcing the New York State Unified Court System's plans for returning to full staffing levels. In the announcement, Chief Judge DiFiore stated: "It is time to return to our normal and full courthouse staffing levels in order to support the fuller resumption of in-person operations, including jury trials and other proceedings in our courts."

In July 2021, Chief Judge DiFiore announced an updated COVID-19 screening protocol for entering a courthouse. Effective July 14, 2021, visitors to a New York court who were fully vaccinated for COVID-19 and could provide proof of vaccination (such as a vaccination card, a picture of a vaccination card on a mobile device, or a New York State Excelsior Vaccination Pass), along with valid ID, could request a court-issued pass permitting them to enter the courthouse without needing to complete a health safety screening or wear a mask. Regular visitors could apply for a 90-day pass. Unvaccinated individuals were subject to health safety screenings, were required to wear a mask, and had to abide by health and safety protocols that were at that time in place.

This announcement was welcome news for New York attorneys and litigants, and the Court system was anticipating at that time a return to normal courthouse operations within the Empire State.

However, the change did not last long. Some trials were believed to have been conducted without masks, but, as COVID-19 numbers increased again, circumstances quickly changed. The so-called "green slips" that were permitted to be used by vaccinated people within the courts were no longer permitted with the rise of COVID-19 cases. Courthouse circumstances changed, along with the advent of the "delta variant," and alterations in the Center for Disease Control requirements. Effective September of 2021, for example, some trials had been conducted in different counties, but not in the numbers that had initially been expected. Into today, different counties continue to effectuate different protocols when it comes to conducting trials, which results in a non-uniform approach throughout the state.

As of this writing, it appears that more jury trials have recently been conducted throughout New York City and the greater metropolitan area, than had occurred in the past year or so. Below is my overview of the recent status of trials in various downstate New York counties.

New York Courts During the Pandemic

Nassau County

In May 2020, Nassau County Supreme Court began a four-phase re-opening plan: Phase 1 involved judges and staff returning to chambers; Phase 2 allowed for an increase in foot traffic in the courthouses with emergency and essential proceedings occurring in-person in designated courtrooms throughout the county; and Phase 3 further expanded the type and manner of cases conducted in person. The initial Phase 4 allowed for another increase in in-person proceedings. Pursuant to Phase 4.1 of the re-opening plan, Nassau County Courts started to resume its jury trials in October of 2020.

Some of the highlights of Nassau County's Phase 4.1 include general safety protocols, such as masks being required at all times, and plexiglass being installed throughout its courthouses. In addition, court officers were present to monitor foot traffic, ensure social distancing, and screen all courthouse visitors for COVID-19, pursuant to the protocols developed by the New York State Office of Court Administration.

Administrative Judge Norman St. Gorge of Nassau County, in consultation with the commission on the Future of New York's Courts, issued the updated "Virtual Bench Trial Protocols and Procedures." According to Chief Judge Janet DiFiore, this document functioned as a statewide manual to guide the bench and bar in conducting virtual bench trials and hearings during the pandemic and beyond. The protocols informed participants of what to expect during a virtual bench trial, and addressed issues such as handling and presenting testimony, and managing documentary and physical evidence. The parties were also permitted to agree upon how different aspects of the trial could be conducted, by completing a proposed stipulation and order.

Richmond County

Within Richmond County on Staten Island, jury trials also resumed carefully. In October of 2020, for example, New York attorney James T. Whalen, Jr. commenced a jury trial in Richmond County that lasted about a week and resulted in a verdict. Whalen described the experience as, "an adjustment." His witnesses testified through plexiglass, while wearing masks. Jurors were disbursed throughout the courtroom, while a second courtroom was used for sidebars and conferences with the court. In November 2020, however, there was another shut down of those courts, and trials were postponed again until 2021.

Kings County

On March 9, 2021, in a letter from the Honorable Lawrence Knipel, administrative judge for civil matters, stated that in-person jury trials were scheduled to begin in Kings County, in Brooklyn, effective on or about March 22, 2021.

Remote Trials—Outside of the New York State Courts

During this pandemic, federal courthouses located within New York have conducted some virtual and some in-person jury trials. In the Eastern District of New York, for example, virtual jury trials were expected to start in late 2021. In contrast, the Southern District of New York reported intent to resume in-person trials. Trial attorneys have received notice as to upcoming federal trials in recent months, which were expected to be conducted in-person.

My understanding is that New Jersey has conducted some virtual trials. New Jersey's solution to its backlog of trials in February 2021 apparently involved conducting virtual jury trials. Since November of 2020, courts have been laying the foundation for such virtual proceedings, by incorporating comments and suggestions from several New Jersey Bar Associations. On January 7, 2021, for example, New Jersey's Acting Administrative Judge Glen Grant announced a two-phase approach for implementing virtual jury trials while COVID-19 remains a factor. Phase 1 trials began in February of 2021 in certain counties, and was initially to be strictly voluntary. The objective was to resume trial work initially with cases with limited complexity. Operational concerns related to cases not readily suited to a virtual format also had to be considered. According to Judge Grant's order, Samsung tablets were to be provided to potential jurors, and the model *voir dire* questions were to be expanded. Phase 2 of this approach was to have begun in April of 2021. As problems and concerns resulted from virtual trials, according to some attorneys, however, New Jersey courts seemed to shift focus from more virtual trials, to more in-person trials.

Other states including Washington and Texas have explored virtual trial options during this pandemic, and the consent of the parties beforehand to engage in such virtual trials is apparently not always guaranteed. Washington, for example, has historically noted that trial testimony of witnesses shall be taken orally and in open court, unless good cause or compelling circumstances are otherwise provided. Some states have, in fact, moved forward with ordering remote trials. Washington, for example, has ordered remote trials. While different courts have rendered different opinions as to whether the pandemic constitutes "good cause" or "compelling circumstances," it seems safe to presume that virtual trials seem likely to remain an option in many venues into the immediate future.

Some states have determined that in light of the ongoing pandemic, taking testimony remotely via virtual trials is the best available option. According to Federal Rules of Civil Procedure 43(a), at trial, witness testimony must be taken in open court, however for good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location. Different states have determined that counsel can examine witnesses without being the same room and do credibility as-

sessments even by virtual means. *See Xcoal Energy & Res. v. Bluestone Energy Sales Corp.*, 2020 U.S. Dist. LEXIS 1497 (D. Del. 2020).

In Florida, the courts have found that conducting trials by virtual means to be sufficient. It has been determined that demeanor and credibility can be evaluated by virtual means. *Ritz Enters v. V.*, 2020 Fla. Cir Lexis 845 (Fla. Cir. Ct. 2020).

In Minnesota, the Court of Appeals held that the district court did not deny an individual's due-process rights when it ordered that his termination trial be held remotely because of concerns about COVID-19 exposure. *In re Children Of: K. H. & D. L.*, 2021 Minn. App. Unpub. LEXIS 396, 2021 WL 1605147 (Ct. Appeals Minn. 2021).

Connecticut also participated in some remote trials, at least effective December of 2020. *Carbone v. Marcus*, 2021 Conn. Sup. LEXIS 1078, 2021 WL 2929802 (Sup. Ct. Conn. 2021). One Connecticut Court remarked: "[a]s emphasized if not accelerated by the current pandemic, remote depositions and even remote trial testimony have become far more common and accessible than was the case 20+ years ago." *Shipman Assocs., LLC v. White & Case LLP*, 2021 Conn. Super. LEXIS 123 at 35, 2021 WL 838276 (Sup. Ct. Conn. 2021).

Remote Trials—Inside of the New York State Courts

Certain New York courts have determined that in light of the pandemic, some proceedings can be conducted by virtual means, including landlord-tenant trials, evidentiary hearings, custodial hearings and depositions. *See Ciccone v. One W. 64th Street Inc.*, 69 Misc.3d 585 (Sup. Ct. N.Y. Cty. 2020). *See also Rodriquez v. Montefiore Med. Ctr.*, N.Y. Misc. LEXIS 10798, 2020 WL 7689633 (Sup. Ct. Bronx Cty. 2020); *Jones v. Memorial Sloan Kettering Cancer Ctr.*, 186 A.D.3d 1851 (3d Dep't 2020).

The New York Court of Claims issued a decision in February of 2021 relating to damages sustained due to a wrongful conviction, in which it was determined that, absent a contrary directive re-opening the courthouses to in-person proceedings in advance of the scheduled trial date, a liability trial was to take place virtually. *Bonilla v. State*, 2021 N.Y.L.J. LEXIS 60 (Ct. of Claims 2021).

Conclusion

My colleagues have taken verdicts on both the plaintiff's side and the defense side during this pandemic. Some have had defense verdicts and some have had large plaintiff's verdicts. Some trials have been conducted in-person, and some virtually. Some trials, such as the one that I conducted most recently in Suffolk County in late 2021, resulted in settlement resolutions.

Most trial lawyers like me who have conducted in-person trials agree that they would have rather conducted those trials the old-fashioned way, without masks. Yet cases must be moved, and safety concerns respected. The concern for trial attorneys is that if jurors or witnesses wear masks, it becomes dramatically more difficult to discern non-verbal cues that may be useful in helping to determine credibility. Masks impede the abilities of jurors, counsel and, likely, the court from evaluating the presentation and the demeanor of witnesses, when much of their faces are covered.

Yet most attorneys on both sides also agree that they would rather conduct in-person jury trials, even with masks, as compared to virtual trials. Connecting to the jury is paramount for both sides, in trial work. It is challenging for litigants, lawyers, jurors, and the courts to continue to endure all of the COVID-19 protocols, yet, for now, we all must continue to endure those challenges.

As trial lawyers, we recognize that we may never get back to our "old normal," with the total volume of trials conducted returning to precisely what it was prior to the advent of COVID-19. As of this writing, I currently have other trials scheduled to be conducted in upcoming months—although it remains uncertain as to precisely when they are all to be conducted. It is also difficult to predict, with this recent return of cold weather, whether the "delta variant," or another variant akin to it, will become increasingly problematic and slow things down yet again.

As trial lawyers, we must remain mindful that more slowdowns and maybe even more shutdowns of this litigation rollercoaster that we are riding may yet occur. As trial lawyers, however, we are used to riding rollercoasters, and we often enjoy doing so. What most of us have learned throughout this COVID-19 pandemic is that—when the action really stops—we miss it.

Recognizing and Overcoming Discovery Obstruction

By Carma Henson

The pandemic has changed how we advocate for our clients. As we diligently work to continue moving cases forward in this new normal, most of us continue to encounter obstruction: attempts by opposing counsel to prevent us from getting the evidence that we are entitled to in order to prove our case. Because successful discovery often is the key to a case, "lawyers enthusiastically press their advantage in a process meant to be collegial."[1] Opposing counsel may "unleash a barrage of discovery requests, or a trickle of incomplete responses, to batter the opposing side into settlement or bleed it into surrender."[2] Don't succumb to such tactics—you must meet obstruction head on.

Spotting Thinly Veiled Abuse and Obstruction

Obstruction can be hard to recognize—there are many places to hide. It's important to know the rules that we *all* must play by to realize when they are being broken.

Ethics Rules

As a starting point, the New York Rules of Professional Conduct prohibit obstruction. Specifically:

- Rule 1.3 requires all attorneys to act with reasonable diligence and promptness in representing a client.[3]
- Rule 3.2 states that a "lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.[4]
- Rule 3.4 prohibits a lawyer from suppressing evidence that the lawyer has an obligation to produce, and concealing or knowingly failing to disclose that which the lawyer is required by law to reveal.[5]

These rules, which largely mirror the Model Rules of Professional Conduct, prohibit lawyers from gamesmanship when responding to discovery requests, from making boilerplate and unfounded objections and claims of privilege, and from failing to produce responsive documents in discovery. They prohibit obstruction. The failure to abide by the basic rules governing compliance with disclosure orders "cannot and will not be tolerated" by the New York courts.[6]

Disclosure Rules Prohibit Gamesmanship

The State of New York has liberal disclosure rules. In fact, the requirements for properly objecting to document requests set forth in the Uniform Rules for the New York State Trial Courts, the Civil Practice Law and Rules, and the Commercial Division of New York are more specific and stringent than the requirements imposed by the similar federal rules.[7] New York's liberal disclosure rules[8] are an "intended departure from the past, when 'the game was for lawyers to keep their cards close to their vests until the trial, where they hoped to surprise their adversaries with a datum too late to meet or counter.'"[9] Pursuant to these rules,

> All parties and their counsel have an obligation to make good faith efforts to fulfill their discovery and disclos[ure] obligations and to resolve all discovery and disclosure disputes, before seeking judicial intervention. Dilatory tactics, evasive conduct and/or a pattern of noncompliance with discovery and disclosure obligations may give rise to an inference of wilful and contumacious conduct, and may result in severe adverse consequences and sanctions. . . .[10]

While there are no appellate decisions that expressly hold that the New York courts should look to federal authority in interpreting the New York disclosure rules, the 2012 Report and Recommendations to the Chief Judge of the State of New York, regarding procedures in the Commercial Division, made various recommendations to "harmonize" the procedures of the state and federal courts.[11] Given that New York's requirements regarding discovery objections are more stringent than the federal rules, the federal caselaw regarding discovery obstruction may be instructive when addressing obstreperous conduct.

Attorney Oversight To Ensure Adequate Disclosure

Lawyers who are evasive or incomplete in responding to discovery, who delay discovery to achieve a tactical advantage, or who engage in any of the myriad forms of discovery abuse that are so commonplace violate their

Carma Henson is a partner at Henson Fuerst, P.A. in Raleigh, N.C. She focuses on handling catastrophic injury cases as well as nursing home abuse and neglect cases. She has taken a particular interest in preventing discovery obstruction, now lecturing nationally on the topic. Ms. Henson is the treasurer of AAJ's Nursing Home Litigation Group, and vice president of NCAJ's Nursing Home section.

duty of loyalty to the procedures and institutions that the adversary system is intended to serve.[12]

Section 130-1.1A(a) of the Rules of the Chief Administrative Judge requires attorneys to sign every pleading, written motion, *and other paper* served on another party or filed or submitted to the court.[13] This signature operates as a certification, to the best of the lawyer's knowledge, information and belief, formed after *an inquiry reasonable under the circumstances* that the contentions within the paper are not frivolous.[14] Conduct is frivolous if:

1. It is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
2. It is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injury another; or
3. It asserts material factual statements that are false.[15]

This rule is similar to Rules 11 and 26(g) of the Federal Rules of Civil Procedure, which require lawyers to sign and therefore certify pleadings, motions and other papers including discovery responses and objections.[16] As in federal court, lawyers practicing in the state courts of New York have a duty to oversee their clients' responses to discovery and to ensure that the responses, and their objections, are not frivolous.

The State of New York requires "full disclosure of all matter *material and necessary* in the prosecution or defense of an action, regardless of the burden of proof."[17] This language should be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity."[18] In other words, it includes whatever is relevant.[19]

In addition, attorneys must "exercise some degree of oversight to ensure that their client's employees are acting competently, diligently and ethically in order to fulfill their responsibility to the court."[20] They must make reasonable inquiry into the completeness of the clients' discovery responses, which requires more than just accepting a client's word on the matter.[21] Furthermore, misrepresentation of the availability of relevant information exposes counsel to liability.[22] In *Bratka v. Anheuser-Busch Co.,* trial counsel abdicated the responsibility to gather responsive documents to the client's general counsel, and thereafter failed to exercise his own independent oversight over the discovery-collection process.[23] General counsel was "grossly deficient" in his efforts to obtain the responsive discovery documents.[24] The court sanctioned defendant, entered a default judgment on liability, and set forth its expectations of trial lawyers' participation in the discovery-gathering process: the court expects "any trial attorney appearing as counsel of record [to] formulate a plan of action which will ensure full and fair compliance with the [discovery] request." This plan includes communicating with the client to identify the proper persons to gather information from, ensuring that all such individuals are interviewed, and ensuring that all such documents identified by those interviews are retrieved. Counsel should then review all documents to see whether they indicate the existence of other responsive documents that have not yet been received.[25]

No Sandbagging—Continuing Obligation To Supplement Promptly

Sandbagging is impermissible. Once a party learns that a prior discovery response was, or is now, incomplete or incorrect, and the failure to amend or supplement would be materially misleading, CPLR 3101(h) requires the attorney to promptly amend or supplementation the prior response.[26] Like Federal Rule 26 (e), CPLR 3101(h) imposes a duty and requires all parties to "*assume the initiative and correct discovery responses to disclosure requests."*[27] The late production of documents can adversely affect your ability to prepare for trial, to question deponents regarding those documents, and to review those documents with your experts. The effects can be widespread. As such, though not required, I recommend sending a letter requesting supplementation 30 days after you receive discovery responses, as my cases always have a claim that the defense will supplement "if and when additional information is received." Continue to follow up regularly.

No Boilerplate Objections

Boilerplate objections—i.e., claims that requests are vague, overly burdensome, irrelevant, not calculated to lead to admissible evidence, and not proportional to the needs of the case—are commonly used to obstruct and delay. However, these objections are prohibited in most jurisdictions,[28] including the State of New York. Boilerplate objections which are "purely conclusory and devoid of any reason" are insufficient as a matter of law and should be stricken.[29] Likewise, boilerplate claims of privilege are insufficient as a matter of law and should be stricken.[30] The burden of proving that an item should not be produced or is protected by a privilege is on the party seeking to avoid such discovery.[31] Boilerplate conclusory allegations do not meet this burden. If opposing counsel raises these objections or baseless claims of privilege, consider whether they are "frivolous" as defined by 130-1.1A. Is the objection "completely without merit in law"? Was it asserted primarily to delay or prolong the resolution of the litigation? If so, the opposing party or counsel may be subject to sanctions pursuant to § 130-1.1A and CPLR 3126.

Responding to Discovery Obstruction

When you suspect obstructive discovery tactics are being used, immediately write a letter detailing your concerns. Cite in the letter the law that supports your arguments, and invite opposing counsel to meet and confer. A good faith effort to confer with opposing counsel is required before you may file a motion to compel.[32]

Document all offers to meet and confer and the results of any meet and confer sessions in writing. Be sure to include any deadlines you've agreed on in your documentation: In doing so, you are setting the backdrop for any future motions. If they continue to breach their discovery obligations despite your attempts to meet and confer, you are ready to file your motion to compel and may have grounds for sanctions.

Consider Motion for Sanctions

Pursuant to Federal Rule 26(g)(3), if counsel certifies a discovery response, disclosure, or objection falsely, you may bring a motion for sanctions. The court *must* impose an appropriate sanction on the lawyer, the party, or both, which may include reasonable expenses and attorney fees.[33] Likewise, the failure to comply with the disclosure rules and disclosure orders is sanctionable pursuant to CPLR 3126 and N.Y. Comp. Codes R. & Regs. tit. 22 § 130-1.1.

> Among the particular types of conduct of a party that have warranted the imposition of sanctions for nondisclosure are: disobedience to a court order compelling disclosure; willful failure to appear for examination before trial; willful failure or refusal to produce witnesses for examination; willful or contumacious refusal to produce documents or materials demanded; failure to respond or to properly answer interrogatories; refusal to exchange or make available to the adverse party medical reports; refusal to give authorization for disclosure of medical reports where privilege waived; refusal to answer questions during deposition; ignoring a notice for discovery and inspection; removal or destruction of property sought to be produced and inspected; wilful failure to sign a deposition; falsely denying the possession of documents sought to be produced; refusal to agree to a mutually convenient date for examination; dilatory tactics, evasive conduct and willful obstruction of a discovery proceeding; and belated compliance with disclosure order or conditional preclusion order.[34]
>
> The court may also impose sanctions because of an attorney's conduct relating to disclosure such as failure to honor disclosure rules and stipulation between parties on disclosure, deliberate and contumacious delay between the commencement of the action and plaintiff's compliance with the court's discovery orders, or disruptive tactics during the deposition questioning of his client.[35]

The party seeking sanctions pursuant to Section 13-1.1 has the burden of demonstrating that the conduct of the opposing party was frivolous within the meaning of the rule.[36] In order for the courts of New York to impose sanctions for the failure to respond appropriately to discovery requests, the behavior must be frivolous, willful or contumacious. A repeated failure to respond to discovery demands,[37] or a pattern of non-compliance with court orders and/or discovery demands may result in sanctions. To avoid sanctions, at the least, the conduct must have a good faith basis.[38]

When filing a motion for sanctions, be sure to clearly state your supporting allegations in your motion. In *Muhametaj v. Town of Orangemtown*, the appellate court reversed the Supreme Court's order imposing sanctions against the defendant and his lawyer because the defendant was not given a "reasonable opportunity to be heard." Although the Supreme Court found that the attorneys engaged in frivolous conduct by substantially delaying the production of emails, improperly constricting the scope of the search for electronic discovery, and delaying production of various witnesses, the plaintiff's letter (instead of a motion) to the court requesting sanctions was insufficient to provide the defendants with notice of their alleged offending conduct.[39]

Types of Sanctions

Sanctions for discovery obstruction may take many forms. Section 130-1.1 provides for costs, attorney's fees, and monetary sanctions against both a party *and* the party's attorney.[40] CPLR 3126 allows for more game-changing sanctions, including final and binding dismissal of an answer or a complaint.[41] Generally the court must find "deliberately evasive, misleading and uncooperative course of conduct or a determined strategy of delay" to be deserving of the most vehement condemnation—the striking of a pleading.[42] As such, it is important to fully document your attempts to address opposing counsel's obstructive conduct, so that you can demonstrate the frivolous nature of their conduct. Absent such a finding, the court may still preclude the disobedient party from making arguments, claims or defenses using the withheld evidence.[43] In order to invoke "the drastic remedy of preclusion," the court must be convinced that the offending party's lack of cooperation with disclosure was willful, deliberate and contumacious.[44] "Such willful and contumacious conduct may be inferred from repeated failures to comply with discovery demands and orders without excuse."[45]

Although severe, these sanctions are imposed because a party's "disregard of their court-ordered discovery obligations cannot be tolerated." "The rights of the demanding party to be able to fully prepare for trial simply cannot be protected by either belated corrective supplements or the hope of discretionary discovery while the action is on the trial calendar."[46]

The rules provide you with the power to ensure your client's case is fairly adjudicated. Demonstrate your knowledge of the rules and your willingness to hold opposing counsel accountable for their discovery misconduct—you likely will earn their respect and hopefully ward off any further attempts to hide the ball.

Endnotes

1. Timothy Wilson, *A Mandate for Failure: The Sedona Cooperation Proclamation and Modern Discovery Under the Federal Rules of Civil Procedure*, 35 U. La Verne L. Rev. 165, 177 (2013) (quoting Ralph Nader & Wesley J. Smith, No Contest: Corporate Lawyers and the Perversion of Justice in America 63, (1996) and citing Marvin E. Frankel, Partisan Justice 18 (1980)).
2. *Id.* (citing Arthur L. Liman, Lawyer: A Life of Counsel and Controversy 234–35 (1998).)
3. *See* N.Y. Rules of Prof'l Conduct R. 1.3.
4. *See* N.Y. Rules of Prof'l Cond. R. 3.2.
5. *See* N.Y. Rules of Prof'l Conduct R. 3.4.
6. *See Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 207 (2012).
7. Compare N.Y. Comp. Codes R. & Regs. tit. 22 § 202.20-c, § 202.70.11-e and CPLR 3122 with Fed.R.Civ.P. 34(b)(2).
8. CPLR 3101, Article 31.
9. Siegel, N.Y. Prac. § 343.
10. *Washington v. City of New York*, 18 Misc. 3d 1109(A) (quoting 44A N.Y. Jur 2d Disclosure § 353)
11. Report and Recommendations to the Chief Judge of the State of New York, The Chief Judge's Task Force on Commercial Litigation in the 21st Century, June 2012 at 16.
12. *See Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 362 (D. Md. Oct. 15, 2008).
13. N.Y.Comp. Codes. R. & Regs. tit. 22 § 130-1.1A(a) (emphasis added).
14. N.Y.Comp. Codes. R. & Regs. tit. 22 § 130-1.1A(b) (emphasis added).
15. N.Y.Comp. Codes. R. & Regs. tit. 22 §130-1.1(c).
16. *See* Fed.R.Civ.P. 11 and Fed.R.Civ.P. 26(g)(1).
17. CPLR 3101 (a)
18. *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y. 2d 403, 406 (1968).
19. *See Mejia v. Delgado*, 2016 N.Y. Misc. LEXIS 3454, *7, 2016 N.Y. Slip Op. 31769 (U), **4 (relying on Allen v. Crowell-Collier Pub. Co., 21 N Y 2d 405, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968).
20. *Bratka v. Anheuser-Busch Co.*, 164 F.R.D. 448, 461 (S.D. Ohio 1995). *See also Sun River Energy Inc. v. Nelson*, 800 F.3d 1219, 1229 (10th Cir. 2015) (cannot abdicate duty of oversight even to in-house counsel).
21. *See A PDX Pro. Co. v. Dish Network Serv.*, LLC, 311 F.R.D. 642, 643, 653 (D. Colo. 2015).
22. *See Williams v. BASF Catalysts LLC*, 765 F.3d 306, 318–19 (3d Cir. 2014).
23. *See Bratka* at 460–61.
24. *See id.* at 461.
25. *See id.*
26. *See Dehaney v. New York City Transit Auth.*, 180 Misc. 2d 695, 695 (1997).
27. *See id.* (emphasis added).
28. *See* Fed. R. Civ. P. 26, Advisory Committee's Note (2015 Amendment). *See also Athridge v. Aetna Cas. & Sur. Co.*, 184 F.R.D. 181, 190 (D.D.C. 1998) (citing *Pulsecard, Inc. v. Discover Card Services, Inc.*, 168 F.R.D. 295, 303 (D. Kan. 1996)).
29. *See Anonymous v. High School for Envtl. Studies*, 32 A.D.3d 353, 356, 359 (2006).
30. *See id.*
31. *See New York State Electric & Gas Corp. v. Lexington Ins. Co.*, 160 A.D.2d 261, 262 (1990).
32. *See* N.Y. Comp. Codes R. & Regs. tit. 22 § 202.7.
33. *See Wash. State Phys. Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 346 (1993); *see also Venator v. Interstate Res., Inc.*, 2016 WL 1574090 (S.D. Ga. Apr. 15, 2016); *see also* Fed. R. Civ. P. 26(g)(3).
34. *Washington v. City of New York*, 18 Misc. 3d 1109(A) (quoting 44A NY Jur.2d Disclosure § 353).
35. *Id.*
36. *See Matter of Miller v. Miller*, 96 A.D.3d 943, 944 (2012).
37. *See, e.g., Dank v. Sears Holding Mgt. Corp.*, 69 A.D.3d 557, 557 (2010); *see also Stark v. Matchett*, 2016 N.Y. Misc. LEXIS 2858.
38. *See Dank v. Sears Holding Mgt. Corp.*, 69 A.D.3d 557, 558 (2010).
39. *See Muhametaj v. Town of Orangetown*, 195 A.D.3d 627, 628 (2021).
40. *See* N.Y.Comp. Codes R. & Regs. tit 22 § 130-1.1; *see also Dank v. Sears Holding Mgt. Corp.*, 69 A.D.3d 557, 558 (2010); *see also* Fed. R. Civ. P. 26(g)(3).
41. *See Washington v. City of New York*, 18 Misc. 3d 1109A (2008); *See e.g., Figdor v. City of New York*, 33 A.D.3d 560, 823 N.Y.S.2d.385 [1st Dep't 2006], [answer struck unless $10,000 sanction paid within 30 days]; *Jones v. Green*, 34 A.D.3d 260, 825 N.Y.S.2d 446 [1st Dep't 2006] [complaint dismissed because of plaintiff's pattern of non-compliance]; *Rampersad v. New York City*, 10 Misc. 3d 1059[A], 809 N.Y.S.2d 483, 2005 N.Y. Slip Op. 52023[U] (Victor, J., 2005), *aff'd*, 30 A.D.3d 218, 817 N.Y.S.2d 20 [1st Dep't 2006] [answer struck for failure to comply with a conditional disclosure order]; *Rojas v. City of New York*, 27 A.D.3d 323, 813 N.Y.S.2d 64, [1st Dep't 2006], affirming an order by Supreme Court Bronx County (Paul A. Victor, J), entered 9/2/05 [answer struck for failure to comply with a conditional disclosure order]; *Anonymous v. High School for Environmental Studies*, 32 A.D.3d 353, 820 N.Y.S.2d 573 [1st Dep't 2006] ["defendants' conduct warranted reimbursement of the time and expense incurred by the plaintiff's attorney in pursuing discovery." Court ordered payment of $7,500]; *Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 207 (2012).
42. *See Mesiti v. Weiss*, 178 A.D.3d 1332, 1335 (2019).
43. *See Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 207 (2012) (defendant prohibited from using the evidence that was not disclosed in a reasonable and timely manner).
44. *See Richards v. RP Stellar Riverton, LLC*, 136 A.D.3d 1011, 1011 (2016).
45. *See Henry v. Datson*, 140 A.D.3d 1120, 1122 (2d Dep't 2016).
46. *See Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 207, 211 (2012); *see also H.R.Prince Inc. v. Elite Envtl. Sys. Inc.*, 107 A.D.3d 850 (2013).

The Caged Traveler

By Eugene A. Ward

In 1985, I was newly married and recently admitted to the New York State bar. My wife Vera and I honeymooned in Italy on a cheap tour. I remember the wheels touching down in the airport and thinking "I can't believe I am in Rome!" In the hotel, a cashier arbitrarily charged breakfasters for packets of orange marmalade. It was my first taste of culture shock, albeit mild. I had traveled in the U.S. for Avon Books for a few years in the late 1970s, lots of cities, staying in nice hotels on their dime, compensation for a paltry salary. Foreign travel meant Montreal or Tijuana, which I had seen.

Vera was an immigrant from Prague, Czechoslovakia. She had traveled extensively in Europe and had lived in London for several years after the Russians invaded in 1968. She was an enthusiastic traveler, an out-of-the-box thinker, eager to taste everything that didn't cost "too much," and used to compromises after growing up with the scarcity and deprivations of a communist country.

I did what many people do to start their travel lives. I went to Italy and Rio de Janeiro, Spain and Portugal, London and Paris and Greece (where we met two elderly brothers, professors of Greek classics. They had never traveled and were topping off their academic careers by visiting for the first time historical places they spent their ca-

---

Eugene Ward was born in Los Angeles, California and moved to the East Coast in 1977. He graduated from New York Law School in 1984 and has been a member of the New York State Bar Association ever since. He focuses on medical malpractice defense and is a member of the New York State Medical Defense Bar Association. He was a partner at Kopff, Nardelli and Dopf and is currently a partner at Dopf, P.C. Mr. Ward has traveled extensively and is the author of two books, "Prague Memories" and "Observations of a Curious Traveler."

"Prague Castle from Charles Bridge," photographed by Eugene A. Ward

reers teaching about). I loved it all, the excitement of being somewhere else, the bustle of other cities, with their old-fashioned buses and phone booths and street urination stalls, seeing the famous places and delighting in making cultural connections. I walked through history, absorbing the sights, sounds and occasionally smells of the world. Immigration had transplanted so much Europe to New York it was both foreign and familiar.

Vera hadn't returned to Prague since 1968. She had become a British citizen and returning was expensive on a British passport because, for diplomatic reasons, she would first have to pay for her education, which included college and a master's degree. In 1988, she became an American citizen and she could visit Czechoslovakia as an American tourist without penalties.

In 1988 Prague was a world apart from Western Europe. It was gloomy; its people were strapped by laws designed to silence any opinions and prevent any actions not approved by the ruling party. Central planners decided how citizens would live. It is popular today to extol the benefits of "socialism" by people who haven't seen the resigned faces of people ground into the bland conformity that collectivism demands. In New York, an exodus of people fled the Eastern European socialist "dream."

Prague was a collection of neglected architectural treasures. Since "the people" owned the buildings, nobody had pride of ownership and the drab, gunmetal-colored walls were deteriorating and thirsty for fresh paint. People wore shabby, unimaginative clothing sold in state-owned stores. Food choices were limited and unappealing. Bananas were a delicacy. American brands were copied but unavailable. We were forced to register with the police and purchase $9/day per person of near-worthless koruna with dollars to support the government. It was a thrilling trip behind the Iron Curtain. Prague had changed little but Vera had changed a lot since 1968. Her brother said she was "no longer Czech."

We returned in 1990, following the Velvet Revolution, to a Prague bursting with hope. Vaclav Havel was leading a chaotic transformation toward freedom and Western European values. His government was grappling with two thorny legal issues: how to return real estate to the families of those from whom it had been confiscated and whether to penalize former members of the communist govern-

ment for the crimes they committed against the citizens. One afternoon, on the anniversary of the 1968 Russian invasion, we joined the crowd in Wenceslas Square to hear Havel speak. He was the playwright who peacefully sank a dictatorship. The memory brings tears to my eyes even now.

My mother-in-law, Frantiska, who occupied a one-bedroom apartment in Prague 3, not far from the city center, had no telephone or refrigerator. Listening to Vera and Frantiska speak Czech, a harsh-sounding language, was like having a woodpecker pounding on my head. I learned about 30 Czech words, not enough to argue with anyone.

My realization that not everything was related to Western Europe ignited my thirst to experience more culture shock, whether by language, religion, architecture, food or culture. I didn't want to feel too comfortable abroad. Practicing law in New York City, I have met many immigrants whose native countries I have visited. My travels have proved to be an icebreaker in court, depositions and meetings.

In 1993 we went to Hong Kong, while it was still British, Bangkok, Singapore and Bali. And then in 1995 to China, as it was starting to modernize. Our guides were communist party members who didn't talk politics. We spent a mandatory hour each day at a "factory" shop. There were as many salespeople as tourists. If we touched any useless trinket, or paid it more than passing attention, a clerk would leech onto us and engage in a robotic hard sell.

I wondered whether the jutting limestone mountains in southern China continued into Vietnam. We went to Japan in 1997, landing in Tokyo on the day that Princess Diana was buried. We saw the commentary on TV but understood none of it. We took the bullet train to Hiroshima to visit the Peace Museum in a monsoon, pausing to reflect at the dome of the Peace Memorial, the only building still standing after the blast. I stood next to a middle-aged Japanese woman and wondered what she was thinking. Our eyes never met.

In 2000 I traveled with another attorney, Chuck Faillace, to Morocco and in 2004 to Vietnam where I discovered that the mountains in southern China dramatically extend into Halong Bay. I wasn't running out of places to see but my appetite for the forbidden was growing.

Over dinner at the former 21 Club in 2008, Chuck dared me to go to Iran. Almost no Americans were going there. Online, I found a travel agency in Shiraz which made the arrangements. When the plane arrived in Tehran, the attractive brunette sitting next to Chuck stood up and pulled on a loose black ankle-length chador, demonstrating the difference in modesty required by Dubai and Iran. After we deplaned, a uniformed agent pulled us aside, fingerprinting us with bright red ink. A French businessman said, "They do it to all of us." Our Tehran guide explained that there was competition among guides to show the rare American tourists Tehran, and that he had won our tour due to his experience.

Rayen Citadel in Iran, photographed by Eugene A. Ward

We would have passed by the Martyrs' Cemetery and the Mausoleum of Ruhollah Khomeini on the way from the Imam Khomeini International Airport but we insisted on stopping. Pulling into the cemetery driveway, our driver was involved in a traffic accident. No lawyers arrived at the scene. Nobody was killed and even if someone had been, that wouldn't have justified burial in the Martyrs' Cemetery which was occupied by the 1980-1988 Iran-Iraq War dead. Unlike cemeteries in the U.S., many graves had a vertical glass fronted display on stilts so families could place photos or memorabilia to honor their lost loved ones. Some had a bracket holding an Iranian flag. It was nearly deserted but humane and moving, even for this Jewish resident of The Great Satan.

"Cell" in Bangkok, Thailand, by Eugene A. Ward

We were the only Americans visiting the mausoleum. Someone asked if we would like to meet Khomeini's son. I would have been the first one on my block to say I met him but he was gone. An older man thanked us profusely for visiting Iran. He remembered life under the last Shah of Iran, when Iran and America were friendly, and preferred it to the theocracy. The mausoleum had a glass-walled shrine exhibiting a framed photo of Ayatollah Khomeini propped on a low table. Chuck slipped a one-dollar bill through the contribution slot that fluttered to the marble floor.

In Tehran, we walked around the Shah's former estate, the Sa'dabad Complex, now a museum. A group of university engineering students followed us, peppering us with questions, trying out their English. It was the only time in my life I felt like Mick Jagger, besieged by curious fans. We drove by the former U.S. Embassy, its wall decorated with "Death to America" graffiti.

Chuck wanted to see the Tehran subway. One morning, we entered and stopped at the turnstile. A clerk came to greet us. Somehow, Chuck conveyed to him that we just wanted to look at the platform. He graciously waved us in after making a gesture I understood to mean I couldn't take pictures. I took a few photos of the platform anyway. On the way out, we were stopped by the clerk's supervisor who insisted that we delete my photos. Then his supervisor appeared and there was a tense discussion between them. Were we terrorists? The clerk looked sheepish. They let us go. I gave the clerk a "New York City" baseball cap for his courtesy. He beamed. A supervisor probably grabbed it for himself.

We flew south to Kerman, on the edge of the Lut Desert. In-flight entertainment consisted of "Mr. Bean" videos; women's bare arms and legs were pixilated. Women (about 10% of the passengers) and men were segregated on either side of the plane. Our downmarket Arkhaven Hotel was in the construction supply district. We ate dinner in the basement where a birthday party with 30 ten-year-old boys proceeded loudly. A teacher supervised an "American Idol" style singing competition. I gave her a red "NYC" baseball cap as a "gift from America," causing an eruption of applause.

While Chuck and I were strolling on the sidewalk, three men in military fatigues stopped us. I felt a jolt of adrenaline. Would we be hassled? Arrested? Dragged through the streets? That would have been a story. But they smiled and asked for a picture. A smile softens the tone anywhere, from jury room to jailhouse.

In southern Iran, we had a different guide, Kambeez, who was in his 30s and prematurely balding. Kambeez drove us around in his car. The itinerary included a trip to the ancient adobe citadel of Bam but we couldn't go because it was being reconstructed after an earthquake. Instead, we visited a smaller citadel at Rayen. Lonely Planet wrote that the caretaker, Hamid Reza, made knives. We saw him grinding a blade, sparks flying. Chuck mentioned that he was interested in knives and Hamid invited us to his home, a kilometer away. His wife brought us tea as we sat on the floor as Hamid spread out a dozen knives on the carpet. He explained that he couldn't show them to relatives because, if they admired one, social graces required that he gift it to them. Chuck was only interested in one knife but Hamid wanted to sell them all before his next family gathering. No sale.

In Fars, we visited Persepolis, one of the world's great archeological sites. Only a handful of other tourists were present. His voice quivering with emotion, Kambeez explained the sophisticated construction techniques used to create the Apadana staircase, a 2,500-year-old treasure that was the ceremonial center of the Achaemenid Empire, and one of the few remaining intact features of Persepolis. Darius the Great wanted to show off his power and his

craftsmen provided the equivalent of stonecutter breakdancing, infusing limestone with history and breathtaking beauty.

Kambeez lived in Shiraz and brought us to his apartment to have dinner and meet his wife who taught English. Before she arrived home, he poured us mediocre scotch he had purchased on the black market and proudly showed us some videos from his illegal satellite hookup. His petite wife appeared, cloaked in a black chador and head scarf and said, "Give me a few minutes." She came out wearing a skin tight orange-colored sleeveless shirt and tight pants. She waited a beat and said, "The Koran says a wife should be attractive for her husband."

To emphasize the point, Kambeez took us to an upscale shopping mall. A majority of the stores carried women's clothing, much of it featuring skirts and dresses with slashes almost up to the undergarments and plunging necklines. This was clothing to flaunt for friends and family, not the public.

We visited the Yazd Water Museum and learned about qanats, ancient underground aqueducts that brought the city water by gravity from many kilometers away. We saw a group of five female college students, swathed in black, accompanied by a teacher. They were as curious about us as we were about them. They had few chances to speak to Americans. A brief, raucous photo session followed. Afterward, Kambeez chastised me for breaching etiquette by asking one of them for an individual photograph because she was married. Pardon my ignorance! My travels have often made me think about cultural differences, especially when I've prepped witnesses born in a foreign country. I wonder how often I've unintentionally offended someone's sensitivities.

In Isfahan, a city renowned for its outstanding Persian architecture, we walked on the banks of the Zayanderud River, spanned by two spectacular 400-year-old stone bridges, where families promenaded or picnicked on the grass. We arrived in daylight but stayed until the blue hour when the bridges were lit up like lanterns and the reflections of the yellow light shimmered on the slow moving water. A Mutawa (morality police) van pulled up, microphone blaring, warning women to observe the rules of modesty. Baring any wrist, ankle, or hair was forbidden. Later, wearing an NYPD cap, I posed for a photo with a poster of Ayatollah Khomeini.

Since I went to Iran, my expectations of travel have changed. I want to explore the vapor of the unfamiliar because it makes me question my assumptions and see my life in a broader context. I've tried to learn to be flexible and to make adjustments on the fly, useful skills for any attorney.

I went with Chuck to Syria in April, 2011 as the Syrian uprising was starting. I was nervous but never in danger although a cat in a carpet store clawed the back of my hand leaving bloody tracks. I've wondered who were those guys with semi-automatic weapons but no uniforms guarding the road near Palmyra. Many of the places we visited—Palmyra, the Grand Mosque and the Citadel in Aleppo—sustained serious damage. The historic Carlton Citadel Hotel in Aleppo, where we stayed, was leveled by a bomb blast in 2014. You can watch it implode on YouTube. They aren't taking reservations. Unfortunately, soldiers inside the hotel were killed by the bomb.

I've travelled a lot including India five times, Bhutan, Nepal, Cambodia, Ethiopia, Sri Lanka, Egypt, Thailand, Cuba, Turkmenistan, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan (where, at a rest stop, locals insisted we join a birthday party and drink vodka with them). Life can be pretty good off the beaten path. I've done plenty of "beaten path" travel and I have nothing against it. Sometimes it is comforting to know that what you are eating won't make you sick.

I have traveled to 11 of the 14 former Soviet republics. Chuck and I had planned a trip to the last three, Belarus, Moldova and Ukraine, that was to depart in April, 2020. The pandemic forced us to kick it over for a year to 2021 and again to 2022. Now Russia's armies are poised to invade Ukraine and Belarus has closed its borders. Political uncertainty is a characteristic of off-the-beaten path travel.

I was planning a trip to Namibia in 2020. I had to prepay the airfare to South African Airlines and lost it when they stopped operating. Maybe I should find a good lawyer.

Like many people in the legal profession, travel has been my passion, my sustenance, my oxygen and my relief from stress. I've been strangled by the pandemic. But I am eager take flight again.

Editor's Note: In the time since this article was written and submitted for publication, some COVID-19 travel restrictions lifted, and Mr. Ward has indeed taken flight again.

Conducting Remote Mediations During the Pandemic

By Theodore K. Cheng

Starting during this COVID-19 pandemic, with courts initially closed and now severely backlogged, and continuing into the future, remote mediations using a video teleconferencing (VTC) platform have increasingly become an efficient and effective way to resolve disputes. As with all software-driven platforms, each has its own special features and limitations. The key for participants is to understand the salient features and limitations of the chosen platform and to become familiar and comfortable enough with the technology to focus on the core of the mediation process, namely, achieving a mutually acceptable resolution of their own making.

Benefits of Remote Mediations

Remote mediations afford many benefits worth considering, including enormous savings in travel time and expenses; avoidance of logistical issues related to coordinating participants' schedules, accounting for unexpected travel delays, and securing a mediation space or participants' lodging; and removal of barriers to having additional participants attend who may otherwise have been precluded due to time or cost considerations (such as the ultimate decision maker at the company, the insurance carrier's adjuster, or an interpreter).

In particular, there has been a broadening of opportunities for junior members of a litigation team—many of whom are younger, women, and/or people of color—to have the ability to attend and participate in mediations. Junior attorneys have oftentimes been unable to do so due to the additional costs that would be imposed upon both the firm and the client. But now, especially without the associated travel and lodging costs, they are able to continue participating, so long as the firm is willing (if necessary) to write off the time. In turn, doing so opens the door to both additional on-the-job training and increased opportunities for younger and diverse attorneys, which is invaluable to their professional development and will ultimately inure to the firm.

Participants in a remote mediation also need only agree on an available date and time for the session to proceed. Because sessions can be scheduled more easily, remote mediations may be preferable for disputes that are time-sensitive or otherwise need a faster path to resolution. Even after conditions improve such that in-person mediations can safely resume, participants' recognition of the benefits of holding mediation sessions remotely will likely encourage their continued use.

Technology and Equipment Considerations

A successful remote mediation begins with an appreciation of the underlying technology and equipment. Participants should participate from a location with secure, reliable, high-speed internet. If the connection is unstable, weak, or prone to outages, it may be remedied by using a Wi-Fi booster, installing a mesh network, using a smartphone's hotspot, hardwiring to the internet by using an ethernet connection, or installing a T1 connection.

Participants also need to ensure that they have a functional microphone and speaker to transmit and receive audio. If using the built-in microphone and speaker in their devices creates feedback issues or otherwise produces less than desirable audio quality, a separate headset or headphones may be necessary. This alternative also often reduces or completely blocks ambient noise, which allows for clearer hearing and audio transmission. Participants should also either confirm that the device has a built-in camera that sufficiently transmits and receives video images or, alternatively, obtain a separate webcam.

Platform Features

When choosing an appropriate VTC platform for a mediation, there are several salient features to consider.

Theodore K. Cheng is an independent, full-time arbitrator and mediator, focusing on commercial, intellectual property, technology, entertainment, and employment disputes. He has been appointed to the rosters of the American Arbitration Association, the CPR Institute, Resolute Systems, the American Intellectual Property Law Association's List of Arbitrators and Mediators, and the Silicon Valley Arbitration & Mediation Center's List of the World's Leading Technology Neutrals. He is a former chair of the New York State Bar Association Dispute Resolution Section and has been inducted into the National Academy of Distinguished Neutrals. Mr. Cheng also has over 20 years of experience as an intellectual property and commercial litigator. More information is available at www.theocheng.com, and he can be reached at theo@theocheng.com.

For example, some platforms provide for simultaneous viewing of a document in real time, such as Word or PDF files, photographs, video clips, e-mail communications, PowerPoint presentations, and internet websites. Some platforms permit users to share their screens, so that all participants can view any document or file open on a device. Some platforms also permit collaboration amongst participants by allowing for editing of a document within the platform. For example, when a mediation results in a resolution, participants may wish to view and edit a draft term sheet, a memorandum of understanding, or even a long-form settlement agreement. Becoming familiar with the features and limitations of any VTC platform is a critical step in ensuring that the mediation will be conducted in a smooth and efficient fashion.

As in many mediations, there may also be a need for the participants to confer privately in various configurations of participants, with or without the mediator, in a room that is separate from the main mediation session room. Different platforms refer to these separate caucus rooms by different names (e.g., "breakout rooms" in Zoom or "breakout sessions" in WebEx). In platforms that offer caucusing, the mediator can virtually place or assign participants so that they can communicate privately and in confidence with each other. In essence, it is no different than had the mediator assigned individuals to physical rooms across or down the hall in the in-person context. The participants can also establish some kind of protocol to permit the mediator's entry into the caucus rooms to help discussion within and among the various participant groupings, preserve attorney-client privileged communications, and ensure confidentiality.

However, most platforms do not have a virtual knock or chime feature to announce when someone is about to enter a caucus room. Having the mediator suddenly appear in a caucus room can not only be jarring and rude, but also potentially breach a confidential, attorney-client privileged communication. To minimize the risk of an unexpected intrusion, the mediator and participants should agree on how the mediator is to announce that the mediator is ready to enter a caucus room. For example, mediators may announce their intention to enter a caucus room by calling, texting, or e-mailing in advance one or more of the participants in a caucus room (typically counsel) to indicate an intention to enter the room. If the platform does not offer the ability to place participants in separate rooms, while a little cumbersome, participants can simply disconnect and reconnect to the platform in various configurations to accommodate the need for private caucusing. Traditional telephone mediations have operated in this manner for decades and, in fact, at least one VTC platform (Sonexis) has a pure audio conferencing version that provides for the creation of caucus rooms. With a little advance planning, participants can develop protocols for mirroring caucus rooms in the virtual world.

Memorializing a Mediated Agreement

At some point during the mediation session, the participants may need to memorialize any or all portions of the discussion.[1] Participants may circulate drafts of documents via e-mail or use some kind of external collaboration tool, such as Google Docs or a shared Dropbox file. However, if the participants anticipate wanting to memorialize any agreement they reach and select a platform with this capability, they should take advantage of this feature

to draft and edit a term sheet or settlement agreement at the conclusion of the mediation.

Some platforms also offer related features that participants may use to affix a signature or other mark on a shared document, which the participants may then screenshot or download, or, alternatively, "whiteboard" freehand drawings or writings. Other platforms allow for the incorporation of third-party software applications to meet these needs, such as DocuSign or RightSignature.

If a platform does not offer any of the above features but does afford recording capability, the mediator may memorialize the resolution on video by orally reading the terms and conditions of any term sheet, memorandum of understanding, or agreement in the presence of all the participants.

Concerns with Remote Mediations

Notwithstanding the popularity of remote mediations, there are some challenges and drawbacks to keep in mind. For example, participants may not be able to fully gauge credibility and read body language; they may sense a lack of control in being assigned and shuttled into different rooms by the mediator; there may be difficulties preserving the confidentiality and security of the proceeding; and, of course, there are the inevitable technical glitches, bugs, and outages that accompany any software-driven platform dependent on the internet.

While most of these concerns can be overcome through training, education, and continued practice and use of the platform, there are other concerns that relate to the psychological and neurological effects of communicating using VTC platforms. For example, after nearly two years in the pandemic, platform fatigue is now a well-recognized problem, but with easily implemented solutions, such as taking frequent breaks or scheduling multiple, shorter session days.[2]

Despite the foregoing, the experience of most participants conducting mediations on VTC platforms has been overwhelmingly positive. Although there will undoubtedly be some desire to schedule in-person sessions as the pandemic conditions improve and there is more widespread vaccination, participants have found the comparatively large time and costs savings to outweigh the need to gather together in-person. Moreover, the resolution rates of mediations conducted on VTC platforms do not appear to be appreciably different from in-person sessions, and, in many areas, may anecdotally have improved under the remote model. Remote mediation appears to have become a mainstay in modern mediation practice.

Endnotes

1. *See, e.g., Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 215 N.J. 242, 262-63 (2013) (holding that all settlement agreements reached resulting from mediation in New Jersey state courts must be reduced to a signed writing or ascribed to in an audio or video recording).
2. *See* Kate Murphy, *Why Zoom Is Terrible*, N.Y. Times (Apr. 29, 2020), https://www.nytimes.com/2020/04/29/sunday-review/zoom-video-conference.html; Liz Foss Lien and Mollie West Duffy, *How to Combat Zoom Fatigue*, Harvard Bus. Rev. (Apr. 29, 2020), https://hbr.org/2020/04/how-to-combat-zoom-fatigue.

NEW YORK STATE BAR ASSOCIATION

VOLUNTEER FOR FREE LEGAL ANSWERS™

Free Legal Answers™

- Online version of a pro bono walk-in clinic model where clients request brief advice and counsel about a specific civil legal issue from a volunteer lawyer.
- Lawyers provide information and basic legal advice without any expectation of long-term representation.
- Increase access to advice and information about non-criminal legal matters to those who cannot afford it.
- There is no fee for the use of the system or for the advice and information provided by the lawyer.

Sign up to be a volunteer
Learn more | **www.NY.freelegalanswers.org**

ABA FREE LEGAL ANSWERS

NYSBA

Don't Guess When You Can Focus Group

By Sean K. Claggett

When attorneys hear the words "focus groups" they immediately associate it with big cases that can afford expending significant money on them. This is a major misconception. The reality is that focus groups can be done in a cost-efficient manner, even for lower value cases. In fact, our firm routinely runs focus groups on cases that have minimal policy limits ($15,000).

Over the past decade, I have conducted over 800 focus groups, many of which were lower value cases. The key lesson I have learned over the years is that you cannot afford not to focus group your cases. David Ball told me many years ago, "The last thing you want is for the jury to be your first focus group."

I have taught many lawyers over the years how to conduct their own focus groups. When I ask these lawyers why they have not been doing their own focus groups, the most common responses I would get is:

(1) I don't know how to set them up;

(2) I don't know how to conduct a focus group; and

(3) I can't afford to do them because most of my cases are lower value cases.

The good news is that focus groups are not difficult to set up, the more focus groups you do the better you will get at conducting them, and you can't afford not to do focus groups.

When setting up a focus group you start by finding a location you can conduct your focus groups. Ten years ago, when my office was quite small, I would do most of my focus groups at local libraries, at the law school, or crowd a focus group into my small office. Today, we do many focus groups on Zoom (we began doing this out of necessity because of the Covid pandemic). The use of Zoom has been one of the greatest advances in conducting focus groups, as it has made it even more affordable, and it makes it much easier for your focus groups members to participate because they don't need to travel to a location, worry about parking, and you don't need to provide them drinks or food. Today, over half of all our focus groups are done over Zoom. The key to Zoom focus groups being successful is you must test the connection of participants a day or two before your focus group. The last thing you want is a person's connection that keeps freezing on you.

Whether you do your focus groups in person or over Zoom, you will need to recruit participants. The recruiting process can be done in many different ways. You can put out adds on craigslist, Facebook, Instagram, or any other online platform. We also recruit from local colleges, churches, retirement communities, and any other local areas where we can place advertisements. We do not use our law firm name when recruiting focus group members, as we don't want there to be any bias of our focus group members when they show up. If you use your law firm in the advertisement, you can guarantee that just about all the focus group participants will have Googled your law firm and they will know what type of clients you represent. We created a separate company, Paramount Focus Groups, to recruit all our focus group members. The amount you will need to pay your participants will greatly be impacted by the community for which you are recruiting. I have seen rates as low as $35 for four hours and as much as $100 for four hours. Our standard payment is $75 for a four-hour focus group.

Once you have your date, time, location and participants recruited, now it's time to get the focus group started. We require our participants to show up 30 minutes prior to the start of the focus group so we can go over the ground rules. One of the most important documents each focus groups member must sign is a confidentiality agreement. If you are concerned about the details of the actual parties of your case compromising your focus group, you can simply change the names of the parties when you present your case. There are countless types of focus groups you can conduct; however, the most common focus group (and the one that I always start with) is what I call a neutral statement focus group. This type of focus group requires you to draft up a neutral statement of the facts of your case. This will require you to not use any adverbs, adjectives, or other advocating language.

One of the most common mistakes people make is they try to win their focus group. It sounds silly, but if you are

---

Sean K. Claggett is a trial lawyer and founder of Claggett & Sykes Law Firm in Las Vegas, Nevada. He can be reached at sean@claggettlaw.com or 702-333-7777. He also runs a nationwide consulting practice where he assists other plaintiff lawyers to hone the themes and issues for their cases prior to trial.

reading this article, it is because you are a competitive person who is in the business of winning, and a successful focus group will require you to hear focus group members dumping on your case. The first focus group I ever did was a total disaster because I could not stomach hearing strangers telling me that my case had problems. When you start hearing bad stuff about your case, it is the greatest gift a focus group can ever give you. We have a phrase at our firm for focus groups, which is to "embrace the bad." When you learn to "embrace the bad," you will start to be an effective focus group moderator. The truth is, you are doing your focus group so you can learn how you can lose your case. If you understand how you can lose your case, you will understand what you need to do to win your case. You may also learn that you have a case you need to settle, which will be the best thing for your client.

We always set up our focus groups for four hours. We typically will present four cases, giving each one about an hour. This also greatly reduces the cost per case. We like to have 10 participants per focus group, which at $75 per participant has a cost of $750. If you focus group four cases, it will only be $187.50 per case, which is an expense that even your lower value cases can afford. You can also have other attorneys use some of the four hours and split the expense with them.

As stated above, you can't afford not to focus group your cases. Focus groups will teach you where your case has problems and where your case is strong. You can then use this information to properly frame your case in a way that gives you the best opportunity to win at trial. One example of this is a case I did about five years ago. It was a slip-and-fall case where my client slipped and fell and knocked down a yellow warning sign. As a lawyer, my instinct was to reject the case. However, after running a few focus groups, I learned that when a business puts up a warning cone, the typical juror believed that meant that there was a problem and the business was in the process of fixing it. Well, the facts of my case were that the business left up yellow cones all day, every day, and it had no intention of ever fixing the problem. The "big problem" that I was terrified of was actually my best piece of evidence of the business being negligent. The jury agreed with me and returned a substantial verdict against the business. Don't guess when you can focus group.

The Evolution of Betty Lugo: Judge-Elect of New York City Civil Court

By Hon. George M. Heymann

Betty Lugo was elected to serve as a New York City Civil Court judge in November of 2021, having previously won the Democratic primary in June of 2021. As this article was being submitted to print, Betty was awaiting notification as to what her upcoming judicial assignment will be.

This article summarizes impressions of Betty Lugo, Esq. (a/k/a "Betty") that this author, a retired judge of the New York City Housing Court, has, which is based upon personal interaction, Betty's biographical information, and a Zoom interview conducted shortly before her primary victory.

Betty is the youngest of six siblings, a situation in which one must quickly learn how to make oneself heard. A Queens native, Betty grew up in Brooklyn, living at times in both Williamsburg and in neighboring Bedford Stuyvesant. Widespread diversity existed within the communities in which she lived, and within her own family. Betty's grandmother was of Taino Indian ancestry from Puerto Rico, for example, and one of her sisters converted to Judaism. Her dad, a Korean War veteran, left the family to return to Puerto Rico when Betty was five years old.

After her dad had left, the onus of raising the family fell to Betty's mother, who came to New York with a fourth-grade education and later obtained an equivalency diploma. Yet Betty's mother also managed to run a small business that permitted her to provide for her family. Many customers of Betty's mother did not speak English, and Betty was called upon to assist in translation. Eventually, Betty also escorted customers to courthouses or to various city agencies, in an ongoing effort to offer assistance. So began Betty's experiences in advocating on behalf of others, which eventually evolved into her legal career.

Betty attributes her interest in politics to her early involvement in the campaigns of two individuals in particular: Shirley Chisholm, the first Black female elected to the House of Representatives, and Herman Badillo, the first Puerto Rican Congressman from New York, who served in other elected and appointed positions as well.

Throughout life, we meet people who inspire us to pursue a particular path professionally. This author asked Betty if there was one individual who most motivated her to focus upon a study of the law. She recounted attending a Law Day event as a college student, which was sponsored by the Latino Justice/Puerto Rican Legal Defense Fund. At that time, Betty heard a speech by a young Puerto Rican woman who had been appointed to the New York Criminal Court by Mayor Ed Koch. That individual was the Hon. Carmen Ciparick, who later became an associate judge of the New York Court of Appeals. Betty credits Judge Ciparick as her inspiration to pursue a law degree.

Betty Lugo with Hon. George M. Heymann

After graduating *cum laude* from Brooklyn College of the City University of New York in 1981, Betty attended Albany Law School, where she earned her Juris Doctor degree in 1984. Upon admission to the New York State Bar, Betty commenced her legal career as a prosecutor while becoming, she reports, the first Hispanic woman assistant district attorney in the Nassau County District Attorney's Office.

While in college, Betty had met and befriended a fellow Puerto Rican female, Carmen A. Pacheco, who predicted that one day they would both become attorneys, then eventually partners in their own law firm. In 1992, Carmen, a graduate of St. John's University Law School, and Betty ful-

Hon. George M. Heymann is a retired Judge of the New York City Housing Court. He is an adjunct professor of law at the Maurice A. Deane School of Law at Hofstra University; a Certified Supreme Court Mediator (in Commercial Cases); Of Counsel to the law firm of Finz & Finz, P.C.; and a member of the Committee on Character and Fitness for the Appellate Division, Second Department (2nd, 10th, 11th and 13th Judicial Districts).

filled that dream by establishing the law firm of Pacheco & Lugo, which they understood to be the first Hispanic women-owned law firm in New York.

Among the many cases that Betty's law firm handled was one involving the Cypress Hills Cemetery, located near the Queens-Brooklyn border. In an effort to expand its area for burial plots, the cemetery permitted contractors to dump construction debris on its grounds, which were then covered with topsoil. In this publicized case, Betty and her law firm argued that the cemetery illegally sold plots that were contaminated to unsuspecting families. After years of litigation, the cemetery was ordered to provide proper cemetery plots and burials to the families.

While managing throughout her professional career an array of cases in both state and federal courts, Betty has also evolved into an active member of the broader legal community.

In the New York State Bar Association (NYSBA), for example, Betty served as the immediate past chair of the Trial Lawyers Section, and as a member of its House of Delegates. In 2020, she was the recipient of NYSBA's Ruth G. Schapiro Memorial Award, due to her noteworthy contribution to the concerns of women through professional or community endeavors. She has obtained Certificates of Appreciation for service on the Grievance Committee for the 2nd, 11th and 13th Judicial Districts (2015-2019), via the Appellate Division. The NYSBA recognized Betty for promoting diversity within the profession (2018), and she also served as a Co-chair of its Committee on Diversity and Inclusion.

Her bar involvement included service as past president of the Puerto Rican Bar Association. She was a founder of the Bar Leaders for Puerto Rico, which raised money after the devastation of Hurricane Maria. Betty also assisted in founding the Connecticut and Massachusetts Hispanic Bar Associations, and earned awards recognizing a "lifetime commitment to the Latino Community." Moreover, Betty has intermittently lectured at law schools including and not limited to her alma mater in Albany.

Betty discussed with this author her upcoming transition from serving as an advocate representing clients to becoming an impartial arbiter of the facts. As her career has included representation of both plaintiffs and defendants, and also work as an arbitrator and a mediator, Betty is well aware of what her role on the bench will be. Throughout recent discussions, Betty has asserted her intent to administer justice equally and fairly as a judge, and to always strive to uphold the rule of law.

In January of 2022, Betty will take the oath of office to become Hon. Betty Lugo, judge of the New York City Civil Court. It is the firm opinion of this author that Betty is a force to be reckoned with, and will quickly prove to become an effective member of the New York City bench.

Book Review:
Commercial Litigation in New York State Courts

By Joanna Jung-Yao Chen

Many commercial litigators may be familiar with the substantive topics and strategic considerations reported in Robert L. Haig's *Commercial Litigation in New York State Courts*. Its newly issued fifth edition now expands this comprehensive resource, containing 28 new chapters on wide-ranging topics including Artificial Intelligence, Comparison with Commercial Litigation in Delaware Courts, Cross-Border Litigation, Fiduciary Duty Litigation, Fraud, Fraudulent Transfer, Gaming, Private Equity, Valuation of a Business, and Valuation of Real Property.

Commercial litigators in New York have witnessed significant changes to their practice over the past several years, including most recently the rapid incorporation of virtual conferences and proceedings during the COVID-19 pandemic. This fifth edition synthesizes cutting-edge developments, with expert advice provided by its 256 principal authors, including 29 trial and appellate judges. Upon review, this author believes the fifth edition to be a valuable resource for veteran practitioners and new attorneys alike.

For example, Chapter 30 concerning Document Discovery provides extensive commentary regarding discovery tools, preservation obligations, and other discovery considerations. Yet that same chapter also includes up-to-date case law regarding the preservation, discoverability, spoliation, and authentication of various forms of electronic information, including social media evidence, information stored on employees' personal electronic devices, and text and instant messages. Given that telecommuting policies have proliferated and appear to be here to stay, the sub section devoted to the preservation and collection of electronic information stored outside of a party's information network is particularly relevant. Similarly, the litigation technology chapter contains instructive sections regarding the implementation of Technology Assisted Review (TAR), New York state court rules regarding TAR, and technology advancements changing how attorneys utilize TAR.

In addition to detailed information regarding each phase of a commercial litigation matter, the fifth edition includes new and expanded chapters on a variety of subjects affecting commercial litigation practitioners. Issues including and not limited to Marketing to Potential Business Clients; Teaching Litigation Skills; Career and Practice Development; and Ethical Issues in Commercial Cases are addressed. For law students and new attorneys looking to develop their careers, the Career and Practice Development chapter may provide helpful guidance regarding judicial clerkships, summer law firm programs, and the development of written and oral advocacy skills.

The fifth edition also contains the inaugural chapter on Diversity and Inclusion in commercial litigation in the State of New York, which highlights the benefits of a diverse litigation team, and provides advice on best practices for the recruitment and retention of attorneys of various diversities.

Overall, the fifth edition encapsulates many thousands of hours of advice on the varied issues that a New York commercial litigator might encounter. Upon recent review, this author believes it to be a worthwhile addition to any commercial litigation practitioner's bookshelf.

Joanna J. Chen is Associate General Counsel–Employment and Compliance at Bumble. She was previously a litigation partner at Phillips Lytle LLP in Buffalo.

Section Committees and Chairpersons

The Trial Lawyers Section encourages members to participate in its programs and to contact the Section Officers listed on the back page or the Committee Chairs for further information.

Arbitration and ADR
Hon. Karla Moskowitz
New York, NY
judgekarla@gmail.com

Tania Pagan
The Pagan Law Firm, P.C.
805 3rd Ave Rm 1205
New York, NY 10022-9513
tpagan@thepaganlawfirm.com

Bankruptcy
Richard A. Klass
16 Court St Fl 28
Brooklyn, NY 11241-1028
richklass@courtstreetlaw.com

Norma E. Ortiz
Ortiz & Ortiz, LLP
3510 Broadway
Astoria, NY 11106-1150
email@ortizandortiz.com

CLE
William S. Friedlander
Friedlander & Mosher P.C.
103 W Seneca St Ste 301
Ithaca, NY 14850-4145
wsf@friedlanderlaw.com

Angelicque M. Moreno
Avanzino & Moreno
26 Court St Ste 2015
Brooklyn, NY 11242-1120
amoreno@jkavanzino.com

Construction and Labor Law
Angelicque M. Moreno
Avanzino & Moreno
26 Court St Ste 2015
Brooklyn, NY 11242-1120
amoreno@jkavanzino.com

Diversity
Katherine A. Buckley
Gale Gale & Hunt LLC
PO Box 6527
Syracuse, NY 13217-6527
kbuckley@gghlawoffice.com

Rashied McDuffie
Buffalo, NY
rashied.mcduffie@gmail.com

Employment Law
Christian J. Soller
Hodgson Russ LLP
677 Broadway Ste 301
Albany, NY 12207-2986
cjsoller@hodgsonruss.com

Ethics and Professionalism
Carmen A. Pacheco
Pacheco & Lugo, PLLC
340 Atlantic Ave
Brooklyn, NY 11201-6696
cpacheco@pachecolugo.com

Immigration
Carmen A. Pacheco
Pacheco & Lugo, PLLC
340 Atlantic Ave
Brooklyn, NY 11201-6696
cpacheco@pachecolugo.com

International Law
James Gavin Simpson
Specialist Prosecutor's Office
Kosovo Specialist Chambers
Netherlands
gavsimpson@hotmail.com

Judicial Administration
William S. Friedlander
Friedlander & Mosher P.C.
103 W Seneca St Ste 301
Ithaca, NY 14850-4145
wsf@friedlanderlaw.com

Betty Lugo
Pacheco & Lugo, PLLC
340 Atlantic Ave
Brooklyn, NY 11201-6696
blugo@pachecolugo.com

Landlord Tenant
Jay S. Duskin
The Law Firm Of Duskin & Crowe
1688 Victory Blvd Fl 2
Staten Island, NY 10314-3564
jduskin@duskinandcrowe.com

Rashied McDuffie
Buffalo, NY
rashied.mcduffie@gmail.com

Landlord Tenant (cont.)
Hon. Enedina Pilar Sanchez
Astoria, NY
epsanchez@nycourts.gov

Legislation
Evan M. Goldberg
Greenwood Lake, NY
info@evangoldberglaw.com

Seth M. Rosner
Seth M. Rosner, PC
1225 Franklin Ave Ste 325
Garden City, NY 11530-1693
seth@rosnerlawny.com

Kevin J. Sullivan
Orchard Park, NY
kevinsullivanlaw@gmail.com

Medical Malpractice
Peter C. Kopff
Peter C. Kopff, LLC
1055 Franklin Ave Ste 306
Garden City, NY 11530-2903
pkopff@kopffllc.com

William Pagan
The Pagan Law Firm, PC
805 3rd Ave Rm 1205
New York, NY 10022-9513
wpagan@thepaganlawfirm.com

Membership
Daniel G. Ecker
Lever & Ecker, PLLC
120 Bloomingdale Rd Ste 401
White Plains, NY 10605-1542
decker@leverecker.com

Christian J. Soller
Hodgson Russ LLP
677 Broadway Ste 301
Albany, NY 12207-2986
cjsoller@hodgsonruss.com

Motor Vehicle Law
Hon. Bianka Perez
Supreme Court Justice
Bronx County, 12th Judicial District
851 Grand Concourse Rm 6M6
Bronx, NY 10451-2937
bperez@nycourts.gov

No Fault Law
Hon. Bianka Perez
Supreme Court Justice
Bronx County, 12th Judicial District
851 Grand Concourse Rm 6M6
Bronx, NY 10451-2937
bperez@nycourts.gov

Hon. Elena Goldberg-Velazquez
Appellate Division, First Department
100 S Broadway
Yonkers, NY 10701-4005
goldberg.elena@yahoo.com

Nursing Home Litigation
William S. Friedlander
Friedlander & Mosher P.C.
103 W Seneca St Ste 301
Ithaca, NY 14850-4145
wsf@friedlanderlaw.com

Pro-Bono/Communities Relations
Betty Lugo
Pacheco & Lugo, PLLC
340 Atlantic Ave
Brooklyn, NY 11201-6696
blugo@pachecolugo.com

Real Property/Premises Liability Law
Betty Lugo
Pacheco & Lugo, PLLC
340 Atlantic Ave
Brooklyn, NY 11201-6696
blugo@pachecolugo.com

Mark J. Moretti
Phillips Lytle LLP
28 E Main St
Rochester, NY 14614-1915
mmoretti@phillipslytle.com

Michele Perlin
Kelly, Rode & Kelly, LLP
330 Old Country Rd Ste 305
Mineola, NY 11501-4143
michele.perlin@icloud.com

Trial Advocacy
Thomas P. Valet
Holbrook, NY
tvalet@rapplaw.com

Trial Evidence
Prof. Michael J. Hutter, Jr.
Albany Law School
80 New Scotland Ave
Albany, NY 12208-3434
mhutt@albanylaw.edu

Tribal Nation Collaboration
PJ Herne
Legal Aid Society of Northeastern NY
17 Hodskin St
Canton, NY 13617-1138
pherne@lasnny.org

Betty Lugo
Pacheco & Lugo, PLLC
340 Atlantic Ave
Brooklyn, NY 11201-6696
blugo@pachecolugo.com

Georgia Murray-Bonton
Law Office Of Georgia Murray
Bonton, P.c.
PO Box 268
Clifton Park, NY 12065-0268
g.bonton@bontonlaw.com

Young Lawyers
Anna Federico
New York, NY
anna.federico1@gmail.com

PUBLICATIONS

Taking the Risk Out of Risk:
An Indemnification Handbook

Authors
George McKeegan, Esq.
William Ranieri, Esq.
Glenn Vallach, Esq.

This book examines the concept of common law or implied indemnity, and indemnity arising from a contractual relationship. Indemnification generally involves the transfer of risk from one party to another.

The topics covered will be useful to a wide array of lawyers, legal scholars, and other practitioners or individuals dealing with indemnity issues. This is particularly true when determining, interpreting and/or clarifying the client's rights and obligations in this area, thereby potentially streamlining or eliminating litigation.

Book (44019)
eBook (44019E)

NYSBA Members $45.00
Non-Members $60.00

ORDER ONLINE: NYSBA.ORG/PUBS | ORDER BY PHONE: 800.582.2452

NEW YORK STATE BAR ASSOCIATION
TRIAL LAWYERS SECTION
One Elk Street, Albany, New York 12207-1002

NEW YORK STATE BAR ASSOCIATION

Annual Meeting

VIRTUAL CONFERENCE

January 18 – January 28, 2022

TICL & Trial Lawyers Section

Thursday, January 27, 2022
8:30 AM - 11:35 AM

Friday, January 28, 2022
8:30 AM - 10:20 AM

All programming will be held virtually along with a few select in-person events.

NYSBA.ORG/AM2022TICLTRIAL