Queens BAR BULLETIN

Queens County Bar Association | qcba.org | 88-14 Sutphin Blvd., 3rd Floor, Jamaica, NY 11435 | 718-291-4500

October 2023 | Volume 91, No. 2

ESTATES UPDATE 2023

BY DAVID N. ADLER

The year in trusts and estates is highlighted by ongoing federal and state estate tax discrepancies, clarification of the new power of attorney statute, guidelines for probate of virtually witnessed wills, and the expansion of digital asset disposition.

TAXATION

The federal estate tax lifetime exemption is presently $12,920,000, said amount being fully exempt from taxation. It is a unified exemption as it incorporates both estate and lifetime gifting, with the exception of a limited $17,000 per person annual gift tax exclusion. There exists portability between spouses as any unused portion of the first spouse to die's exemption may be carried over to the surviving spouse. The law as it exists sunsets after 2025, and will be subject to update and/or amendment.

The New York State estate tax exemption is presently $6,580,000. Yet, it does not necessarily function as a straight-line exemption; there is a brief phase out period, until a taxable estate exceeds 105% of the exemption amount, resulting in full tax inclusion of the entire amount. This exemption amount only applies to New York Estate tax. There is no portability for New York State Estate tax.

A New York benefit is that there presently is no gift tax in this state, providing that the donor survives for three (3) years from the date of gifting. In the event that a donor dies within three (3) years of gifting, the entire amount is clawed back, and included in the estate for estate tax purpose. The flexible state lifetime gifting option can be coordinated with the significant federal exemption amount to maximize certain planning opportunities.

POWER OF ATTORNEY

As discussed in the prior update, the new power of attorney form was sanctioned in June 2021. It is a more streamlined form, as the prior statutory gifts rider was abandoned. Further, all powers of attorney properly executed by the principal prior to the date of the new form were grandfathered in as valid. Yet, some concern arose in the event that the principal of a grandfathered older form signed *prior* to the effective date of the new statutory form, yet the agents signed *after* said date. This was clarified by the legislature in December 2022 (G.O.L.§ 5-1501B), confirming that if the principal executed a valid power of attorney form at the time so executed and prior to the new statutory date, it will remain valid even if the agents sign at a later date.

REMOTE WITNESSING

Wills offered for Probate that were executed pursuant to the Governor's Executive Order (202.14) incorporating virtual witnessing will be held to the procedural standards in effect at that time.

CONTINUED ON PAGE 12

Table of Contents

The Docket

Being the official notice of the meetings and programs listed below. Due to unforeseen events, please note that dates listed in this schedule are subject to change. More information and changes will be made available to members via written notice and brochures. Questions? Please call 718-291-4500.

CLE Seminar & Event listings

OCTOBER 2023

Monday, October 9	*Columbus Day – Office Closed*
Tuesday, October 10	**CLE:** ABC's of Guardianship – Pt 1 – 1:00 pm
Wednesday, October 11	Academy of Law Committee Mtg – 1:00 pm https://us02web.zoom.us/j/87412292526?pwd=bzY1T3VzVlpBRE9BangrQXBXTEV1QT09
Saturday, October 14	EVENT: Latinx Judicial Law Clerks Panel – 12:00 pm via Zoom
Tuesday, October 17	**CLE:** ABC's of Guardianship – Pt 2 – 1:00 pm
Wednesday, October 18	**CLE:** Elder Law – MHL Article 83
Tuesday, October 24	**CLE:** ABC's of Guardianship – Pt 3 – 1:00 pm
Wednesday, October 25	**CLE:** Recent Significant Developments & Decisions from Our Highest NYS Appellate Courts – 5:30 pm
Tuesday, October 31	**CLE:** ABC's of Guardianship – Pt 4 – 1:00 pm

NOVEMBER 2023

Wednesday, November 1	**CLE:** No Fault Litigation Update 2023
Tuesday, November 7	*Election Day – Office Closed*
Wednesday, November 8	**CLE:** Landlord/Tenant Update 2023
Friday, November 10	*Veteran's Day – Office Closed*
Thursday, November 16	**CLE:** Surrogate's Court Committee – 1:00 pm
Thursday, November 16	EVENT: Friendsgiving Fundraiser 6:30 pm
Thursday, November 23	*Thanksgiving Day – Office Closed*
Friday, November 24	*Thanksgiving Holiday – Office Closed*

DECEMBER 2023

Wednesday, December 13	EVENT: Holiday Party at Jericho Terrace, Mineola, NY – 5:30 pm
Monday, December 25	*Christmas Day – Office Closed*
Tuesday, December 26-29	*Christmas Weeky – Office Closed*

JANUARY 2024

Monday, January 1	*New Year's Day – Office Closed*
Wednesday, January 10	**CLE:** Overview of MVA Litigation & Depositions – 1:00 pm
Thursday, January 11	**CLE:** Interplay Between Workers Compensation Claim and a Third Party Action – 1:00 pm
Monday, January 15	*Martin Luther King, Jr. Day – Office Closed*
Wednesday, January 24	**CLE:** Human Rights CLE

2023-2024 Officers and Board of Managers of the Queens County Bar Association

President – Michael D. Abneri
President-Elect – Zenith T. Taylor
Vice President – Kristen J. Dubowski Barba
Secretary – Joel Serrano
Treasurer – Joshua R. Katz

Class of 2024	Class of 2025	Class of 2026
Sandra M. Munoz	Frank Bruno, Jr.	Desiree Claudio
Hamid M. Siddiqui	Etan Hakimi	Ruben Davidoff
Sydney A. Spinner	Sharifa Milena Nasser	Mark L. Hankin
Jasmine A. Valle	Tammi D. Pere	Adam Moses Orlow
Clifford M. Welden	A. Camila Popin	Estelle J. Roond

Queens Bar Bulletin

Executive Director
Jonathan R. Riegel, CAE

Queens Bar Bulletin Editor
Paul E. Kerson

Associate Editors: Stephen D. Fink and Richard N. Golden

Publisher:
Queens Public Media, LLC, under the auspices of Queens County Bar Association. The Queens Bar Bulletin is published eight times annually. All rights reserved. Material in this publication may not be stored or reproduced in any form without permission.

Advertising Office:
Queens Daily Eagle
8900 Sutphin Boulevard, LL11,
Jamaica, Queens, NY 11435
(718) 422-7412

Send letters and editorial copy to:
Queens Bar Bulletin, 88-14 Sutphin Boulevard, 3rd Floor, Jamaica, NY 11435 • **Editor's Note:** Articles appearing in the Queens Bar Bulletin represent the views of the respective authors and do not necessarily carry the endorsement of the Association, the Board of Managers, or the Editorial Board of the Queens Bar Bulletin.

"Queens Bar Bulletin"
(USPS Number: 452-520) in published eight time annually by Queens Public Media, LLC, 8900 Sutphin Boulevard, LL11, Jamaica, NY 11435, under the auspices of the Queens County Bar Association. Entered as periodical postage paid at the Post Office at Jamaica, New York and additional mailing offices under the Act of Congress. Postmaster send address changes to the Queens County Bar Association, 88-14 Sutphin Boulevard, 3rd Floor, Jamaica, NY 11435

New Members

Carlin Brito
Leora Gulkarov
Anna Ivanenko
James R. Karins
Kimberly S. Koehler
Lori A. La Salvia
John R. Margolies
Mary T. Michalos
Peter J. O'Donoghue
Karen H. Rankin
Ziaul Sayem
Michael S. Zen

Necrology

Joseph A. French
Ralph G. Reiser
Hon. Patricia Polson Satterfield

Editor's Note

The End of Court Congestion - Proposed CPLR Section 104 (b)

By Paul E. Kerson

I write to suggest a plan for New York State Court Reform.

I am in the system on a daily basis for the last 48 years. I have served as an Assistant District Attorney, Assistant Attorney General, Public Defender (Assigned Counsel Plan), Acting Village Justice and Past President of the Queens County Bar Association. I have an active general law practice and I have maintained this practice for the past 46 years nearly every business day.

Last week, one of our Supreme Court Justices said to me, during a Conference, that she could produce 25 Decisions on Motions per week, but that she receives 30 new Motions to decide every week. I replied that this current situation was not sustainable. She seemed to be urging me, as a former Bar Association President, to do something about this. Thus, I am publishing this proposal, which should reinvigorate and restore our system of justice in civil cases.

Under this schedule, there is also no room for Trials. Also, each Motion has Affidavits, Affirmations, Memoranda of Law and numerous exhibits. This schedule only leaves only 1.6 hours to consider each Motion and draft a decision, an almost impossible task, assuming a 40-hour work week.

This past month, I have been in the Courthouses of the Bronx County Supreme Court, the Queens County Supreme Court, the New York County Supreme Court and the Westchester County Supreme Court. Despite this tremendous overload, our Courthouses are nearly empty. This situation cries out for Court Reform.

I could sum up the 46 years of constant litigation in two sentences:

1. In the Halls of Justice, most of the Justice is in the Halls.
2. Rarely does anything substantive ever happen until everyone is in the same room in person in the same place at the same time.

What we have now is this: Lawyers sitting at home furiously churning out voluminous Motions clogging the Court system like a blocked water pipe. This has caused flooding and damage to the justice system.

This is occurring while our Courthouses stand nearly empty. These are Courthouses that were formerly filled with lawyers and clients settling cases by talking with each other face-to-face and filling out carbonized "Stip" forms memorializing well crafted Settlements.

Until recently, we prided ourselves on being the last institution in society that regularly uses carbon paper. We did this because it works. This is how we get everybody on the same page.

No computer can ever do this. No computer can get everyone on the same page because no computer can ever achieve the handshake that goes with the carbon paper.

Under no circumstances whatsoever can lawyers create justice while working from home. That is a myth created by the tech industry. When sitting at home alone in front of a computer, where is the carbonized Stip form for everyone to sign? Where is the handshake?

I respectfully request that CPLR Section 104 Construction be amended as follows:

a) The Civil Practice and Law and Rules shall be liberally construed to secure the just, speedy and inexpensive determination of every single judicial proceeding.

b) All Civil Term Supreme Court Parts in the State are required to appoint a Mediator in every case immediately after the pleadings are filed and before any Motions are filed or discovery is conducted. The Mediator must require whatever discovery is necessary to complete a Mediation Hearing where all of the issues are aired. The parties and counsel must be present at the Mediation Hearing. No Motions are permitted to be filed until such time as the Mediator has certified that the case cannot be settled.

CPLR Section 104 (a) has been the law of New York since 1962.

My proposed CPLR Section 104 (b) is designed to carry out CPLR Section 104 (a) now seriously undermined by the wrongful introduction of computers into the uniquely human process of creating justice between angry people.

This process of creating justice depends completely on face-to-face negotiation, carbon paper to get everyone on the same page at the same time, and handshakes all around to finalize this uniquely human process.

This proposed Amendment to CPLR Section 104 is designed to set forth the truth of civil litigation as experienced during all these past 46 years.

Litigation involves people who are very angry at each other: Business Partner v. Business Partner, Brother v. Sister, Husband v. Wife, Accident victim v. Tortfeasor, Buyer v. Seller, Employee v. Employer and the like.

All experienced lawyers know that without putting the people in the same room at the same time, Settlements cannot be easily made. Courthouses were erected for this purpose. The hallways of Courthouses are the place where the negotiations occurred and justice was done in the vast majority of the cases.

Emptying our Courthouses and requiring most things to be done electronically and in writing is counterproductive to the cause of establishing justice.

At Mediation Hearings, everyone is in the same room at the same time and Settlements can be reached, saving years of litigation and thousands of dollars to all parties and the Court system itself. Limited discovery can be ordered on an expedited schedule so that the cases can be settled in the year they are filed instead of waiting 3, 4, 5, 6, 10, and 12 years to be resolved.

I am hopeful that we can together change the mistaken electronic culture that has been developed since the coronavirus pandemic which is antithetical to the administration of justice.

Creating justice is a singularly human endeavor. It requires face to face communication where people can observe tone of voice, body movements, facial expressions, non-verbal communication and finally, litigants can be convinced literally to shake hands with each other.

All of this is missing from the electronic world. The electronic system has little utility in our continued quest for justice. It may be acceptable for electronic filings and Westlaw, but it is not acceptable for creating justice between people which requires putting them in the same room at the same time in a Courthouse at the earliest possible date. I am hopeful that CPLR Section 104 is amended in this way so that our system of justice can be restored.

If not, Motions will be piling up until the system collapses of its own weight. I have several files in my office where Motions have not been decided for more than two years.

This is not the fault of our diligent hardworking Justices and Law Secretaries. It is the fault of the Silicon Valley, pushing tools upon us that are not right for the highly demanding job of creating justice, something that no computer engineer could even begin to understand.

Beep. Beep.

Garbage in, garbage out.

To err is human. But to really screw things up, you need a computer. To collapse a well-run justice system, several thousand computers being worked at home by lawyers not meeting with Mediators, Judges, Justices, Law Secretaries, clients and other lawyers – well, that will do it.

Craig L. Moskowitz, MBA, MS, PE, CME

Stamford, Connecticut
Additional Location: New Jersey
CLM Engineering Associates, LLC
Toll-free: 866-432-4677 **Cell:** 917 270 8822
Email: clmprofessionalengineer@gmail.com
Website: www.clmpe.com

Premises Liability, Construction Defects, Personal Injury, and Construction Accidents

Specialty Focus: ADA compliance, OSHA, construction, slips/trips/falls, storm damage, water intrusion, roofing systems, warranty inspections, civil engineering, structural engineering, building collapse, property condition assessment, building codes, forensic engineering, engineering expert

Education: MBA, University of Bridgeport; MS Construction Administration, Columbia University; Certificate in Construction Management, US Army Officer Engineering School, Honorably- Discharged US Army Engineering Officer, BS Civil Engineering, University of Maine

Years of Experience: 20+

Many years of experience working on behalf of the Plaintiff and/or Defense; has testified over 20 times in various venues

INTRODUCING . . .

KESTENBAUM & SPINNER, PLLC
LAW OFFICES
42-40 BELL BOULEVARD
SUITE 302
BAYSIDE, NEW YORK 11361
(718) 281-0100
(800) 761-0635
www.kandsesq.com

Alan Kestenbaum, Esq. and Sydney Spinner, Esq. are pleased to announce their new partnership, Kestenbaum & Spinner, PLLC!

We look forward to continuing to service your needs for trusts and estates, guardianships, real estate, wage and hour matters, commercial litigation, and personal injury.

To contact us, please reach out to Syd at Syd@kandsesq.com or Alan at Alan@kandsesq.com!

We look forward to hearing from you!

LABOR / EMPLOYMENT LAW FIRM FOR EMPLOYERS

PROTECTING BUSINESS OWNERS SINCE 1979

STEPHEN D. HANS & ASSOCIATES, P.C.
LABOR & EMPLOYMENT COUNCIL OVER 40 YEARS

- Wage & Hour Lawsuits • NYS/US Department of Labor Audits & Investigation
- Defense of Employee Discrimination Claims • All Federal Courts • EEOC • NYS DHR
- NLRB - Anti-Union Representation • Collective Bargaining
- Compliance Assistance • Forms • Instruction • Analysis
- General Labor/Employment Law Defense Representation

718-275-6700

www.hansassociates.com • 30-30 Northern Blvd. Suite 401. Long Island City NY 11101

The Law Offices of
FRANK BRUNO JR.

www.frankbrunolaw.com

Protecting Your Assets & Your Loved One's Inheritance

An effective estate plan shall direct where your assets wind up after you pass away and shall protect against creditors, predators, taxes and long-term care costs. A plan with me addresses both concerns (asset protection and getting the asset to the right person without delay). Protect your "stuff", assets in your estate, so you can avoid the big bad wolf and have your relatives, friends and charities inherit.

If you qualify now or purchased a plan when you were young, a great addition to any estate plan would be long-term care insurance. Explore that option-usually not available or costly or does not supply all of the coverage you need. However, look into it for whatever insurance plan might be available.

If the long-term care insurance is too expensive or you do not qualify, then an Irrevocable Trust, when properly funded; properly executed and done far enough in advance could be the light at the end of the tunnel for your family. The time frame is five years for nursing home Medicaid. Start now.

Consider utilizing trusts instead of wills to avoid the Surrogate Court process, which occurs when you pass away with assets solely in your name. Trusts offer greater resistance to legal challenges compared to wills, making them a sensible choice when disinheriting a child, minimizing the potential for delay, dispute or litigation. In general, trusts offer efficiency and cost savings when settling your estate.

You might think about leaving bequests/assets to your children in Trust, rather than as an outright distribution. In Trusts safeguard their inheritance against potential claims during your children's possible divorce, and upon your child's passing, the inheritance seamlessly transfers to your other children or grandchildren, avoiding the "dreaded" son-in-law or daughter-in-law.

To summarize, an EFFECTIVE estate plan serves a few main purposes: (1) shielding assets from the expenses associated with long-term care, (2) passing assets to your heirs while minimizing tax and legal costs, and (3) preserving assets within the family lineage for your relatives, safeguarding the inheritance from potential complications arising from your children's vices, failed businesses & divorces.

FRANK BRUNO, JR., ESQ.
Attorney at Law
69-09 Myrtle Avenue, Glendale, NY 11385

718-418-5000
frank@frankbrunolaw.com

- **Elder Law & Estate Planning**
- **Special Needs Planning**
- **Estate & Guardianship Litigation**
- **Medicaid Planning & Applications**
- **Trusts Wills**
- **Probate**
- **Guardianship**

- PERSONAL INJURY LAW -

Counselor At Law / Disability Law

Max D. Leifer P.C.

135 West 26th Street / Suite: 11D
New York, NY 10001

Telephone: **(212) 334-9699**
Fax: **(212) 966-9544**
Email: **Info@maxleifer.com**

Max D. Leifer P.C. is an established law firm with over 40 years of experience in:

- **Personal Injury**
- **Negligence**
- **Social Security Disability**
- **Commercial and Union Appeals**

We are committed to providing high quality representation and we work aggressively to obtain the best possible results and to protect the rights of the clients.
FREE Consult in person or by phone.
We are honored to be designated a Super Lawyer firm.
See: **superlawyers.com**

Please feel free to contact us with any questions and our friendly staff will assist you with your concerns.

Thomas J. Rossi
Attorney-at-Law
Dispute Resolution Services

Mediation & Arbitration for the Business, Real Estate & Insurance Communities

-30-Year Member of the Panel of Commercial & Construction Mediators & Arbitrators of the American Arbitration Association

-Fellow of the Chartered Institute of Arbitrators

-Member - National Academy of Distinguished Neutrals

-Adjunct Professor of Law, St. John's University School of Law

Mediated more than 350 complex matters involving Commercial & Business, Construction & Design, Real Estate, Corporate Dissolutions, Employment, Partnership Disputes, Professional Malpractice, Insurance, Property Damage, Contested Estate Matters, International Sales, Intra-Family Disputes

Served as chairperson of arbitration panels or sole arbitrator in more than 250 complex proceedings

Thomas J. Rossi, Esq.
trossi@rcsklaw.com
42-24 235 Street
Douglaston, New York 11363
(O) 718-428-9180 ext. 13
(M) 917-971-0836

President's Message

Justice Sotomayor Highlights Fall Lineup

By Michael D. Abneri

Greetings Everyone

As I write this message, I am engaged in planning one of the most exciting events that I can think of in our recent history. As part of our annual appellate update, which we normally do in in the fall, we have secured a virtual appearance by United States Supreme Court Justice Sonia Sotomayor. This event will take place on October 25th, 2023, at 5:00 pm at the Queens Theater. We will be there "in person" and Justice Sotomayor will attend virtually from Washington D.C. **This event will not be streamed and the only way to attend and see it will be live and in person.** Many of the details are still being worked out as of this writing, but we hope you will join us. This appearance was secured through the efforts of Associate Justice of the Appellate Division, Second Department, Valerie Braithwaite Nelson, the co-chair of the appellate practice committee of our association. She has been working on this for quite a while and I wish to congratulate her on getting this this amazing appearance from a sitting United States Supreme Court Justice. Justice Sotomayor is a native New Yorker, who, after graduating from law school, practiced in the New York State Courts as an Assistant District Attorney in New York County, as a trial lawyer, and later as a commercial litigator in federal court. She became a United States District Court Judge in August of 1992, a Judge of the United States Circuit Court in 1998 and a Supreme Court Justice in 2009. We are proud to have her speak in front of our organization, and please be on the lookout for registration and attendance details.

Another exciting event that occurred in September was our official grand opening and ribbon cutting celebrating the grand opening of our new QCBA offices, as well as those of the Queens Volunteer Lawyer Project located at 88-14 Sutphin in Blvd. I would like to thank the distinguished invited guests who appeared and helped cut the ribbon and attended the reception afterward. As I mentioned in my last message, please feel free to stop by, say hello to our staff and check out the new offices.

I would like to congratulate Justice Philip Hom who was appointed as an associate justice of the Appellate Term, Second Department, 2nd, 11th and 13th Judicial Districts. He is the first Asian American to sit on this bench of the appellate term. Justice Hom was elected to the bench in 2017 in the Civil Court, and the Supreme Court in 2019. He had a distinguished legal career prior to becoming a judge.

Also, we celebrate Hispanic Heritage month, which runs from September 15th to October 15th. By the time of this publication, we will have had several events presented by QCBA, organized by our Diversity & Inclusion Committee and will have cosponsored two events taking place in the Civil Supreme Court and Criminal Supreme Court buildings. Originally, National Hispanic Heritage week was established and signed into law during the presidency of Lyndon Johnson in 1968. In 1988, It was expanded to a one month, during the Reagan administration, running from September 15th to October 15th annually. I wish to recognize our Latino lawyers of Queens and the entire Latino community in celebrating National Hispanic Heritage Month. I am sure there will be other events honoring the Latino community and they are active and valued members of QCBA. There are a number of Latino lawyers who have been elected to the Civil Court and Supreme Court benches, who serve on the Appellative Division and the Court of Appeals, as well as federal courts. We are proud to celebrate with them.

Internally, at QCBA, we are working on revitalizing the lawyer referral program. We are also adopting a new web platform in the next few months, which we hope will improve our members experience going forward. This will take a few months to implement, but it should lead to an enhanced experience for our members.

I sincerely hope that you can attend some of our continuing legal education programs as most of them are free, thanks to our sponsors, and other programs that we either sponsor or co-sponsor. Thank you for reading, and I hope to see you around in the future.

The Honorable Patricia Polson Satterfield (1942-2023)

BY HON. CHEREÉ A. BUGGS

On September 6, 2023, the Hon. Patricia Polson Satterfield (Ret.) passed away. She was a Queens trailblazer, judiciary luminary, community servant, and gifted musician/vocalist. In 1990, when Justice Satterfield was elected to the Civil Court of the City of New York, Queens County she became the first African-American woman elected to the judiciary in Queens. Subsequently, in 1998, she was elected to New York State Supreme Court, Queens County.

Justice Satterfield was born Etta Patricia Polson on July 10, 1942 in segregated, rural Middlesex County, Virginia to Grady and Thea Polson. Her mother was an elementary school teacher; and while her father began his career as an educator, he ultimately became a dentist, graduating with his D.D.S. degree in June 1946, a little more than a month before young Patricia's fourth birthday. Dr. Polson became the first and only Black dentist in the Middle Peninsula area of Virginia.

In an oral history of her life produced by the Samuel Proctor Oral History Program (based at the University of Florida), Justice Satterfield described her childhood as a "happy," structured one. Her mother and maternal grandmother, accomplished musicians, exposed Patricia and her sister Jacqueline to music early. Shaped by that musical influence, she received a Bachelor of Music degree from Howard University; before graduating, she studied with cellist Pablo Casals in Puerto Rico. While at Howard, the late Pulitzer Prize and Nobel Prize-winning author Toni Morrison, a professor at the university during Justice Satterfield's time there, taught an English class in which she was enrolled as a freshman. The late Stokely Carmichael, later known as Kwame Ture, was one of Justice Satterfield's classmates at the college.

After graduating from Howard, she enrolled in Indiana University to pursue a Master's degree in Opera. There, she met her husband, the late Preston T. Satterfield, himself a graduate student at the University, days after graduating with her Master's degree. They married in a matter of weeks. The Satterfields moved from Indiana to Virginia, and then in 1969 to Queens, New York, where they raised their daughter Danielle, and where they remained until Justice Satterfield's 2011 retirement from Supreme Court. She and Preston were married for 52 years, until his 2018 passing.

While home on maternity leave in the 1970s, Justice Satterfield, who had been teaching, pondered her future. She ultimately decided

to attend law school, becoming an evening student at St. John's University School of Law, and continuing to teach during the day. She graduated in 1977. Before becoming a judge, she was an assistant deputy counsel and senior counsel with the New York State Office of Court Administration's Counsel's Office.

Justice Satterfield embraced her place in history, and loved serving as a judge; but even more, her passion was working to make a difference in the lives of others through professional and community-based organizations, including but not limited to: Jack and Jill of America, Inc., Queens Chapter; the Greater Queens Chapter of The Links, Inc.; the National Association of Women Judges Color of Justice program; Samaritan Village, Inc.; the Middlesex (Virginia) County Museum and Historical Society; and the Heritage Committee of Middlesex County. In 1999, she helped establish St. John's University School of Law's Ronald H. Brown Center for Civil Rights, which seeks to support outstanding prospective and current law students who have overcome socioeconomic and educational disadvantage, and to encourage their interest in social justice. She was also a member of Alpha Kappa Alpha Sorority, Inc.

In addition to her organizational activities, on countless occasions, she happily shared her immense vocal talents whenever her busy schedule permitted. One such occasion was in April 2001, when she opened a special citizenship ceremony at Flushing Meadows Park with "America the Beautiful." The event was sponsored by the Queens County Bar Association as part of its 125th anniversary celebration.

Justice Satterfield was the recipient of many awards and accolades, but was particularly humbled to have received the Ellis Island Medal of Honor in May 2022. She was one of 85 medalists recognized for service and leadership in their professions and in the community who exemplify American values. "What an incredible experience to interact with international luminaries," she said about the event. "It is an experience of a lifetime."

Unquestionably, Justice Satterfield's legacy lives on in her daughter, Dr. Danielle Williams, her son-in-law, Allen David Williams, Sr., and in her grandsons, Allen David Williams, Jr. and Aaron Nicholas Williams; but that legacy also continues on in the many people and organizations who and which have benefited from her tireless efforts to uplift others. Importantly, those of us who stand on her shoulders will continue to remember and pay homage to the Honorable Patricia Polson Satterfield, a Queens history maker and leader.

Hon. Cheree A. Buggs, is a Justice of the Supreme Court, Queens County, and an Associate Justice of the Appellate Term, Second Department, 2nd, 11th and 13th Judicial Districts

1 *"150 New U.S. Citizens Sworn In As Queens Celebrates Diversity," Queens Chronicle, April 26, 2001, https://www.qchron.com/editions/queenswide/new u s citizens sworn in as queens celebrates diversity/article_f0a87684 8a10 54f9 9f24 43b88f7f7af3.html*

2 *Making an Impact," by Riverside Foundation, 2022 Annual Report, https://issuu.com/riverside-foundation/docs/230313_foundation_annual_report_2022_v5/s/25826402*

Young Lawyers Committee Happy Hour

SEPTEMBER 28, 2023

The Queens County Bar Association (QCBA), the Queens County Women's Bar Association (QCWBA) and the Brandeis Association of Queens County hosted a Happy Hour Mixer at Austin's Ale House in Kew Gardens on September 28, 2023 to kick off the autumn season. Mitra Hakimi Realty Group and Davidoff Law sponsored the event, which was planned and organized by the QCBA Young Lawyers Committee.

The inclement weather did not stop the party at this event! Everyone made the effort to come even though there was a downpour and the networking and camaraderie was a wonderful thing to see. Among the nearly 65 guests in attendance were QCBA President Michael Abneri, QCWBA President Elizabeth Newton, Brandeis Association Chairperson Hon. Gia Morris, QCBA Young Lawyers Committee Co-Chair Sydney Spinner and Vice Chairs John Ryan and ADA Mary Michalos, numerous judges and a special guest appearance from Queens County District Attorney Melinda Katz.

District Attorney Katz said: *"I appreciated the opportunity to meet with the Young Lawyers Committee and speak to this group of passionate attorneys. The Queens County Bar Association represents attorneys from different practice areas and events such as this are important in bringing everyone together."*

Ms. Spinner kicked off the speeches by thanking all those in attendance. "I think it is important for us to get together and get to know each other better. I love seeing all these familiar faces and judges, as well as many new faces. These events help keep our bar associations alive." Mr. Abneri thanked our sponsors who help make these events a reality with their generous contributions. Ms. Newton, of QCWBA and Justice Morris both welcomed the group and stressed the importance of networking and social events. All three leaders echoed the importance of inclusivity and togetherness. Ms. Spinner later added, "I am pleased to announce the newest Vice Chair of the Young Lawyers Committee for the Queens County Bar Association, Assistant District Attorney, Mary Michalos. The DA's office has so many young attorneys, it is important for us to give them a voice in our section at the bar association. We look forward to working more closely with the Queens County District Attorney and are so proud to have her at this event."

The QCBA Young Lawyers Committee plans social and networking events throughout the year, including a Happy Hour co-hosted with the LGBTQ+ Committee scheduled for Thursday, October 19; their annual Friendsgiving fundraiser on Thursday, November 16 benefitting Dancing Dreams, a local nonprofit organization, and more. The committee also plans CLE programs, including their acclaimed ABCs series, each dealing with a different area of the law. Previous CLEs have included "The ABCs of Real Estate", "The ABCs of How To File An Uncontested Divorce", "The ABCs of Estates" and "The ABCs of Bankruptcy". Their newest offering, a four-part series titled "The ABCs of Guardianship", kicks off next week. Please check the QCBA website (www.qcba.org) for more information and details of these and other upcoming event.

Ribbon Cutting Ceremony

SEPTEMBER 21, 2023

New Queens County Bar Association Office
88-14 Sutphin Blvd., Jamaica, NY

PHOTOS BY WALTER KARLING

Queens County Bar Association

88-14 Sutphin Blvd, 3rd Floor, Jamaica, NY 11435 • Tel 718-291-4500 • www.QCBA.org • CLE@QCBA.ORG

Sponsored by:

MITRA HAKIMI REALTY GROUP

The Law Offices of FRANK BRUNO JR.

Dignity MEMORIAL

The Young Lawyers Committee & The Elder Law Committee Presents

The ABCs of Guardianship

Hosted by:

Sydney A. Spinner, Esq. & Sean C. Acosta, Esq. - *Co-Chairs,* Young Lawyers Committee

Brian R. Heitner, Esq. - *Chair,* Elder Law Committee

Etan Hakimi, Esq. - Sponsor

Topics & Panelists:

October 10, 2023, 1pm – 2pm: Attorney for AIP
Justice Lee Alan Mayersohn, *Queens County Supreme Court*
Edmond W. Wong, Esq., *Law Office of Edmond W. Wong, PLLC*

October 17, 2023, 1pm – 2pm: Court Evaluator
Justice Bernice D. Siegal, *Queens County Supreme Court*
Deidre M. Baker, Esq., *Makofsky Law Group, P.C.*

October 24, 2023, 1pm – 2pm: Guardian
Justice Wyatt N. Gibbons, *Queens County Supreme Court*
Danielle M. Visvader, Esq., *Abrams Fensterman, LLP*

October 31, 2023, 1pm – 2pm: Court Examiner
Frank Bruno, Jr., Esq., *Law Office of Frank Bruno, Jr.*
Panel Discussion with all presenters.

Co-sponsored by:

Program: Each part will include a brief overview of Article 81. Topic presentation from the speaker. Tips & tricks from the Judge with Q&A.

CLE Credit: 1.0 in Professional Practice for each session.

Transitional Course – Valid for All Attorneys. QCBA has been certified by the NYS CLE Board as an Accredited CLE Provider in NYS, 10/2022 - 10/2025.

Great for Newly Admitted Attorneys!

Free to all QCBA, QCWBA, Brandeis & LLAQC Association members.

RSVP: QCBA, QCWBA, Brandeis & LLAQC Member in Good Standing- $0
Non-Member- $35.00 each session

Must Register & Pay by October 6th to receive ZOOM access. WWW.QCBA.ORG or EMAIL: CLE@QCBA.ORG
No Refunds/credits if registration is not canceled by October 6, 2023.

50 Years And Counting: Housing Court Reaches The Half Century Mark

BY HON. GEORGE M. HEYMANN

This month the NYC Civil Court will host a ceremony honoring five decades of service by the NYC Housing Court. Its mission is to ensure that both landlords and tenants have access to their own venue in which to resolve all aspects of disputes, some fairly simple, others far more complex, regarding residential housing in the five boroughs.

Officially known as the "Housing Part" of the Civil Court, it was created by statute in 1973, as opposed to being a "constitutional" court, to alleviate the vast number of landlord-tenant matters that were overburdening the Civil Court. Without its existence, the Civil Court would have collapsed under its own weight of cases. Notwithstanding its vital role, and the responsibilities that this new "court" acquired, it has always been treated as "the stepchild" of the Civil Court since its inception. It is a highly specialized court dealing with issues whose decisions have a major impact on its litigants. With the exception of Family Court, no other court comes close to the tensions, emotions and, often times, downright hate between the parties. It is no small task for the judges presiding in these proceedings to keep things running smoothly and efficiently, especially with the oversized calendars and undersized courtrooms, filled to capacity on any given day. Unlike Family Court, where the judges are on par with Supreme Court justices, at least as far as their salary, Housing Court judges have always been given a salary several percentages lower than a Civil Court judge. Every issue in Civil Court ultimately boils down to dollars and cents, whereas in Housing Court individuals, and even entire families, face the possibility of walking out of courthouse about to become homeless. While it may be the nature of the beast, believe me, no judge takes pleasure in depriving someone of his or her home. Next to one's health, having a roof over your head is of utmost importance.

Initially, aside from a reduced salary [which continues to this day (shameful!)] Housing Court judges were called "hearing examiners"; they were not entitled to wear robes; did not have special parking placards that other judges received and were not invited to attend the annual summer conferences for every other judge statewide, among other things. That all began to change by the efforts of one of the original individuals appointed to serve in this new part, the late Queens Supreme Court Justice Eugene J. Berkowitz. He formed the Association of Housing Court Judges and served as its first president in an effort to have the Housing Court treated with dignity and respect. Today, but for the salary, Housing Court judges have achieved a higher status within the court system they did at the outset.

The answer to the question of whether Housing Court is a landlords' court or a tenants' court depends on which side of the judicial equation you find yourself. Naturally, landlords believe [and recent legislation supports their position] that the court is skewed in favor of the tenants, while the tenants, of course, believe the contrary is true.

While all cases in the Housing Court are denominated as "summary proceedings" because they were created by statute and designed to be resolved quickly, the reality is that many, if not most, matters can remain active for at least six months or more, which is a virtual boon to the tenant seeking to avoid or forestall an eviction. This situation became even more exacerbated with the passage of the Housing Stability and Tenant Protection Act [HSTPA] in 2019, which, as briefly discussed below, extended almost every time frame regarding service of notices, warrants of evictions and stays of execution for up to a year, etc., all of which is favorable to tenants to avoid eviction.

A lease is a contract and when breached by either party, there are consequences. If landlords do not provide housing in accordance with the provisions of the lease, they can be issued violations and required to pay fines that can be quite substantial if conditions that need to be corrected go unabated, or be issued a rent reduction order by DHCR or be penalized by a rent abatement in favor of the tenant after a hearing or trial. In drastic situations, owners may be required to turn their buildings over to receivers until everything is satisfactorily resolved. When tenants fail to live up to their end of the bargain the landlord's only recourse is to commence a proceeding in Housing Court, as self-help is illegal.

On June 14, 2019, there was a sea-change of laws that resulted in a radical transformation of NY's Landlord-Tenant relationships. The HSTPA not only affected all cases from that date forward, it included all matters pending at that time.

In years past, changes to Rent Stabilization and Rent Control Laws were incremental. The statutes would sunset every four to eight years, requiring the Legislature re-examine them and make a determination as to whether to declare the existence of a housing emergency in order for the regulations already in place to continue, subject to any new amendments.

The HSTPA of 2019 was anything but incremental in its approach to NYC's housing laws. It was a tsunami, revamping a substantial amount of the housing laws in one felled swoop and making rent regulations permanent by eliminating all sunset provisions and expiration dates, thereby depriving landlords the automatic opportunity to revisit the issue on a periodic basis. As a result, whether a real housing "emergency" exists or not, it will continue on in perpetuity by Legislative fiat. Moreover, the provisions are now in effect statewide.

As if this statute didn't wreak enough havoc in the Housing Court, who could predict that only a year later, the entire court system, nay, the entire world, would be on lockdown due to COVID-19. Clearly, new protocols were put into place to get the courts up and running again. It was during this period that, in my opinion, Housing Court rose to the occasion to help both landlords and tenants who were trying to cope with a myriad of housing issues. More than any other court, Housing Court was front and center to meet the many unexpected challenges brought on by the pandemic.

My two-decade tenure as a Housing Court judge was pure happenstance. Until I became a Principal Law Clerk in Queens Supreme Court in 1981, the thought of becoming a judge wasn't even on my radar, and Housing Court, in particular, even less so. After working in the judiciary for several months, and given the huge amount of responsibility of doing everything short of wearing the robes, I began to consider becoming a judge myself. At that time, I focused on the Civil and Criminal courts. In 1986, after the first Justice I clerked for was no longer on the bench, I was hired by none other than Justice Berkowitz, who I mentioned earlier. We developed a wonderful "father-son" relationship and he became my mentor, helping to advance my career.

Although he was now at the pinnacle of his career, he never forgot his early days in Housing Court and would love to regale me with his war stories. Aware of my interest in becoming a judge, he would constantly urge me to apply for the Housing Court. I rebuffed him each time. When he finally confronted me as to why I wouldn't apply for the position I gave him three succinct reasons: 1] I never heard anything good about Housing Court; 2] I know nothing about Landlord-Tenant Law and 3] I don't want to know anything about Landlord-Tenant Law. But he was persistent. During the course of the following year, I learned everything I possibly could on the subject and then

CONTINUED ON PAGE 14

ESTATES UPDATE 2023

BY DAVID N. ADLER

CONTINUED FROM PAGE 1

The utilization of cell phone cameras/computers comprising direct interaction, and same day electronic transmission of a copy of the signature page, remain key components of this process.

Yet, it was noted in a significant decision in Queens County, that despite the lack of physical presence of the witnesses, the essential formalities of execution must still be complied with. In Matter of Holmgren 74 Misc 3D 917, (Surr Ct, Qns County 2022), Surrogate Kelly indicated in his decision that the Executive Order, "... occasioned by the extraordinary circumstances surrounding the then emerging Covid-19 Pandemic, did not, as many wrongfully assume, replace the formal requirements of EPTL 3-2.1. Rather, it solely authorized the use of audio-visual technology to satisfy the "presence" requirements contained in the statute".

DIGITAL ASSETS

The digital asset presents a new type of property with respect to estate administration. EPTL Article 13-A was enacted in September 2016 and addresses the ability of a fiduciary to gain access to digital assets. Digital assets are defined as any electronic record in which the user has a right or interest. The statute dictates that priority in granting access emanates through the use of an online tool. This is a specific tool dictating the terms of access between the user and the provider.

In the event that no online tool or similar governing instrument is in effect, the user's direction in a will, trust or Power of Attorney prevails. This may incorporate specific language in the above documents pertaining to the digital assets. In all scenarios, the fiduciary must provide a written request to the service provider plus other relevant documentation (i.e. Letters Testamentary, Power of Attorney, etc.). Despite this, the service provider may still request a Court Order reflecting certain facets of access.

The default provision for the above is a Terms of Service Agreement (TOS) Agreement. These are agreements generally entered into between users and providers at the outset of the relationship. They dictate who gains access upon death, among other user guidelines. They are provider created, and may significantly limit access.

Ideally, utilization of an online tool and specific direction in a dispositive instrument (will, trust, power of attorney) should achieve the individual's intent to provide access. Dispositive instruments should include additional language of and pertaining specifically to the fiduciary power to access digital assets. Further, there should be reference in the dispositive instrument to the content of the digital asset, which will comprise its substance, as opposed to just a catalogue or mere listing. The statute enacted by New York State has national overtones and has been adopted by numerous other states. It attempts to balance the influence maintained by the providers, privacy issues and fiduciary rights and responsibilities. The parameters of this recently enacted statute remain subject to further judicial scrutiny.

QUEENS COUNTY

Our seminar last year, primarily initiated and coordinated by Surrogate Kelly, concerned a review of the mechanics, and all updates on electronic filing in Surrogate's Court. The staff at the Office of Court Administration were extremely helpful participants in this thorough program. Our seminar this year, scheduled for Thursday, November 16, will focus on Administration Proceedings, their necessity, operation and legal parameters.

50 Years And Counting: Housing Court Reaches The Half Century Mark

BY HON. GEORGE M. HEYMANN

CONTINUED FROM PAGE 13

submitted my application. It was a grueling process but ultimately a successful one.

The 20+ years I served on the Housing Court bench were the best of my professional career. Difficult – yes! Rewarding – absolutely! I take great pride in the fact that I was considered by attorneys on both sides of the aisle as an intellectual on the bench, who was known for adroitly resolving complex legal issues. Moreover, I gained an excellent reputation for my prolific writing and vast number published decisions that are still being cited.

In the intervening 12 years since my retirement (where did that time go?!), I'm still writing articles and presenting CLEs on L&T law. I guess after 30 years it's part of my DNA. I'm always flattered by the number of practitioners who still reach out to me for advice.

Happy 50th Anniversary Housing Court! I hope in the future, as I've stated in the past, the powers that be will see fit to place you on equal footing with the Civil Court. Truth be told, you are not a "Part" of that court but an entity unto yourself that should be given the esteem you are entitled to after all these years.

George Heymann is a retired judge of the NYC Housing Court; former adjunct professor of law, Maurice A. Deane School of Law at Hofstra University; certified Supreme Court mediator; of counsel, Finz & Finz, PC and a member of the Committee on Character and Fitness, Appellate Division, Second Department, 2nd, 10th, 11th & 13th Judicial Districts.

Supreme Court Puts a Firm Limit on the Use of Parody in Marketing

BY TANEEM KABIR, ESQ., KABIR LAW PLLC

In a landmark unanimous decision, the Supreme Court of the United States firmly put a limit on protecting parody as a form of free speech in the context of marketing and trademarks.

Background of the Case:

Trademarks guide the consumer in selecting which products the consumer wants to buy and which ones they want to avoid. An effective trademark helps the business owner enjoy the benefits of their product's reputation.

The federal Lanham Act protects trademark owners by creating two federal causes of action: trademark infringement and trademark dilution. In infringement claims, the question is whether the defendant's use of the subject mark is "likely to cause confusion, or to cause mistake, or to deceive."[1] In dilution claims (which can succeed even if an infringement claim fails), the question is whether the defendant's use of the plaintiff's "famous mark" harms the reputation of the plaintiff. A "famous mark" is one that the public widely recognizes as designating the source of the mark owner's goods. The reputational harm can happen by tarnishment resulting from an "association arising from the similarity between" the two marks.[2]

Defendants accused of dilution by tarnishment frequently claim that their use of the plaintiff's mark falls under the "fair use" exception which is codified in the statute: "Any fair use…of a famous mark… including use in connection with…identifying and parodying, criticizing, or commenting upon the famous mark owner [are not actionable]." This exception does not apply when the defendant uses the famous mark as a designation of source of their own goods.[3]

The two issues before the Supreme Court were: (1) whether VIP's product was likely to cause confusion with JDP's marks, and (2) whether VIP's product diluted JDP's marks by tarnishment.

VIP Products ("VIP") produces chewable dog toys designed to look like bottles of Jack Daniel's whiskey (manufactured by Jack Daniel's Properties, or "JDP") with some modifications.

The most obvious modification was that VIP's product was designed to be used as a dog toy and contained no alcohol whatsoever. But the other modifications were less subtle. VIP's toy was about the same size and shape as JDP's bottle, and both featured a black label with stylized white text and a white filigreed border. VIP replaced the words "Jack Daniel's" with the words "Bad Spaniels" but used a font style and arch design that was nearly identical to JDP's. VIP added a graphic of a spaniel dog above its arch design. Below the arch, VIP replaced the words "Old No. 7 Tennessee Sour Mash Whiskey" with "The Old No. 2 On Your Tennessee Carpet," also printed in a font style very similar to JDP's product. VIP replaced the words "40% alc. by vol. (80 proof)" with "43% poo by vol." and "100% smelly."

Notably, VIP packaged their toy with a cardboard hangtag containing the disclaimer "This product is not affiliated with Jack Daniel Distillery."

JDP's product and VIP's product presented side-by-side:

Source: court documents

Procedural History of the Case:

JDP owned multiple trademarks over the words, designs, and even shapes of their products. JDP initially demanded VIP to stop selling its Bad Spaniels product. VIP responded by seeking a declaratory judgment that their product neither infringed nor diluted JDP's trademarks. JDP counterclaimed for trademark infringement and dilution.

In summary judgment arguments, as to the infringement claim, VIP argued that because its chew toy product was a type of expressive work, VIP was necessarily shielded from such a claim under the application of the *Rogers* test (described below). As to the dilution claim, VIP similarly argued that such a claim could not apply because their product was a parody of JDP's product.

The District Court rejected both of VIP's arguments, and refused to apply the *Rogers* test to the case. Because JDP's consumer survey evidence showed that the general public was confused about the source of goods when asked about VIP's product, JDP's infringement claim was valid. And even though VIP's product was a parody, it was still associated with dog excrement which tarnished JDP's brand. Furthermore, VIP's product incorporated JDP's marks for the same purpose that JPD used its own marks, (i.e.: to identify the source of a product), so VIP was not protected from JDP's dilution claims.

On appeal, the Court of Appeals for the Ninth Circuit reversed the lower court's ruling on infringement but upheld the dilution claim. The case was remanded for a determination to be made as to whether VIP's product passed the *Rogers* test. The Ninth Circuit believed VIP's chew toy had some expressive and humorous aspects, and a full application of the *Rogers* test was necessary to determine whether

On remand, the District Court went through its *Rogers* analysis and ruled against JDP, finding that JDP could not satisfy either prong of *Rogers*. VIP was granted summary judgment on the issue. JDP appealed to the Supreme Court.

Supreme Court's Ruling and the History of the *Rogers* Test:

The Supreme Court held that going through a *Rogers* test analysis is not appropriate when "an alleged infringer uses a trademark in the way the Lanham Act most cares about: as a designation of source for the infringer's own goods." Here, VIP used branding on its chew toy product that was essentially a derivative of JDP's marks in a way to signal to consumers about who made the chew toy product. When consumers looked at both products, they were likely to be confused about whether JDP made the chew toy or not.

To understand the Supreme Court's reasoning, it would be helpful to examine the history of the Rogers test. The *Rogers* test was developed by the Second Circuit in 1989 when it held that "the Lanham Act does not bar a minimally relevant use of a celebrity's name in the title of an artistic work where the title does not explicitly denote authorship, sponsorship, or endorsement by the celebrity or explicitly mislead as to content."[4] The ruling arose out of a case in which a defendant movie studio produced a film titled "Ginger and Fred" about two fictional cabaret dancers who imitated the performance style of real life dancers Ginger Rogers and Fred Astaire. Plaintiff Ginger Rogers filed an infringement claim under the Lanham Act as to the use of her name in the film's title. The Second Circuit rejected her claim.

The two prongs of the *Rogers* test are: (1) whether the defendant's use is artistically relevant to the underlying work and (2) whether the defendant's use is explicitly misleading as to the source or content of the work. If a defendant passed both prongs, it was shielded from a trademark infringement claim.[5]

Over the years, the *Rogers* test has been used to counterbalance trademark rights with First Amendment interests. Courts have applied the *Rogers* test to cases where a trademark was being used to perform some other expressive function but not to designate the source of a product. In one of the most famous cases applying the *Rogers* test and finding on behalf of a defendant, *Mattel, Inc. v. MCA Records, Inc.*, 296 F. 3d 894, Barbie doll manufacturer Mattel, Inc. ("Mattel") sued MCA Records, Inc. ("MCA") on the grounds that MCA's production of the "Barbie Girl" song by pop group Aqua infringed and diluted Mattel's various trademarks. In the "Barbie Girl" song, Aqua members sung in a doll-like voice and called each

CONTINUED ON PAGE 17

Supreme Court Puts a Firm Limit on the Use of Parody in Marketing

BY TANEEM KABIR

CONTINUED FROM PAGE 16

other "Barbie" and "Ken" in a clear reference to the marks owned by Mattel.

Regarding Mattel's claim that MCA's song infringed Mattel's various Barbie trademarks, the court applied the *Rogers* test and ruled in favor of MCA: "[T]he use of Barbie in the song title clearly is relevant to the underlying work, namely, the song itself….The song title does not explicitly mislead as to the source of the work; it does not, explicitly or otherwise, suggest that it was produced by Mattel. The only indication that Mattel might be associated with the song is the use of Barbie in the title; if this were enough to satisfy this prong of the *Rogers* test, it would render *Rogers* a nullity."[6]

Regarding Mattel's claim that MCA's song diluted the Mattel brand, the court agreed with Mattel that Aqua's song diluted the Barbie trademark, but nevertheless held that defendant's actions fell under the "noncommercial use" exception to a dilution claim. "Noncommercial use" is use that consists entirely of noncommercial, or fully constitutionally protected, speech.[7] Because Aqua's song lampooned the Barbie image and was a comedic commentary on the values that the band believed Barbie to represent, MCA's use of Mattel's marks were exempted.

Regarding JDP's infringement claim, the Supreme Court held that VIP's product was not protected by the First Amendment: "When the accused infringer has used a trademark to designate the source of its own goods—in other words, has used a trademark as a trademark. That kind of use falls within the heartland of trademark law, and does not receive special First Amendment protection."

As to JDP's dilution claim, the Supreme Court held that VIP's product does not fall into the "non-commercial use" exception just because it parodies or otherwise comments on JDP's original product.

Even though VIP's chew toy had some expressive content, the Supreme Court refused to apply the *Rogers* test because the chew toy was also designed in a way to signal to consumers where the product came from (which VIP admitted): "Consumer confusion about source—trademark law's cardinal sin—is most likely to arise when someone uses another's trademark as a trademark. In such cases, *Rogers* has no proper application. Nor does that result change because the use of a mark has other expressive content."

This ruling narrowed the application of the Rogers test to only cases where the defendant was using another's mark in a non-source-identifying way, even if the defendant was also using that mark for expression, parody, or humor.

The Court provided a helpful analogy supporting its ruling:

> "Suppose a filmmaker uses a Louis Vuitton suitcase to convey something about a character (he is the kind of person who wants to be seen with the product but doesn't know how to pronounce its name). Now think about a different scenario: A luggage manufacturer uses an ever-so-slightly modified Louis Vuitton logo to make inroads in the suitcase market. The greater likelihood of confusion inheres in the latter use, because it is the one conveying information (or misinformation) about who is responsible for a product. That kind of use implicates the core concerns of trademark law..." [Citations omitted]

But what about the fact that VIP's chew toy product was displayed in stores with a hangtag that clearly showed VIP's true trademarks? Consider this photo of VIP's hangtag:

The top part of the hangtag displays logos for "Silly Squeakers" and "Bad Spaniels." These logos were not registered as trademarks by VIP, but could these logos (in addition to the text disclaimer at the bottom disassociating VIP from JDP) nevertheless overcome the contention that VIP was using JDP's branding to confuse consumers as to the source of the goods?

The Court believed VIP's conduct in using these logos was actually an admission that VIP was using its Bad Spaniels logos (derived from JDP's trademarks) as trademarks, that is, to identify the source of VIP's product. So was the use of these Bad Spaniels marks enough to cause confusion? This was the only narrow issue remanded down to the lower court for determination.

Did it not matter that VIP was trying to make a product that obviously parodied JDP's product? The "fair use" exclusion to a dilution claim applies when the defendant parodies, criticizes, or comments on a famous mark owner—but not all the time. The Court pointed out that the federal statute codifying the fair use exclusion actually had its own exclusion: "it does not apply when the use is 'as a designation of source for the person's own goods or services.'"[8] In that circumstance, the defendant does not get away with their parody, criticism, or commentary on the famous mark owner.

The Court explicitly claimed its opinion in this case was narrow: "On infringement, we hold only that *Rogers* does not apply when the challenged use of a mark is as a mark. On dilution, we hold only that the noncommercial exclusion does not shield parody or other commentary when its use of a mark is similarly source-identifying."

A Warning for Manufacturers:

The Court's ruling on this case should be a warning for any manufacturer that incorporates any mark holder's trademark into their own marketing. Those manufacturers must now be cautious that their use of the mark holder's branding has purely humorous, parody, or commentary intentions. If such use can be argued to serve any source-signaling purposes, the manufacturer may face infringement and dilution claims from the mark holder. Perhaps this puts an overall chilling effect on the speech that a manufacturer can express.

Taneem Kabir is a versatile attorney with a varied background in civil litigation, technology, and intellectual property. He has over a decade of experience setting up business structures, assisting innovators in protecting their valuable creations, and advising clients on wide-ranging transactional and litigation issues. As founder of Kabir Law PLLC, he guides business owners in understanding developments in the law, identifying risk areas, and formulating creative ways to reduce liability.

1 *15 USC § 1114(1)(A).*

2 *15 USC § 1125(c)(2)(A).*

3 *15 USC § 1125(c)(3)(A)(ii).*

4 *Rogers v. Grimaldi, 875 F.2d 994,1005 (2d Cir. 1989).*

5 *Taylar Green, The Rogers Test Dances Between Trademark Protection Under The Lanham Act And Freedom Of Speech Under The First AmendmentI (September 2022), https://www.inta.org/wp-content/uploads/public-files/resources/the-trademark-reporter/TMR-Vol-112-No-05-Green.pdf.*

6 *Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 902 (9th Cir. 2002).*

7 *Mattel, Inc. at 905 (9th Cir. 2002), citing 2 Jerome Gilson et al., Trademark Protection and Practice § 5.12[1][c][vi], at 5-240.*

8 *15 USC § 1125(c)(3)(A).*

The Civil Legal Advice and Resource Office (CLARO)

VOLUNTEER WITH CLARO!

TRACK ONE TRAINING

Required for all volunteer attorneys, Track One provides important context and will prepare you to work on the most common cases seen at CLARO clinics.

OCT. 13TH 1:30PM-5PM

TRACK TWO TRAINING

Open to all, Track Two is particularly well-suited for experienced volunteers or litigators interested in working on more advanced cases at the CLARO clinics.

NOV. 3TH 1:30PM-5PM

New York County Lawyers Association Pro Bono Programs

ACCESS JUSTICE BROOKLYN · QVLP · Legal Services of the Hudson Valley

Get involved with CLARO (the Civil Legal Advice and Resource Office) to provide limited scope legal services to unrepresented New Yorkers facing debt collection through the Courts.

Every year tens of thousands of consumer credit collection cases are filed and the vast majority of defendants are unrepresented. This results in an uneven playing field seen in our courts daily.

Join CLARO to meet the dire need for legal assistance in consumer defense.

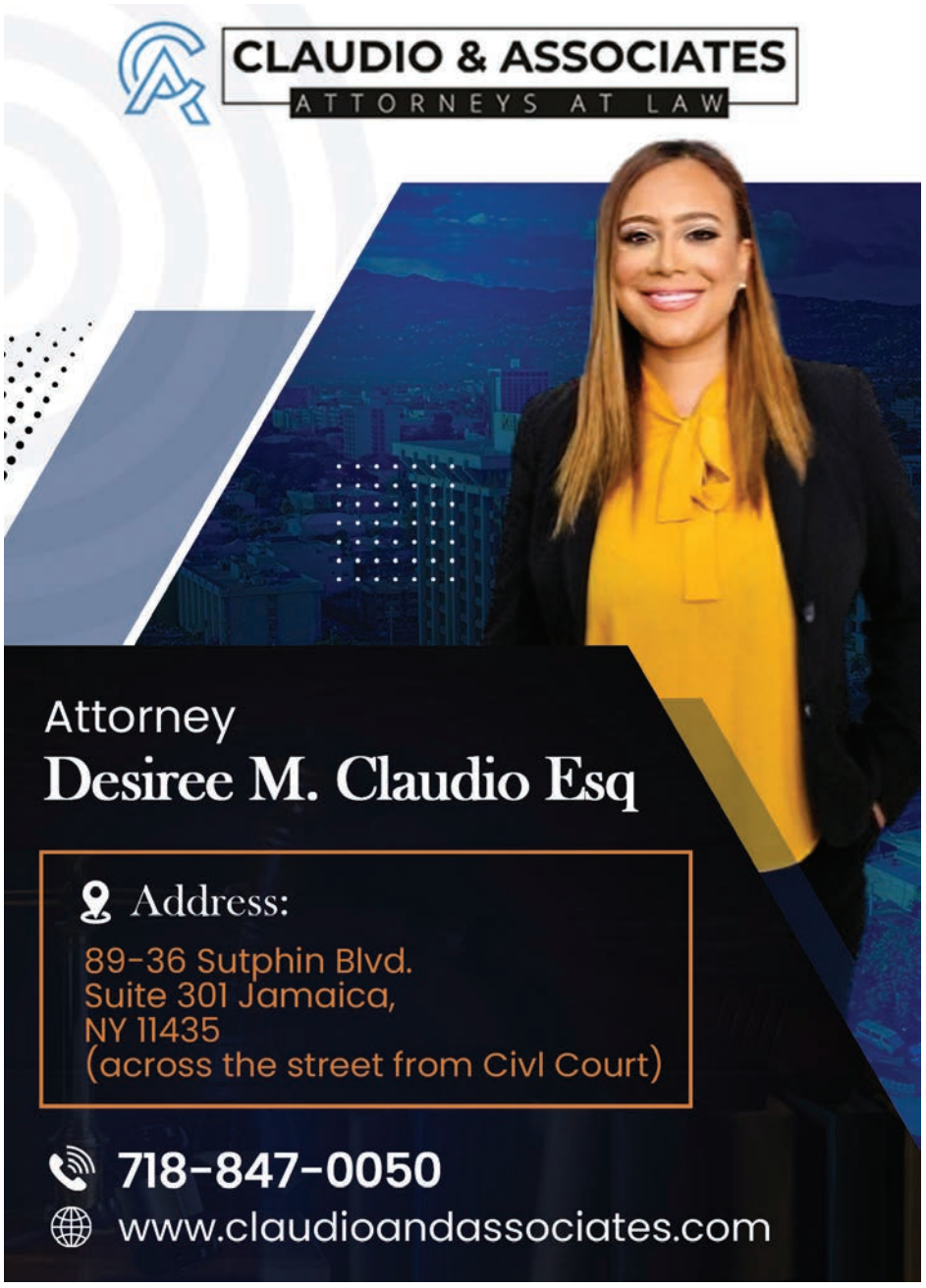
All volunteer attorneys must take a Track One training to qualify to volunteer at:

- Manhattan
- Bronx
- Staten Island
- Queens
- Brooklyn
- Westchester

REGISTER ABOVE!

FEERICK CENTER FOR SOCIAL JUSTICE

FORDHAM UNIVERSITY THE SCHOOL OF LAW



QUEENS COUNTY BAR ASSOCIATION
88-14 Sutphin Blvd, 3rd Floor, Jamaica, NY 11435 • Tel 718-291-4500 • www.QCBA.org • CLE@QCBA.ORG

Sponsored by:

THE JANSEN GROUP
Quality Arbitration Quality Mediation
www.jansenadr.com
516-433-3474
dan@jansenadr.com

CLE Credit: 1.0 in Professional Practice
Transitional Course – Valid for All Attorneys. **Accredited CLE Provider in NYS, 10/2022 - 10/2025.**

Civil Court Committee and Supreme Court Committee presents
ZOOM CLE

NO-FAULT LITIGATION 2023 UPDATE

Wednesday, November 1, 2023
1:00 pm - 2:00 pm

Opening Remarks
Hon. Chereé A. Buggs
Associate Justice, Appellate Term, Second Department
2nd, 11th and 13th Judicial Districts

Darryl E. Lapidus, Esq.
Principal Appellate Court Attorney at the Appellate Term, Second Department

Hamid M. Siddiqui, Esq., *Moderator*
Chair, Civil Court Committee

PROGRAM: Discussion on recent appellate cases and their impact upon, among other things, examinations under oath, the workers' compensation fee schedule, judicial review of arbitration proceedings, and actions seeking relief based upon a declaratory judgment.

Registration: QCBA Member in Good Standing - $0.00 Non-Member - $35.00

Must Register & Pay by October 30th to receive access. WWW.QCBA.ORG or EMAIL: CLE@QCBA.ORG
No Refunds/credits if registration is not canceled by October 30, 2023.

Protecting Your Inheritance During A Divorce

BY FRANK BRUNO, JR.

"I'd marry again if I found a man who had 15 million and would sign over half of it to me before the marriage and guarantee he'd be dead in a year." – Bette Davis

"Anybody who's been through a divorce will tell you that at one point they've thought murder. The line between thinking murder and doing murder isn't that major." – Oliver Stone

"A son can bear with equanimity the loss of his father, but the loss of his inheritance may drive him to despair." – Nicolo Machiavelli

Divorce is stressful, the last thing you need is anxiety about losing a portion of your family inheritance to your spouse. Marital property is divided and separate property is not. New York, an equitable distribution state, allows for separate property to be kept by each spouse following divorce. Only marital property is divided. Inheritance is considered separate property, except under certain circumstances, it can become marital property subject to equitable division. Equitable implies fair and the Court will divide property in a way that it considers fair. Fair is in the eye of the beholder. The Court treats separate property and marital property differently. Separate property is anything earned or owned prior to the marriage or after separation. Definitions as always in the law are tricky and specific. For example, is the separation merely physical or only after a legal separation or filing of the Index Number and service of a Complaint in a divorce?

Let's try again: Inheritance is always separate property unless it is caused to not be separate property. To keep your inheritance after divorce, you must be able to prove to the court that it has remained apart and distinct from your marital property. If a person was unaware of this when the inheritance was received, mistakes could have been made to complicate your divorce. The inheritance could have been placed into a joint account or used to pay off a joint debt. The specific facts and intent come into play such as whether the separate property was comingled inadvertently or intentionally and/or does that even mitigate the issue. Or was it transmuted?

Marital property includes all income and assets acquired throughout the marriage. It does not matter who earned the income or whose name is on the title of property acquired during the marriage. It all remains marital property. However, if an inheritance received during the marriage was kept separate and utilized to purchase something new, then that property would always remain separate… unless some other specific event caused it to be marital property such as using marital funds to pay for some portion of the upkeep or mortgage on the new property. If so, the fight would be on. Examples of Marital Property include any asset acquired during the marriage, such as real estate purchased during the marriage, personal property such as clothing, laptops, art, motor vehicles, planes, or boats purchased during the marriage; bank or brokerage accounts, cash, securities, pensions, and retirement accounts acquired throughout the marriage; gifts exchanged between spouses; and advanced degrees such as law or medicine.

The category of separate property, not subject to division, includes real property, investments, and cash owned before getting married and personal injury compensation, gifts, and inheritances obtained during the marriage. For real property, this includes a separate property contribution to marital purchases; a disclosed use of separate property money to make a down payment - this means consent to use separate property and have it reimbursed later to the contributing spouse; property designated as separate property in a prenuptial, postnuptial, contract, or consented agreement; and property obtained in exchange for separate property during the marriage. Finally, the ever-complicated increase in value of separate property remains separate provided that the spouse made no contributions during the marriage that resulted in that increase.

How is inheritance handled in Divorce? An uncontested stipulated agreement can divide assets in a way agreeable to the parties; more than the required amount can be shared or less. When litigants do not agree about asset division and there is a trial, the Court will determine the marital estate equitably. Equitable does not always feel fair.

The super-secret method to keep assets separate is by not adding the items to the marital estate. Keep the inherited brokerage account in your singular name. Stocks and bond accounts deposited into a jointly owned investment account will be considered marital property, and you will lose part of your inheritance during the divorce. Should you use inherited money to purchase real estate with joint title, your inheritance will become marital property.

SUPREME COURT CONSIDERATIONS TO DIVIDE AN INHERITANCE!

If your inheritance has been commingled into marital property, Courts will consider the specific circumstances when dividing the jumbled inheritance.

Along with intuition and the law here are some questions to address: What was the income and property at the beginning and end of the marriage? How long was the marriage? What is the age and relative health of the parties, age of minor children, health insurance coverage and cost along with child support and maintenance payments? Relative expenses? Each spouse's pension rights and inheritances? Contributions to marital property made by a non-titled spouse? Whether the marital property or investment property can be sold easily to divide money instead of property? What are the anticipated financial circumstances for each spouse going forward? How complicated are the assets and valuations? How about a jointly held business? Sell or divide? Was there marital waste or dissipation? Were assets concealed? Can the asset be split or sold with minimal tax impact? All these factors and more are considered.

PROPER PLANNING TO PROTECT YOUR INHERITANCE FROM DIVORCE

Plan and work the plan. Understand the rules prior to accepting an inheritance to keep inheritance as separate property. Some strategies: Use prenuptial or postnuptial agreements detailing specific inheritance as separate property. Retaining proof/documents relating to the item with its exact value. Place your name on the inherited real estate deed and do not add your spouse to the title. Place inheritance in a separate account. Use a Trust for inherited assets

Work the plan with a seasoned divorce practitioner and an estate attorney. The nuances make all the difference.

Frank Bruno, Jr. is Past President of the QCBA, a Member of the Board of Managers, a regular contributor to the Bar Bulletin and a practicing attorney for more than 26 years.

The Practice Page

The Discoverability of Surveillance Videos

BY HON. MARK C. DILLON
Serves on the Appellate Division, Second Department

This column addresses the rules that pertain to the disclosure of *sub rosa* surveillance videos. Typically, surveillance videos are taken by investigators retained by defendants to surveil personal injury plaintiffs who may or may not be performing physical activities contrary to the limitations they claim in their litigations. Indeed, a videotape that impeaches a plaintiff's sworn deposition or trial testimony can be quite damning in the eyes of a jury.

The bar's attention is directed to the opinion rendered in the case of *Pizzo v Lustig*, 216 AD3d 38 (2nd Dep't. 2023). The plaintiff in *Pizzo* sought damages for personal injuries allegedly incurred as a result of a two-vehicle automobile accident. The plaintiff claimed that the serious injury threshold was met by virtue of significant limitations and permanent consequential limitations as recognized by Insurance Law 5102(d) and 5104. Videotapes of the plaintiff performing activities inconsistent with his litigation claims could be not only probative, but potentially dispositive. The defendant's insurance carrier hired an investigative agency, ISG, to undertake *sub rosa* surveillance of the plaintiff. ISG videoed the plaintiff on a total of eight occasions, the first prior to his deposition, the second a mere two minutes after the plaintiff's deposition concluded, and on six other post-deposition dates between June 25, 2020 and December 20, 2020.

Complicating matters, the plaintiff had served a notice for discovery and inspection as early as January 11, 2019 demanding, *inter alia*, the production of photographs, motion pictures, and films of the plaintiff. Moreover, the Supreme Court had rendered a preliminary conference order dated September 27, 2019 directing the disclosure within thirty days of *inter alia* surveillance videos. The one video of the plaintiff that preceded his deposition was not disclosed within the timeframe contemplated by the court's conference order.

Prior to the filing of the note of issue, the plaintiff moved for summary judgment on the issue of threshold injury. The motion prompted the defendant to disclose its eight videotapes of the plaintiff and ISG's reports regarding them, and thereafter sought to use them to refute the plaintiff's claims of significant and permanent consequential limitations as defined by the Insurance Law. The disclosure was roughly three months after the last of the videos had been obtained. The plaintiff then moved to preclude the videotapes on the ground that they were untimely disclosed and in violation of the initial discovery demand and court-ordered deadlines. The Supreme Court denied preclusion of the videotape evidence and separately denied the plaintiff's motion for summary judgment. The court's determination was modified on appeal to the extent of precluding the use of the nine-second videotape of the plaintiff acquired *prior* to his deposition, but affirmed the use of the post-deposition videos.

Here is the reasoning: The pre-deposition video should have been precluded as the Court of Appeals had held in *Tai Tran v New Rochelle Hosp. Med. Ctr.*, 99 NY2d 383, 388-90 (2003) that surveillance video must be disclosed prior to a party's sworn testimony, consistent with the requirement of CPLR 3101(i) that there be "full disclosure" to prevent unfair surprise to a party. The defendant in *Pizzo* had even conceded that the pre-deposition video of the plaintiff was subject to preclusion. However, nothing in CPLR 3101(i), which governs the disclosure of surveillance video, prevents the acquisition of post-deposition video, and the statute itself imposes no hard-and-fast deadline for the videos' post-deposition disclosure. Trial courts may therefore exercise discretion in regulating videotape disclosure issues (*Polakoff v NYU Hosps. Ctr.*, 176 AD3d 613, 614), subject to their additional discretion to manage their calendars and determine whether to preclude evidence for the violation of discovery orders under CPLR 3126(2) (*Jenkins v Photo Prop. Servs., LLC*, 54 AD3d 726, 726-27). CPLR 3101(h) recognizes that disclosure is a continuing obligation. But in the realm of surveillance, the piecemeal disclosure of each separate videotape would defeat the purpose of further surveillance, as it might incentivize certain plaintiffs to then act differently, hide abilities, or exaggerate movements for the hidden camera, inconsistent with the truth-finding function of the trier of fact. Parties who acquire post-deposition videotapes may therefore disclose them together rather than on a piecemeal basis.

In *Pizzo v Lustig*, which was introduced to the reader in the first paragraph, the trial and appellate courts declined to preclude the post-deposition videos as their disclosure occurred before the filing of a note of issue while discovery was still open, not long after the latest tape had been obtained, and as the plaintiff failed to establish prejudice from the timing of the disclosure. But the appellate court warned that the opinion not be construed to suggest that post-deposition videotape may never be precluded. These cases are fact intensive. The disclosure of *sub rosa* videotape should not be held off for too long. Counsel with surveillance materials subject to CPLR 3101(i) should therefore proceed deliberatively and with caution to comply with the spirit and intent of CPLR 3101(i).

Mark C. Dillon is a Justice of the Appellate Division, 2nd Department, an Adjunct Professor of New York Practice at Fordham Law School, and a contributing author of CPLR Practice Commentaries in McKinney's.

Queens County Bar Association

88-14 Sutphin Blvd – 3rd Floor, Jamaica, NY 11435 • Tel 718-291-4500 • www.QCBA.org • CLE@QCBA.ORG

President: Michael D. Abneri, Esq.

Young Lawyers Committee

Co-Chairs: **Sean C. Acosta, Esq. • Ben Margolin, Esq. • Eric Renfroe, Esq. • Sydney A. Spinner, Esq.**
Vice Chairs: **John Ryan • Katlyne Ryan, Esq.**

The QCBA Young Lawyers Committee Presents Its Fourth Annual

Thursday, November 16, 2023 • 6:30 PM - 8:30 PM
Location: One Station Plaza, 213-10 41st Avenue, Bayside, NY 11361

SPONSORED BY:

Big Apple Abstract Corp.
Lawrence M. Litwack, Esq.

MITRA HAKIMI
- REALTY GROUP -

We are thankful for our members and sponsors. Please join us in giving thanks, and giving back, as we kick off the holiday season at our fourth annual Friendsgiving fundraiser. All proceeds from this event will be donated to:

DANCINGDREAMS
Dance for Every Child

Located in Bayside, Queens, Dancing Dreams provides dance classes to children with medical and physical challenges by pairing them with a teenage "helper" to support them through the class as they focus on their abilities, not disabilities. We will be joined by the Founder & Director, Joann Ferrara, PT.

Registration fee includes two-hour open bar and appetizers. Additional donations welcomed and appreciated!

$30 per person in advance • $40 per person at the door
WWW.QCBA.ORG

SAVE THE DATE!

HOLIDAY PARTY 2023

Wednesday, December 13, 2023

5:30 pm - 9:30 pm

Location

JERICHO TERRACE
249 Jericho Tpke.
Mineola, NY 11501

Valet Parking • Continuous Open Bar • Elaborate Cocktail Hour Reception including Butler Style Passed Hors d'oeuvres • Gourmet Buffet Dinner • Dessert Display

Glatt Kosher dinner from local restaurant available

Music and dancing by ACC DJ

Registration

$120 per person, through December 4
$145 per person, December 5-December 12
$150 per person, day of or at the door

$1,080 per table of 10, through December 4
$1,305 per table of 10, December 5-December 12

Party Sponsorship:
$300 with any ticket purchase
Sponsors are included in all marketing materials, registration confirmations and reminders and are recognized at the party on signage, multimedia displays and announcements

Queens County Bar Association
President: Michael D. Abneri
Annual Holiday Dinner Committee:
George E. Nicholas, *Chair* • Jay M. Abrahams, *Vice-Chair* • Michele Schuster, *Secretary*
Kristen J. Dubowski Barba • Diana C. Gianturco • Lucie M. Graffeo • Delecia Hall • Hon. Maureen McHugh Heitner
Mark J. Keller • Milene Mansouri • Elizabeth J. Newton • Cari E. Pepkin • Ricardo Rengifo • Albert Talero • Peter S. Thomas

Thank You To Our 2023

PLATINUM SPONSORS & CORPORATE PARTNERS

BIG APPLE ABSTRACT CORP.

The Law Offices of FRANK BRUNO JR.

CLAUDIO & ASSOCIATES ATTORNEYS AT LAW

Comprehensive Consultation Psychological Services, P.C.

DAVIDOFF LAW WE ARE YOUR LAWYERS

EAST COAST APPRAISAL SERVICE™

GRASSI ADVISORS & ACCOUNTANTS

SCOTT G. KAUFMAN, P.C.

LKS LEAVITT, KERSON & SEHATI

DR. LAWRENCE LEFCORT

DR. KETAN VORA

LEXITAS™

MALLILO & GROSSMAN ATTORNEYS AT LAW

Maspeth FEDERAL SAVINGS

MITRA HAKIMI - REALTY GROUP -

THE ORLOW FIRM CONFIDENT. DEDICATED. FOCUSED. KNOWLEDGEABLE.

PSR PYRROS, SERRES & RUPWANI WORKERS` COMPENSATION

S&F™ Sacco & Fillas, LLP Attorneys at Law

SCAHILL LAW GROUP P.C. "Where Results Matter"

Subin A FAMILY LAW FIRM SINCE 1954

VISHNICK MCGOVERN MILIZIO LLP ATTORNEYS AT LAW

Lending solutions. Community expertise.

Take advantage of your real estate investment opportunities. Our experienced lenders will guide you while providing competitive rates and a streamlined loan process.

Flushing Bank also offers business loans and lines of credit that are truly customized for your specific needs. Help fund your business growth with our financing options.

For more information, contact us at **CREcall@FlushingBank.com** or **BusinessBankingLending@FlushingBank.com**.