



# NEW YORK WOMEN'S BAR ASSOCIATION

## PRESIDENT'S MESSAGE

APRIL 2020

Dear Members,

At this critical time I reach out to you on behalf of our Board of Directors to wish you all good health and good spirits while we all shelter in place and social distance.



Virginia A. LoPreto

I send our special thanks and good wishes to our judges, court staff and personnel who are keeping our courts functioning for emergencies and to all health care professionals and first responders who are working tirelessly, and at great risk to themselves, to keep us safe.

NYWBA members have been through challenging times before. Since our start, during the depths of the Great Depression, we have been a powerful, caring and supportive community and should keep that in mind as we look out for each other, check in on each other, and stay connected.

Many of us can recall where we were on the morning of September 11, 2001—I was on my way to a court appearance in Criminal Court at 100 Centre Street, in Manhattan, stopped only by the partition of court officers urging people to leave the area as quickly as possible. The second tower had not yet fallen—but it did as I rushed north on Centre Street with thousands of other New Yorkers. There are few words that can describe the days and weeks that followed—the endless hours of searches at Ground Zero and the tremendous loss of life of first responders and everyone else. Terrorism now had a face. A name. It was in our City.

Our next big challenge was the Great Recession which devastated financial markets throughout the world but most notably here in New York City where we witnessed the collapse of Bear Stearns and the bankruptcy of Lehman Brothers. Savings, jobs and homes were lost. Many of even the largest law firms were not hiring and so many of the law school classes of '08 and '09 had no jobs or place to go. Some of our colleagues, who were in what once seemed like secure positions, became unemployed for the first time in their careers.

(Continued on Page 2)

### **AMENDED NOTICE TO MEMBERS** **ANNUAL MEMBERSHIP** **MEETING & ELECTIONS** **NOTE NEW TIME & FORMAT!**

Due to the Coronavirus situation, the *NYWBA Annual Membership Meeting* will be held on **April 21, 2020 at 12 NOON** (instead of 6 p.m.), and **BY TELEPHONE CONFERRING**, instead of in person. *(To participate, members should call in shortly before noon by dialing 1-712-432-3900 and entering access code: 318405#.)*

At this meeting, the Association will provide an update on NYWBA's activities and accomplishments during 2019-2020, and we will hold elections for (a) NYWBA's Officers, Board of Directors and WBASNY Delegates, and (b) WBASNY Officer positions for 2020-2021. A complete list of NYWBA and WBASNY nominees is on page 2. Voting will take place during the telephone conference. *(If you cannot participate in the call and wish to vote using a written proxy, send an email to [ED@nywba.org](mailto:ED@nywba.org). All proxies must be received on or prior to April 20, 2020.)*

All members can participate in this phone conference Annual Meeting, but under Article XIV, Section 1 of the NYWBA By-Laws, only members who are in good standing and whose membership dues were received by January 31st may vote at the Meeting.

Our *Annual Ethics CLE* will follow after the Annual Meeting using video conferencing. We thank our hosts – Board member **Nicole I. Hyland** and her firm, **Frankfurt Kurnit Klein + Selz PC**. The CLE will be particularly timely:

### ***“Practicing Law in a Pandemic: Remote Lawyering in the Age of COVID-19”***

**NYS CLE Credits:** 1.5 hrs (Ethics)

**When:** April 21, 2020, 1 p.m.

**Location:** Via web conference (link provided upon registration)

**Speakers:** **Nicole Hyland, Tyler Maulsby, and James Mariani**

**Register:** Email [etintle@fkks.com](mailto:etintle@fkks.com).

*President's Message (Continued from Page 1)*

In 2012 our City was rocked—physically, structurally and emotionally—by Hurricane Sandy. The loss of life and homes was incomprehensible at that time and on many levels it still is.

We did more than survive each act of terror, crisis, and storm. We grew together, formed close, lasting bonds with friends, family and colleagues. We united. We united notwithstanding the wave of partisanship that was sweeping our country. We remained united so that when this pandemic hit here we were ready to hit the ground running. Running not away, but to our families and homes where we set up computers, laptops, document sharing on various platforms, Zoom calls, videoconferencing and so much more.

In the early days there was little stability in what we could and could not do. Our Courts were grappling with whether and when to shut down; clients needed to hear from us, to know that their cases, needs and concerns could be met; offices one by one closed to some and soon to all; our City now looks deserted. As we sit in our newly constructed “home offices”—whether it be a separate room or just a part of a kitchen table—we are meeting our responsibilities as attorneys.

Here, at NYWBA, we have not forgotten our responsibilities to you as members and colleagues. Our Committee Chairs and Newsletter team have joined together, remotely but indelibly, to bring this Newsletter to you which is chock full of substantive nuts and bolts for surviving this pandemic professionally as well as some wonderful, real, pictures of the new “normal”: working at home. Words will fail me, but the joy we felt as we shared these pictures with each other was incredible. We hope you feel the same way and invite you, encourage you to post them to the NYWBA on LinkedIn. It is these shared experiences that make our Association unique.

We all look forward to the end of this crisis, seeing each other again in court, at bar association events, and about the city, but until then, wishing you, your loved ones and colleagues safety and comfort.

*Virginia*

## ***Your Opinion Matters***

NYWBA is seeking monthly opinions on legal matters. Please send your op-ed piece to [opinions@nywba.org](mailto:opinions@nywba.org).

## **NYWBA NOMINATIONS COMMITTEE REPORT**

The **NYWBA Committee on Nominations** nominated the following candidates to serve for the positions and terms stated below.

### **OFFICERS (2020-2021)**

President:	Amanda B. Norejko
Vice Presidents:	Magnolia D. Levy Hon. Laura E. Drager Jocelyn L. Jacobson
Treasurer:	Sabrina E. Morrissey
Recording Secretary:	Melissa Ephron-Mandel
Corresponding Secretary:	Lissett Costa Ferreira
Immediate Past President:	Virginia A. LoPreto

### **BOARD OF DIRECTORS**

#### **Directors to be Installed – Class of 2020-2023**

Jennifer P. Brown	Dawn M. Cardi
Tara Diamond	Hon. Sherry Klein Heitler
Fran R. Hoffinger	Nicole I. Hyland
S. Yan Sin	

#### **Directors Continuing in Office (Classes 2019-22 & 2018-21)**

Yacine Barry-Wun	Julie Hyman
Leona Beane	Alexandra King
Meaghan E. Carey	Kay Marmorek
Vivian R. Drohan	Nidhi Shetye
Myra L. Freed	Morgan Fraser Mouchette
Hon. Judith J. Gische	Deborah G. Rosenthal
Amy B. Goldsmith	Judith E. White

### **COMMITTEE ON NOMINATIONS\***

#### **Class of 2020-2021**

Yacine Barry-Wun	Hon. Kelly O'Neill Levy
Myra L. Freed	Hon. Lisa A. Sokoloff

#### **NYWBA MEMBERS OF WBASNY BOARD (2020-2021)**

Jennifer P. Brown	Jocelyn L. Jacobson
Elizabeth A. Bryson	Magnolia D. Levy
Dawn M. Cardi	Virginia A. LoPreto
Hon. Betty Weinberg Ellerin	Marjorie A. Martin
Julie Hyman	Hon. Jacqueline W. Silbermann

#### **NYWBA ADVISORY COUNCIL:** Michael W. Appelbaum

### **WBASNY NOMINATIONS COMMITTEE REPORT**

President:*	Joy A. Thompson (Brooklyn)
President-Elect:	Dawn Reid-Green (Staten Island)
Vice Presidents:	Melissa H. Nickson (Western New York) Deborah G. Rosenthal (New York) Marea Wachsman (Brooklyn)
Treasurer:	Simone M. Freeman (Nassau)
Corresponding Secretary:	Dawn A. Lott (Suffolk)
Recording Secretary:	Madison Porzio (Queens)
Immediate Past President:*	Deirdre Hay (Finger Lakes)

\* The 2020-2021 WBASNY President and Immediate Past President take office automatically; the other positions will be voted on.



### Note from the Newsletter Committee

Dear Fellow Members,

As we've seen submissions from NYWBA's numerous, active Committees pouring in through the chaos, the Newsletter Committee has been so proud to help spread the word about this Association's enthusiasm and engagement. This is one of the most substantive editions the Newsletter Chairs can remember—whether because of newfound time on our authors' hands or because there's simply so much new information to share, or perhaps a bit of both. (On that note, because the landscape is changing so quickly, please confirm that the information in these updates is still accurate before acting on it.) This edition has certainly kept us busy. And organizing all the photos of Association members working from home, sometimes with small or furry co-workers, has kept us smiling.

Now more than ever, we're grateful to all our authors, and to our President **Virginia A. LoPreto** for kicking off this special pandemic edition of the newsletter, and to our executive director **Karen Lu** for her tireless organization and patience. We're also grateful for you, our fellow Association Members, and for the work you're doing, and for the solidarity in knowing we're all alone in this together.

Be safe and well,

*Dana E. Heitz, Gabriella Formosa,  
Jennifer Branca, Katelyn M. Brack*



*Executive Director Karen Lu's home office & classroom, day one.*



*President Virginia A. LoPreto (not pictured, but her glass of wine is) and Bunker, after a long day.*



*NYWBA Vice President & Committee Chair Magnolia D. Levy after her first day.*

NYWBA wishes to acknowledge the generous gift from

**FOUNDER AND PAST PRESIDENT  
HON. FLORENCE PERLOW SHIENTAG  
(1908-2009)**

Her financial bequest has helped to underwrite the cost of this Newsletter and many of our CLE programs.

## 10 Tips for Solos and Small Law Firms During the Pandemic

By *Katelyn M. Brack*

Last week, Bill Hauser, a digital marketing expert and owner of SMB Team, hosted a free live webinar that offered invaluable content and tips for solos and small law firm owners. Since many of the members of this community are solos/small law firm owners, I thought it would be helpful to share some of the practical ways that small law firms can survive the pandemic and be recession-proof in the future. Below are some of the main takeaways:

### 1) Work your clients

Get on the phone with your clients and let them know you are here for them. Let them know you are not charging them for the call, but you just want to check in. Make it personal. You have a relationship with that client. Do not make it just a text or e-mail. Put yourself in the client's shoes. Row in the same direction of your client's minds. You cannot take COVID-19 out of their minds right now, so think about the ways the timing is affecting them and their cases. Think about what kind of phone call would you want from your lawyer. Ask questions such as: What do you need help with? How is co-parenting going? Do you need to file for unemployment? Do you need childcare? Do you need help with homeschooling ideas? Create a list of resources for your clients. There is a lot of content out there now on what parents can do with their kids at home. Think about what they can do now to help with their custody case. Provide them with employment information and resources. Reassure your clients that their cases are safe. Show you are still there and working. You have never had a chance to get to know your clients and their cases on a deep level – now is your chance.

### 2) Work your cases

Along the same lines as working your clients, now is a time to work your cases. This is a time that requires you to work harder and smarter. Perhaps work on settling your cases. Thoroughly research a legal issue. Draft settlement proposals. Get on the phone with your adversary. Do a Zoom conference. Work your case and try to resolve issues.

### 3) Your Staff is Your Best Asset

Everyone is scared right now. This is a time that requires leadership. You need to communicate with your staff more than ever before. Use Zoom to see each other's faces. Make both individual calls to your staff to set the tone and agenda, and make sure their heads are on straight. Also do group Zoom conference calls and repeat the same information so that everyone can see each other and know everyone else is on the same page.

Your staff will keep the firm going. Keep them focused. They help with your brand. Show your team what you're made of – step it up. Do not do any of the scary stuff such as say: "Do you have enough work!?!". No, just ask two questions: 1) What do you have on your plate?; and 2) What is an obstacle preventing you from doing work that I can remove?. It is the manager's job to remove those obstacles to better serve their clients.

Remember staff birthdays and anniversaries. Maintain those personal connections. Also, do clean up. Ask employees to help and volunteer with projects. This is the time for innovation.

The best relationships (work included) grow out of a feeling that you survived something together in the trenches (applies to clients too).

### 4) Mentor an Associate or Staff Member

Take this opportunity to mentor/coach and explain legal and practice issues to a young associate. You should go through your list of cases and determine which

clients are or will be hit the hardest by this pandemic. Explain how to speak to that client and explain that, our services go beyond, for example, family law.

### 5) Marketing/Brand

How are you talking to the public? Think about how to keep yourself relevant with honest and sincere content. This is a great time to do a PSA. What your brand stands for is what will define you. Many of your competitors are panicking, cutting costs, and doing layoffs. Get creative with social media. It is a great tool that many people are turning to during this time. You use it as a platform to be calm, sympathetic, and/or humorous. You have to be on the offense. Think about how to market yourself and what makes you different from your competitors. Create a helpful piece of COVID-19 content, whether it be a blogpost, e-book, news article, etc. Offer free consultations. Don't overcomplicate your lead capture. Simple is better than complicated. Your audience doesn't have to be lawyers. When fear is high, lead generation opportunity is highest.

### 6) Clean-up

Make sure you have a good answering service. Update your website. Take inventory of your old files. Reorganize your digital files. Have your staff help you. Pay attention to the details that you did not have time to review in the past.

### 7) Reach out to your network

Now is a good time to reach out to anyone who has ever referred you a case in the past and check in to see how they are doing. Maintain that human, social connection. It will also serve as a reminder that you are still there. Reach out to your bar association networks, former law school classmates, former work colleagues, family and friends.

### 8) Think Big, Smart, Long-Term - not Small, Scared, Short-Term

Are you looking at the short-term – the day to day – or the long-term? This is a marathon not a sprint. Do not react to the day to day. Many small firms are deciding whether to live or die. Are you going to be the firm that crawls into a hole and lays off your entire staff? That's a cowardly thing to do. Think about the universal principle of relativity. Be excited about the long-term possibilities. This too shall pass. If you think small you'll see all the problems. If you think large, you'll see all the opportunities. Only allow yourself to see the solution. This is what you do. Are you going to be set up for the boom coming? Are you setting up with an adjustable plan now? As lawyers, we provide goods and services – sooner or later consumers will return to their previous behaviors. There will be a surge of demand - precisely because of the problems caused by COVID-19 (quarantines, social distancing, etc., more people will file for divorce, start a business, buy real estate, etc.). Apply resource reallocation and avoid resource abandonment (layoffs).

### 9) Remember why you became a lawyer

You made a commitment to being a zealous advocate and counselor. Look at the contract you signed/oath you swore to become a lawyer. This is a good reminder of the backbone of your legal practice.

### 10) Who do you want to be?

This will be a story of resilience and a celebration of change. As lawyers, we have the privilege of helping people have better lives. That's what lawyers can do. Provide value and give your clients some sense of control. Provide them with resources that will make this time easier (Zoom therapy chats, parenting seminars, podcasts, etc.).

*(Continued on Page 9)*



## One New York Lawyer's Story By Julie Hyman

Family law attorney **Julie Hyman** decided on a home office after the September 11th attacks, for added security and peace of mind.

It was her line in the sand for doing business after the attacks. But she never knew how prepared the living/work space would make her for working in the time of the coronavirus.

Her home and home office at Solaria Riverdale provided a perfect place to enjoy her pets -- Rocky, Angel, Coco and Sandy -- and seamlessly continue working in her practice, while reducing exposure to the deadly, flu-like pandemic, also known as COVID-19.

When Julie's not working on motions or speaking with clients on the phone or online, she's enjoying daily walks with her dogs, all the while practicing social distancing.

Sadly, four clients showed symptoms but never were tested. Julie has worked with them by email and phone, and has forgone in-person meetings after Solaria Riverdale took the added measure of not allowing visitors during the pandemic.

Supplies from Amazon eliminate her need to go out shopping at Staples. Amazon also is keeping her and her family entertained with Amazon Music, courtesy of Alexa requests, and movies on Amazon Video.

Being forced to stay home, she's also found more time for cooking and sharing in chores. And she even expects she'll find time to play some of her favorite tunes on her baby grand.

Julie interestingly learned of the outbreak after New York State Health Commissioner Dr. Howard Zucker accidentally had a fender bender with her Range Rover Sport in the garage. Dr. Zucker was the gentleman who left her a note about the accident and paid for the \$18k+ repair on his insurance.

He also alerted her that life in New York was about to change dramatically because of the virus.

Here's how it impacted her clients: Julie has worked on multiple downward modifications of support cases due to significant loss of income from the pandemic.

She received several calls from residential custodial parents who were afraid they and/or their child would contract the virus due to the other parent being considered an essential employee or first responder during the outbreak.

This was especially an issue for parents living in different counties or states.

There were added concerns about exposure to public transportation.

One violation that required modification of visitation during the pandemic was due to a father's failure to do homework with the child on his shared midweek parenting time.

The client says that home schooling was comprised mostly of homework and 1 1/2 hours of class time on Zoom in the morning and 1 1/2 hours in the afternoon. She has had to catch up on the child's homework.



*Sandy inspecting Julie's wine order.*

Another client asked Julie for an immediate separation because she could not shelter in place with her husband. She is willing to move out since her husband said no.

Then there are others who have decided to suck it up because of significant loss of income.

No one is practicing kindness. It is yet another opportunity to fight without the help of the court, Julie says, since divorce is NOT an essential service.

Speaking of court, Julie says she sent a messenger service to Bronx family court with pandemic corona litigation in accordance with the exception A rules. The messenger, however, could not file.

The next step was sending a courtesy copy to the other side and letting them know the court did not accept the papers. Julie informed the other party that she will be requesting a retroactive date to April 1st nunc pro tunc.

The court closing did make Julie wonder if the shut down would encourage resolution without court intervention.

As the virus continues taking its toll on the city, Julie has made sure she's supported local businesses that continue to operate during the outbreak including Minuteman Press, Skyview Wines, Vacuum World, and Salvatores Pizza. She also intends to buy pizza this weekend to feed the Solaria building staff that have continued to show up for work.

Until life returns to normal in the city, it's as normal as it can be at Julie's home and office.

## The Operation of the Criminal Courts during the COVID-19 Closures

**By Olivia Sohmer, Court Attorney, Richmond County Criminal Court;  
Jessica Horani, Senior Trial Attorney, NY County Defender Services; and,  
ADA Catherine Christian, New York County**

The courts of New York City with criminal jurisdiction have suspended all but essential matters. Essential matters include, but aren't limited to, criminal arraignments, habeas corpus petitions, and emergency search warrants. Orders of protection due to expire are deemed extended until the next scheduled court date. However, each court retains authority to modify or terminate its previously issued orders.

Effective March 25, 2020, a virtual procedure was implemented for all arraignments in the five counties of New York City. Under this procedure, conducted over Skype, the judge, prosecutor, defense attorney, and any necessary interpreter, are all in different locations. Court clerks are at the courthouse. The defendant and court officers are at the holding facility which, under the present circumstances, is at the Midtown Community Court for Manhattan and the Bronx, and at the Red Hook Community Justice Center for Brooklyn, Queens, and Staten Island. Following arraignment, all non-custodial matters are being adjourned for at least 90 days. Where bail has been set, sureties may post cash bail immediately at the courthouse; surety and appearance bonds will be accepted and executed per regular procedure; credit card bail may be posted online. Any other form of bail must be posted at the correctional facility.

This procedure is being rolled out throughout the State, went live in a number of central and western counties on March 30, and is expected to be fully implemented statewide by April 3.

In criminal cases where DATs were issued – which embraces many more cases was so prior to January 1 – arraignment on those DATs has been put out to June or July.

Supervised Release has suspended reporting of client non-compliance and re-arrest to the court and court parties until further notice but continues to engage with clients via phone/video conferences. Diversion programs in Richmond County are known to be continuing to engage with participants, and it is believed that this is true in the other counties as well.

In response to concerns about the health of those confined at Rikers Island, a number of habeas corpus applications have been filed. A petition by the Legal Aid Society on behalf of 32 petitioners (<https://bit.ly/2X5p4uQ>) included 15 petitioners with alleged violations of parole, 3 remanded pending trial, 2 remanded pending resolution of matters pending in treatment court, and 12 pre-trial detainees who were alleged to be unable to pay bail. On March 26, 2020, the Hon. Mark Dwyer granted the petition as to 16 petitioners. (<https://bit.ly/2UEukUz>)

On a non-COVID-19, but nevertheless key issue, at the end his April 2 press briefing Governor Cuomo stated that the FY2021 budget law included amendments to the bail reform law. In particular, he stated that additional crimes will be bail eligible. Although the test of the final law is not available as of this writing, early press reports (<https://bit.ly/3bLRxcX>) indicate that offenses that will be eligible for bail under the amendments to the law include first-degree grand larceny, first-degree money laundering, certain child sex crimes, failure to register as a sex offender, offenses tied to domestic violence and hate crimes for third-degree assault and third-degree arson aggravated vehicular assault, and any crime that is alleged to have caused the death of another person. The press briefing also stated that there are “115 crimes that we moved to be alternate to bail eligible.” These changes in the law will take effect in 90 days.

On February 25, 2010, Police Commissioner Shea was the guest speaker at a breakfast hosted by the Citizens Crime Commission. Shea talked about how, by implementing community policing in every precinct, the NYPD is working to understand who is driving crime in each precinct. The goal is neither to over-police nor be soft on crime, but to be “precise on crime.” Shea described NYPD practices to support prevent youth criminal justice involvement through social engagement; to provide mental health services free of stigma to members of the police service; and to assist people who are living on the streets and subways through collaboration with community providers.



(l. to r.): NYPD Commissioner, Dermot Shea; NYWBA Criminal Law Committee Chair Olivia Sohmer; Richard Aborn, President of the Citizens Crime Commission of New York City.



Court Attorney Olivia Sohmer deciphering the amendments to the Bail Reform law.



## Counseling Child Custody Clients During COVID-19

**By Matthew Goodwin, NYWBA Matrimonial & Family Law Committee Co-Chair**

The COVID-19 closure of New York State courts to all but the most essential matters means judicial remedies in child custody cases are presently difficult if not impossible to come by. The court closures also mean that the role of family law and matrimonial practitioners as counselors-at-law during the pandemic is vital to attempting to protect client interests and the best interests of the children at the center of every custody case.

The **Honorable Jeffrey Sunshine**, Statewide Coordinating Judge for Matrimonial Cases, emphasized the importance of attorneys' counseling role in his March 27, 2020 article in the *New York Law Journal*.

Entitled "COVID-19 and Future Custody Determinations," Judge Sunshine's article recognized the difficulty attorneys may face in telling their custody clients there is no redress in court for their co-parent's behavior (or misbehavior as the case may be). Judge Sunshine asks two questions: "So, what do lawyers tell their clients? What should clients be doing?"

To answer the former question, Judge Sunshine suggests lawyers work with clients to help them see their own behavior vis-à-vis their children and the other parent objectively and to "remind them that the actions they take today and during this crisis could well be determinative or dispositive at the time of final decision by a judge."

His answer to the latter question is: "[h]ow [parents] conduct themselves at parenting during a time of pandemic crisis, one of which we have never before seen, will shape their relationship with each other as divorced parents in the future, the relationship they have with their children and most importantly the relationship that their children have with them...If parents do not conduct themselves appropriately and sensibly, their children will remember throughout their lives how they acted and so will the judge deciding the case."

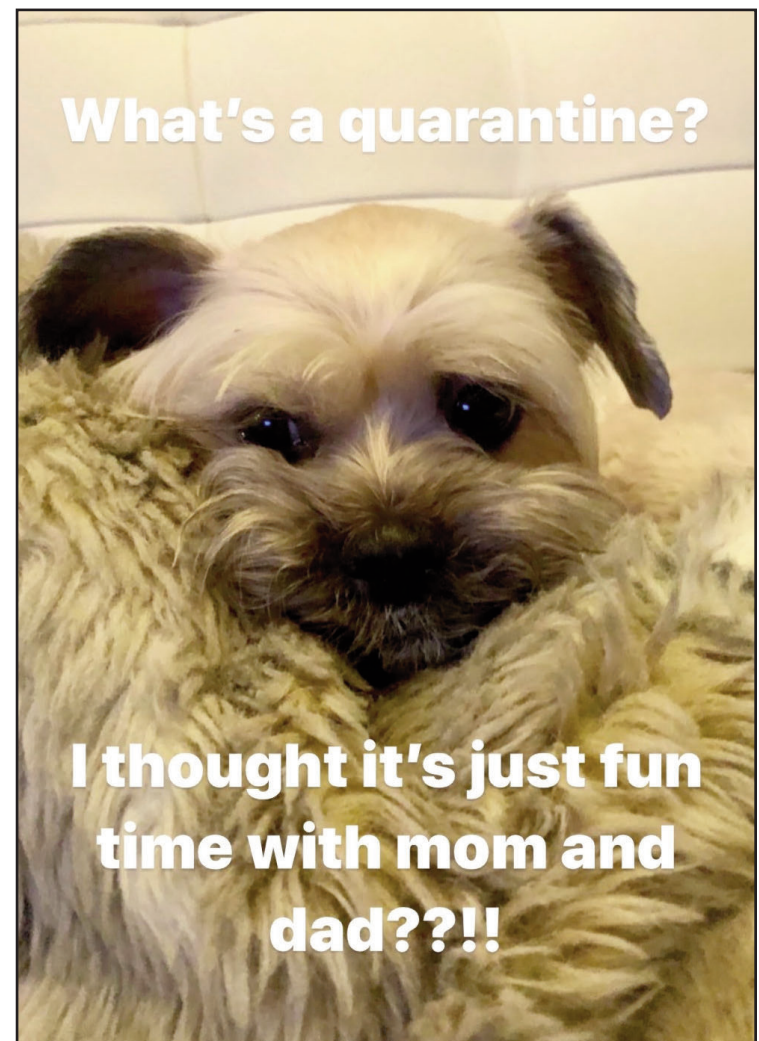
There are a multitude of resources for family law attorneys to help them appropriately counsel their clients respecting COVID-19 in custody cases. The American Academy of Matrimonial Lawyers and Association of Family and Conciliation courts have promulgated "Seven Guidelines for Parents who are Divorced/Separated and Sharing Custody of Children During the COVID-19 Pandemic." Kathleen McNamara, PhD, and Lisa Hall, LMFT, have created their own list of "7 Tips for Family Law Practitioners in the Midst of the COVID-19 Pandemic."

Nevertheless, some clients are their own worst enemies; it can seem that no amount of discussion, reasoning, argument, or explanation—i.e. counseling—can dissuade them from making poor choices or displaying inappropriate behavior that negatively impact their case.

As a result, many family law practitioners struggle in custody cases to strike an appropriate balance between their ethical duty to assert and advocate for their client's position—what the client feels is the "right" parenting or custody outcome—and impressing upon the client that their position and actions may not be in their or their children's best interests. In less fraught times, this dynamic can easily put a strain on the attorney-client relationship; in our current climate of life-and-death health fears, quarantines, stay at home orders, and extreme financial pressures, it is not hard to imagine all the ways in which this dynamic could seriously damage or even end the attorney-client relationship.

Here, Judge Sunshine makes the excellent suggestion that attorneys send his article to custody clients who refuse to listen to reason "and think they are not accountable for their conduct." In other words, if a client will not listen to you, maybe they will listen to him. Indeed, an attorney counseling a custody client amid the COVID-19 pandemic might do well to simply provide the client with information and resources from trusted sources as to best co-parenting practices if the alternative would be irreparable damage to the attorney-client relationship. In addition to Judge Sunshine's article and the other articles above, such clients might benefit from Yale Medical School's "Child Study Family Resources and Suggestions for Coping with Coronavirus."

There is one thing all of the resources listed above have in common: They reinforce that a parent's job right now is to put the welfare and best interests of their child(ren) first and to help them cope with extraordinary uncertainty and disruptions the pandemic has wrought on daily life. It is the attorney's job to counsel their clients accordingly.



*Photo by NYWBA Past President Jennifer P. Brown*

## Summary of Relevant Tax Provisions of the CARES Act

*By Jae W. Lee and Vivian Rivera Drohan*

On March 27, President Trump signed the **Coronavirus Aid, Relief, and Economic Security Act** (the "CARES Act"), legislation intended to help Americans and businesses survive a public health and economic crisis due to COVID-19. This update provides a summary of the relevant tax sections contained in the CARES Act.

### Business Provisions

**Employee Retention Credit for Employers Subject to Closure Due to COVID-19.** The legislation provides a refundable payroll tax credit equal to 50% of qualified wages for certain eligible employers for wages paid or incurred between March 13, 2020 and December 31, 2020. "Eligible employer" means any employer whose (1) operations were fully or partially suspended due to a COVID-19-related governmental order, or (2) gross receipts for the calendar quarter are less than 50% when compared to the same quarter in the prior year. For employers with more than 100 employees in 2019, the credit is generally available only for wages paid to employees that are furloughed (i.e., retained, but are not currently providing services) due to the crisis. For employers with 100 or fewer full-time employees, all wages are eligible for the credit. "Qualified wages" include any "qualified health plan expenses" allocable to the wages, and the amount of qualified wages for each employee for all quarters may not exceed \$10,000. The credit is provided for wages paid or incurred from March 13, 2020 through December 31, 2020. The credit is not available for employers that receive a small business interruption loan.

**Delay of Payment of Employer Payroll Taxes.** Employers are responsible for paying a 6.2% Social Security tax on employee wages. From the time the CARES Act is signed into law through December 31, 2020, many employers will be allowed to defer paying their share of this Social Security tax. Half of this deferred amount would be due on December 31, 2021 and the other half by December 31, 2022. Similar provisions apply to self-employed individuals; however, 50% of the self-employment tax still needs to be remitted on the existing deadlines.

**Modification for Net Operating Losses ("NOLs").** The Tax Cuts and Jobs Act (the "TCJA"), which was enacted in 2017, eliminated net operating loss carrybacks for certain years (which generally included NOLs arising after 2017). Under the TCJA, NOLs arising after 2017 could be carried forward indefinitely, but were limited to 80% of taxable income in the relevant period. These rules were changed by the CARES Act to allow NOLs arising in tax years 2018, 2019 and 2020 to be carried back five years. In addition, the 80% limitation created by the TCJA has been eliminated for tax years beginning before January 1, 2021.

**Modification of Limitation on Losses for Non-Corporate Taxpayers.** The TCJA added Section 461(l) to the Code, which limited non-corporate taxpayers' (individuals, trusts, estates) ability to deduct excess business losses. Excess business losses are defined basically as the excess of aggregate business gross deductions over aggregate business gross income. Deduction of these excess business losses by non-corporate taxpayers was limited to \$250,000 per year (\$500,000 married filing jointly). Unused excess business losses are carried forward as NOLs. These limitations continue through the 2026 tax year. The new provision delays the application of the excess business loss limitation until 2021. Non-corporate taxpayers may be able to deduct all excess business losses created through the end of the 2020 tax year. Taxpayers with losses in 2018 and 2019 that were disallowed by the limitation may file for refunds.

This is potentially a very significant benefit to many businesses. For example, individuals in the real estate business may be able to deduct large losses arising from the 100% bonus depreciation provision in the TCJA (as well as other losses) that would otherwise be limited. This may be especially valuable to individuals who qualify as "real estate professionals," generally by spending at least half their time

(and at least 750 hours) materially participating in real estate businesses. However, based on what we know so far, the new provision does not override the passive loss and at-risk limitations, so the provision may be less favorable for passive investors.

### **Modification of Credit for Prior Year Minimum Tax Liability of Corporations.**

The corporate alternative minimum tax ("AMT") was repealed as part of the Tax Cuts and Jobs Act, but corporate AMT credits were made available as refundable credits over several years, ending in 2021. The CARES Act allows companies to claim larger refundable tax credits now than they otherwise could.

**Modification of Limitations on Business Interest Expense Deduction.** The CARES Act temporarily increases the amount of interest expense businesses are allowed to deduct on their tax returns, by increasing the adjusted taxable income limitation from 30% to 50% for 2019 and 2020. The TCJA previously limited the deduction for business interest for taxpayers with average gross receipts of \$25,000,000 or more to 30% of the taxpayer's adjusted taxable income for tax years beginning in 2018. In addition, the CARES Act allows a taxpayer to elect to treat its 2020 adjusted income as if it were the same amount as its 2019 adjusted taxable income for purposes of applying the interest expense limitation. This may be a significant benefit to some taxpayers and may create additional NOL's in 2020, which could be carried back to previous tax years under the net operating loss modifications addressed above.

**Technical Amendment Regarding Qualified Improvement Property.** The CARES Act provides a long-awaited technical correction to the TCJA relating to "qualified improvement property" (generally, interior improvements to nonresidential buildings). The correction is retroactive to January 1, 2018, and provides for immediate expensing of certain improvements to real property through bonus depreciation. Additionally, to the extent not immediately expensed, it allows for a 15 year recovery period (as opposed to the current the 39-year depreciation life of the building).

**Employer Student Loan Payments.** Employers are allowed to provide a limited student loan repayment benefit to its employees on a tax-free basis. Specifically, employers may contribute up to \$5,250 annually to each employee on a tax-free basis. The annual limitation applies to both the new student loan repayment benefit as well as other educational assistance provided by the employer under current law (ex. tuition, fees, books, etc.). The provision applies to student loan payments made after the enactment date and before January 1, 2021.

### Individual Provisions

**Recovery Rebate Checks.** Recovery rebate checks of up to \$1,200 (\$2,400 for taxpayers married filing jointly) will be made available to most individuals and families, with an additional \$500 for every child. There are no limits on the number of children that qualify. These recovery rebate checks are reduced by \$5 for each \$100 a taxpayer's income exceeds \$75,000 (\$150,000 for taxpayers married filing jointly and \$112,500 for head of household). This means that taxpayers making below \$99,000 (\$198,000 for taxpayers married filing jointly) will generally receive at least some amount of a recovery rebate check.

The refund checks are generally not taxable income and are instead treated as an advance of the refund a taxpayer would normally receive when filing their 2020 tax return. This means that in 2021 the taxpayer will have to recalculate the amount of their credit based on their 2020 information. If there is a change in circumstances for the taxpayer where they are currently phased out based on a 2019 (or 2018)

*(Continued on Page 9)*



*CARES Act (Continued from Page 8)*

tax return, but would otherwise be entitled to the full credit based on their 2020 tax return, the taxpayer will receive a credit in 2020 for the difference.

An open issue in this piece of legislation is what happens to those taxpayers who receive a rebate check based on 2019 (or 2018) tax information but would have received a lesser amount based on their 2020 income. The CARES Act does not explicitly require income recognition on any excess credit (which was required in the House's bill). We anticipate that future regulations may address this issue.

**Special Rules for Use of Retirement Funds.** The CARES Act provides some retirement account relief for coronavirus-related distributions. First, the 10% early withdrawal penalty from qualified retirement accounts is waived for distributions of up to \$100,000 if a withdrawal from a retirement account is for a coronavirus-related distribution. A "coronavirus-related distribution" is defined as a distribution made to an individual: (1) who is diagnosed with COVID-19, (2) whose spouse or dependent is diagnosed with COVID-19, or (3) who experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, having work hours reduced, being unable to work due to lack of child care due to COVID-19, closing or reducing hours of a business owned or operated by the individual due to COVID-19, or other factors as determined by the Treasury Secretary.

In addition, the time period in which to pay the income tax attributable to a coronavirus-related distribution is extended to allow for payments of this tax over three years. Taxpayers may re-contribute the funds withdrawn for a coronavirus-related distribution within three years without regard to that year's cap on contributions. Provisions that provide for increased loans from certain retirement plans are also revised so there may be some circumstances in which pursuing one of the loan options may provide for a way to minimize the tax costs from what would otherwise be a coronavirus-related distribution.

**Treatment of Charitable Deductions.** The CARES Act increases the available itemized deductions for charitable contributions by suspending the 50% of adjusted gross income limitation for 2020. Individuals (whether or not they itemize the deductions) are also permitted to deduct up to \$300 in cash contributions made to churches and charitable organizations in 2020.

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*10 Helpful Tips (Continued from Page 4)*

Be compassionate, be sincere, and have good character. Those are the lawyers who will thrive.

To listen to the full Webinar called "**Lawyer COVID-19 Mastermind (Round 2): How to Future-Proof Your Law Firm,**" click here: <https://smbteam.com/lawyer-mastermind/round-2-access/>



## Assistance Available to Small Businesses During COVID-19

**By Jocelyn L. Jacobson and Gail Bader,  
Solo & Small Law Firm Committee Co-Chairs**

Most, if not all, of us are now working remotely. But if you are a small or solo practitioner you may still have obligations to pay rent and employee's salaries (or dilemmas of how to continue to pay such employees) - whether you have only one employee or a number of them. For small and solo practices that can be a particularly hard burden, especially if your practice is slower with the courts largely closed. But the federal government has passed legislation that can assist the solo or small-firm practitioner in meeting her financial obligations.

The Coronavirus Aid, Relief and Economic Security Act (the "Act" or "CARES Act") was signed into law on March 27, 2020. This Act provides many benefits for small businesses. The most immediately relevant is the Paycheck Protection Program, which offers small business loans (through the SBA 7(a) loan program), specifically directed to small businesses in need of operating capital. Eligible borrowers include "small business concerns" (as defined under SBA regulations) with 500 or fewer employees. These loans will be administered by lenders currently authorized to make loans under the SBA's Business Loan Program. The loans may be used to cover payroll, mortgage interest or rent, leases, utilities and interest on existing debt. There are limits on the amount of the loan which is based on the business' average monthly payments for payroll, rent and other debt obligations.

Borrowers will need to certify that they have been adversely impacted. There are no requirements for personal guarantees or collateral associated with the loan. The only eligibility criteria are that your business was in operation prior to March 20, 2020 and had employees. Detailed application requirements are being developed by the SBA and guidance will be issued to participating banks. Loan applications must be filed prior to June 30, 2020, and will be made through online applications with a participating lender. Lenders will approve and fund these loans in order to expedite the application and approval process (these loans are 100% guaranteed by the SBA; when the loan or a portion of the loan is forgiven, the bank is repaid principal and interest by the SBA). If any portion of the loan is not forgiven, the maximum maturity date is 10 years from the date you apply for loan forgiveness and the maximum interest rate is 4%.

All such loans will qualify for a special loan forgiveness program under which certain costs incurred and payments made - including payroll costs, mortgage interest, rent and utilities - over the 8-week period following the origination date of the loan are forgiven, up to the amount of the actual loan. The amount forgiven would be reduced proportionally by any reduction in employees retained over this period compared to the prior year and any reduction greater than 25% in employee compensation.

In addition, the CARES Act includes tax benefits for small businesses. There are potential credits against payroll taxes for "qualified wages" not exceeding \$10,000 per employee paid to employees from March 13, 2020 to December 31, 2020 if the business is suspended due to a COVID-19-related shut down order or receipts declined more than 50% when compared to the applicable period in the prior year. There are also deferrals of Social Security taxes otherwise owed for wages through the end of the year - this one applies Social Security taxes owed by self-employed individuals as well as to employees. The amount deferred will have to be paid over the following two years - 50% per year.

## Survivors of Domestic Violence: Needs and Access to Services in the midst of the Public Health Crisis

*By NYWBA's Domestic Violence Committee Co-Chairs Shani Adess, Amanda B. Norejko, and Laura A. Russell*

Survivors of domestic violence are at increased risk during this public health crisis. This crisis compounds vulnerabilities that already exist for many survivors who remain with partners who engage in abuse, isolating them even more, and for survivors who have fled but whose whereabouts remain known, the pandemic is keeping them stationary at a known location. Incidents of domestic violence have time and time again been known to spike during crises like this. It is imperative that survivors continue to have access to legal and social services, and opportunities to access these resources are still available to them during this time.

### Orders of Protection:

Requests for orders of protection are considered an "essential function" of the courts. Domestic Violence agencies remain open, and are working remotely to speak with survivors, safety plan with them, and provide advice, counsel, and representation in filings before the court. Previously issued temporary orders of protection will be extended by courts as a matter of course. These new temporary orders must be served on the other party to be enforceable.

### Custody/Visitation:

Issues regarding custody/visitation remain of utmost concern for survivors, though these issues are not being heard by court parts. Having the opportunity to speak with attorneys regarding their visitation obligations is imperative, as survivors who were or are in relationships with a dynamic of domestic violence and a history of one parent making threats, harassing, and/or intimidating their partner to comply with their demands regarding access, contact, and information, will be particularly vulnerable.

All parents must comply with court orders, but they should be advised around what to do if doing so is impossible or unsafe, or if the current court order is silent as to a newly-arising issue involving custody/visitation. Messaging around the importance of "co-parenting" and compliance with full and complete access to children can be devastating, safety-wise, for survivors, if engaging in co-parenting or compliance with a current order increases their risk of harm. For example, visitation or visitation exchange that was supervised by a third party, does not automatically become unsupervised just because that supervisor/location is no longer available. In cases where a child or parent is immuno-compromised, the parties live long distances apart without access to cars or vehicles, or one parent is an essential worker and potentially at heightened risk of exposure as a result, more extensive safety planning is needed to account for these factors.

Still, parties are required to ensure the continuation of visitation, or seek modification of the current order (either in writing amongst the parents or by submitting to the virtual courts a stipulation signed by all parties, depending on how their orders provide for modification to occur). Many court legal service agencies have prepared boilerplate language to temporarily adjust visitation to be via FaceTime, through phone contact, or emails or text, with the expectation that make up visits will be provided after this crisis passes.

Parents who are not provided with access to their child as prescribed, or to whom the child is not returned, or who are unable to locate the other parent and the child, or the other parent is threatening to disappear with the child, may seek enforcement through the NYPD. If that is not possible, they may file an emergency motion and writ of habeas corpus in Family Court.

### How to file:

- Survivors can request orders of protection electronically:
  - Attorneys filing should be sent to: [NYFCAgencies@nycourts.gov](mailto:NYFCAgencies@nycourts.gov)
  - Pro se filings should be sent to: [NYFCAApplications@nycourts.gov](mailto:NYFCAApplications@nycourts.gov)
- Process:
  - After filing the petition, the attorney should call 646-386-5299 to notify the clerk of filing and ensure that it is calendared and confirm that the attorney and client are both available to participate via Skype.
  - After the hearing, the judge will transmit the Temporary Order of Protection electronically. The court will arrange for the opposing party to be served, but we recommend using the Sheriff and having the client sign up for notice when the order is served and therefore enforceable.
  - In most cases, the return date will be 60-90 days in the future, except for if the court issues a Temporary Order of Protection which excludes the respondent from a shared residence in which case the case will be heard within one week at a virtual hearing conducted via Skype.
- For general questions on filing/court processes email: [NYFCinquiry@nycourts.gov](mailto:NYFCinquiry@nycourts.gov)

### Resources for Survivors and for Attorneys Representing Survivors:

The Family Justice Centers ("FJCs") remain open in every borough. Case managers remain available to speak with survivors and attorneys to help arrange safety planning, or access to emergency shelter. Civil legal service providers remain on intake through the FJC, and able to provide legal advice and representation to survivors in need. Contact for our local FJCs are as follows:

- Bronx FJC: 718-508-1220
- Brooklyn FJC: 718-520-5111
- Manhattan FJC: 212-602-2800
- Queens FJC: 718-575-4545
- Staten Island FJC: 718-697-4300

### *Contactless Wine delivery*



Photo by Julie Hymen



## **NYWBA Immigration Law Committee COVID-19 Update**

**By Marcella B. Marucci and Michael Schreiber**

**U. S. Citizenship and Immigration Services (USCIS):** As of March 18, 2020, USCIS temporarily suspended routine in-person services until May 3, 2020. USCIS continues to be operational as staff perform duties that do not involve contact with the public. Emergency services will be made available in limited situations. Individuals with scheduled appointments at USCIS field offices across the country, including Naturalization Interviews and Naturalization Oath Ceremonies, will be notified of changes to their appointments and be automatically rescheduled once normal operations resume. Appointments for Canadian and United Kingdom visa applicants cannot be automatically rescheduled. Individuals from these two countries should call USCIS at 800-375-5283. USCIS asylum offices will notify applicants of cancellations of asylum interviews and automatically reschedule interviews for those applicants. USCIS will reuse previously submitted biometrics for individuals applying to extend employment authorization (I-765, Application for Employment Authorization) for appointments scheduled after March 18. This will remain in effect until Application Support Centers (ASCs) resume normal operations. USCIS has extended the due dates for responding to Requests for Evidence and Notices of Intent to Deny received between March 1 and May 1, 2020. Responses submitted within 60 calendar days after the response deadline will be considered. The Department of Homeland Security (DHS) has extended the REAL ID Act deadline to October 1, 2021.

**U.S. Department of Justice - Executive Office of Immigration Review (EOIR):** All non-detained hearings scheduled through May 1, 2020, have been postponed. Select immigration courts remain operational for filings and detained-only hearings. For a listing of immigration courts that remain operational, please visit [https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic#operational\\_status](https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic#operational_status). EOIR has created temporary email accounts for immigration courts nationwide to facilitate electronic filings while awaiting rollout of the EOIR Court & Appeals System (ECAS) which has been delayed due to COVID-19.

**U.S. Department of State (DOS):** The DOS has temporarily suspended routine visa services at all U.S. Embassies and Consulates worldwide. All routine immigrant and nonimmigrant visa appointments are cancelled as of March 20, 2020. The Visa Waiver Program (ESTA) is not affected by these changes. Emergency and mission critical visa services will continue to be provided as resources allow. Services to U.S. citizens continue to be available.

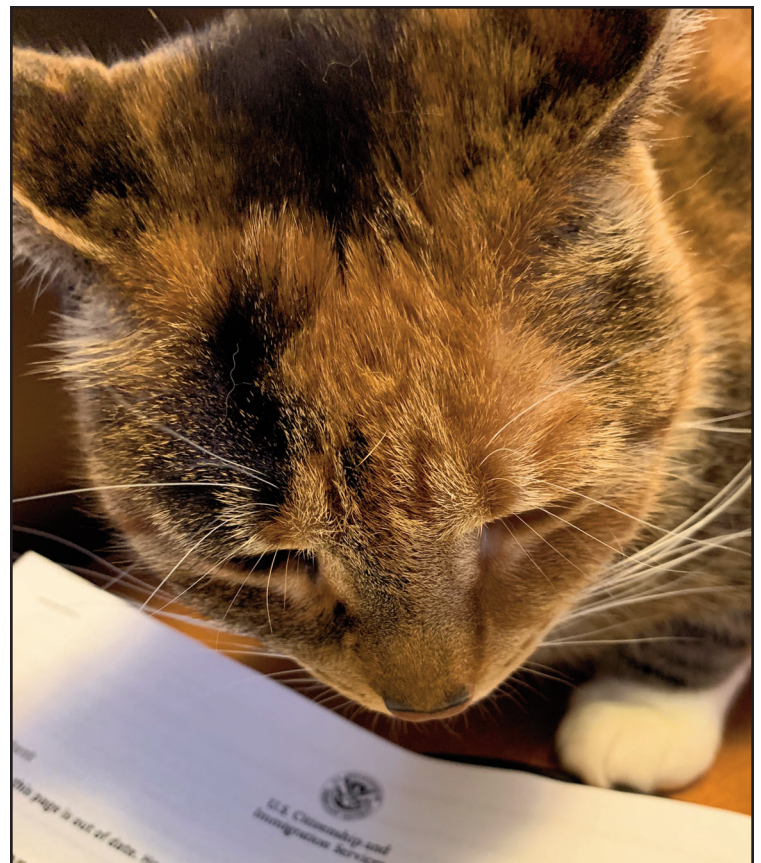
**U.S. Department of Labor (DOL):** The DOL's Office of Foreign Labor Certification (OFLC) remains fully operational, including the National Processing Centers (NPC), PERM System, and Foreign Labor Application Gateway (FLAG) System. Prevailing wage determinations and labor certifications that meet all statutory and regulatory requirements will continue to be processed and issued.

**U.S. Immigration and Customs and Enforcement (ICE):** ICE's enforcement operations and deportations will continue during the crisis although it remains unclear the extent to which enforcement priorities will be implemented. On March 18, 2020, ICE announced that it would temporarily adjust its enforcement posture focusing enforcement on public safety risks and individuals subject to mandatory detention based on criminal grounds. For those not falling into these categories, ICE's Enforcement and Removal Operations (ERO) will use its discretion to delay enforcement actions as appropriate.

**Travel Restrictions:** On January 31, 2020, President Trump signed a proclamation suspending entry into the United States of foreign nationals who were physically present in the People's Republic of China, excluding the Special

Administrative Regions of Hong Kong and Macau. A second proclamation was signed on February 29, 2020 suspending entry into the U.S. of foreign nationals who were physically present in Iran, followed by a third proclamation on March 11, 2020 suspending entry into the U.S. of foreign nationals who were physically present in any of the 26 countries that make up the Schengen Area. On March 14, 2020, the president signed a fourth proclamation restricting travel to the U.S. of foreign nationals who were physically present in the United Kingdom and Ireland. All four proclamations apply to foreign nationals who traveled to the listed countries within the 14 days preceding entry or attempted entry into the U.S. Citizens of the U.S. are not subject to the proclamations and all proclamations provide exceptions for U.S. lawful permanent residents, among others.

As of March 20, 2020, the northern and southern borders of the United States have been closed for all but essential travel. The closures will remain in effect until the Health and Human Services Secretary determines the closures are no longer necessary or one year from the publication of the rule, whichever is earlier. Essential travel includes U.S. citizens and lawful permanent residents returning to the U.S., individuals traveling for medical purposes, to attend school, to work in the U.S., to engage in emergency response and for public health purposes, to engage in lawful cross-border trade, official government travel or diplomatic travel, members of the U.S. Armed Forces including their spouses and children, and military-related travel or operations. Non-essential travel includes tourism which is temporarily restricted.



*Marcella's Paralegal*

**ELDER LAW IN THE TIME OF COVID-19**

Due to the pandemic of COVID-19, the world seems upside down, and particularly so in the lives of our elderly and disabled clients. Some of the most affected areas—medical contacts, benefits and home care and discharge planning—are the subject of our article. In addition to a discussion of the situation affecting our Courts, and laws and policies enacted in response to the pandemic, we have also included some of our personal experiences in dealing with our clients and wards during this difficult time.

***Court Update by Hon. Lisa A. Sokoloff***

As essential parts, the Guardianship Parts remain open. Not for everything. They are open for emergencies only. There is no list of what constitutes an emergency. That determination remains within the judges' discretion. Some examples of situations deemed emergencies involved alleged incapacitated people [AIP] in hospitals who need safe discharge plans, AIPs and IPs who lost their caregivers due to COVID-19, and approval for time sensitive sales and purchases. Much of this is exactly like the matters handled daily by Guardianship Parts before the coronavirus, except those appointed as court evaluators and attorneys for the AIPs now have the added hurdle of not being allowed into hospitals, rehab facilities and nursing homes to speak directly to the AIPs. The Judges thank all those still accepting assignments in these difficult times.

The GFS office remains open and staffed by a rotating team of clerks and court attorneys, to whom all of the Judges and Part staff are indebted. One judge is covering all emergency matters per week. In addition to the Hon. Mary V. Rosado, Tatanisha James and Lisa A. Sokoloff, Kelly O'Neill Levy [who still maintains some guardianship cases] and Shawn Kelly [who took over Tanya Kennedy's remaining cases] are all committed to weeks of coverage. To avoid foot-traffic in the court-houses, most of this coverage is remote. Where necessary, hearings are being held by phone conferencing and/or Skype for Business with court reporters available for transcribing.

Please don't call or email the part clerks, as most of them are home without access. Email is preferable to telephone contact as most Guardianship Parts are operating remotely. Contact information follows: for Judge James [alane@nycourts.gov], Judge Kelly [amdesai@nycourts.gov], Judge O'Neill Levy [predy@nycourts.gov], Judge Rosado [please contact the GFS office], and Judge Sokoloff [jirifkin@nycourts.gov]. Remember to avoid ex-parte communication. The GFS may be contacted for inquiries at 646-386-3328 [for emergencies: smsinger@nycourts.gov].

Stay safe and healthy!

***Telemedicine under COVID-19/Coronavirus  
By Lissett C. Ferreira***

As guardianship and elder law practitioners in the midst of a pandemic, we are presented with unique challenges in ensuring that our and our clients' wards, some of whom are already homebound, are able to receive the medical care that they desperately need. The U.S. Department of Health and Human Services (DHHS) has issued guidance to health care providers on the use of telemedicine services via remote technologies. The guidance effectively eases restrictions on providers with respect to patient privacy and cost-sharing, to facilitate the provision of telemedicine to, among others, elderly, disabled and severely ill patients.

DHHS issued a policy statement clarifying that health care practitioners will not be sanctioned for reducing or waiving a patient's cost-sharing obligations (such as co-insurance or deductibles) for telemedicine services provided during the COVID-19 pandemic. Normally, medical practitioners subject to the anti-kickback and anti-fraud provisions of federal health care programs would risk administrative sanction by the Office of the Inspector General (OIG) of the U.S. DHHS for providing free or reduced-cost telemedicine services, which would be viewed as an illegal inducement for future referrals. The new policy has effectively removed that barrier to the use of remote technologies to facilitate the use of telemedicine.

Additional guidance issued by DHHS clarifies that health care providers covered under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) may communicate with, and provide telemedicine services to, patients via remote communications technologies, even those that are not fully HIPAA-compliant. The guidance permits the use of any non-public-facing remote communication platform or application, including Skype, FaceTime, Facebook Messenger video chat, Google Hangouts video, Zoom and Skype. However, the use of "public-facing" applications, such as Facebook Live, Twitch, and TikTok, is not permitted. Enforcement is premised on the principle of "good-faith," and a provider's use of non-public technologies will be deemed good-faith. Of course, it is recommended that providers inform patients of the potential privacy risks associated with these technologies, and that they fully enable encryption methods and privacy settings.

***Compliance Mandate to Increase Hospital Capacity  
During COVID-19 Epidemic: What is the Cost?  
By Antonia J. Martinez***

Laws and regulations motivated by good intentions sometimes lead to unintended consequences. A new compliance mandate to increase hospital capacity during the Coronavirus health crisis could inadvertently lead to increase in fatalities and community spread of the virus.

Last week NYS required all hospitals statewide to increase capacity by 50% in order to deal with the high volume of patients flooding the healthcare system. On March 18, 2020, my client, Adam, 83, was hospitalized with fever and pneumonia and tested positive for Coronavirus. Six days later he was discharged from the hospital without confirming he no longer had the virus. EMS brought him to his apartment where he lives alone with no one to care for him. No aide from his healthcare agency would come because Adam had tested positive. His daughter briefly met Adam at his apartment since no one else would come. In a highly weakened state, Adam could barely walk. His daughter pleaded with EMS to take him back to the hospital but EMS said it must follow the discharge order. Clearly, this was not a safe discharge plan and two hours later, Adam fell, hit his head and was taken to the hospital where he was admitted. When Adam was re-tested for Coronavirus within 24 hours of his second hospitalization, the results came back positive.

Three days later, the hospital attempted to discharge Adam to a Skilled Nursing Facility ("SNF") without first having received a negative test result in violation of CDC's earlier policy that a patient must have two negative results in 24 hours before release. The current mandate to increase hospital capacity statewide to address the needs of the ever-growing number of Coronavirus patients is having unintended consequences when individuals who are still infected are returned to the community. Furthermore, his daughter, a resident of a different county, may potentially spread the virus in that community. Even though the state has good intentions, the application of the mandate given the pressure the healthcare system is experiencing, is leading to rushed judgments and outcomes that potentially endanger its citizens and further community spread.

***Practical Aspects of Working with Elderly or Disabled Clients and Wards  
(for Guardians) during the COVID-19 Crisis  
By Sabrina E. Morrissey***

This is a difficult time for all of us, but in particular, for the elderly and disabled, who are shut off from their usual activities and are restrained from (non-emergency) medical appointments, grocery store outings and family visits. They are frightened

*(Continued on Page 13)*



## Elder Law *(Continued from Page 12)*

of contracting the virus, which seems to disproportionately impact the elderly and infirm. In addition to helping with their legal needs, many of us maintain close relationships with our elderly and disabled clients. These relationships should continue, and may be strengthened, during this critical time. We are learning about “telemedicine,” which is the subject of the second part of this article. Many of us are now doing “telelaw” from home. I have continued to do legal work on projects that do not require court participation. This includes preparing estate planning documents for future signing, and in one case, preparing a Probate Petition for someone who died last week. This Petition will be ready to file when the Courts reopen for business. We rarely have so much “down time” for planning and consideration of our clients’ needs. This is a good time to think about their needs and work on those to-do items that have ended up on the back burner.

My staff wanted to work, so I tasked them with calling some of my vulnerable clients and wards on a weekly basis, to check in and to be sure that all of their needs are being met.

For professional guardians, this is a particularly harrowing time. I have many wards. I stand in their shoes. In anticipation of (possible) transportation glitches, in early March, I asked the aides who work in the home, to live-in for as many days as possible. This was actually a relief to many of them, who did not want to be exposed on a daily basis to COVID-19, on trains and in taxi cabs. This involved adjustments to payroll. For my wards at home, in anticipation of stores shutting down, I also made as many food purchases in advance as I could. Doctor’s visits were postponed. Medical supplies were pre-ordered. (I was frustrated by the inability of pharmacies to send medications in advance, but for now, medication supplies have continued.) For those wards with special needs, I kept physical therapy visits, but lessened the frequency, and asked the nurses to call in, whenever possible, rather than visiting in person. Telemedicine has become a viable option for healthcare discussions and for assessments of medical condition. (I have had several emails from Mt. Sinai Hospital over the past two weeks, notifying me that they have doctors on-call for telephone conferences, if needed.) I have had numerous phone calls with primary care physicians regarding medical issues and new medicines, as needs have arisen. I instituted strict protocols for all visitors to the home, which includes the necessary handwashing, and wearing of a gown, gloves and mask. Visits are limited to those that are strictly necessary. These practices will continue until the COVID-19 threat is past.

Home care continues to be a challenge, as cases evolve. Some of the aides are growing tired. Their home situations change, and they find they cannot work as much as they initially thought. I am currently in the process of re-designing an entire home care plan for one of my most compromised wards, as this article is being completed. (As Antonia noted in her article, aides may not want to come into a home where COVID-19 is present, leaving an ill client without the necessary level of care at home.)

For those wards in skilled nursing and assisted living facilities, I have kept in regular touch with the staff by phone, since no outside aides are now permitted. So far, only one of my wards in a facility has been infected with COVID-19, and he had a very mild case.

For your clients and wards, whether at home, or in a facility, I encourage you to send cards or cookies (Cheryl’s is still delivering). I also encourage the use of FaceTime. It is comforting for people to see their family, trusted aides, and you, during this time. They feel alone as it is, so to communicate with them and let them see that their supporters are okay, is very comforting.

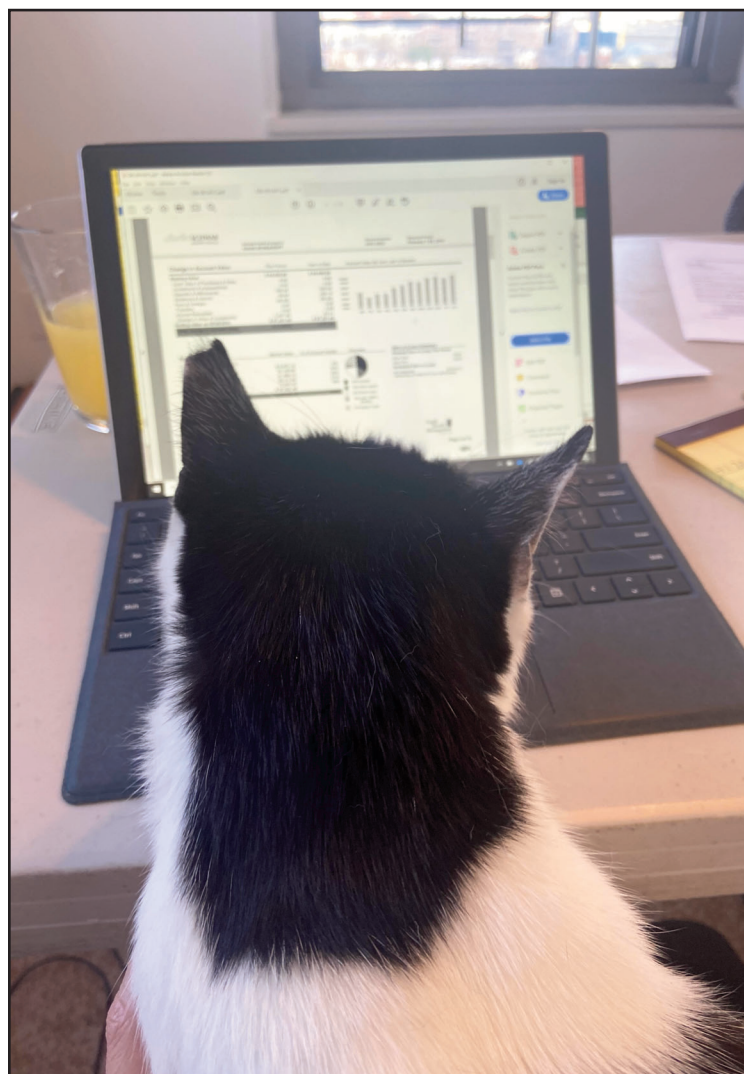
On the specific issue of COVID-19, I mentioned my ward who is positive but is largely asymptomatic. He had a low grade fever and some twitching of his limbs and was treated only with Tylenol. He was in a hospital for a couple of days, but due to the

shortage of beds, they very quickly sent him to quarantine. He cannot return to his usual facility for two weeks, so I spent time working on a safe discharge for him to a quarantine facility, one that is able to meet his needs. Due to his severe disabilities, this was a situation that took attention to detail and numerous calls with doctors and nurses, all of whom were professional and caring. It worked out, but it took time. Thankfully, I had the time to do it. (Unlike Antonia’s client, who is elderly, this ward is younger and, fortunately, did not get the full brunt of the virus.)

This health care crisis has made me more grateful than ever to the medical personnel (including friends and family members of mine) who are putting their lives on the line every day.

In closing, we should all continue to support each other. Reach out, if there are issues or concerns that you have, that we, as an organization or individuals, may be able to resolve. Take care of yourselves, so that you may continue to do your good work for our most vulnerable citizens.

A Final Note: Antonia recommends that everyone should read GIS 20 MA/04 concerning Coronavirus Medicaid Eligibility Processing. This is important guidance on the extension of benefits and the application process during this time. It can be found at: [https://www.health.ny.gov/health\\_care/medicaid/publications/docs/gis/20ma04.pdf](https://www.health.ny.gov/health_care/medicaid/publications/docs/gis/20ma04.pdf).



## **NYWBA Litigation Committee COVID-19 Update** **By Nidhi Shetye and Sara Crasson**

In response to the coronavirus pandemic, New York City Courts have suspended almost all functions but essential matters. Nonetheless, New York City courthouses remain open at this time – although a number of steps have been taken to reduce traffic inside those courthouses for health reasons. Outside New York City, all court operations have been localized in a single court in each county. Judges and staff in all these courts are performing “essential functions” – court functions that cannot be postponed without serious consequences to the parties involved.

– Essential functions in various courts include, but are not limited to, the following:

- Supreme Court: Mental hygiene applications, civil commitments and guardianships, and others as the court may allow.
- Family Court: Child protection proceedings, juvenile delinquency proceedings, family offenses and emergency support orders, and other as the court may allow.
- Housing matters: Essential applications such as landlord lockouts, serious coded violations, and repair orders, and others as the court may allow.
- New York City Criminal Court/City Courts: Criminal arraignments, requests for orders of protection, driver's license suspension lifts and emergency applications, and others as the court may allow.
- All courts: Judges may determine that other individual matters are “essential.”

Additionally:

- Jury trials in progress in civil and criminal cases shall continue. However, no new trials will be started until further notice.
- Special parts – including motion parts, PC parts, compliance parts and others – have been suspended. Regarding Preliminary Conference Parts, there will be management with a goal of minimizing courthouse appearances, maximizing adjournments and stipulations on consent, and allowing remote appearances through Skype or telephone.
- Residential evictions, court-ordered auctions, and residential foreclosure proceedings have been suspended.
- Rescheduling: Parties will be advised of rescheduled Court dates when normal court business resumes.
- All motions, beginning March 16, 2020, will be taken on submission.

### **Reproductive Rights and Women's Health Committee Update** **By Lydia H. Devine**

The response to the COVID-19 outbreak has, as we know, put a strain on health care providers and caused us to evaluate what is and is not essential work. So far, this has affected reproductive rights and women's health in two major ways.

In Texas and Ohio, the state governments have shuttered abortion clinics, and similar bans may soon be passed in Mississippi, Maryland and other states. In Texas and Ohio, the bans have been justified either by deeming abortion a non-essential, elective health service, or on the premise that continuing to perform abortions would take personal protective equipment away from health care providers working on the COVID-19 response. Of course, both of these arguments ignore the truth that abortion is a safe, routine procedure, but is also a time-sensitive one. Significant delays in abortion services will certainly put it out of reach for many women in those states at a time when the prospect of having a child may feel increasingly overwhelming or impossible. The bans are being challenged in Texas and Ohio, and our Committee is monitoring whether and how attorneys in our Bar Association can help with these challenges.

In New York, the State Department of Health issued guidelines that a support person -- whether it is a spouse, family member, friend, or doula -- is essential to a woman's care during labor, delivery, and postpartum. Soon after, the New York Presbyterian and Mt. Sinai hospital networks went beyond these guidelines, banning all support people during labor and delivery. This meant that women giving birth in these hospital networks would have to do so alone, and that spouses could not be present for the birth of their children. This policy was counter not only to the New York State Department of Health's newly-issued guideline but also to World Health Organization guidelines, which recognize that support people perform an essential function by being able to notify hospital staff in emergency situations where laboring women are unable to do so themselves, thereby helping to reduce maternal mortality when time is of the essence. Fortunately, after significant media attention and the publicity of a Change.Org petition which garnered over 600,000 signatures, Governor Cuomo signed an executive order requiring hospitals to allow one support person, so long as that person was asymptomatic for COVID-19. While more restrictive than the policies in place prior to the pandemic, women will no longer be forced to give birth alone.



*Nidhi's Paralegal*



## Practicing Law in a Pandemic: The Ethics of Remote Lawyering in the Age of COVID-19\*

*By Nicole Hyland, Tyler Maulsby and James Mariani*

### Introduction

The COVID-19 pandemic has upended the legal industry. Until recently, law firms have maintained a largely face-to-face business model. In New York, for example, courts have generally required in-person preliminary conferences and compliance conferences, despite their relative inefficiency in comparison to telephone or video conferences. When important documents are signed and notarized, everyone traditionally gathers in the same location, even though it would be more convenient and cost-effective to notarize documents remotely. Lawyers have a reputation for being inept with new technologies and resistant to change. Those stories you hear about law firm partners who read their emails on printouts handed to them by their assistants are not apocryphal – that really happens.

Practically overnight, this has all changed. As an increasing proportion of the population is sheltering in place, law firms are being forced to adapt to a remote-work environment. This new order is placing an unprecedented burden on law firms' technological capabilities. As if that were not enough, lawyers – like many others – are juggling new challenges, such as educating and entertaining children whose schools and parks have been shut down. Add to all this the psychological effects of social isolation; stress over economic uncertainty; shortages of food and other essentials; and a range of emotions in response to media coverage of the pandemic. These stressors can build up over time, creating unfortunate opportunities for lawyers to make mistakes – which can lead to negative outcomes, such as unhappy clients, loss of business, malpractice liability, and even disciplinary proceedings.

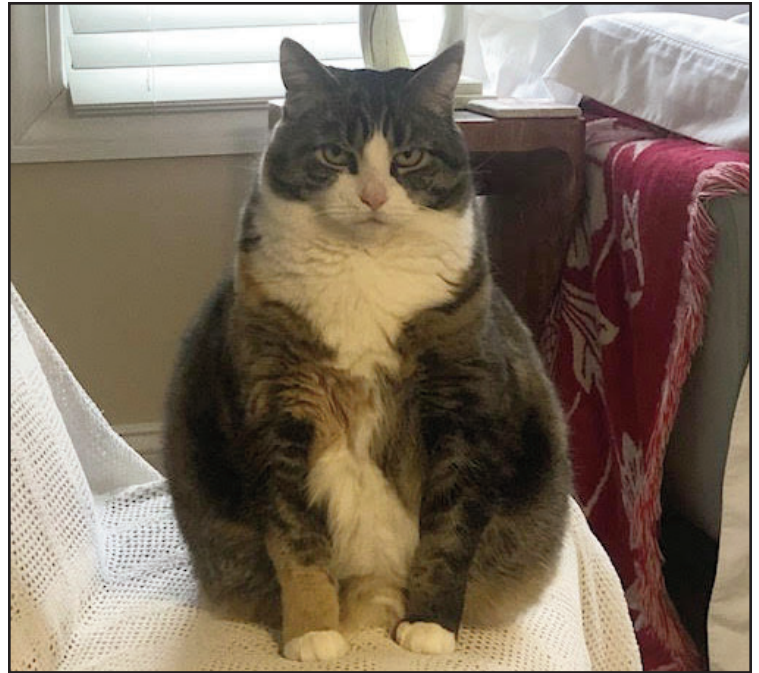
Here is the good news. As lawyers, we are trained to handle new problems and help others do the same. Below are some tips for avoiding errors and ethical violations as we all muddle through this crisis.

### Create a Crisis Plan

Rule 1.1 of the New York Rules of Professional Conduct ("RPCs") requires lawyers to provide competent representation to their clients, including technological competence. Having a plan during this crisis is essential for meeting your duty of competence to your clients. Since we are well into the COVID-19 crisis, many of you have undoubtedly created a crisis plan. If not, however, it is not too late. Take some time to sit by yourself or confer with your law firm partners over video conference and map out a plan for getting through this crisis.

Here are a few items that you may want to include in your crisis plan:

- Form a crisis team and delegate authority to act quickly as the situation develops
- Develop specific policies to respond to the crisis, such as remote-work practices, travel policies, reporting requirements if exposed to COVID-19, enhanced IT helpdesk procedures, improved information security safeguards, emergency alert protocols, etc.
- Monitor daily developments regarding the crisis, such as emergency executive orders, changes in court procedures, filing deadlines, federal and state aid for businesses, etc. You can find regular updates on the latest COVID-19 developments on our Professional Responsibility Law blog at <https://professionalresponsibility.fkks.com>
- Make sure attorneys and staff have up-to-date information about the crisis including the firm's policies as they evolve
- Know where your lawyers and staff are and how to contact them
- Assess your law firm's operational and technological capabilities including how full-scale remote work might require updates or changes to capabilities (e.g. do employee devices have sufficient security features enabled)



*Nicole Hyland says Emma is less thrilled about this intrusion into her territory*

- Determine whether you need to make additional technology investments to ensure that you are able to meet obligations to the firm's clients and incentivizing good information security practices

We prepared a detailed crisis planning checklist, which is available on our blog at <https://professionalresponsibility.fkks.com/post/102g3cc/practicing-law-in-a-pandemic-remote-lawyering-in-the-age-of-covid-19-material>.

### Protect Client Information and Property

RPC 1.6 requires lawyers to protect confidential information from both intentional and inadvertent exposure. In addition, RPC 1.15 requires lawyers to safeguard client property. In this new teleworking environment, lawyers may need to adopt enhanced measures to protect client information and property, including:

- Ensuring that remote work spaces and devices are secure
- Using appropriate password protection, two-factor authentication, and encryption for devices
- Disabling smart speakers and other AI devices when having confidential conversations
- Ensuring that lawyers and staff are properly trained on new or unfamiliar technologies
- Using secure conference video and call software and practices
- Instituting a firm-wide data security policy with appropriate safeguards
- Learning and training personnel to identify and avoid cybercrimes, such as phishing, ransomware attacks, escrow and wire transfer scams, etc.
- Regularly monitoring law firm escrow and operating accounts and understanding insured claim requirements
- Understanding the law firm's insurance policy and implementing any operational requirements necessary for data security claim coverage

*(Continued on Page 16)*

## Practicing Law in a Pandemic (Continued from Page 15)

### Maintain Effective Communication with Law Firm Personnel

Law firms, managing partners, and supervising attorneys each have duties to supervise other lawyers and non-lawyer personnel to ensure that everyone at the firm is complying with their ethical obligations. See RPC 5.1-5.3. Supervision is challenging enough when lawyers and staff are working together in the same office. These challenges increase exponentially when law firm personnel are working remotely from multiple locations. Here are some tips for maintaining effective communication with lawyers and staff during this time:

- Try not to rely exclusively on email when communicating with law firm personnel. Pick up the phone and call people to check on how they are doing. Use video conferencing once in a while, so you can see each other's faces. It's also fun to get a peek into your colleagues' teleworking environments, check out their wall décor, and occasionally see their cats walk across their keyboards.
- Management should communicate regularly with lawyers and staff regarding the law firm's evolving policies, updates on the crisis, reminders about good teleworking practices, and any other relevant issues
- Encourage practice groups within the firm to establish regular check-ins by telephone or video conference
- Senior lawyers who are in a supervisory position should check in regularly with junior lawyers and staff
- Conduct remote training sessions on technology, teleworking best practices, as well as developments in the law
- Send email reminders about best practices
- Remind lawyers and staff to stay current on timekeeping and billing
- Make sure that lawyers and staff are reporting exposure to COVID-19 or any diagnosis
- Have a plan for covering work if a lawyer becomes incapacitated due to illness or for any other reason

### Maintain Effective Communication with Clients

RPC 1.4 requires lawyers to communicate with their clients regarding material developments and keep clients reasonably informed about the status of their legal matters. In addition, RPC 2.1 requires lawyers to render candid advice to clients. RPC 1.14 is a special rule that offers guidance to lawyers who represent clients with diminished capacity, which is particularly relevant during this time, as some clients may become exposed to COVID-19. As we adapt to new modes of communication during this crisis, lawyers should implement additional measures to ensure that they are complying with their duties of communication. Here are some tips:

- Make sure you have current contact information for your clients
- Determine the best way to communicate with each client. For some it will be email. Others may prefer telephone or videoconference. Consider each client's comfort level with technology and be flexible
- Inform clients of any aspects of your teleworking plan that may affect the representation
- Update clients on changes in the law that may affect the representation
- Adjust client expectations about time-frames, results and strategy
- Explain to clients that additional courtesies to opposing counsel are appropriate during this time
- Have a plan in case your client becomes incapacitated or stops communicating with you

### Practice Self-Care and Seek Help for Stress

While it is important to have a crisis plan for your law practice, it is equally important to have a plan for your personal well-being. The plan will be different for each of us, but should probably include some combination of exercise, good nutrition, suffi-

## Employment Rights and COVID-19

By EEOW Committee Co-Chair Megan Goddard  
and Saranicole Duaban of Goddard Law PLLC

### I. Unsafe Work Conditions & Retaliation

Employees who are subjected to unsafe working conditions due to coronavirus have various options. One issue that has repeatedly come up is the lack of face masks. The Occupational Safety and Health Administration ("OSHA") has issued a temporary guidance for the Respiratory Protection (such as face masks) which took effect on March 14, 2020. The guidance states "A respirator shall be provided to each employee when such equipment is necessary to protect the health of such employee" (29 CFR 1910.134). Employees who are not provided with protective masks can file a complaint at OSHA here: [https://www.osha.gov/workers/file\\_complaint.html](https://www.osha.gov/workers/file_complaint.html).

Some employees have been terminated for complaining about unsafe working conditions due to Covid-19, including the inability to work remotely or being asked to leave their home for work related errands. Employees who are terminated for objecting to unsafe working conditions may have a claim under OSHA 11(c), which prohibits retaliations against workers raising concerns regarding health and safety conditions. Employees have **ONLY 30 DAYS** to file a complaint with OSHA if they are retaliated against. (See <https://www.osha.gov/Publications/OSHA3812.pdf>)

Employees who have been retaliated against may also have a claim under the National Labor Relations Act ("NLRA"), which gives employees the right to "engage in protected concerted activities for...mutual aid or protection." To have a claim under this statute an employee does not need to directly work with another employee. One employee may have a claim under this statute if they are speaking out on behalf of other employees. You can find more information about employee rights under the NLRA here: <https://www.nlr.gov/rights-we-protect/rights/employee-rights>

### II. Discrimination and Privacy Issues in the Workplace

**It is important to remember, and surprising that so many employers have forgotten, that employment laws remain in effect, even during a Pandemic.**

We have seen a terrifying increase in discrimination against employees with a  
(Continued on Page 17)

cient sleep, human interaction, entertainment, and individual "me time." As you shelter in place, make sure you are incorporating some or all of these elements into your daily routine. Also, practice kindness and patience with yourself and others. If you are struggling emotionally or psychologically, the ABA has posted a helpful list of mental health resources for lawyers here:

[https://www.americanbar.org/groups/lawyer\\_assistance/resources/covid-19-mental-health-resources](https://www.americanbar.org/groups/lawyer_assistance/resources/covid-19-mental-health-resources)

### Conclusion

As this crisis develops, lawyers will face many unprecedented challenges in their law practices as well as their personal lives. We cannot predict all of these challenges, but we can try to anticipate and plan for many of them. Planning and implementing some of the procedures discussed in this article should help lawyers comply with their ethical obligations and minimize the risk of errors.

\* This article is adapted from an Ethics CLE webinar that was presented by the authors in March 2020. A version of the webinar is also being provided to members of the New York Women's Bar Association on April 21, 2020. You will find more details about the NYWBA webinar elsewhere in this newsletter.



## Employment Rights (Continued from Page 16)

Chinese or Italian background. As is always the case, employers cannot discriminate against employees because they are from regions that have been hard hit by coronavirus. Employers should not apply employment policies only or disproportionately to employees of these races or ethnicities. Additionally, it is still illegal for employers to discriminate against employees who have pre-existing conditions that make them more susceptible to coronavirus such as autoimmune diseases, diabetes, and asthma. Employers should not subject employees with pre-existing conditions to more stringent work restrictions or terminate them. Employers should also continue to engage in the interactive process with employees who may need a reasonable accommodation due to a pre-existing condition and potential exposure to coronavirus.

Another troubling and common issue is an employer's duty to protect its' employees' health information. While it is important for employers to inform employees if they have been potentially exposed to COVID-19, employers cannot disseminate employee health information more than is necessary to protect the health of other employees. The EEOC has created a helpful guide to employment issues during a pandemic available here: [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm)

### III. Paid Sick Leave

The Families First Coronavirus Response Act (FFCRA) which went into effect on April 1, 2020. See <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>. These materials answer some of the most common questions received and will help ensure that the American workforce has all the tools and information needed in these very trying times.

FFCRA offers businesses with fewer than 500 employees tax credits to provide employees with paid leave, either for the employee's own health needs or to care for family members.

The Department of Labor's (Department) Wage and Hour Division (WHD) administers and enforces the new law's paid leave requirements. These provisions will apply from the effective date of April 1, 2020 through December 31, 2020.

**Covered Employers:** The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to certain public employers, and private employers with fewer than 500 employees. Most employees of the federal government are covered by Title II of the Family and Medical Leave Act, which was not amended by this Act, and are therefore not covered by the expanded family and medical leave provisions of the FFCRA. However, federal employees covered by Title II of the Family and Medical Leave Act are covered by the paid sick leave provision.

Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or childcare unavailability if the leave requirements would jeopardize the viability of the business as a going concern.

**Eligible Employees:** All employees of covered employers are eligible for two weeks of paid sick time for specified reasons related to COVID-19. Employees employed for at least 30 days are eligible for up to an additional 10 weeks of paid family leave to care for a child under certain circumstances related to COVID-19.

**Notice:** Where leave is foreseeable, an employee should provide notice of leave to the employer as is practicable. After the first workday of paid sick time, an employer may require employees to follow reasonable notice procedures to continue receiving paid sick time.

### Qualifying Reasons for Leave:

Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (or unable to telework) due to a need for leave because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19; or
6. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Under the FFCRA, an employee qualifies for expanded family leave if the employee is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19.

### Duration of Leave:

**For reasons (1)-(4) and (6):** A full-time employee is eligible for **TWO WEEKS OR 80 hours** of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.

**For reason (5):** A full-time employee is eligible for up to **12 WEEKS** (two weeks of paid sick leave followed by up to 10 weeks of paid expanded family & medical leave) at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

### Calculation of Pay:

**For leave reasons (1), (2), or (3):** employees taking leave are entitled to pay at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).

For leave reasons (4) or (6): employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).

**For leave reason (5):** employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period).

WHD provides additional information on common issues employers and employees face when responding to COVID-19, and its effects on wages and hours worked under the Fair Labor Standards Act and job-protected leave under the Family and Medical Leave Act at <https://www.dol.gov/agencies/whd/pandemic>.

For further information about COVID-19, please visit the U.S. Department of Health and Human Services' Centers for Disease Control and Prevention. See <https://www.cdc.gov/coronavirus/2019-ncov/>.

## ***NYWBA Trusts and Estates Committee COVID-19 Update***

### ***By Tzipora Zelmanowitz***

Governor Cuomo's Executive Order 202.8 limiting court operations to "essential matters" during the pendency of the COVID-19 health crisis has caused a lot of confusion and angst within the legal community. While Surrogate's Court practitioners attempt to navigate the varying practices from county to county with respect to ongoing cases as well as the filing of new cases, this article seeks to provide some clarity on how several of our Surrogate's Courts are currently operating and offer some useful suggestions to advance cases while our courts are closed.

#### **Moratorium on Statute of Limitations and New Filings**

By Administrative Order dated March 22, 2020, the Chief Administrative Judge directed that, "effective immediately and until further order, no papers shall be accepted for filing by a county clerk or a court in any matter of a type not included on the list of essential matters attached as Exh. A. This directive applies to both paper and electronic filings." Notably absent from Exh. A is a list of "essential matters" pertaining to the Surrogate's Courts, further exacerbating non-conformity from county to county. Nevertheless, reports of accepted filings shared by our colleagues as well as updated information on our courts' websites, serve to inform us on how we can continue practicing during this time.

As an initial matter, practitioners should consider e-mailing an inquiry to the Chief Clerk of the particular county for guidance. That said, new applications should include an attorney affirmation detailing the circumstances warranting emergency intervention.

#### ***New York County***

The website for the New York County Surrogate's Court instructs practitioners that papers in "urgent or essential matters must be filed by mail, or if directed by court personnel, by electronic mail." Furthermore, all matters scheduled to be heard through April 30, 2020 have been administratively adjourned and the court will not be issuing citations returnable before the court in April or May of this year. As we understand it, the court is currently accepting applications for the issuance of preliminary letters testamentary (and presumably temporary letters of administration) and the turn-around for the issuance of letters has been reportedly swift.

The Chief Clerk of the New York County Surrogate's Court is Diana Sanabria. She can be reached at [dsanabria@nycourts.gov](mailto:dsanabria@nycourts.gov) or (917) 509-7218.

#### ***Queens County***

As of March 23, 2020, the Queens County Surrogate's Court relocated to an office at the NYC Civil Court Queens County building located at 89-17 Sutphin Boulevard, Jamaica, NY. The court has indicated that proceedings that are e-filed or submitted by mail will be accepted, but only those matters deemed urgent in nature will be processed, and delays will result due to the severe limitations on staffing. No further updates have been published on the court's website.

The Chief Clerk of the Queens County Surrogate's Court is James Lim Becker. He can be reached at [jlbecker@nycourts.gov](mailto:jlbecker@nycourts.gov) or (718) 298-0777.

#### ***Bronx County***

All matters that were scheduled to be heard by the Bronx County Surrogate's Court between March 17, 2020 and April 10, 2020 have been administratively adjourned. Presumably, appearances scheduled for the entire month of April will be similarly adjourned, although no further updates have been posted to the court's website. Notices of future dates for court appearances will be mailed to counsel and litigants.

New filings may only be submitted to the court by regular mail. If papers are brought into the courthouse, they are to be left in a box at the front entrance of the court. Because only essential personnel will be permitted to work at the courthouse, litigants should expect delays in the review, processing and scheduling of matters.

The Chief Clerk of Bronx County Surrogate's Court is Elix R. Madera-Fliegelman. She can be reached at [emadera@nycourts.gov](mailto:emadera@nycourts.gov) or (718) 618-1894.

#### ***Richmond County***

According to their website, effective March 23, 2020, the Richmond County Surrogate's Court is providing "essential/emergency functions only." The court has postponed all calendar appearances, including returns of citations, motions, hearings and examinations. All non-emergency matters can be filed with the court via regular or certified mail, with the understanding that such matters will be processed at a later date.

The Chief Clerk of the Richmond County Surrogate's Court is Ronald M. Cerrachio. He can be reached at [rcerrach@nycourts.gov](mailto:rcerrach@nycourts.gov) or (718) 675-8504.

#### ***Kings County***

Not much information has been made available concerning the operations of the Kings County Surrogate's Court. As previously stated, we encourage practitioners to contact the chief clerk with all inquiries.

The Chief Clerk of the Kings County Surrogate's Court is Doreen Quinn. She can be reached at [daqinn@nycourts.gov](mailto:daqinn@nycourts.gov) or (347) 404-9270.

#### ***Westchester County***

Westchester County Surrogate's Court is effectively shut down at this time. Per the Chief Clerk, the court is not accepting new petitions for probate or administration or applications for preliminary letters. Furthermore, because Westchester County is an e-file county, any documents that have been uploaded to the e-file system and require payment to be processed, will remain in the e-file queue for processing at a later date.

The Chief Clerk of the Westchester County Surrogate's Court is Johanna O'Brien. She can be reached at (914) 824-5656.

#### ***Nassau County***

It is recommended that emergency applications be made by order to show cause, with an attorney affirmation explaining the exigent circumstances warranting emergency status. Attorneys should also consider adding relief requesting that the court dispense with the filing of a bond and alternate service via e-mail or overnight mail. Once papers are ready for filing, they can be e-mailed to the Chief Clerk (contact information provided below).

If an original will needs to be filed, an attorney may submit an affirmation swearing that they are in possession of the original will and advise the court that the original will be filed with the court upon request.

Appearances for essential or emergency Surrogate's Court proceedings in Nassau County are being held via Skype. Litigants who require an interpreter should notify the Court in advance of a scheduled appearance.

On the day of the Skype appearance, the clerk in the Courtroom will call the case and ask for attorney appearances.

*(Continued on Page 19)*



## ***A Supreme Court Mediator's First Perspectives on The Pros and Cons of Virtual ADR***

### ***By Michele Kern-Rappy***

The courts, along with the rest of the world, are in the midst of an unprecedented time. Due to the COVID-19 crisis, New York State courts have been forced to suspend civil trials under the guidance of Chief Judge **Janet DiFiore** and Chief Administrative Judge **Lawrence K. Marks**, maintaining only essential and emergency proceedings. Mediations were deemed an essential function of the court and allowed to continue in an online format. To adapt to these changes, many courts have embraced virtual appearances that parties can participate in from their homes. As a result, many of us have had to shift our ADR practices and adopt Online Dispute Resolution (ODR) skills and processes overnight.

Many different types of technology can be used to create remote or "virtual" mediation sessions. One can video conference on platforms such as Zoom or mobile apps like Skype, WhatsApp, or FaceTime. Mediators can also utilize phone conferences and electronic meeting rooms. All of these programs allow mediations to continue while courts are closed. They even enable mediations to proceed that would otherwise be impossible or challenging due to distance or financial constraint.

While there are tremendous long-term benefits to using Online Dispute Resolution, there are also some disadvantages that need to be recognized.

#### **The Pros of Virtual ADR**

ODR provides parties the ability to pursue a resolution of their disputes during this global pandemic and widens the capabilities of mediation offices. Now they can reach people they might not have been able to before, because ODR can be much more cost-efficient than traditional in-person mediation. Clients can save travel time and avoid the financial costs that travel imposes on themselves and their attorneys. In the international context, when the internet is the carrier of communication, sometimes high telephone toll charges can even be avoided.

In addition to cost efficiency, moving mediations online can resolve many logistical challenges. Often one or more of the parties no longer lives or works near the place where the dispute arose or near the proper jurisdiction and venue as required by contract. Pressing current business may also not permit the decision-maker to travel to an in-person session. These challenges can be solved, or at least partially ameliorated, by ODR. All parties can simply log on from any location and attend mediation, all without violating the current social distancing guidelines. Since parties only have to agree to a time to mediate, this also further alleviates many scheduling conflicts.

ODR is also advantageous because it makes it easier to share documents and evidence during a mediation. Many times, during a session, a party will reference a document or a case that they are relying on, but they will not have hard copies of that material. This often halts the flow of conversation and wastes critical time, because a mediator or a party will attempt to pull it up on a computer and print it out. With ODR, attorneys can easily share their documents with a mediator and other parties through email or distribute the information right in the platform, or they are using. This allows the conversation to continue while someone retrieves the documents and lets all parties easily and quickly access the information.

Paradoxically, the informality of the virtual mediations helps the sessions be more personable.

#### **The Cons of Virtual ADR**

While there are many benefits to virtual mediation, it does have some significant drawbacks. There is no real substitute for face-to-face conversations. Many experts say that mediations are most effective when the parties to the dispute are physically present with each other and a mediator. With ODR, there is an electronic distance between the parties which might cut off or impede the emotional aspect that is key to a successful mediation. For example, it is much harder to see the raising of an eyebrow, the relaxing of the shoulders, and the slight curl of a smile; or to hear a short sharp inhale or exhale, a cleared throat, or an involuntary *soto voce* harrumph in response to something that someone else said. There is no opportunity for two people to walk to the coffee urn at the same and have a quiet word with one another. There is also no opportunity for a lawyer to put her hand on her client's arm in caution, or for a mediator to reach out in support of a party.

*(Continued on Page 20)*

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#### **Trusts & Estates** *(Continued from Page 16)*

The Surrogate will ensure that, wherever necessary, the parties and counsel can consult privately. At the conclusion of the appearance, the Surrogate will direct the clerk regarding the completion of necessary paperwork and authorize the use of his/her stamp and signature where appropriate.

The Chief Clerk of the Nassau County Surrogate's Court is Diana Keller. She can be reached at [dkeller@nycourts.gov](mailto:dkeller@nycourts.gov) or (516) 493-3805.

#### **Zoom Meetings and Document Cataloguing**

Although our courts are not operating at full capacity, Surrogate's Court practitioners can utilize this time to advance their cases in other ways. Indeed, many firms (and family and friends) are making use of Zoom to host meetings or conference calls. Several court reporting companies, such as TriStar Court Reporting, are offering the use of Zoom to conduct virtual depositions. For those unfamiliar with Zoom, it is an application that can be used on any computer, laptop, tablet or phone, which provides a virtual meeting space for multiple participants. The meeting host – typically the court reporter – invites the attorneys and witness to his/her virtual meeting room by sharing a link via e-mail. All meeting participants should have webcam and microphone capabilities for optimal experience.

Another great way to keep your cases moving forward is by reviewing documents that have been produced and may not have been reviewed yet in preparation for depositions or summary judgment motions. Particularly with document heavy matters, document review and logging are often placed on the back burner until utterly necessary. Now that many, if not most, filing and service deadlines have been suspended, document review can assist with formulating a litigation plan.

#### **Conclusion**

In a world that is changing daily and a profession impacted by so many uncertainties, our goal is to stay informed, safe and sane. We will endeavor to keep the Trusts and Estates Committee apprised of additional updates as they become available.

## Virtual ADR (Continued from Page 19)

Online communications can also make it harder for a mediator to figure out the core issues and what is important to each party. It can also be challenging for a mediator to manage the tone of the session.

Another disadvantage to virtual ADR is that there are limitations to its access. While this platform creates greater accessibility for some, it can also create difficulties for others. Despite today's tech-saturated society, many people do not have access to a computer with a webcam or a stable broadband internet connection. Even though most people assume that all parties can participate in ODR platforms, there is no real way to address and resolve this lack of access in this current climate. People cannot go to the library or an internet café because of social distancing. And even if they could, those places would present challenges to confidentiality, an essential component of mediation.

ODR presents other potential confidentiality and privacy concerns. ODR creates an electronic record of the mediation that would not exist if the mediation took place in person. It is also harder to keep track of where documents are going when shared electronically and whether they are remaining secure. Moreover, using an online platform creates a risk that someone is recording the phone call or video conference. It is also difficult to tell if any unauthorized people or devices are listening in on the conversation.

### Guidelines to Improve the Virtual ADR Process

Although virtual ADR poses some challenges to the mediation process, a mediator can mitigate some of these obstacles by adopting several guidelines.

First and foremost, a mediator can implement my RAISE method for mediation. This method encompasses the following five components:

**1. R: Research.** In advance of the mediation, I ask parties to complete a Pre-Mediation Statement. This statement outlines the essential facts, the client's interests, status of settlement negotiations, and reasons for impasse. It provides each party with a meaningful risk assessment of the case and allows a mediator to dig deeper during a session. It also requires counsel to gain insight into their clients' motivations and goals.

**2. A: Active Listening and Acknowledgment.** At the beginning of each session, I ask the parties to listen deeply, take in other people's perspectives, manage their own emotions, and stay composed under pressure. I also ask them to communicate with one another respectfully, remain silent while others are speaking, actively listen to what others have said, and acknowledge what has been said by each party at the session.

**3. I: Insight.** After I emphasize the importance of active listening, I begin the substantive portion of the session by asking each party to identify what is important to them. In a physical meeting, I will list on a whiteboard the essential facts, the client's interests, and the legal outcomes sought in the case. The parties then identify areas of agreement and disagreement and organize the issues that need to be resolved. This process helps clarify information, concerns, and needs and allows the parties to build trust.

**4. S: Solutions.** Once the key issues and common interests have been identified, I will help the parties craft broad solutions that address their needs. Using a facilitative style, I work with them to try and come up with creative res-

olutions that benefit all. I encourage them to be creative and challenge themselves to develop a wide array of options.

**5. E: End in Agreement.** Lastly, the final stage occurs when the parties memorialize and implement a negotiated agreement.

By outlining each of these components at the beginning of a virtual mediation session, a mediator will set essential ground rules. These ground rules explain what is expected of the parties and should aid communication throughout the mediation.

In addition to RAISE, parties and mediators alike can implement a number of tools when mediating through virtual conferencing platforms. First, each party and the mediator should make sure that their virtual conferencing tools are secure and operative. Before the mediation, each person attending a virtual session should perform a test run: ensure that they can log into the program successfully and verify that their video, audio, and internet connection work properly. Then, at the outset of the session, every person should identify themselves, so the mediator and parties alike can make sure they can see and hear each participant.

To address potential confidential and privacy concerns, a mediator should state at the start of a session that recording is not permitted. At this time, a mediator can also demonstrate to the parties that the mediation is secured and protected.

#### Articles Used:

- *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites* by Joseph Goodman  
<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1073&context=dltr>
- *Don't let a Crisis Go to Waste: Time to Explore Expansion of ODR for ADR* by Linda Gerstel  
<https://www.law.com/newyorklawjournal/2020/03/17/dont-let-a-crisis-go-to-waste-time-to-explore-expansion-of-odr-for-adr/>
- *Moving Arbitration Online: The Next Frontier* by Beth Trent and Colin Rule  
<https://www.cpradr.org/news-publications/articles/2013-04-03-moving-arbitration-online-the-next-frontier-nylj>
- *The Future of ODR: The Promise of Advancing Technology*, Michigan Law Review  
<https://mttlr.org/2015/10/the-future-of-odr-the-promise-of-advancing-technology/>
- *Confronting The Challenges of Virtual Mediation*  
<https://www.law360.com/ip/articles/1258457/confronting-the-challenges-of-virtual-mediation>





From the CLE Committee:

During these unprecedented times, can we offer CLE to our members? The answer is yes. Given the COVID-19 crisis, the following formats are permitted without pre-approval: live web-conferences, teleconferences via audio only (is fine), and videoconferences. Zoom or Google Hangouts or another program can be used by multiple people (but free Zoom cannot be used since there is a 40-minute limit and there are limits with free Hangouts as well). The programs can be recorded by the host and distributed for credit as well. Audio is likely the easiest format.

Each committee would need to ensure that each attendee is present during the entire presentation, which requires providing a code to the attendees during each separate section of the CLE program. Each attendee must then sign the NY Attorney Affirmation form and submit it to the CLE Committee to receive a CLE certificate. If you are interested in conducting a CLE, please send an email to us at [cle@nywba.org](mailto:cle@nywba.org).



*Amy B. Goldsmith's Furbaby #1 (above)*

*Amy B. Goldsmith's Furbaby #2 (below)*



*Rocky and Angel are spooked.  
Can you guess who the masked attorney is?*

## Virtual Field Trips

- San Diego Zoo — [www.kids.sandiegozoo.org](http://www.kids.sandiegozoo.org)
- MARS — <https://accessmars.withgoogle.com/> Explore the surface of Mars on the Curiosity Rover
- Live Animal Cameras
  - San Diego Zoo — <https://zoo.sandiegozoo.org/live-cams>
  - Monterey Bay Aquarium — <https://www.montereybayaquarium.org/animals/live-cams>
  - Panda Cam at Zoo Atlanta — <https://zooatlanta.org/panda-cam/>
  - 6 Animal Cams at Houston Zoo — <https://www.houstonzoo.org/explore/webcams/>
  - Belugas at GA Aquarium — <https://www.georgiiaquarium.org/webcam/beluga-whale-webcam/>
  - Jelly Fish at GA Aquarium — <https://www.georgiiaquarium.org/webcam/jelly-webcam/>
- Virtual Farm Tour– Farm Food Canada 360 — <https://www.farmfood360.ca/>
- US Space & Rocket Museum Huntsville –See the Saturn Rocket on You Tube  
<https://www.youtube.com/watch?v=9Qe5RqyMNhc>
- Discovery Education Virtual Field Trips-Polar Bear  
Tundra — <https://www.discoveryeducation.com/learn/tundra-connections/>  
STEM — <https://www.boeingfutureu.com/>
- Manufacturing — <https://www.manufactureyourfuture.com/VirtualFieldTrip/US>
- The Louvre Museum in Paris — <https://www.louvre.fr/en/visites-en-ligne>
- The Great Wall of China — <https://www.thechinaguide.com/destination/great-wall-of-china>
- Boston Children’s Museum — <https://www.bostonchildrensmuseum.org/museum-virtual-tour>
- Guggenheim Museum New York — <https://rem.ax/Guggenheim>
- Smithsonian Natural History Tour — <https://naturalhistory.si.edu/visit/virtual-tour>
- Cincinnati Zoo will do a Facebook live event on their page at 3pm everyday to see animals & an activity to do at home
- Milwaukee With Kids - Fun science experiments to do at home — <https://rem.ax/2UkaSv0>
- The Museum of Natural History in NYC has a full slate of online offerings which include:  
Learn-at-home resources for families and students
  - OLogy, the science website for kids
  - Four Museum courses at Khan Academy
  - Museum quizzes through Kahoot
  - Curriculum collections
  - Grade-specific educator guides and activity sets based on the latest exhibitions, including
  - T. rex: The Ultimate Predator
  - The Nature of Color
  - Butterfly Conservatory
  - The Space Show Worlds Beyond Earth
  - Coursera
  - Ways to visit the #MuseumFromHome
  - Learn more about your favorite exhibits by downloading our free app Explorer
  - See Museum highlights at Google Arts and Culture or visit via a virtual tour



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