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Torts, Insurance & Compensation Law Section Journal

A publication of the Torts, Insurance & Compensation Law Section of the New York State Bar Association

Five Things To Know About New York No-Fault Insurance

Workers Compensation Updates

To Zoom or Not To Zoom: One Mediator's Observations

NYSBA PUBLICATIONS

Labor, Employment and Workers' Compensation Law

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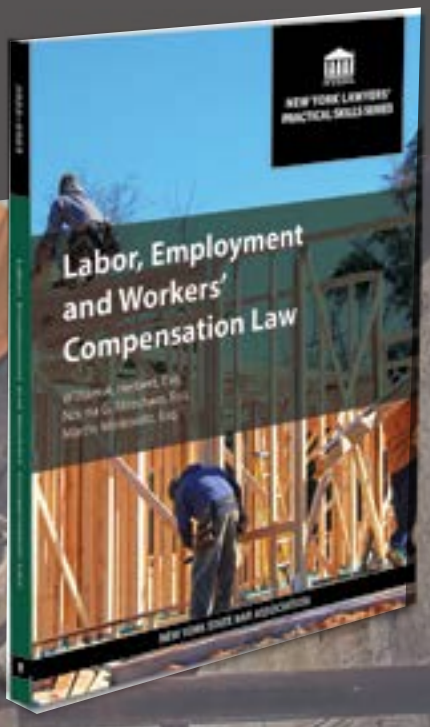

Part One of this practice guide is designed to provide the general practitioner who encounters occasional workplace issues with an overview of the complex and interrelated issues in labor and employment law. Coverage includes the state and federal laws prohibiting discrimination and retaliation in employment, wage and hour laws and workplace health and safety, and more.

Part Two focuses on the essential questions related to workers' compensation law in New York State, with tips on evaluating your client's claim and an overview of the many related forms and their uses.

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Message From the Chair


Brian Rayhill

Dear Fellow Members of the Torts, Insurance & Compensation Law Section:

Our TICL Section of the New York State Bar Association is in the midst of a very prosperous 2023, with many member-driven initiatives and events. For the first time since COVID, we resumed our spring Executive Committee meeting at Citi Field with a great turnout and welcoming to our new EC members. This collaborative gathering brought together both our downstate and upstate TICL members to identify priorities, plan future programs/events and build engagement. In addition, we recently returned from a robust TICL Executive Committee meeting in Chicago with a presentation on cybersecurity risks for attorneys and law firms. We followed the meeting with an enjoyable dinner overlooking the Chicago skyline.

The TICL Section provides frequent legislative updates and takes great pride in sponsoring and co-sponsoring relevant and impactful CLEs, which provide information and knowledge to our section members.

2023 TICL CLE Program Highlights

- Civil Evidence Update
- Remote Notarization: What Lawyers and Notaries Need To Know About Recent Changes
- Helping New York Attorneys With Medicaid Issues
- The Anatomy of an Asbestos Trial
- Introduction to OSHA Inspections and Citations
- Diversity, Equity & Inclusion in the Legal Profession: Understanding the Whys and Hows From a 360 Degree Perspective
- Workers' Compensation & Construction: Starting off on the Right Foot
- How To Read a Property Insurance Policy (and Actually Understand It)
- Automobile Litigation—Key Skills and Strategies in-Client Counseling
- Theory of the Case: Trial Advocacy Skills for New Lawyers
- Yankee CLE —Closing Cases Through Inter-Company Arbitration
- Evidence in a Civil Trial
- Understanding Indemnification Provisions in Construction Contracts

TICL has a tradition of supporting the NYSBA Trial Academy and did so again in 2023 as a Gold Sponsor. We sent a young lawyer to the academy at Syracuse University College of Law and further supported the program with three TICL faculty members. We continue to promote and prioritize diversity and the recruitment of young lawyers within the TICL section. Our CLE Programs in November and January both include segments on diversity, equity & inclusion and we look forward to our November 14, 2023 Virtual Law Student event, which provides a forum for law students to interact with TICL Section leaders.

Networking events are a trademark of TICL, and we have delivered consistently on this in 2023. In June, we sponsored a judicial reception at the Albany Bar Center to recognize the justices of the Appellate Division, 3rd Department. In September, we joined with the Defense Association of New York for a Yankee CLE at the Bronx Supreme Court, which was followed by a Yankees game at the stadium. Later in September, we co-sponsored with the Trial Lawyers Section a judicial reception in New York City to honor New York County Administrative Judge Adam Silvera. TICL has another judicial reception planned for November 8, 2023 to celebrate and honor the newly appointed justices of the Appellate Division, 3rd Department.

We have also found great success through collaboration with other NYSBA sections as we have coordinated programs and events with the Trial Lawyers, Young Lawyers and Dispute Resolution sections. We firmly believe these section

partnerships are the cornerstone for building collegiality with the NYSBA and our profession and will build on this in the years to come.

Our 2023 TICL/Trial Lawyers destination meeting and program is almost upon us, and we look forward to a spectacular CLE event and enjoying time with colleagues and friends at the beautiful Hammock Beach Resort in Palm Coast, Florida on November 30, 2023–December 2, 2023. Among our distinguished slate of presenters and attendees are NYSBA President Richard C. Lewis, Florida State Senator Steve Geller, Hon. George J. Silver, Hon. James G. Clynes, Hon. Suzanne Adams, Hon. Mae A. D'Agostino and Professor Patrick Connors.

If you have not already done so, please gear up for the NYSBA Annual Meeting in New York City on January 16, 2024–January 18, 2024. Our CLE program will be tailored to the needs of our members with an emphasis on the New York State mandatory CLE requirements. Specifically, our Diversity Committee co-chair, Mirna Martinez Santiago, will be presenting a diversity, equity & inclusion component; Supreme Court, New York County Justice James G. Clynes will be presenting an ethics CLE; and a cybersecurity, privacy and data segment will be on the agenda.

I conclude with a personal note of thanks to our entire TICL community who make our section successful and impactful to so many of the venues where we practice. I have thoroughly enjoyed working with our TICL leadership team of Vice Chair Kathleen Barclay; Secretary Rich Kokel; Treasurer Brendan Baynes, and Section Liaison Gina Bartosiewicz to maximize member benefits. Please check-in with our Communities page and please spread the TICL news to your firm attorneys and bar colleagues as now is the optimal time to enjoy all the TICL Section has to offer.

Brian Rayhill

Five Things To Know About New York No-Fault Insurance Law

By Spence Packer

New York's No-Fault Insurance Law is an often overlooked and unconsidered, complex area of New York law, described by the New York Court of Appeals as a "Rube-Goldberg-like maze."[1] The aim of this article is to provide a map through some areas of that maze.

No-Fault Insurance Benefits Are Available to Persons Injured as a Result of Losses Arising Out of the Use or Operation of a Motor Vehicle in New York

Drivers, passengers, pedestrians, and bicyclists are all covered under New York's no-fault insurance regulations.[2] The no-fault regulations specifically exempt operators of motorcycles from no-fault coverage.[3] No-fault insurance covers basic economic loss: medical expenses, work loss, death benefits, and other necessary expenses up to $50,000.[4]

Others who may be excluded from no-fault coverage are those who cause their own injuries, those whose intoxication or drug usage proximately caused the accident that produced the injuries, injuries sustained while committing a felony, those participating in racing or speed tests, those operating a vehicle known by them to be stolen, and those who are injured while repairing a vehicle in the course of business while on business premises.[5]

Injured Persons, Medical Providers, and Automobile Insurers All Have Obligations Under New York's No-Fault Law

When an individual notifies their automobile insurer about a motor vehicle accident, the insurer will transmit an "Application for Motor Vehicle No-Fault Benefits" form (NF-2) to them.[6] If the individual sustained injuries as a result of the accident, they must complete the NF-2 and return it to the insurer within 30 days of the accident in order to be eligible to receive no-fault benefits.[7] In order to remain eligible for no-fault benefits, insureds should comply with insurer requests to appear for independent medical examinations and examinations under oath.[8]

When medical practitioners render treatment to those injured in motor vehicle accidents, the no-fault law provides that the "Verification of Treatment by Attending Physician or Other Provider of Health Service" form (NF-3), or analogous form for certain other providers, must be submitted to the insurer no later than 45 days from the date of service.[9] Failure to comply with the requirement to submit a NF-3 within 45 days of the service will be excused if the provider presents a reasonable justification for the delay.[10]

Insurers who receive no-fault billing from medical providers may pay the bill in full, deny the bill in full, or in part, or request more information in order to process the bill.[11] No-fault payments must be tendered within 30 days of the insurer's receipt of the bill or interest will accrue on same.[12] Interest accrues at the rate of 2% per month, from the date the payment is overdue, if suit or arbitration is filed within 30 days of the "Denial of Claim Form" (NF-10) being issued.[13] If suit is not filed within 30 days of the denial, there is disagreement about whether interest accrues from the date the suit is filed, or the date the summons and complaint is served.[14] In arbitration, the analogous disagreement is whether interest accrues from the date the arbitration is filed or the date of the initiation letter. If an insurer decides to deny a medical provider's no-fault bill, it must do so within 30 days of receiving same, or be subject to preclusion of its defenses raised therein, subject to certain exceptions.[15] An insurer who requires more information in order to process a no-fault bill must request same within 15 business days of receiving the bill.[16] The provider then has 30 days to respond.[17] If the provider does not respond to the request for additional information within 30 days, the insurer must make the request again, within the following 10 days.[18] If the provider has not responded within 120 days of the initial request the insurer may deny the billing within 150 days of the initial request.[19]

'Use or Operation' Is an Important Coverage-Related Threshold Consideration

No-fault benefits are only available to those whose injuries arise out of the "use or operation" of a motor vehicle.[20] "Use or operation" is in large part not defined in the insurance law or regulations but is given meaning through a large body of case law. "Use or operation" doctrine creates a demarcation between motor vehicle accident-related injuries and other torts and acts.[21]

In *Pavone v. Aetna Cas. & Sur. Co.*, 91 Misc.2d 658 (Sup. Ct. 1977), plaintiff was approaching her car when she slipped and fell on ice. The court indicated that plaintiff's status as a covered person turned upon whether her injuries arose out of the use or operation of a motor vehicle. The court held that plaintiff was not entitled to no-fault benefits because a motor vehicle was not the proximate cause of the injuries.

In *Manhattan & Bronx Surface Transit Operating Auth. V. Gholson*, 98 Misc.2d 657 (Sup. Ct. 1979), a bus operator was attacked by a knife-wielding passenger who was angered by the operator's refusal to let the passenger off the bus between stops. The court ruled against no-fault coverage because it declined to find that "the legislature contemplated stretching the concept of a 'motor vehicle accident' to include an assault of a person who happens to be in a motor vehicle."

Walton v. Lumbermens Mut. Cas. Co., 88 N.Y.2d 211 (1996), is the seminal case related to use or operation. In *Walton*, plaintiff was injured when a levelator affixed to a delivery truck tipped over as he stood on it to unload goods. The court held that, "where a person's injuries were produced by an instrumentality other than the vehicle itself, no-fault first-party benefits are not available. The court also held that, "the vehicle itself must be a proximate cause of the injury . . . . Any other rule would permit recovery for claims based on back strains, slip-and-fall injuries, and other similar injuries occurring while the vehicle is being used but which are wholly unrelated to its use." Although the acts of loading or unloading a vehicle are specifically categorized as use or operation of a motor vehicle per the insurance regulations,[22] the *Walton* court noted that it was the levelator which proximately caused the injuries. Use or operation analyses often turn on similar, seemingly minor, facts.

Importantly, defenses based on "use or operation" are an exception to preclusion doctrine under *Cent. Gen. Hosp. v. Chubb Group of Ins. Cos.*, 90 N.Y.2d 195 (1997).[23]

The New York State Workers' Compensation Fee Schedule Is Used for Calculating Reimbursement Amounts for Medical Services Covered by No-Fault Insurance

Per New York Insurance Law § 5108, the New York State Workers' Compensation Fee Schedule is used to calculate the proper reimbursement amounts for medical services rendered to no-fault insureds.

A new fee schedule went into effect for no-fault on October 1, 2020.[24] The new fee schedule contains several substantive differences from its predecessor, not only in reimbursement amounts, but in the way it is applied. Some significant differences are the way out-of-state medical providers may be reimbursed, and confining certain providers of health services to the current procedural terminology (CPT) codes contained in their specific section of the fee schedule.[25]

Generally, monetary amounts for procedures are calculated by multiplying conversion factors, which are specific dollar amounts related to the type of medical provider and the category of procedure that the medical provider is performing, by the relative value units of a specific CPT code.

For example, when a medical doctor performs an office visit, the conversion factor is $15.06.[26] CPT code 99201 is for an initial office visit and has a relative value of 5.83. The conversion factor of $15.06, multiplied by the relative value of 5.83, equals $87.80, which is the proper reimbursement amount for an initial office visit billed using CPT code 99201.

If that same physician performed a surgery, the conversion factor would be $251.94.[27] CPT code 29807 is for a shoulder arthroscopy and has a relative value of 10.87. The conversion factor of $251.94, multiplied by the relative value of 10.87, equals $2,738.59, which is the proper reimbursement amount for this shoulder arthroscopy.

Plaintiff/Applicant Attorney's Fees Are Calculated According to the No-Fault Regulations and Paid by the Insurer

When disputes over no-fault payments are resolved by a court or arbitrator in favor of the plaintiffs/applicants, they are entitled to recover their attorney's fees.[28] Attorney's fees are limited to 20% of the principal amount of first part benefits paid, plus interest, subject to a $1,360 maximum fee.[29]

Spence Packer is an attorney for GEICO. His practice is focused on no-fault litigation, arbitration, and coverage matters. He earned his J.D. at the Benjamin N. Cardozo School of Law.

Endnotes

1 *Contact Chiropractic, P.C. v. New York City Tr. Auth*, 31 N.Y.3d 187 (2018).

2 N.Y. Comp. Codes R. & Regs. tit. 11, § 65-1.1 (N.Y.C.R.R.).

3 *Id.*

4 *Id.*

5 *Id.*

6 11 N.Y.C.R.R. § 65-3.4(b).

7 1 N.Y.C.R.R. § 65-1.1. The no-fault regulations also allow for a Department of Motor Vehicles Accident Report, or other accident report indicating injuries to constitute a written notice of claim. 11 N.Y.C.R.R. § 65-3.3(c). A completed Hospital Facility Form (NF-5) may also constitute written notice of a claim. 11 N.Y.C.R.R. § 65-3.3(d).

8 11 N.Y.C.R.R. § 65-3.5(c), (d), (e).

9 11 N.Y.C.R.R. § 65-1.1.

10 *Id.*

11 11 N.Y.C.R.R § 65-3.5; 11 N.Y.C.R.R § 65-3.8(c).

12 11 N.Y.C.R.R § 65-3.8(a)(1).

13 11 N.Y.C.R.R. § 65-3.9(a), (c).

14 *In Parsons Med. Supply, Inc. v. GEICO Gen. Ins. Co.*, 999 N.Y.S.2d 797 (App. Term, 2d Dep't, 2013), the court analyzed whether no-fault interest should accrue from the date the summons and complaint was filed or served. The Appellate Term cited § 412 of the New York City Civil Court Act, which provides: "In any action . . . wherein interest accrues from the date of inception of the action . . . entitlement to interest shall not begin to accrue until service is completed" on the party to be charged with paying the interest.

15 11 N.Y.C.R.R § 65-3.8(a)(1). An exception to the 30-day rule is raised in *Cent. Gen. Hosp. v. Chubb Group of Ins. Cos.*, 90 N.Y.2d 195 (1997). In *Chubb*, the court held that "lack of coverage" defenses based on a founded belief that the alleged injury did not arise out of an insured accident need not be preserved in a timely denial. In *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559 (1st Dep't, 2011), the court held that failure to appear for independent medical examinations is a breach of a condition precedent to coverage, and "fits squarely within the exception to preclusion doctrine as set forth in" *Chubb*.

16 11 N.Y.C.R.R § 65-3.5(b).

17 11 N.Y.C.R.R § 65-3.6(b).

18 *Id.*

19 11 N.Y.C.R.R. § 65-3.8(b)(3). In *Chapa Prods. Corp. v. MVAIC*, 66 Misc.3d 16 (App. Term, 2d Dep't, 2019), the court held that the deadline to issue a denial where applicant failed to provide verification is 150 days after the initial verification request.

20 N.Y. Ins. Law § 5103(a)(1); 11 N.Y.C.R.R. § 65-1.1.

21 *See Walton v. Lumbermens Mut. Cas. Co.*, 88 N.Y.2d 211, 214 (1996).

22 11 N.Y.C.R.R. § 65-1.1.

23 *Cent. Gen. Hosp. v. Chubb Group of Ins. Cos.*, 90 N.Y.2d 195 (1997) (holding that an insurer may assert a lack of coverage defense despite not issuing a timely denial).

24 35th Amendment to Regulation 83.

25 New York State Workers' Compensation Fee Schedule General Ground Rule 16 describes the fees out-of-state medical providers may charge when they perform services for New York no-fault insureds. New York State Workers' Compensation Fee Schedule General Ground Rule 19 provides that podiatrists, chiropractors, psychologists may not use CPT coding guidelines contained in the medical fee schedule.

26 Conversion factors in the New York State Workers' Compensation Fee Schedule are divided by geographic region. There are four regions in New York, and the above conversion factor is for region four, which includes most "downstate New York" zip codes. To illustrate, Region One's conversion factor for office visits is $12.11. The variations in conversion factor dollar amounts reflect the difference in medical practice maintenance costs in different New York locations.

27 In Region One the surgical conversion factor is $202.53.

28 11 N.Y.C.R.R. § 65-3.10(a).

29 11 N.Y.C.R.R. § 65-4.6(b).

History and Trends in No-Fault Insurance in New York

By Simon Kyriakides, Ben Carpenter and Frank Cruz

Introduction

To the public and law practitioners with limited, if any, exposure to motor vehicle accident litigation, there may be a perception that disputes arising from such accidents are restricted to actions commenced by parties seeking compensation for their pain and suffering. The degree of compensation available here is contingent on available policy limits for liability insurance coverages. In such instances, injured parties may file legal actions alleging that certain parties engaged in conduct or omitted conduct that caused the injuries sustained.

As of this writing, New York is one of 12 states offering no-fault benefits as another but no less important resource for compensation to parties injured in motor vehicle accidents. Under this provision, eligible parties may receive reimbursement for medical expenses for treatment and related expenses stemming from these accidents. This article offers an overview of the New York No-Fault Regulation ("Regulation"), dispute resolution, and advancements in the motor vehicle industry that may impact the no-fault industry.

Recovering Medical Expenses Before the No-Fault Regulation

It is important to note the history of motor vehicle accident-related litigation to better comprehend the reasons for implementing no-fault benefits. Prior to 1974, parties injured in motor vehicle accidents who sought compensation for their injuries and medical expenses had no choice but to commence civil litigation to obtain such compensation. Plaintiffs' actions would claim entitlement to damages for personal injury and medical expenses in one fell swoop. The arguably inherent shortcoming was that plaintiffs would be compelled to wait for favorable outcomes of litigation to recover monies for pain and suffering and medical expenses. Unless plaintiffs had other means to pay for their expenses, they very often found themselves in a quandary about whether to defer medical treatment or forgo treatment altogether, although it was urgently needed. Medical providers that extended liens on personal injury awards offered injured parties momentary relief and opportunities to receive treatment without the determination of parties at fault. Under this scenario, injured parties' payment for medical treatment would be culled from any compensation pursuant to a favorable jury verdict or award.

New York No-Fault Regulation Implemented

Under the *Comprehensive Automobile Insurance Reparations Act* [1], New York State legislation articulated benefits potentially available to parties injured in motor vehicle accidents. The agency, now known as the New York State Department of Financial Services (DFS), enacted the Regulation to define no-fault insurance benefits. While the Regulation presented a boon to injured parties seeking compensation for their pain and suffering, it also theoretically alleviated New York's civil courts' calendars teeming with motor vehicle accident claims. An injured party may receive compensation for damages due to pain and suffering—"non-economic losses"—where injuries breach at least one of nine categories of serious injuries or "thresholds." A serious injury is

> a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.[2]

In addition, parties injured in motor vehicle accidents could be deemed eligible for reimbursement of medical expenses before a determination of fault or causation for the underlying accident. Accordingly, motor vehicle owners in New York State now are required to purchase personal liability insurance and personal injury protection, also known as PIP or no-fault insurance. An eligible injured party can receive benefits up to $50,000, the statutory maximum coverage available to each injured person per accident. [3] An injured party may dispute the no-fault insurance carrier's rationale for denying or failing to timely pay or deny its claim for benefits. While injured parties may file claims for no-fault

benefits on their own behalf, most parties assign their rights to reimbursement to their medical providers. The assignee medical providers then would gain standing to pursue these claims as applicants against the named no-fault insurance carriers/respondents.

Arbitration Versus Litigation

As no-fault claimants may commence actions in court, the courts over time have decided cases that discuss the utility of no-fault benefits, its practical nature, and related public policy concerns. At the Regulation's core, the underlying premises are to guarantee prompt compensation for losses due to fault or negligence, reduce burden on the courts, and provide substantial premium savings to New York motorists.[4] New York's *Comprehensive Motor Vehicle Insurance Reparations Act* [5] and regulations that followed [6] (collectively "No-Fault Insurance Laws") require insurers to provide no-fault benefits for necessary expenses incurred for health care goods and services, including physician services, chiropractic services, physical therapy services, and acupuncture services. A health care service provider is not eligible to collect no-fault benefits if it is unlawfully incorporated or "fails to meet any applicable New York State or local licensing requirement necessary to perform such service in New York . . .." [7]

Partly due to backlogs in New York's civil courts and related costs of litigation, providers increasingly have selected arbitration to resolve their no-fault disputes. Parties who elect litigation to resolve their disputes are bound by the courts' rules and the Civil Practice Law and Rules (CPLR). Throughout its life in litigation, a case may include discovery and motion practice and is subject to the availability of judges and witnesses for trials. On the other hand, parties who instead choose arbitration as an alternative dispute resolution may enjoy the benefits of shorter lead times from filing to resolution at less expense to the parties. While the CPLR, rules of evidence, and courts' rules may guide arbitrators in their decisions, arbitrators are not bound to these resources in issuing their awards.

The Regulation depicts guidelines for initiating arbitrations,[8] jurisdiction, [9] arbitration forum procedures,[10] and arbitrators' appointments.[11] Insurers also must provide claimants the opportunity to arbitrate disputes involving the insurer's liability to pay a claim and, as a result, every automobile insurance contract contains an arbitration clause.[12] When applicants for no- fault benefits opt for arbitration, respondent insurers are compelled to appear for arbitration.[13] According to the Regulation, the interest that accrues during the pendency of a no-fault claim is two percent per month.[14]

Parties' optional arbitration of no-fault disputes is administered by a neutral organization designated by the superintendent of the DFS.[15] As the designated organization, the American Arbitration Association® (AAA®) no-fault arbitration program has realized steady significant growth over time. For instance, no-fault arbitration filings received increased from 304,620 in 2018 to 440,862 in 2022, a 45% increase in five years. In addition, case resolutions increased by 71% during the same period. In 2022, the program administered over 466,000 case resolutions in the arbitration forum. To date, there is no reliable data illustrating the number of no-fault claims filed in New York's courts.

Response to No-Fault Filing Trends

Filing patterns suggest some of the growth can be attributed to an increase in fee schedule disputes.

Over the years, the number of New York no-fault arbitrators increased steadily to meet parties' demands. The

arbitration panel currently consists of 174 arbitrators after the last "class" of arbitrators was appointed in 2019. Panelists are required to be attorneys licensed to practice law in New York State with at least five years' experience, which the No-Fault Arbitrator Screening Committee has determined qualifies such attorneys to review and resolve the issues involved in no-fault insurance disputes.[16] As a practical matter, many appointed arbitrators have insurance litigation-related experience. Arbitrators operate as independent contractors pursuant to compensation agreements with the AAA. They are appointed by and serve at the pleasure of the superintendent of the DFS.[17]

Since 2020, all panelists conduct their arbitration hearings remotely via Zoom and are eligible to hear cases from all over New York. Previously, arbitrators maintained hearing offices spaces throughout the state to facilitate access to applicants based on the latter's locations. Virtual hearings and the "de-regionalization" of the panel have increased efficiency by allowing panel and parties alike to participate in a greater volume of cases without concerns about travel time or regional restrictions.

The Future of No-Fault Insurance

In 1971, Massachusetts became the first state to require no-fault insurance. Numerous other states, including New York, enacted no-fault insurance through the 1970s, and the expectation was that no-fault would be widely adopted throughout the United States. However, support for no-fault waned in the following decades, with four states subsequently repealing their no-fault laws. Currently only 12 states require no-fault insurance. The RAND Institute has researched the issue of no-fault in depth. In 2010, it published a study discussing the history of no-fault in the United States and the factors surrounding the decline in popularity.[18] This publication stated that expected reductions in insurance premiums for states adopting no-fault never materialized largely due to substantially higher medical costs. The study noted that several states, including New York, proactively adopted no-fault reimbursement schedules or other treatment restrictions in an effort to reduce medical costs for no-fault. For the most part, those states that attempted to rein in costs have avoided repeals of no-fault laws. The study also revealed that no-fault regulations and laws generally have succeeded in reimbursing economic losses and reducing the time for payment of claims compared to common law tort states. Political attempts to repeal no-fault insurance in New York State generally have been unsuccessful. Former assembly member Kevin Cahill introduced bills A11026 in 2019 and A101 in 2021 that would repeal no-fault insurance within five years of the enactment of legislation. Neither bill ever made it out of committee. As of this writing, there appears to be no attempt to reintroduce those bills. Since the inception of the Regulation, automobiles have become progressively safer thanks to crash protection designs (e.g., multiple airbags and improved impact zones) and drivers' aids (e.g., stability control, anti-lock braking systems, and lane change warnings/detectors). Such developments arguably have the potential to reduce the number of motor vehicle accidents, the severity of injuries sustained, and the number of resulting fatalities. The following statistics from the Institute for Traffic Safety Management and Research illustrate the number of automobile accidents, automobile/pedestrian accidents, and automobile/bicycle accidents in New York State over a span of 10 years.

Auto Accidents	2012	2022
Accidents	294,757	344,813
Fatalities	1,082	1,023
Injuries	123,926	98,664

Auto/pedestrian	2012	2022
Accidents	15,832	12,473
Fatalities	312	290
Injuries	15,496	11,979

Auto/bicycle	2012	2022
Accidents	6,137	7,268
Fatalities	45	49
Injuries	6,025	6,865

Of note, injuries in auto accidents dropped in the 10-year period likely resulting from greater crash protection. The increase in injuries for auto/bicycle accidents may reflect the great increase in bicycle ridership during that time frame, particularly in New York City. The trends for both accidents and injuries point to a continued generation of no-fault disputes to be resolved. Along with increased crash protection and drivers' aids, the most radical development in automobiles impacting accidents and insurance companies is the development of autonomous vehicles (AV) or "self-driving cars." Companies such as Tesla, Waymo, Ford, and others are continuing to develop AVs, although even the most optimistic projections imply fully autonomous vehicles most likely will not be available until 2030. Even then, this will be limited to a minuscule subset of premium vehicles. The implications of AVs on no-fault insurance are not clear at this time. However, a task force formed by the New York State Bar Association reported in 2020 that there was no need to rework New York's driver obligations and product liability rules. The report also stated that any changes would depend upon the degree to which AV use ultimately permeates society. The report discouraged any suggestions that AV manufacturers assume no-fault liability or self-insurance against harms by AV users, finding such suggestions premature. The task force found that existing liability rules that hold human drivers and

AV manufacturers liable for unlawful driving or producing a defective product to provide an incentive for investment in safe AV systems. It also found that current no-fault laws already allow each owner to take care of its own injuries up to insurance policy limits.

Conclusion

States that offer no-fault insurance and related benefits provide an arguably more cohesive and predictable option for injured parties when compared to common-law jurisdictions based on a determination of fault. In New York State, no-fault parties may choose to resolve their disputes by using litigation or arbitration, two resolution techniques distinguished by their advantages and disadvantages. The advent of AVs and other technological advances in the motor vehicle industry undoubtedly will present interesting challenges to practitioners and consumers in the areas of personal injury and no-fault laws and regulations.

Simon Kyriakides is division senior counsel and vice president for the American Arbitration Association's State Insurance Division, and in that role provides regulatory and compliance oversight, as well as management of the AAA's No-Fault Insurance Arbitration panel. Prior to joining the AAA, he was counsel at the New York State Insurance Department (now the Department of Financial Services), where he provided regulatory advice on insurance issues to the department and the public, and prosecuted cases involving insurance fraud and misconduct.

Ben Carpenter is the vice president of operations at the American Arbitration Association in the New York Insurance Case Management Center. He oversees the operations of the No-Fault Arbitration Program and assists in managing the no-fault arbitrator panel. He is also directly involved in campaigns to educate the public on the New York No-Fault Arbitration Program and the benefits of alternative dispute resolution.

Endnotes

1 N.Y. Ins. Law Article 51.
2 N.Y. Ins. Law § 5102(d).
3 Insureds may elect to purchase additional personal injury protection.
4 *Allstate Ins. Co. v. Mun*, 751 F.3d 94, 99 (2d Cir. 2014).
5 N.Y. Ins. Law § § 5101, *et seq.*
6 11 CRR-NY 65, *et seq.*
7 11 CRR-NY 65-3.16(a)(12).
8 11 CRR-NY 65-4.2.
9 11 CRR-NY 65-4.3.
10 11 CRR-NY 65-4.5.
11 11 CRR-NY 65-4.5(b)(2)(d)(3).
12 N.Y. Ins. Law § 5106(b).
13 11 CRR-NY 65-4.1.
14 11 CRR-NY 65-3.9(a).
15 11 CRR-NY 65-4.2(a).
16 11 CRR-NY 65-4.5(d)(2).
17 11 CRR-NY 65-4.5(d)(3).
18 Anderson, J. M. (2010, February 2). The U.S. Experience with No-Fault Automobile Insurance: A Retrospective, RAND, https://www.rand.org/pubs/monographs/MG860.html.

Frank Cruz, a native of New York City**,** was introduced to ADR when he served as a mediator for the dispute resolution program of the Los Angeles City Attorney's Office and Los Angeles Superior Court's then-pilot ADR program. After 20 years of legal experience, including tenures as trial attorney and managing attorney, he switched gears and was appointed as a no-fault arbitrator with the AAA's New York State Insurance Program. Since May 2016, he has served as vice president with that program, where he leads and maintains working relationships with the New York State Department of Financial Services, arbitrators, and program users. He also has led training for arbitrators and AAA staff to ensure compliance with relevant laws, regulations, and best practices.

TICL SECTION EVENTS

Vice Chair Kathleen Barclay and Mike O'Brien, Past Chair of the TICL Section, with Hon. Laura M. Jordan (center) at 2023 Annual Meeting.

Former TICL Section Chair Molly Casey with very special guest Linus at 2023 Annual Meeting.

Members of the TICL Section Executive Committe enjoy an evening at the Columbia Yacht Club in Chicago for the Executive Committee outing in Sept. 2023.

Prof. Patrick M. Connors, Albany Law School, recipient of the 2023 TICL Section Professor David D. Siegel Award.

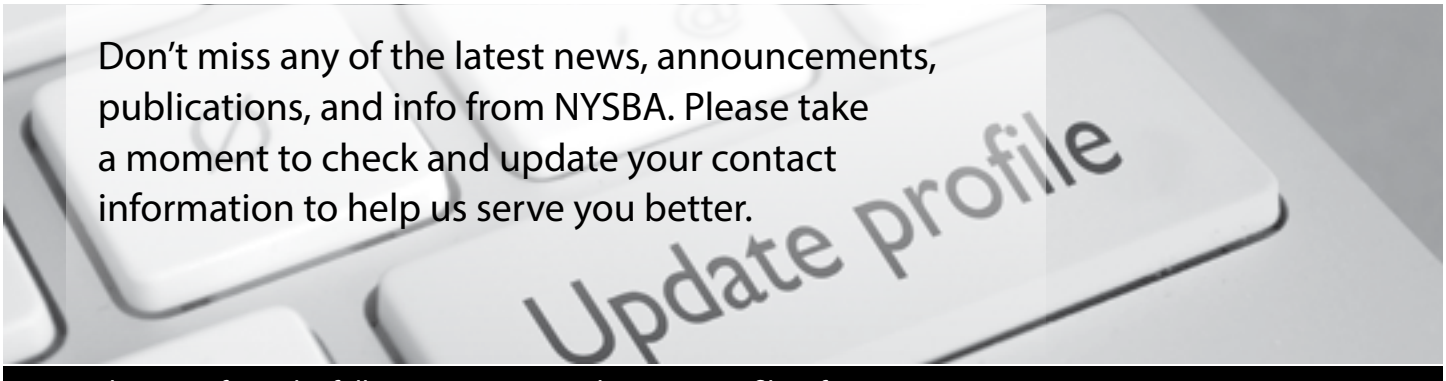
TICL Section EC Member Jim Kelly along with TICL Chair Bryan Rayhill and Hon. Stan Pritzker at the TICL, Trial Lawyers and Young Lawyers sections' Third Department Judicial Reception in Albany, June 2023.

Bret French, secretary of Trial Lawyer Section; Bryan Rayhill, Chair of TICL Section; and TICL EC Member Jim Kelly with guests of honor, Hon. Eddie J. McShan, Hon. Lisa M. Fisher, and Hon. Andrew Ceresia, at the Third Department Judicial Reception.

Brian Rayhill, Chair, TICL Section; Tom Maroney, TICL Executive Committee and the Hon. Suzanne Abrams are looking forward to seeing you in Florida this year!

Members of the TICL Section along with the Trial Lawyers Section and the Young Lawyers Section at the Queens County Bar and NYSBA Young Lawyers Section night.

Tom Maroney, TICL Section Executive Committee and TICL/ Trial Palm Coast Event Program Committee Chair, along with TICL Section 2023 Judicial Honoree Hon. Dennis Butler, Supreme Court, Queens County, and Michael Abner, president of the Queens County Bar and member of the NYSBA House of Delegates, gathered together at the Queens County Bar and NYSBA Young Lawyers Section Pub night and spread the word about the TICL and Trial Lawyers Section Fall Meeting in Palm Coast!



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NYSBA

Trial Academy - Syracuse University, March 2023

Below: Team A: Patrick Conklin, Anthony Brigandi, Maisha Blakeny, Meghan McDonough, Vanessa Murphy, Orelmy Diaz, Jeremy Goldstein, Selma Oprasic, and Tucker Stanclift (cofounder of Trial Academy).

Sherry Levin Wallach, past NYSBA president and cofounder of the Trial Academy, addresses attendees of the program.

Tim Fennell, TICL EC member, leads lecture on direct examination at Trial Academy.

The NYSBA Trial Academy Experience

By Jeremy Goldstein

From March 11 through 15, approximately 40 attorneys from all over the country gathered at Syracuse University College of Law to participate in a five-day trial techniques seminar organized by the New York State Bar Association. Due to the dedication and preparation of faculty, support staff, and attorney-attendees, Trial Academy 2023 was an overwhelming success. Academy attendees of all ages were privileged to hear from both practitioners and judges regarding a variety of topics essential to courtroom success. While morning sessions revolved around group faculty presentations and demonstrations, in the afternoon attendees were divided into teams of 5-10 attorneys where they prepared 10-15-minute presentations for their peers and received targeted feedback from experts in the field. Attendees were expected to prepare two fact patterns in advance—one civil and one criminal—and represented both the prosecution and the defense in scenarios designed to mimic real world situations.

Day One

On the morning of day one, attendees were privileged to hear from Trial Academy co-founders Tucker Stanclift and Sherry Levin Wallach. Having organized the first Trial Academy over 14 years ago, both attorney Stanclift and former NYSBA President Wallach introduced attendees to the principal theme of Trial Academy—using the facts, the law, and emotion to develop a theme and tell a story to the jury. Following these fabulous introductory remarks and greetings, attorneys Peter Moschetti, Jr. and Richard "Rick" Collins presented on opening statements in the civil and criminal context, while attorney Marc Gann of Collins, Gann, McCloskey & Barry led the faculty demonstration on jury selection.

Following a catered lunch in Syracuse University's Dineen Hall, attendees were separated into their working groups to present on that morning's lecture topic. There were five groups with an average of eight attendees per group. In these groups, attendees participated in a mock voir dire process with real jurors and received constructive feedback on their performances. After each attendee finished his or her presentation, they viewed a video-recorded copy of their performance in a separate room with an experienced faculty member. Such one-on-one instruction allowed attendees to focus on their respective strengths and weaknesses and ask questions in a comfortable and casual environment.

Following the afternoon session, all participants gathered at Sheraton Syracuse University Hotel & Conference Center for a Welcome Cocktail Reception & Founders Award Presentation. At the reception, attendees and critique faculty mingled over light refreshments and snacks. Importantly, attorneys of all ages and geographic locations welcomed each other to Syracuse University and engaged in collaborative and productive dialogue about the day's activities and each other's presentations. Following the reception, attendees and faculty continued their discussions and enjoyed the amenities of Syracuse University and its campus.

Day Two

The second day of Trial Academy was just as memorable as the first. Following a complimentary continental breakfast prepared by university staff, attendees gathered in the Melanie Gray Ceremonial Courtroom for a detailed lecture on trial ethics from New York Supreme Court Justices Kimberly O'Connor and Deborah Karalunas. In their lecture, Justices O'Conner and Karalunas touched on a variety of important topics for trial attorneys in New York state, including the new unified rules for New York Supreme and county courts, civility in the courts and the legal profession in general, and tips and reminders when representing clients in the civil or criminal context. In addition to these topics, Justices O'Conner and Karalunas emphasized the importance of an attorney's technological competency in the virtual world. Justices O'Connor and Karalunas' decades of legal experience helped younger practitioners understand and appreciate the nuisances of appearing in New York's state and federal courts and the important role that attorneys play in the New York's justice system.

Following the presentation, former President Wallach, Tim Fennell of Amdursky, Pelky, Fennell, and Wallen, and retired Nassau County Court Judge Jerald Carter lectured on direct examination techniques. Emphasizing the importance of preparation and communication between attorneys and their witnesses, Wallach, Fennell, and Judge Carter stressed the importance of using exhibits to aid a witness in telling his or her story to the jury, the use of open-ended and non-leading questions to clearly articulate the witnesses' theme to jurors, and the availability of re-direct examination to clear up confusion raised on cross examination. These experts also advised attendees that both prosecutors and defense attorneys

should be familiar with pattern jury instructions prior to direct examination, as they provide attorneys with an outline of facts necessary to prove (or disprove) a particular count or charge at issue in a complaint or charging instrument.

After this phenomenal direct examination lecture, Hofstra School of Law trial techniques lecturer and former Nassau County prosecutor Julie D'Agostino presented an opening statement for attendees and expert faculty alike. Using her substantial experience prosecuting cases in the Nassau County District Attorney's Office, Ms. D'Agostino stepped into the fictional shoes of a prosecutor in the "State of Lonestar" and represented the state in its criminal prosecution of accused murderer Richard Grouper. Ms. D'Agostino began her opening statement by summarizing the key evidence against defendant Grouper, the witnesses that would testify against him at trial, and a summary of their expected testimony. Ms. D'Agostino's presentation served as a model for attendees' afternoon presentations, where they each represented the state or a criminal defendant in their own opening statements. Attendees were privileged to have City of New York Criminal Court Judge Guy Mitchell critique their presentations and offer constructive feedback. Following his critique, and after a brief dinner break, attendees were invited to participate in the New York State Bar Association's Criminal Justice Section Executive Committee meeting, which was held at the Sheraton Syracuse University Hotel & Conference Center.

Day Three

On March 13, attendees once again convened in Dineen Hall for a complimentary continental breakfast prepared by university staff. Following this light breakfast and coffee, attendees dove into that morning's activities. Notably, Oneida County Supreme Court Justice Erin Gall and former NYSBA President Vincent Doyle led that morning's faculty presentation, which addressed cross-examination techniques. Utilizing audio-visual media and cinematic clips from film and motion picture, Justice Gall and President Doyle cautioned attendees to approach cross examination with flexibility and grace, explaining to attendees that this phase of trial is critically important and can easily go south if an attorney is not fully familiar with the intimate facts of his or her case and prepared to respond to unexpected testimony. Citing the Latin maxim *primum non nocere* ("First, do no harm"), President Doyle proposed four simple "rules" to ensure successful cross examination: (1) stop when you are winning, (2) stop if you do not know how to proceed, (3) stop when you have made your point, and (4) stop before you get hurt. While these rules may seem unconventional, they are illustrative of the risks that cross examination can bring to prosecuting or defending a case.

In addition to cautioning attendees on risk, President Doyle and Justice Gall emphasized the importance of control throughout the course of cross examination. Explaining that cross examination itself is an opportunity to elicit a "performance" for jurors, President Doyle suggested that effective control over a witness could be established by limiting the boundaries of possible answers, dictating the tone and pace of the questioning, breaking questions down into their basic components, and preventing hostile witnesses from giving non-responsive answers. While controlling a witness throughout cross examination is an important goal, President Doyle did emphasize the importance of maintaining an attorney's own style when engaging in cross examination and utilizing your personality and skill set to solicit the testimony most favorable to your case. As jurors have an acute ability to sense authenticity in a courtroom, trying to imitate other attorneys and their personalities may come off as unauthentic and specious. As such, it is important to utilize your own style and stay within your comfort zone through the course of cross examination.

Following President Doyle and Justice Gall's presentation, attorney Peter Gerstenzang of Gerstenzang, Sills, Cohn & Gerstenzang in Albany continued the discussion of cross examination from a criminal perspective. As one of the leading attorneys in New York state in DWI law, Gerstenzang provided practical approaches to cross examination in the criminal context. In that regard, he introduced attendees to the concept of "looping" during cross examination—that is, establishing facts through cross examination that are subsequently included in future questions, effectively emphasizing such facts to jurors so that they may retain and use them when reaching a verdict. Along these lines, Gerstenzang emphasized that it is important to avoid asking compound questions during cross examination that can confuse jurors and allow hostile witnesses to deflect attention away from harmful facts or evidence.

Following that morning's faculty lectures, attendees once again returned to their working groups for afternoon presentations, where they received constructive feedback from Justice O'Conner and Albany Law School Visiting Assistant Professor of Law Michael Wetmore. Utilizing the principles and skills emphasized by President Wallach, Fennell, and Judge Carter on the morning of day two, attendees engaged in direct examination of witnesses regarding a civil motor vehicle accident that resulted in the death of a 17-year-old female high school student. Following the presentations, attendees returned to Sheraton Syracuse University Hotel for refreshments and debriefing.

Days Four and Five

On the last full day of Trial Academy, morning lectures began with attorney Laurie Vahey of Vahey Law Offices in Rochester presenting on evidence, foundations, and objections. Noting that there are many different forms of evidence that may be used at trial, Vahey emphasized several nuances between federal and state rules of evidence. Notably, in New York State, the standard governing the admissibility of scientific expertise depends on which court an attorney or party is appearing. While federal courts in New York follow the standard articulated by Justice Blackmun in *Daubert v. Merrell Down Pharmaceuticals, Inc.*, attorneys appearing in state courts will need to familiarize themselves with the *Frye* standard in order to ensure that expert testimony reaches the trier of fact. However, regardless of forum, all evidence must meet the minimum foundational requirements of accuracy, authenticity, and relevance to be admissible.

Following Vahey's lecture, criminal and family law attorney Dave Chitekel continued the morning's instruction with his lecture on evidence in the criminal context. While criminal practitioners must be familiar with both *Brady* material and *Giglio* materials in order to zealously advocate for their clients, numerous suppression motions may also permit a defendant to exclude certain confessions or admissions or even tangible property seized in an improper search by law enforcement. Chitekel also advised that criminal defense attorneys may be able to utilize procedural motions to sever counts in an indictment or move for a speedy trial to ensure the optimum outcome for a defendant.

After faculty lectures on evidence, Catherine Christian of Liston Abramson gave attendees the final lecture of Trial Academy 2023. Focusing her presentation on closing argument, Christian, too, emphasized differences between federal and state courts. While in state court a defendant has the opportunity to present his or her closing statement first, in federal court a prosecutor has both the first and last word in summation. Also, much like in opening statements, Christian recommended that prosecutors and defense attorneys review pattern jury instructions to ensure that they hit on all elements of a charge or count in their closing statement. Finally, just like during opening statement, preparation, organization, and delivery are key to communicating your theme to jurors and obtaining a verdict favorable for your client.

In the final afternoon session of the five-day seminar, attendees engaged in their own cross examination demonstrations utilizing the techniques introduced the previous day by President Doyle and Justice Gall. Attendees were privileged to have additional justices of the Supreme Court in attendance to offer their feedback on the examinations. After completion of the afternoon session, attendees returned to Sheraton Syracuse University Hotel to prepare for the final morning session on March 15, which began at 9:00 a.m. with a faculty demonstration of closing argument led by Asha Smith of the Legal Aid Society of Westchester County. Following Smith's presentation, attendees presented closing argument to experts and their peers alike.

In summation, Trial Academy 2023 was a fantastic opportunity for New York attorneys to improve their trial advocacy skills while developing relationships with lawyers from across New York State (and even the entire country). Attendees were so satisfied with the instruction and curriculum provided by critique faculty that many requested that Trial Academy co-founder Tucker Stanclift organize a "Trial Academy II" to further explore the concepts and themes introduced throughout the seminar. Having completed Trial Academy, the undersigned attorney can highly recommend the course to attorneys throughout New York State. Attendees were all immensely grateful for the preparation and dedication of faculty presenters and look forward to future high-quality CLE programming from the New York State Bar Association.

Jeremy Goldstein is an associate attorney at the law firm of Cole, Scott & Kissane in West Palm Beach, Florida, where he practices in the area of insurance defense. Prior to joining CSK, he worked for two large international law firms in Hong Kong handling corporate financing and international trade matters. He is able to read, speak, and write Mandarin Chinese.

Workers' Compensation Law Updates

By Ronald Balter

Since February 20, 2022, two new provisions and an amendment to Workers' Compensation Law have been enacted. They involved issues concerning speeding of benefits to injured workers when there appears to be no insurance coverage, collateral estoppel and to clarify the awarding of attorney fees.

Uninsured Employers Fund Changes

The first effective provision is codified as Workers' Compensation Law § 26(6-a).[1] This amendment directs the Workers' Compensation Board to appoint the Uninsured Employers Fund as temporary carrier to immediately commence payment of indemnity and medical benefits to an injured worker if the Workers' Compensation Board cannot determine a workers' compensation carrier for an employer within 30 days of a new claim for workers' compensation benefits.

When an employer fails to obtain workers' compensation insurance as required by Workers' Compensation Law § 50 it can take many months and in some circumstances years before an injured worker is awarded benefits. If the workers remain out of work for an extensive period of time, they will not be receiving wage replacement benefits or having their medical bills paid. By appointing the Uninsured Employers Fund to pay both indemnity and medical bills the Legislature hoped that those workers, who unbeknownst to them were working for an uninsured employer, would be in a position much more similar to a worker whose employer had a workers' compensation carrier.

The key language in the provision is

> In the event that the board is unable to determine the identity of the responsible insurance carrier for the employer within thirty days of the filing of a new claim, the board shall:
>
> (a) appoint the uninsured employers' fund as the responsible party until such time as the identity of the responsible insurance carrier for the employer is determined. **Upon such appointment, the uninsured employers' fund shall** immediately commence payments and provide medical care in accordance with the provisions of this chapter . . . . (emphasis added)

However, in practice the Uninsured Employers Fund has not been immediately instituting the payment of medical and indemnity benefits to the injured workers. In reality the Uninsured Employers Fund is still litigating the compensability of claims and seeking a finding of employer-employee relationship.

In practice the amendment may have sped up the time before a case involving an uninsured employer has a hearing at the Workers' Compensation Board. This can lead to an earlier payment of benefits to the injured worker; however, it will not be paid as quickly as the Legislature intended as they had hoped by the language of this bill that it would be within about two months of the date of accident.[2] Until the Uninsured Employers Fund is directed to commence payments at the initial hearing as the law requires, the intent of the legislation will not be realized.

Collateral Estoppel

The purpose of the provision is to limit the collateral estoppel effect of decisions of the Workers' Compensation Board in a related proceeding. It was enacted in response to the second Court of Appeals decision in *Auqui v. Seven Thirty One Limited Partnership* (*Auqui II*).[3] Although this amendment was in response to a case involving the use of collateral estoppel based upon a decision of the Workers' Compensation Board, a look back nearly 40 years to a decision involving unemployment insurance is the inspiration for this amendment to the Workers' Compensation Law.

In *Ryan v. New York Telephone Co.*,[4] the Court of Appeals prevented a plaintiff from seeking to sue his former employer for various causes of action based upon a prior finding in his unemployment benefit claim that the termination was valid and denied him unemployment benefits. Mr. Ryan had been fired for theft of company property. His lawsuit was based upon the actions that took place at the time of his termination including false arrest, malicious prosecution, slander and wrongful discharge. The Court of Appeals held because Mr. Ryan had a full and fair opportunity to litigate whether the termination for theft of company property was valid and lost his claim for unemployment benefits that he could

not bring the lawsuit over the same issues and seek damages from his former employer over the events surrounding the termination.[5]

In response to the *Ryan* decision, the New York State Labor Law was amended to add § 623 (2.) The new section prohibits the use of any finding of fact or law in an unemployment proceeding from being used in any other proceeding.

As noted above, the *Auqui II* decision was the second decision in that case from the Court of Appeals in 2013. The earlier decision[6] was vacated by this decision. The first decision held that that a finding of no further disability at the Workers' Compensation Board was binding on the claimant in the negligence lawsuit arising out of the same accident. However, the Court of Appeals in *Auqui II* vacated its initial decision and held that there is a difference between what is being litigated before the Workers' Compensation Board and in Supreme Court in a negligence action.

Before the Workers' Compensation Board, "[t]he focus of the [Workers' Compensation Law], plainly, is on a claimant's ability to perform the duties of his or her employment."[7] The Court continued to state that in a lawsuit the focus

> is intended to make an injured party whole for the enduring consequences of his or her injury—including, as relevant here, lost income and future medical expenses. Necessarily, then, the negligence action is focused on the larger question of the impact of the injury over the course of plaintiff's lifetime.[8]

The Court of Appeals conceded that there is some overlap between the focus of a workers' compensation claim and a negligence lawsuit, however, that overlap was not sufficient to bind a claimant/plaintiff to findings made at the Workers' Compensation Board in the related negligence action.

Although it took nearly a decade from the time of *Auqui II*, the Legislature has limited by statute the use of collateral estoppel of decisions from the Workers' Compensation Board to the sole issue of employer-employee relationship "in any action or proceeding arising out of the same occurrence."[9] The sponsor's memo indicated that despite the outcome of *Auqui II*, injured workers were still faced with attempts in related negligence actions for findings of the Workers' Compensation Board to be found to stop the relitigating of issues in court that were lost before Workers' Compensation Board.

Although these amendments to the Workers' Compensation Law seek to end the use of collateral estoppel on issues other than employer-employee relationship,[10] they also create situations where an injured worker could be left with no remedy. The Workers' Compensation Board could find an employer-employee relationship between the injured worker and his or her employer, but then find that the claim is not compensable because there was no accident within the meaning of the Workers' Compensation Law or the Workers' Compensation Board could find that the accident did not arise out of and in the course of employment. A claimant/plaintiff who was found to not have had an accident by the Workers' Compensation Board could get a second bite of the apple to show there was an accident against the defendants in the related lawsuit. Those defendants could not use the finding of no accident against the claimant. If a finding was made by the Workers' Compensation Board that an accident did not arise out of and in the course of employment, the employer could find itself being sued directly in court and then trying to prove that the claim was compensable, which would allow it to avoid liability in both the workers' compensation claim and the lawsuit, and the claimant left without a remedy.

Another issue that is left open by these amendments involves the issue of apportionment. If a claimant has two workers' compensation cases and apportionment of the disability is apportioned 70% to the case without the related lawsuit and 30% to the related case, could the defendants in court argue that they would only be liable for 30% of the damages by arguing that 70% of the disability is unrelated based solely on the finding in the unrelated workers' compensation claim?

Attorney Fees

Attorney fees in workers' compensation were always on a contingency basis under Workers' Compensation Law § 24. However, there was no set percentage set either on the retainer prescribed by the Workers' Compensation Board or in the Workers' Compensation Law. Section 24 had indicated that fees were to be awarded as "commensurate with the services rendered and the amount of compensation awarded, having due regard for the financial state of the claimant." The fee was never to be based solely upon the amount of money that the claimant was found entitled to receive by the law judge at the Workers' Compensation Board.

Over the course of time attorneys representing injured workers understood how fees were awarded and would explain that to their new clients when retained. In *Pavone v. Ambassador Transportation, Inc.*,[11] the Appellate Division went so far as to state that for an attorney "there is no requirement that the attorney specifically state the time spent for the performance of his or her services." However, shortly thereafter the Workers' Compensation Board began to require attorneys to document the services they rendered in order to justify a fee in excess of at first $450 and after August 30, 2017, $1,000.

This change in policy by the Workers' Compensation Board was upheld by the Appellate Division in *Tenecela v.*

Vrapo Construction,[12] the Appellate Division in a footnote indicated that its opinion in *Pavone* no longer need be followed.

This put all attorneys appearing before the Workers' Compensation Board in an ethical quandary under the Rules of Professional Conduct.[13] The Rules of Professional Conduct prohibit an attorney from taking a fee that is both based upon a contingency and fixed.[14] That was the result of the Workers' Compensation Board's change in policy of how it would award fee to attorneys.

The Legislature fixed this issue with an amendment to § 24 of the Workers' Compensation Law that was to be effective January 1, 2022. However, when Governor Hochul signed the bill, it was with an Approval Statement. The Approval Statement stated that she was signing the bill with the understanding that the Legislature would pass amendments to the bill. The bill was amended and also delayed its effective date until January 1, 2023.[15]

Under the original and amended bill, a set schedule of fees was codified in the Workers' Compensation Law for the first time. Depending on the type of award that was being made by the Workers' Compensation Board, the attorney would be entitled to a set percentage of the award, a set multiple of the award or a combination of the two. The attorney would no longer have to detail the services rendered in a fee application, if the fee requested was over $1,000. They are now required to, as all math students have been told for years, "to show their work" as to how they calculated the fee they are requesting. The Workers' Compensation Board issued a modified fee form, OC-400.1,[16] in which the attorney is required to indicate the type of fee they are requesting and how they determined the value of any retroactive money that they have obtained for their client. The online version of the form contains a hyperlink to explain to the attorney the mathematical formulas to be used in calculating a fee. The link shows the fee calculated down to the penny. Since the start of 2023 some fees have been awarded down to the penny; however, many attorneys are only asking for a fee for an even dollar amount below the exact fee that they would be entitled to be awarded.

The big change between the bill passed in 2021 and 2022 is how a fee is to be calculated when the award contains money for future medical benefits. When a case is settled under § 32 of the Workers' Compensation Law, an allocation for future medical benefits is required to be included to protect the interests of Medicare. These monies, known as a Medicare Set Aside (MSA), cannot be included in the fee. The MSA can be very large depending on the type and amount of treatment that the injured worker will need for the rest of their life. If a § 32 agreement calls for $100,000 for indemnity benefits and has an MSA for $250,000, the attorney s limited to a fee on the $100,000 of $15,000 under the amended § 24 of the Workers' Compensation Law. They could not get a fee on the money allocated for the MSA. If the award is for retroactive medical expenses, such as reimbursement for prior out of pocket expenses, the attorney should still be entitled to a fee on those monies.[17]

Ronald Balter is a partner with Vecchione, Vecchione, Connors & Cano in Garden City Park, New York. He is also the co-author of the annual *New York Workers' Compensation Handbook* (Lexis/Nexis).

Endnotes

1 Chapter 35 of the Laws of 2022. This was an amendment of Chapter 717 of the Laws of 2021. The amendment was to increase the period of time before the Uninsured Employers Fund was to be directed to pay benefits from 10 days to 30 days. The prior bill was signed by the governor with the understanding that the law would be amended from 10 days to 30 days in the next legislative session, in which it was modified accordingly.

2 *See* Sponsor Memo to Bill A359A (2022).

3 22 N.Y.3d 246 (2013).

4 62 N.Y. 2d 494 (184).

5 The criminal charges that were filed against Mr. Ryan were initially adjourned in contemplation of dismissal and eventual were dismissed in the interests of justice. Ryan at 498.

6 20 N.Y. 2d 1035 (2013).

7 *Auqui II* at 256.

8 *Auqui II* at 256.

9 Workers' Compensation Law § 118-a and Workers' Compensation Law § 11(2).

10 Employer-Employee relationship was left as the only issue that could be used for collateral estoppel as the Court of Appeals had previously ruled that the Workers' Compensation Board has primary jurisdiction to resolve that issue. *See, O'Rourke v. Long*, 41 A.D. 2d 219 (1976) and *Botwinick v. Ogden*,59 N.Y. 2d 909 (1983).

11 26 A.D. 3d 645 (2006).

12 *Tenecela* at1220 Fn.2.

13 22 N.Y.C.R.R. § 1200.

14 22 N.Y.C.R.R. § 1200 Rule 1.5(a)(8).

15 The bill required multiple regulatory changes to the Rules and Regulations of the Workers' Compensation Board. A summary of the changes can be found here: https://www.wcb.ny.gov/content/main/SubjectNos/sn046_1572.jsp.

16 https://www.wcb.ny.gov/content/main/forms/oc400-1.pdf.

17 *Shea v. Icelandair*, 63 A.D. 3d 30 (2009).

To Zoom or Not To Zoom in Mediation: One Mediator's Observations

By James E. Morris

While sitting in LaGuardia Airport waiting for my flight in January 2020 after attending the New York State Bar Association Annual Meeting, I saw many people wearing face masks as they disembarked a plane. Upon investigation I learned that the flight originated in Asia. "Overkill," I thought. Two months later, COVID was fully upon us.

Our lives were dramatically altered: where we worked, how we communicated, how we attended public events, shopped, and conducted so many of our activities.

The mediation world as we knew it was turned upside down. The courts were closed, offices were empty, and no one was in a hurry to resolve litigated cases. Most of us were compelled to work from home as in-person human contact was feared. We functioned in our own "safe bubble."

As someone whose full-time practice is mediation, and who has conducted more than 3,600 mediations in person over the last 30 years, this new world presented a tremendous challenge. Unlike the years when litigants and their attorneys travelled to my Rochester office—or I travelled to attorney's offices, hotels, or other conference areas from Albany to Buffalo—we were isolated.

Timely as could be, we discovered Zoom—a new platform which provided an effective virtual alternative to meeting with people face to face. As computers and cell phones became the almost exclusive manner of human contact, Zoom enabled us to mediate anywhere—from our home, from our office, or in a car and from afar. (Dr. Seuss). Virtual mediation allowed us to continue helping litigants reach resolution of their cases.

After three years' experience of virtual mediation, I find that many would like to continue using that form exclusively, while others prefer in person, and some want to use a mix or "hybrid." Now that the COVID crisis has abated, and we can choose our mediation methods, it seems a good time to compare the advantages of each method as we go forward.

Advantages of Virtual Mediation

Several virtual platforms have become available including Teams, Google Meet, Skype, and Webex. The winner and most often used in mediation is Zoom. It is easy to log in and administer, and I believe it is secure if operated correctly. Zoom allows you to share documents, sequester participants in multiple "rooms" and even communicate by text during the proceedings.

Convenience

Zoom offers unparalleled convenience for scheduling. Upon agreeing to mediate, finding an agreeable date can be difficult, depending on the number of participants and their geographic locations. Scheduling virtually may make it easier for the participants and the mediator to commit to a date. With Zoom, a person can be part of the process from any location where they have access to a computer or cell phone. A colleague of mine now mediates from his Arizona vacation home with ease.

During the height of COVID, I was conducting mediations exclusively from my family room. Recently I commented to an adjuster that I liked the shirt he was wearing, to which he responded, "You don't want to see below my waist." (Sweatpants or something less). One defendant was a cross-country truck driver who used his cell phone for both voice and video. Occasionally we would see other trucks passing by and hear horns blaring.

For those who want more privacy, Zoom has a virtual background tool that can conceal a participant's location. It can backfire, however, such as when a person tells us they are in their office with a virtual background and the dog starts barking.

Costs

Zoom cuts the costs of mediation. The cost of travel is no longer a factor, including the cost of transportation and lodging. The ability to not miss the days at work before and after the mediation is also very appealing.

Availability

As a result of our new technology, I have found that decision makers are more available to participate in the process. A line adjustor whose authority to settle a case is limited may now have a supervisor or claims manager present to facilitate the process.

Flexibility

Zoom also offers considerable flexibility for the mediation process, depending on the complexity of each case. I have conducted more than 200 full or partial Zoom mediations

and am still learning the nuances. One session consisted of so many parties that I used 11 "rooms." I control the placement from my computer, going back and forth to keep track of all participants. It's kind of like flying an airplane and serving drinks in the cabin at the same time.

Advantages of In-Person Mediation

Ability to 'Read the Room'

While Zoom has much to offer, there is nothing to compare to being physically present in any meeting. Each participant can "read the room." It is a good opportunity to get to know the parties and determine what kind of impression a person would make in front of a jury. The virtual mediation process is like a two-dimensional experience, while meeting in-person offers a three- or even four-dimensional experience, with the fourth dimension being the "feel of the room." Looking at a computer screen lacks this advantage. In person it is also difficult for a participant to suddenly not be available as distraction or "something else came up."

Personal Contact

As mediator, I like to have personal contact with the people in the room. Body language and eye contact are all part of my observation of sincerity and truth. I like to watch the interactions among the participants. For example, in one room the plaintiff will react with his or her attorney; in another, the defense counsel and adjuster may give me different vibes. It is all human nature.

Developing Relationships

I also like to develop relationships with participants. I may start conversations about hobbies, world events, and families and try to establish some commonality. It seems to put people in a more relaxed informal mood and establishes trust with the mediator. When the mediator's power of persuasion is needed as the process marinates, litigants have now built a trust factor to help bring the matter at hand to a resolution.

Confirms Importance

All cases are extremely significant to the participants. In the higher value cases the defense often will have its "person with authority" come from a distance, which confirms the importance of the case to the defense. This gives the plaintiff the feeling that the defense is taking the claim seriously and shows a commitment to the process. I have often heard the claimants say, "Now I know the others are taking the claim seriously."

Personal Connections Between Litigants

In the general session at the start of mediation, it is helpful to bring all participants together to greet each other prior to being sent to their caucus rooms. Meeting in-person sometimes enables a personal connection between litigants. This can be especially meaningful in medical malpractice cases, in which the representative of the defense may wish an opportunity to look at the claimant in person, face to face, and express their sympathies or apologize for what happened. They may say they are present to participate and give a fair value to a claim and want to work hard to get that result. This goes a long way in tempering feelings and leading to agreement.

In the general opening, occasionally the participants may want to deliver an opening to express its position. This has been helpful in technical cases involving engineers or construction. The expert on behalf of each litigant could for the first time in person be learning of the opposite point of view. I had a case where each side brought an engineer to describe its position with the use of visual aids. About three hours into the mediation, they asked if they could talk together privately. Within several minutes they had resolved the claim by conceding points to each other and advising the principals.

Sidebars

Sidebars are more easily conducted face to face than with phones or in video. Often in cases where progress was slow and one of the attorneys went to the restroom down the hall, I might go and wait for that person to walk back down the hall and have a brief conversation, which can be very insightful.

Occasionally, when a case has not settled, I will offer to drive a defense representative to the airport, which is near my office, to catch their flight. Somewhere in the 10-minute trip, he or she lets me know where they really think the case can settle. This is valuable information I would not otherwise have received.

Technology Traps

With in-person mediation, there is no worry about the wi-fi signal fading or only getting every other word, a tech problem that occurs in many virtual meetings. (Although I had a problem once during a mediation when the heat went off on a cold winter day. We all then scampered off to another site a at local hotel.)

Multiple Parties

Meeting in-person is far superior in cases involving multiple attorneys and parties. This is especially true when there are sub cases within the main case, and we are looking for a global resolution. This includes workers comp issues and coverage problems as well as apportionment or identification.

Confidentiality

Confidentiality is a significant concern raised regarding virtual meetings. When in person, we all know who is in the room. Virtually, we really don't know who else is in the back-

ground eavesdropping or even giving behind the scenes advice to the litigant.

Hybrid: In-Person and Virtual Mix

As people are becoming more comfortable meeting in person again, some people may come to the meeting, but a few cannot make the personal appearance. In these situations, we can offer a mix—a hybrid. While not as good as having everyone together, it may offer a useful alternative. In this case, the Zoom connection goes through my computer so I can control the positioning of the parties and preserve privacy for those in a virtual room.

Conclusion

The world has changed dramatically since March 2020. But we humans can adapt and we have with Zoom and other programs in conducting and attending mediations.

While I am grateful for those alternatives, there is no substitute for in-person appearance. The third and fourth dimension provide so many benefits for litigants and attorneys. Virtual mediation can be impersonal and has many drawbacks, though it is always convenient and efficient. At the end of the day, no matter which option you choose, the fact that successful communications take place is the goal for all.

One other thing I've learned: From now on, when I see everybody wearing a mask, I will too!

James E. Morris is an attorney and full-time mediator from Rochester, New York. His mediation practice covers all of New York, Pennsylvania, and Connecticut. He is a distinguished fellow of the American College Civil Trial Mediators and the National Association of Distinguished Neutralsand and is also recognized in *Best Lawyers* and *Super Lawyers*.

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