

# THE MOTHER COURT

A NEWSLETTER OF THE SDNY CHAPTER OF THE  
FEDERAL BAR ASSOCIATION

SPRING 2022 · VOLUME 2 · ISSUE 2

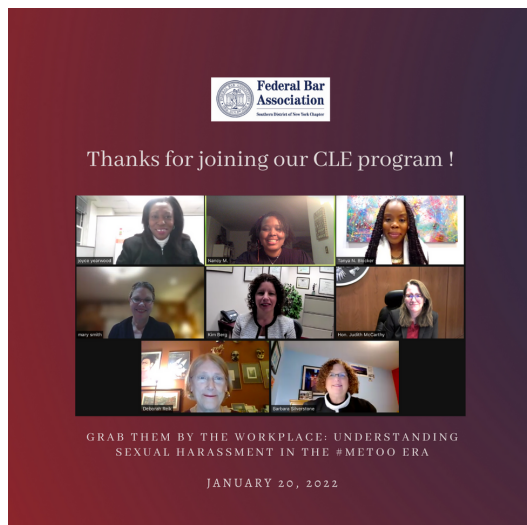


**Hon. Laura Taylor Swain, Chief Judge  
Southern District of New York**

## GREETINGS FROM THE MOTHER COURT

**BY: LAURA TAYLOR SWAIN  
CHIEF JUDGE, SDNY**

As I write this in mid-March 2022, the pandemic-prompted restrictions on our personal and professional activities are easing rapidly. Over the past two years, bench and bar have adapted to new modes of virtual interaction in the continued service of justice. In-person court proceedings continued to ensure, in safe and creatively modified spaces, the protection of fundamental rights. Since September 2020, the Mother Court has conducted over 120 in-person jury trials. Over 7,800 of our fellow citizens have answered the call to service and over 1,400 have been selected to serve. Their commitment to duty is inspiring to us all. My colleagues and I are grateful for your partnership in ensuring access to fair and impartial justice in even the most challenging of times, and we look forward to seeing more of you, in person, soon.



**On January 20, 2022, the Hon. Judith McCarthy moderated a CLE panel on sexual harassment in the workplace. On the panel were representatives of the EEOC, NYS Division of Human Rights, in-house counsel, employee-side and employer-side attorneys.**

## A MESSAGE FROM THE PRESIDENT

*The More DEI, The Better.*

Dear Colleagues:

Welcome to our Spring issue! A key benchmark of the Federal Bar Association is increasing diversity, equity, and inclusion (DEI) throughout the organization. I am proud that the SDNY chapter has always been and continues to be a leader in this aspect. Indeed, our chapter has always seen DEI as a qualification in addition to practice area and expertise when inviting individuals to serve on our panels, write articles, and lead our organization. I hope you will take note of all the different ways we seek to be inclusive while perusing our newsletter. As the confirmation hearing on the groundbreaking nomination of the first Black woman to the United States Supreme Court takes place, and as the first black woman to lead the SDNY chapter, I say “yes, more diversity equity and inclusion, please.”

Be sure to look for our Summer issue in June!



**Nancy Morisseau, President  
SDNY Chapter**



On February 3, 2022, Hon. Ona T. Wang, Magistrate Judge (SDNY), Hon. Sanket Bulsara, Magistrate Judge (EDNY) and Hon. Diane Gujarati, District Judge (EDNY), share their inspiring career trajectories with attendees of the Talking With Trailblazers, our first hybrid event held at Dunnington Bartholow & Miller LLP.



**NATIONAL DEFENSE AUTHORIZATION ACT AND  
THE DEPARTMENT OF DEFENSE'S  
COVID-19 VACCINE MANDATE  
BY: SHANE COOPER**

In August 2021, after the Federal Drug Administration fully approved the Pfizer version of the COVID-19 vaccine, the Department of Defense (DoD) mandated the vaccination of all servicemembers against COVID-19. This mandate also permits servicemembers to seek and obtain administrative, medical, or religious exemptions. Since that announcement, each service branch of the Navy, Marine Corps, Army, and Air Force has been crafting and implementing its policies to fulfill this mandate.

As the services developed policy, some questioned whether a servicemember's refusal to receive a COVID-19 vaccine might result in an adverse characterization of discharge. The most common adverse characterization of discharge from the military is an "other than honorable" (OTH) discharge. An OTH discharge likely means that one will not be entitled to most veterans' benefits. While an OTH is considered an administrative rather than a punitive discharge (i.e. a more serious bad conduct or dishonorable discharge resulting from a court-martial), an OTH discharge can still carry serious consequences for the discharged servicemember as they transition to life in the civilian sector.

To address these concerns, House lawmakers inserted language into the National Defense Authorization Act for Fiscal Year 2022 (NDAA 22) by limiting the characterization of discharge for refusing the COVID-19 vaccine to only an 'honorable' or 'general discharge under honorable conditions.' Concurrently, each of the services moved at varying paces during Fall 2021 to craft internal policies that included similar limitations being proposed in NDAA 22.

## **NATIONAL DEFENSE AUTHORIZATION ACT (Continued)**

By early December 2021, some services began to initiate discharges while Congress was putting the finishing touches on NDAA 22. Based on statements released by these services, no servicemember discharged solely for refusing the COVID-19 vaccine received an OTH discharge. The Air Force was the first service to announce that it had separated 27 of its servicemembers for refusing the vaccine and refusing to apply for an exemption. Shortly thereafter, the Marine Corps announced it had separated 103 Marines under a similar policy.

President Biden signed NDAA 22 into law on December 27, 2021. Section 736 requires that any servicemember discharged on the sole basis of failing to obey a lawful order to receive a vaccine for COVID-19 would be characterized as honorable or general under honorable conditions. Also, section 720 requires that DoD's service branches establish uniform procedures for administrative, medical, and religious exemptions. While NDAA 22 addressed discharge characterization limits and mandated uniform procedures for exemptions, the services retain much discretion concerning the pace and implementation of its mandatory vaccine policy and exemptions. By February 2022, over 700 DoD servicemembers had been discharged under these policies but at varying paces by each service.

The Navy reported in February 2022 it had discharged 270 servicemembers for refusing the COVID-19 vaccine. Yet, as of early March 2022, according to media reports, the Army had not yet discharged anyone for refusal of the vaccine. The Army reports nearly 3,000 servicemembers have refused the vaccine and may begin initiating discharges very soon. Looking ahead, much of the attention will likely shift to legal challenges concerning DoD's religious exemptions policy for the vaccine. Thousands of servicemembers have already filed religious exemption requests but very few have been granted.

In February, the Navy approved its first religious exemption in seven years for any vaccine. The Air Force has approved nine recent requests, the Marine Corps has approved three, and the Army has approved none. Various groups of servicemembers have filed lawsuits challenging the military's vaccine mandate and religious exemption policies that are now winding their way through the federal court system, which will warrant further monitoring.

*Shane Cooper is a retired Captain and Navy judge advocate. Views expressed are personal views of the author and not necessarily those of the Department of Defense or the Department of the Navy.*



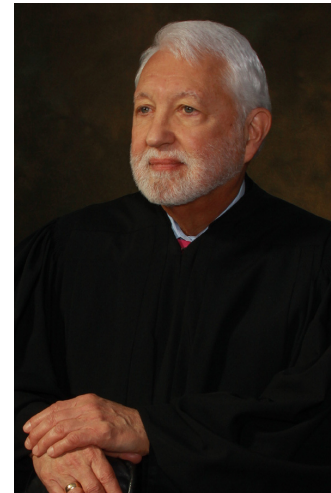
## THE GREAT AMERICAN DOUBLE STANDARD

BY: HON. JED S. RAKOFF

The United States has in practice a very harsh legal regime for poor persons of color and a very forgiving legal regime for rich persons who are white.

This double standard is perhaps most apparent in the area of criminal law. For more than two decades now, the United States has been, by a substantial margin, the world's leader in imprisoning people, locking up about two million people each year. The overwhelming majority of these people are poor, and more than sixty percent of them are young men of color. By contrast, we very rarely prosecute top-level business executives, most of whom are white, even when their companies are involved in massive frauds of which it is very difficult to believe these managers were unaware.

None of this is inevitable, and indeed much of this double standard is the product of choices made over just the past few decades. The mass incarceration of poor persons of color is chiefly the result of exceedingly punitive state and federal laws that were passed, with bipartisan support, in the last quarter of the twentieth century. These laws prescribe severe, and frequently mandatory, prison terms for a very wide range of criminal offenses.



**WHY THE INNOCENT  
PLEAD GUILTY AND  
THE GUILTY GO FREE**

**AND OTHER PARADOXES OF  
OUR BROKEN LEGAL SYSTEM**



**JED S. RAKOFF**

*"Perhaps most disturbing of all, not a few of these omnipresent guilty pleas were entered by persons who were later determined by courts to be factually innocent but who had nonetheless plead guilty in order to avoid the risk of endless years in prison"*

## **GREAT AMERICAN DOUBLE STANDARD (Continued)**

These punitive laws not only hugely increased the overall number of persons incarcerated, but also changed how they got there, by leading all but a tiny handful of persons accused of state and federal felonies to enter into plea bargains in order to moderate the potentially draconian penalties they otherwise faced. This also had the effect of shifting most actual sentencing power from judges to prosecutors. And, as a further effect, jury trials – the great protection embodied in our state and federal constitutions – virtually disappeared, with fewer than three percent of those charged with felonies proceeding to trial. Perhaps most disturbing of all, not a few of these omnipresent guilty pleas were entered by persons who were later determined by courts to be factually innocent but who had nonetheless plead guilty in order to avoid the risk of endless years in prison.

By contrast, in recent years, high-level executives who commit business crimes have rarely faced even the risk of prison. To be sure, there was a time when prosecutors regarded it as their duty to ferret out the highest level executives who had participated in (and sometimes orchestrated) significant corporate misconduct, for in many cases they could accurately be said to be the persons ultimately responsible for these crimes.

Thus, for example, in the period around a quarter-century ago, the CEOs of Enron, WorldCom, Tyco, and numerous other large miscreant companies were prosecuted, convicted, and sent to prison. But this all ended beginning around fifteen years ago, when prosecutors realized they could much more easily obtain guilty pleas from the companies themselves, without undertaking the arduous and expensive investigations, and legal risks, of going after the people at the top.

## **GREAT AMERICAN DOUBLE STANDARD (Continued)**

Therefore, while there is much agreement that fraud in the pooling and marketing of mortgage-backed securities by banks and mortgage brokers played a major role in the huge and harmful economic collapse known as the Great Recession, virtually no high-level executives were prosecuted for this massive fraud.

While very recently there have been some modest indications that mass incarceration is beginning to slightly decline and that the government is seeking to return to its long-ago policy of prosecuting high-level executives, so far these are mostly straws in the wind. Meanwhile, I suggest that it is incumbent on all of us – not least, judges – to denounce the existing double standard and seek, within the law, to eliminate it.

*Hon. Jed S. Rakoff is a Senior United States District Judge in the Southern District of New York. This article reflects the views set forth in Judge Rakoff's recent book, Why The Innocent Plead Guilty and The Guilty Go Free, and Other Paradoxes of Our Broken Legal System (Farrar, Straus, and Giroux, 2021).*



## **BRIEF TIPS ON APPELLATE PRACTICE**

### **BY: KERSUZE MORANCY**

#### **Tip #1 – Identify the Issues on Appeal**

This is where you develop the theory of the case. Select the strongest issues and focus on those you feel will have the highest probability of success on appeal.

#### **Tip #2 – Know the Standard of Review**

The standard of review is the lens through which an appellate court will review the case. There may be multiple standards of review, depending on the issues being raised on appeal. The standard of review is so important that the Federal Rule of Appellate Procedure 28(a)(8)(B) requires a separate heading for it.

#### **Tip #3 – Understand The Facts**

The statement of facts section of the brief is your opportunity to present your client's story. Therefore, you must have a good understanding of the facts and the record. You should not make legal arguments in this section of the brief. Present the facts accurately and maintain your credibility. Let the court know if the facts are undisputed. Support your facts with citations from the record/appendix. Focus on the facts relevant to your argument but don't hesitate to present facts that do not support your position.

#### **Tip #4 – Use Point Headings Effectively**

Each point heading in the brief should be persuasive. They should be succinct and advance your argument.

#### **Tip #5 – Present Strong Legal Arguments**

The argument section should be well researched and carefully outlined prior to drafting. Lead with your strongest and most effective argument. Be concise. Avoid using repetitious or ambiguous language. Use simple terms and short sentences.

#### **Tip #6 – Edit**

It cannot be overemphasized that you need to edit your brief before submitting it. Effective editing techniques including printing the brief and reading it aloud or simply having an editor proofread the brief.



Kersuze Morancy is the Director of the CP Legal Research Group at Counsel Press, the nation's largest appellate service provider. Kersuze focuses on appeals (federal and state), specifically drafting appellate briefs and motions for clients from coast to coast. Kersuze is a graduate of Rutgers University School of Law – Camden.



## SDNY Welcomes Two Magistrate Judges

**Hon. Jennifer Willis** is a graduate of Columbia University and New York University School of Law. She has worked as a public defender for over twenty years, serving as a staff attorney at the Committee for Public Counsel Services, in Massachusetts, and at the Law Office of the Cooke County Public Defender, in Illinois, before joining the Federal Defenders of New York in 2015. Judge Willis was the Director of Strategic Litigation at the Federal Defenders and in that capacity coordinated training and litigation aimed at addressing systemic racial disparities in criminal cases. Judge Willis has extensive experience with novel legal issues and complex motion practice. She also has considerable trial experience and over the course of her career she has tried more than one hundred felony bench trials and more than thirty-five felony jury trials.



**Hon. Valerie Figueredo** is a graduate of the University of Miami and the University of Pennsylvania Law School. Judge Figueredo was an Assistant District Attorney at the New York County District Attorney's Office, where she handled criminal appeals. Before joining the District Attorney's Office, Judge Figueredo worked as an Assistant Solicitor General at the New York State Office of the Attorney General. In addition to her extensive appellate experience, Judge Figueredo worked as a trial litigator at Cravath, Swaine & Moore and Shapiro, Arato & Bach, and served as a law clerk to the Honorable Colleen McMahon, of the United States District Court for the Southern District of New York, and the Honorable R. Guy Cole, Jr., of the United States Court of Appeals for the Sixth Circuit.



## **Hon. Constance Baker Motley Diversity, Equity, and Inclusion Essay Competition**

The Federal Bar Association's Diversity & Inclusion Committee and the Younger Lawyers Division invites Law Students and Younger Federal Practitioners to participate in this inaugural essay competition.

The Federal Bar Association's Honorable Constance Baker Motley Diversity, Equity, and Inclusion Young Member Essay Competition is created to celebrate the life of the Honorable Constance Baker Motley (September 14, 1921 – September 28, 2005) and promote her legacy by encouraging law students and younger federal practitioners to promote, achieve, and sustain diversity, equity, and inclusion in the legal profession.

The Competition is named after Judge Baker Motley, the first African American woman appointed to the United States federal judiciary and the first woman judge in the Southern District of New York. She was a key leader of the African American civil rights movement, a lawyer, judge, state senator, and Borough President of Manhattan, New York City.

### **Eligibility**

The Competition is open to all full or part-time law students seeking a juris doctor (JD) or a Master of Laws (LLM), any federal practitioner or professional under the age of 40-years-old, or have been practicing ten years or less, whether a current member of the Federal Bar Association or a prospective member.

The submissions will address strategies to promote, achieve and sustain diversity, equity and inclusion in federal practice and be **no longer than 500 words**. Please note: the judging portion of the essay competition will redact an individual's identifying information.

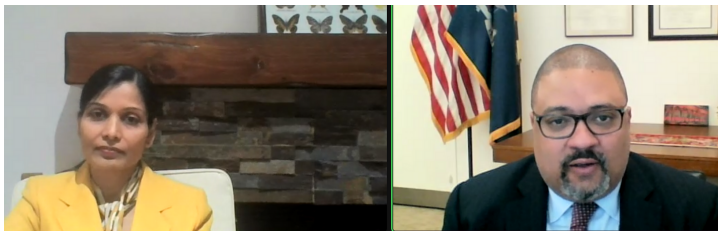
### **Prizes**

Four winning essays will be selected. A national first prize winner will be selected by a panel assembled by the FBA Diversity and Inclusion Committee receiving a cash grand prize of \$1,000 and submission publication in The Federal Lawyer. A second-place winner will receive a \$500 cash prize, \$250 for third and \$100 for honorable mention.

### **Deadline**

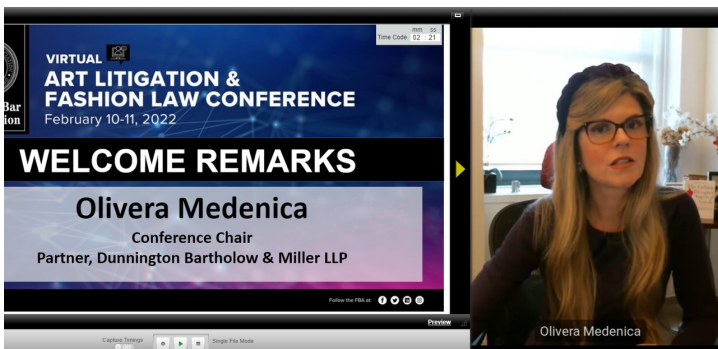
Submissions must be emailed by **5:00 pm on May 13, 2022** via the FBA web portal. To apply, please click the "submit" button.





February 24, 2022, Black History Month edition of Talking With Trailblazers featuring Alvin L. Bragg, Jr. -- a son of Central Harlem, the first African American and the fourth person to ever be elected as Manhattan's District Attorney in 80 years.

Padmaja Chinta receives in-person the 2021 FBA SDNY Presidential Award which was announced in October 2021 at the virtual installation ceremony.



February 10-11, 2022, FBA Art Litigation and Fashion Law Conference held virtually over two days, with four educational panels each day.

#### UPCOMING PROGRAMS

- **APRIL 25-28, 2022** - FBA CAPITOL HILL DAY (HYBRID)
- **MAY 2022** - MEET THE CIRCUIT CHIEFS LAW DAY EVENT



## Federal Bar Association

Southern District  
of New York Chapter

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Interested in writing for *The Mother Court*? Email us for more information.

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