DEFENSE PRACTICE UPDATE

MARTIN CLEARWATER & BELL LLP

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Court Ordered Mediations – A Jurisdictional Comparison

By: Michael F. Madden and Emma B. Glazer

In an effort to resolve cases before trial, jurisdictions across the tri-state area are implementing court-ordered mediation or arbitration programs. Although the results are not binding, the goal is for parties who participate to electively resolve these matters for a mutually agreeable, reasonable figure before additional sums are expended in both the prosecution and defense, to decrease judiciary costs, and to circumvent the lengthy time period in bringing cases to their final resolution. The following is a comparison of different approaches to court-sponsored mediation programs in New York and New Jersey. Given the relative success and popularity of New Jersey's program, New York State recently announced its intention to expand mediation beyond limited types of cases into civil litigation generally. It is expected that in the coming months, each New York judicial district will announce specifics regarding its own respective program. Such programs are likely to include some of the characteristics already in place in other jurisdictions with pre-existing mediation or arbitrations.

In 1974, the Second Department of the Appellate Division instituted the Civil Appeals Management Program ("CAMP") to attempt to reduce the number of cases taken on appeal by holding a settlement conference. The original CAMP system involved selecting only a certain number of cases on the basis of a review of the documents filed when the appeal was taken. The CAMP administrator identified cases that, based upon the administrator's experience, would be most likely to resolve with a settlement conference. Historically, selected cases included medical malpractice, premises liability, and serious personal injuries. Appeals involving *pro se* plaintiffs, child custody, statute of limitations, and jurisdictional and constitutional questions typically were not selected for CAMP conferences. The conferences were held prior to perfection of the appeal, such that should the case resolve, the parties were not forced to expend additional money preparing and filing the briefs.

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Court Ordered Mediations...

Former Appellate Division justices serve as Special Referees during these settlement conferences. It is expected that attorneys attending these conferences are prepared for meaningful settlement discussions with their adversaries and with any adjusters/clients and/or principals available for any necessary consultation(s).

Recently, the Second Department has expanded the settlement program to include the Mandatory Civil Appeals Mediation Program ("MCAMP") for appeals that have already been perfected. All perfected appeals with the exception of child custody matters are required to participate in the program. While the CAMP conferences are more informal, the MCAMP conferences have more stringent requirements, which are outlined in the Second Department's Rules of Practice. Specifically, five days before the conference, parties are expected to provide the Special Master with copies of the Order appealed from, the underlying motion papers submitted to the trial court, and any other information pertinent to possible resolution of the matter. The parties to the appeal, counsel, and in the case of a corporate entity, a personal representative who has authority to resolve the matter are all required to appear for the initial, ninety-minute session. In the event a case does not resolve after the first session, the parties may schedule additional sessions as agreed by the Special Referee. While adjournments can be granted, MCAMP conferences cannot be adjourned more than three times or for a total of more than thirty days. In our experience thus far, MCAMP conferences offer an opportunity for substantive and meaningful settlement negotiations. It is expected that the parties and their counsel have authority to resolve cases and are willing to engage in good faith negotiation. The Second Department believes the MCAMP program will both allow for a mutually acceptable outcome of disputes and will significantly reduce the backlog of appeals awaiting arguments and decisions.

Likewise, trial courts in the metropolitan region have also begun to institute court-ordered mediation programs. New Jersey trial courts statewide have a mandatory, non-binding arbitration program pursuant to New Jersey Court Rule 4-21. Civil cases involving automobile negligence, personal injury actions with the exception of those involving products liability and professional malpractice, contract and commercial actions are scheduled for mandatory, non-binding arbitration sessions following the completion of the discovery period. The arbitration is to occur within sixty days of the discovery end date, including any extension or adjournment. Arbitrators in the program are retired judges or attorneys selected for inclusion after at least ten years of practice in the aforementioned areas. At least ten days before the arbitration, the parties are required to exchange a statement of factual and legal issues and any pertinent exhibits. Such materials are also to be provided to the arbitrator at the hearing itself. The arbitrator can consider all materials provided, regardless of whether such items would be admissible at trial.

After hearing the evidence and reviewing the materials provided, the arbitrator advises the parties of his/her valuation of the case, including their opinion with regard to the likelihood of a verdict and any culpability assigned to the plaintiff, and an estimate of the monetary award. The arbitrator documents his or her findings and the basis for the valuation, assessment and potential award. Ten days after the hearing, the arbitrator files the non-binding arbitration award with the Civil Division Manager. The parties then have thirty days to accept or reject the award. The award is deemed accepted and the case will be dismissed unless one of the parties affirmatively files a Notice of Rejection and Demand for Trial De Novo within thirty days of filing. In that case, a trial date will be assigned within ninety days from the date of the rejection. Of course, rejection of the award does not preclude the parties from engaging in further independent negotiations as trial approaches.

In our experience thus far, MCAMP conferences offer an opportunity for substantive and meaningful settlement negotiations. It is expected that the parties and their counsel have authority to resolve cases and are willing to engage in good faith negotiation.

Notably, in an effort to further encourage the parties to accept the Arbitration Award, a party demanding a Trial De Novo may be liable for reasonable costs associated with trial, including attorney's fees, incurred after the rejection of the arbitration award

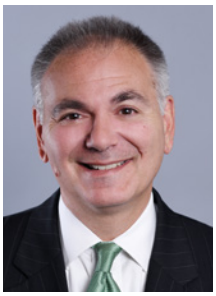
if another party did not demand a trial. Attorneys' fees are limited to $750 total or $250 per day and compensation for witnesses shall not exceed $500. However, reasonable costs will not be awarded if the party who demanded the Trial De Novo obtains a verdict 20% more than the arbitration award or if the award denied money damages and the party who demanded the Trial De Novo obtained a verdict of at least $250.

For example, if the arbitration award was for $100,000 and the plaintiff demands a Trial De Novo, and the verdict is $200,000, then plaintiff will not be awarded costs. If the defendant rejected the award of $100,000 and the verdict was $100,000, then the plaintiff can get costs. If the award was for $100,000 and the plaintiff rejected, and the verdict was $50,000, the defendant can get costs. These "penalties" are designed to encourage the parties to accept the arbitrators' award, or at the very least resolve the matter in advance of a verdict.

In our experience, the New Jersey arbitration hearings are often scheduled relatively soon after the discovery end date such that summary judgment motions have not yet been filed, much less heard. In such cases, the parties may elect to reject the award, file a dispositive motion, and renew efforts at resolution after motion practice. It may be more advantageous to adjourn arbitrations in cases likely to resolve until after such motions are pending when the parties are in a better position to assess the strengths of liability, causation, and damages arguments.

Following in New Jersey's footsteps, the New York Unified Court System recently announced that each judicial district statewide will be implementing its own alternative dispute resolution program, mandatory for all civil cases. In Kings County, the Presumptive Mediation Program is scheduled to begin in December 2019 and is designed after the non-binding arbitration program in New Jersey. For medical malpractice cases, Justice Ellen Spodek will preside over mediations that involve Maimonides Medical Center concurrent with her supervision of the early settlement program involving this hospital. Justice Genine Edwards will preside over all other medical malpractice mediations. Approximately ninety days after the filing of the Request for Judicial Intervention, notices will be sent out scheduling the mediation. This first mediation session is designed to occur approximately two months following the Preliminary Conference. The mediation is a thirty-minute session, which may continue at a rate of $400 per hour should the parties elect. Parties may opt-out of the mediation by filing an Order to Show Cause or an in person application to the mediator upon a showing that mediation would not be feasible and/or fruitful.

In 2020, we expect the Presumptive Mediation Program to be implemented statewide. The Ninth Judicial District (Westchester, Putnam, Rockland, Orange and Dutchess counties) has already announced its intention to implement a much broader Presumptive Mediation Program. Currently, only matrimonial and commercial actions are mediated within the court system, though this is expected to expand. Likewise, the Tenth Judicial District (Nassau and Suffolk counties) already offers mediations in commercial, child custody, divorce, and guardianship matters, though this will likely expand further to include medical malpractice cases and other types of civil litigation. The exact details for these programs, and those not yet formally announced but expected to be forthcoming in the remaining judicial districts have not yet been released, though they likely will track the procedures recently implemented in Kings County.



Michael F. Madden is a Senior Partner at Martin Clearwater & Bell LLP with over 23 years of experience at the Firm. His practice encompasses all aspects of medical and professional liability malpractice defense, defending health care professionals, physician practice groups and major university medical centers and hospitals in malpractice actions from inception through trial.

Emma B. Glazer is an Associate at Martin Clearwater & Bell LLP, where she focuses her practice on the defense of medical malpractice cases, psychiatric malpractice defense, personal injury defense and professional liability defense in New York and New Jersey. She has experience in all phases of litigation including federal court cases.

Medical Malpractice Considerations When Evaluating and Treating Retinopathy of Prematurity

By: Kevin P. McManus and Michelle A. Frankel

Few pediatric ophthalmologists and retinal specialists evaluate and treat retinopathy of prematurity (ROP) for a number of reasons. The scheduling of the procedure can be complex and if performed negligently then potential exposure can be high. We successfully defended a hospital client in a case where the plaintiff alleged that our client hospital and co-defendant ophthalmologists failed to timely diagnose and treat ROP in a newborn resulting in total blindness. The facts, alleged negligence and ultimate legal defenses in this case highlight important considerations for ophthalmologists, retinal specialists and neonatal personnel when faced with patients who may have ROP.

ROP is a disease of the eye that may develop in premature infants. It causes abnormal blood vessels to grow and spread throughout the retina (the tissue that lines the back of the eye). These abnormal blood vessels are fragile and can leak, scarring the retina and pulling it out of position, which may cause retinal detachment. ROP can result in functional or complete blindness.

The American Academy of Ophthalmology (AAO) published guidelines regarding how to screen and detect ROP.[1] According to the AAO, infants with a birth weight of less than 1500g or with a gestational age of 30 weeks or less should have retinal screening examinations performed after pupillary dilation by using binocular indirect ophthalmoscopy with a lid speculum to detect ROP. One examination is sufficient only if it unequivocally shows the retina to be fully vascularized bilaterally.

The initial screening examination and subsequent examinations should be performed to permit sufficient time for treatment; this should further allow for any extra time required for transfer to another facility for treatment, if necessary. Treatment should generally be accomplished within 72 hours of determination of the treatable disease to minimize the risk of retinal detachment before treatment.

In our case, the infant was born on June 13, 2005 at 25 5/7 weeks gestation. The infant had comorbidities related to prematurity including patent ductus arteriosus (PDA), renal failure, thrombocytopenia and hepatomegaly. Initial ROP screening examinations were scheduled to occur on July 26, 2005, August 1, 2005 and August 9, 2005 but were deferred on each occasion by the hospital's neonatal intensive care unit (NICU) staff given the critical condition of the infant. An initial ROP exam was conducted by the co-defendant ophthalmologist on August 15, 2005 and incomplete vascularization was found so a follow up examination was scheduled for two weeks later. This exam was then deferred because of the infant's instability and was rescheduled for September 6, 2005. The September 6th exam was also deferred because of the infant's critical condition. The infant was diagnosed with marked ROP on September 12, 2015 and treatment was recommended. Treatment was deferred by the NICU staff because of the infant's instability until September 22, 2005. The infant underwent several subsequent procedures but was left with total blindness by the time of her hospital discharge. It was alleged that the defendants were negligent in delaying the infant's ophthalmological screening examinations and in failing to treat ROP within 72 hours of diagnosis.

We successfully defended a hospital client in a case where the hospital and co-defendant ophthalmologists allegedly failed to timely diagnose and treat retinopathy of prematurity (ROP) in a newborn resulting in total blindness.

1. *See generally,* Screening Examination of Premature Infants for Retinopathy of Prematurity, AMERICAN ACADEMY OF PEDIATRICS, SECTION OF OPHTHALMOLOGY, AMERICAN ACADEMY OF OPHTHALMOLOGY, AMERICAN ASSOCIATION FOR PEDIATRIC OPTHALMOLOGY AND STRABISMUS AND AMERICAN ASSOCIATION OF CERTIFIED ORTHOPTISTS, *Pediatrics*, Official Journal of the American Academy of Pediatrics, originally published online December 31, 2012, available at https://www.aao.org/clinical-statement/screening-examination-of-premature-infants-retinop.

Significantly, the infant's initial screening examinations were deferred by the hospital staff because of the infant's instability. Consequently, the initial screening examination and follow-up examinations were performed outside the window of time recommended by the AAO Guidelines. The infant was ultimately diagnosed with ROP and developed total blindness. Given this poor outcome, there was high exposure and our defense strategy was to demonstrate the severity of the infant's condition during her prolonged, six month neonatal admission.

When defending health care providers, documentation of medical decisions and the rationale for treatment decisions is critical to establish the exercise of professional judgment and that the decisions were not due to negligence. In this case, as happens in many cases, there were no changes made to the notes by the attending neonatologists and therefore did not accurately document the status of ROP exams and changes in the infant's status over time. This complicated our defense. To address this, we met with multiple neonatologists and nurses who were tasked with caring for this infant over the course of her six month neonatal admission. We created a daily chronology based on interviews, physician and nurses notes, flowsheets, and laboratory results to demonstrate the critical condition of this infant during significant intervals when examinations and treatment were being deferred. We emphasized how the medical judgments made by the clinicians about whether to subject the infant to the stress of examinations and treatment. We retained a neonatology expert who defended the care and treatment rendered in a written affirmation submitted to the Court in support of a motion for summary judgment, which argued that defendants were not negligent and the case should be dismissed. The expert affirmation explained that ROP screening exams are traumatic to the infant and can result in significant morbidity and that treatment carried an even higher risk of morbidity in an infant whose condition was so severe that she was not expected to survive. The expert further explained how caring for extremely premature infants, such as this infant, often requires the deferment of exams and treatment in an unstable infant, or an infant whose survival is at risk. In deciding whether to perform the screening examination, the physician must exercise caution and judgment as to whether the infant is stable enough for examination and treatment.

Ultimately in our case, we successfully demonstrated that the infant was too unstable to undergo the examinations. She was in critical condition with a poor prognosis for neurological function. Her chance of survival given her comorbidities was low. The decisions to defer the ophthalmological examinations and treatment by the hospital NICU staff were appropriate medical judgments made in an effort to save her life and improve her overall outcome.

Given the aforementioned, it is important for ophthalmologists, retinal specialists and other medical staff involved in neonatal care and treatment to be cognizant of how and when to perform an ROP screening. AAO guidelines should be followed when appropriate to do so and, especially when there are reasons not to adhere to the guidelines, medical providers must be particularly careful to accurately document the patient's pertinent medical information and their related medical judgments. Such information will be critical to defend against claims of negligence if later raised and detailed documentation itself will be persuasive to a jury.

Kevin P McManus is a Partner at Martin Clearwater & Bell LLP with over 20 years of experience in the medical malpractice defense field. His practice encompasses all areas of medical malpractice defense, defending health care professionals and hospitals in malpractice actions from inception through trial.

Michelle A. Frankel is an Associate at Martin Clearwater & Bell LLP. Her practice encompasses all areas of medical malpractice, dental malpractice, podiatric malpractice, nursing home defense, general liability and professional liability.

Labor & Employment Focus

Sexual Harassment Training – Are You In Compliance?

By: Valerie K. Ferrier

Article reprinted from MD News Long Island – November 2019

Both New York State and New York City law now require annual sexual harassment training for all employees. The laws overlap and in some cases conflict, making proper implementation tricky for employers. The deadline for compliance with the city's training requirement was April 1, 2019, and the deadline for compliance with the state law was October 9, 2019. While the city law covers employers with 15 or more employees over the course of a year (even if not all at once), the state law applies to businesses with even a single employee. Moreover, the term "employee" is broadly defined, encompassing part-time and full-time employees, seasonal and temporary workers, and even employees who are based in another state if they "work a portion of their time in New York State." The city law also applies the training requirement to paid or unpaid interns who work at least 80 hours in a year and for at least 90 days.

The laws specify various requirements for the training, including advising employees of their rights and remedies under anti-discrimination laws, as well as an interactive component to the training. This latter requirement means that simply giving an employee a video to watch or a manual to read does not comply with the law. Employers must also provide the training in their employees' primary language. Managers and supervisors are held to a higher standard under the law, and must escalate or resolve any harassment or discrimination issue that is brought to their attention, even if no one has actually complained about it.

Given how recently the laws went into effect, it remains to be seen how the New York State Department of Labor (which enforces the state law) or the New York City Commission on Human Rights (which enforces the city law), will treat non-compliance. No financial penalty is currently written into either law. It seems safe to assume, however, that in the event an employer is faced with a sexual harassment or discrimination lawsuit, an adverse inference may be applied by a court if they failed to provide the legally required training. And legislators may eventually amend the laws to apply monetary sanctions if it appears that voluntary compliance is lacking.

Both the state and city provide free online training, as do many companies. However, online training may not meet the interactivity requirement, and depending on where or the audience for whom the training was produced, it may not meet the state or city requirements. Many national companies sell a "one size fits all" training that is supposed to work in every state, but does not necessarily do so. In addition, companies that sell training to multiple states may include information that is not accurate or relevant in New York, such as reference to California's anti-bullying laws, which has no state or city analog.

Live training is a best practice, according to the New York State Department of Labor, and also has inherent advantages. It lets the employer see who is paying attention, who is rolling their eyes, who is furiously taking notes. A live session may be a way for an employer to learn about or pre-empt problems in the workplace.

MCB's Labor & Employment Practice Group can provide tailored live training that both meets the requirements of the law and helps protect your business. The free online training provided by the state and city may comply with the law by covering all the requirements, but they do not go further to protect business owners. For a flat fee, MCB's attorneys can provide training that delves into the nuances of this sensitive topic, to help prevent nuisance lawsuits that may be based on a misunderstanding of the law. Employers obviously have an obligation to let employees know what the law is, but it is equally important that they understand what the law is *not*.

Valerie K. Ferrier is a Partner and the Head of Martin Clearwater & Bell LLP's Labor & Employment Practice Group. Ms. Ferrier is an experienced litigator and counselor who has been practicing in the field for over 12 years, including the healthcare, hospitality, staffing and retail industries.

MCB CASE RESULTS

October 2019: Motion for Summary Judgment in Case Involving Home Health Aides – Westchester County

Senior Partner Jeffrey A. Shor assisted by Associates Michael F. Bastone and Brian S. Kim obtained a motion for summary judgment in a home health services case. In this case, MCB represented a company that provides home health aides to residents of an assisted living facility. On the day in question, the scheduled aide called in sick. While the company sought to find a replacement, the plaintiff was discovered unresponsive in his shower. Plaintiff alleged that the company failed to notify the family of the missing aide and failed to check on the resident in his home. It was claimed that the resident suffered a traumatic brain injury and irreversible cognitive decline requiring increased care for the remainder of his life. We moved for summary judgment on the basis of causation, arguing that there was no evidence of a traumatic brain injury at the time of the incident and that the patient's cognitive decline was separately explained by his pre-existing neurological disorders and a subsequent onset of normal pressure hydrocephalus. The Court granted our motion, holding the plaintiff's expert failed to respond to our expert's opinions and failed to address the contrary facts in the medical records.

October 2019: Motion for Summary Judgment in Pressure Ulcer Case – Kings County

MCB Partner Aryeh S. Klonsky and Associate Geoffrey Bleau successfully moved for summary judgment on behalf of a New York hospital dismissing the case of a 58-year-old male who developed a Stage IV decubitus pressure ulcer during his admission. The plaintiff was admitted without pressure ulcers, but with a significant medical history, including chest pain, syncope, coronary artery disease, congestive heart failure, ischemic cardiomyopathy, acute coronary syndrome, diabetes, electrolyte abnormalities, albumin levels below 3.0 g/dl and years of alcohol abuse (one bottle of liquor a day for many years). Our motion successfully argued that the hospital was not negligent and that the pressure ulcers were unavoidable due to the plaintiff's poor nutrition and due to the patient's required positioning during intubation.

In response to our motion for summary judgment, plaintiff's counsel sought and received court permission to be relieved as counsel. The plaintiff did not obtain new counsel, and ultimately, Kings County Supreme Court Justice Bernard Graham granted our motion for summary judgment dismissing the case in its entirety.

September 2019: Defense Verdict in Infant Erb's Palsy Matter – Westchester County

Senior Partner Sean F.X. Dugan assisted by Partner Francesca L. Mountain and Associate Michael B. Manning obtained a defense verdict in Westchester County. In this matter, the plaintiff claimed that employees of defendant medical center carelessly mismanaged the plaintiff mother's prenatal care by failing to diagnose an incompetent cervix and thus perform cerclage on her cervix upon admission to our client hospital on February 15, 2012. This omission allegedly caused preterm labor and delivery resulting in a 24 week gestation newborn. The infant was delivered via vaginal delivery in double footling breech position, in respiratory failure and with an Erb's Palsy of the left upper extremity, on March 2, 2012. Plaintiffs claimed that defendant hospital employees failed to perform a C-section, failed to avoid a traumatic vaginal delivery, and improperly tugged on the fetus's feet in delivering the newborn. Plaintiffs also alleged failure to properly resuscitate the infant upon delivery, failure to diagnose and treat brachial plexus injury to the left arm, pulmonary hypertension and aspiration, and infectious processes. Our attorneys argued that the hospital and co-defendant attending obstetrician did not depart from accepted medical practice by performing a vaginal breech delivery on March 2, 2012; that the co-defendant did not depart from accepted medical practice in his supervision of our then resident during this delivery; that our then resident did not exercise independent medical judgment during her participation in the delivery of this infant; and that the defendants did not depart from good practice by applying excessive lateral traction during the vaginal breech delivery of this infant on March 2, 2012.

Our attorneys obtained a defense verdict and subsequently obtained a Judgment against the plaintiffs dismissing this matter in its entirety against our clients. Plaintiff did not file a Notice of Appeal.

September 2019: Motion to Dismiss – Radiology Failure to Diagnose Cancer – Kings County

Senior Partner John J. Barbera, Partner Aryeh S. Klonsky and Of Counsel Gregory A. Cascino obtained a dismissal of this medical malpractice action which arose out of our radiologist's interpretation of Plaintiff's December 18, 2014 cervical MRI. Plaintiff underwent a cervical CT on November 18, 2016, which was worrisome for soft tissue sarcoma. In Plaintiff's May 6, 2019 Complaint he alleged that our radiologist misread the MRI and failed to diagnose his cancer at that time. MCB filed a pre-answer motion to dismiss all claims as time-barred by the statute of limitations, which accrued upon the alleged misdiagnosis and expired 2 1/2 year later on June 18, 2017. The motion preemptively addressed Plaintiff's anticipated reliance on "Lavern's Law," which now provides that the statute of limitation on claims alleging a failure to diagnose cancer accrues at the time of the discovery of the misdiagnosis. Specifically, MCB cited its legislative history, which allows for the revival of claims such as Plaintiff's which became time-barred on or after March 31, 2017. Such revived claims must be brought by July 31, 2018, however, which Plaintiff's claims were not. Plaintiff did not oppose our motion and voluntarily withdrew all claims with prejudice.

What's New at MCB?

MCB Congratulates 8 Partners for Selection to 2019 New York Super Lawyers and 3 Partners for Selection to 2019 New York Rising Stars!

SELECTED TO SUPER LAWYERS

Top Row: Anthony M. Sola, Bruce G. Habian, Erik J. Kapner, Gregory J. Radomisli, Jeffrey A. Shor, Kenneth R. Larywon
Second Row: Peter T. Crean, Sean F. X. Dugan

SELECTED TO RISING STARS

Above: Francesca L. Mountain, Ryan T. Cox, Samantha E. Shaw

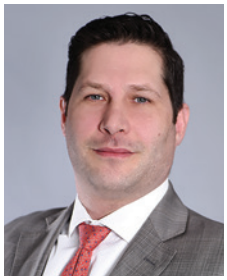
Valerie K. Ferrier Presents at the Greater New York Chamber of Commerce Educational Breakfast Series

Things You Didn't Know You Needed to Know to Protect Your Business

December 6, 2019

Valerie K. Ferrier, head of MCB's Labor & Employment group, offered insight into a variety of legal issues that business owners and employers need to be aware of to protect their bottom line. An overview of topics includes ADA compliance, timekeeping, record keeping, pay practices and more.

To schedule a presentation by Valerie, please contact her directly at valerie.ferrier@mcblaw.com.



MCB Welcomes Edward Warnke to the Labor & Employment Practice Group!

At MCB, Edward Warnke will work with Partner Valerie Ferrier, advising and representing business owners and employers across various industries in labor and employment matters. Edward earned his JD from Hofstra University's Maurice A. Deane School of Law, where he served as a legal intern in the Civil Enforcement Unit of the New York City Police Department and as a student attorney in the Law Reform Clinic in Hempstead, New York. Prior to pursuing a career in law, Edward served as an Amphibious Reconnaissance Marine with the First Reconnaissance Battalion in the United States Marine Corps, where he was awarded the Gold Level Public Service Award and the Navy and Marine Corps Achievement Medal for Combat Distinguishing Device.

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