NEW YORK STATE BAR ASSOCIATION
Journal
NYSBA
MARCH/APRIL 2018
VOL. 90 | NO. 3

THE TECH ISSUE

Technology and the Profession
Mark A. Berman, Editor

NOT YOUR PARENTS' ROBOT
NYC FAMILY COURT GOES PAPERLESS
ARTIFICIAL INTELLIGENCE, REAL ETHICS
TECH ADVANCES IN THE NYS COURTS

LAW PRACTICE MANAGEMENT: THE BUSINESS OF LAW

NYSBA CLE

April & May 2018
Live Programs & Webcasts

Bringing you the best and most relevant continuing education to help you be a better lawyer.

Last year over 2,000 lawyers and judges volunteered for a NYSBA CLE. For decades, CLE volunteers have been developing and presenting seminars, preparing rich collections of written materials and raising the bar for legal practice in New York.

April

Managing Partners Roundtable: Emerging Technologies for Law Firms
Tuesday, April 10th | NYC & Webcast

Diversity in the American Workforce
Tuesday, April 10th | NYC & Webcast

Attorney Fee Dispute Resolution
Tuesday, April 10th | NYC & Webcast

Smooth Moves 2018
Tuesday, April 10th | NYC

Premises Liability 2018: What You Need to Know in New York
Wednesday, April 11th | Albany & Webcast

Basics of Environmental Law
Thursday, April 12th | NYC
Wednesday, April 18th | Buffalo
Thursday, April 19th | Albany & Webcast
Thursday, April 19th | Long Island

Home Care in New York State
Thursday, April 12th | NYC
Monday, April 16th | Albany & Webcast

Ethics and Civility
Friday, April 13th | Albany
Friday, April 13th | Buffalo
Friday, April 13th | Long Island
Friday, April 13th | Syracuse
Friday, April 20th | NYC & Webcast

Technology in Your Practice
Tuesday, April 17th | NYC & Webcast

Critical Areas in Matrimonial Law II
Wednesday, April 18th | NYC & Webcast
Friday, April 20th | Albany
Friday, April 27th | Westchester

Business Law Basics: Fill in the Gaps
Friday, April 20th | NYC & Webcast

Advanced Legal Writing
Monday, April 23rd | Long Island
Tuesday, April 24th | Westchester
Thursday, April 26th | NYC & Webcast
Monday, April 30th | Syracuse

Planning with Your Client's Retirement and Life Insurance
Tuesday, April 24th | Albany
Tuesday, April 24th | Buffalo
Wednesday, April 25th | Long Island
Wednesday, April 25th | Syracuse
Thursday, April 26th | Westchester
Friday, April 27th | NYC & Webcast

Internet Law Update 2018
Wednesday, April 25th | NYC & Webcast

Resolving E-Discovery Disputes Efficiently Through Arbitration
Wednesday, April 25th | NYC

Emerging Liability Issues for the Healthcare Industry
Thursday, April 26th | NYC & Webcast

The Marriage of Elder Law and Family Law
Thursday, April 26th | NYC & Webcast

CPLR Update 2018
Friday, April 27th | Rochester
Saturday, April 28th | Buffalo

May

Advanced Legal Writing
Wednesday, May 2nd | Rochester
Thursday, May 3rd | Buffalo
Friday, May 4th | Albany

Critical Areas in Matrimonial Law II
Wednesday, May 2nd | Long Island
Friday, May 11th | Rochester

Aging & Longevity
Wednesday, May 9th | NYC & Webcast

Starting a Solo Practice in New York
Thursday, May 10th | NYC & Webcast

DWI on Trial – Big Apple XVIII
Friday, May 11th | NYC & Webcast

Insurance Coverage Update 2018
Friday, May 11th | Albany
Friday, May 11th | Buffalo
Friday, May 11th | Long Island
Friday, May 18th | NYC

Buying and Selling Your Practice
Tuesday, May 15th | NYC & Webcast

The Lawyer as Employer
Tuesday, May 15th | NYC & Webcast

Mitigating Bias: A Focus on Clients with Capacity Concerns
Tuesday, May 15th | NYC & Webcast

Landlord and Tenant Law Update 2018
Tuesday, May 15th | Albany & Webcast
Wednesday, May 16th | Long Island
Wednesday, May 16th | Rochester
Thursday, May 17th | NYC

Recent Developments in Cannabis Law
Tuesday, May 22nd | Albany & Webcast

Introduction to Immigration Law
Thursday, May 24th | Albany & Webcast

Intro to Civil Practice Skills: Torts, Personal Injury and Insurance Law
Wednesday, May 30th | NYC

Failure to Diagnose Breast Cancer
Thursday, May 31st | NYC & Webcast

Upcoming Destination Meetings www.nysba.org/Sections

International Section
Seoul, South Korea | April 23-24
New York City | June 11-15

Trusts & Estates Law Section
Sea Island, GA | May 3-6

Tax Section
Portland, ME | June 22-24

Elder Law & Special Needs Section
Queens Landing, Ontario | July 11-14

Family Law Section
Manchester, VT | July 12-14

Torts, Insurance & Compensation Law Section
Enniskerry, Ireland | July 22-25

Real Property Law Section
Westbrook, CT | July 26-29

www.nysba.org/cle
Register online or call 1.800.582.2452

The New York State Bar Association Has Been Certified by the New York State Continuing Legal Education Board as an Accredited Provider of Continuing Legal Education in the State of New York.

From the NYSBA Bookstore

Best Sellers

Estate Planning & Will Drafting in New York (w/2017 Revision) Updated!

Written and edited by experienced practitioners, this comprehensive book is recognized as one of the leading references available to New York attorneys involved in estate planning. Includes Forms.
Print: 4095C | E-book: 4095CE | 930 pages | **Member $185** | List $220

Probate and Administration of New York Estates (w/2017 Revision) Updated!

A comprehensive, practical reference covering all aspects of probate and administration, from the preparation of the estate to settling the account. This offers step-by-step guidance on estate issues, and provides resources, sample forms and checklists.
Print: 40054 | E-book: 40054E | 1,096 pages | **Member $185** | List $220

Legal Manual for New York Physicians, 5th Ed. Updated!

Written and edited by more than 70 experienced practitioners, this title is a must-have for physicians and attorneys representing physicians.
Print: 41326 | E-book: 41326E | 1,238 pages | **Member $135** | List $175

NY Lawyers' Practical Skills Series Updated!

An essential reference, guiding the practitioner through a common case or transaction in 25 areas of practice. Nineteen titles; 16 include downloadable forms.
Print: 40018PS | **Member $695** | List $895

NYSBA Estate Planning System Updated!

This Estate Planning System is a fully automated, document assembly software that enables the user to draft customized, estate planning documents for a client.
Print: 6270 (CD) | E-book: 6270E (Downloadable) | **Member $1,104** | List $1,351

NYSBA's Surrogate's Court Forms Updated!

(Powered by HotDocs™)
New York State Bar Association's Surrogate's Forms is a fully automated set of forms that contains all the official probate forms as promulgated by the Office of Court Administration (OCA) as well as the forms used specifically by the local Surrogate's Courts.
PN: 6229 | **Member $666** | List $781

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total.

Must-Have Titles

Attorney Escrow Accounts – Rules, Regulations and Related Topics, 4th Ed.
Fully updated, this is the go-to guide on escrow funds and agreements, IOLA accounts and the Lawyers' Fund for Client Protection. With CD of forms, ethics opinions, regulations and statutes.
Print: 40264 | E-book: 40264E | 436 pages
Member $60 | List $75

Evidentiary Privileges, 6th Ed.
Covers the evidentiary, constitutional and purported privileges that may be asserted at the grand jury and at trial.
Print: 40996 | E-book: 40996E | 450 pages
Member $55 | List $75

Foundation Evidence, Questions and Courtroom Protocols, 5th Ed.
This classic text has long been the go-to book to help attorneys prepare the appropriate foundation testimony for the introduction of evidence and examination of witnesses.
Print: 41074 | E-book: 41074E | 344 pages
Member $65 | List $80

New York Contract Law: A Guide for Non-New York Attorneys
A practical, authoritative reference for questions and answers about New York contract law.
Print: 4172 | E-book: 4172E | 622 pages
Member $95 | List $130

N.Y. Criminal Practice, 5th ed.
Written by criminal law attorneys and judges with decades of practical experience in the field, this book is intended to guide inexperienced and veteran attorneys alike.
Print: 41466 | E-book: 41466E | 1,160 pages
Member $150 | List $190

Grow Your Practice: Legal Marketing and Business Development Strategies
A must-have for attorneys on marketing and management resources that focus on clients and complement today's dynamic legal practice.
Print: 41265 | E-book: 41265E | 302 pages
Member $50 | List $65

Preparing For and Trying the Civil Lawsuit, 2nd Ed.
More than 30 of New York State's leading trial practitioners and other experts reveal the techniques and tactics they have found most effective when trying a civil lawsuit.
Print: 41955 | E-book: 41955E
Member $185 | List $235 | 1,528 pages

www.nysba.org/pubs
1.800.582.2452 Mention Code: PUB8937

Welcome to the NEW NYSBA *Journal*.

We've redesigned our flagship publication to make the *Journal* even more interesting and useful for our members – and to make it easier to share *Journal* content with fellow members, colleagues and the legal community. And later this year, the *Journal* will include a section devoted to State Bar news, to keep you informed about your Association's activities.

When you have a moment, use your smartphone to scan the QR code on the cover of this issue. That code will take you to the NYSBA Blog, a new page on our website that will be the jumping-off point to access on-line articles and other content from our NYSBA publications. With one click, you'll be able to share an article on social media or by email.

One thing that won't be changing about the *Journal*: the quality and relevance of our editorial content. We will continue to bring you, our members, in-depth articles on current legal issues along with the practical information you need to be successful in your legal career.

NEW YORK STATE BAR ASSOCIATION
Journal

BOARD OF EDITORS
Hannah R. Arterian
Syracuse
Marvin N. Bagwell
Westbury
Brian J. Barney
Rochester
Mark A. Berman
New York City
Katherine W. Dandy
White Plains
Janet M. DiFiore
Albany
Elissa D. Hecker
Irvington
Michael J. Hutter
Albany
Barry Kamins
Brooklyn
Paul R. Kietzman
Latham
Daniel J. Kornstein
New York City
Ronald J. Levine
New York City
Julia J. Martin
Syracuse
Marian C. Rice
Garden City

MANAGING EDITOR
Daniel J. McMahon
Albany
e-mail: dmcmahon@nysba.org

PUBLISHER
Pamela McDevitt
Executive Director

NYSBA PRODUCTION STAFF
EDITOR
Kate Mostaccio

COPY EDITORS
Alex Dickson
Reyna Eisenstark
Howard Healy

EDITORIAL OFFICES
One Elk Street, Albany, NY 12207
(518) 463-3200 • FAX (518) 463-8844
www.nysba.org

NYSBA ADVERTISING
Network Media Partners
Attn: Holly Klarman, Account Executive
307 International Circle, Suite 190
Hunt Valley, Maryland 21030
Email: hklarman@networkmediapartners.com
Phone: 410.584.1960

EUGENE C. GERHART
(1912 – 2007)
Editor-in-Chief, 1961 – 1998

Contents

NEW YORK STATE BAR ASSOCIATION
Journal
MARCH/APRIL 2018 VOL. 90 | NO. 3

8 Technology and the Profession

by Mark A. Berman, Editor

In this issue:

Departments:

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. Copyright ©2018 by the New York State Bar Association. The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $30. Library subscription rate is $210 annually. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

CONNECT WITH NYSBA
VISIT NYSBA.ORG/BLOG

Comment. Connect. Share.

NEW YORK STATE BAR ASSOCIATION

QUALIFIED. CONSISTENT. TRUSTED.

LAWYER REFERRAL

As the world evolves, so does the New York State Bar Association Lawyer Referral and Information Service.

In the age of online marketplaces, the legal profession is experiencing a moment of opportunity. By deeply embedding these tools in our program, we have laid the foundation for seamless connection between our LRIS members and the public.

Better yet, the NYSBA LRIS meets the ABA Standards for Lawyer Referral. You can trust the growth of your practice to a top-notch referral service.

NEW, QUALITY REFERRALS

Our trained, experienced staff screens these calls and passes on the vetted legal matters to our panel members.

COST EFFECTIVE

With one low yearly cost to join our panels, our goal is for every attorney to receive referrals that allow them to earn back the cost of joining the panel and then some.

TRUSTED

Meets ABA Standards for Lawyer Referral

WEB & MOBILE BASED

Our platform offers a range of benefits to members, including online access to your referrals and disposition reporting.

FOR MORE INFORMATION

www.nysba.org/JoinLR | LR@nysba.org | 800.342.3661

NYSBA

Serving the Governed, Not the Governors

Floyd Abrams, counsel for the *New York Times* in *United States v. New York Times* (1971), with Kathleen Sullivan and a bust of Learned Hand, just prior to a program on the 100th anniversary of *Masses Publishing v. Patten*, co-sponsored by NYSBA's Committee on Media Law.

President's Message

BY SHARON STERN GERSTMAN

I finally got around to seeing "The Post," the Oscar-nominated movie about Katherine Graham's decision to publish the Pentagon Papers in the *Washington Post*. Her decision, played against the background of her business decisions to have a public offering of stock and to turn the *Post* into a national newspaper, appropriately demonstrates the tension between the responsibility of the press and making a profit. It also does an excellent job of handling the delicacy of friendships between high-ranking leaders and publishers and editors.

It is interesting that Daniel Ellsberg delivered the 4,000 Xeroxed pages to the *New York Times*, and then when the *Times* was under a preliminary injunction sought by President Nixon, to the *Washington Post* and several other newspapers. As well as can be discerned, at no time did Daniel Ellsberg seek publication from television, even though most Americans got their news from television in 1971.

Similarly, Edward Snowden leaked the NSA material he hacked to journalists at the *Guardian* and the *Washington Post*, and one documentary filmmaker, not to electronic media outlets, though both the *Guardian* and the *Post* have online personas.

While print newspapers are literally fighting for their lives, it is significant to note that these two famous "leakers" trusted journalists at print newspapers to sift through thousands of pages and items to protect the privacy and safety of American citizens. While there have been scandals at print media (e.g., Jayson Blair at the *Times*) as well as on network television (e.g., Brian Williams' fabricated story, Dan Rather's rush to air a story), television and other electronic sources of news seem less reliable, and more easily manipulated. The leakers may also have been influenced by the tendency of electronic media to whittle down material to sound bites, or even 288 characters.

Of particular interest, with respect to the Pentagon Papers, was that the challenge was led by President Nixon. The Papers implicated the Kennedy and Johnson administrations, and it is reported that Nixon's first inclination was to let them be published so that the blame for the Vietnam War would be focused on them. However, President Nixon understood that the release of classified information, regardless of who it helped or hurt, was a danger to his or any other presidency, and he put the full force of the federal government behind the prevention of its publication. He recognized that foreign powers would not entrust the United States with their intelligence if there was a significant harm in the public airing of such classified information. This importance was apparently dismissed by President Trump in his permission to release the "Nunes Memorandum," which included confidential information provided by British intelligence.

The 6-3 decision of the U.S. Supreme Court, which heard and decided the case within a few days, upheld the refusal of the D.C. District and Circuit Courts to issue any injunction, and reversed the decision of the Second Circuit, which had issued the injunction to the *New York Times*. The per curiam decision reflected the lack of time to develop an opinion that would satisfy the individual justices' view on why prior restraint based upon national security was improper in this case. The three justices dissenting (Chief Justice Burger, Justice Blackmun and Justice Harlan) were of the view that there was insufficient time for the government to gauge the effect on national security, and that the court should not act so hastily. Justice Marshall's opinion to allow publication was based on the overbreadth of "national security," as a limit on

First Amendment rights. Justices Brennan and Douglas based their opinions on the failure of the government to meet one of the three recognized exceptions to the First Amendment. Justice Hugo, a First Amendment absolutist, recounted the history and purpose of the First Amendment. His opinion, quoted in the film, makes the case for the necessity of a free press:

> The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.

Justices Stewart and White recognized the power of the Executive to protect national security. Justice White determined that the government did not fit a congressionally authorized prior restraint. Justice Stewart did a masterful job of weighing two great principles: The need of secrecy and confidentiality in the administration of foreign affairs and the need for a check and balance on the power of the executive. In deciding in favor of publication, he stated:

> In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry – in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For, without an informed and free press, there cannot be an enlightened people.

As technology changes how we receive information and the print media, which were so vital in informing us of the truth of the Vietnam War, become a rarity, we must hope that the resulting form will continue to be "alert, aware and free" to provide an "informed and critical public opinion," or the values of our democratic government will be unprotected.

Sharon Stern Gerstman can be reached at ssterngerstman@nysba.org

Foundation Memorials

A fitting and lasting tribute to a deceased lawyer or loved one can be made through a memorial contribution to The New York Bar Foundation…

This meaningful gesture on the part of friends and associates will be appreciated by the family of the deceased. The family will be notified that a contribution has been made and by whom, although the contribution amount will not be specified. Memorial contributions are listed in the Foundation Memorial Book at the New York Bar Center in Albany. Inscribed bronze plaques are also available to be displayed in the distinguished Memorial Hall.

To make your contribution call **The Foundation** at **(518) 487-5650** or visit our website at **www.tnybf.org**

Lawyers caring. Lawyers sharing.
Around the Corner and Around the State.
THE NEW YORK BAR FOUNDATION

WHEN YOU LOVE WHAT YOU DO, IT SHOWS.

NAM RANKED #1 ADR FIRM FOR THE 7TH STRAIGHT YEAR
New York Law Journal Reader Rankings Survey

NAM RANKED #1 ADR FIRM IN THE U.S. 3 YEARS IN A ROW
National Law Journal Reader Rankings Survey

7 OF NAM'S MEDIATORS IN THE TOP 10
New York Law Journal Reader Rankings Survey

NAM MEDIATORS RANKED IN THE TOP 3 IN THE U.S. 5 YEARS IN A ROW
National Law Journal Reader Rankings Survey

7 OF NAM'S ARBITRATORS IN THE TOP 10
New York Law Journal Reader Rankings Survey

6 OF NAM'S NEUTRALS NAMED 2017 ADR CHAMPIONS
National Law Journal

NAM VOTED ONE OF THE TOP 3 ADR FIRMS IN NJ IN 2017
2017 Best of The New Jersey Law Journal Survey

NAM VOTED ONE OF THE TOP 3 ADR FIRMS IN THE U.S.IN 2017
2017 Corporate Counsel Reader Rankings Survey

NAM VOTED ONE OF THE TOP 3 ADR FIRMS IN THE MIDWEST IN 2017
2017 Best of the Midwest Survey

NAM
NATIONAL ARBITRATION AND MEDIATION

#1 ADR firm in New York State -The New York Law Journal
#1 ADR firm in the United States -The National Law Journal

122 East 42nd Street, Suite 803, New York, NY 10168
Additional Locations: Garden City, Brooklyn, Staten Island, Westchester and Buffalo
(800) 358-2550 | namadr.com

Technology and

A SPECIAL ISSUE

The New York State Bar Association *Journal* is for the first time devoting an entire issue to technology, and I am honored to be its editor, as I am to be Chair of the recently formed Committee on Technology and the Legal Profession (the "Committee"). Presidents Sharon Stern Gerstman and Claire P. Gutekunst understood that NYSBA needs to be a leader in educating its members in this ever-changing world of technology. To accomplish that goal, they formed this Committee, picking some of the best and brightest technology lawyers in the state to serve. The world has changed so much in the past 20 years, as illustrated by this quote from an article in the January 1998 *Journal*, where the author incredibly noted:

> Many lawyers view the Internet and Web as a playground for young people and have no personal interest in sending and receiving email or in "surfing the Web." On a personal basis, that is fine. Even in a law practice context, not using e-mail for client communications has a good rationale: Email is not terribly secure and tends to be "stream of consciousness" rather than careful and thought out communication.

To help celebrate NYSBA's high-tech prowess, the *Journal* this month not only is exclusively devoted to technology but also NYSBA's Executive Committee has decided to revamp the feel of the *Journal* to make it more forward-looking. NYSBA, likewise, will soon be updating its website to be more user-friendly and to appeal to our younger membership. All the great content in the *Journal*, after members enjoy its benefits, will now be available nationwide and internationally, showing off the assets of NYSBA.

To showcase New York State and its leading role in technology issues, we are proud, in this inaugural technology issue, to feature articles written by New York State Chief Judge Janet DiFiore, First Department Presiding Justice Rolando Acosta, and Second Department Presiding Justice Alan Scheinkman. This issue contains terrific articles on artificial intelligence as well as on its ethical implications, the "Internet of Things," the ethics of "online" legal service providers, decedents' digital assets in the estate context, and the judicial use of social media.

In its short time in existence the Committee has already produced a first-of-its-kind "best practices" guide that lawyers need to follow to seek to minimize the risk of having confidential client and privileged communications being hacked. Those "best practices" are reproduced on page 52 and can be found on NYBSA's website at www.nysba.org/nysbacyber. The Committee, working with NYBSA, is seeking to partner with professionals that NYSBA members could retain to assess a lawyer's or law firm's vulnerability to computer viruses, hacking and other improper electronic intrusions. And NYSBA already has in place through USI a well-priced, robust cyber security insurance program of which members should take advantage. The first step, of course, is for a law firm to implement affirmative steps to prevent cybersecurity events, but, if that fails, members should know that NYSBA has a backstop for you. The Committee will also be working with the Federal Bureau of Investigation – New York Field Office – Cyber Branch to educate our members on cybersecurity issues.

Committee members have been filmed discussing their expertise, and these videos are already on YouTube and will be made available on NYSBA's website and through NYSBA's weekly content eblasts. In addition, given the continuously evolving technological landscape and the new and unique features that differentiate today's most prevalent social media platforms, the Committee will be coming out with a series of videos highlighting these platforms in order to properly educate attorneys on the intricacies of these platforms and how lawyers will likely encounter them in their practice.

The Committee's work extends to the courthouse. In April, the Committee will be presenting a CLE, which will be videotaped, on the use of technology in the state's most advanced digital Commercial Division courtroom. The awesome power of this courtroom will be highlighted through a mock hearing. It is this courtroom that Justice Scheinkman has written about in his article.

The key to the Bar's future is to demonstrate its relevance to law students and younger lawyers. As such, the Com-

the Profession

By Mark A. Berman, Editor

mittee is working with some of the law schools in New York to bring NYSBA's technological expertise directly into the classroom where we would educate students on ethical issues as they relate to these new technologies. We have already designed three sessions for Hofstra Law's Computer Technology in Legal Practice course, which covers social media, e-discovery and cybersecurity. Now that is value added by NYSBA for our younger generation! The Committee has met with the Young Lawyers Section to discuss with them their technology concerns.

Autonomous and Connected Vehicles; and *Introduction of Discovery and Use of Electronic Information*. These CLEs will be available online.

Finally, through the Committee's officers, the Commercial and Federal Litigation Section, along with the Law Practice Management Committee, was at Legal Week, where, among other things, its CLEs, the Committee's "Best Practices" cybersecurity guide and the Section's 2017 *Social Media Ethics Guidelines* were available to attendees.

Open for registration is the Committee's four-part cutting-edge webinar series on current developments in artificial intelligence featuring some of the nation's thought leaders in this area. Our live CLEs, both downstate and upstate, often co-sponsored with the Commercial and Federal Litigation Section and Law Practice Management Committee, include *Finding and Using Social Media as Evidence: Tips & Ethics*; *Law Firm Cyber Protection: Everything You Need and Want to Know*; *Criminal ESI: Electronic Information in Criminal Investigations and Proceedings*; *Legal Ethics in the Digital Age*; the European Union's *Global Data Protection Regulation and How It Might Affect the Practice of Law in New York*;

Mark A. Berman is a partner in the commercial litigation department of Ganfer & Shore, LLP, representing clients in state and federal courts as well as in arbitral forums and in mediations. He is the Chair of the Committee on Technology and Legal Profession of the New York State Bar Association. He is also the Immediate Past Chair of the State Bar's Commercial and Federal Litigation Section and the current co-chair of its Commercial Division Committee. Mark writes the column on New York State E-Discovery issues for the *New York Law Journal* and is a member of the New York State Chief Judge's E-Discovery Working Group. He can be reached at mberman@ganfershore.com and at http://ganfershore.com/attorneys/mark-a-berman/.

Going Paperless: THE

In 1998, I was elected a judge of the Westchester County Court. My first assignment was to sit in Family Court in Westchester and Dutchess counties. It was there that I came to understand, first-hand, the critical importance of providing timely justice services to vulnerable litigants who come to our courthouses in times of crisis. I have never forgotten the weight of the responsibility of deciding those sensitive cases. Nor have I forgotten how delays and inefficiencies prolonged and amplified the harm and trauma that many families and children were already experiencing.

Upon assuming the position of Chief Judge in February 2016, I announced the "Excellence Initiative," a comprehensive and critical evaluation of court operations at every level of our system, focused on improving efficiency, providing high-quality justice services to the public and supporting the complex, substantive work of our judges.

Going paperless has greatly streamlined case commencement and case processing, leading to timelier dispositions for families and children in need of closure and stability.

The effective use of court technology is a centerpiece of the Excellence Initiative. Technology has revolutionized our society and improved our personal and professional lives in so many ways. The public rightly expects the courts to take advantage of technology to improve our services and carry out our work efficiently and effectively. In our fast-moving electronic age, public confidence is not fostered by images of court staff pushing carts piled high with documents, physically searching for case folders in records rooms, and manually entering data into computers from stacks of paperwork.

THE PAPERLESS NEW YORK CITY FAMILY COURT

We have an obligation to do better – and the New York City Family Court is leading the way by leveraging the power of technology to better serve families and children. On June 5, 2017, under the leadership of Administrative Judge Jeanette Ruiz, the New York City Family Court, with more than 200,000 new case filings each year, became the largest paperless court in the state – and one of the largest in the country. The court is now completely digital for all newly commenced cases and (with limited exceptions) no longer uses or produces any hard copy paper records or files.

In the paperless Family Court, all records in a case file are received digitally and saved in the court's Universal Case Management System (UCMS). Judges, Support Magistrates, Court Attorney-Referees and Judicial Hearing Officers (hereinafter "jurists") review all court records online and enter their case progress notes into UCMS. Petitions and orders are signed by jurists electronically, enabling the presentment agencies and attorneys with access to UCMS to immediately view and print all signed orders and documents. Appropriate case data and signed documents are also exchanged with Family Court agencies through computer interfaces, including the Office of Child Support Services, the Division of Criminal Justice Services and state and federal order of protection registries and firearms databases.

Consistent with the shared objectives of the Excellence Initiative and the Strategic Plan for the New York City Family Court, going paperless has greatly streamlined case commencement and case processing, leading to timelier dispositions for families and children in need of closure and stability. And the ability of all participants in our highly interconnected family justice system to digitally share comprehensive case information has contributed to meaningful court appearances and just resolutions.

HISTORY

Our progress toward a paperless Family Court actually began outside New York City, in Cortland and Westchester counties. The Cortland County Family Court was our pioneer, going all paperless as early as 2008, followed by Westchester County Family Court in February 2011. The latter court has handled approximately 200,000 paperless cases over the last seven years.

The New York City experience began in 2012 with a pilot program in Queens County that enabled court administrators and managers to develop a detailed blue-

NEW YORK CITY FAMILY COURT

By Chief Judge Janet DiFiore

print of systems and protocols that eventually facilitated citywide implementation by June 5, 2017 – six months ahead of our original target date. In 2015, the Office of Court Administration's (OCA) Division of Technology (DOT) worked with the court to launch the Secure Jurist Electronic Signature Program, which allows jurists to sign orders electronically. A similar program quickly followed to capture litigant signatures electronically. This was a critical development in the evolution of an all-digital Family Court, making it possible to create and immediately save signed orders and records in UCMS, without the need to manually scan documents into the system. Also critical to the success of the paperless court was the requirement that jurists and clerical staff enter all case notes and actions into UCMS to ensure a complete digital record of every case, including what took place at prior appearances and the pendency of any related cases.

The public rightly expects the courts to take advantage of technology to improve our services and carry out our work efficiently and effectively.

CURRENT PRACTICE

In the paperless Family Court, the official records in each case are those maintained in UCMS, our computer system of record. All documents, including petitions, orders to show cause, stipulations, and orders are stored in electronic format. To facilitate the review of case files and records on the bench, jurists may use a second monitor positioned vertically to allow for full-page viewing of documents, enabling them to enter or review notes in UCMS while simultaneously viewing full-page records from the case file. Case documents are viewable under tabs marked "Forms," "Reports" or "OP (Orders of Protection)."

Any hard copies received are scanned into UCMS and are not retained except for "quality control" purposes (to ensure that scanning/digitizing are error free), or upon request by a jurist. Hard copy documents presented directly to a jurist are scanned into UCMS at the conclusion of the appearance. On occasion, complicated or lengthy documents are returned to the jurist during the pendency of the case. However, our jurists understand and are fully committed to the pursuit of a paperless model in which retention and printing of hard copies are minimized.[1]

Orders are prepared by court staff and submitted to jurists for electronic review and signature. Once signed, orders are immediately available to presentment agencies and attorneys with access to UCMS, or securely emailed to agencies and attorneys, or printed and distributed to litigants, if appropriate.

BENEFITS

The paperless Family Court is a prime example of how the New York State court system is leveraging the power of technology to enhance the quality of justice. The benefits of going all-digital are obvious and significant. It streamlines the commencement of cases, resulting in substantial time and cost savings for all litigants and case participants, including the presentment agencies that commence tens of thousands of Family Court cases each year.

Providing immediate remote access to court documents and case information, including the ability to print signed orders and petitions outside the courthouse, greatly improves access to justice for litigants, attorneys and agencies. Those entitled to view court files no longer have to travel to the courthouse and wait for the files to be retrieved, and they don't have to wait to view files that

Janet DiFiore
is Chief Judge of the State of New York.

happen to be in someone else's possession. Access to justice is also enhanced, and court intervention expedited, when family offense petitions can be completed and filed online, with the data sent directly to UCMS.

Going paperless facilitates efficient management of our staggering caseloads, including the ever-increasing amounts of digital information, such as medical records, that are regularly submitted in Family Court matters. Paperless courts reap additional cost savings by reducing our costly dependence on physical storage and off-site archival facilities. Misplacement of files or loss of paper files due to fire or water damage are no longer concerns, as digital records are backed up and saved with multiple layers of disaster recovery.

Providing immediate remote access to court documents and case information, including the ability to print signed orders and petitions outside the courthouse, greatly improves access to justice for litigants, attorneys and agencies.

Finally, the enormous reduction in paper-processing and data entry tasks enables digital courts like the Family Court to reallocate staff to more productive functions, including courtroom support and litigant services.

OTHER USES OF TECHNOLOGY

There are many other ways in which the New York State court system is using technology to help us achieve excellence in the delivery of justice in our civil, criminal and family courts. Most notably, we have developed a dynamic case management tool, called the "Dashboard," which provides updated information about each trial court's case inventory. This caseload data is searchable and can be filtered in numerous ways to help us identify and address backlogs and delays. Our Dashboards have been a key component in the significant progress we have made to promote efficiency and timely justice under the Excellence Initiative.

Our e-filing program, which recently surpassed 73,000 registered attorney users, was expanded to all four Departments of the Appellate Division on March 1, 2018. Our E-Track system allows attorneys to track the progress of their cases through email notifications. And the Summons Part of the New York City Criminal Court sends text messages to defendants reminding them of their next court appearance date – helping them avoid missed appearances that could result in issuance of arrest warrants.[2]

And coming back to the Family Court, "CourtCasts" is a series of podcast tutorials conducted by experienced New York City Family Court judges, court attorneys and clerks for the benefit of colleagues who may be new to the court or not as well-versed on a variety of vital topics, such as conducting probable cause hearings in juvenile delinquency matters, and procedures for custody, visitation and family offense intake, among many others.

Finally, our remote order of protection program is enhancing access to justice and personal safety for domestic violence victims by allowing petitions for temporary orders of protection to be filed electronically and initial *ex parte* hearings to be conducted via video conference from safe havens such as shelters and hospitals. Over the past year, this program has become operational in 15 counties, with plans to expand statewide by the end of 2019.

CONCLUSION

I take great pride in the fact that the New York City Family Court is the largest paperless court in the state, and is providing a model for how our entire court system can take advantage of the latest technology to advance our constitutional mission of providing fair, timely and high-quality justice services to every litigant. The hard-working jurists and staff who have made the paperless Family Court a reality – in New York City and around the state – deserve our praise and gratitude.

1. All evidence in a case remains in the format submitted and is not digitized. Evidence is stored in the courtroom for the pendency of the proceeding or until further order of the court. At the conclusion of the proceeding, evidence is returned or disposed of pursuant to established protocols promulgated by OCA.

2. Hon. Lawrence K. Marks, A Technology-Focused Approach to Justice, N.Y.L.J., Jan. 22. 2018, at S1, col. 3.

Technological Innovations at the Appellate Division, First Department

By Hon. Rolando T. Acosta

Technology is a bigger driving force in the legal profession than ever before, and the judiciary is no exception. As Chief Judge Janet DiFiore announced in her State of Our Judiciary address on February 6, "the delivery of justice must keep pace with the needs of our modern society if we are to maintain public trust in the rule of law and the people's confidence that our courts remain, in the words of our first President, 'the firmest pillar of good government.'"[1] And, as Chief Administrative Judge Lawrence Marks recently wrote in the *New York Law Journal*, "One critical means of achieving the goals of the [Chief Judge's] Excellence Initiative is through technology. By expanding and modernizing our technology operations, we have made justice more accessible and more efficient."[2] Judge Marks enumerated several technological innovations, including e-filing, computer "dashboards" that allow courts to analyze caseloads in myriad ways, and upgrades to teleconferencing systems and other resources, which are bringing New York's court system into the 21st century.[3]

At the Appellate Division, First Department we have made several strides toward modernizing the court, and many more are in the works. To be sure, appellate courts have traditionally been slower to change than their trial-level counterparts, but the availability of cutting-edge technology is inevitably changing the appellate process for the better, making it increasingly efficient and responsive to an ever more technologically savvy appellate bar.

Last fall, we began live-streaming oral arguments on the court's website, making the judiciary's operations more transparent to the public. And we will add convenience and reduce costs by implementing e-filing of commercial appeals in March of this year (in fact, lawyers, litigants, and the public may now view our e-filing rules on our website, with a tutorial to follow).[4] I anticipate that all cases will be e-filed within the next year or two. There are several benefits to e-filing: it diminishes the amount of paper we use, provides court attorneys, judges, litigants, the public, and the press with text-searchable versions of briefs and records, increases the speed at which cases can be processed, and permits the seamless digital archiving of court submissions. E-filing has already been working in the trial courts, and it's time for the Appellate Division to catch up.

As I see it, improving our technological infrastructure is critical. That is why, since I became Presiding Justice, we have replaced our antiquated computer servers, which ensures that our information is better protected than ever before and that our employees are able to perform their duties more efficiently. Furthermore, we have begun implementing Microsoft OneDrive and OneNote, which utilize secure cloud storage and facilitate a more collaborative work environment, and we are training our entire judicial and nonjudicial staff on cybersecurity and general software competency.

We have also equipped our judges with state-of-the-art electronic tablets (Microsoft Surface Pro 4s) so that they can read briefs and write opinions from virtually anywhere. Eventually, I expect that many of our judges will bring their tablets onto the bench – not to watch Netflix or shop online, but to quickly and seamlessly access case law, the briefs, and the records to which counsel often refer during oral arguments. Currently, when we hear an appeal with a multi-volume record and an arguing attorney says, for example, "I'd like to direct the court's attention to page 957," it might not be practicable in the moment for the judges to find the correct volume and flip to the right page; instead, we often ask the lawyer to continue with the argument, noting that we can simply look up the referenced page on our own time. Having

Rolando T. Acosta
is the Presiding Justice of the Appellate Division, First Department.

the briefs and records on our tablets, by contrast, will enable us to jump to the correct page in seconds and ask questions as needed. In addition, we plan to implement and encourage hyperlinking – in briefs, records, and internal reports drafted by our court attorneys – so that our judges can access information even more quickly by simply clicking on a link, rather than typing every case citation into a legal research website.

It's not only the judges who will be able to use electronic tablets and other such devices in the courtroom to make the adjudicatory process more efficient. The court recently approved a new Portable Electronic Device Policy, which permits attorneys and litigants to use electronic devices like tablets or smartphones to assist them during their oral arguments. Interested readers may view the new policy on the court's website. As an added convenience, we have installed Wi-Fi access points throughout the courthouse, so attorneys, litigants, and other visitors can access high-speed internet free of charge.

In my view, "we've always done it that way" is not a sufficient reason to continue doing something in the same manner as before. That is why the Court is developing a five-year strategic technology plan, which includes the creation of a new case-management system that will allow us to track and analyze our caseload with greater precision, the launching of a new website that will be more user-friendly, and the acquisition of cutting-edge technology like Surface Hubs for courtroom presentations, CLEs, teleconferencing, and the like. As part of our five-year plan, I have also tasked my Court's internal Committee on Case Management with the responsibility of examining the systems of the Court that may benefit from a fresh look and the use of technology, despite having served us well in the past. This includes everything from how cases are processed and assigned to judges to whether court attorneys must draft internal reports on all motions where the parties stipulate to an outcome. We are leaving no stone unturned as we examine every aspect of the Court with an eye toward modernization, making sure we respond to the needs of appellate lawyers and litigants in the 21st century.

These technological advances and others will enable our Court to better serve the public by adjudicating cases more efficiently and adding convenience. Furthermore, not only will our modernizing initiatives enable us to adjudicate appeals faster than ever before, but we will also save some trees in the process. As we continue building the appellate court of the future, the Appellate Division, First Department remains, as always, open to suggestions from the public and the bar.

1. Janet DiFiore, Chief Judge of the State of New York, *The State of Our Judiciary 2018* (Feb. 6, 2018).

2. Lawrence K. Marks, *A Technology-Focused Approach to Administering Justice*, N.Y.L.J. (Jan. 19, 2018).

3. *Id.*

4. www.nycourts.gov/courts/ad1/index.shtml.

TECH in the Courtroom

Integrated Courtroom Technology (ICT) Comes to the Commercial Division of Supreme Court, Westchester County

By Hon. Alan D. Scheinkman and Sheng Guo

In January 2018, the Commercial Division of Supreme Court, Westchester County, became the first civil court in the state to implement Integrated Courtroom Technology (ICT). The Westchester Commercial Division ICT project built off the 2016 development of ICT in the new, state-of-the-art Family Court in Yonkers, New York. Since then, ICT has expanded into Family Court courtrooms in New York City.

The ICT initiative focuses on enabling all courtroom participants – judges, clerks, attorneys, litigants, witnesses, jurors, and members of the public – to take fullest advantage of modern evidence presentation systems. It "glues" multiple components of courtroom technology into a modular, powerful, yet easy-to-use platform to promote efficiency and ensure full access to all participants in the proceeding. These are the key components:

- An excellent sound system that permits all participants to clearly hear the proceedings.
- Audio and video conferencing for remote appearances and remote interpreting.
- An evidence presentation system that permits attorneys to display physical and electronic evidence, and witnesses to annotate the evidence, in a controlled fashion to all court participants.
- Assistive listening capacity for hearing-impaired participants.
- Monitors for displaying testimony when real-time court reporting is used.
- Secure Wi-Fi access for judges with state-issued Surface tablets/laptops and open public internet access for the public.

In developing the ICT courtrooms in Yonkers Family Court, we were able to work from essentially raw space, unencumbered by existing walls and infrastructure. In contrast, we did not have the luxury of designing and building the courtroom technology components from scratch in the Commercial Division courtroom. Courtroom 105, located in the Westchester County Courthouse Annex, is spacious and dignified but its pre-existing technology had become obsolete, even though

the facility was not all that old. The annex was designed in the 1990s and built in the early 2000s.

Our goal from the beginning was to obtain the latest and best courtroom technology and to tailor it to fit the needs of the Commercial Division while maintaining the aesthetics and integrity of the courtroom. We took into consideration the punch list of desired courtroom technology features developed by the Commercial Division Advisory Council, chaired by Robert Haig, Esq. of Kelly, Drye and Warren, and took our list of requirements to the technology experts and architects from both the Ninth Judicial District staff and the Office of Court Administration. Sheng Guo, OCA's Chief of Technology, attended several days of trials and hearings in the pre-existing courtroom so that he could see, first-hand,

Hon. Alan D. Scheinkman is the Presiding Justice of the Appellate Division, Second Department.

Sheng Guo is the New York State Office of Court Administration's Chief of Technology.

how the court and counsel worked with traditional presentation methods and develop an appreciation for how courtroom presentation could be improved by the use of modern technology.

The Commercial Division handles important, complex commercial litigations, quite often involving multiple parties, with each party potentially having multiple attorneys and legal support staff. Jury trials are not uncommon. Use of video-recorded depositions is frequent. Discussion of complicated contractual provisions occurs all the time. Unlike the situation in family courts, the courtroom has a jury box and also has two pairs of counsel tables. It is vital that all parties – counsel, witnesses, the court and the public – be able to clearly see, hear and understand all proceedings.

sotto voce conversations between counsel and clients at the counsel table, the inadvertent broadcast of dialogue not intended for public dissemination may be avoided by toggling a convenient on/off switch.

EVIDENCE PRESENTATION SYSTEM

In the Commercial Division, it is hardly uncommon to see attorneys hauling in voluminous amounts of evidence and documents by hand truck. Because of the lack of evidence presentation system, many attorneys struggled to set up an easel and used a pre-printed foamboard to show the evidence. At times, counsel would write on a flipchart to illustrate a point. In jury cases, the judge, counsel and the witness might have copies of the key exhibits before them as the contents were described, while jurors and the

Sound System/Wi-Fi

Video Conferencing

SOUND REINFORCEMENT SYSTEM

Even though the pre-existing courtroom had a decent standalone sound system consisting of an audio mixer, microphones and ceiling-mounted speakers, only the front counsel tables were equipped with microphones. While the sound quality was loud and clear when the attorneys spoke directly into the microphones at a sitting position, the microphones were not very useful when attorneys were standing while speaking – a hardly infrequent occurrence. Nor were the microphones able to amplify the voices of counsel at the podium.

In the ICT implementation, the existing microphones on the front counsel tables were replaced with new ones with a better voice pick-up range and which are no longer in rigidly fixed positions. As a result, all the participants in the courtroom can hear the attorney's voice whether he or she is sitting or standing. With the addition of microphones to the back counsel tables, attorneys no longer have to switch between front and back tables, thus making the courtroom more efficient. A microphone was also placed on the podium. The new microphones are capable of picking up sound throughout the courtroom. While the microphones are so sensitive that they may capture public were left to make sense of the testimony without the benefit of having the exhibits before them. These old-fashioned approaches could be avoided only if the attorneys could hire a vendor to install multiple display monitors for use in a particular case. This involved trucking in more equipment and running temporary cables to connect those monitors to the attorney's computer. This was a costly and time-consuming endeavor, not to mention the safety hazards posed by open wires on the floor and the difficulty of positioning the equipment so that everyone could see it without blocking means of ingress and egress.

In the new design, attorneys can present evidence from any one of the four counsel tables, or from the podium. All forms of evidence may be presented, including documents, video (live or recorded), and audio (live or recorded). All that is needed is a laptop or tablet (or even a smartphone) that can send the video signal to the HDMI port and an HDMI cable. It does not matter what type or version of computer operating system (e.g., Windows or Mac) or applications (e.g., Word, Wordperfect, Excel, Adobe) are used. Counsel can retrieve and present evidence which is stored on their computers

locally or which is stored in the "cloud" using high-speed Wi-Fi connections, provided by the court free of charge. In addition, attorneys may present physical evidence using the document camera on the podium.

For the convenience of the attorneys, a wireless charging station has been installed on each of the four counsel tables, and a USB charging port is also available on the podium.

The evidence presentation system simply takes the video images from the computer screen of the presenting attorney and replicates and re-displays them in real time to the judge, clerk, court reporter, witness, the other counsel, the jury, as well as the spectators. (As discussed below, the judge and the clerk have the ability to limit the presentation so that, for example, the jury does not see a proposed exhibit until it has been admitted into evidence.) Each counsel table has one 24-inch Full HD (1080p) monitor, with the ability to accommodate two monitors on demand when needed. The judge, court clerk and court reporter all have individual monitors. In the jury box, a total of eight monitors were installed so that every two jurors share a monitor. In addition, two 48-inch monitors with articulated arms were installed on the side walls for the spectators.

A touchscreen monitor was provided for the witness stand. The witness can annotate the evidence on the screen using his or her finger or a stylus. In this fashion, the witness can mark a person or location depicted on a photograph. The clerk can take a snapshot of the annotated evidence and save it onto the court's network for future reference, such as for printing it for purposes of an appellate record. It is envisioned that a procedure for "assembling" the original evidence in electronic format and saved annotated evidence for jury deliberation will be developed down the road.

The distributive nature of the displays has significant advantages. First, of course, the viewers will be able to see crisp and clear images, including fine print in documents or details in photos, from a high-definition monitor right in front of them. Second, since individual monitors are installed, the presiding judge or the clerk can control who can see the evidence and when. For instance, the judge may preview the evidence before allowing it to be displayed to the opposing counsel or to the jury and the public. The ability to control the evidence display sequence, obviously, will reduce the chance of accidentally displaying inadmissible evidence to the jurors or others.

One of the common complaints in the past when temporary monitors were installed was that the temporary monitors disrupted the visual communications between the judge and attorneys, or between the attorneys and the witness or jury. We have rectified the problem by using low-profile monitor mounts on the counsel tables and the bench. Those monitors can be adjusted to lower positions so that there are clear lines of sight among courtroom participants.

Wireless Charging Systems

Podium Microphone

Cable and Wire Management

CONFERENCING SYSTEMS

One of the recommendations from the Chief Judge's Task Force on Commercial Litigation in the 21st Century was to encourage judges to conduct conferences by telephone rather than requiring the attorneys to travel to court. However, using old school technology involved having to turn on the speakerphone on the handset and then put it near a microphone, introducing complexity and rendering poor call quality. Moreover, it could be difficult for a judge to effectively manage the call because the audio equipment allowed the speaker to keep speaking indefinitely. In the ICT implementation, audio conferencing and video conferencing are integrated well with the courtroom sound system. You can hear the voice of the remote party clearly, as if he or she is talking directly to a microphone in the courtroom. More important, video conference technology, such as Skype, is much more effective than plain audio conferencing. Because

the participants can see and hear each other, the problem of a run-on call is resolved; further, use of the video equipment enables the participants to discuss a displayed document. The use of courtroom video conference technology is expected to expand. A variety of circumstances may arise (e.g., a snowstorm, a travel delay, or a health problem) that may prevent an attorney or a witness from appearing in person in the courtroom. However, it may be acceptable in non-testimonial situations for counsel and other participants to appear remotely via video conferencing. In the future, counsel may be able to wait in their offices for their case to be reached for a video conference, rather than having to physically travel to a courthouse and wait during a lengthy calendar call. This should increase efficiency and reduce cost and delay. Where the parties consent, a witness may even be permitted to testify remotely as well.

Additionally, there are cases in which a participant does not understand English or is hearing impaired. Rather than rely exclusively on the availability of an on-site language interpreter, which must be arranged in advance, it can be effective to use video conferencing for translation. The interpreter can sit at his or her office in a remote location, connect to the courtroom video conferencing system using Skype, hear and see the court proceeding, and translate in real time.

ADA COMPLIANCE

It is critical to make proper accommodations for people with disabilities when implementing courtroom technology. An infrared-based assistive listening system was installed to address the needs of the hearing impaired. Sound from the audio mixer will be encoded, then transmitted via an infrared emitter. Upon request, the court personnel can assign an infrared receiver and a microphone, or an induction loop for those using compatible hearing aids.

Avoiding messy cable runs on the floor not only helps to preserve the beauty of the courtroom, it also makes the courtroom safer for all users by eliminating tripping hazards and obstacles to mobility. In the Commercial Division courtroom, the contractor was able to hide all video and power cables under the in-carpet Connectrac wireways. The special ramp design ensures a very gradual slope to the wireways, which is a requirement for ADA compliance.

STREAMING

While the courtroom is spacious, there may be times when it is not able to accommodate all who wish to be present in large or well-publicized cases. The built-in streamer can stream court proceedings live to an overflow room. In addition, the judge may authorize the stream to be viewable by law clerks who conduct legal research in the chambers. We will explore the possibility of streaming court proceedings to attorneys' offices after clearing the legal and security obstacles.

The other usage of the streamer would be for the court reporter to connect his or her laptop, and stream real-time transcript over the Wi-Fi network. A hearing-impaired individual, especially the one with severe hearing loss, can read the streamed transcript from a court-provided laptop.

CONCLUSION

Keeping New York's pioneering Commercial Division at the cutting edge, the newly initiated ICT part in White Plains will enable more efficient, effective case management in complicated business disputes, better serving the justice needs of New York's business community and supporting the state's role as a global commercial hub.

Are you feeling overwhelmed?

The New York State Bar Association's Lawyer Assistance Program can help.

We understand the competition, constant stress, and high expectations you face as a lawyer, judge or law student. Sometimes the most difficult trials happen outside the court. Unmanaged stress can lead to problems such as substance abuse and depression.

NYSBA's LAP offers free, confidential help. All LAP services are confidential and protected under section 499 of the Judiciary Law.

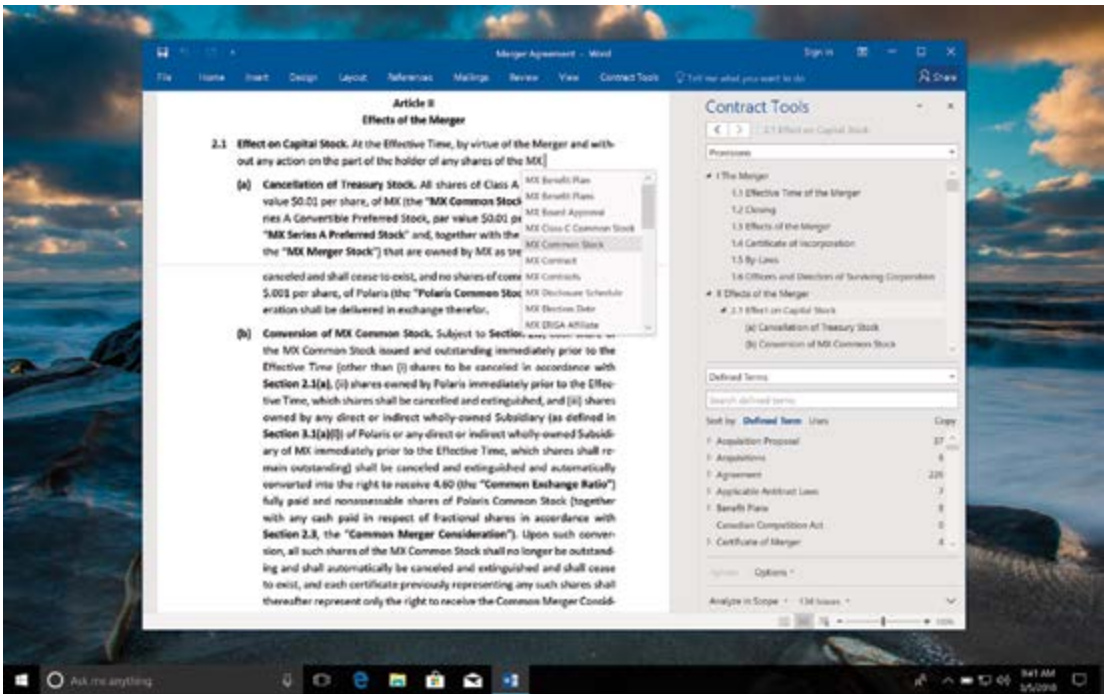
Call 1.800.255.0569

NEW YORK STATE BAR ASSOCIATION
LAWYER ASSISTANCE PROGRAM

A **MICROSOFT WORD**
ADD-IN FOR CONTRACTS
THAT ACTUALLY WORKS

CONTRACT TOOLS

Lightning-fast analysis, autocompletion, proofreading,
real-time updating, automatic to-dos, and more.
Get a free trial at **papersoftware.com**.



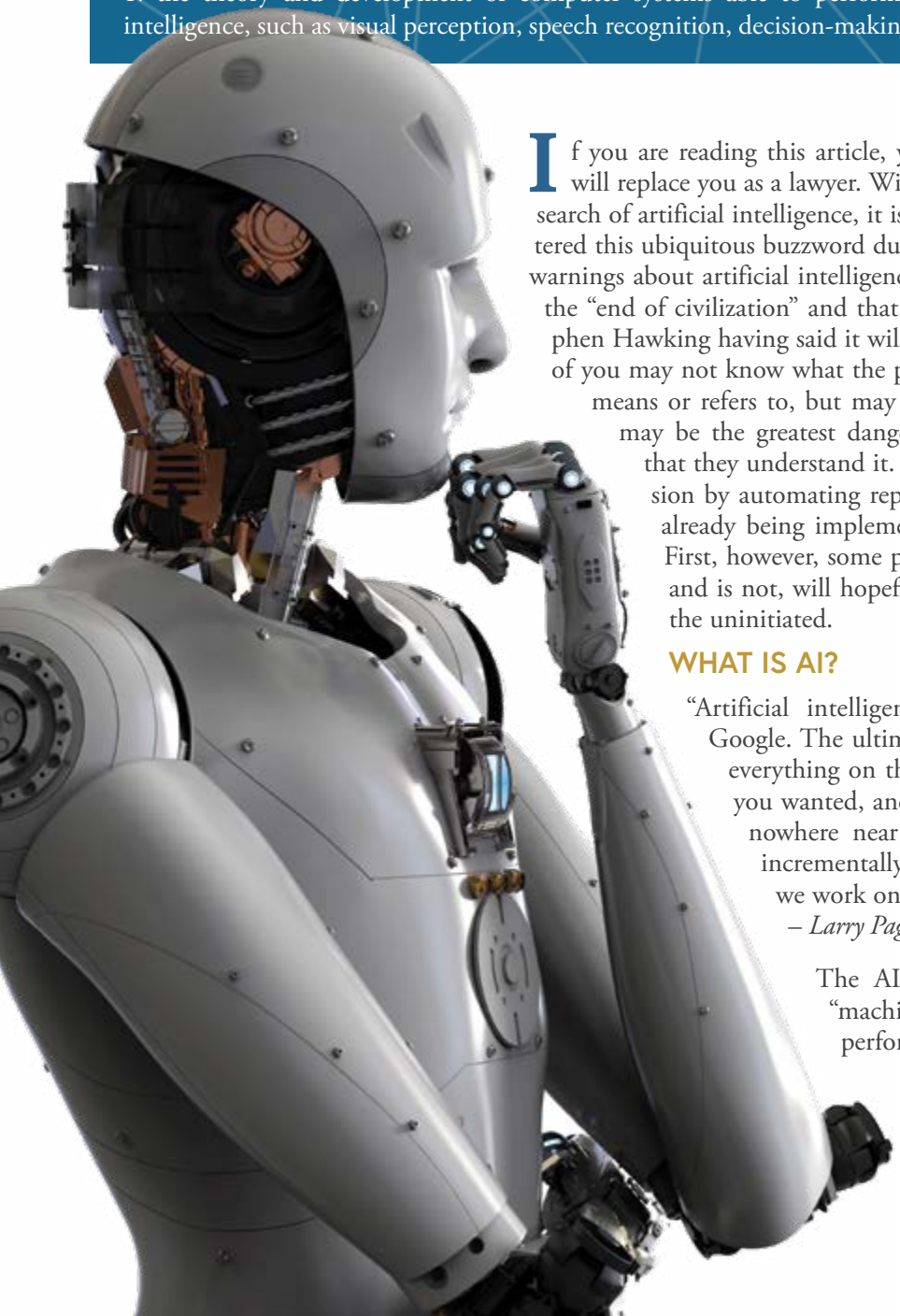
PAPER SOFTWARE

Not Your Parents' ROBOT

By Alison Arden Besunder

ar·ti·fi·cial in·tel·li·gence
/ ärdē'fiSHēl inētelējēns/
noun

1. the theory and development of computer systems able to perform tasks that normally require human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages.[1]



If you are reading this article, you may already be wondering if a robot will replace you as a lawyer. With 118 million hits yielded from a Google search of artificial intelligence, it is safe to assume you have by now encountered this ubiquitous buzzword du jour. Much of the conversation gives dire warnings about artificial intelligence – with Elon Musk predicting it will be the "end of civilization" and that "we're summoning the demon," and Stephen Hawking having said it will "spell the end of the human race." Many of you may not know what the phrase "artificial intelligence" (AI) actually means or refers to, but may be too overwhelmed to ask. Indeed, this may be the greatest danger of AI: that people conclude too early that they understand it. AI will ultimately impact the legal profession by automating repetitive tasks. Some of the ways that AI is already being implemented by law firms are mentioned below. First, however, some preliminary context to what AI actually is, and is not, will hopefully render the field less overwhelming to the uninitiated.

WHAT IS AI?

"Artificial intelligence would be the ultimate version of Google. The ultimate search engine that would understand everything on the web. It would understand exactly what you wanted, and it would give you the right thing. We're nowhere near doing that now. However, we can get incrementally closer to that, and that is basically what we work on."

– Larry Page, co-founder of Google[2]

The AI boom is driven by a field known as "machine learning" that trains computers to perform tasks based on examples rather than human-driven programming. Some credit its birth to a summer conference in 1956 on artificial intelligence, which coined the name.[3] In 1997, IBM's Deep Blue computer defeated chess

world champion Garry Kasparov (unlike the 1983 movie *War Games*, it did not result in the brink of nuclear annihilation; 20 years later, we continue to rely on human decision-making to provide us with that paralyzing fear).

Panelists at ALM's Legal Tech–Legal Week articulated various definitions:

- "(1) A branch of computer science dealing with the simulation of intelligent behavior in computers; (2) the capability of a machine to imitate intelligent human behavior."
- "Taking information and applying it to technology to teach machines to think on their own without human prompting."
- "AI utilizes learning algorithms that derive meaning out of data by using hierarchy of multiple layers that mimic the neural networks of the brain."
- "AI is the use of technology to automate or augment human thought."
- "Machine learning is the computers' ability to learn without being explicitly programmed to do so."[4]

One thing that appears to be agreed upon is that there is no one way to define AI, although each definition seems to be saying the same thing. The most effective way to illustrate the answer to the question "What is AI?" is to focus less on the definition and more on the technologies available and in use today, with an eye toward the projections of what may be possible tomorrow.[5]

HOW DOES AI WORK?

There is often a sense that AI is "manna from heaven," which it is not. The truth is that AI is not new; the discussion has been ongoing for decades.[6] What is new are the ways in which it is being developed and adopted in the real world today, where there is exponentially more available recorded data than ever before. Noted one panelist for a tech company at Legal Tech Week, "By 2020, there will be as many data bytes as stars in the universe." Said another, "In 10 years, data will double every eight hours."

The general vision of AI is out of Hollywood, derived from the *Terminator* movies and Spielberg's 2001 movie *A.I.* Raised on this vision of the fictional future, it is tempting to conclude that, once in motion, the robots will overtake us, removing any human autonomy or decision-making capability. The temptation should be resisted. Technology can enhance human abilities and limitations imposed by time. Through that lens, AI is better defined as "augmented intelligence," a tool that, if (when) deployed properly, will make lawyers more efficient and allow us to return to what we went to law school to do – strategize, analyze, and advise on the law, not just generate more paper.

The promise of AI is that the technology will be capable of taking large quantities of data and detecting patterns and trends, synthesizing the data in a condensed time frame in a way that humans cannot. AI is best suited for any type of task that can be repeatable.

A quote attributed to Einstein is, "If I had an hour to solve a problem I'd spend 55 minutes thinking about the problem and five minutes thinking about solutions." The application of AI without a problem to solve will be an exercise of futility. Once the problem to be solved is identified, the next step is to determine the scope of data being fed to the machine. Think "garbage in, garbage out." Too much data can overwhelm the process. Limited data can lead to bias. If the data set used is not properly targeted, the result can be suboptimal, if not worthless. It is reasonable to believe that in a post-*Zubulake* world, once AI is adopted in litigation, most of the attention will be drawn toward the scope of the data set, similar to present debates over algorithms used in e-discovery.

Some examples of current uses of AI are instructive.

In Montgomery County, Ohio, a juvenile court judge worked with IBM's Watson as part of a pilot program. The judge's typical daily docket included 30 to 35 juveniles, each of whom he could only allot 5 to 7 minutes based on 600 pages of data for each juvenile offender. Said the judge, the AI synthesized the data on each individual to a three-page summary of the data he was looking for, helping to "retrieve more information in a more concise way to allow me to treat the children and the families I serve."[7]

LegalMation, also using IBM Watson technology, partnered with a leading global retailer to automate their response to lawsuits. After uploading a complaint, the software generated a draft answer, initial set of document requests, form interrogatories and special interrogatories within two minutes, a task typically delegated to a junior attorney.[8] In China, an AI tool named Xiaofa greets visitors to a Beijing court, guides them to the correct service window, and can handle more than 40,000 litigation questions and 30,000 legal issues in everyday language.[9]

Alison Arden Besunder
is the founder of Arden Besunder P.C., where she practices trusts and estate litigation. She is currently a member of the NYSBA Committee on Technology and the Legal Profession and its Artificial Intelligence Subcommittee, and previously served as the co-chair of the former NYSBA Privacy Task Force. The views expressed in this article are the author's own and not on behalf of either committee. Facebook: www.facebook.com/ardenbesunderlaw/. Twitter: @estatetrustplan. Blog: http://besunderlaw.com/insights/blog/. LinkedIn: www.linkedin.com/in/alisonardenbesunder/.

Existing technologies within reach, like Casetext's CARA and Ross Intelligence's "Eva," help condense and synthesize data from case law to provide you with summaries and research memos. CARA can help identify the cases that your adversary's brief omitted so that you can highlight them in your response. Ross Intelligence's AI program, based on the IBM Watson platform, is already being used by major law firms such as Dentons and Latham & Watkins. Kira is able to extract 400 data points in contracts to extract key information like terms, price, parties, governing law, assignment, etc., without reading through hundreds of pages of M&A documents. These are over-the-counter applications already in popular use today.

On the other hand, there is real and legitimate cause for concern that deploying AI in the context of criminal sentencing or to "predict" recidivism will be racially biased against African-Americans and other minorities.[10] This stands to reason, since the data set is fraught with contextual socioeconomic factors that a human might discern and consider but that an AI program might not. In that context, bias in data will perpetuate more bias. Still, AI also poses the positive potential to assist with exoneration of the wrongfully convicted.[11]

Lawyers are risk averse by nature and training. AI should be viewed with a healthy dose of skepticism, with particular focus on implicit and explicit bias manifesting itself into the machine-learning algorithms, which can happen when human judgment and bias are encoded into the program.[12] There will not be a "one size fits all" application of AI. However, the technology industry is waiting for lawyers to tell them what and what not to build. Though it is tempting to simply prohibit AI in its entirety because of its complexity, doing so would be like banning fire because it sometimes burns people. The task that lies ahead for lawyers and the bar is to examine the potential and provide a framework and guiding set of principles that, hopefully, can help shape the development of the technology by communicating with the existing innovators in this space. Efforts are already underway to grapple with the standards and enforcement of accountability in this space.[13]

WILL A ROBOT TAKE MY JOB?

The fear, stoked by the media,[14] is that robots will replace lawyers. Lawyers do not have the exclusive monopoly on this anxiety: Salespersons, pharmacists, analysts and others share this concern. For fun, visit www.willrobotstakemyjob.com, which assuages that fear, calculating only a 3.5 percent risk that a robot will replace lawyers (Automation Risk Level: "Totally Safe"). Medical and clinical laboratory technologists, on the other hand, have an Automation Risk Level of "You Are Doomed" at 90 percent probability of automation, as do accountants, auditors, and billing and posting clerks who compile, compute and record billing, accounting, statistical and numerical data.

For more on AI, the AI subcommittee of the NYSBA Technology Committee has scheduled an Artificial Intelligence Webinar Series on (or about) the third Wednesday of every month in March, April, May, and June, offering one credit in professional practice (and the last in ethics).

Our March 21 dialogue on the questions raised in this article will be made available through NYSBA's website.

On April 18, an illustrious panel will discuss the Growing Use of Artificial Intelligence Applications in the Legal Profession and Their Potential Impact on Your Practice.

On May 16, the series continues with Artificial Intelligence and Data Privacy / Protection: Big Data, U.S. Data Privacy Laws, and the EU General Data Protection Regulation.

No series would be complete without the impact of technology on ethical obligations. On June 20, the series concludes with a discussion on Artificial Intelligence and Legal Ethics: How the Rules of Professional Conduct Bear on the Use of AI in Your Legal Practice.

Lawyers should be focused on innovative ways to harness the promise of AI technology. It can be deployed to perform the tasks that lawyers should not be billing to clients, making lawyers "better, faster, cheaper." Properly implemented, AI will assist lawyers by providing us with the ability to make better decisions based on enhanced analysis of data in less time, freeing lawyers to devote time to substantive rather than repetitive tasks. For those who can draw insights from structured and unstructured data it can give them a valuable competitive advantage. It can present strategies for change that can enhance client service and client relationships in the private sector, and access to justice in the public sector. The correct use of the technology in the right areas will allow lawyers to do more in less time.

The billable hour as the measurement of value for a lawyer's work has been long overdue for a disruption. So much of what lawyers do is tied to how much one can physically take in a finite amount of time, whether 80 or 100 hours a week, and how many all-nighters one can withstand. A computer never tires and will "brute force" its way through massive amounts of data, without the need for an expensed dinner and a car service home. If AI can take the robot out of the lawyer and make the practice more about the strategic and intellectual analysis, then we should not necessarily "fear the (AI) reaper."

Like it or not, AI will eventually change the manner and measure in which legal services are provided, and, ideally, bring us to a future with the ability to make radically better decisions and recommendations.

WHAT SHOULD I DO NOW?

Certainly, regulatory oversight of AI is needed "just to make sure that we don't do something very foolish." The law requires deliberation, consideration, and analysis, a vetting process that requires more time than the exponential pace of technological developments allows. In this regard, the NYSBA Committee on Technology and the Legal Profession is divided into topic-specific subcommittees devoted to the salient aspects of technology and the law, particularly how they impact the practice of law. The Artificial Intelligence Subcommittee continues to explore issues implicated by the growing use of AI to deliver legal services and decide legal disputes, and seeks to identify challenges posed by AI and how the legal profession and courts should respond to those challenges to protect the public, access to justice, and the profession.

The ethical rules require lawyers to continue to educate themselves on technological developments. Those developments evolve quickly. The webinar series is intentionally designed to help fulfill this requirement on what can seem a daunting topic, and provide the tools to understand the issues presented beyond the "hype." We hope to see you "online" when you tune in for the series.

1. Oxford Dictionary definition.

2. Bernard Mar, *28 Best Quotes About Artificial Intelligence*, Forbes, July 25, 2017, https://www.forbes.com/sites/bernardmarr/2017/07/25/28-best-quotes-about-artificial-intelligence/#624024284a6f. Some other quotes of note in the article include: "Before we work on artificial intelligence why don't we do something about natural stupidity" and "Forget artificial intelligence – in the brave new world of big data, it's artificial idiocy we should be looking out for."

3. Tom Simonite, *The Wired Guide to Intelligence*, Wired Business, Feb. 1, 2018. https://en.wikipedia.org/wiki/Dartmouth_workshop.

4. For a "deeper dive" into the difference between machine learning, data science, AI, Deep Learning, and Statistics in the language of a data scientist, you can reference an article of the same name by Vincent Granville, *Difference Between Machine Learning, Data Science, AI, Deep Learning, and Statistics*, Data Science Central blog, Jan. 2, 2017.

5. For a good "101" breakdown of how to scientifically understand AI, reference Kathryn Hume's article *How to Spot a Machine Learning Opportunity, Even if You Are Not a Data Scientist*, Harvard Business Review, Oct. 20, 2017.

6. *See Some Speculation about Artificial Intelligence and Legal Reasoning*, Stanford Law Review, 1970; note also the first "International Conference on AI and Law" in 1987 at Northeastern University as noted in https://futurism.com/an-ai-law-firm-wants-to-automate-the-entire-legal-world/.

7. http://www.mydaytondailynews.com/news/local/hey-watson-local-judge-first-use-ibm-artificial-intelligence-juvenile-cases/InVqz6eeNxvFsMVAe5zrbL/.

8. Aebra Coe, *Legal Tech Download: AI Clerks and Chinese Robots*, Law 360, Oct. 20, 2017.

9. *Id*.

10. Julia Angwin, Jeff Larson, *et al.*, *Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And It's Biased Against Blacks*, ProPublica, July 29, 2017, http://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

11. Ken Strutin, *The Innocence Machine: From Gideon to Gigabytes*, N.Y.L.J., Sept. 25, 2017.

12. See Kathryn Hume, *Artificial Intelligence Is the Future – But It's not Immune to Human Bias*, Maclean's, Dec. 27, 2017, http://www.macleans.ca/opinion/artificial-intelligence-is-the-future-but-its-not-immune-to-human-bias/.

13. *See, e.g.*, Curt Levey and Ryan Hagemann, *Algorithms With Minds of Their Own*, Wall Street J., Nov. 13, 2017.

14. https://www.cnbc.com/2017/02/17/lawyers-could-be-replaced-by-artificial-intelligence.html.

PROBATE v. PRIVACY: The Technology Battle After Death

By Jill Choate Beier

EPTL 13-A-1(i)

defines digital assets as any electronic record in which the user has a right or interest but does not include the underlying asset or liability unless the asset or liability is also an electronic record.

Most of us have some type of "digital presence" on the internet and, most likely, each of us will continue to use the internet more and more. In recent years, the media has reported various stories involving the administration of a deceased individual's digital assets. For example, family members of a soldier, killed by a bomb while stationed in Fallujah, were unable to get access to email correspondence from the soldier's Yahoo! account;[1] family members of a 15-year-old who committed suicide were unable to access their son's Facebook account to search for answers;[2] or, the full Flickr photo account of a blogger who died suddenly of a heart attack during the night was closed and unavailable to the family after his death.[3]

In all of these cases, the current federal privacy laws that were created, in part to protect our privacy, ultimately prevented surviving family members from accessing the digitally stored memories that were left behind. Whether you have just one email account or you have several email accounts plus Twitter, Instagram, Shutterfly and Pinterest accounts plus documents stored in the cloud, the question is the same: What happens to our digital presence when we are unable to access our digital accounts? This article will review the issues involved with administering digital assets, discuss New York's Estates, Powers and Trusts Law (EPTL) Article 13-A and provide some guidance for planning for digital assets.

WHAT PREVENTS A FIDUCIARY FROM ACCESSING DIGITAL ASSETS?

Federal and State Privacy Laws

There are two main federal privacy laws that impact the planning for and administration of digital assets: The Computer Fraud and Abuse Act[4] and the Stored Communications Act.[5] The Computer Fraud and Abuse Act (CFAA) prohibits unauthorized access to computers and protects against anyone who "intentionally accesses a computer without authorization or exceeds authorized access."[6] The fiduciary who attempts to access, or hires a forensic computer expert to obtain access to, a deceased individual's physical device without proper authorization is in violation of the CFAA.

Similarly, the Stored Communications Act (SCA) makes it a crime for anyone to "intentionally access without authorization a facility through which an electronic communication service is provided."[7] In addition, the SCA regulates the type of information that a service provider, such as Google or Yahoo!, may or may not disclose to someone other than the account holder. A service provider may disclose non-content information to any third person without authorization of the account holder.[8] It is worth noting, however, that nothing in the SCA requires the service provider to disclose non-content information when requested. On the other hand, the SCA specifically prohibits a service provider from divulging the contents of an electronic communication unless the disclosure is made to an intended recipient or with the "lawful consent" of the account holder or intended recipient. Therefore, the SCA is often the basis on which a service provider will refuse to release any information for a deceased user's account for fear of potential liability.

In addition to federal privacy laws, practitioners should also be mindful of state laws that prohibit the unauthorized use and access of a computer. All 50 states have enacted statutes criminalizing unauthorized access to computer systems.[10] Although it is unlikely that federal or state prosecutors will pursue charges against a family member for such an arguably minor infraction, the potential for prosecution still exists.

Terms of Service Agreements (TOS)

Every service provider has a set of rules, policies and procedures regarding the accounts that they hold and manage. Therefore, every account holder will be bound by the TOS if the service provider has a policy regarding account access or the transfer and disposal of account content. However, not all service providers have a policy

Jill Choate Beier is the founder of the firm, Beier & Associates, PLLC with its primary location in Lake Placid, New York. Her practice includes a broad range of matters in the personal planning area, including estate and tax planning for individuals and families; estate and trust administration; all aspects of Surrogate's Court practice, including probate proceedings, will contests and guardianships, and planning for charitable giving and philanthropy. She is an active member of the Trusts and Estates Law Section of the New York State Bar Association and has served in many positions of leadership such as Chair of the Estate and Trust Administration Committee and Vice-Chair of the Surrogate's Court Committee. Currently, she is the Treasurer for the Section's Executive Committee. Website: www.beierpllc.com.

that indicates what will happen upon the death of an account holder. For example, Shutterfly's TOS does not include an explicit discussion of what happens when the account holder dies. Shutterfly's TOS states that the individual agrees not to disclose his or her username or password to any third party and acknowledges that the individual's access to the account is non-transferable.[11] The TOS for LinkedIn, Google and Twitter each contain similar language regarding disclosure of the secured access information and transferability.[12] Yahoo!, on the other hand, explicitly states in its TOS that the account cannot be transferred and, upon the account holder's death, any rights to content in the email account are terminated and all content may be permanently deleted.[13] Consequently, practitioners should carefully read the TOS for each account held by their clients to understand how the TOS may impact a fiduciary's ability to access digital assets.

Case Law Application of Federal Privacy Laws

Very few courts have addressed the issue of whether a fiduciary may access the digital assets of a deceased or incapacitated individual. The few relevant cases, however, have been decided in favor of the service provider based on the prohibitions in the SCA.[14] Against this backdrop of privacy law, TOS prohibitions and case law interpretation, New York State adopted the Revised Uniform Fiduciary Access to Digital Assets Act (with minor revisions) as EPTL Article 13-A to address the complexities involved with accessing the digital assets of another person.

EPTL ARTICLE 13-A ADMINISTRATION OF DIGITAL ASSETS

EPTL Article 13-A was enacted in September of 2016 and directly addresses the ability of a fiduciary (i.e., executor, agent, trustee, guardian) to access digital assets. The law applies retroactively to any governing instrument that was created on, before or after the date it was enacted.[15] Therefore, as discussed in more detail below, practitioners may be able to utilize the provisions of the statute even where the governing instrument is silent regarding digital assets.

Defining and Identifying Digital Assets

The first step in understanding the statute is to understand how digital assets are defined. Indeed, the definition of digital assets is critical in determining how to plan for and administer them. EPTL 13-A-1(i) defines digital assets as any electronic record in which the user has a right or interest but does not include the underlying asset or liability unless the asset or liability is also an electronic record. That means if the electronic record represents cash or stocks or bonds in an investment account, then the cash, stocks or bonds are not subject to the statute and the fiduciary cannot be prevented from gaining access to those assets even where the financial institution has no brick and mortar presence. On the other hand, if the electronic record represents another electronic record such as emails, photos or documents stored in the cloud, virtual property in gaming sites, blogs, domain names, online music and books, then these are the types of assets that are governed by EPTL Article 13-A.[16]

With increased usage of the internet and more types of digital assets yet to be created, digital assets should be a topic of discussion when practitioners gather information from clients. This should include a discussion about how much and what type of access the client wants his or her fiduciary to have upon the client's death or incapacity. Some clients may struggle with the idea that a third party may have access to their digital assets after death or upon incapacitation. Clients may also struggle with the need for authorizing such access. It is important, therefore, to discuss the concepts of potential identity theft,

post-mortem privacy, preserving the digital "shoebox" of letters and messages, and potential losses (particularly for small business owners) that may result from the fiduciary's inability to access digital assets. Many clients either have not considered these issues or are not even aware of them. Helping clients understand this information will help them make informed decisions regarding the disposition and administration of digital assets.

After discussing the issues involved, the next planning step is to create a complete inventory of the client's digital assets. This may include the associated account access information. Some websites require a user to periodically change the password for the account, so the list may need to be updated for new passwords and for any new accounts that the client may create. In addition, some service providers require a user to choose a "secret question" to verify his or her identity. These secret questions and the answers should be included in the inventory and updated as necessary. After the inventory has been created, the next step is to ensure the inventory is stored in a secure location. If the inventory is in hard copy format, it may be stored in a safe deposit box or other locked storage unit. If the inventory is stored in an electronic file or multiple electronic files, the client should consider creating a master password for the storage device such as a CD or USB flash drive. The main purpose is to save the information in a secure and undisclosed location so that upon the user's death or incapacitation, the information is accessible only to the appropriate parties. Another alternative is to consider the use of password services, which are tools that are designed to protect and manage passwords. Free and commercial software is available for this purpose and can be kept on the client's smartphone, computer or on a web-based service.[17]

Once the inventory of digital assets is complete, the next step is to determine the amount of access the client wants the fiduciary to have and create an estate plan that reflects the client's wishes.

Accessing Content Versus Other Digital Assets

Article 13-A parallels the structure of the federal privacy laws and bifurcates the rules for gaining access to digital assets into two categories: "content of electronic communications" and "other digital assets." Accordingly, the requirements that must be satisfied are different for each category and vary based on the role of the fiduciary (e.g., agent, executor, trustee, guardian).

Generally, to access the content of an electronic communication, the fiduciary must be given specific authority by the account holder in a governing instrument.[18] So, if the client wants his or her fiduciary to obtain full access to digital assets, including the content, upon death or incapacitation, the practitioner must ensure that the language in the governing instrument specifically authorizes such access. The language should mimic the language in the federal privacy laws and should clearly indicate that the fiduciary has the authority to access digital assets in accordance with Article 13-A.

Another method contemplated by the statute to grant full access to digital assets is through the use of an online tool provided by the service provider (a "user tool"). The user tool authorizes an individual (named by the account holder) to access the user's account upon death or incapacitation.[19] The statute provides that the use of an online user tool overrides any contradictory instruction in a governing instrument[20] and, therefore, works similarly to a beneficiary designation on a brokerage account. The person named in the online user tool will be able to access the account immediately without the need for court involvement or other additional approval from the service provider. To date, only Google and Facebook provide account holders with an online user tool.[21] Practitioners should determine whether their client has an online account with this functionality and encourage the client to use it if the client wants another person to have access to that account.

Where the governing instrument is silent regarding the fiduciary's ability to access digital assets or there is no governing instrument, the statute, nevertheless, may allow the fiduciary to gain limited access to the client's digital assets. The statute provides that a fiduciary may obtain access to the catalogue of electronic communications[22] and digital assets (other than the content of an electronic communication), collectively referred to as "other digital assets," without any specific language or authority in the governing instrument. Therefore, the fiduciary's access to other digital assets is by default under the statute, meaning that unless the account holder specifically prohibits the fiduciary from obtaining access to other digital assets, the statute will allow it. For clients who have not planned in advance, the default rules can be very helpful in identifying assets such as online bank accounts, E-bay accounts, and the like, by analyzing the catalogue of electronic communications. In addition, the default rules can provide access to other digital assets such as calendar entries and the client's contacts file, which may prove helpful in marshalling the assets of a deceased or incapacitated individual.[23]

Other Requirements Under Article 13-A

In all four fiduciary roles contemplated by the statute, the fiduciary requesting access to digital assets must provide a written request to the service provider plus other relevant documentation (e.g., a death certificate, letters testamentary or other documents issued by the court) to substantiate that the fiduciary has authority to access the digital assets of the user.[24] In addition, the service provider may request a court order that includes a finding that (i) disclosure of the content does not violate federal privacy laws or (ii) the user consented to the disclosure or (iii) disclosure of the content is reasonably necessary for the administration of the estate.[25]

In most instances, even where the fiduciary is not requesting access to the account holder's content or other digital assets but merely is requesting that the account be terminated, the service provider may require a court order that includes a finding that the account information is linked with sufficient evidence to the account holder.[26] This may pose a problem for fiduciaries. Many of us have email accounts that do not include our names but instead may be a nickname along with numbers and/or other letters that are not obviously connected to the account holder. As a result, the service provider, as a matter of course, will require assurances from the fiduciary and the court that access is being granted to the proper account.[27] Consequently, practitioners should keep in mind this potential evidentiary requirement when gathering digital asset inventory information from their clients.

DOES EPTL ARTICLE 13-A OVERRULE THE TOS?

Generally, the use of the online user tool or an instruction in a governing instrument overrides a contrary provision in a TOS agreement. However, if a user has not provided for fiduciary access to digital assets[28] in a governing instrument or through the use of an online tool, the TOS can modify or eliminate the fiduciary's access to digital assets. The statute is somewhat unclear and the author's interpretation is that the service provider can amend a TOS agreement to modify or eliminate a fiduciary's access so long as the user is required to "*act affirmatively and distinctly from the user's assent to the terms of service agreement.*"[29] How such a standard will be satisfied so that a fiduciary's ability to access the account becomes restricted or eliminated is uncertain. Such restrictive language will likely emerge either in a stand-alone user agreement or will be included in an amendment to the TOS. A series of recent court decisions (unrelated to EPTL Article 13-A and this issue) may be instructive regarding a court's interpretation of what it means for a user to affirmatively and distinctively agree to such a restriction.[30]

Click-Wrap Versus Browse-Wrap Agreements

It is undisputed that a TOS is a contract of adhesion. The courts have distinguished two different methods in which an individual agrees to the terms of the TOS, either via a "click-wrap" agreement or a "browse-wrap" agreement. The courts have determined that the enforceability of the provisions of the TOS depends on which method was used when the individual agreed to the TOS.

A "click-wrap" agreement is one in which an individual agrees to the TOS of the service provider by affirmatively clicking on the "I Agree" button prior to clicking on the button to create the account. A "browse-wrap" agreement is one in which the enrollment page simply includes a statement that the user agrees to the terms of the agreement by creating an account and using the service. In a recent case, the issue was whether the forum selection clause in a TOS agreed to by the decedent was enforceable against the court-appointed administrators

ARTHUR B. LEVINE CO., INC.
SURETY BOND AGENTS

- COURT & LITIGATION
- BANKRUPTCY & DEPOSITORY
- TRUSTS & ESTATES
- INDEMNITY & MISCELLANEOUS
- LICENSE & PERMITS

370 Lexington Ave.
Suite 1101
New York, NY 10017

212-986-7470
212-697-6091 Fax

bonds@levinecompany.com

SURETY BOND SPECIALISTS

www.LevineCompany.com

of the estate.[31] The court stated that Yahoo! had the burden of demonstrating that the forum selection clause in the TOS was "reasonably communicated and accepted and if, considering all the circumstances, it is reasonable to enforce the provision at issue."[32] The court further stated that a forum selection clause has almost always been enforced in a "click-wrap" agreement, but that such a clause in a "browse-wrap" agreement has not.[33]

It remains to be seen whether service providers will attempt to restrict a fiduciary's access to the holder's account as contemplated in the statute. The distinction drawn by the court regarding browse-wrap and click-wrap agreements, however, may be analogous to an analysis of whether a user acted "affirmatively and distinctively" to assent to and be bound by new fiduciary restrictions in a TOS.

ADDITIONAL PLANNING CONSIDERATIONS

Skills of the Fiduciary

An important factor in administering digital assets is whether the named fiduciary has the technological skills necessary to deal with digital assets. A fiduciary will need to have the skills to access computers, laptops, and personal electronic devices in addition to accessing various types of online accounts. A fiduciary may also need to determine whether some material should be deleted and not distributed to preserve decedent's privacy (i.e., medical records, adult recreational material). If the practitioner is unsure whether the named fiduciary has the necessary skills, language should be included in the governing instrument authorizing the fiduciary to engage a technology specialist, if needed.

In addition, practitioners should consider adding language to the fiduciary's powers and duties clause to authorize the fiduciary to create an inventory; change passwords; back up data on external media; consolidate, distribute or destroy content; value the assets for tax purposes; delete secret accounts; and clean up devices. The fiduciary should also have the power to abandon or eliminate digital assets that are worthless and ensure that metadata is deleted along with specific digital assets that the client wants deleted upon death. Finally, the governing instrument should provide for the distribution of tangible digital property as well as digital assets and should include a definition of digital assets that is consistent with federal privacy laws. One thing that practitioners should not include in the governing instrument is a detailed list of the client's accounts and passwords.

Secure Digital Assets

Practitioners should strongly encourage their clients to regularly back up any electronically stored data, especially data that is stored by a service provider. Backing up the data will allow the fiduciary to access locally stored data and backups for collecting, managing, and distributing digital assets. Thus, the necessity of requesting access from the service provider should be limited to the sole purpose of closing or memorializing accounts. In addition, this method helps fiduciaries avoid any potential problems of federal and state data privacy laws and computer crime laws related to accessing remotely stored information.[34]

Other Planning Considerations

Other planning methods that will facilitate the fiduciary's access to management and distribution of the client's digital assets involve the use of business entities, such as a limited liability company. Many service providers recognize the importance of digital assets to a business and will allow an entity to own the digital assets instead of the individual owner of the business. For example, many businesses have Facebook accounts, Twitter accounts, or LinkedIn accounts, as well as web pages, blogs, and other types of online accounts. If the social media account or other digital asset is owned by the business, then there will be no interruption of operations should the business owner die or become incapacitated. In addition, public figures and celebrities who use social media for publicity or endorsements should transfer ownership to the management company. Another consideration is to provide access to digital assets to family members, friends, or business associates during life. For example, Shutterfly allows for multiple user access. Dropbox also allows users to share file folders with multiple parties. If other individuals have access to these accounts, then the fiduciary also, theoretically, will have access without engaging the service provider.

CONCLUSION

It is evident that the administration of and planning for digital assets and digital accounts can create various legal issues. Those issues will continue to grow as new technologies emerge. In addition, there is no doubt that the number of clients with digital assets and digital accounts will continue to rise. However, a majority of states in this country have enacted the uniform law as New York has, which will significantly improve the process of administering digital assets. In addition, service providers recognize the problem and are attempting to develop procedures for dealing with digital assets upon a user's death. The best practice is to urge clients to create an estate plan that encompasses digital assets and digital accounts and to designate a fiduciary with the necessary skills to administer such assets.

The challenges of dealing with new technology may be daunting, but with proper planning those challenges can be overcome to bring comfort to the families and friends who are left behind.

---

1. *See In re Ellsworth*, No. 2005-296. 651-DE (Mich. Prob. Ct. 2005).

2. Tracy Sears, *Family, lawmakers push for Facebook changes following son's suicide*, available at http://wtvr.com, January 8, 2013.

3. *See* Maria Perrone, *What Happens When We Die: Estate Planning of Digital Assets*, Common Law Conspectus, p. 197, Vol. 21 (2012).

4. 18 U.S.C. §§ 1030 et seq. (2006).

5. 18 U.S.C. §§ 2701 et seq. (2006).

6. 18 U.S.C. § 1030(a).

7. 18 U.S.C. § 2701(a).

8. *See* 18 U.S.C. § 2702(c)(6) (which sets forth an exception to the general rule for disclosure of customer records by providing that a service provider "may divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications…) to any person other than a governmental entity").

9. 18 U.S.C. § 2702(b)(1) and (3) (emphasis added).

10. *See* Jim Lamm, "Planning Ahead for Access to a Decedent's Online Accounts," available at http://www.digitalpassing.com/2012/02/09/planning-ahead-access-contents-decedent-online-accounts/, February 9, 2012.

11. *See* http://www.shutterfly.com/help/terms.jsp.

12. *See* http://www.linkedin.com/static?key=user_agreement&trk=hb_ft_userag; http://www.google.com/intl/en/policies/terms/; https://twitter.com/TOS.

13. http://help.yahoo.com/kb/index?page=product&y=PROD_ACCT&locale=en_US.

14. *See, e.g.*, *In re Ellsworth*, No. 2005-296. 651-DE (Mich. Prob. Ct. 2005; In re Facebook, U.S. Dist. LEXIS 134977 (N.D. Cal. Sept. 20, 2012); Ajemian v. Yahoo, 987 N.E.2d 604 (Mass. App. Ct. 2013).

15. EPTL 13-A-2.1.

16. This list is not meant to be all inclusive of the type of digital assets governed by the statute.

17. Although not endorsed by the author, examples of password services include LastPass, SecureSafe Pro, PasswordBox and EZ Safe.

18. *See* EPTL 13-A-3.1, -3.3, and -3.6.

19. EPTL 13-A-2.2(a).

20. *Id*.

21. *See* https://www.facebook.com/settings?tab=security&section=memorialization&view; see also http://support.twitter.com/articles/15362inactive-account-policy#.

22. The electronic catalogue of an electronic communication may include information such as the date, the sender, the recipient and the subject matter of the electronic communication.

23. *See, e.g.*, In *re Serrano*, N.Y.L.J. 2017-174, June 14, 2017 (Surr. Ct. N.Y. Co.) (where the court determined that entries posted on an electronic calendar and stored as contacts did not constitute an "electronic communication," as that term is defined in the SCA. Therefore, the calendar entries and contacts constitute other digital assets and may be disclosed by Google under the default rules of Article 13-A).

24. *See, e.g.*, EPTL 13-A-3.1 – 3.8 et seq.

25. *See* EPTL 13-A-3.1(e)(3) and -3.2(d)(4).

26. *See* EPTL 13-A-3.1(e)(3)(A), -3.2(d)(4)(A), -4.1(g)(3)(C), -4.2(e)(1).

27. *See* p. 17 Brief for Google, Inc. as Interested Party, Hage v. Gotmortgage.com on Petition for Writ of Mandate from the California Superior Court, San Diego County, No. 37-2016-00003885-CU-FR-CT (where Google argued that a separate document signed by the account holder granting access to the content of the account holder's email account titled "occloser@gmail.com" was insufficient to establish ownership and that the trial court erroneously put the burden on Google to prove that the defendant did not own the account and stated that it is not the obligation of the service provider to investigate and assess the validity of user consent).

28. EPTL 13-A-2.3(c).

29. EPTL 13-A-2.2(c) (emphasis added).

30. The previous case law generally involves the enforcement of arbitration clauses and forum selection clauses in TOS.

31. *See Ajemian v. Yahoo! Inc.*, 987 N.E.2d 604, 615 (Mass. App. Ct. 2013).

32. Id. at 611 (citing *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S. Ct. 1907 (1972)).

33. *Id*. at 613.

34. James D. Lamm, Christina L. Kunz, Damien A. Riehl & Peter John Rademacher, *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, U. Mimani L. Rev., Vol 68:385, 416 (February 2014).

NEW YORK STATE BAR ASSOCIATION

TOOLS TO HELP YOUR PRACTICE

Fastcase
FREE Legal Research

CLIO
Cloud Based Legal Practice Management System…
members save $40

LawPay
Simple, Secure, Online Way to Accept Credit Card Payment…
receive a 6 month FREE trial

For more information, **#memberbenefits**
or **VISIT www.nysba.org/MemberBenefits**

NYSBA

the IoT:

WHAT IS THE INTERNET OF THINGS?

The term "Internet of Things" (IoT) refers to the internetworking of a wide variety of objects embedded with electronics, software, sensors, actuators, and connectivity that enables these objects to generate, collect, and exchange data. While each object is separately and uniquely identifiable, what sets the IoT apart from a mere multiplicity of objects is the fact that the objects are capable of operating together through existing internet infrastructure. The interconnectivity of the IoT allows objects to be sensed or controlled remotely across networks, creating opportunities for more direct integration of the physical world into computer-based systems.

Gartner[1] points to the rapid growth of the IoT, noting that in 2017 approximately 8.4 billion objects were expected to be in use, up 31 percent from 2016. Gartner, in that estimate, does not include smartphones, tablets, and computers, of which there are many more billion units. Expert predictions of the breadth of the IoT by the year 2020 vary widely, ranging between 20.8 billion and 30.7 billion such devices. Even if the growth turns out to be less rapid than many expect, the extent to which our lives will be affected by interconnected devices will surely be enormous, and the associated legal issues promise to engage a greater and greater portion of the time of legal practitioners of all sorts.

LIVING IN AN INTERCONNECTED WORLD

The explosion of internet-connected devices has affected all of our lives in one way or another. In order to get a sense of the many ways we come into contact with such devices, we can usefully distinguish among consumer, business, and infrastructure applications.

Consumer applications include connected entertainment, car, and smart home devices such as washer/dryers, refrigerators/freezers, ovens, robotic vacuums, heating systems, or air purifiers that use Wi-Fi for remote monitoring. Smart home technology also includes devices that provide assistance for disabled and elderly persons, including monitors for seizures or falls, and other kinds of connected health devices. Recent years have seen an enormous increase in the prevalence of wearable technology, such as Fitbit or Apple Watch, and "quantified self"

Ronald J. Hedges is a member of Dentons' Litigation and Dispute Resolution practice group. He has extensive experience in e-discovery and in the management of complex litigation and has served as a special master, arbitrator and mediator. He also consults on management and discovery of electronically stored information (ESI). He was a U.S. Magistrate Judge from 1986 to 2007 and is the principal author of the third edition of the Federal Judicial Center's *Pocket Guide for Judges on Discovery of Electronic Information*, available under "publications" at the FJC website. Website: www.dentons.com/en/ronald-hedges. LinkedIn: www.linkedin.com/in/ron-hedges-710421126.

What Is It, What Can Happen With It, and What Can Be Done When Something Happens

By Ronald J. Hedges and Kevin F. Ryan

technologies (data acquisition on aspects of a person's daily life in terms of food consumption or exercise, physical states such as heart rate, mood, arousal, blood oxygen levels, and mental or physical performance). Automobiles now have built-in, computer-connected sensors that tell the operator to brake or get back into his or her lane, and we are not far from the day when highways will be filled with self-controlled vehicles requiring minimal operator input.

Some devices straddle the line between consumer and business application. For example, cameras and audio devices can stream live feeds of everything from babies in the nursery, to building and property perimeters, to conferences, to wild animals in remote regions of the world.

Business (or enterprise) applications include various devices aimed at determining and responding to consumer preferences and linking marketing to personal devices via text messaging or other forms of communication. Also included are various technologies used to track consumer responses, such as conversion tracking, drop-off rate, click-through rate, and interaction rate. The IoT also includes network control and management of manufacturing equipment, permitting greater efficiency in the development of new products, dynamic response to product demands, asset management, and health and safety management. Finally, a wide range of health care applications has emerged, connecting patients and data about them with medical personnel many miles away.

Infrastructure management applications include technologies that permit monitoring and controlling bridges, railway tracks, wind farms, and other structures and facilities. A large class of cyber-physical systems have emerged, including smart grids, virtual power plants, intelligent transportation (computer-operated train systems, for example), and smart cities. IoT infrastructure can be used to observe conditions that can compromise safety and security, to schedule repair and maintenance activities efficiently, and to assist firefighters, soldiers, and others in search and rescue or military operations.

PROBLEMS THAT MIGHT ARISE WITH INTERCONNECTED DEVICES

Given this proliferation of interconnected devices, what kinds of legal problems can we expect to arise? We suggest potential problems can be of several sorts: they can be related to (1) privacy concerns, (2) security concerns, (3) investigation and criminal matters, or (4) personal injury and other sorts of civil litigation. In this article, we focus solely on litigation issues raised by the IoT. But a brief tour of other sorts of problems will give the reader a sense of the tremendous breadth of legal issues that will soon emerge (if they have not already done so).

The devices and networks in the IoT contain and transmit a huge amount of personal data, information that the average person would consider private. Medical and health devices contain information about activity, heart rate, diet, and so forth; smart homes know when residents were at home and when they were not; cameras

Kevin F. Ryan, (kryan@mcba.org) is Executive Director of the Monroe County Bar Association. Prior to coming to the MCBA, he was the Director of Education and Communication at the Vermont Bar Association for 15 years. He has also taught on the faculties of the Vermont Law School, Norwich University, the University of Denver, Regis University, and others. He has presented numerous CLE programs on subjects ranging from legal ethics to technology and law office management. He holds a graduate degree in political science from Princeton University and a JD from the University of Denver Sturm College of Law. He has also been a visiting scholar at Harvard Law School. Website: www.mcba.org. Facebook: www.facebook.com/mcbany/. Twitter: @MCBA_ny. LinkedIn: https://www.linkedin.com/groups/2449682/profile.

contain images, some of which may be compromising, and the metadata about those images; business applications know consumers' purchasing habits and their responsiveness to particular sorts of messages. It remains to be seen what information about an individual might be held and distributed within smart cities. We may be living in an age when the boundaries of privacy are shifting, but the amount of information about a person that will be moving around the IoT is truly staggering and guaranteed to generate major privacy concerns.

With all that data floating around on networks, security becomes a critical issue. The recent spate of security breaches, from Equifax to hospitals in several states and nations to the National Security Agency, illustrates the susceptibility of even tightly secured networks to the work of malicious hackers. As more information about individuals finds its way into the IoT, potential for such security breaches increases.

Obviously, the devices and networks of the IoT contain personal information that might reveal aspects of a person's condition or behavior, and therefore become

the target of investigatory and criminal proceedings. An Apple Watch knows how far someone walked yesterday and what their heart rate was and that data has entered the network. A cell phone contains even more information about a person's movements. A smart home knows not only when a resident was there but also what lights were on and whether the security system was engaged. As new devices and interconnections emerge, the opportunities to investigate aspects of someone's life increase exponentially. Lawyers and judges are already wrestling with determining what sorts of data from what sources can be sought in criminal proceedings and considering the ways the traditional rules may need to change to take into account the new world of the IoT.

LITIGATION

With the above as background, let's assume that "X" had just left her office and was driving home in her new-model SUV. She decided that, because the weather had become chilly, she would increase the temperature in her home by four degrees. She instructed the smart thermostat in the home to accomplish this with a smart phone app that controlled the thermostat. The phone was connected through a Bluebooth device to her SUV and from the SUV to a Wi-Fi. Thirty minutes after the instruction to the thermostat she arrived at her home. It was aflame and the fire department had arrived and was at work, having been alerted to smoke and flames coming from the home by a neighbor. By the time the fire was extinguished, the home and its contents were a total loss.

X immediately thought that something was wrong and so she consulted an attorney about possible litigation. The attorney agreed that something seemed to have gone wrong but told X that he would have to undertake an investigation before he could commence a civil action. The attorney explained that he would have to contact whoever was in the likely chain of causal acts, ask for whatever records might be available, and consult with an expert to review the records and see what happened. (Of course, he put whoever he contacted on notice of possible litigation and requested that all records be preserved.)

As a result of the investigation, the attorney became satisfied that there was sufficient evidence that the app "miscommunicated" the temperature change to the thermostat and that the miscommunication caused a temperature rise that destroyed the home heating system and started the fire. The attorney was also satisfied that the thermostat should have recognized the miscommunication and prevented the rise of temperature to a dangerous level. On the first anniversary of the fire, X's attorney filed a diversity action in United States district court, naming the manufacturers of both devices as defendants and asserting products liability claims. He also asserted negligence claims, not being convinced that products liability claims would suffice.

After the defendants unsuccessfully moved to dismiss the complaint on *Twombly*/*Iqbal* grounds, they filed answers. In the answers the defendants asserted, among other things, that X was herself responsible at least in part for the fire because she had not completed installation of either the app or the thermostat. Had she followed all the prompts on installation she could have directed the app and the thermostat to "cap" temperature change. In any event, the thermostat could have been enabled to detect smoke and fire in the home and to send a signal to the local fire department when it did so. Moreover, the defendants asserted third-party claims against every other entity in the causal chain because the evidence the app manufacturer gathered from its records appeared to show that X's instruction somehow became "garbled" in transit to the thermostat.

Once the defendants answered, the parties conducted a Rule 26(f) conference to prepare a joint discovery plan. Discovery disputes arose immediately. These included:

1. X's attorney learned that the defendant manufacturers had not instituted a litigation hold on receipt of his preservation letter. They took the position that the letter was insufficient to put them on notice of imminent litigation. Instead, holds were implemented on receipt of summonses.

2. X's attorney advised the defendants that he intended to demand production of, among other things, the source codes for the app and the thermostat so that his expert could determine why the devices failed. In response, the manufacturer of the app advised that the source codes were irrelevant and that, in any event, the source codes had been modified six months after the fire and pre-modification codes had not been retained. Moreover, the source codes would have to be subpoenaed because these were developed by independent contractors in other states. Finally, both manufacturers took the position that all source codes were trade secrets and proprietary and would not be turned over absent a protective order that restricted access to only one expert.

DISCOVERY-RELATED ISSUES

Let's step back from our hypothetical and think about the issues presented for ultimate resolution. First, as to causes of action and defenses:

1. Rule 11 imposes an obligation on a putative plaintiff's attorney to conduct an adequate investigation into the facts and controlling law prior to signing a pleading. What might "adequate" mean in the context of an IoT action? However "adequate" might be defined, it will likely be necessary for the attorney to retain one or more consultants to assist him before the commencement of litigation. Why? The attorney will need to understand, among other things, the operation of the devices in issue, the interaction between the devices, and existing safeguards against data breach and untoward consequences.

2. The plaintiff in our hypothetical asserted cause of action sounding in both strict liability and negligence, and the defendants have alleged that X was herself negligent. The defendants also asserted third-party claims against (presumably) Bluetooth and the manufacturer of the SUV. The IoT may give rise to a multi-party action that may culminate in an allocation of fault between all parties.

3. Given the nature of the IoT and, specifically, the development and implementation of the app and devices in issue, both fact and expert testimony will be necessary to allocate liability. The latter will require *Daubert*- or *Frye*-qualified expert opinions.

Then, as to discovery:

1. Discovery in an IoT-related action will likely involve large volumes, and perhaps varieties, of electronically stored information (ESI). That ESI will have to be collected, searched and analyzed in defense of asserted causes and actions and, to at least some degree, produced. That production will itself have to be searched and analyzed by the receiving party. These various tasks will almost certainly require the assistance of nonparty consultants. Without that assistance, no attorney may understand the "ins and outs" of interconnected devices.

2. Large volumes and varieties of ESI may give rise to concern about proportionality under Rule 26(b)(1). Assuming that a party asserts that a discovery request is not proportional to the needs of the action, what proofs should that party be prepared to offer and what witness or witnesses will that party rely on to do so?

3. "[P]ossession, custody or control" of ESI for Rule 34(a)(1) might well be a recurring question in IoT actions. As in our hypothetical, third-party vendors or consultants might maintain ESI that is relevant to a claim or defense. If so, can a requesting party demonstrate that a responding party has some tie to a third party sufficient to require that party to make a production? If not, the requesting party will presumably have to subpoena the third party. Resolution of "control" is likely to be a fact-intensive undertaking.

4. Requests for discovery in an IoT action may well encompass arguments that the ESI sought is proprietary and that the discovery not be had. This raises the possible need for protective orders under Rule 26(c) and limitation of access to the proprietary ESI.

5. As with every action involving ESI, there is the possibility that at least some ESI may have been lost. Any loss may lead to proceedings unrelated to the merits.

CONCLUSION

We may be entering a brave new world of complexity in civil litigation because of the IoT. That complexity may require attorneys to devote additional time and resources to understand the ways in which the IoT works, thus fulfilling the duty of competence under Rule of Professional Conduct 1.1.

1. Gartner, Inc. is a research and advisory firm providing information-technology-related insight for IT and other business leaders located across the world.

SOURCES

- E. Corken, "Current Issues Regarding Possession, Custody or Control," 16 DDEE 426 (2016).H.B. Dixon, Jr., "The Wonderful and Scary Internet of Things," Judges' Journal 36 (Summer 2017).
- "The Smart Home Checklist" (Online Trust Alliance), at https://otalliance.org/system/files/files/initiative/documents/ota_smarthome_check_list.pdf.
- The Sedona Conference Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control," 17 Sedona Conf. J. 469 (2016).
- United States Department of Homeland Security, "Strategic Principles for Securing the Internet of Things (IoT)" (Nov. 15, 2016), at https://www.dhs.gov/sites/default/files/publications/Strategic_Principles_for_Securing_the_Internet_of_Things-2016-1115-FINAL....pdf.
- Press Release, Gartner, Inc., Gartner Says 8.4 Billion Connected "Things" Will Be in Use in 2017, Up 31 Percent From 2016, at https://www.gartner.com/newsroom/id/3598917.
- Amy Nordrum, "Popular Internet of Things Forecast of 50 Billion Devices by 2020 Is Outdated," IEEE, Aug. 18, 2016, https://spectrum.ieee.org/tech-talk/telecom/internet/popular-internet-of-things-forecast-of-50-billion-devices-by-2020-is-outdated.

Artificial Intelligence, Real Ethics

By Professor Roy D. Simon

At the dawn of the computer age, IBM's slogan was, "Machines should work; people should think." Artificial intelligence (often called "AI") is turning that slogan into a practical reality. Increasingly, artificial intelligence is enabling machines to do the legal work you used to do, leaving you more time to think, to plan, to strategize. But what about legal ethics? What ethical issues does artificial intelligence raise for lawyers, and how should you respond to those ethical issues?

Let's make the concept of artificial intelligence more concrete. Let's think of artificial intelligence as an amazing bionic legal intern who can do flawless work in a fraction of the time, and at a fraction of the cost, that it would take you to do the same work. That used to be science fiction, but now it's not. The future is already here, and new inventions are coming at us at warp speed. (Other writers in this issue delve more deeply into the meaning and realities of "artificial intelligence," but for purposes of this article, a bionic legal intern will suffice as a tangible manifestation of the idea.)

How are you going to control this bionic legal intern? What are your ethical duties and choices?

YOUR FIRST DUTY: BE COMPETENT

As a lawyer, your first duty is to be competent. The first substantive rule in the New York Rules of Professional Conduct is Rule 1.1, entitled "Competence." The first sentence of Rule 1.1(a) says: "A lawyer should provide competent representation to a client." The next sentence in Rule 1.1(a) explains that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Rule 1.1 does not literally *mandate* competent representation because it says a lawyer "should" provide competent representation, not "shall," but Rule 1.1(b) puts teeth in the duty of competence by essentially prohibiting incompetent representation. Rule 1.1(b) provides: "A lawyer *shall not* handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it." (Emphasis added.)

What does Rule 1.1 mean to a practicing lawyer? It means three things.

First, you must endeavor to acquire the "legal knowledge and skill" you need to do a good job on the matters you handle. And since the technology that you use to handle legal matters keeps changing, you have to keep up with the changes. This idea is expressed in Comment [8] to Rule 1.1, headed "Maintaining Competence," which says:

> To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, [and] *(ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information . . . .* (Emphasis added.)

You therefore must stay current with the "benefits and risks" of any AI software and services that you use. What does that mean? Do you have to become a computer science expert? No. You don't have to understand the code or algorithms behind the AI product. (Even many of the experts who develop these products don't fully understand them.[1]) But, as a lawyer, you do have to understand what an AI product can and cannot do, and you have to evaluate whether it is performing as advertised. (I will discuss these ideas in more detail below.)

Second, Rule 1.1 requires you to exercise "thoroughness and preparation" commensurate with the tasks at hand. If you are using technology to conduct legal research,

Roy D. Simon is a Distinguished Professor of Legal Ethics Emeritus at Hofstra University School of Law, where he taught from 1992 until 2010, and he is the principal author of *Simon's New York Rules of Professional Conduct Annotated* (published by Thomson Reuters). He is a legal ethics advisor to law firms and serve s as an expert witness in cases where the professional conduct of lawyers or law firms is at issue.

to communicate with clients, to file court papers, or to perform other legal tasks, then you should learn to use that technology competently. And if courts or clients or co-counsel or opposing counsel are using a given technology – such as e-discovery, electronic filing, email, or PDFs – then you need to keep abreast of the "benefits and risks" associated with that technology.

Third, if a new matter comes along that you are not technologically competent to handle, then under Rule 1.1(b) you have three choices: (1) turn down the matter; (2) spend whatever time it takes to acquire the necessary legal knowledge and technological skill; or (3) associate with a different lawyer – whether in your own firm or (with your client's permission) in a different firm – who already has the necessary technological knowledge and skill.

If you need to learn a skill that involves technology – social media, ECF, PACER, metadata, spam filters, whatever – you can consult with a nonlawyer who can teach you what you need to know, or you can delegate to a nonlawyer who already has that skill, as long as you supervise the nonlawyer in compliance with the Rules of Professional Conduct. And that brings us to the next topic: your duty to supervise nonlawyers.

RULE 5.3: YOUR DUTY TO SUPERVISE NONLAWYERS

Under Rule 5.3, entitled "Lawyer's Responsibility for Conduct of Nonlawyers," you have a duty to "ensure that the work of nonlawyers who work for the firm is *adequately supervised, as appropriate*." (Emphasis added.) Artificial intelligence products are effectively non-human nonlawyers. Let's return to the analogy of our fast and flawless bionic legal intern. In my view, supervising a bionic legal intern – the software equivalent of an artificially intelligent robot lawyer – is equivalent to supervising a human legal intern. What does it mean to ensure that the bionic legal intern – the artificial intelligence product – is "adequately supervised, as appropriate?" I have three concrete suggestions: (1) hire an expert to vet the AI product; (2) learn what the AI product can (and can't) do; and (3) double-check the output of the AI product. I'll discuss each suggestion.

1. Hire an expert to check out the AI product

The analogy to the human legal intern is helpful. You wouldn't hire a new legal intern without a background check, and you shouldn't use a new artificial intelligence product without a background check. Before you buy or use an AI product in your law practice, you should ask a lot of questions. Who developed the AI product? What is the developer's reputation? Is the product compatible with the other software you already use? Is the product free of malware that could steal your confidential information, or does it contain vulnerabilities that could open a back door to let cyberattackers into your system? These questions are not mere paranoia.[2]

But there's a big obstacle to checking out an AI product: you are a lawyer, not a software engineer. Most lawyers have no idea how to find the answers to questions about AI products or developers. So you should do what you do in the rest of your practice when you encounter an area beyond your expertise: hire an expert. When you need a complex damages calculation or an environmental quality test, you hire an expert. When you have a technology issue, you should hire an IT consultant. Your firm should designate a skilled technology person or company – inside or outside your firm – to vet every new artificial intelligence product (and every new software product) that you use in your law practice.

2. Learn what the AI product can do – and what it can't do

AI products can do amazing things, but they also have limitations, and you need to know what they are. If a legal intern spends most of her time preparing UCC forms, you wouldn't rely on her to write a complaint in an antitrust case, and you shouldn't count on an AI product to do things it cannot do.

For example, suppose you have written a memorandum of law (for a tribunal or a transaction), and you want to know, this afternoon, whether the authorities you cited are still good law and whether you missed any authorities you should have cited. Artificial intelligence can perform this task. Several AI products will not only cite check an entire memo but also will suggest additional cases.[3] Within a minute, the AI software will generate a report. But what does the report cover? Does the product check statutes and regulations to see if they have been

amended? Will the report tell you whether the quotations in your memo are 100 percent accurate? Will it suggest additional cases based only on the cases you have cited, or will it actually examine the fact pattern in your memo to look for issues you missed? You don't have to understand how to use every feature of an AI product (just as you don't have to understand every feature of Word or Excel). But you do have to understand what the AI product can and cannot do, and you need to learn how to deploy the product features that you actually use.

AI products, like legal interns, get results only if you give the right instructions. I learned this concept the hard way, long before AI. When I was a brand new attorney at a large firm, I drafted a complaint and sent a messenger down to the courthouse to file it. An hour later the messenger came back with the complaint, still unfiled. The clerk had refused to accept the complaint because it did not have a blueback. I grumpily added the blueback and sent the messenger to court again. Then I complained to a colleague that the court clerks were hung up on petty details. My colleague said, "That may be true, but you should never send someone to do something you haven't done yourself."

You don't have to master AI products, but you should try them out to get a feel for how they work. Ask an IT person at your firm to tutor you for an hour or two, or search for YouTube videos about how to use each product. Then you will be in a position to know when a particular AI product is appropriate, and you can instruct your subordinates on what to do with each product.

3. Double check the AI product's output

When a legal intern drafts a brief, you read it over for quality control. You have to do the same thing with the work product of an AI tool. For example, some AI software products will actually draft substantive memos in certain subject areas, or review contracts, or fill out forms to fight parking tickets. These whiz-bang tools may produce great work, but you are still responsible for the work product. If the work product is defective and the client is harmed, the client is going to sue you and your law firm, not the artificial intelligence product.

You don't have to duplicate the entire task that the AI product performed, just as you don't start the research and drafting from square one when a legal intern submits a draft brief. But you do have to read the entire paper to make sure it is relevant, organized, clear, and not contrary to common sense. You also should spot-check the case citations and quotations, at least until you develop confidence in the particular AI product.

RULE 1.6(c): YOUR DUTY TO PROTECT CONFIDENTIAL INFORMATION

All lawyers know that they have a duty of confidentiality, but not all lawyers realize that Rule 1.6(c) of the New York Rules of Professional Conduct was amended effective January 1, 2017. Amended Rule 1.6(c) requires lawyers to make "reasonable efforts" to protect confidential information against three things: (1) inadvertent disclosure or use; (2) unauthorized disclosure or use; and (3) unauthorized access (e.g., hacking from outside or inside your firm).

Most AI products, such as the cite-checking products described above, require access to your confidential data. (A draft memo itself is confidential information, for example.) This raises a lot of questions about confidentiality. What happens to your confidential data once the AI vendor gains access to it? Who has access to it at the AI vendor? Does the AI vendor share your confidential information with other third-party vendors? If so, do you know who those third-party vendors are, and have you checked them out? Do they have a contractual duty of confidentiality? What happens to your client's data if the AI vendor is sold, merges, retires, or goes bankrupt? If the AI vendor is subpoenaed, is the vendor contractually obligated to give you notice so that you can intervene to challenge the subpoena?

These questions are just the tip of the iceberg regarding confidentiality. Excellent guidance on transmitting or storing confidential information is available in N.Y. State Ethics Op. 1020 (2014), which concerned the ethics of cloud storage. Opinion 1020 concluded that whether a lawyer may post and share documents using a cloud data storage tool depends on whether the technology employed "provides reasonable protection to confidential client information and, if not, whether the lawyer obtains informed consent from the client after advising the client of the relevant risks." The same principles should apply when you give an AI vendor access to your confidential data.

RULE 1.5(a): FEE AND EXPENSE ISSUES

Rule 1.5(a) prohibits a lawyer from charging fees and expenses that are "excessive" (i.e., are not "reasonable"). This raises at least two issues relevant to artificial intelligence.

The first question is, may you charge your clients when you use artificial intelligence products the way you charge clients for Westlaw or Lexis? In my opinion, the answer is yes as long as you either (1) charge your clients at your out-of-pocket cost (e.g., a fair share of the cost of a license, or the cost per use), or (2) you obtain consent from your clients to charge a reasonable markup.[4]

Second, are you charging an excessive fee if you perform hourly rate legal work the old fashioned way instead of using an AI product that could do the job faster? That is a tough question, and depends on the circumstances.

An analogy might help. If you charge by the hour, are you charging an excessive fee if you do all of your legal research by reading bound copies of reporters instead of by using Westlaw, Lexis, or Fastcase? Three or four decades ago the answer was probably no, but today I think the answer is yes – doing all of your legal research in bound books results in an excessive fee because you can KeyCite or Shepardize cases in a fraction of the time it takes to slog through paper volumes. Similarly, today, I think you are not charging an excessive fee if you continue using your customary methods instead of using a newfangled AI product, but soon most lawyers will be using AI products and services for certain types of work (such as the cite-checking products discussed earlier), and charging for 10 hours of your time to do work that AI could do in 10 minutes sounds like an excessive fee to me. You have to keep abreast of the benefits of technology that applies to your practice.

Now for a bonus question: Do you have a duty to alert your clients to the option of using AI products that may save substantial fees or arrive at quicker or more accurate results? Right now the answer to that question is unclear – but before long, practicing law without using AI will be like practicing law with an Underwood manual typewriter, and you will have to tell your clients that there is a better, cheaper, faster way.

CONCLUSION: TECHNOLOGY MOVES AHEAD BUT ETHICAL DUTIES REMAIN CONSTANT

Artificial intelligence is making it possible to create products that sound like magic – lightning fast, uncannily accurate, effortless to use. These new products raise new questions about legal ethics. But the ethical principles remain familiar – lawyers must be competent, supervise the work product, protect confidential information, and charge reasonable fees and expenses. If you keep those timeless ethical principles in mind, you can keep your ethical balance even as technology moves ahead at a dizzying pace.

1. *See* Cliff Kuang, *Can A.I. Be Taught to Explain Itself?*, N.Y. Times Magazine, Nov. 21, 2017 ("As machine learning becomes more powerful, the field's researchers increasingly find themselves unable to account for what their algorithms know–or how they know it").

2. *See* Shane Harris & Gordon Lubold, *Russia Turned Kaspersky Software Into Tool for Spying*, Wall St. J., Oct. 11, 2017 (reporting that the Russian government modified a popular antivirus software program to turn it into an espionage tool that secretly scanned computers for classified U.S. government documents).

3. Some examples are BriefCheck by Shepard's, WestCheck by Westlaw, CARA by CaseText, and EVA by ROSS. They all work a bit differently. You should try them all to see how they work and which ones you like best.

4. *See* ABA Ethics Op. 93-393 (1993) ("Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead should pass ethical muster" but, absent the client's agreement, a lawyer may not "create an additional source of profit for the law firm" by charging above cost for computer research services or other non-legal services).

LEGAL REFERRAL SERVICES: New Technology, New Ethics Guidelines

Ronald C. Minkoff is the head of the Professional Responsibility Group at Frankfurt Kurnit Klein & Selz, P.C., and a member of Committee on Standards of Attorney Conduct and the Committee on Technology and the Legal Profession. Blog: www.newyorklegalethics.com. Facebook: www.facebook.com/FrankfurtKurnit/. Instagram: @FrankfurtKurnit. LinkedIn: www.linkedin.com/company/frankfurt-kurnit-klein-&-selz/. Twitter: @FrankfurtKurnit. Website: http://fkks.com.

Tyler Maulsby is an associate at Frankfurt Kurnit Klein & Selz, P.C. and the secretary of the NYCBA Committee on Professional Ethics. LinkedIn: www.linkedin.com/in/tyler-maulsby. Twitter: @TylerMaulsby.

Online lawyer referral services ("Online LRS") – sometimes called "online marketing services" or "lead generators" – are proliferating, and many solo and small-firm lawyers want to get on board. Who can blame them? An Online LRS can help lawyers grow their practice by exposing them to potential clients who have a need for specific services. But questions remain as to whether lawyers can participate in this relatively new technology without violating their ethical obligations.

In August 2017, the New York State Bar Ethics Committee (the "Committee") issued a pair of opinions making clear that a lawyer can take advantage of an Online LRS, subject to certain limitations. The first, NYSBA Ethics Op. 1131 (2017), outlined generally what an Online LRS (and an attorney participating in one) must do to comply with the New York Rules of Professional Conduct (RPC). The second, NYSBA Ethics Op. 1132 (2017), issued the same day, concluded that New York practitioners may not use Avvo's Online LRS (called Avvo Legal Services) in its current form. Taken together, these opinions are certain to make waves as the legal profession struggles to adapt to new technologies, unbundle legal services, and offer clients cost-effective solutions.

Here's what New York lawyers need to know.

WHAT THE NEW YORK RULES SAY

For-profit legal referral services predate the internet age, and have long been frowned upon by Bar regulators. Indeed, RPC 7.2(a) prohibits a lawyer from "compensat[ing] or giv[ing] anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made" such a recommendation. More specifically, RPC 7.2(b) limits the organizations that a lawyer may pay to "recommend[] [or] employ" the lawyer, or "recommend or promote the use of a lawyer's services," even assuming "there is no interference with the exercise of independent professional judgment on behalf of a client." This rule limits lawyers to using not-for-profit lead providers, such as legal aid or public defender offices, military legal assistance offices, a "lawyer referral service *operated, sponsored or approved by a bar association or authorized by law or court rule*," or bona fide organizations that provide legal referrals to members, such as labor unions (emphasis added). This is a narrow rule indeed. Combined with RPC 5.4, which prohibits lawyers from splitting fees with non-lawyers, and RPC 7.3, which prohibits soliciting business from the general public by "real-time or interactive computer-accessed communication," the obstacles to participating in a for-profit Online LRS may seem insurmountable.

But a for-profit Online LRS can take different forms. On the one extreme is a service which specifically recommends a given lawyer as the best person for the client's assignment. At the other is a listing of lawyers, perhaps by

area of expertise, such as was found in the old-fashioned yellow pages. The first can pose a risk that lawyers will pay more – either voluntarily or at the service's behest – in return for the service recommending them more often to potential clients, and that the recommendations themselves may be unrelated to the lawyer's expertise. Lawyer listings, on the other hand, pose no such risk.

Also, each Online LRS has a different business model, with some charging flat fees, some taking a piece of the legal fee, and others charging based on the amount of work received or performed. Again, the more payment is keyed to work performed or fees received, the more Bar regulators fear that the Online LRS will interfere with participating lawyers' independent judgment.

So how to separate a good for-profit Online LRS from a bad one? Do we simply reject them all, as RPC 7.2(b) seems to suggest? Or do we take a more nuanced approach? The Committee chose the latter. While not exactly writing on a clean slate – the Nassau County Bar Association Ethics Committee had approved a model for an ethically appropriate Online LRS 17 years ago in Nassau Co. 01-04 (2001) – the Committee came up with the most comprehensive guidance yet for lawyers wishing to participate in one of these services.

NYSBA ETHICS OP. 1131 – APPROVING SOME TYPES OF FOR-PROFIT ONLINE LRS

In Opinion 1131, the Committee addressed whether a lawyer could pay an Online LRS to provide the lawyer with contact information for potential clients in need of legal services. The Opinion concluded that such a payment was permissible – and thus participation in the Online LRS was permissible – so long as (1) the Online LRS selected the lawyer by "transparent and mechanical methods" and did not otherwise analyze the client's legal issue or the qualifications of the lawyer; (2) the Online LRS did not explicitly or implicitly recommend the lawyer; and (3) the Online LRS' communications about the lawyer's services complied with the attorney advertising rules, mainly RPC 7.1 and 7.3.

It is important to note that Opinion 1131 turned on the fact that the lawyer would pay the lead generator either a fixed monthly fee or a fee for the name of each potential client. The lead generator's fee did not vary depending on whether the potential client actually retained the lawyer, how much work the lawyer performed, or the size of the lawyer's fee.

How does this work in practice? A client contacts a for-profit Online LRS looking for a matrimonial lawyer in the client's hometown. If the Online LRS provides a list of matrimonial lawyers in that town (perhaps listed alphabetically), or provides the name of a single matrimonial lawyer based on a randomized computer algorithm, that would be permissible under Opinion 1131, provided the selection through a randomized algorithm was transparent to the client. If, on the other hand, the Online LRS asks for a description of the problem and determines that an experienced matrimonial lawyer knowledgeable about custody issues would be needed due to the complexity of the client's legal issue, that would be impermissible. So would giving preferences to lawyers who pay the Online LRS more, who the Online LRS rates as a "better" law-

yer, or who the owners or managers of the Online LRS favor for some personal reason of their own.

Also relevant is how the Online LRS is paid. As stated previously, if the Online LRS receives a flat monthly or per-contact fee to list the lawyer, that is permissible. If the Online LRS receives a larger payment when the lawyer ends up doing more work, or is paid a portion of the legal fee received, that is impermissible.

NYSBA ETHICS OP. 1132 – AVVO LEGAL SERVICES

In Opinion 1132, the Committee applied the principles articulated in Opinion 1131 to Avvo Legal Services, a service introduced in 2016 by the lawyer rating website Avvo. Specifically, the Committee addressed whether Avvo Legal Services' payment structure violated RPC 7.2. The Opinion described Avvo Legal Services as follows: a prospective client in need of legal services can visit a section of Avvo's website and answer a series of questions about the client's specific legal matter. The client can choose a specific "package," which includes a combination of services including "advice sessions, document reviews, and start-to-finish support." The client can then choose to be connected to a lawyer either at random or by selecting a lawyer among a list presented on the website. On the back end, Avvo pays the participating attorney all of the legal fees generated when the client purchases the "package," but then separately charges the attorney a "marketing fee" for each completed service. The marketing fee depends on the price of the legal service the lawyer provided. Crucially, Avvo also displays a "rating" for each lawyer based on an internal formula which generates a numerical value between 1 and 10.

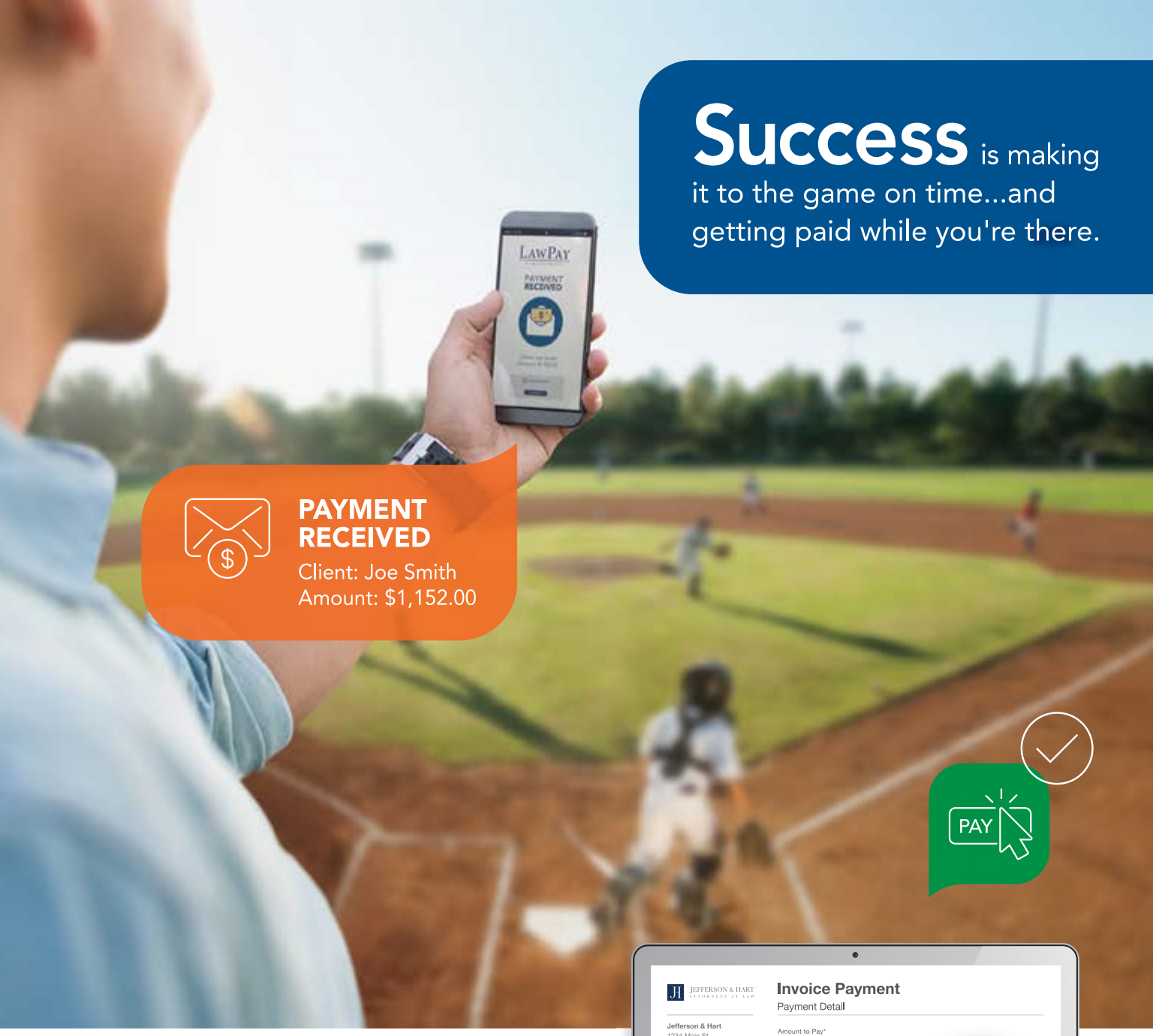
The Committee concluded that Avvo Legal Services' marketing fee was a prohibited referral fee under RPC 7.2. The reason: Avvo's rating system, combined with marketing promoting the ratings as a tool to help clients find the "right" lawyer, created "the reasonable impression that Avvo is 'recommending' those lawyers."

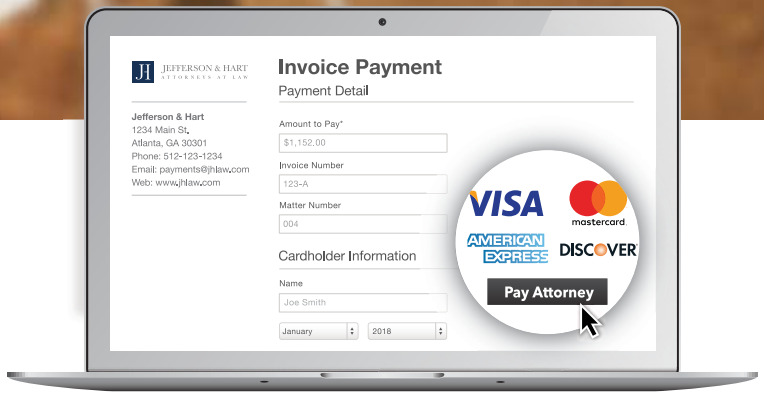
With Opinion 1132, New York became one of several jurisdictions to challenge Avvo Legal Services – all but one have flatly rejected it, usually on more grounds than just the illegal fee. But more important, the Opinion acknowledged the vigorous debate that Avvo's business model has spawned both inside and outside the legal profession. For instance, the Opinion noted that "[t]he number of lawyers and clients who are using Avvo Legal Services suggest that the company fills a need that more traditional methods of marketing and providing legal services are not meeting." The Committee concluded that "changes to Avvo's mode of operation – or future changes to the Rules of Professional Conduct – could lead us to alter our conclusions."

THE TAKEAWAY

The Committee's opinions were obviously bad news for Avvo. In our view, rightly so: Avvo overreached by creating a model that it must have known breached the ethics rules in a failed effort to become an Uber-like disrupter of the legal profession. But this is vastly outweighed by the good news. The Committee has now recognized that a for-profit Online LRS may exist comfortably under the rules, provided the Committee's guidelines are followed. Not only that, but the Committee all but recommended that the existing rules be re-examined to broaden lawyers' access to Online LRS and similar technologies, knowing this will help access to justice by connecting lawyers with clients who need their services.

This is a signal of great hope. Over the past several years the "legal tech" world has exploded with numerous websites and other online tools geared toward delivering legal services in a non-traditional fashion. The goal of many of these services is to try and close the "justice gap" and provide affordable legal services to individuals who cannot otherwise pay for them. These attempts often have been met with significant resistance by Bar regulators and ethics committees, largely owing to the current state of the law and ethics rules. These regulatory bodies are facing increasing pressure to adapt to the times and allow some mechanism by which legal tech providers can coexist with our ethics rules. Opinions 1131 and 1132 show the Committee doing just that. We look forward to rule changes consistent with these opinions in the near future.





Have the best of both worlds

LawPay was developed to simplify the way attorneys get paid, allowing you to run a more efficient practice and spend more time doing what you love. Our proven solution adheres to ABA rules for professional conduct and IOLTA guidelines. Because of this, LawPay is recommended by 47 of the 50 state bars and trusted by more than 45,000 lawyers.

LawPay® AN AFFINIPAY SOLUTION + NYSBA®

lawpay.com/nysba | 855-759-5284

The experts in legal payments

LawPay is a registered ISO of Merrick Bank, South Jordan, UT

"Objection, Your (To Your Social Media Activity?)

Congratulations! You have either been elected/appointed a judge of the New York State Court System, or appointed a federal judge of the United States. You have taken your oath/affirmation,[1] donned the black robe, and ascended the bench. Now, for the big questions. Not how to decide a particular case. No, for the purposes of this article the big questions now posed to you are:

> **What do you do about your social media accounts and posts? And, do they result in your having to recuse in more cases than the average judge not on social media?**
>
> ***The answer is "It depends."***

What is the content of the particular social media post? What is the relation to a case pending before the judge, if at all? Who are the "friends" of the judge on social media, and what is the nature of the communications with those "friends," if any? These, and other inquiries, form the basis for evaluating any challenge to the social media posts of a judicial officer.[2] In addition, look to the codes of ethics:

> A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved . . . . A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.[3]

First of all, a judge is not forbidden from having social media accounts. New York ethics opinions have specifically held that there is nothing inherently improper about a judge utilizing social media.[4] However, these opinions have also advised that judges should take care concerning appearances of impropriety, should stay abreast of changes in technology that may impact the judge's duties under the Rules, and should consider whether online connections and friendships in combination with any other factors create a circumstance for recusal.[5] Judges should evaluate if they can be fair and impartial – such as in situations where the contact is happenstance or coincidental, similar to being members of the same professional, civic or social organizations as an attorney appearing before them. Indeed, the Maryland Judicial Ethics Committee once stated it best: "[a]ttorneys are neither obligated nor expected to retire to hermitage upon becoming a judge."[6]

What about when a judge affirmatively posts to social media, and those posts raise eyebrows? Take the case of an Ohio Supreme Court Justice, who at the time of his posts was also a candidate for governor in Ohio, making headlines for two separate social media posts. In one, he spoke out against the NFL players who were kneeling during the National Anthem, saying he would "NEVER attend a sporting event where the draft dodging millionaire athletes disrespected the veterans who earned them the right to be on that field. Shame on you all." [7] In a second post, some months later, in the wake of the sexual harassment scandal reaching Sen. Al Franken's office, the judge posted what he said was related to the

> national feeding frenzy about sexual indiscretions . . . . As a candidate for Governor let me save my opponents some research time . . . In the last fifty years I was sexually intimate with approximately 50 very attractive females . . . . Now can we get back to discussing legalizing marijuana and opening the state hospital network to combat the opioid crisis.[8]

At the time of this writing, there are some calling for the judge to withdraw from the race for governor (which he said he would do in any event if another potential candidate, whom he named, entered the race), or even for the judge to step down from the bench, though no official action appears to have yet been taken. Because of the backlash, including from the state's chief justice, the social media post was deleted, but the judge later posted new comments.[9] The Ohio Chief Justice is quoted as stating: "No words can convey my shock, . . . This gross

Michael L. Fox is Assistant Professor of Business Law, and the Pre-Law Advisor, at Mount Saint Mary College in Newburgh, New York. He received his Bachelor of Arts (B.A.) from Bucknell University, summa cum laude and Phi Beta Kappa; and his Doctor of Law (J.D.) from Columbia University School of Law, where he was a Harlan Fiske Stone Scholar. He was an AV-rated litigator by Martindale-Hubbell when in practice. He is a Past Chair of the Young Lawyers Section, and currently serves as Vice President for the Ninth Judicial District of NYSBA, and as a Member of the NYSBA Executive Committee and House of Delegates. The opinions and thoughts expressed herein are those of the author alone. Website: www.msmc.edu/Academics/Academic_Divisions/Business/faculty/michael_fox.

Honor"

By Professor Michael L. Fox

disrespect for women shakes the public's confidence in the integrity of the judiciary."[10]

Then there is the case of a Gwinnett County, Georgia, magistrate judge. The judge posted on social media, in the wake of the Charlottesville protests:

> It looks like all the snowflakes have no concept of history . . . . It is what it is. Get over it and move on. Leave history alone – those who ignore history are deemed [sic] to repeat the mistake [sic] of the past. In Richmond VA all of the Confederate monuments on Monument Ave. have people on horses whose asses face North. PERFECT! [11]

The judge made a follow-up post comparing the protesters wanting to take down the monuments to ISIS destroying history. The chief magistrate judge initially suspended the judge, making the following statement:

> As Chief Magistrate Judge, I have made it clear to all of our judges that the Judicial Canons, as well as our internal policies, require judges to conduct themselves in a manner that promotes public confidence in the integrity, impartiality and fairness of the judiciary, . . . I consider any violation of these principles and policies to be a matter of utmost concern.[12]

The judge later offered his resignation/retirement.[13]

Several other incidents – sitting judges, judicial candidates and nominees posting on all manner of social and political topics – have made headlines and raised questions.[14] But, in one very recent matter before the Florida Third District Court of Appeal, the court addressed a law firm's petition for a trial judge to recuse from a case because she was Facebook friends with an attorney for a non-party who had entered an appearance. The firm contended that the judge would be influenced by the social media friendship.[15] We know from our earlier discussion that in New York, and other jurisdictions, the mere occurrence of a "friendship" on social media is not sufficient to force recusal of a judge – any more than a "friendship" or "acquaintance relationship" that develops through repeated contacts at bar association and social functions would force recusal. A recent news article reported that of the 11 states that have issued rules/guidance for judges on social media, Florida's are most restrictive.[16] The Third District Court of Appeal, though, in a decision issued in August 2017, broke with a prior Florida appellate court ruling and ethics opinion, finding recusal was not required.

The court first noted that, stemming from pre-social media days, "as a general matter, . . . 'allegations of mere "friendship" with an attorney or an interested party have been deemed insufficient to disqualify a judge.'"[17] The court then recounted the prior decision of the Fourth District Court of Appeal (which cited Florida Judicial Ethics Advisory Committee Opinion 2009–20), which held that a judge who was Facebook friends with a prosecutor on a case had to recuse.[18] The *Herssein* court discussed the Fifth District Court of Appeal decision in *Chace v. Loisel*, in which that court held a trial judge was required to recuse from a matrimonial action when the judge sent a friend request to the litigant-wife during the pendency of the case (which the wife did reject), although the *Chace* court at the same time cast doubt on the Fourth District's *Domville* holding.[19] The *Herssein* court held that "'[a] Facebook friendship does not necessarily signify the existence of a close relationship.' . . . 'some people have thousands of Facebook "friends."'"[20] The *Herssein* court also reasoned that "Facebook members often cannot recall every person they have accepted as 'friends' or who have accepted them as 'friends.'"[21] Finally, the court stated: "many Facebook 'friends' are selected based upon Facebook's data-mining technology rather than personal interactions."[22] Therefore, the *Herssein* court ultimately concluded as follows:

> To be sure, some of a member's Facebook "friends" are undoubtedly friends in the classic sense of person for whom the member feels particular affection and loyalty. The point is, however, many are not . . . . In fairness to the Fourth District's decision in *Domville* and the Judicial Ethics Advisory Committee's 2009 opinion, electronic social media is evolving at an exponential rate. Acceptance as a Facebook "friend"

> may well once have given the impression of close friendship and affiliation. Currently, however, the degree of intimacy among Facebook "friends" varies greatly. The designation of a person as a "friend" on Facebook does not differentiate between a close friend and a distant acquaintance. Because a "friend" on a social networking website is not necessarily a friend in the traditional sense of the word, we hold that the mere fact that a judge is a Facebook "friend" with a lawyer for a potential party or witness, without more, does not provide a basis for a well-grounded fear that the judge cannot be impartial or that the judge is under the influence of the Facebook "friend." On this point we respectfully acknowledge we are in conflict with the opinion of our sister court in *Domville*. Petition denied.[23]

It appears from a recent news report that the law firm has now appealed the matter to the Florida Supreme Court,[24] although as of the time of this writing there is no indication of a further appeal or decision on Westlaw.

There have been two interesting opinions/proceedings in New York State. In 2013, a New York State judge asked the Advisory Committee on Judicial Ethics whether the judge had to recuse from a criminal trial at the request of the defendant's attorney or the defendant because the judge was Facebook friends with the parents or guardians of minors allegedly affected by the defendant's activities.[25] The opinion held Facebook friend status alone was not sufficient for recusal, and the judge's impartiality was not reasonably in question. There was thus no appearance of impropriety.[26] Per the opinion:

> The Committee believes that the mere status of being a "Facebook friend," without more, is an insufficient basis to require recusal. Nor does the Committee believe that a judge's impartiality may reasonably be questioned (see 22 NYCRR 100.3[E][1]) or that there is an appearance of impropriety (see 22 NYCRR 100.2[A]) based solely on having previously "friended" certain individuals who are now involved in some manner in a pending action . . . . As the Committee noted in Opinion 11-125, interpersonal relationships are varied, fact-dependent, and unique to the individuals involved. Therefore, the Committee can provide only general guidelines to assist judges who ultimately must determine the nature of their own specific relationships with particular individuals and their ethical obligations resulting from those relationships. With respect to social media relationships, the Committee could not "discern anything inherently inappropriate about a judge joining and making use of a social network" (Opinion 08-176). However, the judge "should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge's court through a social network . . . [and] must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a . . . relationship requiring disclosure and/or recusal" (*id.*). If, after reading Opinions 11-125 and 08-176, you remain confident that your relationship with these parents or guardians is that of a mere "acquaintance" within the meaning of Opinion 11-125, recusal is not required. However, the Committee recommends that you make a record, such as a memorandum to the file, of the basis for your conclusion . . .[27]

In December 2016, the New York State Commission on Judicial Conduct issued its determination in a rather extreme case – *In re the Proceeding Pursuant to Section 44, Subdivision 4, of the Judiciary Law in Relation to Lisa J. Whitmarsh, a Justice of the Morristown Town Court, St. Lawrence County*.[28] In that case, the town justice had posted comments to Facebook concerning an ongoing prosecution before a different town court. The posts were made between March 13 and March 28, 2016. The determination set forth, in part, the following, which is quoted at length because of its importance to the subject of this article:

> Respondent had approximately 352 Facebook "friends." [sic] Respondent's Facebook account privacy settings were set to "Public," meaning that any internet user, with or without a Facebook account, could view content posted on her Facebook page . . . On March 13, 2016, respondent posted a comment to her publicly viewable Facebook account, . . . criticizing the investigation and prosecution of [defendant]. Respondent commented, inter alia, that she felt "disgust for a select few," that [defendant] had been charged with a felony rather than a misdemeanor because of a "personal vendetta," that the investigation was the product of "CORRUPTION" caused by "personal friends calling in personal favors," and that [defendant] had "[a]bsolutely" no criminal intent . . . Respondent's post also referred to her judicial position, stating, "When the town board attempted to remove a Judge position – I stood up for my Co-Judge. When there is a charge, I feel is an abuse of the Penal Law – I WILL stand up for [DEFENDANT]" [sic] [emphasis in original] . . . Other Facebook users posted comments on respondent's Facebook page, commending respondent's statements in her post of March 13, 2016, and/or criticizing the prosecution of [defendant]. The first Facebook user to comment was Morristown Town Court Clerk [ ], who posted the following on March 13, 2016, at 7:58 AM: "Thank you Judge [ ]! You hit the nail on the head." Respondent did not delete the court clerk's comment, which was viewable by the public . . . On March 23, 2016, a local news outlet posted an article on its website reporting on respondent's Facebook comments . . . and re-printed respondent's Facebook post of March 13, 2016, in its entirety . . . On March 28, 2016, respondent removed all postings concerning the [ ] matter from her Facebook page after receiving a letter from [the] District Attorney [ ] questioning the propriety of her

> comments and requesting her recusal from all matters involving the District Attorney's office.[29]

The Commission determined that the respondent town justice had "violated Sections 100.1, 100.2(A), 100.2(C) and 100.3(B)(8) of the Rules Governing Judicial Conduct . . . and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law."[30] The Commission further determined that posts to Facebook are public, cannot be considered private in any sense, and "[a]ccordingly, a judge who uses Facebook or any other online social network 'should . . . recognize the public nature of anything he/she places on a social network page and tailor any postings accordingly."[31] The Commission rightfully pointed out that:

> [w]hile the ease of electronic communication may encourage informality, it can also, as we are frequently reminded, foster an illusory sense of privacy and enable too-hasty communications that, once posted, are surprisingly permanent. For judges, who are held to "standards of conduct more stringent than those acceptable for others" . . . and must expect a heightened degree of public scrutiny, internet-based social networks can be a minefield of "ethical traps for the unwary."[32]

Ultimately, the town judge was given an admonition as a sanction.

Finally, there is the very recent case out of the Town of Floyd (Oneida County). There, the town justice, who had been serving since 1999, agreed to resign on December 31, 2017, as part of a stipulation with the New York State Commission on Judicial Conduct. At the time of this writing, the resolution of the matter was newly reported, and not much detail was available. However, it appears that the judge (who also served as a justice in two village courts), "conveyed bias in favor of law enforcement and against a political organization," and also criticized gun regulations, on Facebook.[33] More detail was not available, although the remarks, it was reported, were made in November.[34] The outcome in this case was more severe than that in the Morristown Town Court matter above. In the Town of Floyd matter, the judge also agreed "to neither seek nor accept judicial offices in the future."[35] The Commission's administrator provided a short statement, which sums up this article perfectly, and should be taken to heart by all elected

and appointed judges: "On social media as anywhere, a judge must uphold the integrity and impartiality of the judiciary, and avoid conduct that conveys or appears to convey bias for or against particular political, religious or other groups."[36]

In conclusion, although judges can use social media, and certainly may have "friends" both on and off social media, judicial officers (as well as candidates for judicial office, judicial nominees, and attorneys), should be very cautious when it comes to social media friendships and postings.[36] Judges and attorneys are not only private citizens, they are also public officers, officers of the court, and under oath to uphold the integrity and impartiality of the law and the justice system. That requires more than a passing thought before hitting "Tweet" or "Share."[38]

1. *See* 28 U.S.C. § 453 (oath of office taken by all U.S. justices and judges); *see also* N.Y. Const. Art. XIII, § 1 (oath of office taken by the New York State executive, legislators and justices/judges). It is interesting to note that once the oath is taken and filed along with the commission, it is a public record, and a judge need not produce a certified copy of same to satisfy a litigant that the oath was properly taken, and to discharge judicial duties (*In re Anthony*, 481 B.R. 602, 613–14 (D. Neb. 2012)). It is further interesting to note that had New Yorkers answered 2017 ballot Proposition 1 in the affirmative, and called for a Constitutional Convention, the delegates to that convention would have taken the state oath of office. See Notes of Decisions to N.Y. Const. Art. XIII, § 1; Op. Atty. Gen. 202 (1938).

2. While this article does not specifically address the obligations of, and rules governing, attorneys on social media, keep in mind that there are numerous rules and guidelines to be aware of before embarking on social media. *See, e.g.*, *Social Media Ethics Guidelines of the Commercial & Federal Litigation Section of the New York State Bar Association* (updated 2017), www.nysba.org/socialmediaguidelines17. For two cautionary tales, *see* D. Weiss, *Penn State Frat Prosecutor Faces Ethics Hearing Over Fake Facebook Page, Texts to Judges*, ABA Journal, www.abajournal.com/news/article/penn_state_frat_prosecutor_faces_ethics_hearing_over_fake_facebook_page_all (Aug. 22, 2017); D. Weiss, *CBS Fires Lawyer Over Facebook Posts Calling Vegas Shooting Victims Likely 'Republican Gun Toters*,' ABA Journal, www.abajournal.com/news/article/cbs_fires_lawyer_over_facebook_comments_calling_vegas_victims_likely_republ/ (Oct. 2, 2017). Separately, there are concerns about making clear to jurors that, while they are serving and deliberating, they are not to utilize social media. *See U.S. v. Ganias*, 755 F.3d 125, 132–33 (2d Cir. 2014).

3. Code of Conduct for United States Judges, Canons 1 & 2(A). *See also* 22 N.Y. Comp. Codes R. & Regs. §§ 100.1, 100.2(A), 100.3. *See generally*, A. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 Wash. L. Rev. 851, 854 (1989) ("Indeed, the basic rule of the Code of Conduct, the one to which all other rules are mere commentary, reflects this concern: judges should avoid not only impropriety but also the appearance of impropriety in all things relating to their office").

4. See New York Opinions 08-176 (2009) and 11-125 (2011). *See also* ABA Formal Op. 462 (2013).

5. *Id*.

6. *See* Maryland Judicial Ethics Committee Op. Request No. 2012-07 (2012).

7. J. Delk, *Ohio Judge Slams Cleveland Browns Players for Protesting During National Anthem*, The Hill, http://www.thehill.com/homenews/347974-ohio-supreme-court-justice-criticizes-cleveland-browns-players-national-anthem/ (Aug. 25, 2017) (the article notes that the draft ended in 1973, and therefore none of the NFL players are actually draft-dodgers).

8. L. Bever & M. Eltagouri, *Ohio Governor Candidate Apologizes for Boasting of Sexual History With '50 Very Attractive Females*,' The Washington Post, www.washingtonpost.com/ news/politics/wp/2017/11/17/ohio-governor-candidate-boasts-of-sexual-history-with-approximately-50-very-attractive-females/?utm_term=.f4e0214e023c/ (Nov. 18, 2017). The social media post included details describing several women such that they might be identifiable, and those descriptions are not repeated here.

9. *Id*.

10. *Id*.

11. D. Weiss, *Magistrate Judge Retires After Facebook Comments About 'Snowflakes' and 'Nut Cases*,' ABA Journal, www.abajournal.com/news/article/magistrate_judge_retires_after_his_ facebook_comments_about_nut_cases_tearin/ (Aug. 18, 2017).

12. C. O'Brien, *Gwinnett Magistrate Judge Suspended Over Facebook Post About Charlottesville, Va. Protesters*, Gwinnett Daily Post, www.gwinnettdailypost.com/local/gwinnett-magistrate-judge-suspended-over-facebook-post-about-charlottesville-va/article_672ba1c8-07be-5edd-9e67-6a66be9bfc1d.html (Aug. 15, 2017).

13. *See* D. Weiss, *Magistrate Judge Retires After Facebook Comments About 'Snowflakes' and 'Nut Cases*,' *supra*.

14. For brief descriptions of other instances, *see* C. Ampel, *Watch Your Mouth, Your Honor: Lessons for Judges on Social Media*, N.Y.L.J. (Aug. 28, 2017), www.law.com/newyorklawjournal/almID/1202796679106/?slreturn=20171029093202/.

15. D. Weiss, *Appeals Court Considers Removal of Judge Who Is Facebook Friends with Lawyer*, ABA Journal, www.abajournal.com/news/article/appeals_court_considers_removal_of_judge_who_is_facebook_friends_with_lawye/ (July 31, 2017).

16. *See* D. Weiss, *Judge Shouldn't Be Booted From Case Because of Facebook Friendship with Lawyer, Appeals Court Rules*, ABA Journal, www.abajournal.com/news/article/judge_shouldnt_be_booted_from_case_because_of_facebook_friendship_with_lawy/ (Aug. 25, 2017).

17. *Law Offices of Herssein & Herssein, P.A. v. U. Serv. Auto. Assoc.*, 229 So.3d 408, 2017 WL 3611661 (Fla. App. 3d Dist. Aug. 23, 2017) (citing *Smith v. Santa Rosa Island Auth.*, 729 So.2d 944, 946 (Fla. App. 1st Dist. 1998); *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332, 1338 (Fla. 1990) ("There are countless factors which may cause some members of the community to think that a judge would be biased in favor of a litigant or counsel for a litigant, e.g., friendship, member of the same church or religious congregation, neighbors, former classmates or fraternity brothers. However, such allegations have been found legally insufficient when asserted in a motion for disqualification")).

18. *Herssein*, 2017 WL 3611661, at *2 (citing *Domville v. State*, 103 So.3d 184 (Fla. App. 4th Dist. 2012); Fla. JEAC Op. 2009–20 (Nov. 17, 2009)).

19. *Herssein*, 2017 WL 3611661, at *2–3 (citing *Chace v. Loisel*, 170 So.3d 802, 803–04 (Fla. App. 5th Dist. 2014)).

20. *Herssein*, 2017 WL 3611661, at *3 (citing *Sluss v. Commonwealth*, 381 S.W.3d 215, 222 (Ky. 2012); State v. Madden, No. M2012-02473-CCA-R3-CD, 2014 WL 931031, at *1–2 (Tenn. Crim. App. Mar. 11, 2014)).

21. *Herssein*, 2017 WL 3611661, at *3 (citing *Furey v. Temple Univ.*, 884 F. Supp. 2d 223, 241 (E.D. Pa. 2012); *Slaybaugh v. State*, 47 N.E.3d 607, 608 (Ind. 2016)).

22. *Herssein*, 2017 WL 3611661, at *4.

23. *Id*.

24. *See Law Firm Asks: Does Facebook Friendship Disqualify Judge?*, CBS News, http://www.dfw.cbslocal.com/2017/10/18/does-facebook-friendship-disqualify-judge/ (Oct. 18, 2017).

25. *See* New York Opinion 13-39 (2013).

26. *Id*.

27. *Id*.

28. 2016 WL 7743777 (N.Y. Com. Jud. Cond. Dec. 28, 2016).

29. *Id*.

30. *Id*.

31. *Id*. (citing N.Y. Opinion 08-176).

32. *Id*. (citing, *inter alia*, J. Browning, *Why Can't We Be Friends? Judges' Use of Social Media*, 68 U. Miami L. Rev. 487, 511 (2014)).

33. J. Velasquez, *Town Justice Resigns After Probe of His Facebook Remarks*, N.Y.L.J., www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/12/18/town-justice-resigns-after-probe-of-his-facebook-remarks/ (Dec. 18, 2017).

34. *Id*.

35. *Id*.

36. *Id*.

37. Judges should further be cautious before using social media or the internet to research cases, attorneys, parties or potential jurors. For a full discussion, see recent ABA Formal Opinion 478 (Dec. 8, 2017) (citing, *inter alia*, Rule 2.9(C) of the Model Code of Judicial Conduct, which prohibits online research and information gathering about a juror or party)..

38. As stated by the Gwinnett County Chief Magistrate Judge in accepting the resignation of one of the judges discussed above: "My decision to accept Judge [ ]'s resignation is not a comment on his personal opinions; he is entitled to those, . . . While, thankfully, our Constitution protects the right of all citizens to express their opinions, Judges are held to a more stringent standard by the Judicial Canons." T. Estep, Gwinnett Judge Resigns After Controversial Confederate Monument Posts, The Atlanta Journal-Constitution, www.ajc.com/news/local-govt-politics/gwinnett-judge-resigns-after-controversial-confederate-monument-posts/eO1o7wMa0zUNoa7IGz4YZK/ (online, Aug. 16, 2017).

Estate Planning and Will Drafting in New York

Revised 2017

Estate planning is a diverse, challenging and sophisticated area of practice that requires the technical skills of a tax attorney; a strong understanding of business, real property and decedents' estates law; and the sensitivity and caring of a personal adviser. Estate planning is much more than mere will drafting—it is a well-recognized specialty that is a prominent part of the legal profession.

Written and edited by experienced practitioners, this comprehensive book is recognized as one of the leading references available to New York attorneys involved with estate planning. The step-by-step coverage is a great resource for novice as well as experienced practitioners. Especially useful are many "real world" examples, practice tips and sample forms. Includes downloadable forms.

EDITOR-IN-CHIEF & PRODUCT INFORMATION

Michael E. O'Connor, Esq.
Costello Cooney Fearnon PLLC, Syracuse, NY

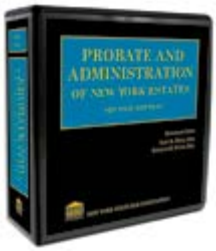
Book with Downloadable Forms
PN: 4095C | **NYSBA Members $185** | Non-Members $220

E-Book with Downloadable Forms
PN: 4095CE | **NYSBA Members $185** | Non-Members $220

Revision for Past Purchasers
PN: 50957 | 2017 Revision | **NYSBA Members $130** | Non-Members $150

Probate and Administration of New York Estates

Second Edition, Revised 2017



This comprehensive, practical reference covers all aspects of probate and administration, from the preparation of the estate to settling the account.

Probate offers step-by-step guidance on estate issues, detailed appendixes, sample forms and checklists. Of particular note in this edition are chapters on federal and New York estate tax, and fiduciary income-tax planning.

Probate is written and edited by experienced attorneys from across New York State, whose expertise is invaluable to novice and experienced practitioners alike. Periodic updates will make *Probate and Administration of New York Estates* the first reference you turn to when handling an estate.

EDITORS-IN-CHIEF & PRODUCT INFORMATION

Gary R. Mund, Esq., New York, NY
Douglas H. Evans, Esq., Sullivan & Cromwell, New York, NY

PN: 40054 (Print) | 2017 | 1,096 pages | looseleaf
PN: 40054E (E-Book) | 2017 | 1,096 pages | PDF
NYSBA Members $185 | Non-Members $220

Revision for past purchasers
PN: 50058 | 2017 Revision | **NYSBA Members $125** | Non-Members $150

To order call **1.800.582.2452** or visit us online at **www.nysba.org/pubs**

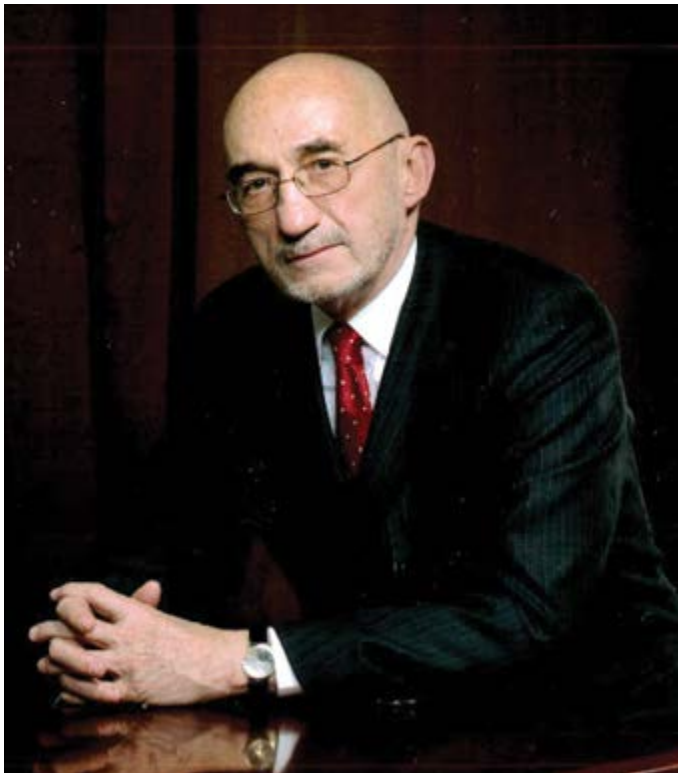
Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total. Prices do not include applicable sales tax.

Mention code: PUB8946 when ordering.

NYSBA

One for the Ages

I met Dick Farrell[1] (I never heard anyone who knew him call him Richard) in 1997 on an interminable Amtrak journey to Buffalo[2] for a bar association program. We got to talking, and over the course of the next 11 or so hours he updated me on Albany politics, told me tales of the Moors in Spain, and gave me one of the best tips I ever heard for warming up an audience in a faraway place like Buffalo. "When you get into town, go to a newsstand in the downtown area, buy a couple of postcards of local sights and attractions, and work those places and people into your lecture."[3] The next day I set the scene for a case I was discussing by describing an automobile accident at the intersection of William and Ogden Streets (having eaten earlier at the aptly named "Billy Ogden's").



Professor Richard T. Farrell of Brooklyn Law School, author of the Eleventh Edition of **Prince Richardson on New York Evidence**, *former clerk to Court of Appeals Judge John F. Scileppi, and full-time faculty member of the law school from 1964–2014, teaching both New York Practice and Evidence.*

Over time, he taught me the pedagogical benefits of good storytelling, relatable quotes, and, of course, humor. No one who heard him lecture will ever forget the rules and practice techniques illuminated by "Me, Doctor," "not for the gifted," or my favorite, the beta wolf (attorney) approaching the alpha (judge), sideways and with enough of his backside visible to make clear he posed no threat.

We repeated the Buffalo trip a number of times and visited other cities throughout the Empire State, becoming friends and, eventually, great friends. I loved his voice, so Brooklyn, and the way he would give a raspy "yeah, yeah, yeah, yeah" when he agreed with something you said. I learned that he somehow managed to be inducted into both the Army and the Marines, and was honorably discharged from both. He was proud of his time in the Marines, but in a quiet, not "Hoorah" kind of way.

Never once did he mention to me his cases in the U.S. Supreme Court or N.Y. Court of Appeals, but no visit passed without hearing about his wife Carol, four sons, countless grandchildren, or the annual Farrell Family vacations to Long Beach Island.

When I visited him at Brooklyn Law School, it was mandatory to eat at Caffe Buon Gusto on Montague Street, a journey of a few blocks that took 20 to 30 minutes to navigate as judges, lawyers, and students stopped to greet him. Walking into the restaurant was like walking into "Cheers" with Norm.

I can attest that he kept his promise to several generations of Brooklyn Law School students: they could call him if they were ever stumped in practice; he took more than one of those calls when I was with him.

He patiently explained the difference between the Jesuits (Fordham) and the Vincentians (St. John's). On a trip to the Culinary Institute of America last summer to celebrate his 80th birthday, in the five minutes it took to walk from the parking garage to the restaurant, I learned about the Native Americans resident when the Europeans arrived, the architecture of the campus, and something (I can't remember what) about collard greens (the CIA uses various vegetables in its decorative plantings). I wish I had written it all down.

After programs at the City Bar we would cross the street to the lobby bar in the Algonquin, and it was easy to imagine him sitting at Dorothy Parker's Round Table.

He made me want to read more, travel more, think more.

When I called and he recognized my number he would always answer "Davey Darling," and no matter how gray my hair got he always called me "kid." He always had time to talk, and was generous in so many ways. Last fall I received a book in the mail, *Atlas Obscura*, and when I called to thank him he said be sure to look up "Toki Pona."[4]

From him I learned to love great hotels, and count as my favorite The Planters' Inn in Charleston, South Carolina. Soon I will be traveling to Rome (Italy, not New York), and I was looking forward to talking with him before leaving so I could learn 10 interesting but little known facts about the Roman Empire, as well as the best place to go for pasta.

I won't get that chance; he passed away on February 7, aptly surrounded by the family he could never stop talking about. It seems appropriate that the priest presiding at his funeral Mass was a victim of traffic in Borough Park and arrived a tad late, voicing hope in a merciful God because he parked at a fire hydrant in front of the church. I think Dick would have appreciated that.

He was whip smart, funny as hell, and because of a wonderful quirk of decrepit passenger rail service, my friend. I will miss him.

1. Professor Richard T. Farrell of Brooklyn Law School, author of the Eleventh Edition of Prince Richardson on New York Evidence, former clerk to Court of Appeals Judge John F. Scileppi, and full-time faculty member of the law school from 1964-2014, teaching both New York Practice and Evidence.

2. Amtrak was not the fast, modern, and efficient rail system it is today.

3. Remember the world before the internet?

4. That's right, you will have to look it up yourself.

David Paul Horowitz (david@newyorkpractice.org) is a member of Geringer, McNamara & Horowitz in New York City. He has represented parties in personal injury, professional negligence, and commercial cases for over 26 years. In addition to his litigation practice, he acts as a private arbitrator, mediator and discovery referee, and is now affiliated with JAMS. He is the author of *Bender's New York Evidence and New York Civil Disclosure* (LexisNexis), as well as the most recent supplement to *Fisch on New York Evidence* (Lond Publications). Mr. Horowitz teaches New York Practice at Columbia Law School and lectured on that topic, on behalf of the New York State Board of Bar Examiners, to candidates for the July 2016 bar exam. He serves as an expert witness and is a frequent lecturer and writer on civil practice, evidence, ethics, and alternative dispute resolution issues. He serves on the Office of Court Administration's Civil Practice Advisory Committee, is active in a number of bar associations, and served as Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee.

How Law Firms Can Prepare for Hurricanes and Other Extreme Weather

By Chris Owens

Following an unprecedented host of destructive hurricanes this year, many law firms are asking how they can prepare for the next one. Inclement weather can wreak havoc – flooding offices, damaging computers and servers, destroying paper records, and keeping attorneys from reaching their clients. Several days of lost data and billable hours, not to mention damaged facilities, mean big monetary losses.

Practitioners and firms can protect themselves with a range of preparations, depending on how much they are willing to invest in them and on whether they are steeling themselves for a hypothetical storm or for one forecast for the next day.

PLANNING AHEAD: BC/DR

In the legal IT industry, such preparations are called the BC/DR (Business Continuity and Disaster Recovery) technology strategy, which refers to the two main aspects of a plan for extreme weather or other highly disruptive events – a strategy to both stay operational during the storm as well as recover any processes impacted by the event. (Your BC/DR plan is different from the administrative one, which documents where people should go, who declares a disaster, phone trees, operational control, etc.)

Two metrics dictate the development of the BC/DR plan, Recovery Time Objective (RTO) and Recovery Point Objective (RPO). These are, respectively, the maximum amount of time a firm can tolerate being without services and the maximum amount of data that can be lost, usually defined for individual business systems, such as messaging or conflict checking. The ideal metric for each of these is, naturally, zero. It used to be that the closer you wanted to get to zero, the more you had to spend, typically exponentially. Four hours was a common compromise that many firms made for critical systems (that is, four hours without access to systems and four hours of data lost), but recent technological advances have made it possible to get to almost zero loss and minimal outage, even for boutique firms.

Having backups of your data is imperative to the DR portion of your BC/DR strategy. Before the advent of modern solutions, this was accomplished by sending backup tapes offsite. Typically, someone would be deemed responsible for sending it off weekly or even daily with services like Iron Mountain. With contingencies like illnesses and holidays, this was a logistical pain and at best carried a 24-hour RPO with potential RTOs of several days.

To overcome the 24-hour RPO associated with tape recovery from a site-level failure, firms realized they needed to store data sets in a second location and update as frequently as possible. Once a service for only the largest law firm budgets, pricing for storage, network bandwidth and collocation has dropped significantly, allowing all firms to enjoy this protection. As continuous data protection systems developed, not only did the replica data sets serve as a disaster recovery option, but they also replaced traditional backup functions. Today, hardly any firms use tape backups and archiving directly to disk is commonplace.

With RPO commonly approaching zero, firms started to emphasize reduction of RTO, particularly for critical systems like email and documents. Having a data bunker for mitigating RPO was much more cost effective than buying duplicate servers, switches, and software ready to take over production services at a moment's notice. Buying those systems during a disaster could prove problematic and certainly did not decrease RTO. Again, the privilege of having the level of technology and automation to drive down RTO was enjoyed by only the largest of firms.

Enter the cloud service provider and the opportunity to provide BC/DR protections with an operating expense rather than a large capital one. The cloud now makes it possible to back up data continuously as well as spin up environments quickly in the event of a disaster. Zerto, for example, works with virtualized environments such as VMware or Hyper-V to perform near synchronous replication to cloud providers like Microsoft Azure and Amazon Web Services, allowing recovery costs to be on-demand and consumption-based. This pushes RTO down from days or hours to minutes. You can also choose

to replicate to regional cloud solution providers that are part of the Zerto solution partner program.

Alternatively, many law firms practice disaster avoidance, choosing to move their primary IT infrastructure offsite to a colocation facility specializing in 24/7/365 operations (among other reasons such as saving space, streamlining maintenance, and saving on cooling and power costs). For example, if your office is in a city – one beset with construction, poor electric grids, faulty fiber connections, and water options – or somewhere else prone to disruption, such as a coastal zone, a collocation will mitigate chances of an outage. Even if the colocation facility is close to your main site, it is still better equipped to deal with an event that would take down systems in commercial buildings. Manhattan colocation centers stayed running during Hurricane Sandy while the firms with on-premises data centers suffered.

Many of us are moving to the cloud entirely with services like Office 365, in which case the question of disaster recovery and data center locations is moot. Continue to do your research, and don't forget to test your plan. If you do not trust it to work when you need it, you may not even use it when the time comes.

If you do rely on paper files – and a surprising number of offices still do – the advice is less technical. Keep them high. That is, not in the basement, even if you are not in a flood-prone area, and off the floor. When helping law firms set up, we usually put servers and important files about six inches off the floor. You could also start scanning, digitizing, and backing up your files. Aside from hurricane prep, this is generally a good idea. Companies like Iron Mountain can also store your paper files in a secure area for you.

DAY-OF PLANNING FOR IT

Once the news stations start their frantic coverage of an impending hurricane, it is too late to put in place a comprehensive plan and test it. But there are some actions that may minimize the toll of the storm on your business.

First, remind your laptop users to bring their laptops with them in the event they are under an evacuation order. With data center systems up and a working internet connection, the user experience for those with laptops will likely be unaffected, meaning that business is largely unaffected. In addition, ensure other remote access solutions are working properly. Firms that use Citrix, VMware or Microsoft remote access solutions extensively on a daily basis won't need to worry about this. However, many firms only rely on them for the occasional person who needs to work from home. These firms need to ensure that the systems are patched, up to date, scalable to support an influx, and that everyone knows how to use them. You can have the most robust and redundant remote access system, but if nobody knows how to connect to Citrix, it will not be very useful on the day it is most needed.

Know your limits. Many remote access solutions are designed for a specific capacity and may have limits on concurrent licensing. Don't tell 100 users that they can all go home and work from Citrix if you only have 20 concurrent licenses. In the short term, you'll have to deal with the licensing limitations, but for the long term, you should purchase licenses for however many people you want to connect. Also, check that your systems are physically capable of supporting the extra load. Just because you have 100 licenses to support 100 concurrent users does not mean that a single XenApp server with limited RAM will be able to handle it. Some quick things that can be done include augmenting the Citrix farm or adding extra memory to virtual Citrix servers, or increasing the number of total virtual desktops if a Virtual Desktop Infrastructure (VDI) system is used.

TIPS FOR ATTORNEYS AND NON-IT STAFF

Emails from IT routinely get ignored in the inbox in favor of other matters that seem more pressing. It is especially important to read these emails while preparations for inclement weather are underway. Everything may be in place for you to work smoothly, but you may find yourself clueless on the day of, if you haven't been following announcements. And then all your emails, from IT as well as from clients, will be in danger of going unread. Your firm may revert to backup systems if the main infrastructure is affected, for example, and you will need to know how to access them in advance. It may require going to a specific website, enrolling and creating a new password, or some other deviation from routine.

Make sure you know how to use Citrix or whatever your firm uses for remote access before you need to log in. Ask IT any questions you have before the storm hits. Some telephone systems support making and receiving phone calls through your computer or mobile device. If this is available to you, make sure you have a headset and know how to use it. It's also a good idea to have a physical printout of contact information for all staff, or at least critical contacts like IT and management.

If you have a laptop, bring it home with you. Don't forget the power cord.

Chris Owens is the Chief Technology Officer at Kraft Kennedy and leads the Enterprise Client Systems Group from Kraft Kennedy's Houston office. With more than 15 years of technology and management consulting experience, Chris has advised law firms of all sizes. He is an expert in server and storage consolidation, disaster recovery and business continuity, email messaging design and migration, document management, and thin-client architecture. LinkedIn: www.linkedin.com/in/christophermowens. Twitter: @KraftKennedy. Blog: www.kraftkennedy.com/blog/.

A CYBERSECURITY GUIDE *FOR ATTORNEYS*

Lawyers must keep abreast of the risks associated with managing technology and sensitive information, taking steps to safeguard themselves, their firm and their clients. "Cyber-criminals have begun to target lawyers to access client information, including trade secrets, business plans and personal data. *Lawyers can no longer assume that their document systems are of no interest to cyber-crooks*."[1]

Here are some ways to protect yourself, your firm and your clients:[2]

PROTECT FIRM COMPUTERS AND NETWORKS

Install security and antivirus software that protects against malware or malicious software on mobile devices and computers used within the firm or accessed from outside the office. Secure electronic communications as appropriate, through passwords or encryption, as well as the transmission of data stored in the cloud, ensuring secure "cloud" storage. Scrub "metadata" from electronic communications. Also, use a firewall program to prevent unauthorized access.

REQUIRE STRONG AUTHENTICATION

Ensure that users accessing your firm's network create strong user IDs and passwords/passcodes for computers, mobile devices and online accounts. Make sure users are accessing official websites when entering passwords/passcodes using a mix of upper and lowercase letters, numbers, symbols and/or long, uncommon phrases. Differentiate passwords/passcodes on devices and/or accounts, changing them regularly in order to maintain passwords/passcodes in a secure manner. Be sure to never provide your passwords/passcodes to others.

PROVIDE FIRM EDUCATION

Establish security practices and policies for all firm employees. Monitor employees and enforce best practices pertaining to internet usage guidelines for mobile devices, internet usage, email and social media. Do not update software and apps unilaterally; instead, updates should be done after inquiry to the responsible individual or department. Identify an individual/department responsible for the above monitoring and advise all firm employees of the need to update devices upon consultation with appropriate personnel at the firm.

ACCESS INFORMATION ON SECURE INTERNET CONNECTIONS

Connect to the internet using only secure wireless network connections to ensure a private connection, such as a VPN. Public internet provided at airports, hotels and/or internet cafes may not be secure.

SUSPICIOUS EMAILS, ATTACHMENTS AND UNVERIFIED APPS/PROGRAMS

Be suspicious of opening, forwarding or responding to unsolicited emails and attachments or links from unknown sources and be sure to charge phones on reliable USB ports. Do not download apps/programs from unverified sources to your computer or mobile devices, especially apps/programs that have access to contacts or other information on your mobile devices. Log out of apps/programs instead of simply closing the internet browser. And avoid file sharing services.

SOFTWARE UPDATES

Software vendors regularly provide patches and/or updates to their products to correct security flaws and improve functionality. Ensure timely patches and antivirus software updates are installed in all devices.

1. NYSBA Comm. on Prof'l Ethics Op. 1019 (Aug. 6, 2014) (emphasis added).

2. This content is part of a brochure available for download on the NYSBA website at www.nysba.org/nysbacyber.

NEW YORK STATE BAR ASSOCIATION

Artificial Intelligence Webinar Series

Wednesday, March 21, 2018 – **What Is Artificial Intelligence ("AI")? How Does It Work? What Are the Potential Implications of AI in General, and for Your Practice?**
1.0 MCLE Credit in Professional Practice

Wednesday, April 18, 2018 – **The Growing Use of Artificial Intelligence Applications in the Legal Profession and Their Potential Impact on Your Practice**
1.0 MCLE Credit in Professional Practice

Wednesday, May 16, 2018 – **Artificial Intelligence and Data Privacy/Protection: Big Data, U.S. Data Privacy Laws, and the EU General Data Protection Regulation**
1.0 MCLE Credit in Professional Practice

Wednesday, June 20, 2018 – **Artificial Intelligence ("AI") and Legal Ethics: How the Rules of Professional Conduct Bear on the Use of AI in Your Legal Practice**
1.0 MCLE Credit in Ethics

All webinars scheduled for 1:00 p.m. - 2:00 p.m.

This series is comprised of four one-hour lunchtime CLE programs. Register for any one at $75 per program, or register for all four programs for $200 and save $25 a program.

Learn more at **www.nysba.org/AIWebinarSeries**

Sponsored by the Committee on Technology and the Legal Profession.

NYSBA

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

To the Forum:

I'm a personal injury attorney practicing at a boutique law firm that offers legal services across multiple specialties, including financial services, intellectual property, and trusts and estates (just to name a few). Recently, and very sadly, a friend from law school – who was also a personal injury attorney, but with a solo practice – passed away. Through the years, we kept in touch personally and professionally and would occasionally reach out to one another for advice on particular issues. Unbeknownst to me, before he died, my friend informed his secretary that he wanted to refer two of his cases to me. The secretary in turn gave the clients my name and information, and they contacted me to discuss taking over their cases. I'm still in the process of clearing conflicts and evaluating how far each case has progressed. In one of the matters, my friend had conducted a preliminary investigation and gathered some medical records, but had not yet filed the lawsuit. I'm still not sure how much work was done in the other matter. In any event, my friend and I did not have a referral or fee-sharing arrangement, and nothing was written in his will – it was just his verbal instruction to his secretary. If I accept either of these cases, should I pay a referral fee to my friend's estate for the matters I accept? Or, if I determine that I cannot accept these cases and pass them on to a third attorney, can I accept a referral fee?

While I'm on the topic of wills and estates, there's another question I'd like to ask *The Forum*. A physician I regularly consult and use as an expert in my practice asked me if my firm's trusts and estates group would draft a will for him and his wife. Assuming that the trusts and estates attorneys draft the will, if I use this doctor as an expert in a future case, will I be required to disclose my firm's representation of him as a client? Will that disqualify him?

Sincerely,
May B. Fee

Dear May B. Fee:

Unfortunately, the death of a colleague or business partner is something many of us will have to deal with during our careers. When the time comes, there are certain professional and ethical considerations to bear in mind.

Rule 7.2(a) of the New York Rules of Professional Conduct (RPC) provides that a lawyer may not pay a fee for the referral of business (although certain exceptions apply, which we have previously discussed (*See* RPC 7.2(a); Vincent J. Syracuse, Maryann C. Stallone & Carl F. Regelmann, Attorney Professionalism Forum, N.Y. St. B.J., March/April 2017, Vol. 89, No. 3). RPC 7.2(a) specifically provides that "[a] lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client." However, RPC 1.5(g) *does allow lawyers* to divide legal fees between themselves and other lawyers not associated in a firm as long as the total fee is not excessive, the client acknowledges the division of payments in writing, and the division is either proportionate to the work performed by each lawyer or the lawyers assume joint responsibility for the representation in writing. *See* RPC 1.5(g).

There is another exception under RPC 5.4(a)(2) which provides for the sharing of legal fees. While RPC 5.4(a) generally prohibits lawyers from sharing legal fees with non lawyers, subparagraph (a)(2) allows a division of fees between a lawyer who completes the work of a deceased lawyer and the *estate* of the deceased lawyer. RPC 5.4(a)(2) specifically states: "[A] lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer."

The RPC are somewhat vague when it comes to the logistics of assuming a deceased lawyer's case. RPC 1.4 offers some guidance and requires an attorney to explain a matter to the extent reasonably necessary to

permit the client to make informed decisions regarding the representation. The New York State Bar Association Committee on Professional Ethics ("Committee") has interpreted this rule to require the attorney left in charge of the matter to inform the deceased lawyer's clients that they are free to choose any lawyer to represent them and to have copies of the file with respect to the matter. *See* NYSBA Comm. on Prof'l Ethics, Op. 1128 (2017). This is consistent with RPC 1.17(c), which requires that a joint written notice from the buyer and seller be given to a law firm's clients when that law firm is sold, advising, the clients that they may seek other representation and collect their case file.

Based on the facts you describe, RPC 1.5(g) does not apply; under RPC 1.5(g), the client must first consent to the arrangement, including the division of fees between the attorneys, and that consent must be in writing. *Id.* Because you stated that you and your friend did not have a fee-splitting or referral arrangement, the prerequisites of RPC 1.5(g) are not met. At best, because the "referring" attorney (your friend) is deceased, you would be sharing the fee with his estate, which is, by definition, a "non-attorney." Therefore, RPC 1.5(g) does not apply here. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 210 (2016 ed.)

We believe your question is answered by RPC 5.4(a)(2), cited above, which tells us that you may – but are not obligated to – pay to your friend's estate "either a fair proportion of the contingent fee at the conclusion of the matter or a *quantum meruit* payment at any time, before or after the matter is concluded." NYSBA Comm. on Prof'l Ethics, Op. 1128 (2017), quoting Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1424 (2016 ed.). Therefore, should you take over the matter in which your friend did some work before his death, you may pay his estate an amount commensurate with the work he completed. On the other hand, if you assume the case in which your friend had not yet done anything, you may *not* pay his estate any portion of the fees, since this would constitute improper fee-sharing with a non-lawyer in violation of RPC 5.4(a). It is important to note that RPC 5.4(a)(2) allows you to pay the "estate" of the deceased lawyer but not his individual family members. Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1424 (2016 ed.).

Finally, should you decide not to take either of the matters your friend left you before he passed, and instead decide it is best to refer one or both to another lawyer, you may receive a share of the fees so long as you and the successor attorney comply with the mandates of RPC 1.5(g) discussed above. *See* NYSBA Comm. on Prof'l Ethics, Op. 1128 (2017). As the Committee noted, it would be helpful if there was more guidance on succession planning for sole practitioners in the RPC or in court rules which would assist attorneys and clients when an attorney passes away. *Id.*; *see also* Vincent J. Syracuse, Maryann C. Stallone & Carl F. Regelmann, *Attorney Professionalism Forum*, N.Y. St. B.J., January 2017, Vol. 89, No. 1 (addressing the unraveling of files of a deceased solo practitioner).

Moving on to the dilemma with your expert (and potential new client), RPC 1.7(a) provides that "a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." "Differing interests," a term defined by RPC 1.0(f), means "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest."

This is an issue that we covered in prior Forums (Vincent J. Syracuse, Amanda M. Leone & Carl F. Regelmann, *Attorney Professionalism Forum*, N.Y. St. B.J., November/December 2017, Vol. 89, No. 9; Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., February 2015, Vol. 87, No. 2). Attorneys owe duties of loyalty and independent judgment to their current clients. A conflict of interest may undermine and

impair a lawyer's loyalty or ability to exercise independent judgment on behalf of a client. The comments to RPC 1.7 establish that resolution of a conflict of interest first requires a lawyer "to identify clearly the client or clients," and, second, "determine whether a conflict of interest exists, *i.e.*, whether the lawyer's judgment may be impaired or the lawyer's loyalty may be divided if the lawyer accepts or continues the representation." RPC 1.7 Comment [2]. Comment 8 to Rule 1.7 clarifies that the "mere possibility of subsequent harm does not itself require disclosure and consent." Rather, the critical inquiry is "the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." RPC 1.7 Comment [8].

The Committee recently opined on a predicament similar to the one you face. In NYSBA Comm. on Prof'l Ethics, Op. 1140 (2017), the Committee determined that drafting a will for an individual that the inquiring attorney occasionally uses as an expert witness "is not discordant with the firm's concurrent representation of clients whom the service provider treats and on whose behalf the service provider may testify." In that specific situation, the law firm already represented patients of the expert physician in workers compensation matters. The Committee went on to explain that the legal services solicited by the expert (drafting a will) does not necessarily implicate "differing interests" and was not factually or legally related to the claims of the firm's other clients (i.e., workers compensation claims). *See id.* The Committee affirmed that "[n]o reason emerges to suppose that drafting of estate documents for [the expert] will adversely affect the firm's professional judgment in representing any other current client (unless the [expert's] testamentary plans affects one of the [current clients] – a situation we imagine would rarely if ever arise)." *Id.*

Therefore, it is not enough that there exists a "mere possibility" of a future conflict between the firm's existing clients and the expert witness – that alone "does not require disclosure and consent from the respective clients." *Id.* Speaking specifically to any "significant risk" potentially presented by the concurrent representation, the Committee stated that "[n]either the law firm's interest in receiving its routine fee for drafting wills or any follow-on work, nor its longstanding social relationship with the [expert], poses a 'significant risk' of impairing the lawyer's ability to exercise professional judgment on behalf of its clients . . . so as to engender a 'personal interest' within the meaning of Rule 1.7(a)." NYSBA Comm. on Prof'l Ethics, Op. 1140, citing NYSBA Comm. on Prof'l Ethics, Op. 901, n. 3 (2011) (concurrent representation of a corporation on business matters and of a corporate officer in acquiring a summer home in which the corporation has no stake does not constitute a personal interest conflict).

Moreover, the Committee noted that nothing in the Rules requires a lawyer to disclose that he or she has represented one of his or her expert witnesses unless expressly asked. When an existing client or opposing counsel inquires about any relationships between the law firm and the expert witness, however, the attorney has an affirmative obligation to give a truthful response pursuant to RPC 4.1 (a lawyer "shall not knowingly make a false statement of fact" to a third person). *Id.* Even if the need to respond is triggered by such an inquiry, however, the obligation to be truthful is subject to the confidentiality constraints of RPC 1.6(a), which may require the expert witness's consent. *Id.* This is especially true when the nature of the representation concerns estate planning, which is often a sensitive subject. *Id.*

When an inquiry comes from the court, however, attorneys have different disclosure obligations. Should a tribunal ask about any prior-existing relationship between the expert witness and the lawyer or law firm, the lawyer must be forthcoming about any attorney-client relationship with the expert, and, if necessary, correct any misstatements or false statements made by his or her witness. *See* NYSBA Comm. on Prof'l Ethics, Op. 1140; RPC 3.3(a)–(b) (an attorney "shall not make a false statement of fact" to a tribunal, and must take "reasonable remedial measures" if the lawyer comes to know that a witness offered by the lawyer has testified falsely). If the expert witness does not disclose his or her relationship with the attorney or otherwise lies about it, the confidentiality safeguards of RPC 1.6(a) yield to RPC 3.3(a)–(b) which "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." NYSBA Comm. on Prof'l Ethics, Op. 1123 (2017) (noting that the obligation to disclose confidential information may be necessary to correct false information submitted to a tribunal). Notwithstanding the above rules regarding confidentiality and candidness before the tribunal, however, there is no obligation for you to voluntarily disclose that your law firm provided estate planning services to your expert witness and his wife unless you are asked.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com)
Amanda M. Leone, Esq.
(leone@thsh.com) and
Carl F. Regelmann, Esq.
(regelmann@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

My firm recently began providing *pro bono* services for a not-for-profit organization that assists individuals with mental health issues. In most of the cases we have handled, we had an immediate impact, the work was extremely gratifying for the attorneys, and the clients were thrilled to receive assistance. Recently, however, we began representing one individual in a criminal matter where we have faced significant communication issues. Although the client receives treatment for his mental health issues, this client has become aggressive on occasion, is often non-responsive, and has occasionally been verbally abusive to the attorneys on the case. The attorneys in my firm are becoming frustrated because they are trying to act professionally, but are concerned that they are not getting through to the client and, on occasion, are fearful of the client.

I thought that if I placed some limitations on the client's communications with our attorneys, it might resolve some of these issues. For example, we could inform the client that his communications with us are limited to pre-arranged meetings or calls. If that doesn't work, I might possibly limit communications outside the courtroom only to writing. Although I think this might help the situation, and still allow us to provide competent legal advice, I don't want to run afoul of my ethical obligations to the client. Is it acceptable to place limitations on communications with our own client? I think that if I had some assistance from a staff member at the organization we are working with in future client meetings, it might also help. But I am concerned about waiving attorney-client privilege. In the event that I can't resolve the communication issues, is there any reason we can't withdraw as counsel? Are there any other ethical issues our firm should consider when providing legal services to individuals with mental health problems going forward?

Sincerely,
Mo Bono

NEW YORK STATE BAR ASSOCIATION
Online Publications
In Partnership with Fastcase
NYSBA

Already a NYSBA member with free access to Fastcase legal research?

Upgrade now to also access NYSBA Online Publications Library on the Fastcase database.
Visit **www.nysba.org/fastcase**

With a subscription to the NYSBA Online Publications Library, you can browse or search NYSBA legal publications, such as the complete award-winning Practical Skills Series, and quickly link to the cases and statutes cited through Fastcase. In addition to traditional legal research, attorneys will enjoy online access to over 60 practice-oriented professional publications covering many different areas of practice. The NYSBA Online Publications Library is not available on any other online platform.

Get the complete NYSBA Online Publications Library and enjoy exclusive members-only savings that will more than cover your membership dues. And, your annual subscription includes all updates during the subscription period to existing titles as well as new titles – at no extra cost! Subscriptions to individual titles are also available.

A member subscription is a fraction of the cost of the complete hardbound library. For more information visit www.nysba.org/fastcase.

Not yet a NYSBA member?

Join now at **www.nysba.org/whynysba**

"I Spy, With My Little Eye"

As a "yoot," a term coined by that lawyer's lawyer, Vincent LaGuardia Gambino, I was always intrigued by iSpy books. I can remember spending hours of the day attempting to find various thimbles, jacks, buttons, etc. I never would have thought that as an adult I would again be utilizing my iSpy skills, this time in law school. While

I am not looking at colorful pictures, I am searching through cases hunting for a few key points: the legal issue presented and the applicable legal rule. I still find this task to be difficult, a year and a half into my law school career. It seems every case I read is convoluted with various legal issues and facts and key points of that legal analysis. The real meat and potatoes of the case can get lost in a sea of words. I approach every case as if I am looking for Moby Dick. While spotting a big white whale in a dark blue ocean sounds easy, that ocean is immense and teeming with similar looking whales swimming around. In a year and a half, I have built a sturdy vessel and solid harpoon aim, but boy can that crafty whale be elusive.

Hopefully my current professors are not reading this, but this semester, my favorite class is Environmental Ethics. Naturally, I enjoy my other courses and professors as well (you guys are great!), but this class is truly fascinating. With a focus on discussion, as opposed to case law recitation, the course has truly gotten me to think "outside of the box." Meeting once a week, the two-hour sessions pass in the blink of an eye. You know something interests you when you aren't peering up at the clock every 10 minutes, wondering how it hasn't been the 45 minutes you could have sworn it felt like. Last week's discussion centered on climate change, and the notion of climate change "winners" and "losers." The thought of there being beneficiaries of climate change never occurred to me. But when you consider it, the idea makes sense. Think: Alternative energy companies, property owners, pharmaceutical companies. These are a few of the significant list of potential "winners" that stand to benefit from climate change. Without this class, my thoughts on climate change would not have extended beyond warming temperatures, increased water levels, and population displacement.

As I write, the Barrister's Ball lies on the horizon. It's an annual event at the law school that gives students an excuse to dress up, eat some delicious hors d'oeuvres, and consume alcohol – or, as my friends and I like to call it, "adult sodas." Surprising myself and, no doubt, my parents, I will be bringing a date to the Ball. Just to clear the air, she is neither invisible, nor is she being paid to accompany me. Success! As an added bonus, I'll be taking my first ever spring break trip down to Florida in March to visit the historic city of St. Augustine. It is nice to have Balls and breaks to look forward to, especially with midterms looming just over the horizon.

Lukas M. Horowitz, Albany Law School Class of 2019, graduated from Hobart William Smith in 2014 with a B.A. in history and a minor in political science and Russian area studies. Following graduation, he worked for two years as a legal assistant at Gibson, McAskill & Crosby, LLP, in Buffalo, New York, and with the New York Academy of Trial Lawyers hosting CLE programs. Lukas can be reached at Lukas.horowitz@gmail.com.

NEW YORK STATE BAR ASSOCIATION

Update Your Member Profile

You're a criminal defense attorney – so why are you getting emails about trusts and estates CLEs?

Or, you work in public service. Why are you being urged to buy books on marketing your law firm?

The answer is simple:
we don't know your area of practice.

And the solution is simple:
update your member profile.

Our goal is to send you the content and news you need, when you need it – no more, no less.

Help us serve you better.
Update your member profile.
www.nysba.org/myprofile

TO ADVERTISE WITH NYSBA, CONTACT:
Network Media Partners
Attn: Holly Klarman, Account Executive
307 International Circle, Suite 190
Hunt Valley, Maryland 21030
hklarman@networkmediapartners.com
410.584.1960

MARKETPLACE DISPLAY ADS:
$565
Large: 2.22" x 4.44"

Please go to nysba.sendmyad.com to submit your PDF file.

Payment must accompany insertion orders.

Follow NYSBA on Twitter

Stay up-to-date on the latest news from the Association

www.twitter.com/nysba

HEADQUARTERS STAFF EMAIL ADDRESSES

Executive

Pamela McDevitt
Executive Director
pmcdevitt@nysba.org

Executive Services
Kathleen R. Mulligan-Baxter, General Counsel
kbaxter@nysba.org

Member Outreach & Development

Mark Wilson, Bar Services Specialist
mwilson@nysba.org

Patricia K. Wood, Associate Director, Attorney Engagement and Retention
pwood@nysba.org

Marketing and Communications

Dan Weiller, Managing Director of Marketing and Communications
dweiller@nysba.org

Adam Rossi, Director of Marketing
arossi@nysba.org

Christina Couto, Editor, State Bar News
ccouto@nysba.org

Joan Fucillo, Senior Messaging & Communications Specialist
jfucillo@nysba.org

Design Services

Web Site
Brandon Vogel, Social Media and Web Content Manager
bvogel@nysba.org

MIS & Content Management

Jason Nagel, Managing Director of IT Services
jnagel@nysba.org

Jeffrey Ordon, IT Operations Manager
jordon@nysba.org

Lucian Uveges, Applications Development Manager
luveges@nysba.org

Member Resource Center
Jeremy Knickerbocker, Manager
jknickerbocker@nysba.org

Publications
Daniel J. McMahon, Director
dmcmahon@nysba.org

Kathryn Calista, Senior Publications Attorney
kcalista@nysba.org

Kirsten Downer, Research Attorney
kdowner@nysba.org

Print and Facilities Operations

Gordon H. Ryan, Senior Director
gryan@nysba.org

Building Maintenance

Graphics

Print Shop
Donald Gardinier, Print Production Manager
dgardinier@nysba.org

Governmental Relations

Ronald F. Kennedy, Director
rkennedy@nysba.org

Kevin Kerwin, Deputy General Counsel
kkerwin@nysba.org

Continuing Legal Education

Katherine Suchocki, Senior Director of CLE & Law Practice Management
ksuchocki@nysba.org

CLE Programs
Patrick Boland, CLE Program Manager
pboland@nysba.org

Sally Bratten, CLE Program Attorney
sbratten@nysba.org

Jessica Patterson, CLE Program Manager
jpatterson@nysba.org

Thomas Richards, CLE Program Attorney
trichards@nysba.org

Cindy O'Brien, CLE Event Manager
cobrien@nysba.org

Section and Meeting Services
Patricia B. Stockli, Director
pstockli@nysba.org

Lisa J. Bataille, Chief Section Liaison
lbataille@nysba.org

Finance

Kristin M. O'Brien, Senior Director
kobrien@nysba.org

Amira Rizvanovic, Controller
arizvanovic@nysba.org

Legal and Community Services

Stacey Whiteley, Managing Director of Legal and Community Services
swhiteley@nysba.org

Minika Udoko, Diversity and Inclusion Specialist
mudoko@nysba.org

Law, Youth and Citizenship Program
Kimberly Francis, LYC Program Specialist
kfrancis@nysba.org

Lawyer Assistance Program

Lawyer Referral and Information Service
Eva Valentin-Espinal, LRS Specialist
evalentin@nysba.org

Pro Bono Services
Kristen Wagner, Director
kwagner@nysba.org

Human Resources

Paula M. Doyle, Senior Director
pdoyle@nysba.org

The New York Bar Foundation

Deborah Auspelmyer, Foundation Executive
dauspelmyer@tnybf.org

the NEW YORK BAR FOUNDATION

2017-2018 OFFICERS
John H. Gross, *President*
Hauppauge
Lesley Rosenthal, *Vice President*
New York
Pamela McDevitt, *Secretary*
Albany
Lucia B. Whisenand, *Assistant Secretary*
Syracuse
Martin Minkowitz, *Treasurer*
New York

DIRECTORS
Earamichia Brown, *New York*
June M. Castellano, *Rochester*
Honorable Cheryl E. Chambers, *New York*
Ilene S. Cooper, *Uniondale*
Donald C. Doerr, *Syracuse*
Hermes Fernandez, *Albany*
Marion Hancock Fish, *Syracuse*
Stephen D. Hoffman, *New York*
John R. Horan, *New York*
James B. Kobak, Jr., *New York*
Susan B. Lindenauer, *New York*
Roger Juan Maldonado, *New York*
Edwina Frances Martin, *New York*
Joseph V. McCarthy, *Buffalo*
Elizabeth J. McDonald, *Pittsford*
Ellis R. Mirsky, *Nanuet*
Carla M. Palumbo, *Rochester*
David M. Schraver, *Rochester*
Lauren J. Wachtler, *New York*

EX OFFICIO
Emily F. Franchina, *Garden City*
Chair of The Fellows
James R. Barnes, *Albany*
Vice Chair of The Fellows

THE NEW YORK BAR FOUNDATION

JOURNAL BOARD MEMBERS EMERITI

David C. Wilkes
Immediate Past Editor-in-Chief

Rose Mary Bailly
Richard J. Bartlett
Coleman Burke
John C. Clark, III
Angelo T. Cometa
Roger C. Cramton
Willard DaSilva
Louis P. DiLorenzo
Philip H. Dixon
Maryann Saccomando Freedman
Emlyn I. Griffith
H. Glen Hall
Paul S. Hoffman
Judith S. Kaye
Charles F. Krause
Philip H. Magner, Jr.
Wallace J. McDonald
J. Edward Meyer, III
Gary A. Munneke
John B. Nesbitt
Kenneth P. Nolan
Eugene E. Peckham
Albert M. Rosenblatt
Lesley Friedman Rosenthal
Sanford J. Schlesinger
Robert J. Smith
Lawrence E. Walsh
Richard N. Winfield

2017-2018 OFFICERS

Sharon Stern Gerstman
President
Buffalo

Michael Miller
President-Elect
New York

Scott M. Karson
Treasurer
Melville

Sherry Levin Wallach
Secretary
Cross River

Claire P. Gutekunst
Immediate Past President
Yonkers

VICE-PRESIDENTS

First District
Taa R. Grays, New York
Carol A. Sigmond, New York

Second District
Domenick Napoletano, Brooklyn

Third District
Henry M. Greenberg, Albany

Fourth District
Matthew R. Coseo, Gansevoort

Fifth District
Stuart J. LaRose, Syracuse

Sixth District
Alyssa M. Barreiro, Binghamton

Seventh District
David H. Tennant, Rochester

Eighth District
Norman P. Effman, Warsaw

Ninth District
Michael L. Fox, Huguenot

Tenth District
Peter H. Levy, Jericho

Eleventh District
Karina E. Alomar, Ridgewood

Twelfth District
Steven E. Millon, New York

Thirteeth District
Jonathan B. Behrins, Staten Island

MEMBERS-AT-LARGE OF THE EXECUTIVE COMMITTEE

Earamichia Brown
Margaret J. Finerty
Michael W. Galligan
Sarah E. Gold
Richard M. Gutierrez
Bryan D. Hetherington
Drew Jaglom
Elena DeFio Kean
Bruce J. Prager
Sandra Rivera
William T. Russell, Jr.

MEMBERS *of the* HOUSE *of* DELEGATES

FIRST DISTRICT
Aaron, Hon. Stewart D.
Abramson, Joel E.
†*Alcott, Mark H.
Alvarez, Janet
Berman, Mark Arthur
Billings, Hon. Lucy
Bloom, Allan S.
Brown Spitzmueller, Janiece
Brown, Earamichia
Chambers, Hon. Cheryl E.
Chang, Vincent Ted
Cheng, Theodore K.
Christian, Catherine A.
Cohen, Carrie H.
Connery, Nancy A.
Davis, Tracee E.
Ferguson, Gerald J.
Ferrara, Paul A.
Finerty, Margaret J.
First, Marie-Eleana
Foley, Jenifer J.
* Forger, Alexander D.
Freedman, Hon. Helen E.
Gallagher, Pamela Lee
Galligan, Michael W.
Gische, Hon. Judith J.
Goldberg Velazquez, Elena Molly
Goldfarb, David
Grays, Taa R.
†*Gutekunst, Claire P.
Hack, Jay L.
Haig, Robert L.
Hills, Bethany
Himes, Jay L.
Hoffman, Stephen D.
Hollyer, Arthur Rene
Jaglom, Drew
†*James, Seymour W., Jr.
Kiernan, John S.
Kiernan, Peter J.
Kiesel, Michael Thomas
* King, Henry L.
Kobak, James B., Jr.
Koch, Adrienne Beth
Krausz, Diane F.
Land, Stephen B.
†*Lau-Kee, Glenn
* Leber, Bernice K.
Lessard, Stephen Charles
Madden, Hon. Joan Anne
Mandell, Andrew
Maroney, Thomas J.
Martin Owens, Deborah
McNamara, Christopher James
McNamara, Michael J.
† Miller, Michael
Minkoff, Ronald C.
Moskowitz, Hon. Karla
Owens, John, Jr.
Prager, Bruce J.
Quartaro, Neil A.
Rosner, Seth
Russell, William T., Jr.
Safer, Jay G.
Schnabel, David H.
Sen, Diana S.
* Seymour, Whitney North, Jr.
Shampnoi, Elizabeth Jean
Sicular, David R.
Sigmond, Carol Ann
Silkenat, James R.
Singer, David C.
Sonberg, Hon. Michael R.
Spirer, Laren E.
* Standard, Kenneth G.
Stong, Hon. Elizabeth S.
Temkin, Barry R.
Tesser, Lewis F.
Udell, Jeffrey A.
Weiss, Mira B.
Whiting, Judith
Whittingham, Kaylin L.
†* Younger, Stephen P.

SECOND DISTRICT
Aidala, Arthur L.
Bonina, Andrea E.
Chandrasekhar, Jai K.
Chidekel, David M.
Cohn, Steven D.
Edgar, Paula Taryn
Fallek, Andrew M.
Grimaldi, Judith D.
Heller, Meredith Stacy
Masucci, Deborah
Napoletano, Domenick
Richman, Steven H.
Richter, Aimee L.
Romero, Manuel A.
† Shautsova, Alena
Slavin, Barton L.
Steinhardt, Hon. Marsha L.
Weston, Hon. Michelle

THIRD DISTRICT
Barclay, Kathleen Anne
Burke, Jane Bello
Fernandez, Hermes
Gailliard, Glinnesa D.
Gerbini, Jean F.
Gold, Sarah E.
Greenberg, Henry M.
Grogan, Elizabeth Janas
Hacker, James E.
Heath, Hon. Helena
Hersh, Martin
Hurteau, Daniel Joseph
Kean, Elena DeFio
Kearns, Deborah S.
Mandell, Adam Trent
†*Miranda, David P.
Onderdonk, Marne L.
Rivera, Sandra
Rosiny, Frank R.
Ryba, Hon. Christina L.
Schofield, Robert T., IV
Stabinski, Alexander Leon
* Yanas, John J.

FOURTH DISTRICT
Clouthier, Nicole L.
Coffey, Peter V.
Coseo, Matthew R.
Jones, Barry J.
King, Barbara J.
Rodriguez, Patricia L.R.
Schwenker, Eric C.
Sciocchetti, Nancy
Sharkey, Lauren E.
Walsh, Joseph M.
Wildgrube, Michelle H.

FIFTH DISTRICT
Fennell, Timothy J.
Gensini, Gioia A.
†*Getnick, Michael E.
Hage, Joseph K., III
LaRose, Stuart J.
McCann, John T.
Murphy, Hon. James P.
* Richardson, M. Catherine
Williams, James M.

SIXTH DISTRICT
Abbott, Rachel Ann
Barreiro, Alyssa M.
Corbin, Gemma Rossi
Denton, Christopher
Eberle, Aaron Kyle
Flanagan, Patrick J.
Gutenberger Grossman, Kristin E.
Kelly, Kevin Thomas
Lanouette, Dawn Joyce
†*Madigan, Kathryn Grant
May, Michael R.
Shafer, Robert M.

SEVENTH DISTRICT
Adams, Holly A.
Brown, T. Andrew
Buholtz, Eileen E.
* Buzard, Allen Vincent
Castellano, June M.
Christensen, Amy L.
Cicero, Jill M.
Gaddis, Sheila A.
Getz, Jon P.
Hetherington, Bryan D.
Jackson, LaMarr J.
Lawrence, C. Bruce
McDonald, Elizabeth J.
* Moore, James C.
Moretti, Mark J.
* Palermo, Anthony Robert
* Schraver, David M.
Shaw, Linda R.
Tennant, David H.
* Vigdor, Justin L.
* Witmer, G. Robert, Jr.

EIGHTH DISTRICT
Disare, Melinda G.
Doxey, Deborah Anne
* Doyle, Vincent E., III
Effman, Norman P.
* Freedman, Maryann Saccomando
† Gerstman, Sharon Stern
* Hassett, Paul Michael
Mosher, Matthew Thomas
Nowotarski, Leah Rene
Pajak, David J.
Spitler, Kevin W.
Sullivan, Kevin J.
Sweet, Kathleen Marie
Young, Oliver C.

NINTH DISTRICT
Bowler, Richard J.
Braunstein, Lawrence Jay
Burke, Michael K.
Burns, Stephanie L.
Clark, Alan John
Cobb, Lisa M.
Fay, Jody
Fox, Prof. Michael L.
Glass, David L.
Goldschmidt, Sylvia
Hyer, James L.
Keiser, Laurence
Kessler, Leonard
Kirby, Dawn
Levin Wallach, Sherry
McNamara, Timothy G.
* Miller, Henry G.
* Ostertag, Robert L.
Pappalardo, John A.
Preston, Kevin F.
Schriever, Andrew P.
Schub, Benjamin E.
Shamoon, Rona G.
Starkman, Mark T.
Stieglitz, Steven
Thaler-Parker, Jessica D.
Weathers, Wendy M.
Weis, Robert A.

TENTH DISTRICT
Barcham, Deborah Seldes
Block, Justin M.
* Bracken, John P.
Burns, Carole A.
Calcagni, John R.
Christopher, John P.
Clarke, Christopher Justin
DiFalco, Michael Drew
Ferris, William Taber, III
Fishberg, Gerard
Genoa, Marilyn
Glover, Dorian Ronald
Karson, Scott M.
Kase, Hon. John L.
* Levin, A. Thomas
Levy, Peter H.
Mancuso, Peter J.
Margolin, Linda U.
Meisenheimer, Patricia M.
Pessala, Hon. Elizabeth D.
Poster-Zimmerman, Lynn D.
* Pruzansky, Joshua M.
* Rice, Thomas O.
Singer, Hon. Conrad D.
Strenger, Sanford
Tarver, Terrence Lee
Tully, Rosemarie
Wicks, James M.

ELEVENTH DISTRICT
Alomar, Karina E.
Bruno, Frank, Jr.
Carola, Joseph, III
Cohen, David Louis
DeFelice, Joseph F.
Gingold, Hilary
Gutierrez, Richard M.
Lee, Chanwoo
Samuels, Violet E.
Vitacco, Guy R., Jr.

TWELFTH DISTRICT
Braverman, Samuel M.
Calderón, Carlos M.
Cassidy, Daniel D.
Marinaccio, Michael A.
Millon, Steven E.
* Pfeifer, Maxwell S.
Santiago, Mirna M.

THIRTEENTH DISTRICT
Behrins, Jonathan B.
Cohen, Orin J.
Lamberti, Anthony J.
Martin, Edwina Frances
Mascolo, Anthony A.
McGinn, Sheila T.
Miller, Mrs. Claire C.

OUT OF STATE
Jochmans, Hilary F.
Millett, Eileen D.
Ravin, Richard L.
Sulimani, Natalie

† Delegate to American Bar Association House of Delegates * Past President

The Worst Mistakes in Legal Writing — Part II

In the last issue of the *Journal*, the *Legal Writer* discussed general mistakes that appear frequently in legal writing. Part II in this multi-part series covers grammar and punctuation and includes a bonus section on frequently misspelled words.

A. GRAMMAR AND PUNCTUATION MISTAKES

When it comes to the meaning of sentences, grammar and punctuation contribute a lot. It's crucial that your grammar and punctuation be impeccable.

1. Mistakes Involving Commas vs. Semicolons

Commas are used to join two closely related independent clauses separated by a conjunction. Semicolons are used to connect two closely related independent clauses *not* separated by a conjunction.

Incorrect: This contract provides that the seller should pay for the shipping of the goods, it does not state which party is responsible for the shipping.

Correct: This contract provides that the seller should pay for shipping the goods, but it doesn't state which party is responsible for the shipping.

Correct: This contract states that the seller should pay for the shipping of the goods; it doesn't state which party is responsible for the shipping.

Here's a common mistake when it comes to commas versus semicolons:

a. Using a semicolon as the equivalent of a comma.

Incorrect: Although he's usually a careful person; he acted negligently this time.

Correct: Although he's usually a careful person, he acted negligently this time.

Gerald Lebovits (GLebovits@aol.com), an acting State Supreme Court justice in Manhattan, is an adjunct at Columbia, Fordham, and NYU law schools. He thanks judicial interns Rosemarie Ferraro (University of Richmond) and Jie Yang (NYU School of Law) for their research.

> ***Multiple exclamation points look cute on social media, but they have no place in mature or professional writing.***

2. Mistakes Involving Colons vs. Semicolons

A colon introduces elements that illustrate the information preceded by the colon. A semicolon connects two closely related independent clauses.

Incorrect: There are two parties in a lease agreement; lessor and lessee.

Correct: There are two parties in a lease agreement: lessor and lessee.

Here are some common mistakes when it comes to colons versus semicolons:

a. Using a colon after a linking verb or preposition.

Incorrect: The evidence includes: a gun and a pair of gloves.

Correct: The evidence includes a gun and a pair of gloves.

b. Using a colon before examples following the words *such as*.

Incorrect: He enjoys risky outdoor activities, such as: skiing and bungee jumping.

Correct: He enjoys risky outdoor activities, such as skiing and bungee jumping.

c. Using a semicolon as the equivalent of a colon.

Incorrect: The court record shows that the following people appeared in court; Mr. Smith, Ms. Smith, and Mr. Porter.

Correct: The court record shows that the following people appeared in court: Mr. Smith, Ms. Smith, and Mr. Porter.

3. Mistakes Involving Apostrophes

There are two correct ways to use apostrophes.[1] The first is as part of a contraction, such as can't, doesn't, don't, it's, we're, and won't. The second is to show possession, such as "Jacob's computer."

a. If the subject has a name ending with *S*, then you have a choice whether you want to follow the formal rule (*e.g.:* Louis's car) or to drop the last *S* (*e.g.*: Louis' car). Be consistent with whichever way you choose.

b. If a word is plural, don't use an apostrophe. Usually, nouns are made plural by adding *S (e.g.:* tools), -es (*e.g.:* taxes), or -ies (*e.g.:* companies). There is no noun that becomes plural by adding an apostrophe, except for a single letter or a single number.

Incorrect: I have several *tool's* in my car.

Correct: I have several *tools* in my car.

4. Mistakes Involving Quotations

Quotations legitimize argument by showing that the author didn't make stuff up. Quoting someone directly eliminates the need for your readers to research a citation to see just how close to the original your paraphrasing was. When inserting quotations into writing, writers commonly make several mistakes.

Here are some common mistakes when it comes to quotations:

a. Sticking the period outside of the quotation marks.

Incorrect: My mother always told me that the best way to "avoid conflict" is to "remove yourself from the situation".

Correct: My mother always told me that the best way to "avoid conflict" is to "remove yourself from the situation."

b. Failing to use brackets or ellipses when they're needed.

When you alter a word or a letter in a quotation, you must put the altered word or letter in brackets. When you delete a word or more from the middle of a quotation, you must insert three ellipses, all spaced out, in the space formerly occupied by the deleted words. When you delete a word or more from the end of a quotation and what's left from the quotation is an independent clause, add four ellipses, all spaced out.

c. Using quotation marks when you're paraphrasing.

Never use quotation marks when you're paraphrasing. When you paraphrase, you're rewriting a quotation to express with your own words an idea not your own. When you quote, you're using someone else's words to express an idea that isn't yours. Save the quotation marks for when you are quoting someone directly.

d. Using too many quotations (or using long ones).

Quotations are useful, but it's possible to use too many quotations. When you use lots of quotations, your readers get the impression that you have no thoughts of your own and nothing to contribute. And when you use lots of quotations, you imply that you don't know how to express or support your own argument.

No one can, in the abstract, say how many quotations are too many. But to judge whether you're using too many, take into account the size of your quotations, the number of quotations you've already used, and the length of your paragraphs. Quality is better than quantity. You can always paraphrase instead.

e. Incorrect quotation marks.

The first, or opening, quotation mark is a double quotation mark. The last, or closing, quotation mark is a double, too. If your quotation itself quotes something, you must add single internal quotation marks, like this: " ' . . . ' " You must then say where both your quotation and the internal quotation come from, all the way down to the pinpoint citations.

5. The Serial Comma: To Use or Not to Use?

Should it be used? The answer depends on your preference. Usage varies. The *Legal Writer* uses them. They help with precision. Whatever you choose, be consistent throughout your writing.

Correct: I had bacon, eggs, and orange juice for breakfast this morning.

Correct: I had bacon, eggs and orange juice for breakfast this morning.

6. Mistakes Involving Exclamation Points

When it comes to exclamation points in legal writing, less is more. And none is best. A sentence (other than a quotation repeating someone else's exclamation point) that ends in an exclamation point loses its significance and casts doubt on the author's skills at understatement. Whatever you do, never end a sentence with more than one exclamation point. Multiple exclamation points look cute on social media, but they have no place in mature or professional writing.

When the misspelling of a word is a word in and of itself, spell checking software can't discover the mistake.

7. Hyphens and Dashes

The differences between a hyphen (-), an en-dash (–), and an em-dash (—) are subtle, but they extend beyond the obvious and simple differences in length.

a. Hyphens.

A hyphen is used to join words like *eco-friendly* and *time-sensitive* and in some other scenarios, such as when you use someone's age as an adjective (*e.g.:* "a 5-year-old boy") and when you refer to a person who identifies as being two nationalities (*e.g.:* "Italian-Americans have made extraordinary contributions all across the United States.").

A hyphen also joins compound adjectives.

Incorrect: The criminal justice system. (But it's also correct not to hyphenate compound adjectives if you're sure that your reader will understand your sentence on first read. Will a reader think you mean that the system of justice is criminal?)

Correct: The criminal-justice system.

Correct: The system of criminal justice.

b. En-Dashes.

An en-dash is used to express a range of numbers, times, or dates, such as 1–5 or January–June, and can be read as "through" or "to."

c. Em-Dashes

An em-dash, the longer of the dashes, is used in more casual situations than en-dashes, such as when you interrupt your own train of thought. It's also used for emphasis.

B. COMMON SPELLING MISTAKES

The following is a list of commonly misspelled words. When the misspelling of a word isn't a word itself, spell-checking software can usually detect it. When the misspelling of a word is a word in and of itself, spell checking software can't discover the mistake. (The asterisk after the word means that the original is a correct word.)

The Misspelling → The Correct Spelling

Acommodate → Accommodate

Causal* → Casual

Definately → Definitely

Form* → From

Heresay → Hearsay

Judgement → Judgment

Libel* → Liable

Maintenence → Maintenance

Manger* → Manager

Mispel → Misspell

Neccesary → Necessary

Ocassion → Occasion

Parol* → Parole

Priviledge → Privilege

Pronounciation → Pronunciation

Rational* → Rationale

Recieve → Receive

Schedual → Schedule

Seperate → Separate

Statue* → Statute

Tommorrow → Tomorrow

Trail* → Trial

The column continues in the *Journal*'s next issue with Part III of the Worst Mistakes in Legal Writing.

---

1. You may also use an apostrophe when you drop one or more letters from a word, such as in "rock 'n' roll" (as opposed to "rock and roll"). An apostrophe replaces a dropped letter.

Did you renew your NYSBA membership for 2018?

If so, **THANKS!**

If not, **this could be your last issue.**

Renew today, it's easy: **www.nysba.org/renew**

NYSBA

NYSBABOOKS

Enhance Your Practice with the 2017-2018 edition of

New York Lawyers' Practical Skills Series . . .
Written by Attorneys for Attorneys.

Winner of ACLEA's Award for Outstanding Achievement in Publications

Includes **Downloadable Forms**

Complete Set of 19

Members save $200 off the list price by purchasing the complete set of 19

2017–2018 • PN: 40018PS | List: $895 | **NYSBA Members $695**

Practical Skills Series Individual Titles

Arbitration and Mediation *(w/Forms)*

Business/Corporate and Banking Law Practice *(w/Forms)*

Criminal Law and Practice *(w/Forms)*

Debt Collection and Judgment Enforcement *(w/Forms)*

Elder Law and Special Needs Planning/ Will Drafting *(w/Forms)*

Guardianship *(w/Forms)*

Labor, Employment and Workers' Compensation Law*

Limited Liability Companies *(w/Forms)*

Matrimonial Law *(w/Forms)*

Mechanic's Liens *(w/Forms)*

Mortgages *(w/Forms)*

Mortgage Foreclosures *(w/Forms)*

New York Residential Landlord-Tenant Law and Procedure*

Probate and Administration of Decedents' Estates *(w/Forms)*

Real Estate Transactions-Commercial Property *(w/Forms)*

Real Estate Transactions-Residential Property *(w/Forms)*

Representing the Personal Injury Plaintiff in New York *(w/Forms)*

Social Security Law and Practice*

Zoning, Land Use and Environmental Law *(w/Forms)*

*These titles do not include downloadable forms

Order online at **www.nysba.org/PSS2018** or call **1.800.582.2452**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total. Prices do not include applicable sales tax.

Mention code: PUB8946 when ordering.

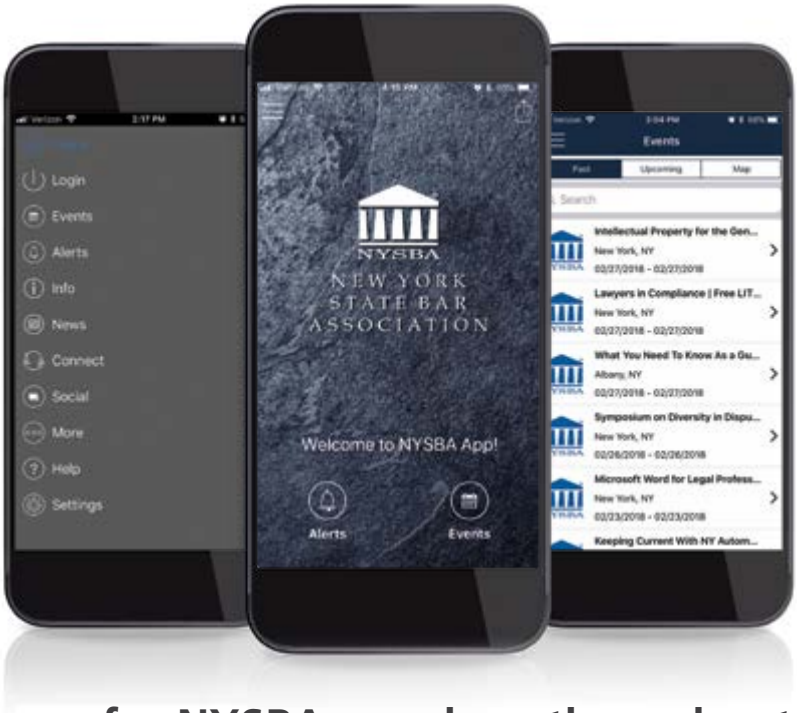
NYSBA

Periodicals

ADDRESS CHANGE – Send To:
Member Resource Center
New York State Bar Association
One Elk Street
Albany, NY 12207
(800) 582-2452
e-mail: mrc@nysba.org

NEW YORK STATE BAR ASSOCIATION

Meet the new NYSBA app!



The essential app for NYSBA members throughout the year.

- Register and track NYSBA events and credits
- Receive real time notifications and updates
- Interact year-round with NYSBA
- Connect directly with members
- Update your member profile

Experience your membership in the palm of your hand.

Download the app today!

GET IT ON Google Play

Download on the App Store

NYSBA